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116TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 116–317

VOTING RIGHTS ADVANCEMENT ACT OF 2019

NOVEMBER 29, 2019.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4) to amend the Voting Rights Act of 1965 to revise the criteria for determining which States and political subdivisions are subject to section 4 of the Act, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

99–006

SECTION 1. SHORT TITLE.

This Act may be cited as the "Voting Rights Advancement Act of 2019".

SEC. 2. VIOLATIONS TRIGGERING AUTHORITY OF COURT TO RETAIN JURISDICTION.

(a) TYPES OF VIOLATIONS.—Section 3(c) of the Voting Rights Act of 1965 (52 U.S.C. 10302(c)) is amended by striking "violations of the fourteenth or fifteenth amendment" and inserting "violations of the 14th or 15th Amendment, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group,".

(b) CONFORMING AMENDMENT.—Section 3(a) of such Act (52 U.S.C. 10302(a)) is amended by striking "violations of the fourteenth or fifteenth amendment" and inserting "violations of the 14th or 15th Amendment, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group,".

SEC. 3. CRITERIA FOR COVERAGE OF STATES AND POLITICAL SUBDIVISIONS.

(a) DETERMINATION OF STATES AND POLITICAL SUBDIVISIONS SUBJECT TO SECTION 4(a).—

(1) IN GENERAL.—Section 4(b) of the Voting Rights Act of 1965 (52 U.S.C. 10303(b)) is amended to read as follows:

"(b) DETERMINATION OF STATES AND POLITICAL SUBDIVISIONS SUBJECT TO REQUIREMENTS.—

"(1) EXISTENCE OF VOTING RIGHTS VIOLATIONS DURING PREVIOUS 25 YEARS.—

"(A) STATEWIDE APPLICATION.—Subsection (a) applies with respect to a State and all political subdivisions within the State during a calendar year if—

"(i) 15 or more voting rights violations occurred in the State during the previous 25 calendar years; or

"(ii) 10 or more voting rights violations occurred in the State during the previous 25 calendar years, at least one of which was committed by the State itself (as opposed to a political subdivision within the State).

"(B) APPLICATION TO SPECIFIC POLITICAL SUBDIVISIONS.—Subsection (a) applies with respect to a political subdivision as a separate unit during a calendar year if 3 or more voting rights violations occurred in the subdivision during the previous 25 calendar years.

"(2) PERIOD OF APPLICATION.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), if, pursuant to paragraph (1), subsection (a) applies with respect to a State or political subdivision during a calendar year, subsection (a) shall apply with respect to such State or political subdivision for the period—

"(i) that begins on January 1 of the year in which subsection (a) applies; and

"(ii) that ends on the date which is 10 years after the date described in clause (i).

"(B) NO FURTHER APPLICATION AFTER DECLARATORY JUDGMENT.—

"(i) STATES.—If a State obtains a declaratory judgment under subsection (a), and the judgment remains in effect, subsection (a) shall no longer apply to such State pursuant to paragraph (1)(A) unless, after the issuance of the declaratory judgment, paragraph (1)(A) applies to the State solely on the basis of voting rights violations occurring after the issuance of the declaratory judgment.

"(ii) POLITICAL SUBDIVISIONS.—If a political subdivision obtains a declaratory judgment under subsection (a), and the judgment remains in effect, subsection (a) shall no longer apply to such political subdivision pursuant to paragraph (1), including pursuant to paragraph (1)(A) (relating to the statewide application of subsection (a)), unless, after the issuance of the declaratory judgment, paragraph (1)(B) applies to the political subdivision solely on the basis of voting rights violations occurring after the issuance of the declaratory judgment.

"(3) DETERMINATION OF VOTING RIGHTS VIOLATION.—For purposes of paragraph (1), a voting rights violation occurred in a State or political subdivision if any of the following applies:

"(A) FINAL JUDGMENT; VIOLATION OF THE 14TH OR 15TH AMENDMENT.—In a final judgment (which has not been reversed on appeal), any court of the United States has determined that a denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group, in violation of the 14th or 15th Amendment, occurred anywhere within the State or subdivision.

"(B) FINAL JUDGMENT; VIOLATIONS OF THIS ACT.—In a final judgment (which has not been reversed on appeal), any court of the United States has determined that a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting was imposed or applied or would have been imposed or applied anywhere within the State or subdivision in a manner that resulted or would have resulted in a denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group, in violation of subsection (e) or (f), or section 2 or 203 of this Act.

"(C) FINAL JUDGMENT; DENIAL OF DECLARATORY JUDGMENT.—In a final judgment (which has not been reversed on appeal), any court of the United States has denied the request of the State or subdivision for a declaratory judgment under section 3(c) or section 5, and thereby prevented a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting from being enforced anywhere within the State or subdivision.

"(D) OBJECTION BY THE ATTORNEY GENERAL.—The Attorney General has interposed an objection under section 3(c) or section 5 (and the objection has not been overturned by a final judgment of a court or withdrawn by the Attorney General), and thereby prevented a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting from being enforced anywhere within the State or subdivision.

"(E) CONSENT DECREE, SETTLEMENT, OR OTHER AGREEMENT.—A consent decree, settlement, or other agreement was entered into, which resulted in the alteration or abandonment of a voting practice anywhere in the territory of such State that was challenged on the ground that the practice denied or abridged the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group in violation of subsection (e) or (f), or section 2 or 203 of this Act, or the 14th or 15th Amendment.

"(4) TIMING OF DETERMINATIONS.—

"(A) DETERMINATIONS OF VOTING RIGHTS VIOLATIONS.—As early as practicable during each calendar year, the Attorney General shall make the determinations required by this subsection, including updating the list of voting rights violations occurring in each State and political subdivision for the previous calendar year.

"(B) EFFECTIVE UPON PUBLICATION IN FEDERAL REGISTER.—A determination or certification of the Attorney General under this section or under section 8 or 13 shall be effective upon publication in the Federal Register.".

(2) CONFORMING AMENDMENTS.—Section 4(a) of such Act (52 U.S.C. 10303(a)) is amended—

(A) in paragraph (1), in the first sentence of the matter preceding subparagraph (A), by striking "any State with respect to which" and all that follows through "unless" and inserting "any State to which this subsection applies during a calendar year pursuant to determinations made under subsection (b), or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which this subsection applies during a calendar year pursuant to determinations made with respect to such subdivision as a separate unit under subsection (b), unless";

(B) in paragraph (1) in the matter preceding subparagraph (A), by striking the second sentence;

(C) in paragraph (1)(A), by striking "(in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection)";

(D) in paragraph (1)(B), by striking "(in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection)";

(E) in paragraph (3), by striking "(in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection)";

(F) in paragraph (5), by striking "(in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection)";

(G) by striking paragraphs (7) and (8); and

(H) by redesignating paragraph (9) as paragraph (7).

(b) CLARIFICATION OF TREATMENT OF MEMBERS OF LANGUAGE MINORITY GROUPS.—Section 4(a)(1) of such Act (52 U.S.C. 10303(a)(1)) is amended by striking "race or color," and inserting "race, color, or in contravention of the guarantees of subsection (f)(2),".

SEC. 4. DETERMINATION OF STATES AND POLITICAL SUBDIVISIONS SUBJECT TO PRECLEARANCE FOR COVERED PRACTICES.

The Voting Rights Act of 1965 (52 U.S.C. 10301 et seq.) is further amended by inserting after section 4 the following:

"SEC. 4A. DETERMINATION OF STATES AND POLITICAL SUBDIVISIONS SUBJECT TO PRECLEARANCE FOR COVERED PRACTICES.

"(a) PRACTICE-BASED PRECLEARANCE.—

"(1) IN GENERAL.—Each State and each political subdivision shall—

"(A) identify any newly enacted or adopted law, regulation, or policy that includes a voting qualification or prerequisite to voting, or a standard, practice, or procedure with respect to voting, that is a covered practice described in subsection (b); and

"(B) ensure that no such covered practice is implemented unless or until the State or political subdivision, as the case may be, complies with subsection (c).

"(2) DETERMINATIONS OF CHARACTERISTICS OF VOTING-AGE POPULATION.—

"(A) IN GENERAL.—As early as practicable during each calendar year, the Attorney General, in consultation with the Director of the Bureau of the Census and the heads of other relevant offices of the government, shall make the determinations required by this section regarding voting-age populations and the characteristics of such populations, and shall publish a list of the States and political subdivisions to which a voting-age population characteristic described in subsection (b) applies.

"(B) PUBLICATION IN THE FEDERAL REGISTER.—A determination or certification of the Attorney General under this paragraph shall be effective upon publication in the Federal Register.

"(b) COVERED PRACTICES.—To assure that the right of citizens of the United States to vote is not denied or abridged on account of race, color, or membership in a language minority group as a result of the implementation of certain qualifications or prerequisites to voting, or standards, practices, or procedures with respect to voting newly adopted in a State or political subdivision, the following shall be covered practices subject to the requirements described in subsection (a):

"(1) CHANGES TO METHOD OF ELECTION.—Any change to the method of election—

"(A) to add seats elected at-large in a State or political subdivision where—

"(i) 2 or more racial groups or language minority groups each represent 20 percent or more of the political subdivision's voting-age population; or

"(ii) a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision; or

"(B) to convert one or more seats elected from a single-member district to one or more at-large seats or seats from a multi-member district in a State or political subdivision where—

"(i) 2 or more racial groups or language minority groups each represent 20 percent or more of the political subdivision's voting-age population; or

"(ii) a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision.

"(2) CHANGES TO JURISDICTION BOUNDARIES.—Any change or series of changes within a year to the boundaries of a jurisdiction that reduces by 3 or more percentage points the proportion of the jurisdiction's voting-age population that is comprised of members of a single racial group or language minority group in a State or political subdivision where—

"(A) 2 or more racial groups or language minority groups each represent 20 percent or more of the political subdivision's voting-age population; or

"(B) a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision.

"(3) CHANGES THROUGH REDISTRICTING.—Any change to the boundaries of election districts in a State or political subdivision where any racial group or language minority group experiences a population increase, over the preceding

decade (as calculated by the Bureau of the Census under the most recent decennial census), of at least—

"(A) 10,000; or

"(B) 20 percent of voting-age population of the State or political subdivision, as the case may be.

"(4) CHANGES IN DOCUMENTATION OR QUALIFICATIONS TO VOTE.—Any change to requirements for documentation or proof of identity to vote such that the requirements will exceed or be more stringent than the requirements for voting that are described in section 303(b) of the Help America Vote Act of 2002 (52 U.S.C. 21083(b)) or any change to the requirements for documentation or proof of identity to register to vote that will exceed or be more stringent than such requirements under State law on the day before the date of enactment of the Voting Rights Advancement Act of 2019.

"(5) CHANGES TO MULTILINGUAL VOTING MATERIALS.—Any change that reduces multilingual voting materials or alters the manner in which such materials are provided or distributed, where no similar reduction or alteration occurs in materials provided in English for such election.

"(6) CHANGES THAT REDUCE, CONSOLIDATE, OR RELOCATE VOTING LOCATIONS.—Any change that reduces, consolidates, or relocates voting locations, including early, absentee, and election-day voting locations—

"(A) in 1 or more census tracts wherein 2 or more language minority groups or racial groups each represent 20 percent or more of the voting-age population of the political subdivision; or

"(B) on Indian lands wherein at least 20 percent of the voting-age population belongs to a single language minority group.

"(c) PRECLEARANCE.—

"(1) IN GENERAL.—Whenever a State or political subdivision with respect to which the requirements set forth in subsection (a) are in effect shall enact, adopt, or seek to implement any covered practice described under subsection (b), such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such covered practice neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, and unless and until the court enters such judgment such covered practice shall not be implemented. Notwithstanding the previous sentence, such covered practice may be implemented without such proceeding if the covered practice has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within 60 days after such submission, or upon good cause shown, to facilitate an expedited approval within 60 days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin implementation of such covered practice. In the event the Attorney General affirmatively indicates that no objection will be made within the 60-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to the Attorney General's attention during the remainder of the 60-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court.

"(2) DENYING OR ABRIDGING THE RIGHT TO VOTE.—Any covered practice described in subsection (b) that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race, color, or membership in a language minority group, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of paragraph (1) of this subsection.

"(3) PURPOSE DEFINED.—The term 'purpose' in paragraphs (1) and (2) of this subsection shall include any discriminatory purpose.

"(4) PURPOSE OF PARAGRAPH (2).—The purpose of paragraph (2) of this subsection is to protect the ability of such citizens to elect their preferred candidates of choice.

"(d) ENFORCEMENT.—The Attorney General or any aggrieved citizen may file an action in a Federal district court to compel any State or political subdivision to satisfy the obligations set forth in this section. Such actions shall be heard and determined by a court of 3 judges under section 2284 of title 28, United States Code. In any such action, the court shall provide as a remedy that any voting qualification

or prerequisite to voting, or standard, practice, or procedure with respect to voting, that is the subject of the action under this subsection be enjoined unless the court determines that—

"(1) the voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting, is not a covered practice described in subsection (b); or

"(2) the State or political subdivision has complied with subsection (c) with respect to the covered practice at issue.

"(e) COUNTING OF RACIAL GROUPS AND LANGUAGE MINORITY GROUPS.—For purposes of this section, the calculation of the population of a racial group or a language minority group shall be carried out using the methodology in the guidance promulgated in the Federal Register on February 9, 2011 (76 Fed. Reg. 7470).

"(f) SPECIAL RULE.—For purposes of determinations under this section, any data provided by the Bureau of the Census, whether based on estimation from sample or actual enumeration, shall not be subject to challenge or review in any court.

"(g) MULTILINGUAL VOTING MATERIALS.—In this section, the term 'multilingual voting materials' means registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, provided in the language or languages of one or more language minority groups.".

SEC. 5. PROMOTING TRANSPARENCY TO ENFORCE THE VOTING RIGHTS ACT.

(a) TRANSPARENCY.—

(1) IN GENERAL.—The Voting Rights Act of 1965 (52 U.S.C. 10301 et seq.) is amended by inserting after section 5 the following new section:

"SEC. 6. TRANSPARENCY REGARDING CHANGES TO PROTECT VOTING RIGHTS.

"(a) NOTICE OF ENACTED CHANGES.—

"(1) NOTICE OF CHANGES.—If a State or political subdivision makes any change in any prerequisite to voting or standard, practice, or procedure with respect to voting in any election for Federal office that will result in the prerequisite, standard, practice, or procedure being different from that which was in effect as of 180 days before the date of the election for Federal office, the State or political subdivision shall provide reasonable public notice in such State or political subdivision and on the Internet, of a concise description of the change, including the difference between the changed prerequisite, standard, practice, or procedure and the prerequisite, standard, practice, or procedure which was previously in effect. The public notice described in this paragraph, in such State or political subdivision and on the Internet, shall be in a format that is reasonably convenient and accessible to voters with disabilities, including voters who have low vision or are blind.

"(2) DEADLINE FOR NOTICE.—A State or political subdivision shall provide the public notice required under paragraph (1) not later than 48 hours after making the change involved.

"(b) TRANSPARENCY REGARDING POLLING PLACE RESOURCES.—

"(1) IN GENERAL.—In order to identify any changes that may impact the right to vote of any person, prior to the 30th day before the date of an election for Federal office, each State or political subdivision with responsibility for allocating registered voters, voting machines, and official poll workers to particular precincts and polling places shall provide reasonable public notice in such State or political subdivision and on the Internet, of the information described in paragraph (2) for precincts and polling places within such State or political subdivision. The public notice described in this paragraph, in such State or political subdivision and on the Internet, shall be in a format that is reasonably convenient and accessible to voters with disabilities including voters who have low vision or are blind.

"(2) INFORMATION DESCRIBED.—The information described in this paragraph with respect to a precinct or polling place is each of the following:

"(A) The name or number.

"(B) In the case of a polling place, the location, including the street address, and whether such polling place is accessible to persons with disabilities.

"(C) The voting-age population of the area served by the precinct or polling place, broken down by demographic group if such breakdown is reasonably available to such State or political subdivision.

"(D) The number of registered voters assigned to the precinct or polling place, broken down by demographic group if such breakdown is reasonably available to such State or political subdivision.

"(E) The number of voting machines assigned, including the number of voting machines accessible to voters with disabilities, including voters who have low vision or are blind.

"(F) The number of official paid poll workers assigned.

"(G) The number of official volunteer poll workers assigned.

"(H) In the case of a polling place, the dates and hours of operation.

"(3) UPDATES IN INFORMATION REPORTED.—If a State or political subdivision makes any change in any of the information described in paragraph (2), the State or political subdivision shall provide reasonable public notice in such State or political subdivision and on the Internet, of the change in the information not later than 48 hours after the change occurs or, if the change occurs fewer than 48 hours before the date of the election for Federal office, as soon as practicable after the change occurs. The public notice described in this paragraph in such State or political subdivision and on the Internet shall be in a format that is reasonably convenient and accessible to voters with disabilities including voters who have low vision or are blind.

"(c) TRANSPARENCY OF CHANGES RELATING TO DEMOGRAPHICS AND ELECTORAL DISTRICTS.—

"(1) REQUIRING PUBLIC NOTICE OF CHANGES.—Not later than 10 days after making any change in the constituency that will participate in an election for Federal, State, or local office or the boundaries of a voting unit or electoral district in an election for Federal, State, or local office (including through redistricting, reapportionment, changing from at-large elections to district-based elections, or changing from district-based elections to at-large elections), a State or political subdivision shall provide reasonable public notice in such State or political subdivision and on the Internet, of the demographic and electoral data described in paragraph (3) for each of the geographic areas described in paragraph (2).

"(2) GEOGRAPHIC AREAS DESCRIBED.—The geographic areas described in this paragraph are as follows:

"(A) The State as a whole, if the change applies statewide, or the political subdivision as a whole, if the change applies across the entire political subdivision.

"(B) If the change includes a plan to replace or eliminate voting units or electoral districts, each voting unit or electoral district that will be replaced or eliminated.

"(C) If the change includes a plan to establish new voting units or electoral districts, each such new voting unit or electoral district.

"(3) DEMOGRAPHIC AND ELECTORAL DATA.—The demographic and electoral data described in this paragraph with respect to a geographic area described in paragraph (2) are each of the following:

"(A) The voting-age population, broken down by demographic group.

"(B) If it is reasonably available to the State or political subdivision involved, an estimate of the population of the area which consists of citizens of the United States who are 18 years of age or older, broken down by demographic group.

"(C) The number of registered voters, broken down by demographic group if such breakdown is reasonably available to the State or political subdivision involved.

"(D)(i) If the change applies to a State, the actual number of votes, or (if it is not reasonably practicable for the State to ascertain the actual number of votes) the estimated number of votes received by each candidate in each statewide election held during the 5-year period which ends on the date the change involved is made; and

"(ii) if the change applies to only one political subdivision, the actual number of votes, or (if it is not reasonably practicable for the political subdivision to ascertain the actual number of votes) in each subdivision-wide election held during the 5-year period which ends on the date the change involved is made.

"(4) VOLUNTARY COMPLIANCE BY SMALLER JURISDICTIONS.—Compliance with this subsection shall be voluntary for a political subdivision of a State unless the subdivision is one of the following:

"(A) A county or parish.

"(B) A municipality with a population greater than 10,000, as determined by the Bureau of the Census under the most recent decennial census.

"(C) A school district with a population greater than 10,000, as determined by the Bureau of the Census under the most recent decennial census. For purposes of this subparagraph, the term 'school district' means the geo-

graphic area under the jurisdiction of a local educational agency (as defined in section 9101 of the Elementary and Secondary Education Act of 1965).

"(d) RULES REGARDING FORMAT OF INFORMATION.—The Attorney General may issue rules specifying a reasonably convenient and accessible format that States and political subdivisions shall use to provide public notice of information under this section.

"(e) NO DENIAL OF RIGHT TO VOTE.—The right to vote of any person shall not be denied or abridged because the person failed to comply with any change made by a State or political subdivision to a voting qualification, standard, practice, or procedure if the State or political subdivision involved did not meet the applicable requirements of this section with respect to the change.

"(f) DEFINITIONS.—In this section—

"(1) the term 'demographic group' means each group which section 2 protects from the denial or abridgement of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2);

"(2) the term 'election for Federal office' means any general, special, primary, or runoff election held solely or in part for the purpose of electing any candidate for the office of President, Vice President, Presidential elector, Senator, Member of the House of Representatives, or Delegate or Resident Commissioner to the Congress; and

"(3) the term 'persons with disabilities', means individuals with a disability, as defined in section 3 of the Americans with Disabilities Act of 1990.".

(2) CONFORMING AMENDMENT.—Section 3(a) of such Act (52 U.S.C. 10302(a)) is amended by striking "in accordance with section 6".

(b) EFFECTIVE DATE.—The amendment made by subsection (a)(1) shall apply with respect to changes which are made on or after the expiration of the 60-day period which begins on the date of the enactment of this Act.

SEC. 6. AUTHORITY TO ASSIGN OBSERVERS.

(a) CLARIFICATION OF AUTHORITY IN POLITICAL SUBDIVISIONS SUBJECT TO PRECLEARANCE.—Section 8(a)(2)(B) of the Voting Rights Act of 1965 (52 U.S.C. 10305(a)(2)(B)) is amended to read as follows:

"(B) in the Attorney General's judgment, the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th Amendment or any provision of this Act or any other Federal law protecting the right of citizens of the United States to vote; or".

(b) ASSIGNMENT OF OBSERVERS TO ENFORCE BILINGUAL ELECTION REQUIREMENTS.—Section 8(a) of such Act (52 U.S.C. 10305(a)) is amended—

(1) by striking "or" at the end of paragraph (1);

(2) by inserting after paragraph (2) the following:

"(3) the Attorney General certifies with respect to a political subdivision that—

"(A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to violate section 203 are likely to occur; or

"(B) in the Attorney General's judgment, the assignment of observers is necessary to enforce the guarantees of section 203;"; and

(3) by moving the margin for the continuation text following paragraph (3), as added by paragraph (2) of this subsection, two ems to the left.

SEC. 7. PRELIMINARY INJUNCTIVE RELIEF.

(a) CLARIFICATION OF SCOPE AND PERSONS AUTHORIZED TO SEEK RELIEF.—Section 12(d) of the Voting Rights Act of 1965 (52 U.S.C. 10308(d)) is amended—

(1) by striking "section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section" and inserting "the 14th or 15th Amendment, this Act, or any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group"; and

(2) by striking "the Attorney General may institute for the United States, or in the name of the United States," and inserting "the aggrieved person or (in the name of the United States) the Attorney General may institute".

(b) GROUNDS FOR GRANTING RELIEF.—Section 12(d) of such Act (52 U.S.C. 10308(d)) is amended—

(1) by striking "(d) Whenever any person" and inserting "(d)(1) Whenever any person";

(2) by striking "(1) to permit" and inserting "(A) to permit";

(3) by striking "(2) to count" and inserting "(B) to count"; and

(4) by adding at the end the following new paragraph:

"(2)(A) In any action for preliminary relief described in this subsection, the court shall grant the relief if the court determines that the complainant has raised a serious question whether the challenged voting qualification or prerequisite to voting

or standard, practice, or procedure violates this Act or the Constitution and, on balance, the hardship imposed upon the defendant by the grant of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted. In balancing the harms, the court shall give due weight to the fundamental right to cast an effective ballot.

"(B) In making its determination under this paragraph with respect to a change in any voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting, the court shall consider all relevant factors and give due weight to the following factors, if they are present:

"(i) Whether the qualification, prerequisite, standard, practice, or procedure in effect prior to the change was adopted as a remedy for a Federal court judgment, consent decree, or admission regarding—

"(I) discrimination on the basis of race or color in violation of the 14th or 15th Amendment;

"(II) a violation of this Act; or

"(III) voting discrimination on the basis of race, color, or membership in a language minority group in violation of any other Federal or State law.

"(ii) Whether the qualification, prerequisite, standard, practice, or procedure in effect prior to the change served as a ground for the dismissal or settlement of a claim alleging—

"(I) discrimination on the basis of race or color in violation of the 14th or 15th Amendment;

"(II) a violation of this Act; or

"(III) voting discrimination on the basis of race, color, or membership in a language minority group in violation of any other Federal or State law.

"(iii) Whether the change was adopted fewer than 180 days before the date of the election with respect to which the change is to take effect.

"(iv) Whether the defendant has failed to provide timely or complete notice of the adoption of the change as required by applicable Federal or State law.".

(c) GROUNDS FOR STAY OR INTERLOCUTORY APPEAL.—Section 12(d) of such Act (52 U.S.C. 10308(d)) is further amended by adding at the end the following:

"(3) A jurisdiction's inability to enforce its voting or election laws, regulations, policies, or redistricting plans, standing alone, shall not be deemed to constitute irreparable harm to the public interest or to the interests of a defendant in an action arising under the U.S. Constitution or any Federal law that prohibits discrimination on the basis of race, color, or membership in a language minority group in the voting process, for the purposes of determining whether a stay of a court's order or an interlocutory appeal under section 1253 of title 28, United States Code, is warranted.".

SEC. 8. DEFINITIONS.

Title I of the Voting Rights Act of 1965 (52 U.S.C. 10301) is amended by adding at the end the following:

"SEC. 21. DEFINITIONS.

"In this Act:

"(1) INDIAN.—The term 'Indian' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act.

"(2) INDIAN LANDS.—The term 'Indian lands' means—

"(A) any Indian country of an Indian tribe, as such term is defined in section 1151 of title 18, United States Code;

"(B) any land in Alaska that is owned, pursuant to the Alaska Native Claims Settlement Act, by an Indian tribe that is a Native village (as such term is defined in section 3 of such Act), or by a Village Corporation that is associated with the Indian tribe (as such term is defined in section 3 of such Act);

"(C) any land on which the seat of government of the Indian tribe is located; and

"(D) any land that is part or all of a tribal designated statistical area associated with the Indian tribe, or is part or all of an Alaska Native village statistical area associated with the tribe, as defined by the Bureau of the Census for the purposes of the most recent decennial census.

"(3) INDIAN TRIBE.—The term 'Indian tribe' or 'tribe' has the meaning given the term 'Indian tribe' in section 4 of the Indian Self-Determination and Education Assistance Act.

"(4) TRIBAL GOVERNMENT.—The term 'Tribal Government' means the recognized governing body of an Indian Tribe.

"(5) VOTING-AGE POPULATION.—The term 'voting-age population' means the numerical size of the population within a State, within a political subdivision, or within a political subdivision that contains Indian lands, as the case may be,

that consists of persons age 18 or older, as calculated by the Bureau of the Census under the most recent decennial census.".

SEC. 9. ATTORNEYS' FEES.

Section 14(c) of the Voting Rights Act of 1965 (52 U.S.C. 10310(c)) is amended by adding at the end the following:

"(4) The term 'prevailing party' means a party to an action that receives at least some of the benefit sought by such action, states a colorable claim, and can establish that the action was a significant cause of a change to the status quo.".

SEC. 10. OTHER TECHNICAL AND CONFORMING AMENDMENTS.

(a) ACTIONS COVERED UNDER SECTION 3.—Section 3(c) of the Voting Rights Act of 1965 (52 U.S.C. 10302(c)) is amended—

(1) by striking "any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce" and inserting "any action under any statute in which a party (including the Attorney General) seeks to enforce"; and

(2) by striking "at the time the proceeding was commenced" and inserting "at the time the action was commenced".

(b) CLARIFICATION OF TREATMENT OF MEMBERS OF LANGUAGE MINORITY GROUPS.—Section 4(f) of such Act (52 U.S.C. 10303(f)) is amended—

(1) in paragraph (1), by striking the second sentence; and

(2) by striking paragraphs (3) and (4).

(c) PERIOD DURING WHICH CHANGES IN VOTING PRACTICES ARE SUBJECT TO PRECLEARANCE UNDER SECTION 5.—Section 5 of such Act (52 U.S.C. 10304) is amended—

(1) in subsection (a), by striking "based upon determinations made under the first sentence of section 4(b) are in effect" and inserting "are in effect during a calendar year";

(2) in subsection (a), by striking "November 1, 1964" and all that follows through "November 1, 1972" and inserting "the applicable date of coverage"; and

(3) by adding at the end the following new subsection:

"(e) The term 'applicable date of coverage' means, with respect to a State or political subdivision—

"(1) June 25, 2013, if the most recent determination for such State or subdivision under section 4(b) was made on or before December 31, 2019; or

"(2) the date on which the most recent determination for such State or subdivision under section 4(b) was made, if such determination was made after December 31, 2019.".

Purpose and Summary

H.R. 4, the "Voting Rights Advancement Act of 2019," builds on the extensive legislative record developed by the House Committee on the Judiciary ("Judiciary Committee") during the consideration of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, which reauthorized the Voting Rights Act of 1965 [1] ("VRA" or "Act") for another 25 years.[2] Both Houses of Congress assembled extensive evidence of the continuing need for preclearance in covered jurisdictions. The 2006 Committee report accompanying the bill noted that the Judiciary Committee held a dozen hearings that included testimony from 39 witnesses, and assembled more than 12,000 pages of testimony and documentary evidence from scholars, election officials, attorneys, the United States Department of Justice ("DOJ"), and various organizations.[3]

H.R. 4 amends the VRA in a variety of ways to reinvigorate the Act's enforcement mechanisms and, thereby, bolster its guarantee against voting discrimination by states and localities on the basis

[1] Voting Rights Act of 1965, Pub. L. No 89–110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1973 to 1973aa-6 (2006).

[2] Pub. L. No. 109–246 (2006).

[3] H.R. Rep. No. 109–478, at 5 (2006).

of race, color, or language-minority status. In sum, H.R. 4 creates a new coverage formula to determine which states will be subject to the VRA's preclearance requirement that is based on current evidence of voting discrimination in response to the Supreme Court's holding that the previous formula was outdated. In addition, the bill (1) establishes practice-based preclearance authority; (2) increases transparency by requiring reasonable public notice for voting changes; (3) expands judicial authority impose a preclearance requirement on a particular jurisdiction after finding violations of any Federal voting rights law; and (4) establishes an enhanced standard for injunctive relief. In combination, the changes will restore the VRA's vitality to protect the right of all Americas to have the equal opportunity to vote and participate in the political process.

Background and Need for Legislation

BACKGROUND

On June 25, 2013, in *Shelby County, Alabama v. Holder,*[4] the Supreme Court struck down portions of the VRA, leaving American voters vulnerable to tactics of vote suppression and discrimination. Writing for the majority in the 5 to 4 decision, Chief Justice John Roberts acknowledged that "voting discrimination still exists; no one doubts that,"[5] however, he noted that the preclearance coverage formula in Section 4(b) of the VRA—which determines the jurisdictions that are subject to the VRA's preclearance requirement in Section 5 of the Act—could "no longer be used as a basis for subjecting jurisdictions to preclearance."[6] Chief Justice Roberts stated that the formula was unconstitutional because the coverage formula was "based on decades-old data and eradicated practices," making it no longer responsive to current needs and therefore an impermissible burden on the constitutional principles of federalism and the equal sovereignty of states.[7] He went on to state that the "[Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future" and "[t]o serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."[8] Without Section 4(b), Section 5 is inoperable until Congress enacts a new coverage formula, which the Court invited Congress to do.[9]

A. Oversight and Legislative Hearings

At the outset of the 116th Congress, the Committee on House Administration, led by Chairperson Zoe Lofgren (D–California), reconstituted the Subcommittee on Elections, which had been eliminated six years earlier. Under the leadership of Chairperson Marcia L. Fudge (D–Ohio), the Subcommittee on Elections conducted an extensive review of the landscape of voting in America post-*Shelby County* and examined the current barriers to voting across the country. The Subcommittee on Elections took Congress

[4] 570 U.S. 529 (2013).
[5] *Shelby Cty.,* 570 U.S. at 536.
[6] *Id.* at 557.
[7] *Id.* at 551.
[8] *Id.* at 553 (internal citations omitted).
[9] *See id.* at 557.

to the American people, engaged with voters, stakeholders, officials and election administrators, and collected testimony and evidence on the state of voting rights and election administration to ensure every eligible American has equal and fair access to the ballot and the confidence their ballot is counted as cast.

In November 2019, the Subcommittee of Elections issued a report titled, "Voting Rights and Elections Administration in the United States of America,"[10] which the Judiciary Committee has adopted in full as part of its legislative record in support of H.R. 4. Chairperson Fudge commented on Congress' critical role in protecting the right to vote for all eligible Americans:

> Nearly 6 years after the Supreme Court decided *Shelby County v. Holder,* this report makes clear that voter suppression and discrimination still exist. It is our duty as elected Members of Congress to uphold and defend the Constitution and protect the rights of the voter. America is great because of her ability to repair her faults. It is time for us to set the right example as a democracy and encourage people to vote, rather than continuing to erect barriers that seek to suppress the vote and the voices of our communities.[11]

To collect the contemporaneous evidence called for by the Supreme Court, the Subcommittee on Elections held hearings in Alabama, Arizona, Florida, Georgia, North Carolina, North Dakota, Ohio, and Washington D.C.[12] An inaugural listening session was also held in Texas. The hearing in North Dakota was held on the Standing Rock Sioux Reservation and focused on issues specific to Native American voters. The Subcommittee on Elections found an array of tactics in place used to suppress the votes of targeted communities and barriers that impede the free exercise of the right to vote. In the course of its investigation, the Subcommittee of Elections collected over 3,000 pages of wide-ranging testimony and evidence. Specifically, the Subcommittee of Elections found persistent discrimination in voting law changes such as purging voter registration rolls, cut backs to early voting, polling place closures and movement, voter ID requirements, implementation of exact match and signature match requirements, lack of language access and assistance, and discriminatory gerrymandering of legislative districts at the state, local, and federal level. The Subcommittee on Elections also found Native Americans are disproportionately targeted and impacted by voter ID laws and polling place closures.

In addition to the Subcommittee on Elections, the Judiciary Committee and its Subcommittee on the Constitution, Civil Rights, and Civil Liberties ("Subcommittee on the Constitution") held eight hearings on barriers to voting, continuing evidence of voting discrimination, and Congress's legal authority to enact remedial legis-

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[10] Report on Voting Rights and Election Administration in the United States of America, *Subcomm. on Elections, H. Comm. on House Admin.* (Nov. 2019) [hereinafter "Subcommittee on Elections Report"].

[11] Press Statement, Rep. Fudge Releases Report on Voting Rights and Elections Administration (Nov. 13, 2019), https://fudge.house.gov/press-statements/rep-fudge-releases-report-on-voting-rights-and-elections-administration/.

[12] *See Hearings Before the Subcomm. on Elections of the H. Comm. on House Admin.* 116th Cong. (2019).

lation.[13] The Subcommittee on Civil Rights and Civil Liberties of the House Oversight and Reform Committee conducted a hearing on "Protecting the Right to Vote: Best and Worst Practices," which examined election practices that maximize access to the ballot for eligible voters and disenfranchise eligible voters or increase obstacles to voting.[14] At this hearing, directors from civil rights organizations testified about voter suppression tactics across the country. Collectively, the hearings before the three committees produced strong contemporaneous evidence of ongoing discriminatory laws and practices that result in suppression of the right to vote against racial and language minorities.

The Judiciary Committee also received additional written testimony and reports from interested governmental and non-governmental organizations (NGOs) and private citizens,[15] which the Judiciary Committee adopts in their entirety as part of the legislative record in support of H.R. 4. In all, the three committees have assembled thousands of pages of testimony, documentary evidence, and appendices from over 126 groups and individuals, including State and local elected officials, tribal officials, scholars, attorneys, and other representatives from the voting and civil rights community and Members of Congress. In addition to the oral and written testimony, the Judiciary Committee requested, received, and incorporated into its hearing record a series of comprehensive reports that have been compiled by NGOs that have expertise in voting rights litigation and extensively documented: (1) the extent to which discrimination against minorities in voting has and continues to occur; (2) the impact of the suspension of Section 5 preclearance on the voting rights of minority voters and (3) the continued need for the expiring provisions of the VRA.[16]

In summary, the Judiciary Committee advances H.R. 4 in the face of overwhelming record evidence—developed over the course of the hearings discussed above—that states and their political subdivisions have continued to engage in voting discrimination in the years since the 2013 *Shelby County* decision.

B. Committee Statement on Importance of the Preclearance Process

When Congress passed the VRA in 1965, it sought to deliver on what had long been an empty promise to African Americans and other people of color: the right to participate in our democracy as equal citizens. The Act not only prohibited states from denying the right to vote on the basis of race, but also required certain states and local jurisdictions that had practiced the most severe forms of

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[13] *See Hearings Before the H. Comm. on the Judiciary and Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary,* 116th Cong. (2019).

[14] *See Protecting the Right to Vote: Best and Worst Practices: Hearing Before the Subcomm. on Civil Rights and Civil Liberties of the H. Comm. on Oversight and Reform,* 116th Cong. (May 1, 2019).

[15] *See An Assessment of Minority Voting Rights Access in the United States,* U.S. Comm'n on Civil Rights (2018).

[16] *See The Case for Restoring and Updating the Voting Rights Act,* Am. Civil Liberties Union (2019); *Democracy Defended: Analysis of Barriers to Voting in the 2018 Midterm Elections,* The NAACP Legal Def. and Educ. Fund (2019); *Democracy Diverted: Polling Place Closures and the Right to Vote,* The Leadership Conference Educ. Fund (2019); *Field Hearing Report Identifying and Removing Barriers to Political Participation by Native Voters,* The Native Am. Rights Fund (2019); *Practice Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities' Votes,* Asian Americans Advancing Justice, Mexican Am. Legal Def. and Educ. Fund, NALEO Educ. Fund (2019); *The State of Voting Rights Litigation,* Brennan Center for Justice (2019); *Voting Discrimination Against Racial and Ethnic Minorities 1994–2019,* Lawyers' Comm. for Civil Rights Under Law (2019).

discrimination to get approval from the DOJ, or from a court, before making any changes to their voting laws.

Congress enacted this "preclearance" requirement to address what the Supreme Court called an "unremitting and ingenious defiance of the Constitution" by states determined to suppress the vote. Even after the passage of earlier federal civil rights laws, states would continue to enact laws designed to disenfranchise African American voters, like literacy tests; and when those laws were struck down by the courts after years of litigation, the states would simply switch to some other method of voter suppression, like poll taxes.

This relentless game of whack-a-mole meant that African American voters could be shut out of the polling place even if they were successful in every lawsuit they brought because by the time they succeeded in striking down a discriminatory law, a new one would already be in place to keep them from the ballot box. So, as the Supreme Court explained when it first upheld the Voting Rights Act in *South Carolina v. Katzenbach,*[17] Congress put in place the preclearance requirement "to shift the advantage of time and inertia from the perpetrators of the evil to its victims."

For decades afterward, enforcement of this law improved the ability of African Americans and other people of color to cast votes, run for office and equally participate in the political process. However, because many state and local governments persisted in attempting to suppress the vote in communities of color—or to dilute their votes through racial gerrymandering—Congress reauthorized the VRA in 1970, 1975, 1982, and 2006. Each time, the legislation passed by overwhelming bipartisan margins. And each time, Congress kept essentially the same coverage formula for determining which jurisdictions would be subject to preclearance based on the evidence compiled in its legislative record.

In 2013, however, the Supreme Court in Shelby County held that the coverage formula in the VRA was unconstitutional because it was not based on current conditions. The Judiciary Committee heard from dozens of witnesses and assembled thousands of pages of evidence of ongoing discrimination as it had done in past reauthorizations, but in the Court's view, because certain statistics had improved in the jurisdictions subject to preclearance, Congress could no longer justify imposing preclearance on those jurisdictions. This determination was not without controversy on the Court. Justice Ruth Bader Ginsburg observed in a strongly worded dissent that: "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."

The Judiciary Committee record indicates that after the *Shelby County* decision, a deluge of voter suppression laws were passed across the nation, including in many states and local jurisdictions that had been subject to preclearance before the ruling. For instance, within 24 hours, Texas and North Carolina moved to reinstitute draconian voter identification (ID) laws, both of which were later held in federal courts to be intentionally racially discriminatory. The three separate committees identified above have

[17] 383 U.S. 301, 328 (1966).

heard evidence about these states and other ongoing voter suppression laws.

The Court also emphasized the equal sovereignty of the states and on states' authorities to administer elections. In each reauthorization process, this Committee and Congress as a whole, has focused on acting within its authority under the Fourteenth Amendment's guarantee of equal protection under the law and the Fifteenth Amendment's prohibition on states from denying the right to vote on the basis of race. Crucially, both Amendments give Congress the power to enforce these rights "by appropriate legislation." In its decision in *Katzenbach,* the Supreme Court held that this authority under the Fifteenth Amendment means Congress "may use any rational means" to make laws protecting the right to vote and the Court has deferred to that authority following each reauthorization. In *Shelby County,* however, the Court appeared to depart from this "rationality test" and applied a different, possibly heightened form of scrutiny. After *Shelby County,* there has been substantial confusion about the standard, which has allowed some states free reign to enact stringent voter ID laws, to purge their voter registration rolls, and to engage in a host of other measures designed to roll back the achievements of the Voting Rights Act.

Nonetheless, Congress has the power—and indeed the obligation—to address this tide of voting discrimination. The Fourteenth and Fifteenth Amendments expressly empower Congress to enact laws protecting the right to vote and guaranteeing the equal protection of all citizens. And although the Supreme Court's decision in *Shelby County* suspended the DOJ preclearance procedures, the Court made clear that it was not striking down preclearance altogether. Rather, it invalidated the part of the law that determines which jurisdictions are subject to preclearance. It explained it was doing this because Congress had not substantially updated that formula for several decades. In fact, the Court expressly said that Congress could "draft another formula based on current conditions."

Based upon the record compiled by the committees and the NGO's, the Judiciary Committee finds that current conditions justify the continuation of the Section 5 preclearance process and that the coverage formula in H.R. 4 is crafted within the constitutional bounds of congressional authority as defined by relevant Supreme Court precedent. The right to vote lies at the very core of our democracy and is foundational to the rule of law. Though substantial progress has been made, the overall record, particularly in the wake of suspension of Section 5 preclearance, continues to justify the need for the VRA's temporary provisions.

C. Need for the Original VRA and Subsequent Reauthorizations

1. Historical Background

a. Constitutional Authority for Federal Regulation of State and Local Voting Procedures to Combat Racial Discrimination

While it remains true that, in general, states are left to regulate their own elections, the post-Civil War amendments to the U.S. Constitution fundamentally re-ordered the relationship between the federal and state governments by giving Congress the express

authority to enforce the mandates of those amendments against the states. In doing so, these amendments gave Congress both the authority and the obligation to combat race discrimination by the States and their political subdivisions.[18] For instance, the VRA was enacted under Congress's authority to enforce the Fifteenth Amendment to the U.S. Constitution, which provides that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous servitude.[19] Likewise, the Fourteenth Amendment guarantees, among other things, the equal protection of the laws[20] and gives Congress the authority to enforce this guarantee through legislation.[21] It should also be noted that, with respect to elections for Congress, Congress has broad authority under the Constitution's Elections Clause to supplant state and local voting procedures and practices when it so chooses.[22]

b. Brief History of Discriminatory Barriers to Voting

Although the Nation has made substantial progress since the enactment of the VRA in ensuring full and equal participation by racial, ethnic, and language minority citizens in the electoral process, there remain significant and ever-evolving barriers to such full participation. Additionally, with the erosion of longstanding federal protections against voting discrimination, the possibility that this progress may be erased is ever present. Indeed, there is, sadly, precedent in the Nation's history for such retrogression, which pervades the history of civil rights in the United States. A more fulsome discussion of Congress's constitutional authority appears later in this Committee report.

i. The Persistence of Racial Discrimination Against African Americans in Voting Reflects the Deep-Rooted Racial Ideology That Undergirded Slavery in the United States

The end of the Civil War and the abolition of slavery ushered in a brief but important period in American history where federal lawmakers took significant steps to protect the civil rights of African Americans and other racial minorities. During the Reconstruction Era the Fourteenth Amendment and the Fifteenth Amendment were ratified and the Civil Rights Act of 1866, among other federal civil rights protections, was enacted.[23] Though not comprehensive, these legal protections for, among other things, voting

[18] *See H.R. 1, the "For the People Act of 2019": Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (Jan. 29, 2019) (oral testimony of Sherrilyn Ifill, President and Dir.-Counsel, NAACP Legal Defense and Educ. Fund).

[19] U.S. Const., amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.") and § 2 ("The Congress shall have power to enforce this article by appropriate legislation").

[20] U.S. Const., amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[21] *Id.*, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article").

[22] U.S. Const., art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of choosingg Senators.").

[23] Michelle Alexander, *The New Jim Crow* at 29, The New Press (2012).

rights—enforced through the use of federal troops—permitted a nascent multiracial democracy to form for a brief period in parts of the former Confederacy.[24] Yet the centuries-old institution of slavery established a racial caste system in the United States so pervasive that it survived the oppressive economic and social institution that it was intended to preserve. The political will to maintain the civil rights advancements made in the Civil War's immediate aftermath soon subsided. The withdrawal of the last federal troops as part of the Compromise of 1877—which secured the presidency for Rutherford B. Hayes in the contested 1876 presidential election—marked the end of the Reconstruction period.[25] Without the protection of federal troops and the political will to enforce the few federal civil rights laws enacted in the immediate aftermath of the Civil War, the backlash against gains made in African American voting was swift. Many former Confederate States moved quickly to enact laws designed to suppress African American voting rights while countenancing acts of racial violence and intimidation.

By the 1890s—often considered by civil rights historians as the nadir of African American civil rights—many southern States had amended their constitutions to effectively disenfranchise African American voters and established what would become known as Jim Crow laws.[26] An oppressive regime of legal segregation designed to reassert a racial caste system akin to that imposed by slavery, Jim Crow laws were designed to preserve white political supremacy through the denial of civil rights and the right to vote—the bedrock on which all other civil rights were founded. Using a combination of "violence, voting fraud, white officials' discriminatory use of election structures (such as gerrymandering and the use of at-large elections to prevent black office holding), statutory suffrage restrictions, and, in the waning years of the century, revision of the 'reconstructed' state constitutions," reactionary whites effectively erased the gains in political representation made by African Americans during Reconstruction.[27] Indeed, the enactment of the many barriers to voting that Congress initially intended the VRA to address can be traced back to this period.[28]

Undergirding Jim Crow laws were the racial attitudes spawned during slavery, which continued to perpetuate themselves throughout American society, particularly in the States of the former Confederacy where Jim Crow was born. Racial discrimination in voting, however, was legal in many places throughout the United States, not just the South. For example, on the eve of the Civil War, every northern State save New York and all but one in New England disenfranchised African American voters, and even those States that did permit African Americans to vote placed qualifications that limited the number of eligible African American voters.[29]

Furthermore, the concept of white racial superiority stemming from slavery, and later its successor Jim Crow, informed societal attitudes towards other racial and ethnic groups. As the United

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[24] *Id.*

[25] Bernard Grofman, Lisa Handley, et al., *Minority Representation and the Quest for Voting Equality* at 6 (1992).

[26] Bernard Grofman and Chandler Davidson, ed., *Controversies in Minority Voting: The Voting Rights Act in Perspective* at 10 (1992).

[27] *Id.* at 10–11.

[28] H.R. Rept. 439, 89th Cong. at 11 (1965).

[29] *Id.* at 8.

States' population grew ever more diverse, other ethnic and racial minorities were also subjected to voting and other forms of discrimination as well as acts of racial violence – which were often tolerated if not supported by local or State authorities. In short, the odious racial caste system which evolved to justify slavery, and the historical conflicts between the federal government and Native American tribes, have attached social stigmas to Americans belonging to other racial and ethnic minority groups as well. Additionally, many Native Americans have suffered a long history of discrimination, both before and after Congress conferred automatic U.S. citizenship to all Native Americans in 1924.[30] Moreover, this discrimination has occurred within the context of historical conflicts between many Native American tribes and a federal government that often acted in a manner indifferent to its treaty obligations or antagonistically towards tribal sovereignty.

It took nearly a century of civil agitation following the adoption of the Civil War Amendments, culminating in the civil rights movements of the 1950s, 60s and early 70s to end de jure racial discrimination in the United States. During this "Second Reconstruction," civil rights activists advanced legal theories before a receptive Supreme Court to fully enforce constitutional guarantees of legal equality and used public protests to shape public opinion to push federal lawmakers to once again take action to protect the civil rights of racial and ethnic minorities through the enactment of the Civil Rights Act of 1964, and, most importantly, the Voting Rights Act of 1965.

U.S. history since the Civil War has been punctuated by moments of real promise for the realization of full racial equality-spurred in part by the initiatives of an engaged federal government responding to those fighting on behalf of civil rights for all Americans. Unfortunately, this progress has been fitful as these periods have been followed by periods of political backlash, and subsequent backsliding on civil rights. The Reconstruction Era was the first such period that provided a brief glimpse of what the Nation could achieve. Like mercury, however, the racial attitudes born from America's early dependence on slavery continued to seep into any crack in the Nation's resolve, taking whatever shape necessary to perpetuate the racial caste system that had touched almost every aspect of life in communities across the country for centuries. It took a "Second Reconstruction" spearheaded by the leaders of the Civil Rights Movement, and the many ordinary Americans who took up the cause, for the United States to start living up to its founding ideals.

ii. Brief History of the VRA

The VRA was a remarkable response to the persistence of racial discrimination in voting and was intended to prevent the kind of backsliding on voting rights enforcement that occurred after the Civil War. That it sought to protect the right to vote was not novel. Instead, what made it indispensable was that it was structured to prevent those invested in preserving white supremacy from adapting State laws to evade federal attempts to enforce the constitutional guarantee of the right to vote regardless of race.

[30] Indian Citizenship Act of 1924, Pub. L. 68–175, 43 Stat. 253 (1924).

The 1965 Judiciary Committee report accompanying the VRA noted both the historic struggle for civil rights and Congress's failure to protect minority voting rights following the end of the Reconstruction period and the enactment of Jim Crow laws. The Judiciary Committee noted in its report that "[t]he bill, as amended, [is] designed primarily to enforce the 15th amendment to the Constitution of the United States and is also designed to enforce the 14th amendment and article I, section 4"[31] and that "[t]he historic struggle for the realization of this constitutional guarantee indicates clearly that our national achievements in this area have fallen far short of our aspirations."[32]

Although in the years prior to the passage of the VRA, Congress passed several civil rights bills in 1957, 1960, and 1964,[33] to facilitate voting rights enforcement litigation by the DOJ and private plaintiffs, the Judiciary Committee observed that "enforcement has encountered serious obstacles in various regions of the country."[34] The Judiciary Committee found that States quickly adapted their laws in response to voting rights litigation in order to maintain racially discriminatory voting, noting "[t]he history of 15th amendment litigation in the Supreme Court reveals both the variety of means used to bar [African American] voting and the durability of such discriminatory policies."[35] Litigation, even where successful, was not enough to vindicate the voting rights of racial minorities in these regions. As Justice Ginsburg noted in her dissent in Shelby County: "Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place."[36] To slay the beast, Congress had to forge a weapon capable of defeating each of the Hydra's heads for good.

To that end, Congress added a provision to the VRA that subjected States and political subdivisions with a history of racial discrimination in voting to a preclearance requirement, which "required prior approval or preclearance of a proposed change to any voting law, and applied only to those states or political subdivisions" that fell under its coverage formula.[37] As originally enacted, the coverage formula covered any state or political subdivision that maintained a "test or device" as a prerequisite to voting or registering to vote on November 1, 1964 "and either less than 50% of citizens of legal voting age were registered to vote or less than 50% of such citizens voted in the presidential election in the year in which the state or political subdivision used the test or device."[38] The preclearance provision was initially set to expire after five years.

The Judiciary Committee report noted that each of the six southern states that fell within the coverage formula and were subject to the VRA's preclearance requirement "has had a general public

[31] H.R. Rept. 439, 89th Cong. at 6 (1965).
[32] *Id.* at 8.
[33] *Id.* at 9.
[34] *Id.*
[35] *Id.* at 8.
[36] 570 U.S. at 560.
[37] *History of Enforcement of the Voting Rights Act of 1965: Hearing before the Subcomm. on the Constitution, Civil Rights, and Civil Justice, H. Comm. on the Judiciary*, 116th Cong. (Mar. 12, 2019) (written statement of L. Paige Whitaker, Legislative Attorney, Congressional Research Service at 2).
[38] *Id.*

policy of racial segregation evidenced by statutes in force and effect in the areas of travel, recreation, education, and hospital facilities."[39] Certain state and local governments openly espoused racially discriminatory attitudes, which demonstrated that the disparities in voter registration and voter participation were the result of intentional racial discrimination in voting.[40]

In light of the foregoing factors, the Judiciary Committee considered the preclearance provision to be the most critical, observing:

> The judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.[41]

For example, the Judiciary Committee report noted that even where litigation was successful and "where some registration has been achieved, [African American] voters have sometimes been discriminatorily purged from the roll."[42] Even during the enactment of the initial 1965 Act, Congress recognized that state actions designed to exclude minorities from effectively participating in the electoral process could take on new forms. Indeed, the entire preclearance requirement is premised on Congress having found that litigation alone was not effective, as States and localities simply found alternative means to effectuate racially discrimination.

While the Civil Rights Movement was successful in pushing courts and the Congress to end States' overt racially discriminatory policies, racial discrimination in voting—as in other facets of American society—continued to persist, and evolved by taking on new, more covert forms. In the decades following the enactment of the VRA, both the courts and Congress—during subsequent reauthorizations of the VRA—took notice as States and political subdivisions began to adopt new, less overt methods to limit full minority participation in the electoral process. Based on substantial evidence presented to the Judiciary Committee at the time of each reauthorization, Congress extended the temporary provisions of the VRA in 1970, 1975, 1982, 1992, and 2006, and amended the Act to take account of new evolving threats to voting rights.[43] For example, in 1975, the Congress expanded the VRA to cover new geographic areas after finding "a systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English."[44] During the 1982 reauthorization of the VRA, the Judiciary Committee report observed:

> Congress and the courts have long recognized that protection of the franchise extends beyond mere prohibition of official actions designed to keep voters away from the polls, it also includes prohibitions of state actions which so manipulate the elections process as to render voters meaningless.[45]

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[39] H.R. Rept. 439, 89th Cong. at 14 (1965).
[40] *Id.*
[41] *Id.* at 10.
[42] *Id.*
[43] See H.R. Rept. 109–478, 109th Cong. (2006).
[44] H.R. Rept. 94–196, 94th Cong. at 16 (1975).
[45] H.R. Rept. 97–227, 97th Cong. at 17 (1981).

The Judiciary Committee found that, despite progress made with regard to increasing minority registration and the number of minority elected officials, "manipulation of registration procedures and the electoral process" by state actions continued to "effectively exclude minority participation from all stages of the political process."[46] These state actions included "at-large elections, high fees and bonding requirements, shifts from elective to appointive office, majority vote run-off requirements, numbered posts, staggered terms, full slate voting requirements, residency requirements, annexations/retrocessions, incorporations, and malapportionment and racial gerrymandering."[47]

In enacting the VRA, Congress sought to arrest the forces animating State and local government attempts to evade federal enforcement of minority voting rights. The effects of past racial discrimination continue to resound down through the ages, and much progress remains to be made today towards true racial and social justice. Moreover, though it has been decades since Jim Crow ended, the racial attitudes that animated it remain within living memory and continue to cast a long shadow across the Nation's legal, economic, and social institutions. Yet a generation of Americans have come of age without having to live under the burdens imposed by de jure racial discrimination. That is in large part because the VRA continues to be one of the primary bulwarks against voter discrimination—no matter what method or form such discrimination takes—and ensuring that the right to vote is guaranteed fully for all Americans.

iii. First, Second, and Third Generation Barriers to Voting

Understandably, the original provisions of the VRA focused primarily on vote denial practices given that de jure racial discrimination in almost every aspect of public life had been the policy of many States for decades, effectively abrogating the voting rights of African Americans and other racial minorities in defiance of the Fourteenth and Fifteenth Amendments. Moreover, State and local officials in many States were also actively engaged in resisting federal efforts to effectuate minority voting rights. The 1965 Committee report, however, also makes clear that the VRA was always envisioned to be a flexible response to conditions "on the ground" that affected the ability of minority voters to exercise effectively the franchise.

The VRA as initially passed addressed so-called "first generation" barriers to voting that were enacted following the end of Reconstruction.[48] These barriers included methods such as poll taxes, literacy tests, and other devices designed to facilitate overt disenfranchisement of racial minorities by preventing them from registering and voting.[49] By the 1970s, States and subdivisions determined to discriminate against minority voters began to adopt other, more subtle barriers to meaningful participation in the democratic proc-

[46] *Id.* at 14.
[47] *Id.* at 18.
[48] *Discriminatory Barriers to Voting: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties, H. Comm. on the Judiciary,* 116th Cong., (Sept. 5, 2019) (written statement of Steven Mulroy, Professor of Law, University of Memphis Cecil B. Humphreys School of Law at 2).
[49] *Id.*

ess in response to increased minority voter registration due to the enforcement of the VRA.[50]

These so-called "second generation barriers" are designed not to outright exclude minority voters from participation, but to dilute or underrepresent the strength of their votes.[51] These include practices such as the racial gerrymandering of electoral districts; adoption of at-large election districts rather than smaller, single-member individual electoral districts; and the annexation of another political subdivision in order to dilute the ability of minority voters to impact the outcome of an election. In keeping with the overall purpose of the VRA, Congress amended the statute to ensure these practices were forbidden.

Finally, while second generation barriers remain a threat to voting rights, in recent years, States and political subdivisions have begun adopting "third generation" barriers to make voting more onerous for minority voters.[52] These practices include the adoption of procedures making it more difficult for language minorities to register; placing burdensome restrictions on third-party voter registration activities; moving or closing down polling places to increase the difficulty for minorities to vote; and countenancing confusing election administration procedures to remain in place for practices such as provisional balloting and voter ID requirements.

D. Framework of Congress's Constitutional Authority to Combat Voting Discrimination

1. Katzenbach and Related Cases

Soon after the VRA was first enacted, the Supreme Court resoundingly upheld its constitutionality in Katzenbach. In that case, South Carolina contended that Congress had exceed its constitutional authorities and "encroach[ed] on an area reserved to the States by the Constitution."[53] It also argued that the coverage formula "violate[d] the principle of the equality of States."[54] The Court posed the following as the fundamental question in the case: "Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?"[55]

The Court held that it had. First, it construed the Fifteenth Amendment's text and purpose to mean that "[a]s against the reserved powers of the States, Congress may use *any rational means to effectuate the constitutional prohibition of racial discrimination in voting*."[56] In applying this "rationality test" to measures passed pursuant to Congress's Fifteenth Amendment authority, the Court affirmed that the Amendment's express grant of authority to Congress means that Congress is empowered to enact proactive legislation beyond simply "forbid[ding] violations of the Fifteenth Amendment in general terms."[57] The Court made clear that any legislation to enforce the Fifteenth Amendment is constitutional when "as in all cases concerning the express powers of Congress with relation to the reserved powers of the States . . . 'Let the end be legiti-

[50] *Id.*
[51] *Id.* at 2–3.
[52] *Id.* at 3.
[53] 383 U.S. at 323.
[54] *Id.*
[55] *Id.* at 324.
[56] *Id.* (emphasis added).
[57] *Id.* at 327.

mate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution . . . .'"[58]

The Court acknowledged that Congress had acted in an "inventive" and "uncommon" manner in imposing a preclearance requirement on covered jurisdictions in Sections 4(b) and 5.[59] Section 4(b) provided the "coverage formula" for determining which jurisdictions are subject to the Section 5 preclearance requirement and requires these covered jurisdictions to "preclear" proposed changes in their voting procedures or practices and submit the proposed changes for approval by DOJ or by a federal court.[60] Section 5 requires jurisdictions covered by Section 4(b) to submit any changes in their voting procedures or practices for approval by DOJ or by a federal court. Pursuant to Section 5, DOJ or the court can block any changes that have discriminatory purposes or effects.[61] The coverage formula was triggered if a state or political subdivision, as of various points in the 1960s or early 1970s, (1) employed prohibited "tests or devices" used to limit voting; and (2) had fewer than 50% voter registration or turnout among its voting-age population.[62] Section 3(c), known as the "bail-in" provision, allows courts to retain jurisdiction to supervise further voting changes in jurisdictions where the court has found violations of the Fourteenth or Fifteenth Amendments. If a jurisdiction is "bailed in," it must submit any changes to its voting procedures for approval either to the court or to DOJ.[63] That provision was not affected by the Court's holding in *Shelby County*.

In Katzenbach, the Court held that Section 5's preclearance remedy was "clearly a legitimate response to the problem" of voting discrimination.[64] Given the difficulty of litigating voting discrimination suits on a case-by-case basis, the Court held that Congress appropriately decided "to shift the advantage of time and inertia from the perpetrators of the evil to its victims."[65] The Court elaborated:

> Congress knew that some of the States covered by [Section] 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.[66]

As to the coverage formula, the Court held that South Carolina's arguments regarding the "equality of [the] States" applied only to

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[58] *Id.* at 326 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).
[59] *Id.* at 324, 327; see 52 U.S.C. §§ 10303–10304 (1982).
[60] *See* 52 U.S.C. § 10304(a).
[61] *Id.*
[62] Id. § 10303(b).
[63] *Id.* § 10302(c).
[64] 383 U.S. at 327–28, 335.
[65] *Id.* at 328.
[66] *Id.* at 335 (internal citations omitted).

the terms on which states were admitted into the Union.[67] It reasoned that Congress justifiably confined the preclearance remedy to the areas in which voting discrimination occurred most frequently. Additionally, the Court viewed South Carolina's criticism that the formula was inadequately tailored as "largely beside the point."[68] Congress had "reliable evidence of actual voting discrimination in a great majority" of covered jurisdictions; the formula it devised was "relevant to the problem of voting discrimination"; and "[n]o more was required."[69] Katzenbach thus applied a standard akin to rational-basis review, asking whether the means Congress chose to address the problems it faced were rationally related to its ends.[70]

During the same term, the Supreme Court also upheld Congress's broad authority under the Fourteenth Amendment to prevent voting discrimination against non-English speakers. In Katzenbach v. Morgan, the Court upheld a ban on the use of English literacy tests for voters who were educated in American schools in other languages.[71] Prior to the enactment of that ban, citizens who had moved to New York City from Puerto Rico were frequently denied the right to vote.[72] New York City argued that the ban could be constitutional only if the Court determined that the State's English literacy test itself violated the Fourteenth Amendment.[73] The Supreme Court rejected that view, holding that—like the enforcement provision of the Fifteenth Amendment—Section 5 of the Fourteenth Amendment grants Congress broad "discretion in determining whether and what legislation is needed to secure [the Amendment's] guarantees."[74] The Court concluded that "[i]t was well within congressional authority to say that" these non-English speakers' right to vote "warranted federal intrusion upon any state interests served by the English literacy requirement," and that "[i]t was for Congress . . . to assess and weigh the various conflicting considerations" underlying that determination.[75]

The initial VRA was set to expire after five years, and in 1970 Congress renewed it for another five years with some modifications to the coverage formula.[76] In 1975, Congress reauthorized the VRA for another seven years and extended its coverage to jurisdictions meeting Section 4's coverage criteria as of November 1972.[77] Fur-

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[67] *Id.* at 328–29.

[68] *Id.* at 329.

[69] *Id.*

[70] *See, e.g., Congressional Authority to Protect Voting Rights After Shelby County v. Holder: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary,* 116th Cong. (Sept. 24, 2019) [hereinafter "Congressional Authority Hearing"] (statement of Justin Levitt, Professor of Law, Associate Dean for Research and Gerald T. McLaughlin Fellow, Loyola Law School at 27) [hereinafter "Levitt Statement"]; see also Richard L. Hasen, *Shelby County and the Illusion of Minimalism,* 22 Wm. & Mary Bill of Rts. J. 713, 716 (2014) (*Katzenbach* "gave considerable deference to congressional determinations about the means necessary to 'enforce' the Fifteenth Amendment prohibition by states in discriminating in voting on the basis of race and applied a rationality standard of review").

[71] 384 U.S. 641 (1966). More specifically, the challenged provision prohibited the use of English literacy tests as to voters who had successfully completed sixth grade "in a public school, or in a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the language of instruction was other than English." *Id.* at 643 & n.1.

[72] *Id.* at 644.

[73] *Id.* at 648.

[74] *Id.* at 651; *see also id.* at 650–51 (explaining that these enforcement powers are "the same broad powers expressed in the Necessary and Proper Clause" of the Constitution, and noting that a similar analysis applied in *Katzenbach*).

[75] *Id.* at 653.

[76] Voting Rights Act Amendments of 1970, Pub. L. No. 91–285 (1970).

[77] Voting Rights Act of 1965, amendments, Pub. L. No. 94–73 (1975).

thermore, Section 203 of the law added extensive protections for members of language minorities (i.e., non-English speakers), including by supplementing Section 2 to prohibit voting discrimination against language minorities, and requiring provision of language assistance to voters. Section 203 also expanded the preclearance coverage formula to include jurisdictions where more than 5 percent of voting-age citizens did not speak English and where English-only voting materials had previously been provided.[78] In 1982, Congress reauthorized the VRA for another 25 years without changing the coverage formula.[79]

The Supreme Court's standard for reviewing the preclearance requirement and coverage provisions did not change during this period. In *City of Rome v. United States*, decided in 1980, the city of Rome, Georgia contended that Congress exceeded its authority by allowing preclearance to be granted only if a change in voting procedures did not have the purpose *or effect* of discriminating on the basis of race.[80] Rome contended that the Fifteenth Amendment prohibited only purposeful discrimination, and that Congress's enforcement authority was therefore limited to preventing such conduct. The Court rejected this argument, holding that "even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect."[81] The Court held that "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the *risk* of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact."[82] The Court found "no reason . . . to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from undoing or defeating the rights recently won by" African Americans.[83]

2. City of Boerne v. Flores, the Fourteenth Amendment, and the Congruence and Proportionality Test

In a line of cases beginning with *City of Boerne v. Flores*, the Supreme Court has articulated limits on Congress's authority under Section 5 of the Fourteenth Amendment to remedy discrimination where those remedial measures are applied against the States.[84] Although this line of cases does not involve voting rights, it may have influenced the Court's analysis in *Shelby County*, as discussed further below.

City of Boerne involved a challenge to the Religious Freedom Restoration Act of 1993 ("RFRA"), enacted by Congress to protect the free exercise of religion.[85] Among other things, RFRA prohibited State and local governments (as well as the federal government) from "substantially burden[ing]" a person's exercise of religion ab-

[78] *Id.* § 203.
[79] Voting Rights Act Amendments of 1982, Pub. L. No. 97–205 (1982).
[80] 446 U.S. 156, 173 (1980).
[81] *Id.* (footnote omitted).
[82] Id. at 177 (emphasis added).
[83] *Id.* at 178 (internal quotations and brackets omitted).
[84] *See* 521 U.S. 507 (1997).
[85] *See id.*; *see also* Pub. L. No. 103–141 (1993).

sent a compelling interest.[86] In enacting the statute, Congress acted pursuant to its power under Section 5 of the Fourteenth Amendment, to enforce the right to the free exercise of religion (considered applicable against the States through the Fourteenth Amendment's Due Process Clause).[87] The Court held that Congress had exceeded that authority because the protections and remedies afforded by RFRA went beyond the requirements of the Free Exercise Clause of the First Amendment, as the Court had then construed it.[88]

Of most relevance here, the Court held that "*[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end*."[89] It interpreted Section 5 of the Fourteenth Amendment as "remedial,"[90] meaning any law enacted through that authority had to be tethered to remedying violations of the underlying constitutional right.

In *City of Boerne*, the Court, in fact, pointed to the VRA as an example of what Congress *should do* when compiling a legislative record to support legislation to enforce a constitutional right. In that case, the Court found that, in contrast to the extensive record of voting discrimination assembled by Congress when it passed the VRA, "RFRA's legislative record lacks examples of modern instances of . . . laws passed because of religious bigotry."[91] The Court concluded that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[92] Rather, the Court viewed RFRA as designed to *expand* the scope of rights protected under the Free Exercise Clause—which, acting through its enforcement powers under the Fourteenth Amendment, it could not do.

The Court employed this "congruence and proportionality" test in limiting other statutes as well. For instance, it held that Congress exceeded its authority when it passed legislation subjecting states to lawsuits for money damages based on certain violations of the Age Discrimination in Employment Act,[93] the employment discrimination provision of the Americans with Disabilities Act ("ADA"),[94] and the self-care provision of the Family and Medical Leave Act ("FMLA").[95] The Court, however, upheld damages remedies applied against states for violations of the family-care provision of the FMLA[96] and the public accommodations provision of the ADA.[97] In those cases, the Court relied in substantial part on legislative records documenting historical and ongoing discriminatory practices (regarding gender-based parental leave policies in the FMLA case and accommodations for the disabled in the ADA case).[98]

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[86] *Boerne*, 521 U.S. at 515–16.
[87] *Id.* at 517.
[88] *Id.* at 513–14; *see Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).
[89] *Boerne*, 521 U.S. at 520 (emphasis added).
[90] *Id.*
[91] *Id.* at 530.
[92] *Id.* at 532.
[93] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–83 (2000).
[94] *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).
[95] *Coleman v. Ct. of App. of Md.*, 566 U.S. 30, 39 (2012).
[96] *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003).
[97] *Tennessee v. Lane*, 541 U.S. 509, 533–534 (2004).
[98] *See Hibbs*, 538 U.S. at 730–37; *Lane*, 541 U.S. at 523–29.

In a 2009 case known as *Northwest Austin*, the Court avoided directly ruling on a challenge to the constitutionality of the VRA's coverage formula and preclearance requirement but warned that "[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."[99] The Court also acknowledged, but did not settle a dispute between the parties about whether *City of Boerne*'s standard applied in cases challenging the VRA.[100] Instead, the Court observed that "the [VRA] imposes current burdens and must be justified by current needs."[101] The Court also noted that "a departure from the fundamental principle of equal sovereignty [among states] requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[102]

3. Shelby County v. Holder

About seven years after the reauthorization of the VRA in 2006, the Court invalidated Section 4(b)'s coverage formula in *Shelby County* decision. The Court began its analysis by reiterating the framework it outlined in *Northwest Austin* requiring Congress to (1) justify the burdens of preclearance based on "current needs" and (2) demonstrate that the coverage formula was "sufficiently related to the problem that it targets."[103] The Court also noted that the scope of Section 5 was broadened in 2006 to prohibit any voting law that has the purpose (even if not the effect) of diminishing the ability of citizens on account of race, color, or language-minority status to elect their preferred candidates of choice, and that nothing had been done to ease the restrictions in Section 5 or narrow the scope of coverage to address concerns related to the federalism costs imposed by those provisions.[104]

The Court emphasized the states' traditional autonomy in administering elections and the importance of federalism principles writ large.[105] The Court noted that the federal government does not "have a general right to review and veto state enactments before they go into effect" and that "States retain broad autonomy in structuring their governments and pursuing legislative objectives."[106] The Court did not expressly state whether it would employ *Katzenbach*'s "rationality" test or *Boerne*'s "congruence and proportionality" test. Rather, it stated in a footnote that "[b]oth the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*, and accordingly *Northwest Austin* guides our review under both Amendments in this case."[107] The Court explained that in *Northwest Austin*, "we concluded that 'a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the

[99] *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (*Northwest Austin*).
[100] *Id*. at 204.
[101] *Id*. at 203.
[102] *Id*.
[103] 570 U.S. at 542; *see also id*. at 554 ("Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.").
[104] *Id*. at 549–50.
[105] *See id*. at 542–44.
[106] *Id*. at 542–43.
[107] *Id*. at 542 n.1 (internal citation omitted).

problem that it targets.' These basic principles guide our review of the question before us."[108]

The Court next observed that voting discrimination had "changed dramatically" since the VRA's enactment in 1965.[109] The most flagrantly discriminatory mechanisms for suppressing the vote, such as through literacy tests, had been outlawed for decades. The Court held that the coverage formula was no longer rational in "practice and theory":

> At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." . . . The areas where Congress found "evidence of actual voting discrimination" shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average."
>
> We explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." . . . We therefore concluded that "the coverage formula [was] rational in both practice and theory." . . . It accurately reflected those jurisdictions uniquely characterized by voting discrimination "on a pervasive scale," linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. . . . The formula ensured that the "stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant."
>
> Nearly 50 years later, things have changed dramatically . . . In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." . . . The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.[110]

The Court further noted that when Congress reauthorized the VRA in 2006, voter registration among African American and white voters was nearly equal (and in some instances higher for African American voters) in the six states originally subject to preclearance, and that DOJ objected to only a very small percentage of proposed voting changes in the preceding decade.[111]

In light of what the Court viewed as significant improvements in the state of voting rights, what it found most objectionable was Congress's failure to change the Section 4(b) coverage formula. As the Court put it: "Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s

[108] *Id.* at 542 (internal citation omitted).
[109] *Id.* at 546–47.
[110] *Id.* at 546–47.
[111] *Id.* at 548.

and early 1970s."[112] The Court rejected the argument that the coverage formula was permissible because—regardless of its terms—it resulted in coverage of jurisdictions that Congress intended to cover and that had engaged in ongoing voting discrimination practices. The Court stated:

> The Government's reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one—subjecting a disfavored subset of States to 'extraordinary legislation otherwise unfamiliar to our federal system' . . . —that failure to establish even relevance is fatal.[113]

The Court emphasized that to serve the purposes of the Fourteenth and Fifteenth Amendments, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."[114] The Court did not conduct a detailed review of the voluminous evidence assembled by Congress demonstrating ongoing, second-generation barriers to voting, because the core problem, in the Court's view, was that "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions."[115]

Significantly, the Court invited Congress to "draft another formula based on current conditions."[116] The Court went on to note that, "[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[117]

NEED FOR LEGISLATION

A. The Judiciary Committee's Factual Findings Demonstrate Substantial and Continuing Voting Discrimination Since the Shelby County Decision

Testimony received at the subcommittees' hearings revealed that after the *Shelby County* decision in 2013, discriminatory voting changes were implemented particularly—though not exclusively—in several jurisdictions formerly subject to the VRA's preclearance requirement. This extensive evidence shows that efforts to discriminate persist and evolve, such that a revised coverage formula is needed to protect minority voters.

Since 2013, at least 23 States have enacted newly restrictive statewide voter laws.[118] These statewide voter laws include strict

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[112] *Id.* at 551.
[113] *Id.* at 552 (quoting *Northwest Austin*, 557 U.S. at 211).
[114] *Id.* at 553.
[115] *Id.* at 553–54.
[116] *Id.* at 557.
[117] *Id.*
[118] See *History and Enforcement of the Civil Rights Act of 1965: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. 4 (2019) [hereinafter "VRA History Hearing"] (statement of Catherine Lhamon, Chair, U.S. Comm'n on Civil Rights [hereinafter "Lhamon VRA History Statement"]); *Congressional Authority to Protect Voting Rights After Shelby County v. Holder: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong., Unofficial Tr. 32 (2019) [hereinafter "Congressional Authority Hearing"] (statement of Joseph D. Rich) [hereinafter "Rich Statement"]; Congressional Authority Hearing, Unofficial Tr. 24 (statement of Debo P. Adegbile, Partner, Wilmer Hale) [hereinafter "Adegbile Statement"];

Continued

voter identification laws; voter registration barriers such as requiring documentary proof of citizenship, allowing challenges of voters on the rolls, and unfairly purging voters from rolls; cuts to early voting; and moving or eliminating polling places.[119] The impact of the *Shelby County* decision was summarized by Kristen Clarke, President and Executive Director of the Lawyers' Committee for Civil Rights Under Law, who testified before the Subcommittee that:

> [W]e have vetted complaints from tens of thousands of voters since *Shelby*, many revealing systemic voting discrimination. In short, this is how *Shelby* has impacted our democracy.
>
> First, we have seen the resurgence of discriminatory voting practices, some motivated by intentional discrimination, and this discrimination has been most intense in the very jurisdictions that were once covered by Section 5. They range from the consolidation of polling sites to make it less convenient for minority voters to vote to the curtailing of early voting hours, the purging of minority voters from the rolls under the pretext of list maintenance, strict photo ID requirements, abuse of signature match verification requirements to reject absentee ballots, the threat of criminal prosecution, and more.
>
> Second, we have seen increased levels of recalcitrance and hostility among elected officials who institute and reinstitute discriminatory voting changes with impunity. Well-known examples come out of North Carolina, where the legislature adopted an omnibus bill that the Fourth Circuit found was crafted with surgical precision. . . .
>
> Third, the loss of public notice regarding changes in voting practices that could have a discriminatory effect is significant. Most suppressive actions occur in small towns sprinkled across the country where constant oversight is difficult, if not impossible.
>
> Fourth, the public no longer has the ability to participate in the process of reviewing practices before they take effect. And between 2000 and 2010, DOJ received between 4,500 and 5,500 submissions, capturing between 14,000 and 20,000 voting changes per year. Without Section 5, communities are in the dark, and unable to share critical information that can help to illuminate the discrimination that sometimes underlies voting changes.
>
> Fifth. The preclearance process had an identifiable deterrent effect that is now lost.
>
> Sixth. The status quo is not sustainable. Civil rights organizations are stepping up to fill the void created by the *Shelby* decision at insurmountable expense.
>
> And finally, this will be the first redistricting cycle in decades if Congress fails to restore the Voting Rights Act. A little over 12 years ago, both Chambers of Congress re-

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see also Voting Rights and Election Administration in America: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin. 116th Cong. (2019) [hereinafter "America Oversight Hearing"] [Lhamon Statement at 36].

[119] See Lhamon VRA History Statement at 4–6; see also Sonia Gill, *The Case for Restoring and Updating the Voting Rights Act*, Am. Civil Liberties Union at 32–44 (2019).

> authorized the Act with tremendous bipartisan support. Many members of the House present for that vote are still here today. Bipartisan support for the Act has been consistent across the decades and should remain so today. The Supreme Court has put the ball in Congress' court, and this body must undertake action now to help our country safeguard the right to vote for all.[120]

1. United States Commission on Civil Rights 2018 Report

Catherine Lhamon, Chair of the United States Commission on Civil Rights, testified before the Constitution Subcommittee about the findings of the Commission's 2018 report on voting rights.[121] This 2018 report documented the disturbing trend of ongoing voting discrimination in States such as Texas, Georgia, and North Carolina that had previously been subject to Section 5 preclearance and found that Texas has the highest number of recent VRA violations in the nation.[122] Subsequent testimony submitted to the Subcommittee bolstered the Commission's findings, particularly with respect to those three States as well as Alabama.

Texas

Within hours of the *Shelby County* decision, the Texas Attorney General declared that the state would implement its restrictive voter ID law notwithstanding the fact that a federal court had ruled that the same Texas law could not receive preclearance due to its retrogressive effects on minority voters.[123] The Subcommittee heard testimony about the changing demographics of Texas and that the fear of a majority-minority electorate had resulted in the implementation of discriminatory laws, policies, and practices primarily directed at African American and Latino voters.[124] Witnesses described recent examples of voter suppression tactics including: the reinstatement of at-large voting, criminal and civil penalties for "voter fraud" such as errors on voter registration forms resulting in a decrease of voter registration drives, requiring government-issued identification to vote, widespread purging of

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[120] *See Continuing Challenges to the Voting Rights Act Since Shelby Cty. v. Holder: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary,* 116th Cong., Unofficial Tr. 5–6 (2019) [hereinafter "*Shelby* Anniversary Hearing"] (statement of Kristen Clarke, President and Exec. Dir., Lawyers' Comm. for Civil Rights Under Law) [hereinafter "Clarke Shelby Statement"]; *see also* America Oversight Hearing, Unofficial Tr. 13–15 (2019) (statement of Kristen Clarke, President and Exec. Dir., Lawyers' Comm. for Civil Rights Under Law) [hereinafter "Clarke Oversight Statement"].

[121] *See U.S. Comm. on Civil Rights, An Assessment of Minority Voting Rights Access in the United States* (2018).

[122] *See* Lhamon Statement at 4; *see also* America Oversight Hearing (statement of Catherine E. Lhamon, Chair, U.S. Comm'n on Civil Rights at 4) [hereinafter "Lhamon Oversight Statement").

[123] Federal courts have subsequently found that the Texas voter ID law is intentionally discriminatory against minority voters. *See Evidence of Current and Ongoing Voting Discrimination: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary,* 116th Cong. (2019) [hereinafter "Evidence Hearing"] (statement of Myrna Pérez, Dir., Voting Rights and Elections Program, Brennan Center for Justice at NYU School of Law) [hereinafter "Pérez Statement"]; *Oversight Hearing on Voting Rights and Election Admin. in Ga., Subcomm. on Elections, H. Comm. on House Admin.,* 116th Cong. 1 (2019) [hereinafter "Georgia Oversight Hearing"] (statement of Gilda Daniels, Dir. of Litigation, Advancement Project at 3) [hereinafter "Daniels Statement"].

[124] *See Enforcement of the Voting Rights Act in the State of Tex.: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary,* 116th Cong., Unofficial Tr. 18–22, 25–29 (2019) [hereinafter "Texas VRA Hearing"] (statements of Ernest I. Herrera, Staff Attorney, Mexican Am. Legal Def. and Educ. Fund [hereinafter "Herrera Statement"] and Gary Bledsoe, President, Texas NAACP and NAACP Nat'l Board Member [hereinafter "Bledsoe Statement"]).

voter rolls, a 2019 policy targeting naturalized citizens to be purged from voter registration rolls, Texas's failure to comply with the National Voter Registration Act (NVRA), discrimination against and hostility toward minority voters by election judges and polling officials, failure of officials to process voter registrations of minority voters, delayed opening of polling sites in areas with large proportions of minority voters, late changes to polling sites and assigning locations of polling sites that are inconvenient to minority voters, long voting lines, nonfunctioning electronic voting equipment, the elimination of straight-ticket voting, intimidation by state troopers at polling locations, and harassment of African American voters by vigilante groups.[125]

Georgia

The Subcommittees heard testimony that after the end of preclearance in 2013, Georgia voters were faced with a myriad of discriminatory voting barriers: attacks on third party registration, restrictive voter identification laws, the closure of more than 200 precincts, database challenges that spoiled legitimate registrations, the purging of more than one million voters, holding registrations of 53,000 people based on the flawed process of "exact match," election staff who did not have the resources or training to meet the needs of voters, long voting lines, naturalized citizens who had to sue for their voting rights, the lack of ballots in multiple languages for Limited English Proficient voters, inoperable voting machines and the inadequate distribution of machines to communities, poor oversight of county application of state laws leading to disparate treatment between counties, lines for districts have been misapplied or miscommunicated forcing do-over elections or disqualifying otherwise eligible candidates, rejection of a disturbing number of absentee ballots, and the inconsistent application of the provisional ballot system resulting in different standards for the administration of elections in each of Georgia's 159 counties.[126]

North Carolina

Shortly after the *Shelby County* decision, North Carolina—a State where the DOJ had objected to more than 150 voting practices under preclearance—passed a "monster" voter suppression law (HB 589), the nation's most wide-sweeping voter suppression law, which resulted in racial discrimination in accessing the polls, including through closures of poll sites and long voting lines.[127] Among other things, the legislation banned paid voter registration drives, restricted voting by eliminating same-day voter registration, reduced early voting by a week, eliminated the option of early vot-

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[125] *See* Pérez Statement at 3, 5–6, 8; Evidence Hearing (statement of Derrick Johnson, President and CEO, NAACP at 5–11) [hereinafter "Derrick Johnson Statement"]); Bledsoe Statement at 1–5; *Listening Session on Voting Rights and Elections in Brownsville Tex., Subcomm. on Elections, H. Comm. on House Admin.,* 116th Cong., Unofficial Tr. 76, 78, 82–83, 93–95 (2019) (testimony of Mimi Marziani, President of the Tex. Civil Rights Project); *Listening Session on Voting Rights and Elections in Brownsville Tex., Subcomm. on Elections, H. Comm. on House Admin.,* 116th Cong., Unofficial Tr. 22–24 (2019) (Rolando Rios, Attorney).

[126] *See* Subcommittee on Elections Report at 69–70; Derrick Johnson Statement at 11–12; Georgia Oversight Hearing (statement of Stacey Abrams, CEO and Founder, Fair Fight Action at 2–4) [hereinafter "Abrams Oversight Statement"]; *see also* Clarke Oversight Statement at 4–8, 10, Appx. at 6–11.

[127] *See H.R. 1: The "For the People Act of 2019": Hearing Before the H. Comm. on the Judiciary,* 116th Cong., Unofficial Tr. 53, 86, 113–14 (2019) [hereinafter "H.R. 1 hearing"] (testimony of Vanita Gupta) [hereinafter "Gupta H.R. 1 Testimony"].

ing sites at different hours, and reduced satellite polling sites for elderly voters and voters with disabilities.[128] The Subcommittee on Elections Report noted that "leading up to the 2016 election, at least 17 counties made significant cuts to early voting days and hours, and early voter turnout among Black voters declined almost nine percent statewide compared to 2012."[129] The U.S. Court of Appeals for the Fourth Circuit described this law as "the most restrictive voting law North Carolina has seen since the era of Jim Crow" with "provisions [that] target African Americans with almost surgical precision."[130] Other voter suppression efforts including gerrymandering, purging of voter rolls, the 2018 voter ID constitutional amendment, reductions to early voting, issues with curbside voting, excessively long lines, voting machine issues, and poll worker misconduct.[131]

Alabama

Immediately after the Shelby County decision, Alabama proceeded to implement new racially discriminatory restrictions on the ability of its minority citizens to register and vote including: a photo ID law, the closure of DMV offices in the "Black Belt" (areas with the highest proportion of African Americans) where people need to acquire the necessary photo ID to vote, restrictive absentee ballot rules, requiring proof of citizenship to register to vote, closure of polling sites, untrained poll workers, and felon re-enfranchisement issues.[132]

In addition to the persistent voting discrimination in specific states, the Subcommittee heard testimony about the following discriminatory voting practices that have resulted in the disenfranchisement of minority voters.

2. Restrictions on Voter Registration, Early Voting, and Voting by Mail

The Constitution Subcommittee received testimony regarding recent efforts to impede voter registration. For example, Georgia targeted third-party registration, which impeded registration by mi-

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[128] *See Legislative Proposals to Strengthen the Voting Rights Act: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary,* 116th Cong. (2019) [hereinafter "VRA Legislation Hearing"] (statement of John C. Yang, President and Exec. Dir., Asian Americans Advancing Justice-AAJC at 12) [hereinafter "Yang Statement"]; see also Subcommittee on Elections Report at 51–52.

[129] Subcommittee on Elections Report at 51–52 (citations omitted).

[130] *See North Carolina State Conference of the NAACP v. McCrory,* 831 F.3d 204, 227 (4th Cir. 2016); H.R. 1 Hearing, Unofficial Tr. 21 (Gupta H.R. 1 Testimony); VRA Evidence Hearing (statement of Dale Ho, Dir., Voting Rights Project, Am. Civil Liberties Union at 7) [hereinafter "Ho Statement"]; Levitt Statement at 10; *Oversight Hearing on Voting Rights and Election Admin. in N.C., Subcomm. on Elections, H. Comm. on House Admin.,* 116th Cong. (2019) [hereinafter "NC Oversight Hearing"] (statement of Irving L. Joyner, Professor of Law, NCCU School of Law and Legal Counsel and Chair, NC NAACP Legal Redress Comm. at 2) [hereinafter "Joyner Statement"]; Daniels Statement at 4.

[131] Pérez Statement at 3–7; Joyner Statement at 19–20; NC Oversight Hearing (statements of Tomas Lopez, Exec. Dir., Democracy N.C. at 2–5 [hereinafter "Lopez Statement"] and Caitlin Swain, Co-Dir., Forward Justice at 3–5, 7–8, 10–11 [hereinafter "Swain Statement"]).

[132] *See Hearing on Voting Rights and Election Admin. in Ala., Subcomm. on Elections, H. Comm. on House Admin.,* 116th Cong. (2019) [hereinafter "Alabama Oversight Hearing"] (statement of Jenny Carroll, Professor of Law, Univ. of Ala. Hugh F. Culverhouse Jr. School of Law at 1–15) [hereinafter "Carroll Statement"]; Alabama Oversight Hearing (statements of James Blacksher, Attorney at 7) [hereinafter "Blacksher Statement"]; Isabel Rubio, Exec. Dir., Hispanic Interest Coalition of Ala. at 2–3; Scott Douglas, Exec. Dir., Greater Birmingham Ministries at 2–3; and Nancy Abudu, Deputy Legal Dir., Voting Rights, S. Poverty Law Ctr. at 2); America Oversight Hearing, Unofficial Tr. 4 (testimony of Denise Lieberman, Senior Attorney and Program Dir., Power and Democracy, Advancement Project) [hereinafter "Lieberman Testimony"].

nority voters.[133] In addition, Stacey Abrams, a former gubernatorial candidate and founder and Chair of Fair Fight Action, testified that post-*Shelby County,* Georgia's then-Secretary of State "refused to take action to process registration forms in a timely manner" and that there were "unpublished internal rules, such as the 90-day blackout period during which no voter registration forms were processed, causing delays that denied registrants the right to vote."[134] After the *Shelby County* decision, Georgia also implemented the racially discriminatory "exact match" policy, which was discredited and rejected by the U.S. Department of Justice in 2009 because it presented "real," "substantial" and "retrogressive" burdens on voters of color.[135] The exact match policy requires that the data in a voter registration application must be an exact match of the voter's name, and if not, the application is rejected without notice to the applicant.[136] In 2016, Georgia entered into a federal settlement, because 34,000 voters were denied the right to vote in that election cycle due to the exact match policy, but the next year Georgia implemented the same discriminatory policy, which led to approximately 53,000 suspended voter registrations in 2018, 70 percent of whom were African American voters who comprised roughly 30 percent of Georgia's eligible voters.[137] For these reasons, a federal court ultimately put a stop to the law's implementation only four days before the election, because of the "differential treatment inflicted on a group of individuals who are predominantly minorities."[138] Voters also experienced problems during the November 2018 midterm elections such as not receiving absentee ballots, waiting in long lines (*e.g.,* lines at the Pittman Park voting station were reportedly 300 people deep with a wait time of 3.5 hours), broken or inoperable voting machines led to voters being turned away or given provisional ballots.[139] Ms. Abrams testified before the Subcommittee that if preclearance was in place, it would have prevented the state from enacting these discriminatory laws:

> The State of Georgia has found itself in multiple lawsuits where upon adjudication, the State has been told that their actions were racially discriminatory. That means that people have been denied the right to vote. They will never be able to unring that bell. And I believe that preclearance—in fact, we know empirically that preclearance would have permitted more voters to cast

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[133] *See Shelby* Anniversary Hearing (statement of Stacey Y. Abrams, Founder & Chair, Fair Fight Action at 23) [hereinafter "Abrams Statement"].

[134] *See id.* at 23–24.

[135] *See* Pérez Statement at 4; Abrams Statement at 2; *Discriminatory Barriers to Voting: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary,* 116th Cong. (2019) [hereinafter "Discriminatory Barriers Hearing"] (statement of Helen Butler, Exec. Dir., Ga. Coalition for the People's Agenda at 5–6) [hereinafter "Butler Statement"]; *see also* Letter from Loretta King, Acting Assistant Attorney General, U.S. Dep't of Justice, Civil Rights Division, to Thurbert E. Baker, Ga. Attorney General (May 29, 2009), https://www.justice.gov/crt/voting-determination-letter-58.

[136] *See* Abrams Statement at 50.

[137] *See id.* at 24.

[138] *Georgia Coal. for People's Agenda, Inc. v. Kemp,* 347 F. Supp. 3d 1251, 1267 (N.D. Ga. 2018) ; Shanon Van Sant, *Judge Rules Against Georgia Election Law, Calling It A 'Severe Burden' For Voters,* Nat'l Public Radio (Nov. 3, 2018), https://www.npr.org/2018/11/03/663937578/judge-rules-against-georgia-election-law-calling-it-a-severe-burden-for-voters.

[139] *See* Daniels Statement at 5; America Oversight Hearing, Unofficial Tr. 87 (testimony of Virginia Kase, Chief Exec. Officer, League of Women Voters) [hereinafter "Kase Testimony"].

their ballots because the policies that denied them the right to vote would not have been enacted.[140]

The Subcommittee on Elections also heard testimony regarding the signature match policy in Florida, which allows ballots to be marked "invalid" because of a missing signature or signature mismatch.[141] One report noted that during the 2014 and 2016 elections, younger and ethnic minority voters were more likely to have their vote-by-mail ballots rejected and less likely to have these ballots cured when flagged for a signature mismatch.[142] One witness testified that during the 2018 election, approximately 83,000 votes in Florida were rejected for signature mismatch.[143] Similarly, California was sued by a civil rights organization for invalidating tens of thousands of vote-by-mail ballots, which were rejected because election officials (who had no expertise in handwriting) determined that the signature on the envelope did not match the one on file.[144]

In 2019, Tennessee enacted a law that restricts third-party groups or individuals from registering voters in large-scale voter registration efforts in disenfranchised, economically disadvantaged majority-minority communities.[145] Violations of this law could result in criminal penalties and civil fines up to, but not necessarily limited to, $10,000.[146]

The Subcommittees heard testimony about voters who were denied early voting opportunities or who faced other barriers to the ballot box. Chairperson Fudge's Subcommittee on Elections noted that since 2010, several States have reduced the hours and/or days of early, and in-person voting available to voters, and that the USCCR Minority Voting Report found that cuts to early voting can cause long lines with a disparate impact on voters of color.[147] For example, Texas voters have been denied early voting opportunities, including African American college students who may not have transportation to polling sites. Before the November 2018 midterm elections, Waller County, Texas failed to provide adequate early voting opportunities for students at the Prairie View A&M University, a historically black university or "HBCU."[148]

In addition, the Subcommittee on Elections heard testimony that voters in Florida, particularly voters of color, took advantage of early voting in high numbers. In 2011, Florida made cuts to early voting and eliminated the final Sunday of early voting, which led to long lines at polling locations and massive wait times, "wait times that were two to three times longer in Black and Latino pre-

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[140] *See* Abrams Statement at 39.

[141] *See* Subcommittee on Elections Report at 70–71.

[142] *See id.* at 70–71.

[143] *See id.* at 70.

[144] *See id.* at 71.

[145] *See* Discriminatory Barriers Hearing (statements of Tequila Johnson, Co-Founder and Vice President, The Equity Alliance at 6 and statement of Steven J. Mulroy, Bredesen Professor of Law, Cecil C. Humphreys School of Law, Univ. of Memphis at 9 [hereinafter "Mulroy Statement"]); see also America Oversight Hearing, Unofficial Tr. 24–25 (testimony of Kristen Clarke, President and Exec. Dir., Lawyers' Comm. for Civil Rights Under Law) [hereinafter "Clarke Oversight Testimony"].

[146] *See* Mulroy Statement at 9. A federal court has temporarily blocked this law, stating that it was "troublingly vague." *See* Talal Ansari, *Judge Temporarily Blocks Tennessee Voter-Registration Drive Law,* Wall St. Journal (Sept. 12, 2019), https://www.wsj.com/articles/judge-temporarily-blocks-tennessee-voter-registration-drive-law-11568322920.

[147] *See* Subcommittee on Elections Report at 47.

[148] *See* Texas VRA Hearing (statement of Jayla Allen, Chair, Rock the Vote at 5–6); *see also* Subcommittee on Elections Report at 51; America Oversight Hearing (statement of Deuel Ross, Senior Counsel, NAACP Legal Def. Fund at 6) [hereinafter "Ross Statement"].

cincts than in White precincts."[149] Also, early voting locations on college campuses were not equitably assigned, and students at Florida A&M University, a public HBCU, were not able to vote on campus.[150] According to one study that examined on-campus early voting in Florida during the 2018 general election, "almost 30 percent of campus early vote ballots were cast by Hispanic voters, compared to just under 13 percent of early ballots cast at non-campus locations, and more than 22 percent of campus early vote ballots were cast by Black voters, compared to 18 percent of early ballots cast at non-campus locations."[151]

As noted in the Subcommittee on Elections Report, one of the most egregious examples of cutbacks to early voting occurred in Ohio.[152] After almost a decade of expanding Ohio voters' access to the ballot, the State changed course and drastically limited access to early voting opportunities.[153] For example, in 2014, Ohio eliminated its "Golden Week," the period when citizens could register to vote and cast an absentee ballot on the same day.[154] In addition, Ohio only allowed one early, in-person voting site regardless of population size (*e.g.*, Cuyahoga County has a population of more than 1.2. million people and is given the same single early voting site as the smallest counties in the States such as Vinton County, which has a population of just over 13,100 people).[155] Also, last minute changes to the early voting policies created confusion among voters, thereby limiting voters' access to the polls.[156] One witness described voter suppression in Ohio as a "more subtle erosion of our voting rights but the results are devastating nonetheless."[157] In 2016, Arizona enacted a law limiting collection of mail-in ballots and making it a felony to knowingly collect and submit another voter's completed ballot under certain circumstances.[158] In 2014, a Georgia state senator criticized the historic "Souls to the Polls" early voting initiative as a partisan stunt because the poll site was located at South DeKalb Mall, an area "dominated by African American shoppers" and "near several large African American mega churches," and noted, "I would prefer more educated voters than a greater increase in the number of voters."[159]

Furthermore, the record evidence establishes that in 2018, over 2.6 million people submitted vote-by-mail (VBM) ballots in Florida and that the statewide average of rejected VBM ballots in the 2018 election was 1.2 percent, which is a rate even higher than in 2012

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[149] *See* Subcommittee on Elections Report at 50 (citing testimony of Judith Browne Dianis).

[150] *See Protecting the Right to Vote: Best and Worst Practices: Hearing Before the Subcomm. on Civil Rights and Civil Liberties of the H. Comm. on Oversight and Reform,* 116th Cong. (2019) [hereinafter "Best Practices Hearing"] (statement of Leigh M. Chapman, Dir., Voting Rights Program, The Leadership Conference on Civil and Human Rights at 6) [hereinafter "Chapman Statement"]; America Oversight Hearing, Unofficial Tr. 70 (testimony of Barbara Arnwine, National Co-Chair, Nat'l Comm. for Voter Justice) [hereinafter "Arnwine Testimony"].

[151] *See* Subcommittee on Elections Report at 50–51.

[152] *See id.* at 47–50.

[153] *Id.* at 47–48.

[154] *Id.* at 48.

[155] *Id.* at 49.

[156] *Id.*

[157] *See Voting Rights and Election Admin. in Ohio: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.,* 116th Cong. (2019) [hereinafter "Ohio Oversight Hearing"] (statement of Daniel Ortiz, Outreach Dir., Policy Matters Ohio at 1).

[158] Pérez Statement at 5.

[159] *See* Subcommittee on Elections Report at 51; Georgia Oversight Hearing (statement of Sean Young, Legal Dir., ACLU of Ga. at 3, 70) [hereinafter "Young Statement"].

or 2016 presidential elections.[160] In Broward County, one of three counties that make up the Miami metropolitan area, the rejection rate was 2.8 percent, and the rejection rate was even higher among voters between the ages of 18–21.[161] A witness stated that, "[a]s the rest of [the] Country applauded the young organizers from Parkland for getting engaged in the civic process to make change in their communities, it is estimated that 15 percent of mail-in ballots submitted by Parkland residents between the ages of 18 and 21 were never counted in the 2018 election.[162] Also, based on a report produced by ACLU Florida and the University of Florida analyzing the 2014 and 2016 elections, ″younger and ethnic minority voters were much more likely to have their VBM ballots rejected, and less likely to have their VBM ballots cured when they were flagged for a signature mismatch.[163]

3. Voter ID Laws

Voter ID laws require voters to provide some form of official identification before they are permitted to exercise their right to vote. Such requirements disproportionately and negatively impact certain classes of voters, including racial minorities, the young, the elderly, and economically disadvantaged groups, and effectively represent another barrier to voting.[164] The record reveals that post-*Shelby County*, several States have tried to implement restrictive voter ID laws, particularly in States with a history of voter discrimination. For example, in Texas, a formerly covered jurisdiction under Section 5, the Texas Attorney General, within hours of the *Shelby County* decision, announced his intention to revive a voter identification law (SB14) that was initially blocked under preclearance.[165] The law was crafted to allow voters to use only certain forms of government identification, including handgun licenses and other forms of identification disproportionately held by white voters, but prohibited the use of other forms of identification, including student IDs, tribal IDs, or other forms of federal or State

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[160] *See Voting Rights and Election Admin. in Fla.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.,* 116th Cong. (2019) [hereinafter "Florida Oversight Hearing"] (statement of Andrew Gillum, Chair, Forward Florida at 1). Parkland residents between the ages of 18 and 21 were never counted in the 2018 election." Also, based on a report produced by ACLU Florida and the University of Florida analyzing the 2014 and 2016 elections, "younger and ethnic minority voters were much more likely to have their VBM ballots rejected, and less likely to have their VBM ballots cured when they were flagged for a signature mismatch."

[161] *See id.* at 1–2.

[162] *Id.* at 2.

[163] *See id.*; *see also* Daniel A. Smith, Vote-By-Mail Ballots Cast in Florida, ACLU Florida (2018), *https://www.aclufl.org/sites/default/files/aclufl_-_vote_by_mail_-_report.pdf*; America Oversight Hearing (statement of Elena Nunez, Dir. of State Operations and Ballot Measure Strategies, Common Cause at 4) [hereinafter "Nunez Statement"].

[164] *See* Subcommittee on Elections Report at 59–69; *Legislative Proposals to Strengthen the Voting Rights Act: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter "VRA Legislation Hearing"] (statement of Arturo Vargas, Chief Exec. Officer, Nat'l Ass'n of Latino Elected and Appointed Officials (NALEO) at 17) [hereinafter "Vargas Statement"] (noting "long line of surveys and studies has consistently shown that potential African American, Latino, Native American, and other underrepresented voters disproportionately lack the identification documents they may need to register and to vote in person, and disproportionately face barriers to obtaining required identification"); *See* Garza Statement at 3; *Listening Session on Voting Rights and Elections in Brownsville Tex., Subcomm. on Elections, H. Comm. on House Admin*., 116th Cong., Unofficial Tr. 31, 36 (2019) [hereinafter "Texas Listening Session"]; Kase Testimony, Unofficial Tr. 87; *see also* Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minorities Communities' Votes 39–41 (2019), https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf.

[165] *See* Levitt Statement at 10; *Shelby* Anniversary Hearing, Aden Testimony at 10.

government IDs.[166] Texas was sued and, during the litigation, the record demonstrated that about 600,000 registered voters and approximately 1 million unregistered but eligible voters did not have an approved form of ID.[167] The voter ID law also created barriers for voters who were elderly, economically disadvantaged, or lacked means to obtain an approved form of ID.[168] An elderly Latino voter, who testified at trial, took pride in walking to the polls and voting in every election.[169] He did not have a vehicle and did not have the required IDs under the voter ID law. After Texas enacted the voter ID law, he was unable to vote in three elections before his passing.[170] It was proved at trial that more than half a million eligible voters were disenfranchised by Texas's voter ID law, but by the time the plaintiffs prevailed in their litigation, it was too late to address voting discrimination that occurred in those elections that took place while the law remained in effect.[171]

Mississippi previously submitted a voter ID measure to the DOJ for preclearance, but had not obtained approval to implement it, yet within hours of the *Shelby County* decision, Mississippi announced that it would implement this voter ID law.[172] Similarly, the day after the *Shelby County* decision was handed down, Alabama implemented its voter ID law, which required voters to present a form of government-issued photo identification to vote and included a provision that would allow a potential voter without the required ID to vote if that person could be "positively identified" by two poll workers, a provision that harkened back to pre-1965 vouch-to-vote systems.[173] The Subcommittee on the Constitution received testimony that about 118,000 registered voters lacked the photo ID required by this law, that minority voters are two times more likely than white voters to lack the required ID, and that African American voters are over four times more likely than other voters to have their provisional ballots rejected because of a lack of acceptable ID.[174] There also were reports that poll workers were improperly rejecting voters who had valid photo IDs because their residential addresses on the IDs did not match the addresses on their voter registration documents.[175]

In particular, Native American voters have faced extreme difficulty in obtaining the required IDs to vote.[176] For example, North Dakota implemented a law requiring voters to provide IDs with a physical, residential street address, threatening to disenfranchise thousands of Native Americans living on rural reservations where

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[166] *See* Derrick Johnson Statement at 5; *Shelby* Anniversary Hearing, Aden Testimony at 10.

[167] *See Shelby* Anniversary Hearing, Aden Testimony at 10. Texas VRA Hearing (statement of Jose Garza, Voting Rights Counsel, Mexican Am. Legislative Caucus, Tex. House of Rep. at 4) [hereinafter "Garza Statement"].

[168] *See* Garza Statement at 3; Texas Listening Session, Unofficial Tr. 31, 36.

[169] *See* Texas VRA Hearing, Unofficial Tr. 54.

[170] *See id.* at 55.

[171] *See Shelby* Anniversary Hearing, Aden Testimony at 4; H.R. 1 Hearing, Unofficial Tr. 77–78 (testimony of Sherrilyn Ifill, President and Dir.-Counsel, NAACP LDF) [hereinafter "Ifill Testimony"].

[172] Pérez Statement at 3.

[173] *See id.*; *see also Shelby* Anniversary Hearing, Aden Testimony at 6; Ross Statement at 4.

[174] *See Shelby* Anniversary Hearing, Aden Testimony at 6; H.R. 1 Hearing, Unofficial Tr. 160 (Ifill Testimony).

[175] *See Shelby* Anniversary Hearing, Aden Testimony at 7.

[176] *See* Subcommittee on Elections Report at 62–66; James Thomas Tucker, et al., *Field Hearing Report Identifying and Removing Barriers to Political Participation by Native Voters*, The Native Am. Rights Fund 99–109 (2019).

many do not have residential addresses.[177] Native Americans including veterans, school teachers, elders, and other life-long voters, who the poll workers had known their entire lives, were being turned away from polls because they did not have the required IDs. Voters described the hurt and humiliation they felt when they were unable to vote.[178]

4. Purging of Voter Rolls

Testimony received by the Subcommittee on the Constitution established that purging of voter rolls in a racially-discriminatory manner continues to occur at an extremely high rate. A report submitted as part of testimony by the Brennan Center for Justice at New York University School of Law stated that "between 2016 and 2018, counties with a history of voter discrimination have continued purging people from the rolls at much higher rates than other counties," and found that approximately "17 million voters were purged nationwide between 2016 and 2018."[179] One witness testified that the *Shelby County* decision has had a profound and negative impact: for the two election cycles between 2012 and 2016, jurisdictions no longer subject to preclearance had purge rates significantly higher than jurisdictions that were not subject to preclearance in 2013.[180] Moreover, Alabama, Arizona, Indiana, and Maine have written policies that by their terms violate the 1993 National Voter Registration Act (NVRA) and provide for illegal purges.[181] Alabama, Indiana, and Maine have policies for using data from a database called the Interstate Voter Registration Crosscheck Program (Crosscheck) to immediately purge voters without providing the notice and waiting period required by federal law.[182]

Testimony revealed numerous examples of purging since the *Shelby County* decision. For example, Georgia purged approximately 1.4 to 1.5 million voters between the 2012 and 2016 elec-

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[177] *See* Subcommittee on Elections Report at 90–97; Evidence Hearing (statement of Natalie A. Landreth, Senior Staff Attorney, Native Am. Rights Fund at 3) [hereinafter "Landreth Statement"]; Derrick Johnson Statement at 11; *Shelby* Anniversary Hearing, Aden Testimony at 12; H.R. 1 Hearing, Unofficial Tr. 173–175 (Ifill Testimony); Lhamon Statement at 5–6; *Hearing on Voting Rights and Election Admin. in the Dakotas, Subcomm. on Elections, H. Comm. on House Admin.*, 116th Cong. 1 (2019) [hereinafter "Dakotas Oversight Hearing"] (statement of Alysia LaCounte, General Counsel, on behalf of Turtle Mountain Band of Chippewa at 2–3); Dakotas Hearing (statement of Myra Pearson, Chairwoman, Spirit Lake Tribe at 1–4); Dakotas Hearing (statement of Charles Walker, Councilman at Large, on behalf of Standing Rock Sioux Tribe at 2–6) [hereinafter "Walker Statement"]; Dakotas Hearing (statement of Roger White Owl, Chief Exec. Officer, on behalf of Mandan, Hidatsa & Arikara Nation at 2–3).

[178] *See* Dakotas Hearing (statement of Jacqueline De León Staff Attorney, Native Am. Rights Fund at 1) [hereinafter "De León Statement"]. *See also* Dakotas Hearing (statement of O.J. Semans, Sr. Co-Exec. Dir., Four Directions, Inc. at 2).

[179] *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice at New York Univ. School of Law (Aug. 1, 2019) (analyzing 2019 U.S. Election Assistance Commission data), https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds; *see also* America Oversight Hearing (statement of Michael Waldman, President, Brennan Center for Justice at 3 [hereinafter "Waldman Statement"]).

[180] *See* Pérez Statement at 6. *See also* Best Practices Hearing (statement of Myrna Pérez, Deputy Dir., Democracy Program and Dir., Voting Rights & Elections, Project Brennan Center for Justice at New York Univ. School of Law at 7) [hereinafter "Pérez Oversight Statement"] and Appx. A at 9 ("Purge practices can be applied in a discriminatory manner that disproportionately affects minority voters. In particular, matching voter lists with other government databases to ferret out ineligible voters can generate discriminatory results if the matching is done without adequate safeguards. African American, Asian American, and Latino voters are much more likely than Caucasians to have one of the most common 100 last names in the United States, resulting in a higher rate of false positives.")

[181] Federal standards for purges were set in the NVRA. See Pérez Oversight Statement, Appx. E at 1.

[182] *See* Derrick Johnson Statement at 8; Pérez Oversight Statement, Appx. E. at 1–2.

tions—double its rate between 2008 and 2012.[183] This represented an additional 750,000 voters purged from its rolls between 2012 and 2016 as compared to the period between 2008 and 2012. Of the State's 159 counties, 156 reported increases in removal rates post-*Shelby County* and included the State's 86 most populous counties.[184] In addition, the increase in purge rates occurred during a period when Georgia was criticized for several controversial voter registration practices.[185] Also, Georgia was sued for blocking registration applications between 2013 and 2016 based on the "exact match" policy, which required that information (including hyphens in names) match state databases precisely.[186] The Subcommittee on the Constitution heard testimony that in 2017, Georgia purged half a million voters in a single day, an 8 percent reduction in Georgia's voting population, and that an estimated 107,000 of these voters were removed through arguably an unconstitutional application of a use-it-or-lose-it law.[187] In addition, during the 2018 elections, a disturbing number of people were given provisional ballots, not because they were not effectively registered, but because of "malfeasance and incompetence of the Secretary of State's office."[188] Stacey Abrams testified that "due to the purging of voters and the patterns of purging and the number of people who were forced to cast provisional ballots because of the ineffectiveness and the malfeasance of that process, there is essentially a racial map of African American communities that were subject to casting provisional ballots which have to be remedied."[189] She described that although voter turnout was high in 2018, it does not mean that voter suppression did not occur:

> In the State of Georgia, there has been an argument that because we had the highest turnout record in Georgia for voter turnout in 2018, there could not have been voter suppression. I would argue that that is the moral equivalent of saying that because more people get in the water, there can't be sharks.[190]

Ms. Abrams also testified that while maintaining effective voter rolls is a legitimate purpose, Georgia's flawed policies have directly harmed minority voters:

> There is a legitimate purpose to laws that allow for the cleaning of rolls for people who have passed [a]way, for people who are no longer eligible to vote, for people who moved from the State, and I do not believe there is any well-intentioned person who would say that cleaning and maintaining the rolls is improper.
>
> But what we argue is that the approach that has been taken has been so egregious and so flawed and sometimes so directly intended to harm voters of color, that we have undermined the intention of actually maintaining access to the rolls.

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[183] Abrams Statement at 3; Pérez Oversight Statement, Appx. at 8.
[184] *See* Pérez Oversight Statement, Appx. E at 4.
[185] *Id.*
[186] *Id.*
[187] *See* Derrick Johnson Statement at 7; Abrams Statement at 3.
[188] *See* Abrams Statement, Unofficial Tr. 61.
[189] *Id.* at 68.
[190] *Id.* at 58.

> In the State of Georgia, as I pointed out, 1.4 million people were purged between 2010 and 2018. Half a million were purged in a single day in the State of Georgia. That should raise alarms for anyone, because the reality is when you show up to vote, and you are told that you cannot cast a ballot because you have been removed from the rolls, even though you know that you should not have been, you are now called upon to become your own attorney, to argue with who is likely a volunteer that you have the right to vote. And if you happen to be in one of those hyper-suppressive communities, that ability may be quashed.[191]

As in Georgia, Texas purged an extremely high number of voters from its rolls. Texas purged approximately 363,000 more voters between 2012 and 2014 than it did between 2008 and 2010.[192] Recently in 2019, the Texas Secretary of State in concert with the State Attorney General targeted voters based on their national origin and attempted to remove approximately 95,000 registered voters based on alleged "voter fraud."[193] After issuing an advisory to county voter registrars about non-citizens and voter registration, the Texas Secretary of State issued a press release identifying the approximately 95,000 voters as "non-U.S. citizens [who] have a matching voter registration record" and that "58,000 of whom have voted in one or more Texas elections."[194] After a suit was filed against the State of Texas, it was determined that the list of voters had used flawed methodology to identify non-citizen voters and in doing so inaccurately identified naturalized citizens as non-citizens.[195]

The record evidence establishes that voters in other States were also purged from rolls based on faulty and inaccurate databases and records. For example, in Beaufort County, North Carolina, two-thirds of the voters that were purged from the roll were African American. One North Carolinian, a 100-year-old African American woman, lived in Belhaven, North Carolina her entire life and voted regularly for decades.[196] Shortly before the 2016 presidential election, however, her voter registration was challenged based on a postcard that was sent in a mass mailing by a local challenge.[197] Between 2016 and 2018, North Carolina removed 11.7 percent of voters from the rolls and only 19 of its counties purged fewer than 10 percent of their voters; no county purged fewer than 8 percent.[198] These purges have been especially troubling for minority voters—in 90 out of 100 counties, voters of color were over-represented among the purged group.[199] In Ohio, over 200,000 voters

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[191] *See id.* at 60–61.
[192] *See* Pérez Oversight Statement, Appx. E at 4.
[193] *See* Pérez Statement at 6; Herrera Statement at 6; Texas VRA Hearing (Statement of Jerry Vattamala, Dir., Democracy Program, Asian Am. Legal Def. and Educ. Fund at 6) [hereinafter "Vattamala Statement"]; VRA History Hearing, Unofficial Tr. 87 (testimony of Thomas A. Saenz, President and General Counsel, Mexican Am. Legal Def. and Educ. Fund) [hereinafter "Saenz History Statement"]; *see also* America Oversight Hearing, Unofficial Tr. 17 (Ho Statement).
[194] *See* Subcommittee on Elections Report at 43.
[195] *See* Herrera Statement at 6; Vattamala Statement at 6; Saenz History Statement at 4.
[196] *See* NC Oversight Hearing (statement of Patricia Timmons-Goodson, Vice-Chairwoman, U.S. Comm'n on Civil Rights at 5–6) [hereinafter "Timmons-Goodson Statement"].
[197] *See id.* at 6.
[198] *See* Pérez Oversight Statement, Appx. F at 4.
[199] *See id.*

were purged who had not voted in the last election and who allegedly failed to respond after receiving a postcard in the mail.[200] For example, Chairperson Fudge's Subcommittee on Elections noted that a 2016 Reuters analysis of Ohio's voter purge found that purges of voter rolls have disproportionately affected minority voters:

> '[I]n predominantly African American neighborhoods around Cincinnati, 10 percent of registered voters had been removed due to inactivity since 2012, compared to just four percent in the suburban Indian Hill. The study further found that more than 144,000 people were removed from the rolls in Ohio's three largest counties, which includes the cities of Cleveland, Cincinnati, and Columbus—hitting hardest neighborhoods that are low-income and have a high proportion of Black voters.' Ohio's Secretary of State Frank LaRose recently revealed errors in the state's purge list as groups found tens of thousands of people were wrongfully on the list.[201]

In addition, one witness testified that in Ohio there is also a concern that new U.S. citizens, such as refugees who become naturalized citizens, are more susceptible to being purged erroneously due to lack of understanding about federal and State laws, intimidation by official notices (*e.g.*, like the notice sent out by Ohio after a period of inactivity by the voter), and their limited language skills.[202]

In Virginia, previously covered counties removed approximately 379,019 more voters between 2012 and 2016 than between 2008 and 2012.[203] All the previously covered Virginia counties except one increased removal rates after *Shelby County*.[204] A contributing factor to the high purge rates could be due to a highly problematic purge process that Virginia mounted in 2013.[205] More than 99 percent of Virginia's voters live in counties that have increased removal rates after *Shelby County*.[206] Also, nearly 39,000 voters were removed from Virginia's voter rolls when the State relied on a faulty database to delete voters who allegedly moved out of the commonwealth.[207] In Florida, from 2008 to 2010, the median purge rate was 0.2 percent and that number jumped to 3.6 percent from 2012 to 2014.[208] Chairperson Fudge's Subcommittee on Elections noted that between 2000 and 2012, Florida engaged in systematic purges of purported "non-citizens" from the voter rolls by comparing rolls to driver's license data, which is an unreliable method because the driver's license databases do not reflect citizenship:[209]

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[200] *See* Best Practices Hearing, Unofficial Tr. 13–14; Ohio Oversight Hearing (statement of Naila Awan, Senior Counsel, Demos at 1–4) [hereinafter "Awan Statement"]; *See also* Pérez Oversight Statement, Appx. E at 6; Derrick Johnson Statement at 7; *see also Voting Rights and Election Admin. in Am.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.*, 116th Cong. (2019) (statement of Hannah Fried, Dir., All Voting is Local at 12–13) [hereinafter "Fried Statement"].

[201] *See* Subcommittee on Elections Report at 42–4; *see also* QuickFacts, The Village of Indian Hill city, Ohio, at https://www.census.gov/quickfacts/thevillageofindianhillcityohio (providing population estimate of The Village of Indian Hill city as approximately 88% white).

[202] *See* Ohio Oversight Hearing (statement of Elaine Tso, Interim Co-Chief Exec. Officer, Asian Services in Action at 5).

[203] *See* Pérez Oversight Hearing, Appx. E at 5.

[204] *See id.*

[205] *See id.*; Pérez Statement at 7.

[206] Pérez Oversight Statement, Appx. E at 5.

[207] *See* Pérez Oversight Statement, Appx. E at 1.

[208] *See* Pérez Oversight Statement, Appx. F at 2.

[209] Subcommittee on Elections Report at 44.

> The vast majority of voters on Florida's 2012 purge list were people of color. The data in a federal complaint alleging Section 2 violations (based on Florida voter registration data) showed that 87 percent were voters of color: 61 percent were Hispanic (whereas 14 percent of all registered voters in Florida were Hispanic); 16 percent were Black (whereas 14 percent of all registered voters were Black); 16 percent were White (whereas 70 percent of registered voters were White); and 5 percent were Asian American (whereas only 2 percent of registered voters were Asian).[210]

In 2013, Florida officials sought to purge thousands of voters who were purportedly non-citizens, but during the prior year, Florida's purge list was inaccurate and was reduced from 180,000 supposed non-citizens to approximately 2,700.[211] Between 2016 and 2018, Florida purged more than 7 percent of its voters.[212] In 2016, New York election officials erroneously purged over 200,000 names from the rolls, with no public warning and little notice to those who had been purged.[213]

In Arkansas, the Secretary of State sent the county clerks more than 7,700 names to be removed because of purported felony convictions.[214] The roster, however, was highly inaccurate and included people who had never been convicted of a felony as well as persons with prior convictions whose voting rights had been restored.[215] In Arkansas, voters who supposedly had criminal convictions were purged from the voter rolls, but the list erroneously included people who did not have convictions, but were involved in other court proceedings such as civil legal proceedings for a divorce.[216]

5. Voting Suppression Issues Related to Polling Sites

The Subcommittees received testimony that voters were unable to vote due to the closure and relocation of polling sites, transportation to polling sites, intimidation of voters, and other issues, primarily in communities of color.[217] A report by the Leadership Conference on Civil and Human Rights, submitted as part of testimony, analyzed polling places in over 750 counties that were previously covered under Section 5 and found that 1,688 polling sites were closed between 2012 and 2018, almost double the 868 closures found in the previous report.[218] For example, Georgia has had a

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[210] *Id.* at 44–45.
[211] *See* Pérez Statement at 7.
[212] *See* Pérez Oversight Statement, Appx. F at 2.
[213] *See* Pérez Oversight Statement at 4.
[214] *See id.* at 4; Pérez Statement at 7.
[215] *See* Pérez Statement at 7.
[216] *See* Pérez Oversight Statement, Appx. E at 5.
[217] *See* Subcommittee on Elections Report at 53–59; Practice-Based Preclearance: Protecting Against Tactics Persistently Used To Silence Minorities Communities' Votes at 42–48 (2019), https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf; *see also* America Oversight Hearing, Unofficial Tr. 69–71 (testimony of Hannah Fried, Dir., All Voting is Local).
[218] *See* Vargas Statement at 20–21 ("[P]olling place relocation plans frequently move voting further from communities of color, even though members of those communities have less access to transportation and less flexibility to set aside work and family-related obligations to travel to and wait at polling locations . . . The geographic concentration of communities of color makes it more likely that many minority voters suffer when a polling places [sic] closes, and more likely that decisionmakers purposefully or incidentally put minority voters at [sic] disadvantage by

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long troubled history involving polling sites.[219] Indeed, Georgia's practices for maintaining and reporting polling place data to the U.S. Election Assistance Commission (EAC) were so inaccurate and unreliable that a civil rights advocacy organization was not able to include Georgia in a 2016 report.[220] Reporting by a major newspaper, however, revealed that since the *Shelby County* decision, approximately 214 polling places have closed in the State, and most of the counties that closed polling places had significant African American populations.[221] Ms. Abrams described the poll sites issues in Georgia as creating a "chilling effect" on the right to vote:

> We also know that Georgia had an extraordinary number of poll closures. We had 214 polls close out of roughly 3,000. Those are largely African American communities. And while those poll closures may have been permissible because of some nuance of law, what we found was that there was a disproportionate effect on communities of color, largely African American, particularly poor. If you do not own transportation, and there is no public transportation, the closure of a polling place that is 2 miles from your house now being moved to 10 miles from your house has not only a chilling effect on your right to vote, it absolutely negates your ability to cast that vote. . . .[222]

One of the most egregious examples of attempted polling place closures happened before the November 2018 midterm election in Randolph County where the Board of Elections proposed to close seven out of the nine polling places in a county whose population is 60 percent African American.[223] The poll closures in Randolph County would have had the effect of requiring African American voters in poor rural areas, many lacking transportation, to travel long distances to vote, potentially dissuading many from voting.[224] In Fulton County, the Board of Elections violated State law that required proper public notice in its attempt to close polling places in neighborhoods that were over 80 percent African American, affecting over 14,000 voters.[225] In Irwin County, the Board of Elections tried to close the only polling place that existed in the only African American neighborhood of the county, affecting thousands of voters, contrary to the recommendations of the non-partisan Association of County Commissioners of Georgia. The board alleged

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withdrawing resources from their communities."); Rich Statement at 5; Evidence Hearing (Statement of Vanita Gupta, President and CEO, The Leadership Conference on Civil and Human Rights at 4) [hereinafter "Gupta Evidence Statement"] ("The Shelby decision paved the way for systematic statewide efforts to reduce the number of polling places in Texas (−750), Arizona (−320), and Georgia (−214). Quieter efforts to reduce the number of polling places without clear notice or justification spread throughout Louisiana (−126), Mississippi (−96), Alabama (−72), North Carolina (−29), and Alaska (−6)); Democracy Diverted, Polling Place Closures and the Right to Vote, The Leadership Conference Education Fund (2019), http://civilrightsdocs.info/pdf/reports//Democracy-Diverted.pdf.

[219] *See* Butler Statement at 2–3; Abrams Statement at 3–4; Georgia Oversight Hearing (statement of Cliff Albright, Cofounder, Black Votes Matter at 1–3) [hereinafter "Albright Statement"].

[220] *See* Chapman Statement at 4.

[221] *See id.*; *see also* Gupta Evidence Statement at 3–4 ("We found 1,173 fewer polling places in 2018—despite a significant increase in voter turnout." Since *Shelby*, Texas has closed 750 polling places; Arizona closed 320; Georgia, 214; Louisiana, Mississippi, North Carolina, and Alabama trail behind them.).

[222] Abrams Statement at 68.

[223] *See* Derrick Johnson Statement at 9–10; Chapman Statement at 4; Young Statement at 2.

[224] *See* Chapman Statement at 4.

[225] *See* Young Statement at 2–3.

that it wanted to close the polling place to save costs, but managed to keep open a polling place located at the Jefferson Davis Memorial Park in a neighborhood that was 99 percent white.[226]

Voters in Georgia also were subjected to extremely long lines, sometimes being forced to wait for hours on end to vote.[227] A polling place in Grady County was relocated only two weeks prior to the 2018 elections in Grady County without proper notice to the community.[228] Voters arrived at the original polling place and had to be directed to the actual proper location.[229] There were a number of people who had left work to vote and drove to the original location, but because they had limited time to be away from work, they could not drive to the proper location and were unable to vote.[230] One witness testified that a group of seniors at a county senior center arranged to ride to the polling site with Black Votes Matter on the "Blackest Bus in America," but a Jefferson County official instructed the seniors to return to the center on the alleged basis that county policy prohibits political activities on county property.[231]

In Texas, voters lost approximately 750 polling locations since the *Shelby County* decision and most of the closures (590) took place after the 2014 midterm election.[232] Many of the closures took places in counties with a significant population of African American and Latino citizens: Dallas County (41 percent Latino and 22 percent African American) closed 74 polling locations, Travis County (34 percent Latino) closed 67, Harris County (42 percent Latino and 19 percent African American) closed 52, Brazoria (30 percent Latino and 13 percent African American) closed 37, and Nueces County (63 percent Latino) closed 37.[233]

In Arizona, polling places were closed throughout the State, many with significant populations of Latino voters. In advance of the 2016 general election, Maricopa County (31 percent Latino) closed 171 polling locations, Mohave County (16 percent Latino) closed 34, Cochise County (35 percent Latino) closed 32, and Pima County (37 percent Latino) closed 31.[234] The scale of closures is also alarming: Cochise County (−65 percent), Graham County (−50 percent), Mohave County (−49 percent), and Gila County (−48 percent), all of which closed about half or more of their polling places.[235] Cochise County, for example, is located on the U.S.-Mexico border and has had a long history of problems providing ballot access to its Latino voters.[236] In the 2012 election, prior to the *Shelby* decision, the EAC reported that there were 49 polling places serving the county's 130,000 residents; in 2016, the number of polling places dropped to 18.[237]

In addition, voters were burdened with long lines at the polling sites. In Texas, in some instances, once voters waited for an inordinate amount of time in one line, they had to stand in a different

[226] *Id.*
[227] *See* Ifill Testimony at 6.
[228] *See* H.R. 1 Hearing, Unofficial Tr. 150–51.
[229] *See id.*
[230] *See id.*
[231] *See* Albright Statement at 2.
[232] See Gupta Evidence Statement at 5.
[233] *Id.*
[234] *See id.*
[235] *See id.*
[236] *See* Chapman Statement at 3–4.
[237] *Id.*

line to get a provisional ballot.[238] There were long lines in Charleston, South Carolina, and during election night as the elections were being called, African Americans voters were still standing in line after two to three hours.[239] Voters in Florida experienced similar issues due to poll site closures and the lack of accessibility to sites.[240] The Subcommittee also heard testimony about the widespread problems with inaccessibility at polling sites for voters with disabilities, specifically in New Hampshire and Kansas.[241]

Native American voters in particular have continued to face unique barriers with regard to voting. As noted by the Subcommittee on Elections Report, those barriers include "high rates of poverty and homelessness on reservations, a lack of traditional addresses, difficulties obtaining required IDs and registering to vote, and long distances to travel to polling locations."[242] The Subcommittee on Elections Report also noted that research conducted by the National Congress of American Indians found that for Native Americans, the voter turnout rate is five to 14 percentage points lower than the rate of many other racial and ethnic groups.[243]

At hearings before the Subcommittee on the Constitution and Chairperson Fudge's Subcommittee on Elections in Arizona and North Dakota, tribal leaders, litigators, and advocates testified about voting disenfranchisement in Native American communities.[244] The Subcommittees received testimony regarding voting challenges faced by Native American voters and communities, including the closure of polling locations, the lack of satellite voting offices on Native American reservations, long distances and lack of transportation to polling locations, voter ID laws that exclude tribal identification cards as accepted ID, the lack of translated voting materials in Native languages, purging voters with non-traditional mailing addresses from the rolls, the assignment of voters to incorrect precincts based on inadequate voter registration forms, vote dilution due to redistricting, unreliable technology and lack of access to the internet, and voters who are homeless or facing housing instability.[245]

For example, Alaska has proposed a shift to vote by mail, but mail delivery is a significant issue. Mail delivery is slow and often by air service, which can take as long as two to three weeks.[246] As noted in the Subcommittee on Elections Report, testimony received before the Alaska State Advisory Committee to the U.S. Commission on Civil Rights revealed that during times of inclement weather, some villages may be inaccessible by air for several weeks at

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[238] *See* Ifill Testimony at 169.
[239] *See id.*
[240] *See* Gupta H.R. 1 Testimony at 182.
[241] *See* Lhamon Statement at 5; *see generally* America Oversight Hearing, statement of Michelle Bishop, Voting Rights Specialist, National Disability Rights Network at 105–107.
[242] Subcommittee on Elections Report at 108.
[243] *Id.* at 87.
[244] *See id.* at 85–108.
[245] *See* Subcommittee on Elections Report at 89–108; Discriminatory Barriers Hearing at 7–8 (Statement of Dr. James Thomas Tucker, Pro Bono Voting Rights Counsel, Native Am. Rights Fund) [hereinafter "Tucker Statement"]; Lhamon Statement at 4; Landreth Statement at 3; VRA Legislation Hearing (Statement of Bryan L. Sells at 5, 17–19); *Voting Rights and Election Admin. in Am.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.*, 116th Cong. (2019) (testimony of Catherine E. Lhamon, Chair, U.S. Comm'n on Civil Rights); *see generally* James Thomas Tucker, et al., *Field Hearing Report Identifying and Removing Barriers to Political Participation by Native Voters*, The Native Am. Rights Fund (2019).
[246] *See* Subcommittee on Elections Report at 102.

a time.[247] In-person voting in Alaska poses barriers to access as well, because the poll sites are often too far away from where residents live. Some Native American voters had to travel for a hundred miles to get to a poll site.[248] In one case, a polling place was moved away from a village and the Native Alaskan voters' only option was to travel to their polling site by airplane.[249] In another case, a Native American elder had to walk two miles to be able to get to a voting place.[250] In Nevada, for example, the closest polling locations were extremely far away, some located hundreds of miles away from native communities.[251] In Kansas, Native American voters, who brought a tribal ID, were turned away at the polling place because poll workers were not aware that tribal IDs were considered an acceptable ID under State law.[252] For Native Americans living in North Dakota, there were several issues included ill-equipped polling sites that ran out of ballots, extremely long distances to polling site locations, confused voters showing up at the wrong polling site, voters including college students being turned away because of the lack of an approved ID, the lack of early voting opportunities in Indian country, and the failure to provide notice regarding polling site locations.[253] Utah moved to all-mail balloting in 2014, but allowed in-person early voting at a single location, which was easily accessible to White voters, but three times less accessible to Navajo voters who had to drive approximately three hours to get to the polling site.[254] In addition, a vote-by-mail option may be facially neutral and beneficial to voters who do not have easy access to a polling site, but in Arizona, for example, only 26 percent of Native Americans reside on a U.S. Postal Service carrier route as opposed to 96% of non-Native Americans who live on these routes.[255] Recently, States also have made efforts to pass laws prohibiting the so-called practice of "ballot harvesting," which would make it a crime for groups or individuals to collect and transmit ballots for voters, and ultimately disenfranchises voters living in rural areas who are disabled, elderly, and/or lack transportation to the polls.[256]

States also have denied limited English proficient (LEP) voters the right to language assistance and assistance by a person of the voter's choice.[257] For example, in Texas in 2015, Williamson Coun-

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[247] *Id.*
[248] *See* Gupta H.R. 1 Statement at 175.
[249] Subcommittee on Elections Report at 105.
[250] *See* Lhamon Statement at 38.
[251] *See* Tucker Statement at 18.
[252] *See* Lhamon Statement at 37–38.
[253] *See* Subcommittee on Elections Report at 90-97.
[254] *See* Subcommittee on Elections Report at 53 (citing testimony of Kristen Clarke).
[255] *See* Gupta Evidence Statement at 23; *see also* Tucker Statement at 20 (explaining states like Nevada and California give discretion to country clerks to designate precincts in rural and tribal areas as all vote-by-mail if they do not meet a designated threshold of registered voters which results in the suppression of Native American voter participation); Landreth Statement at 2 ("outside of Pima and Maricopa counties, only 18 percent of Native Americans have home mail delivery"); James Thomas Tucker, et al., *Field Hearing Report Identifying and Removing Barriers to Political Participation by Native Voters*, The Native Am. Rights Fund 129, 132 (2019).
[256] *See Voting Rights and Election Admin. in Am.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.*, 116th Cong. (2019) (testimony of Elena Nunez, Dir. of State Operations and Ballot Measure Strategies, Common Cause); James Thomas Tucker, et al., *Field Hearing Report Identifying and Removing Barriers to Political Participation by Native Voters*, The Native Am. Rights Fund 154–155 (2019; Subcommittee on Elections at 98–102.
[257] *See Voting Rights and Election Admin. in Am.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.*, 116th Cong. (2019) (statement of John Yang, President and

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ty denied an Indian American voter the right to have her son act as her interpreter because her son was registered to vote in a neighboring county, which was prohibited by the Texas Election Code.[258] In 2018, about one week before the 2018 midterm election, a civil rights organization received reports that election officials in Harris County, Texas announced that volunteer Korean interpreters would no longer be allowed to offer their assistance to LEP voters within poll sites and would have to stay beyond the 100-foot zone outside of poll sites, where they would not be able to assist nearly as many LEP voters.[259] Witnesses also testified that language assistance was lacking in Florida for Haitian Creole and Spanish-speaking voters, and in North Carolina for Puerto Rican voters. [260]

Furthermore, the Subcommittee on the Constitution received testimony about racist propaganda that targeted minority candidates, meritless lawsuits against voting rights organizations, and voter intimidation and harassment at polling locations.[261] For example, in New Jersey, Asian American candidates for the local school board were targeted with anti-immigrant and xenophobic mailers and flyers.[262] One witness testified that the investigative unit of the Georgia Secretary of State's office is extremely aggressive and has engaged in a pattern of intimidation, including pursuing frivolous cases against voting rights organizations and conducting home visits to individual voters or activists, and community organizers with the intention of creating a chilling effect on civic engagement.[263] In North Carolina, there was a visible presence of KKK members and swastikas on the street near pro-voting marches as well as derogatory comments from bystanders during elections following the *Shelby County* decision.[264] Witnesses also testified that state troopers were present near and in polling sites. For example, in Cordele, Georgia, a voting activist who partnered with Black Votes Matter was providing rides to the polls when he was stopped and issued a parking ticket by a state trooper.[265] The trooper called for backup resulting in seven patrol cars. Also, in New York, 30 Chinese American voters, many of whom were college students, suffered baseless citizenship and voter registration challenges, impeding their right to vote.[266]

6. Vote Dilution

Numerous States, including Alabama, Arizona, Georgia, Louisiana, North Carolina, Texas, and Mississippi, have continued to

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Exec. Dir., Asian Am. Advancing Justice (AAAJ) at 9); Voting Rights and Election Administration in Am.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin., 116th Cong. (Oct. 17, 2019) (statement of Arturo Vargas, Chief Exec. Officer, NALEO Educ. Fund at 6–7).

[258] *See* Vattamala Statement at 7.

[259] *See* Vattamala Statement at 7.

[260] *See* Subcommittee on Elections Report at 73; Florida Oversight Hearing (Statement of Marleine Bastien, Exec. Dir., Family Action Network Movement and FANM in Action at 2); Batista Statement at 1; *see also Shelby* Anniversary Hearing (Statement of Kira Romero-Craft, Managing Attorney, Latino Justice, PRLDEF at 2–3).

[261] *See Voting Rights and Election Admin. in Am.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.*, 116th Cong. (2019) (statement of Elena Nunez, Dir. of State Operations and Ballot Measure Strategies, Common Cause at 2–3).

[262] *See* Yang Statement at 10.

[263] *See* Albright Statement at 2.

[264] *See* Lhamon Statement at 4–5.

[265] *See* Albright Statement at 2.

[266] *See* Lhamon Statement at 5.

use redistricting plans and other means to dilute the strength of votes cast by racial and language minority voters.[267] For example, in 2015, the Fayette County Commission in Georgia attempted to revert to an at-large voting system in a special election in 2015 to replace an African American Commissioner who passed away unexpectedly.[268] In Gwinnett County, Georgia in 2015, the redistricting plans for the County Board of Commissioners and Board of Education resulted in no African American, Latino, or Asian American candidates being elected to those boards despite the fact that the county is considered to be one of the more racially diverse counties in the southeastern portion of the United States.[269] Also, the Emanuel County School Board in Georgia was sued for diluting the strength of African American voters by "packing" most of them into one district and dispersing the remaining African American voters among the other six districts.[270] African American citizens comprised 81 percent of the voting-age population in one of the districts and a minority in all of the other six.[271] Although African American citizens made up one-third of the county's voting-age population and close to half of the students in Emanuel County, and although African American candidates had run in other districts, there had never been more than one African American member on the School Board at one time as a result of this practice.[272]

The Alabama state legislature's redistricting plan for Birmingham eliminated the nine majority-African American and nine majority-white district balance in the Jefferson County House Delegation, which had provided African American legislators the ability to block unwanted local bills, and replaced it with ten majority-white and only eight majority-African American districts.[273] In 2015, over the objections of African American members of Jefferson County's delegation, the state legislature passed a statute giving majority-white municipalities in Jefferson County and neighboring majority-white county governments power to appoint members to the Birmingham Water Works Board, which previously had been appointed solely by the Birmingham City Council.[274] This diluted the political power of a majority-African American electorate over one of the most profitable water systems in Alabama and a valuable asset for Birmingham's economic development.[275]

In 2017, the at-large scheme of electing members to the Board of Commissioners in Jones County, North Carolina was challenged on the basis that the method diluted the voting strength of African American voters.[276] No African American candidate had been elected to the Jones County Board of Commissioners since 1998.[277] The North Carolina General Assembly also drew district lines that split a large historically black college, down the middle. One part of the

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[267] *See* Subcommittee on Elections Report at 75–79; Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minorities Communities' Votes at 23–28 (2019), https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf.

[268] *See* Subcommittee on Elections Report at 78–79.

[269] See *id.* at 79; Greenbaum Statement at 20–21.

[270] *See id.* at 21.

[271] *Id.*

[272] *Id.* at 21–22.

[273] *See* Blacksher Statement at 7–8.

[274] *See id.* at 8.

[275] *Id.*

[276] *See* Greenbaum Statement at 24–25.

[277] *Id.*

campus was included in one district while the other was in another for the purpose of diluting the African American vote.[278]

In Texas, state officials have refused to recognize the growth of the Latino voter population and failed to create new Latino-majority districts,[279] and attempted to dilute the vote of Asian Americans and other minority voters.[280] In addition, Pasadena, Texas converted two single-member district positions on the city council to at-large seats in order to prevent the emergence of a Latino majority city council.[281] Pasadena was not required to secure preclearance, and the discriminatory change went into effect immediately upon enactment.[282]

Prior to *Shelby County*, the Arizona legislature submitted a change to the DOJ for Section 5 preclearance and proposed adding two at-large members to a five-single district board in the Maricopa County Community College District, which has a history of racially polarized voting.[283] The DOJ issued a "more information letter" based on concerns that the changes would weaken the electoral power of minority voters on the board and the state legislature did not seek to implement the change.[284] After the *Shelby County* decision, the change was implemented, and a Latino candidate lost an at-large seat and two of the at-large members who won were white.[285]

In Louisiana, African American citizens make up 32 percent of the population, but just one of the State's seven Supreme Court districts is majority African American in population. As a result, six of the seven justices on the most powerful court in the State are white and the State's Supreme Court districts have not been redrawn since 1999. Similarly, "The Mississippi Plan," which is codified in the 1890 Mississippi Constitution, is a racially discriminatory election system that has prevented African American candidates from winning a statewide office. The plan requires that candidates running for state-wide office such as governor or attorney general must win not only a majority of the popular votes, but also a majority of the State's 122 House districts, of which two-thirds are majority white.[286] If no candidate meets both requirements, a statewide election is decided by the state house of representatives.[287] This has resulted in no African American candidates winning statewide office in over 130 years despite Mississippi having the highest African American population in the United States.[288]

As noted by Chairperson Fudge's Subcommittee on Elections Report, in 2019, the Supreme Court held, in a 5–4 majority opinion, that partisan gerrymandering claims are not justiciable because they present a political question beyond the reach of the federal

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[278] *See* Timmons-Goodson Statement at 4.
[279] *See* Saenz History Statement at 2; *see also* Greenbaum Statement at 27.
[280] *See* Vattamala Statement at 8.
[281] *See* Vargas Statement at 9; Herrera Statement at 3–4.
[282] *See* Herrera Statement at 4.
[283] *See* Greenbaum Statement at 9.
[284] *See id.*
[285] *Id.*
[286] *See* Debbie Elliott, *Black Voters Sue Over Mississippi's Jim Crow-Era Election Law*, All Things Considered, Nat'l Public Radio (Sept. 24, 2019), https://www.npr.org/2019/09/24/763510668/black-voters-sue-over-mississippis-jim-crow-era-election-law.
[287] *See id.*
[288] *Id.*

courts.[289] Chief Justice Roberts, writing for the majority, noted that while federal courts can resolve "a variety of questions surrounding districting," including racial gerrymandering, it is beyond their power to decide when political gerrymandering has gone too far.[290] The Subcommittee on Elections notes that this decision jeopardizes the rights of millions of minority voters, cedes the field to State courts, and fails to set a national protection standard.[291] As noted in the Report, "[w]ithout the full protection of the Voting Rights Act requiring states and localities with a history of discriminatory practices to preclear their new maps, states could arguably create discriminatory maps, but color them in the rhetoric of party affiliation, not race."[292]

7. Obstacles to Restoring the Right to Vote

Formerly incarcerated individuals continue to be disenfranchised and denied the right to vote. As noted in the Subcommittee on Elections Report, the "criminal justice system disproportionately targets, arrests, sentences, and incarcerates people of color," and "disenfranchisement policies for felony convictions . . . disproportionately impact communities of color."[293] For example, African American voters are four times more likely to lose their right to vote than the rest of the voting-age population and disparities in the criminal justice system have stripped one in every 13 African Americans of their right to vote, which is four times the disenfranchisement rate of non-African Americans.[294]

The Subcommittees were presented with testimony regarding recent efforts to place additional burdens on the right to vote for people who are released from prison.[295] For example, although Florida recently passed a referendum ending permanent disenfranchisement for the formerly incarcerated, the Florida legislature responded by passing a law that denies voter eligibility to any individuals with outstanding costs, fines, fees, and restitution associated with their felony convictions.[296] Similarly, Alabama requires

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[289] *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).
[290] *Id.* at 2496; *see id.* at 2498–2508.
[291] Subcommittee on Elections Report at 76.
[292] *Id.* at 77.
[293] *Id.* at 119.
[294] *Id.*
[295] *See id.* at 119–23; *Voting Rights and Election Admin. in Am.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.,* 116th Cong. (Oct. 17, 2019) (statement of Brenda Wright, Senior Advisor for Legal Strategies, Demos at 9–10); *Voting Rights and Election Admin. in Am.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.,* 116th Cong. (2019) (Statement of Michael Waldman, President, Brennan Center for Justice at 6–7); *Voting Rights and Election Admin. in Am.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.,* 116th Cong. (2019) (Testimony of Denise Lieberman, Senior Attorney and Program Dir., Power and Democracy, Advancement Project at 84); *Voting Rights and Election Admin. in Am.: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.,* 116th Cong. (2019) (Testimony of Virginia Kase, Chief Exec. Officer, League of Women Voters at 86–87); James Thomas Tucker, et al., *Field Hearing Report Identifying and Removing Barriers to Political Participation by Native Voters,* The Native Am. Rights Fund 111–114 (2019).
[296] *See* Subcommittee on Elections Report at 120–21; VRA Legislation Hearing (Statement of Janai Nelson, Associate Dir. Counsel, NAACP Legal Def. Fund at 8) [hereinafter "Nelson Statement"]; VRA Evidence Hearing (testimony of Dale Ho, Dir., Voting Rights Project, Am. Civil Liberties Union at 31–32); Pérez Testimony at 4; Ifill Testimony at 7; *see also* Pérez Oversight Statement, Appx. H at 1–2; Best Practices Hearing (testimony of Ho at 16–17); *Voting Rights and Election Admin. in Fla: Hearing Before the Subcomm. on Elections of the H. Comm. on House Admin.,* 116th Cong. (2019) [hereinafter "Florida Oversight Hearing"] (statement of Andrew Gillum at 28); *see also Voting Rights and Election Admin. in Am.: Hearing Before the Subcomm. On Elections of the H. Comm. on House Admin.,* 116th Cong. (2019) (statement of Deuel Ross, Senior Counsel, NAACP Legal Def. Fund at 22).

formerly incarcerated individuals to pay their fines and fees before they can register to vote.[297] Tennessee requires that these individuals pay all legal financial obligations, fines, and fees, including child support, before they may have their right to vote restored, a provision that places an enhanced burden on low-income individuals.[298] Texas also has prosecuted formerly incarcerated individuals for mistakenly voting. For example, in Tarrant County, an individual mistakenly voted because she thought that once she was released from incarceration, she would have the right to vote restored. Texas prosecuted her for this mistake.[299]

B. Analysis of the Impact of Shelby County

As a result of the *Shelby County* decision, States and counties that were previously required to obtain preclearance from the federal government before changing their voting laws and practices were able to enact measures with the purpose and effect of reducing the vote of minority communities. Although such laws and practices may still be challenged through Section 2 litigation, the evidence above demonstrates that after-the-fact litigation cannot adequately stem this tide of discriminatory measures. Therefore, in advancing H.R. 4, Congress is doing as the Supreme Court invited it to do in *Shelby County*: passing a new coverage formula for the VRA's preclearance requirement.[300] Updating the Section 4(b) coverage formula to determine which jurisdictions are subject to federal preclearance under Section 5 will allow the VRA to operate as intended. Re-establishing the preclearance requirement will stop discriminatory measures in certain jurisdictions with a recent history of discrimination *before* they can be enacted, as Congress had intended in passing the VRA.

Testimony received by the Subcommittees revealed that, in the time leading up to the VRA's reenactment in 2006 and continuing into the present, discriminatory voting measures have been highly concentrated in jurisdictions that were previously subject to preclearance under Section 4(b). Dr. Peyton McCrary noted that, although the Court correctly observed in *Shelby County* that outright *vote denial* does not persist to the degree it did when the VRA was first enacted, Congress nevertheless assembled an extensive record of discriminatory voting changes that would have diluted minority voting strength—including intentionally discriminatory changes—enacted by States and counties but blocked by Section 5 objections."[301] As Dr. McCrary explained:

> Once the 1965 Voting Rights Act suspended the use of discriminatory tests or devices and began sending federal examiners into covered jurisdictions with the lowest voter registration levels, African Americans began to register and vote in significant numbers. In response Southern legislatures often adopted new electoral procedures designed to dilute the growing minority voting strength, drawing on

[297] *See* Subcommittee on Elections Report at 122; Carroll Statement at 11.

[298] *See* H.R. 1 Hearing, Unofficial Tr. 82–83 (testimony of Ifill); Mulroy Statement at 8 (noting felon disenfranchisement law has a discriminatory impact: "Tennessee is thus one of only 4 states where more than 20% of adult black population is disenfranchised.").

[299] *See* Subcommittee on Elections Report at 123; Bledsoe Statement at 4.

[300] *Shelby Cty.,* 570 U.S. at 557.

[301] VRA History Hearing (statement of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School at 2).

> the experience of jurisdictions which had already adopted these mechanisms before 1965. Use of at-large elections—requiring candidates to run city-wide or county-wide rather than from smaller districts or wards—was the cornerstone of the vote dilution structure, along with the use of multi-member legislative districts.
>
> The evidence before Congress when reauthorizing Section 5 of the Voting Rights Act in 2006 included data from a study of all the objections interposed by the Department of Justice. Between 1965 and 2000 over 80 percent of all objections were to changes that would have diluted minority voting strength and no more than 15 percent of the objections addressed changes that would deny or abridge minority voting strength. From 2000 through mid-2004, when the study was completed, less than 12 percent of the changes involved denial or abridgement, while 88 percent addressed problems of vote dilution.

In addition, Professor J. Morgan Kousser presented compelling and persuasive testimony regarding the need for a preclearance requirement particularly in the formerly covered jurisdictions. Professor Kousser noted that as Congress approached the 25-year renewal deadline of Section 5 in 2006, the need to satisfy the *Boerne* "congruence and proportionality" standard spurred Section 5 proponents to compile an extensive factual record of ongoing voting discrimination, but that the record may not have been persuasive to the Court because "it was not consolidated into one report, quantified to determine how 'congruent' the geographical scope of Section 4 was with the geographical incidence of voting discrimination."[302] In addition, the Court in *Shelby County* viewed the "fundamental problem" as Congress's failure in 2006 to update its coverage formula based on the record that it compiled.[303] The Court accordingly did not pass judgment on whether the kind of record assembled by Congress could support a revised coverage formula that has a sufficiently "logical relation" to current and recent evidence of discrimination.[304]

In the wake of the *Northwest Austin* case, Professor Kousser began to create a database of all voting rights actions under any federal or State statutes or constitutional provisions, including lawsuits, settlements and consent decrees, objections interposed by DOJ under Section 5, and requests by DOJ for more information under Section 5. This database includes 4,090 minority victories under federal law and 389 under the California Voting Rights Act from 1957 through 2019.[305] His analysis of the database resulted in four principal points: (1) the original coverage scheme of Section 4(b), as amended in 1975 and 1970, fit the pattern of proven violations of voting rights extraordinarily well—92 percent of the total actions in which minorities were successful concerned State and local jurisdictions within the areas of Section 4(b) coverage; (2) voting rights violations did not diminish over long periods of time—there were more than three times as many in the 25 years after

[302] *See* VRA Legislation Hearing (statement of Professor J. Morgan Kousser, Cal. Inst. of Tech. at 4–5) [hereinafter "Kousser Statement"].
[303] *Shelby Cty.*, 570 U.S. at 554.
[304] *Id.*
[305] *See* Kousser Statement at 1.

the 1982 renewal of the VRA than there were in the 25 years from 1957 to 1982, and over 90 percent continued be concentrated in covered jurisdictions; (3) the pattern of voting rights actions is less the product of the degree of discrimination than of the opportunities of litigation and administrative action made available by congressional and especially by Supreme Court decisions; and (4) the striking success of minorities in using the State-level California Voting Rights Act to shift from at-large elections to single member districts reinforces the third point about the pattern of voting rights actions.[306]

Professor Kousser analyzed whether the Section 4(b) coverage formula was a congruent means to combat the injury it aimed to prevent or remedy, *i.e.*, whether the pattern of VRA actions fit the Section 4(b) coverage scheme.[307] As shown in the table below, out of 3,771 of the 4,090 total successful voting rights actions for the period between 1957 and 2019, these actions concerned areas that were covered under Section 4(b) of the VRA. In other words, approximately 92 percent of the total voting actions in which minorities were successful concerned State or local jurisdictions within the area of Section 4(b) coverage.[308]

TABLE 1.—THE TEMPORAL AND GEOGRAPHICAL PATTERN OF SUCCESSFUL VOTING RIGHTS ACTIONS, 1957–2019

Topic	Years	Total # of Actions	# in Covered Jurisdictions	% in Covered Jurisdictions
Total # of actions	1957–2019	4,090	3,771	92.2
	1957–1981	819	798	97.4
	1982–2006	3,059	2,825	92.4
	2007–2019	187	130	69.5
	1957–1965	84	83	98.8

In addition, Kousser noted that the number of actions more than tripled in the time period from the renewal of the VRA in 1982 through the most recent reauthorization in 2006 (3,059 total actions), as compared to the period before enactment of the modern federal voting rights law in 1957 through the 1982 VRA renewal (819 total actions).[309] Additionally, comparing the number of actions after 2006 through 2019 with the number between 1957 and the passage of the VRA in 1965, a period in which, according to the Court, voting discrimination was "pervasive . . . flagrant . . . widespread . . . rampant," Professor Kousser found more cases per annum in the latter than in the earlier years (15.5 cases per year for 2007–19 vs. 10.5 per year for 1957–65).[310] He also found that more than two-thirds of the voting rights actions after 2006, the time of the most recent reauthorization of the VRA, were concentrated in covered jurisdictions.[311] He observed that based on the data, "if Congress had started from scratch in 2006, it could hardly have developed a more accurate coverage scheme than it did."[312]

[306] *See id*. at 1–2.
[307] *See id*. at 4–5, 7–10.
[308] *Id*. at 7.
[309] *See* VRA Legislation Hearing (Kousser Statement at 7).
[310] *Id*. at 8.
[311] *Id*.
[312] *Id*.

In addition, Professor Kousser analyzed voting rights actions *excluding* actions involving Section 5 and found that five out of six successful non-Section 5 actions originated in covered jurisdictions:[313]

TABLE 2.—OTHER POSSIBLE EXPLANATIONS OF THE CONGRUENCE OF THE PRE-SHELBY CONGRUENCE OF THE COVERAGE SCHEME AND VOTING RIGHTS ACTIONS

A. Cases Not Involving Section 5

Topic	Years	Total # of Actions	# in Covered Jurisdictions	% in Covered Jurisdictions
# Actions under Section 2	1965–2019	1,291	1,066	82.6
# Actions under Section 2, Sections 203 or 208, Fourteenth or Fifteenth Amendments	1965–2019	1,605	1,312	81.7

Furthermore, Professor Kousser found that the pattern is not the result of a concentration of minorities (*i.e.*, where minorities resided) in covered jurisdictions.[314] Controlling for the minority percentage in population, the covered jurisdictions were six to 12 times as likely to develop cases as compared to non-covered jurisdictions as shown in Table 2B below.[315]

B. Counties with Different Proportions of Minorities

% Non-Hispanic White Citizen Voting Age Population (CVAP), 2010	Covered Counties		Non-Covered Counties	
	% Counties with Minority Successes	# Minority Successes	% Counties with Minority Successes	# Minority Successes
>80% Non-Hispanic White	36.0	283	6.2	44
<=80% Non-Hispanic White	80.9	3,236	11.9	276

From a slightly older version of this database.

Professor Kousser observed that in counties with a higher number of white voters—specifically, those in which non-Hispanic white Americans exceeded 80 percent of the citizen voting age population (CVAP)—the proportion of counties with at least one successful voting rights action was six times as high in the covered counties as in the non-covered counties (36 percent compared to 6.2 percent) and 6.4 times as many actions originated in covered as in non-covered heavily white counties (283 compared to 44).[316] Professor Kousser also determined that the contrast is even more striking in the counties with a lower number of white voters, where there were 6.8 times as many successful actions in covered as in non-covered counties (80 percent vs. 11.9 percent), and 11.7 times as many total actions (3,236 compared to 276) in covered as in non-covered jurisdictions.[317]

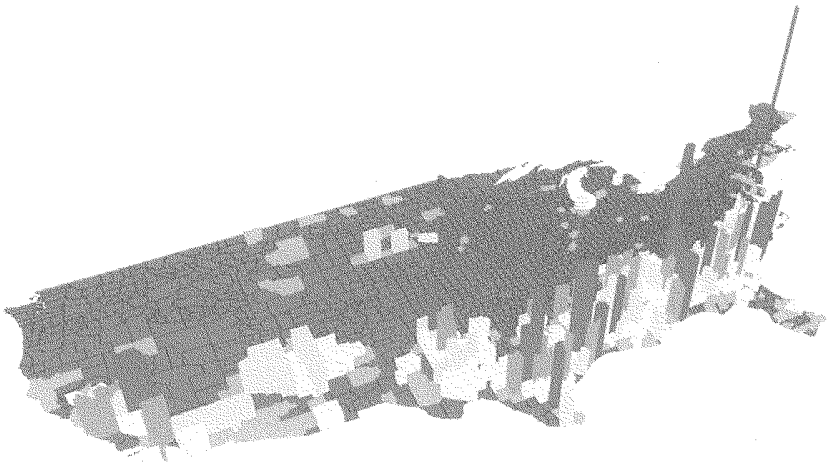
In drawing his conclusion about the pattern of discrimination in the formerly covered jurisdictions, Professor Kousser testified that the data demonstrates that the coverage formula in Section 4(b) was tailored to target the most problematic jurisdictions for minority voters:

[313] *Id.*
[314] *See* Kousser Statement at 9.
[315] *Id.*
[316] *See* Kousser Statement at 9.
[317] *Id.*

> Since litigation can be brought under those provisions against jurisdictions throughout the country, the pattern in this table makes it even clearer that voting discrimination has been centered in those areas covered under Section 4. This is especially true because some Section 2 cases in covered jurisdictions didn't have to be filed, because Section 5 had already either deterred discrimination or been settled by objections under Section 5. The 82% concentration of Section 2 cases in covered jurisdictions therefore is no doubt an *under*estimate of the concentration of discrimination there.[318]

In addition, Professor Kousser's voting rights events map illustrates the contrast between covered and non-covered jurisdictions with regard to the number of voting rights actions in the 3,143 counties or county-equivalents in the United States. In 2,393 counties or county-equivalents (*i.e.*, 76 percent), there were no voting rights actions at all. As indicated by the skyscrapers (indicating multiple actions), the voting rights actions are concentrated in the southern states that were initially covered in the original 1965 VRA, and in Texas and Arizona, which became covered states in the 1975 amendments.

Map 1: Voting Rights Events by County, 1957-2014



Based on this and other evidence gathered throughout the Judiciary Committee's consideration of H.R. 4, the Judiciary Committee finds that in the absence of Section 5, efforts to discriminate against minority voters persist and evolve particularly in the formerly covered states. As such, there is a need for the protection of voting rights of minority voters and the reestablishment of the preclearance regime. As discussed further below, H.R. 4's revised coverage formula reflects this recent and ongoing evidence of voting discrimination.

[318] Kousser Statement at 8.

C. The Record Bolsters Congress's Constitutional Authority to Adopt a New Coverage Formula and Related Measures

As outlined above, Congress has broad authority under the Fourteenth and Fifteenth Amendments to prohibit and affirmatively prevent voting discrimination against racial and language minorities.[319] Congress also has plenary authority to enact legislation regulating "[t]he times, places and manner of holding elections for Senators and Representatives."[320]

The foregoing establishes a substantial record of ongoing discrimination, particularly in formerly covered jurisdictions and in recent years during which the Court rendered the VRA's preclearance mechanism inapplicable. In light of that record, the Judiciary Committee concludes it is necessary to restore a preclearance process in those jurisdictions where voting discrimination has been substantial and persistent. Furthermore, the Judiciary Committee concludes it is necessary to apply a preclearance mechanism with respect to particular voting practices that are most likely to result in unconstitutional discrimination. The Judiciary Committee also concludes that other, related measures discussed below are needed to effectuate this legislation.

The Judiciary Committee does not reach these determinations lightly. The Supreme Court has made clear that the VRA "imposes current burdens and must be justified by current needs," and that any preclearance coverage formula must be "sufficiently related to the problem that it targets."[321]

Nevertheless, although the Court invalidated Section 4(b)'s coverage formula in *Shelby County*, it "issue[d] no holding on [Section] 5 itself."[322] Rather, the Court indicated that Congress could "draft another formula based on current conditions."[323] Furthermore, the Court cited *Katzenbach* approvingly throughout its opinion. Although it disagreed with the Justice Department's interpretation of *Katzenbach*, it in no way purported to overrule that decision. For example, in explaining the showing needed to defend Section 4(b)'s coverage formula, the Court noted that "*Katzenbach* reasoned that the coverage formula was rational because the 'formula . . . was relevant to the problem'" that the VRA sought to address.[324]

As such, *Shelby County* "leaves open substantial room for Congress to establish new criteria" for a coverage formula.[325] *Shelby County* requires that any such formula must be "'relevant to the problem'" that Congress is targeting and based on "facts having [a] logical relation to the present day."[326] Beyond that, the Court did not state any particular requirements for a new formula. Accordingly, the Judiciary Committee has carefully tailored the proposed legislation to address specific and contemporary practices that deny or abridge the right to vote on the basis of race or language minor-

[319] *See Katzenbach*, 383 U.S. at 325–27 (discussing Congress's enforcement powers under the Fifteenth Amendment); *Morgan*, 384 U.S. at 648–51 (same, with respect to Fourteenth Amendment).

[320] U.S. Const., art. I § 4 cl. 1.

[321] *Shelby Cty*., 570 U.S. at 542 (quoting *Northwest Austin*, 557 U.S. at 203).

[322] *Id*. at 557.

[323] *Id*.

[324] *Id*. at 551–52 (quoting *Katzenbach*, 383 U.S. at 329).

[325] Adegbile Testimony at 4.

[326] *Shelby Cty*., 570 U.S. at 551 (quoting *Katzenbach*, 383 U.S. at 329); *see id*. at 556 (criticizing the 2006 coverage formula because it was "based on 40-year-old facts having no logical relation to the present day.").

ity status. Furthermore, nothing about the Court's opinion in *Shelby County* cast doubt on Congress's ability to enact other measures to prevent voting discrimination that are less burdensome than a preclearance requirement.[327]

Finally, the Committee notes that while the record compiled by the three Subcommittees establishes the continuing pervasiveness of a variety of barriers to voting in certain jurisdictions, H.R. 4 does not expressly list all of them as bases for triggering the preclearance requirement in its "covered practices" provision. While Congress's constitutional authority is broad enough to support including all of these barriers as bases for requiring preclearance, Congress here chooses to exercise its discretion and restraint by limiting the scope of that provision to those practices listed in the bill. The Committee notes that while these barriers are not expressly listed as bases for practice-based preclearance, they may still constitute violations of the VRA in specific cases, and the Committee expects the DOJ and others to pursue jurisdictions engaged in such violations. In addition, Congress will continue to monitor developments as to those barriers not expressly covered by the bill to determine whether it is necessary to amend the VRA in the future.

1. The Continuing Need for Preclearance

The Judiciary Committee concludes that a tailored preclearance provision is necessary to address the significant and pervasive voting discrimination described above. The Judiciary Committee heard evidence of a "resurgence of discriminatory voting practices, many motivated by intentional discrimination," and that "this discrimination has been most intense in the very jurisdictions that were once covered by Section 5."[328] Professor Kousser's analysis, in particular, demonstrates that discriminatory measures have been heavily concentrated in specific jurisdictions.[329] That heavy concentration warrants "'disparate geographic coverage'" for preclearance.[330] Indeed, a preclearance remedy that failed to tailor coverage in jurisdictions where discriminatory measures have occurred with the highest frequency could create precisely the types of unjustifiable burdens that the Court described in *Shelby County*. The evidence of discriminatory practices that have emerged in previously covered jurisdictions subsequent to the Court's holding in *Shelby County* is particularly persuasive. The Court in *Katzenbach* found it compelling that other statutory remedies enacted up to that point had failed to stop patterns of abuses. So too here, the evidence demonstrates that even where plaintiffs facing discrimination have succeeded in litigation under Section 2 of the VRA, that success has come at a great price and often only after substantial harms have ensued.

As one scholar explained, after-the-fact litigation results all too often in "justice delayed."[331] In North Carolina, for example, the legislature decided to move forward with a draconian voter ID bill the day after Shelby County was decided.[332] The bill was signed

[327] *See id*. at 537 (noting Section 2 of VRA was "not at issue in this case.").
[328] Clarke Shelby Statement at 2.
[329] Kousser Statement at 7–9.
[330] *Shelby Cty*., 570 U.S. at 542 (quoting *Northwest Austin*, 557 U.S. at 203).
[331] Levitt Testimony at 9.
[332] *Id*. at 10.

into law in August 2013 and was immediately challenged in court. Nevertheless, the law was in operation during the 2014 midterm primaries and elections.[333] It was only in mid-2016—following a series of delays—that the law was struck down following a jury trial. The court held that the law "target[ed] African Americans with almost surgical precision,"[334] but because of those delays, voters in North Carolina were subject to an intentionally discriminatory measure during an election cycle.

A similar scenario unfolded in Texas. One practitioner explained that the NAACP "successfully challenged Texas' voter ID law," with the trial court holding that the law was discriminatory in both purpose and effect.[335] The United States Court of Appeals for the Fifth Circuit agreed that the law was discriminatory at least in effect. As that witness explained, however, "during the 3 years in which we litigated the case through trial, and before voters received relief, Texas elected a U.S. Senator, all 36 members of the Texas delegation to the U.S. House of Representatives, a Governor, a Lieutenant Governor, Attorney General, Controller, all 150 Members of the State house, over 175 trial court judges, and over 75 District Attorneys. Relief simply was too late for voters across all of those elections."[336]

Another practitioner noted more generally that "because elections take place during the time that Section 2 litigation is pending, government officials are often elected under election[] regimes that are later found to be discriminatory—and there is no way to adequately compensate the victims of voting discrimination after-the-fact."[337] This practitioner noted that in the ten successful Section 2 cases brought by the ACLU, "more than a dozen elections were held between the time of the filing our case and the ultimate resolution of that case. In the interim, more than 350 federal, State, and local government officials were elected under regimes that were later found by a court to be racially discriminatory, or which were later abandoned by the jurisdiction."[338]

Sean Young of the ACLU of Georgia likewise stressed the critical need for preclearance and explained that Section 2 litigation is not an adequate remedy on its own.[339] For example, he explained that after the *Shelby County* decision, the Georgia General Assembly put a plan in place that resulted in a decrease of African American board members from 67 percent to 28 percent on the Sumter County Board of Education.[340] Ultimately, a court struck down the plan as discriminatory under Section 2 of the VRA. But Mr. Young noted that the litigation lasted five years and cost "hundreds if not thousands of attorney hours, and thousands of dollars in expert fees," and resulted in five years of "discriminatory elections taking place over and over" during which "African American school chil-

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[333] *Id.*
[334] *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).
[335] *Shelby* Anniversary Hearing, Unofficial Tr. 33 (Aden Testimony).
[336] *Id.* at 33–34; *see also* Levitt Testimony at 11.
[337] Ho Testimony at 12.
[338] *Id.; see also id.* Appx. A (spreadsheet listing elections that were held during the course of litigation). Mr. Ho noted that this was a conservative estimate because it did not include local elections. *Id.* at 12 & n.43.
[339] *See* Subcommittee on Elections Report at 81 (citing testimony of Sean Young).
[340] *Id.*

dren and their parents did not have their interests adequately represented the board."[341]

In addition to the time consuming aspect of litigation, other witnesses noted the extraordinarily high costs of bringing such challenges, which could run up to several million dollars.[342] For example, witnesses who appeared before the Subcommittee for Elections noted that costs for a Section 2 case can range from hundreds of thousands of dollars to $10 million.[343] Moreover, one witness testified that these costs are particularly burdensome for Native American tribes, which have limited resources to spend on attorney's fees.[344]

Accordingly—as Congress concluded when it first adopted the preclearance provision in the VRA—the Judiciary Committee concludes that Congress should "shift the advantage of time and inertia" away from States and subdivisions that have persistently engaged in discriminatory practices.[345]

2. The Need to Update and Clarify Certain Temporary and Permanent Provisions of the VRA

a. Coverage Formula

Section 3 of H.R. 4 contains a new coverage provision intended to meet the requirements set out in *Shelby County*. First, a State as a whole would be covered if during the past 25 years (1) 15 or more voting rights violations occurred within the State; or (2) 10 or more voting rights violations occurred within the State, at least one of which was committed by the State itself. Second, a political subdivision would be covered if three or more voting rights violations occurred in that subdivision during the past 25 years. If those criteria are met, a State or subdivision would remain covered for ten years.

The legislation defines several types of events or incidents as "voting rights violations." The definition includes: (A) a final judgment by a court that a State or subdivision engaged in voting discrimination in violation of the Fourteenth or Fifteenth Amendment; (B) a final judgment by a court that a State or subdivision engaged in voting discrimination in violation of Section 2 or Section 203 of the VRA; (C) a final judgment by a court denying a State or subdivision's lawsuit seeking to obtain preclearance (i.e., a determination by a court that a proposed change in voting procedures by a covered jurisdiction cannot go forward); (D) an objection by DOJ blocking a covered jurisdiction from moving forward with a proposed change in voting procedures, where the objection has not been withdrawn or overturned by the final judgment of a court; or (E) a settlement or consent decree that results in a State or subdivision abandoning or altering a proposed change to its voting procedures, where a challenge to the proposed change contended that the change violated the VRA or the Fourteenth or Fifteenth Amendment.

This coverage formula cures the primary defect identified in *Shelby County*: it depends upon recent information, rather than

[341] *Id.*
[342] *See* Saenz History Statement.
[343] *See* Subcommittee on Elections Report at 79–83.
[344] *Id.* at 89.
[345] *Katzenbach*, 383 U.S. at 328.

"decades-old data and eradicated practices."[346] It "creates a dynamic standard, based on each jurisdiction's recent history, whereby geographic coverage will adjust by moving the temporal window of triggering violations forward."[347] To the extent this revised coverage formula encompasses many of the same jurisdictions that were subject to coverage under Section 4(b), that overlap is a result of those jurisdictions' persistence in enacting discriminatory measures, as documented above.[348]

The formula encompasses events or circumstances that occurred up to 25 years prior, a "lookback period" that the Judiciary Committee assesses is needed to identify (as *Katzenbach* described) "voting discrimination where it persists on a pervasive scale."[349] As one practitioner observed:

> [T]he 25-year lookback is an especially important provision because a shorter period might not be a broad enough window to indicate whether or not voting rights violations have been pervasive under *Katzenbach*, especially given the nature of elections, which are cyclical and occur every two or four years. That is all the more true because election changes tend to happen around the census and redistricting, which occur once a decade.[350]

By aggregating repeated instances of voting discrimination over a reasonably significant period of time, the coverage formula more reliably identifies jurisdictions in need of preclearance than would a formula based on relatively few instances occurring in a more recent timeframe. As one scholar put it, the formula "seeks to identify recidivists for whom more potent medicine may be necessary, based on facts rather than assumptions."[351]

Additionally, the types of findings or circumstances constituting a "voting rights violation" for purposes of the coverage formula are reasonably related to findings of unconstitutional practices. Even assuming the Fifteenth Amendment prohibits only voting practices that are intentionally discriminatory, the Supreme Court has repeatedly held that Congress's enforcement authority extends well beyond the power to prohibit practices that the Amendment already makes unlawful.[352] As discussed earlier, in *City of Rome*, the Court upheld a provision of Section 5 that allowed preclearance to be granted only if a proposed voting change did not have a discriminatory purpose *and* would not have a discriminatory effect. The Court explained that Congress may "prohibit state action that, though itself not violative of [the Fifteenth Amendment], perpetuates the effects of past discrimination."[353] And the Court found "no reason . . . to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an ef-

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[346] *Shelby Cty.*, 570 U.S. at 551.
[347] Adegbile Testimony at 5.
[348] *See* Kousser Statement at 7–9; *see also* Sonia Gill, *The Case for Restoring and Updating the Voting Rights Act,* Am. Civil Liberties Union at 32 (2019).
[349] *Katzenbach,* 383 U.S. at 308.
[350] Adegbile Testimony at 25.
[351] Levitt Testimony at 28.
[352] *See, e.g., City of Rome*, 446 U.S. at 173–75; *Katzenbach*, 383 U.S. at 325–27; *see also* Levitt Testimony at 23–25.
[353] *City of Rome,* 446 U.S. at 176.

fective method of preventing States from 'undoing or defeating the rights recently won by'" African American voters.[354]

In this instance, Congress likewise is entitled to deference in determining the indicia of voting discrimination that may identify unconstitutional behavior by State and local jurisdictions or that may identify other practices likely to "undo[] or defeat" recent progress. Provisions (A) and (B), as described above, require a final court judgment that a State or subdivision has engaged in the kind of voting discrimination that Congress plainly has the authority to prohibit. Provision (C) likewise requires a court finding that a proposed voting change by a State or subdivision was put forward with a discriminatory purpose or would have discriminatory impact. Although provisions (D) and (E) do not require court findings, they address situations where a State or subdivision may have attempted to engage in an unlawful practice that is never adjudicated by a court because DOJ blocked it from taking effect, or because the parties settled. Accordingly, the coverage formula ensures that the legislation is "remedial" under *City of Boerne* and its progeny.

Finally, the coverage formula ensures that facts justifying coverage for a State or subdivision do not become stale over time. Coverage is limited to a ten-year period, at the end of which it is reassessed anew. Moreover, States and subdivisions would retain the "bailout" mechanism built into the VRA. This ensures that coverage is "dynamic and tethered to a recent history of serious voting rights violations."[355]

b. Preclearance Based on Known Practices

Section 4 of H.R. 4 would also impose a preclearance requirement for any jurisdiction seeking to engage in certain practices that may be likely to result in discrimination against minority groups. These "covered practices" include: (1) creating or adding "at-large" seats for elected offices, where the jurisdiction includes racial or language minority populations above a certain percent threshold; (2) redistricting that reduces the voting-age population of a particular racial or language minority group by 3% of more, where the jurisdiction includes racial or language minority populations above a certain percent threshold; (3) redistricting that increases the population of a racial or language minority group by 10,000 or by 20% of the voting-age population or more; (4) changing requirements for documentation or other qualifications needed to cast a vote; (5) reducing or altering the provision of multilingual voting materials; and (6) reducing or moving voting locations, where the jurisdiction includes racial or language minority populations above a certain percent threshold.[356]

Importantly, this form of "known practices coverage" avoids engaging in the "disparate treatment of States" that the Court in *Shelby County* found problematic under the principle of equal sov-

[354] *Id.* at 178 (quoting *Beer v. United States*, 425 U.S. 130, 140 (1976)) (internal quotations and brackets omitted).

[355] Adegbile Testimony at 27; *see also* Levitt Testimony at 29 ("The overall structure of preclearance in H.R. 4 not only builds in reference to current conditions, it builds in breathing room.").

[356] Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minorities Communities' Votes 42–48 (2019), https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf.

ereignty.[357] It applies equally across all jurisdictions, or across all jurisdictions with certain percent thresholds of minority populations. Moreover, it does not ban any of the covered practices outright—even though the Supreme Court has held that Congress can in fact ban practices that are thought to correlate with voting discrimination.[358] Given the evidence documented and referenced in this Report, the Judiciary Committee has ample grounds to conclude that each of these practices creates at least a risk of unconstitutional voting discrimination. As such, Congress has authority to require an additional layer of scrutiny through preclearance before such practices are permitted to go into effect.

c. Bail-in Preclearance

Section 2 of H.R. 4 would strengthen the "bail-in" provision in Section 3(c) of the VRA—which allows courts to subject certain jurisdictions to preclearance—by permitting courts to bail in jurisdictions where there have been violations of the VRA and other federal prohibitions against discrimination in voting, in addition to instances where there have been violations of the Fourteenth or Fifteenth Amendment. Because this provision would apply on a case-by-case basis with individual judgments left to the courts, it is inherently tailored to the facts on the ground in each jurisdiction.

d. Notice

Section 5 of H.R. 4 would require State and local jurisdictions to publicize certain types of changes in their voting practices and to provide other types of information that may be relevant in assessing potential violations of the VRA. As one scholar explained, this provision "aims to provide citizens with additional information about the electoral pinch points where gathering the data about jeopardy to voting rights has proved most problematic in the past: changes at the last minute before an election, changes in the polling place resources available for a given election, and changes in the district lines determining the electorate for a given election."[359] This type of reporting requirement entails a relatively low burden on States and plainly bears a logical relation to facilitating Congress's ability to enforce the law.

e. Federal Election Observers

Section 6 of H.R. 4 would add to the Attorney General's authority to assign federal election observers under Section 8 of the VRA. It would permit DOJ to assign election observers in instances where doing so is considered necessary to enforce statutory provisions of the VRA (rather than solely to enforce the Fourteenth and Fifteenth Amendments). It would also permit DOJ to assign election observers for the purpose of enforcing bilingual election requirements. Any burden imposed on States by this provision is minimal and should not raise the types of federalism and sovereignty concerns discussed in *Shelby County*.

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[357] *Shelby Cty.*, 570 U.S. at 544.

[358] *See Morgan,* 384 U.S. at 649–52; *see also Oregon v. Mitchell*, 400 U.S. 112, 150 (1970) (upholding nationwide ban on literacy tests).

[359] Levitt Testimony at 31.

f. Injunctive Relief

Lastly, Section 7 of H.R. 4 would empower private parties (in addition to DOJ) to file lawsuits for injunctive relief if a State or political subdivision is about to engage in a change to voting practices that the plaintiff believes will violate the VRA. Furthermore, Section 7 would require the court hearing the case to grant relief to the plaintiff if the court determines that the complaint has raised a "serious question" regarding the lawfulness of a change in voting practices, and if the court determines that the balance of interests and hardships favors the plaintiff.

This standard departs somewhat from the typical standard for obtaining a preliminary injunction, under which a plaintiff must show that he or she "is likely to succeed on the merits" and is likely to suffer "irreparable harm" absent an injunction, and must demonstrate that the overall balance of interests tilts in his or her favor.[360] However, the Supreme Court has repeatedly held that Congress may alter common-law standards for seeking equitable relief so long as the "alternative comports with constitutional due process," particularly in cases presenting issues of public interest.[361] As one scholar has explained, "the cost and difficulty of amassing evidence and expertise sufficient to secure timely preliminary relief in a voting case often remains greater than in most other contexts, the clock often remains shorter, and the damage of a discriminatory election remains irreparable."[362] As such, "[i]t is rational . . . to establish a standard for the granting of preliminary injunctive relief designed to address these distinct characteristics in election cases."[363] The Judiciary Committee assesses that such a standard is not only "rational" but may be critical to ensuring that elections are not conducted under voting procedures that are ultimately held to be unlawful and discriminatory.

3. Additional Congressional Authority Pursuant to the Elections Clause

As the foregoing discussion demonstrates, Congress has ample authority to adopt H.R. 4 under the Fourteenth and Fifteenth Amendments to the Constitution. Additionally, pursuant to the Elections Clause of the Constitution, Congress has authority to pass the proposed legislation insofar as it pertains to federal elections for members of Congress. The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."[364]

The Supreme Court has explained that the Elections Clause provides Congress "general supervisory power over the whole subject" of federal elections.[365] As one scholar explained, Congress during

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[360] *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

[361] Levitt Testimony at 29 (citing, *inter alia, Yakus v. United States*, 321 U.S. 414, 441–42 (1944); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496–97 (2001); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

[362] Levitt Testimony at 30; *see also also* Sonia Gill, *The Case for Restoring and Updating the Voting Rights Act*, Am. Civil Liberties Union at 38–49 (2019).

[363] Levitt Testimony at 30.

[364] U.S. Const., art. I § 4 cl. 1.

[365] *Ex parte Siebold*, 100 U.S. 371, 387 (1879).

Reconstruction relied on this authority in enacting certain statutes governing federal elections, and the Supreme Court upheld one such statute based on that authority.[366] Much more recently, in a case striking down a State law that imposed term limits on members of the House, the Court explained that the process for "electing representatives to the National Legislature" arose as a "new right" created by "the Constitution itself."[367] As such, federalism concerns that may typically arise under the Tenth Amendment when Congress displaces the power of the States do not apply in the federal elections context. Rather, the Elections Clause is a relatively rare instance in which the Constitution delegated power *to* the States to regulate elections and reserved power to Congress to change those regulations.[368]

By its plain text, the Elections Clause does not require that Congress act in furtherance of any particular purpose when it regulates federal elections. Thus, Congress's authority is not limited to remedying violations of other constitutional provisions.[369] For example, in a decision issued the same month as *Shelby County*, the Supreme Court struck down an Arizona law requiring voting registrants to produce evidence of citizenship; the Court (in a decision authored by Justice Scalia) held that the law was preempted by the National Voter Registration Act (NVRA), which was enacted under Congress's Elections Clause authority.[370] The NVRA requires use of a uniform federal form to register voters, and the Court accordingly held that Arizona could not alter or add to the paperwork required to register to vote. The Court observed:

> The Clause's substantive scope is broad. "Times, Places, and Manner," we have written, are "comprehensive words," which "embrace authority to provide a complete code for congressional elections" . . . . The power of Congress over the "Times, Places and Manner" of congressional elections "is paramount, and *may be exercised at any time, and to any extent which it deems expedient* . . . ."[371]

Accordingly, the Elections Clause supplies authority for Congress to enact this legislation, including its coverage formula and preclearance mechanisms, insofar as the legislation affects the "Times, Places, and Manner" for electing members of Congress. For example, the Clause clearly allows Congress to regulate the circumstances in which State or local governments move polling places or change early voting practices for elections to federal office. The case just described further demonstrates that Congress may regulate the manner in which States register voters for federal elections, including by regulating identification requirements.

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[366] Congressional Authority Hearing (testimony of Franita Tolson, Vice Dean for Faculty and Acad. Affairs and Professor of Law, Univ. of S. Cal., Gould School of Law at 6) [hereinafter "Tolson Testimony"].

[367] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995).

[368] *See id.* (structure of the Elections Clause "is consistent with our previous recognition that, in certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution"); *see also* Tolson Testimony at 5 ("the Clause is impervious to the federalism concerns that have constrained congressional action under the Fourteenth and Fifteenth Amendments.").

[369] *See* Tolson Testimony at 5.

[370] *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 20 (2013).

[371] *Id.* at 8–9 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *Siebold*, 100 U.S. at 392 (emphasis added)).

If the legislation were sustained *only* based on the Elections Clause and not based on Congress's enforcement authority under the Fourteenth or Fifteenth Amendments, then it presumably could no longer apply with respect to purely State or local elections. As one scholar noted, however, "states and local governments use many of the same practices in federal elections as they do for state and local elections. For example, voters are registered simultaneously in federal, state, and local elections in most states. Voters also go to the same polling place, at the same time, and vote on one ballot for federal, state, and local elections in most places."[372] Thus, as a practical matter, Congress's use of its Elections Clause authority may still impact state and local election practices.

D. Representative Johnson's Argument Against H.R. 4 is Unavailing

During the Judiciary Committee markup of H.R. 4, Representative Mike Johnson (R–LA) offered an amendment that would have added a rule of construction providing that a "voting rights violation" shall only consist of intentional discrimination based on race, color, or language-minority status. He contended that the Fourteenth and Fifteenth Amendments do not grant Congress the authority to adopt measures beyond those that remedy *intentional* voting discrimination. According to this view, the VRA's prohibition on State and local voting laws that have a discriminatory *effect* on minority voters is constitutionally suspect because it is not "congruent and proportional" to the harm—despite many voting rights cases alleging that a given voting law or practice has a discriminatory effect often also present evidence of a discriminatory purpose. Instead, Representative Johnson contended that the VRA's prohibition on "neutral" voting laws with a discriminatory effect is a "substantive" act that goes beyond Congress's power "to enforce" the guarantees of the Fourteenth and Fifteenth Amendment.

Representative Johnson's contention is unavailing. To begin with, the Supreme Court has not expressly applied the "congruence and proportionality test" to the VRA, despite being urged to do so by litigants in *Shelby County*, and has only applied it to non-voting rights cases involving claims under the Fourteenth Amendment.

In any event, the Supreme Court has long made clear that Congress has broad constitutional authority to enact legislation in order to remedy and root out the grave and persistent constitutional harm of voting discrimination. The Court has recognized that in response to litigation and other efforts, those wishing to discriminate against minority voters have relied on less overt methods of voting discrimination, implementing voting laws and procedures aimed at diluting minority voting strength. Indeed, the Supreme Court expressly held in *City of Rome* that "even if . . . the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to [its enforcement authority], outlaw voting practices that are discriminatory in effect."[373] If Congress has authority to outlaw any changes to voting practices that have discriminatory effects, then it is equally within Congress's enforcement power to make determinations about preclearance coverage

[372] Tolson Testimony at 10.
[373] 446 U.S. at 173 (emphasis added).

based upon whether a State or subdivision has repeatedly enacted measures that are found to have unlawful discriminatory effects. In addition, a definition of a "voting rights violation" that is limited to a finding of intentional discrimination could exclude a great many instances in which courts find discriminatory effects but do not adjudicate—because they do not need to—whether intentional discrimination has occurred.

Hearings

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress, the following hearings were used to consider H.R. 4:

- H.R. 1, the "For the People Act of 2019," House Committee on the Judiciary, January 29, 2019
- "History and Enforcement of the Voting Rights Act of 1965," Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Committee on the Judiciary, March 12, 2019
- "Enforcement of the Voting Rights Act in the State of Texas," Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Committee on the Judiciary, May 3, 2019
- "Continuing Challenges to the Voting Rights Act Since *Shelby County v. Holder*," Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Committee on the Judiciary, June 25, 2019
- "Discriminatory Barriers to Voting," Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Committee on the Judiciary, September 5, 2019
- "Evidence of Current and Ongoing Voting Discrimination," Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Committee on the Judiciary, September 10, 2019
- "Congressional Authority to Protect Voting Rights After *Shelby County v. Holder*," Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Committee on the Judiciary, September 24, 2019
- "Legislative Proposals to Strengthen the Voting Rights Act," Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Committee on the Judiciary, October 17, 2019

In addition, the Judiciary Committee considered the record compiled over the course of several hearings before other committees. Specifically, the Judiciary Committee considered testimony and other evidence presented to the Subcommittee on Elections of the Committee on House Administration at hearings on voting rights and election administration in America, seven field hearings in Alabama, Arizona, Florida, Georgia, North Carolina, North Dakota, and Ohio, and a listening session in Texas, as well as to the Subcommittee on Civil Rights and Civil Liberties of the House Committee on Oversight and Reform in a hearing on protecting the right to vote.

Committee Consideration

On October 23, 2019, the Judiciary Committee met in open session and ordered the bill, H.R. 4, favorably reported as an amend-

ment in the nature of a substitute, by a rollcall vote of 19 to 6, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Judiciary Committee advises that the following rollcall votes occurred during the Judiciary Committee's consideration of H.R. 4:

1. An amendment by Mr. Johnson (LA) to add a rule of construction providing that the act and any amendment made by it that a voting rights violation shall consist only of intentional discrimination that occurs on the basis of race, color, or membership in a language minority group was defeated by a rollcall vote of 6 to 18.

Roll Call No. **Date:** 10/23/19

COMMITTEE ON THE JUDICIARY

House of Representatives

116th Congress

Amendment # 2 ( ) to Amend ANS HR 4 offered by Rep. Johnson (LA)

☐ PASSED

☑ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)		✓	
Hank Johnson (GA-04)			
Ted Deutch (FL-02)		✓	
Karen Bass (CA-37)		✓	
Cedric Richmond (LA-02)		✓	
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)			
Ted Lieu (CA-33)			
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)			
Lou Correa (CA-46)		✓	
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)			
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Debbie Mucarsel-Powell (FL-26)		✓	
Veronica Escobar (TX-16)		✓	
	AYES	NOS	PRES
Doug Collins (GA-27)			
James F. Sensenbrenner (WI-05)			
Steve Chabot (OH-01)			
Louie Gohmert (TX-01)			
Jim Jordan (OH-04)			
Ken Buck (CO-04)	✓		
John Ratcliffe (TX-04)			
Martha Roby (AL-02)	✓		
Matt Gaetz (FL-01)			
Mike Johnson (LA-04)	✓		
Andy Biggs (AZ-05)			
Tom McClintock (CA-04)			
Debbie Lesko (AZ-08)	✓		
Guy Reschenthaler (PA-14)			
Ben Cline (VA-06)	✓		
Kelly Armstrong (ND-AL)			
Greg Steube (FL-17)	✓		
	AYES	NOS	PRES.
TOTAL	6	18	

2. Motion to report H.R. 4, as amended, favorably was agreed to by a vote of 19 to 6.

Roll Call No.

Date: 10/23/19

COMMITTEE ON THE JUDICIARY

House of Representatives
116th Congress

Final Passage on H.R. 4

☑ PASSED

☐ FAILED

	AYES	NOS	PRES.	
Jerrold Nadler (NY-10)	✓			
Zoe Lofgren (CA-19)	✓			
Sheila Jackson Lee (TX-18)	✓			
Steve Cohen (TN-09)	✓			
Hank Johnson (GA-04)				
Ted Deutch (FL-02)	✓			
Karen Bass (CA-37)	✓			
Cedric Richmond (LA-02)	✓			
Hakeem Jeffries (NY-08)				
David Cicilline (RI-01)	✓			
Eric Swalwell (CA-15)				
Ted Lieu (CA-33)				
Jamie Raskin (MD-08)	✓			
Pramila Jayapal (WA-07)	✓			
Val Demings (FL-10)				
Lou Correa (CA-46)	✓			
Mary Gay Scanlon (PA-05)	✓			
Sylvia Garcia (TX-29)	✓			
Joseph Neguse (CO-02)	✓			
Lucy McBath (GA-06)	✓			
Greg Stanton (AZ-09)	✓			
Madeleine Dean (PA-04)	✓			
Debbie Mucarsel-Powell (FL-26)	✓			
Veronica Escobar (TX-16)	✓			
	AYES	NOS	PRES	
Doug Collins (GA-27)				
James F. Sensenbrenner (WI-05)				
Steve Chabot (OH-01)				
Louie Gohmert (TX-01)				
Jim Jordan (OH-04)				
Ken Buck (CO-04)		✓		
John Ratcliffe (TX-04)				
Martha Roby (AL-02)		✓		
Matt Gaetz (FL-01)				
Mike Johnson (LA-04)		✓		
Andy Biggs (AZ-05)				
Tom McClintock (CA-04)				
Debbie Lesko (AZ-08)		✓		
Guy Reschenthaler (PA-14)				
Ben Cline (VA-06)		✓		
Kelly Armstrong (ND-AL)				
Greg Steube (FL-17)		✓		
	AYES	NOS	PRES.	
TOTAL	19	6		

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Judiciary Committee advises that the findings and recommendations of the Judiciary Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures and Congressional Budget Office Cost Estimate

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Judiciary Committee has requested but not received a formal cost estimate for this bill from the Director of Congressional Budget Office. The Judiciary Committee has requested but not received from the Director of the Congressional Budget Office a formal statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

Duplication of Federal Programs

No provision of H.R. 4 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Performance Goals and Objectives

The Judiciary Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4 would amend the Voting Rights Act of 1965 to establish a new coverage formula to determine which states would be subject to the Act's preclearance requirements and also expands other existing enforcement mechanisms in the Act.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 4 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

Section–by–Section Analysis

Section 1. Short Title. Section 1 sets forth the short title of the bill as the "Voting Rights Advancement Act of 2019" ("VRAA").

Section 2. Violations Triggering Authority of Court to Retain Jurisdiction. Section 2(a) amends Section 3(c) of the Voting Rights Act of 1965 (the "VRA"). Section 3(c) of the VRA, known as the "bail-in" provision, currently allows courts to retain jurisdiction to super-

vise further voting changes in jurisdictions where the court has found violations of the Fourteenth or Fifteenth Amendments. If a jurisdiction is "bailed in," it must submit any changes to its voting procedures for approval either to a U.S. district court or to the Attorney General. Section 2(a) strikes "violations of the Fourteenth and Fifteenth amendment" and inserts "violations of the Fourteenth or Fifteenth Amendments, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group." By amending this language, Section 2(a) strengthens the "bail-in" provision by permitting courts to bail in jurisdictions where there have been violations of the VRA and other federal prohibitions against discrimination in voting, in addition to instances where there have been violations of the Fourteenth or Fifteenth Amendments.

Section 2(b) of the bill makes technical and conforming amendments to Section 3(a) of the VRA.

Section 3. Criteria for Coverage of States and Political Subdivisions. Section 3(a)(1) of the bill amends Section 4(b) of the VRA by inserting a new coverage formula intended to meet the requirements set out in *Shelby County*. Formerly, Section 4(b) provided the coverage formula for determining which jurisdictions were subject to the Section 5 preclearance requirement. The coverage formula was triggered if a state or political subdivision, as of various points in the 1960s or early 1970s, (1) employed prohibited "tests or devices" used to limit voting and (2) had fewer than 50 percent voter registration or turnout among its voting-age population. In *Shelby County*, the Court held that Section 4(b) was unconstitutional because it imposed current burdens that were no longer responsive to the current conditions in the voting districts in question.

Under the new coverage formula in Section 3(a)(1), "a State and all political subdivisions within the State" would be covered if, during the previous 25 calendar years, there were (1) 15 or more voting rights violations or (2) ten or more voting rights violations and at least one violation was committed by the state itself, rather than a political subdivision (e.g., county, town, school district). In addition, Section 3(a)(1) provides that a political subdivision would be covered if three or more voting rights violations occurred in that subdivision during the past 25 years. Section 3(a)(1) also specifies that the 25-year coverage period would be on a rolling basis to keep up with current conditions and ends 10 years after a jurisdiction is covered.

Section 3(a)(1) provides that if a state or political subdivision obtains declaratory judgment and the judgment remains in effect, coverage under preclearance shall no longer apply unless voting rights violations occur after the issuance of a declaratory judgment.

Section 3(a)(1) defines several types of events or incidents as "voting rights violations." The definition includes:

(1) a final judgment by a court that a state or political subdivision engaged in voting discrimination "on account of race, color, or membership in a language minority group, in violation of the Fourteenth or Fifteenth Amendment";

(2) a final judgment by a court that a state or political subdivision engaged in voting discrimination in violation of Sec-

tion 2 (prohibits any state or political subdivision from enacting any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," or on account of "member[ship] [in] a language minority group") or Section 203 (requires that language minorities receive voting materials, assistance, and information in the language of the applicable minority group) of the VRA;

(3) a final judgment by a court denying a state or political subdivision's lawsuit seeking to obtain preclearance (*i.e.*, a determination by a court that a proposed change in voting procedures by a covered jurisdiction cannot go forward);

(4) a denial of preclearance by the Attorney General under Section 3(c) or Section 5 (sets out transparency provisions that will make it more difficult for states and subdivisions to hide problematic voting changes before an election), which prevents a covered jurisdiction from moving forward with a proposed change in voting procedures; or

(5) a consent decree, settlement, or other agreement which results in the alteration or abandonment of a voting rights practice that had been challenged as discriminatory.

Section 3(a)(1) sets forth the timing of determinations of voting rights violations by the Attorney General and requires that the determinations are made "[a]s early as practicable during each calendar year . . . including updating the list of voting rights violations occurring in each State and political subdivision for the previous calendar year." This section also provides that the determination or certification of the Attorney General shall be effective upon publication in the Federal Register.

Section 3(a)(2) of the bill makes conforming amendments to Section 4(a) of the VRA. Section 4(a) provides the mechanism by which a covered jurisdiction can "bail out" of the preclearance requirement. Essentially, a jurisdiction must demonstrate to a court that it has not engaged in discriminatory practices and has complied with the preclearance process in the preceding 10 years.

Section 3(b) of the bill amends Section 4(a)(1) by striking "race or color," and inserting "race, color, or in contravention of the guarantees of subsection (f)(2)," which protects the voting rights of a member of a language minority.

Section 4. Determination of States and Political Subdivisions Subject to Preclearance for Covered Practices. Section 4 of the bill would add after Section 4 of the VRA a new "Section 4A" that would provide a new "practice-based preclearance" formula for known practices that would apply nationwide and cover voting law changes that have historically been used to discriminate against voters.

New Section 4A(a)(1) provides that each state and political subdivision must identify all new laws, regulations, or policies that include voting qualifications or prerequisites to voting covered by subsection (b), and ensure that no covered practice is implemented unless it has been precleared.

New Section 4A(a)(2) provides that the Attorney General, in consultation with the Director of the Bureau of Census and the heads of other governmental offices, must determine as early as possible

each calendar year the voting-age populations and characteristics of those populations, and publish a list of the states and subdivisions to which a voting-age population characteristic described in the "Covered Practices" section. Section 4 of the bill sets forth that a "determination or certification of the Attorney General under this paragraph shall be effective upon publication in the Federal Register."

New Section 4A(b) defines the following as "covered practices" and includes additional protections for Native American voters:

(1) any change to the method of election to (a) add seats elected at-large or (b) convert one or more seats elected from a single-member district to one or more at-large seats or seats from a multi-member district in a state of subdivision where "2 or more racial groups or language minority groups each represent 20 percent or more of the political subdivision's voting-age population" or "a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision";

(2) any change or series of changes within a year to the boundaries of jurisdictions that reduces by 3 or more percentage points the proportion of the jurisdiction's voting-age population that is comprised of members of a single racial group or language minority group in a state or subdivision where "2 or more racial groups or language minority groups each represent 20 percent or more of the political subdivision's voting-age population" or "a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision";

(3) any change to redistricting in a state or subdivision where any racial group or language minority group experiences a population increase over the preceding decade of at least 10,000 or 20 percent of voting-age population of the state or subdivision;

(4) any change to requirements for documentation or proof of identity to vote such that the requirements will exceed or be more stringent than those set out in Section 303(b) of the Help America Vote Act of 2002 or such requirements under state law on the day before the date of enactment of the VRAA;

(5) any change that reduces multilingual voting materials or alters the manner in which such materials are provided or distributed, where no similar reduction or alteration occurs in materials provided in English; or

(6) any change that reduces, consolidates, or relocates voting locations, including early, absentee, and election-day voting locations: (a) in 1 or more census tracts wherein 2 or more language minority groups or racial groups represent 20 percent or more of the voting-age population of the political subdivision; or (b) on Indian lands wherein at least 20 percent of the voting-age population belongs to a single language minority group.

New Section 4A(c)(1) sets forth a preclearance process for the covered practices described above. A state or political subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that the covered

practice "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." The covered practice cannot be implemented unless and until the court enters such judgment. A state or subdivision can forego pursuing the described court action and implement the covered practice if the Attorney General has not interposed an objection within 60 days. Section 4A(c)(1) provides that the Attorney General or any aggrieved citizen may file an action in a U.S. district court to compel any state or political subdivision to satisfy the preclearance requirements. The court must provide injunctive relief as a remedy unless the "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" is not a covered practice or the State or political subdivision has complied with the preclearance requirements.

New Section 4A(c)(2) provides that any covered practice defined in New Section 4A(b) that has the purpose of effect of diminishing the ability of citizens to elect their preferred candidates of choice on account of race, color, or language minority status is considered a denial or abridgement of the right to vote for purposes of this practice-based preclearance provision.

New Section 4A(c)(3) defines "purpose" as used in Section 4A to include any discriminatory purpose.

New Section 4A(d) grants authority to the Attorney General or a private party to file a civil action in federal district court to compel any state or locality to comply with this section. Such actions are to be heard before a three-judge panel. This subsection requires such a court to enjoin the challenged voting practice unless the challenged practice is not a covered practice the jurisdiction has precleared the challenged practice.

New Section 4A(e) specifies that the calculation of the population of a racial or language minority group must be carried out using the methodology outlined in regulatory guidance. That regulatory guidance governing redistricting under Section 5 of the VRA.

New Section 4A(f) provides that Census Bureau data, whether estimates or actual enumerations, cannot be subject to challenge or review in court for purposes of any determinations under this section.

New Section 4A(g) defines "multilingual voting materials" as used in this section to mean "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, provided in the language or languages of one or more language minority groups."

Section 5. Promoting Transparency to Enforce the Voting Rights Act. Section 5 adds after Section 5 of the VRA a new Section 6. New Section 6 imposes new notice and disclosure by states and political subdivisions for three voting-related matters, including: (1) late breaking voting changes involving federal elections (e.g., changes in voting standards or procedures enacted 180 days before a federal election); (2) polling resources involving federal elections (e.g., information concerning precincts/polling places, number of voting age and registered voters, voting machines, and poll workers); and (3) redistricting, reapportionment, and other changes in voting districts involving federal, state, and local elections. Section 5 of the bill also provides that public notice for each of these mat-

ters must be in a format that is accessible to voters with disabilities such as those who have low vision or who are blind.

Section 6. Authority to Assign Observers. Section 6 of the bill amends Section 8 of the VRA. Section 8 of the VRA currently allows DOJ to assign federal election observers to covered jurisdictions where the Attorney General has received "meritorious complaints" from residents, local officials, or organizations that voting violations are likely to occur, or where the Attorney General determines that assignment of observers is "otherwise necessary" to enforce the Fourteenth or Fifteenth Amendment. These observers must be authorized to enter polling places to observe whether people who are entitled to vote are being permitted to do so, and to observe the processes in which votes are tabulated. Section 6 would give the Attorney General authority to assign election observers in instances where doing so is considered necessary to enforce statutory provisions of the VRA rather than solely to enforce the Fourteenth and Fifteenth Amendments. It would also permit election observers to be assigned for the purpose of enforcing bilingual election requirements.

Section 7. Preliminary Injunctive Relief. Section 7 of the bill amends Section 12(d) of the VRA. Section 12(d) currently provides that, "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes."

Section 7 clarifies the scope and the persons who are authorized to seek injunctive relief. Section 7 strikes "section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section" and inserts "the Fourteenth or Fifteenth Amendment, this Act, or any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group." Section 7 also strikes "the Attorney General may institute for the United States, or in the name of the United States," and inserts "the aggrieved person or (in the name of the United States) the Attorney General may institute" lawsuits for injunctive relief, thereby empowering private parties to file lawsuits for injunctive relief if a state or political subdivision is about to engage in a change to voting practices that the complainant believes will violate the VRA. Furthermore, Section 7 would require the court to grant relief to the plaintiff if the court determines that the complaint has raised a "serious question" regarding the lawfulness of a change in voting practices, and if the court determines that the balance of interests and hardships favors the plaintiff. Typically, a plaintiff seeking a preliminary injunction must show that plaintiff "is likely to succeed on the merits"; the plaintiff must also typically show a likelihood of suffering "irreparable harm" absent an injunction, and must demonstrate that the overall balance of interests tilts in the plaintiff's favor. This provision would therefore bolster the ability of private parties to obtain relief in court on an expedited basis, and without having to dem-

onstrate conclusively that a change in voting procedures will violate the VRA.

Section 8. Definitions. Section 8 of the bill amends Title I of the VRA by clarifying several definitions related to the Native American voting population. The defined terms include "Indian," "Indian Lands," "Indian Tribe," "Tribal Government," and "Voting-Age Population," which are referred to in amended Section 4 of the VRA.

Section 9. Attorneys' Fees. Section 9 of the bill adds at the end of Section 14(c) of the VRA, which provides definitions for the Act's attorneys' fee provision, a definition for "prevailing party" to mean "a party to an action that receives at least some of the benefit sought by such action, states a colorable claim, and can establish that the action was a significant cause of a change to the status quo."

Section 10. Other Technical and Confirming Amendments. Section 10 of the bill makes technical and conforming amendments to Sections 3(c), 4(f), and 5 of the VRA.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 4, as reported, are shown as follows:

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

VOTING RIGHTS ACT OF 1965

* * * * * * *

TITLE I—VOTING RIGHTS

* * * * * * *

SEC. 3. (a) Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the United States Civil Service Commission [in accordance with section 6] to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that [violations of the fourteenth or fifteenth amendment] *violations of the 14th or 15th Amendment, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group,* justifying equitable relief have occurred in such State or subdivision: *Provided,* That the court need

not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) If in [any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce] *any action under any statute in which a party (including the Attorney General) seeks to enforce* the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that [violations of the fourteenth or fifteenth amendment] *violations of the 14th or 15th Amendment, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group,* justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect [at the time the proceeding was commenced] *at the time the action was commenced* shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2): *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

SEC. 4. (a)(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of [race or color,] *race, color, or in contravention of the guarantees of subsection (f)(2),* no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in [any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision of such State (as such

subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless] *any State to which this subsection applies during a calendar year pursuant to determinations made under subsection (b), or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which this subsection applies during a calendar year pursuant to determinations made with respect to such subdivision as a separate unit under subsection (b), unless* the United States District Court for the District of Columbia issues a declaratory judgment under this section. [No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section.] A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action—

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or [(in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection)] in contravention of the guarantees of subsection (f)(2);

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or [(in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection)] that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners or observers under this Act have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 5 of this

Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory—

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or [(in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection)] in contravention of the guarantees of subsection (f)(2) unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after

judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or **[**(in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection)**]** that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of title 28 of the United States Code.

[(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

[(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.**]**

[(9)**]** *(7)* Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of section 4(a)(1). Any aggrieved party may as of right intervene at any stage in such action.

[(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less

than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972. A determination or certification of the Attorney General or of the Director of the Census under this section or under section 8 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.]

(b) DETERMINATION OF STATES AND POLITICAL SUBDIVISIONS SUBJECT TO REQUIREMENTS.—

(1) EXISTENCE OF VOTING RIGHTS VIOLATIONS DURING PREVIOUS 25 YEARS.—

(A) STATEWIDE APPLICATION.—Subsection (a) applies with respect to a State and all political subdivisions within the State during a calendar year if—

(i) 15 or more voting rights violations occurred in the State during the previous 25 calendar years; or

(ii) 10 or more voting rights violations occurred in the State during the previous 25 calendar years, at least one of which was committed by the State itself (as opposed to a political subdivision within the State).

(B) APPLICATION TO SPECIFIC POLITICAL SUBDIVISIONS.—Subsection (a) applies with respect to a political subdivision as a separate unit during a calendar year if 3 or more voting rights violations occurred in the subdivision during the previous 25 calendar years.

(2) PERIOD OF APPLICATION.—

(A) IN GENERAL.—Except as provided in subparagraph (B), if, pursuant to paragraph (1), subsection (a) applies with respect to a State or political subdivision during a calendar year, subsection (a) shall apply with respect to such State or political subdivision for the period—

(i) that begins on January 1 of the year in which subsection (a) applies; and

(ii) that ends on the date which is 10 years after the date described in clause (i).

(B) NO FURTHER APPLICATION AFTER DECLARATORY JUDGMENT.—

(i) STATES.—If a State obtains a declaratory judgment under subsection (a), and the judgment remains in effect, subsection (a) shall no longer apply to such State pursuant to paragraph (1)(A) unless, after the issuance of the declaratory judgment, paragraph (1)(A) applies to the State solely on the basis of voting rights violations occurring after the issuance of the declaratory judgment.

(ii) POLITICAL SUBDIVISIONS.—If a political subdivision obtains a declaratory judgment under subsection (a), and the judgment remains in effect, subsection (a) shall no longer apply to such political subdivision pursuant to paragraph (1), including pursuant to paragraph (1)(A) (relating to the statewide application of subsection (a)), unless, after the issuance of the declaratory judgment, paragraph (1)(B) applies to the political subdivision solely on the basis of voting rights violations occurring after the issuance of the declaratory judgment.

(3) DETERMINATION OF VOTING RIGHTS VIOLATION.—For purposes of paragraph (1), a voting rights violation occurred in a State or political subdivision if any of the following applies:

(A) FINAL JUDGMENT; VIOLATION OF THE 14TH OR 15TH AMENDMENT.—In a final judgment (which has not been reversed on appeal), any court of the United States has determined that a denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group, in violation of the 14th or 15th Amendment, occurred anywhere within the State or subdivision.

(B) FINAL JUDGMENT; VIOLATIONS OF THIS ACT.—In a final judgment (which has not been reversed on appeal), any court of the United States has determined that a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting was imposed or applied or would have been imposed or applied anywhere within the State or subdivision in a manner that resulted or would have resulted in a denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group, in violation of subsection (e) or (f), or section 2 or 203 of this Act.

(C) FINAL JUDGMENT; DENIAL OF DECLARATORY JUDGMENT.—In a final judgment (which has not been reversed on appeal), any court of the United States has denied the request of the State or subdivision for a declaratory judgment under section 3(c) or section 5, and thereby prevented a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting from being enforced anywhere within the State or subdivision.

(D) OBJECTION BY THE ATTORNEY GENERAL.—The Attorney General has interposed an objection under section 3(c) or section 5 (and the objection has not been overturned by a final judgment of a court or withdrawn by the Attorney General), and thereby prevented a voting qualification or prerequisite to voting or standard, practice, or procedure

with respect to voting from being enforced anywhere within the State or subdivision.

(E) CONSENT DECREE, SETTLEMENT, OR OTHER AGREEMENT.—A consent decree, settlement, or other agreement was entered into, which resulted in the alteration or abandonment of a voting practice anywhere in the territory of such State that was challenged on the ground that the practice denied or abridged the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group in violation of subsection (e) or (f), or section 2 or 203 of this Act, or the 14th or 15th Amendment.

(4) TIMING OF DETERMINATIONS.—

(A) DETERMINATIONS OF VOTING RIGHTS VIOLATIONS.—As early as practicable during each calendar year, the Attorney General shall make the determinations required by this subsection, including updating the list of voting rights violations occurring in each State and political subdivision for the previous calendar year.

(B) EFFECTIVE UPON PUBLICATION IN FEDERAL REGISTER.—A determination or certification of the Attorney General under this section or under section 8 or 13 shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equiva-

lent level of education in a public school in, or a private school accredited by, any State of territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. [Such minority citizens are from environments in which the dominant language is other than English.] In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

[(3) In addition to the meaning given the term under section 4(c), the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to section 4(b), the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

[(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of section 4(a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided,* That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.]

SEC. 4A. DETERMINATION OF STATES AND POLITICAL SUBDIVISIONS SUBJECT TO PRECLEARANCE FOR COVERED PRACTICES.

(a) PRACTICE-BASED PRECLEARANCE.—

(1) IN GENERAL.—Each State and each political subdivision shall—

(A) identify any newly enacted or adopted law, regulation, or policy that includes a voting qualification or pre-

requisite to voting, or a standard, practice, or procedure with respect to voting, that is a covered practice described in subsection (b); and

(B) ensure that no such covered practice is implemented unless or until the State or political subdivision, as the case may be, complies with subsection (c).

(2) DETERMINATIONS OF CHARACTERISTICS OF VOTING-AGE POPULATION.—

(A) IN GENERAL.—As early as practicable during each calendar year, the Attorney General, in consultation with the Director of the Bureau of the Census and the heads of other relevant offices of the government, shall make the determinations required by this section regarding voting-age populations and the characteristics of such populations, and shall publish a list of the States and political subdivisions to which a voting-age population characteristic described in subsection (b) applies.

(B) PUBLICATION IN THE FEDERAL REGISTER.—A determination or certification of the Attorney General under this paragraph shall be effective upon publication in the Federal Register.

(b) COVERED PRACTICES.—To assure that the right of citizens of the United States to vote is not denied or abridged on account of race, color, or membership in a language minority group as a result of the implementation of certain qualifications or prerequisites to voting, or standards, practices, or procedures with respect to voting newly adopted in a State or political subdivision, the following shall be covered practices subject to the requirements described in subsection (a):

(1) CHANGES TO METHOD OF ELECTION.—Any change to the method of election—

(A) to add seats elected at-large in a State or political subdivision where—

(i) 2 or more racial groups or language minority groups each represent 20 percent or more of the political subdivision's voting-age population; or

(ii) a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision; or

(B) to convert one or more seats elected from a single-member district to one or more at-large seats or seats from a multi-member district in a State or political subdivision where—

(i) 2 or more racial groups or language minority groups each represent 20 percent or more of the political subdivision's voting-age population; or

(ii) a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision.

(2) CHANGES TO JURISDICTION BOUNDARIES.—Any change or series of changes within a year to the boundaries of a jurisdiction that reduces by 3 or more percentage points the proportion of the jurisdiction's voting-age population that is comprised of

members of a single racial group or language minority group in a State or political subdivision where—

(A) 2 or more racial groups or language minority groups each represent 20 percent or more of the political subdivision's voting-age population; or

(B) a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision.

(3) CHANGES THROUGH REDISTRICTING.—Any change to the boundaries of election districts in a State or political subdivision where any racial group or language minority group experiences a population increase, over the preceding decade (as calculated by the Bureau of the Census under the most recent decennial census), of at least—

(A) 10,000; or

(B) 20 percent of voting-age population of the State or political subdivision, as the case may be.

(4) CHANGES IN DOCUMENTATION OR QUALIFICATIONS TO VOTE.—Any change to requirements for documentation or proof of identity to vote such that the requirements will exceed or be more stringent than the requirements for voting that are described in section 303(b) of the Help America Vote Act of 2002 (52 U.S.C. 21083(b)) or any change to the requirements for documentation or proof of identity to register to vote that will exceed or be more stringent than such requirements under State law on the day before the date of enactment of the Voting Rights Advancement Act of 2019.

(5) CHANGES TO MULTILINGUAL VOTING MATERIALS.—Any change that reduces multilingual voting materials or alters the manner in which such materials are provided or distributed, where no similar reduction or alteration occurs in materials provided in English for such election.

(6) CHANGES THAT REDUCE, CONSOLIDATE, OR RELOCATE VOTING LOCATIONS.—Any change that reduces, consolidates, or relocates voting locations, including early, absentee, and election-day voting locations—

(A) in 1 or more census tracts wherein 2 or more language minority groups or racial groups each represent 20 percent or more of the voting-age population of the political subdivision; or

(B) on Indian lands wherein at least 20 percent of the voting-age population belongs to a single language minority group.

(c) PRECLEARANCE.—

(1) IN GENERAL.—Whenever a State or political subdivision with respect to which the requirements set forth in subsection (a) are in effect shall enact, adopt, or seek to implement any covered practice described under subsection (b), such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such covered practice neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, and unless and until the court enters such judgment such covered practice shall not be implemented. Notwith-

standing the previous sentence, such covered practice may be implemented without such proceeding if the covered practice has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within 60 days after such submission, or upon good cause shown, to facilitate an expedited approval within 60 days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin implementation of such covered practice. In the event the Attorney General affirmatively indicates that no objection will be made within the 60-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to the Attorney General's attention during the remainder of the 60-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court.

(2) DENYING OR ABRIDGING THE RIGHT TO VOTE.—Any covered practice described in subsection (b) that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race, color, or membership in a language minority group, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of paragraph (1) of this subsection.

(3) PURPOSE DEFINED.—The term "purpose" in paragraphs (1) and (2) of this subsection shall include any discriminatory purpose.

(4) PURPOSE OF PARAGRAPH (2).—The purpose of paragraph (2) of this subsection is to protect the ability of such citizens to elect their preferred candidates of choice.

(d) ENFORCEMENT.—The Attorney General or any aggrieved citizen may file an action in a Federal district court to compel any State or political subdivision to satisfy the obligations set forth in this section. Such actions shall be heard and determined by a court of 3 judges under section 2284 of title 28, United States Code. In any such action, the court shall provide as a remedy that any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting, that is the subject of the action under this subsection be enjoined unless the court determines that—

(1) the voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting, is not a covered practice described in subsection (b); or

(2) the State or political subdivision has complied with subsection (c) with respect to the covered practice at issue.

(e) COUNTING OF RACIAL GROUPS AND LANGUAGE MINORITY GROUPS.—For purposes of this section, the calculation of the population of a racial group or a language minority group shall be carried out using the methodology in the guidance promulgated in the Federal Register on February 9, 2011 (76 Fed. Reg. 7470).

(f) SPECIAL RULE.—For purposes of determinations under this section, any data provided by the Bureau of the Census, whether based on estimation from sample or actual enumeration, shall not be subject to challenge or review in any court.

(g) MULTILINGUAL VOTING MATERIALS.—In this section, the term "multilingual voting materials" means registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, provided in the language or languages of one or more language minority groups.

SEC. 5. (a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [based upon determinations made under the first sentence of section 4(b) are in effect] *are in effect during a calendar year* shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on [November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972] *the applicable date of coverage*, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his atten-

tion during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

(e) The term "applicable date of coverage" means, with respect to a State or political subdivision—

(1) June 25, 2013, if the most recent determination for such State or subdivision under section 4(b) was made on or before December 31, 2019; or

(2) the date on which the most recent determination for such State or subdivision under section 4(b) was made, if such determination was made after December 31, 2019.

SEC. 6. TRANSPARENCY REGARDING CHANGES TO PROTECT VOTING RIGHTS.

(a) NOTICE OF ENACTED CHANGES.—

(1) NOTICE OF CHANGES.—If a State or political subdivision makes any change in any prerequisite to voting or standard, practice, or procedure with respect to voting in any election for Federal office that will result in the prerequisite, standard, practice, or procedure being different from that which was in effect as of 180 days before the date of the election for Federal office, the State or political subdivision shall provide reasonable public notice in such State or political subdivision and on the Internet, of a concise description of the change, including the difference between the changed prerequisite, standard, practice, or procedure and the prerequisite, standard, practice, or procedure which was previously in effect. The public notice described in this paragraph, in such State or political subdivision and on the Internet, shall be in a format that is reasonably convenient and accessible to voters with disabilities, including voters who have low vision or are blind.

(2) DEADLINE FOR NOTICE.—A State or political subdivision shall provide the public notice required under paragraph (1) not later than 48 hours after making the change involved.

(b) TRANSPARENCY REGARDING POLLING PLACE RESOURCES.—

(1) IN GENERAL.—In order to identify any changes that may impact the right to vote of any person, prior to the 30th day before the date of an election for Federal office, each State or political subdivision with responsibility for allocating registered voters, voting machines, and official poll workers to particular precincts and polling places shall provide reasonable public notice in such State or political subdivision and on the Internet,

of the information described in paragraph (2) for precincts and polling places within such State or political subdivision. The public notice described in this paragraph, in such State or political subdivision and on the Internet, shall be in a format that is reasonably convenient and accessible to voters with disabilities including voters who have low vision or are blind.

(2) INFORMATION DESCRIBED.—The information described in this paragraph with respect to a precinct or polling place is each of the following:

(A) The name or number.

(B) In the case of a polling place, the location, including the street address, and whether such polling place is accessible to persons with disabilities.

(C) The voting-age population of the area served by the precinct or polling place, broken down by demographic group if such breakdown is reasonably available to such State or political subdivision.

(D) The number of registered voters assigned to the precinct or polling place, broken down by demographic group if such breakdown is reasonably available to such State or political subdivision.

(E) The number of voting machines assigned, including the number of voting machines accessible to voters with disabilities, including voters who have low vision or are blind.

(F) The number of official paid poll workers assigned.

(G) The number of official volunteer poll workers assigned.

(H) In the case of a polling place, the dates and hours of operation.

(3) UPDATES IN INFORMATION REPORTED.—If a State or political subdivision makes any change in any of the information described in paragraph (2), the State or political subdivision shall provide reasonable public notice in such State or political subdivision and on the Internet, of the change in the information not later than 48 hours after the change occurs or, if the change occurs fewer than 48 hours before the date of the election for Federal office, as soon as practicable after the change occurs. The public notice described in this paragraph in such State or political subdivision and on the Internet shall be in a format that is reasonably convenient and accessible to voters with disabilities including voters who have low vision or are blind.

(c) TRANSPARENCY OF CHANGES RELATING TO DEMOGRAPHICS AND ELECTORAL DISTRICTS.—

(1) REQUIRING PUBLIC NOTICE OF CHANGES.—Not later than 10 days after making any change in the constituency that will participate in an election for Federal, State, or local office or the boundaries of a voting unit or electoral district in an election for Federal, State, or local office (including through redistricting, reapportionment, changing from at-large elections to district-based elections, or changing from district-based elections to at-large elections), a State or political subdivision shall provide reasonable public notice in such State or political subdivision and on the Internet, of the demographic and electoral

data described in paragraph (3) for each of the geographic areas described in paragraph (2).

(2) GEOGRAPHIC AREAS DESCRIBED.—The geographic areas described in this paragraph are as follows:

(A) The State as a whole, if the change applies statewide, or the political subdivision as a whole, if the change applies across the entire political subdivision.

(B) If the change includes a plan to replace or eliminate voting units or electoral districts, each voting unit or electoral district that will be replaced or eliminated.

(C) If the change includes a plan to establish new voting units or electoral districts, each such new voting unit or electoral district.

(3) DEMOGRAPHIC AND ELECTORAL DATA.—The demographic and electoral data described in this paragraph with respect to a geographic area described in paragraph (2) are each of the following:

(A) The voting-age population, broken down by demographic group.

(B) If it is reasonably available to the State or political subdivision involved, an estimate of the population of the area which consists of citizens of the United States who are 18 years of age or older, broken down by demographic group.

(C) The number of registered voters, broken down by demographic group if such breakdown is reasonably available to the State or political subdivision involved.

(D)(i) If the change applies to a State, the actual number of votes, or (if it is not reasonably practicable for the State to ascertain the actual number of votes) the estimated number of votes received by each candidate in each statewide election held during the 5-year period which ends on the date the change involved is made; and

(ii) if the change applies to only one political subdivision, the actual number of votes, or (if it is not reasonably practicable for the political subdivision to ascertain the actual number of votes) in each subdivision-wide election held during the 5-year period which ends on the date the change involved is made.

(4) VOLUNTARY COMPLIANCE BY SMALLER JURISDICTIONS.—Compliance with this subsection shall be voluntary for a political subdivision of a State unless the subdivision is one of the following:

(A) A county or parish.

(B) A municipality with a population greater than 10,000, as determined by the Bureau of the Census under the most recent decennial census.

(C) A school district with a population greater than 10,000, as determined by the Bureau of the Census under the most recent decennial census. For purposes of this subparagraph, the term "school district" means the geographic area under the jurisdiction of a local educational agency (as defined in section 9101 of the Elementary and Secondary Education Act of 1965).

(d) RULES REGARDING FORMAT OF INFORMATION.—The Attorney General may issue rules specifying a reasonably convenient and accessible format that States and political subdivisions shall use to provide public notice of information under this section.

(e) NO DENIAL OF RIGHT TO VOTE.—The right to vote of any person shall not be denied or abridged because the person failed to comply with any change made by a State or political subdivision to a voting qualification, standard, practice, or procedure if the State or political subdivision involved did not meet the applicable requirements of this section with respect to the change.

(f) DEFINITIONS.—In this section—

(1) the term "demographic group" means each group which section 2 protects from the denial or abridgement of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2);

(2) the term "election for Federal office" means any general, special, primary, or runoff election held solely or in part for the purpose of electing any candidate for the office of President, Vice President, Presidential elector, Senator, Member of the House of Representatives, or Delegate or Resident Commissioner to the Congress; and

(3) the term "persons with disabilities", means individuals with a disability, as defined in section 3 of the Americans with Disabilities Act of 1990.

SEC. 8. (a) Whenever—

(1) a court has authorized the appointment of observers under section 3(a) for a political subdivision; [or]

(2) the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b), unless a declaratory judgment has been rendered under section 4(a), that—

(A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) are likely to occur; or

[(B) in the Attorney General's judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to the Attorney General to be reasonably attributable to violations of the 14th or 15th amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the 14th or 15th amendment), the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment;]

(B) in the Attorney General's judgment, the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th Amendment or any provision of this Act or any other Federal law protecting the right of citizens of the United States to vote; or

(3) the Attorney General certifies with respect to a political subdivision that—

(A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to violate section 203 are likely to occur; or

(B) in the Attorney General's judgment, the assignment of observers is necessary to enforce the guarantees of section 203;

the Director of the Office of Personnel Management shall assign as many observers for such subdivision as the Director may deem appropriate.

(b) Except as provided in subsection (c), such observers shall be assigned, compensated, and separated without regard to the provisions of any statute administered by the Director of the Office of Personnel Management, and their service under this Act shall not be considered employment for the purposes of any statute administered by the Director of the Office of Personnel Management, except the provisions of section 7324 of title 5, United States Code, prohibiting partisan political activity.

(c) The Director of the Office of Personnel Management is authorized to, after consulting the head of the appropriate department or agency, designate suitable persons in the official service of the United States, with their consent, to serve in these positions.

(d) Observers shall be authorized to—

(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and

(2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.

(e) Observers shall investigate and report to the Attorney General, and if the appointment of observers has been authorized pursuant to section 3(a), to the court.

* * * * * * *

SEC. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, or 10 or shall violate section 11(a), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Whoever, within a year following an election in a political subdivision in which an observer has been assigned (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 10, or 11(a) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

[(d) Whenever any person] *(d)(1) Whenever any person* has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by [section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section] *the 14th or 15th Amendment, this Act, or any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in*

a language minority group, [the Attorney General may institute for the United States, or in the name of the United States,] *the aggrieved person or (in the name of the United States) the Attorney General may institute* an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them [(1)] *(A)* [to permit] *to permit* persons listed under this Act to vote and [(2)] *(B)* [to count] *to count* such votes.

(2)(A) In any action for preliminary relief described in this subsection, the court shall grant the relief if the court determines that the complainant has raised a serious question whether the challenged voting qualification or prerequisite to voting or standard, practice, or procedure violates this Act or the Constitution and, on balance, the hardship imposed upon the defendant by the grant of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted. In balancing the harms, the court shall give due weight to the fundamental right to cast an effective ballot.

(B) In making its determination under this paragraph with respect to a change in any voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting, the court shall consider all relevant factors and give due weight to the following factors, if they are present:

(i) Whether the qualification, prerequisite, standard, practice, or procedure in effect prior to the change was adopted as a remedy for a Federal court judgment, consent decree, or admission regarding—

(I) discrimination on the basis of race or color in violation of the 14th or 15th Amendment;

(II) a violation of this Act; or

(III) voting discrimination on the basis of race, color, or membership in a language minority group in violation of any other Federal or State law.

(ii) Whether the qualification, prerequisite, standard, practice, or procedure in effect prior to the change served as a ground for the dismissal or settlement of a claim alleging—

(I) discrimination on the basis of race or color in violation of the 14th or 15th Amendment;

(II) a violation of this Act; or

(III) voting discrimination on the basis of race, color, or membership in a language minority group in violation of any other Federal or State law.

(iii) Whether the change was adopted fewer than 180 days before the date of the election with respect to which the change is to take effect.

(iv) Whether the defendant has failed to provide timely or complete notice of the adoption of the change as required by applicable Federal or State law.

(3) A jurisdiction's inability to enforce its voting or election laws, regulations, policies, or redistricting plans, standing alone, shall not be deemed to constitute irreparable harm to the public interest or to the interests of a defendant in an action arising under the U.S. Constitution or any Federal law that prohibits discrimination on the basis of race, color, or membership in a language minority

group in the voting process, for the purposes of determining whether a stay of a court's order or an interlocutory appeal under section 1253 of title 28, United States Code, is warranted. A jurisdiction's inability to enforce its voting or election laws, regulations, policies, or redistricting plans, standing alone, shall not be deemed to constitute irreparable harm to the public interest or to the interests of a defendant in an action arising under the U.S. Constitution or any Federal law that prohibits discrimination on the basis of race, color, or membership in a language minority group in the voting process, for the purposes of determining whether a stay of a court's order or an interlocutory appeal under section 1253 of title 28, United States Code, is warranted.

(e) Whenever in any political subdivision in which there are observers appointed pursuant to this Act any persons allege to such an observer within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the observer shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

* * * * * * *

SEC. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995).

(b) No court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such a ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include

any other subdivision of a State which conducts registration for voting.

(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

(4) The term "prevailing party" means a party to an action that receives at least some of the benefit sought by such action, states a colorable claim, and can establish that the action was a significant cause of a change to the status quo.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided,* That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e) In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.

* * * * * * *

SEC. 21. DEFINITIONS.

In this Act:

(1) INDIAN.—The term "Indian" has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act.

(2) INDIAN LANDS.—The term "Indian lands" means—

(A) any Indian country of an Indian tribe, as such term is defined in section 1151 of title 18, United States Code;

(B) any land in Alaska that is owned, pursuant to the Alaska Native Claims Settlement Act, by an Indian tribe that is a Native village (as such term is defined in section 3 of such Act), or by a Village Corporation that is associated with the Indian tribe (as such term is defined in section 3 of such Act);

(C) any land on which the seat of government of the Indian tribe is located; and

(D) any land that is part or all of a tribal designated statistical area associated with the Indian tribe, or is part or all of an Alaska Native village statistical area associated with the tribe, as defined by the Bureau of the Census for the purposes of the most recent decennial census.

(3) INDIAN TRIBE.—The term "Indian tribe" or "tribe" has the meaning given the term "Indian tribe" in section 4 of the Indian Self-Determination and Education Assistance Act.

(4) TRIBAL GOVERNMENT.—The term "Tribal Government" means the recognized governing body of an Indian Tribe.

(5) VOTING-AGE POPULATION.—The term "voting-age population" means the numerical size of the population within a State, within a political subdivision, or within a political subdivision that contains Indian lands, as the case may be, that

consists of persons age 18 or older, as calculated by the Bureau of the Census under the most recent decennial census.

* * * * * * *

Dissenting Views

Title VII of the Civil Rights Act of 1964 was designed to protect individuals from intentional employment discrimination on the basis of race, color, religion, sex, or national origin.[1] The Senate floor managers of Title VII, Senators Clifford Case (R–NJ) and Joseph Clark (D–PA), made clear that Title VII only prohibited intentional discrimination and did not require statistical parity based on race, religion, or national origin. In their exhaustive memorandum distributed prior to Senate debate on the bill, the senators wrote, "[t]here is no requirement in Title VII that an employer maintain a racial balance in his work force." This interpretation was reiterated by Senator Hubert Humphrey (D–MN), who said, "[i]f [a] Senator can find in Title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there."

Over time, however, Title VII's prohibition of disparate treatment also came to cover employers' actions that resulted in a disparate impact on covered groups, even if those actions were the result of facially neutral policies which were applied without any intent to discriminate. Alfred W. Blumrosen, the Equal Employment Opportunity Commission's first Chief of Compliance, employed "[c]reative administration" to draft regulations which would be interpreted under Title VII "liberally."[2]

Under such regulations, Title VII would come to be interpreted to ban not just intentional discrimination but also practices that disproportionately and adversely affected the numerical representation of a covered group, even if such a practice was neutral by its terms and motivated by no ill will. The Supreme Court ultimately approved claims based on disparate impact in the 1971 case of *Griggs v. Duke Power Co.*[3]

The result of this legal shift is that much discussion of civil rights has shifted into a numbers game that has nothing to do with discriminatory treatment based on race. To show how this numbers game works, take the example of the Department of Justice's *letter* declining to "preclear" South Carolina's voter ID law in 2011.[4] The Department claimed in the letter that "minority registered voters were nearly 20% more likely to . . . be effectively disenfranchised" by the law because they lacked a driver's license. But the difference

---

[1] Title VII: Unlawful Employment Practices, Civil Rights Act of 1964 42 U.S.C. § 2000e–2, *available at https://www.law.cornell.edu/uscode/text/42/2000e-2*.

[2] *See* Alfred W. Blumrosen, *Black Employment and the Law* 53 (1971) (stating that "[c]reative administration converted a powerless agency operating under an apparently weak statute into a major force for the elimination of employment discrimination"); *id*. at 58 (stating that "[t]he objective was to maximize the effect of the statute [Title VII] on employment discrimination without going back to the Congress for more substantive legislation"). Blumrosen later admitted that such regulations did not "flow from any clear congressional grant of authority." Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 95 (1972).

[3] 401 U.S. 424 (1971).

[4] Letter from the Office of the Assistant Attorney General to C. Havird Jones, Jr., Esq., Assistant Deputy Attorney General, *available at https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l*_111223.pdf.

between white and African-American holders of a driver's license was only 1.6 percent. The Justice Department used the 20% figure because, while the state's data showed that 8.4% of white registered voters lacked any form of DMV-issued ID, as compared to 10.0% of non-white registered voters, the number 10 is 20% larger than the number 8.4. It's true mathematically that 10 is 20% larger (actually, 19%—the Justice Department rounded up) than 8.4, but it clearly distorts the reported difference in driver's license rates, and it was used to declare the South Carolina law discriminatory.

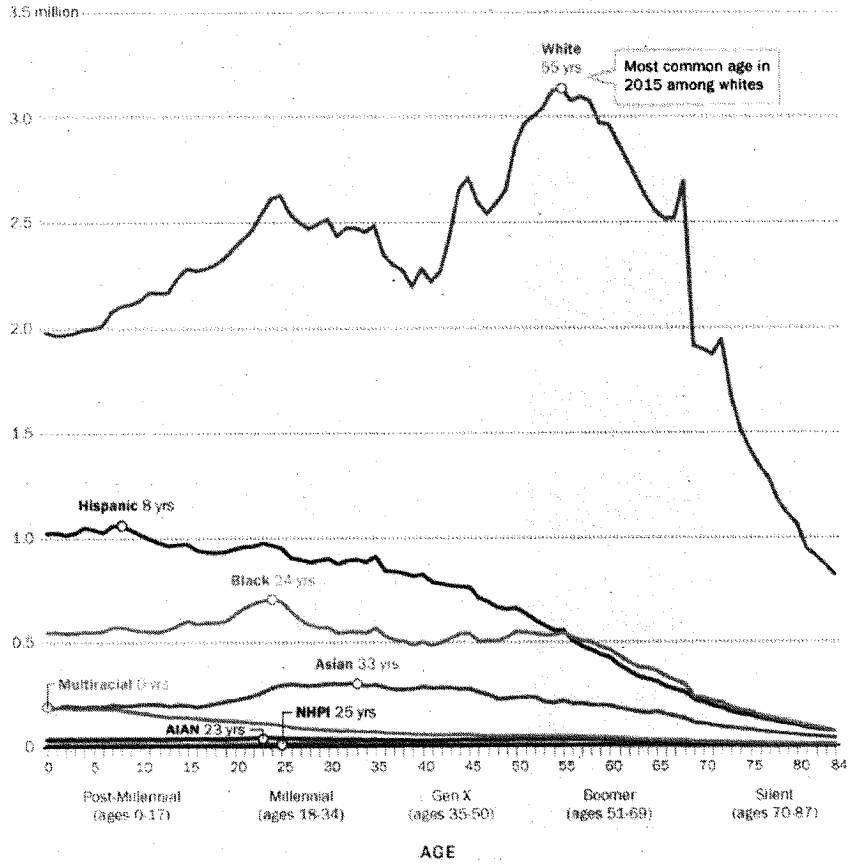
There are thousands of potential explanations for differences in outcomes among demographic groups. To just take just one example, as a group, the data indicates whites have a *higher median age* than other minority demographics, and due to those higher age rates they will generally have more accumulated resources and work experience, which will lead to some differences in general outcomes.[5]

[5] *Most Common Age in U.S., by Race and Ethnicity*, PEW RESEARCH CENTER (July 6, 2016), *available at https://www.pewresearch.org/fact-tank/2019/07/30/most-common-age-among-us-racial-ethnic-groups/ft*_16-06-23_raceage3-2/.

Most common age in U.S., by race and ethnicity

In U.S., most common age for whites is much older than for minorities

Number of people of each age by race/ethnicity, 2015



Going back to the South Carolina voting law example, *data shows* that younger people of all races tend to be the least likely to have driver's licenses.[6] Consequently, if African Americans have proportionately more young people in their demographic group, there will naturally be a disproportionate number of people in that demographic group without driver's licenses.

[6] Vanessa M. Perez, Ph.D., *Americans With Photo ID: A Breakdown of Demographic Characteristics*, PROJECT VOTE (Feb. 2015), available at *http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf*.

Table 8: Black Individuals with Driver's License or Passport by Age Group

AGE GROUP	PERCENTAGE OF BLACK POPULATION	DRIVER'S LICENSE OR PASSPORT	NEITHER	REFUSED/ DON'T KNOW
17-20	8%	64%	36%	0%
21-24	8%	59%	41%	0%
25-29	10%	64%	36%	0%
30-34	8%	79%	21%	0%
35-39	7%	75%	25%	0%
40-44	10%	86%	14%	0%
45-49	6%	68%	32%	0%
50-54	12%	74%	23%	3%
55-59	10%	71%	29%	1%
60-64	7%	77%	23%	0%
65-69	5%	85%	15%	0%
70-74	4%	67%	33%	0%
75+	2%	81%	19%	0%
Age missing	1%	75%	25%	0%
Total	**100%**	**73%**	**27%**	**0%**

Table 8 shows the rates of government-issued identification for Blacks broken down by age group.

It shows that the youngest individuals are least likely to have identification (those younger than 25). But rates are also low for other age groups, particularly for those 25 to 29, and 70 to 74.

Table 6: White Individuals with Driver's License or Passport by Age Group

AGE GROUP	PERCENTAGE OF WHITE POPULATION	DRIVER'S LICENSE OR PASSPORT	NEITHER	REFUSED/ DON'T KNOW
17-20	3%	80%	20%	0%
21-24	6%	90%	10%	0%
25-29	9%	88%	11%	1%
30-34	7%	90%	10%	0%
35-39	7%	89%	10%	1%
40-44	9%	95%	5%	1%
45-49	7%	92%	8%	0%
50-54	10%	90%	9%	1%
55-59	11%	93%	6%	1%
60-64	9%	95%	5%	0%
65-69	8%	92%	7%	0%
70-74	6%	93%	7%	0%
75+	7%	88%	11%	1%
Age missing	1%	96%	4%	0%
Total	**100%**	**91%**	**8%**	**0%**

Table 6 shows that among Whites, the lowest rate of identification are among people younger than 20 years of age, for those between the ages of 25 to 29, and for the elderly 75 and older.

(Further, researchers including one at Harvard Business School *found that* "U.S. states increasingly require identification to vote . . . Using a difference-in-differences design on a 1.3-billion-observations panel, we find the laws have no negative effect on registration or turnout, overall or for any group defined by race, gender, age, or party affiliation. These results hold through a large number of specifications and cannot be attributed to mobilization against the laws, measured by campaign contributions and self-reported political engagement.")[7]

The disparate impact approach to civil rights—and the assumption that different outcomes are the result of discrimination—is fundamentally unsound for the same reason social scientists are trained that "correlation does not imply causation." In other words, there can be all sorts of correlations between one event and another, but that doesn't answer the question as to why that correlation exists.

Similarly, the idea that a certain neutral policy is associated with disparate impacts on certain covered classes of people doesn't imply the disparate result was caused by discrimination (or anything else in particular). Yet often, discrimination is often assumed as the cause of disparate impacts, and, even worse, it is often selectively assumed as the cause in ways that ignore the influence of culture, for political purposes.

History of the Voting Rights Act and H.R. 4 Concerns

The Supreme Court struck down the decades-old formula (Section 4 of the Voting Rights Act of 1964) that Congress originally crafted to determine which states or localities would have to get their election law changes pre-approved by the Justice Department (a process called "preclearance"). What the Supreme Court left in place, however, was Section 3 of the Voting Rights Act, which authorizes federal courts to impose preclearance requirements on states and localities that have enacted intentionally discriminatory voting procedures in violation of the Fourteenth and Fifteenth Amendments. If a state or locality is found by the federal court to have discriminated in voting, then the court has discretion to re-

[7] Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence From a U.S. Nationwide Panel, 2008-2016*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Feb. 2019), *available at https://www.nber.org/papers/w25522.pdf.*

tain supervisory jurisdiction and impose preclearance requirements on the state or locality until a future date at the court's discretion. The Supreme Court also left in place Section 2 of the Voting Rights Act, which applies nationwide and allows claimants to sue any jurisdiction for a violation of voting rights.

Currently, Section 3 allows a federal court to place a jurisdiction under a preclearance regime if it has demonstrated "violations of the Fourteenth or Fifteenth Amendment" that involve intentional discrimination. H.R. 4, however, adds that a federal court could place a jurisdiction under a preclearance regime if it has demonstrated "violations of this Act; or violations of any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group," including those that allow "disparate impact" claims.

Another part of H.R. 4 creates a system in which states and localities can be placed under a Department of Justice preclearance regime if the Attorney General determines that a given number of "violations of any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group" have occurred. Under the bill, states would be covered under a preclearance regime for 10 years if the Attorney General determines 10 or more violations occurred in the state over the previous 25 years, only one of which would have to be committed by the state itself as opposed to a locality. Any violation, no matter how insignificant in context, could count as one of the "strikes" against a state or locality. Under the bill, as it would interact with other current voting rights laws and the relevant case law, the covered violations could include violations based not on any evidence of actual discrimination, but on statistical showings that, for example, moving a polling station from one block to another a few blocks away had a statistically disparate impact on minority voters because, say, 2% more minority voters than non-minority voters would have to walk further to get there. (See also the example of the South Carolina law described previously, in which the Justice Department declared the law discriminatory because 1.6% more African-Americans than whites were affected adversely by a lack of a driver's license.)

Outside groups have compiled a submission of evidence to demonstrate the need to amend the Voting Rights Act. The list of examples overwhelmingly includes Department of Justice objections to state and local voting rules changes under Section 5 of the Voting Rights Act, Section 2 cases, and cases in which a jurisdiction may have stopped defending the case after the district court level. Department of Justice Section 5 objections are just that, and not official determinations by a court of ultimate jurisdiction that a state or locality actually did something illegal under any of the currently valid other portions of the Voting Rights Act that apply nationwide. Section 2 cases can continue to be brought today, so such cases don't demonstrate the need to amend the Voting Rights Act. And cases in which a jurisdiction may have stopped defending the case after the district court level may simply indicate the jurisdiction couldn't afford to continue appealing the case up to a higher court, where the jurisdiction may ultimately have won if it could have afforded to.

The power given to the Attorney General under H.R. 4 is striking. The bill provides that a violation of a voting rights law has been committed as long as no appeals court has overturned a lower court's determination. The way the process oftentimes works in practice is that the Department of Justice uses its vast resources to effectively coerce localities into settling voting rights violation claims, or abandoning their defenses of their voting rules prior to exhausting their appeals. Faced with the prospect of spending potentially hundreds of thousands of dollars to successfully litigate a case to final victory, many localities simply fold and agree to admit to a violation, or to stop defending themselves, just to avoid the costly litigation (which nearly always includes massive requests for the production of documents from the localities). Even states find these cases enormously expensive, not only because of the document production they involve, but because of the expert witnesses who must be tasked with parsing all manner of statistics alleged to prove one statistically disparate impact or other. Whenever a state or locality is pressured into settling a case, or if they cannot afford to appeal a lower court decision, that would count as a "final judgment" under the bill and count as a strike against them counting toward coverage.

This dynamic of the Justice Department's coercing settlements threatens to increasingly politicize the process under the bill. For example, under the proposal the Justice Department could flood states and localities with voting rights violation claims just to see which ones enter into settlements or stop defending themselves. Then, the Justice Department could look to see which states come closest to the "ten strikes" threshold under the bill and focus their resources on getting "over the top" within the 25-year time frame.

One need only look to a previous hearing on this issue to know that H.R. 4 creates a system in which voting laws will be politicized at the Department of Justice. In *Davis v. Guam*, the Ninth Circuit Court of Appeals considered Guam's decision to restrict voting on a certain plebiscite to "Native Inhabitants of Guam," thereby excluding from the right to vote anyone who wasn't a "Native Inhabitant of Guam." [8]

That shockingly discriminatory voter registration form is pictured here:

[8] Opinion, *Davis v. Guam*, No. 17–15719, D.C. No. 1:11–cv–00035 (9th Cir. July 29, 2019), *available at http://cdn.ca9.uscourts.gov/datastore/opinions/2019/07/29/17-15719.pdf.*

GUAM DECOLONIZATION REGISTRY
APPLICATION FOR REGISTRATION
AND CERTIFICATION OF VOTER ELIGIBILITY
Guam Election Commission, P.O. Box BG, Hagatna, Guam 96932
Suite 200, 414 West Soledad Avenue, Hagatna, Guam 96910
Tel: (671) 477-9791/2/3 Fax: (671) 477-1895

Title 3 Guam Code Annotated, Sec. 21009, as added by Public Law 25-106. Unlawful Registration a Crime. Any person who willfully causes, procures or allows that person, or any person, to be registered with the Guam Decolonization Registry, while knowing that the person, or other person, is not entitled to register with the Guam Decolonization Registry, shall be guilty of perjury as a misdemeanor. The Guam Decolonization Registry shall have such false affidavit of registration automatically stricken from the Registry.

PART I - APPLICATION FOR REGISTRATION

NAME Davis (Last) Arnold (First) E (Middle Name) (Family Name)

Mailing Address P.O. Box 4261 (Residence)
AAFB Yigo 96929

I.D.# 122807974 Date of Birth: 7/15/36 Date of Guam (If Applicable) Male Female (Circle One)

CERTIFICATION

I ARNOLD E. DAVIS hereby certify that I am a Native Inhabitant of Guam which is defined as a person who became a U.S. Citizen by virtue of the authority and enactment of the 1950 Organic Act of Guam, or a descendant thereof.

Subscribed and sworn to before me on: I hereby certify under penalty of perjury pursuant to the laws of Guam, that the information provided is true to the best of my knowledge.

Officer authorized to take oaths Signature of Applicant, Legal Guardian, or Registrant 3/4/09 Date

Legal Guardian Relationship with Minor / Registrant:

PART II - CERTIFICATION OF VOTER ELIGIBILITY

CERTIFICATION

I _____ hereby certify that I will be eighteen (18) years of age or older on the date of the Political Status Plebiscite Election, a registered voter in Guam, and that I am a Native Inhabitant of Guam which is defined as a person who became a U.S. Citizen by virtue of the authority and enactment of the 1950 Organic Act of Guam, or a descendant thereof.

Subscribed and sworn to before me on: I hereby swear under penalty of perjury pursuant to the laws of Guam, that the information provided is true to the best of my knowledge.

Officer authorized to take oaths Signature Date

APPLICANT NATIVE INHABITANT INFORMATION

As the applicant, I claim I am a descendant of a Native Inhabitant of Guam through my: (Check One)

MOTHER ☐ **FATHER** ☐ **BOTH PARENTS** ☐

MOTHER
Maiden Last First Middle Name Paternal Family Name

Date of Birth I.D.#

As determined by the Ninth Circuit Court of Appeals, "our obligation is to apply established Fifteenth Amendment principles, which single out voting restrictions based on race as impermissible whatever their justification. Just as a law *excluding* the Native Inhabitants of Guam from a plebiscite on the future of the Territory could not pass constitutional muster, so the 2000 Plebiscite Law fails for the same reason." That blatantly unconstitutional act of racial voting discrimination was challenged in court by a private citizen, a retired service member. The Trump Justice Department was willing to help Major Davis in his case against Guam, *but no one in the Obama Justice Department lifted a finger to defend him*. Nor did any of the other groups assembled at the hearing—the NAACP, the ACLU, the Leadership Conference on Civil Rights—do anything about it. Vanita Gupta was a witness at that hearing. She is the current head of the Leadership Conference on Civil

Rights, and was the head of the U.S. Department of Justice's Civil Rights Division during the time this racial discrimination in voting occurred. At the hearing reference above she was asked by Mr. Cline, very simply, "would you agree that that type of discriminatory election [in Guam] is unacceptable in the Twenty-First Century in the United States?" Ms. Gupta could only reply "I unfortunately cannot speak to a matter that was under investigation during my full tenure in the Justice Department."[9] That speaks volumes about how politicized the Department of Justice can be, and how biased it can be when selectively enforcing what are supposed to be universal principles.

H.R. 4 also contains a requirement that certain election laws *automatically* be subject to preclearance. Found in Section 4A of H.R. 4, this "practice-based preclearance" would apply *nationwide* and would automatically cover election law changes such as modifying jurisdictional boundaries, voter qualification laws (including voter ID laws), and changes regarding bilingual ballot procedures.

Also, Section 3(a) of the bill, creating a new section 4(b) of the VRA, provides that preclearance applies "to a State and all political subdivisions" if 15 or more voting rights violations occur by the State or any of its political subdivision over a 25-year period. That means that all political subdivisions within a state can become subject to preclearance based solely on other political subdivisions' violations, and the state itself can become subject to preclearance based solely on violations in certain political subdivisions. That is so even when political subdivisions have no control over and can't be held responsible for the actions of other political subdivisions, which may be under the control of a different political party.

Proponents of H.R. 4 argue that victims of voting discrimination should not have to spend their time and money to go to court first to have their claims decided. However, both Section 3's preclearance provisions and H.R. 4's preclearance provisions require litigation prior to the preclearance process going into effect. Indeed, Section 3 preclearance requirements can be obtained after litigating just a single case. The H.R. 4 preclearance process, by contrast, will require much more litigation before it can be triggered. Of course, H.R. 4 also requires certain types of voting laws to be subject to preclearance without any prior showing of discrimination of any kind.

Existing law already protects Americans from voting discrimination: Section 2 of the Voting Rights Act allows lawsuits, even those based on disparate impacts, to stop State and local voting laws, including through preliminary injunctions; and Section 3 of the Voting Rights Act allows federal judges across the country to put jurisdictions under preclearance requirements when those jurisdictions have a record of actual discrimination in voting.

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[9] Voting Discrimination: Hearing Before the Subcomm. on Const., C.R., & C.L., 116 Cong. 109 (2019) (Statement of Rep. Benjamin Cline), *available at https://www.c-span.org/video/?c4815813/answer.*

In sum, H.R. 4 unconstitutionally creates a system in which a politicized Department of Justice can federalize control over State and local elections when there is no evidence the State or locality engaged in actual discriminatory conduct.

Signed,

DOUG COLLINS.
MIKE JOHNSON (LA).

Appendix

COMMITTEE ON HOUSE ADMINISTRATION
CHAIRPERSON ZOE LOFGREN (D-CALIF.)

SUBCOMMITTEE ON ELECTIONS

REPORT ON

Voting Rights and Election Administration in the United States of America

PREPARED BY CHAIRPERSON MARCIA L. FUDGE (D-OHIO)

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EXECUTIVE SUMMARY

INTRODUCTION

"Voting is the right that is 'preservative of all rights,' because it empowers people to elect candidates of their choice, who will then govern and legislate to advance other rights."

— Kristen Clarke, Lawyers' Committee for Civil Rights Under Law

In 1965, following years of suppression, discrimination, protest, and a fight for equality that led to the Civil Rights Act of 1964, President Lyndon B. Johnson signed into law the Voting Rights Act of 1965 ("Voting Rights Act").[1] The Voting Rights Act was created to address long entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[2] The Voting Rights Act protected the American people from racial discrimination in voting for nearly 50 years. In 2013, the Supreme Court of the United States ("the Court") struck down portions of the 2006 Voting Rights Act reauthorization in *Shelby County v. Holder* ("*Shelby County*"), leaving American voters vulnerable to tactics of suppression and discrimination.[3] In the aftermath of the Court's decision, the duty of Congress remains unchanged – the Legislative Branch is entrusted with protecting the right to vote for every eligible American. This is as essential today as it was in 1965.

In North Dakota, Native Americans, this land's first inhabitants, have been forced to obtain identification cards they would never have otherwise needed, or face being stripped of their right to vote. In advance of the 2018 election, tribes went to great lengths to ensure tribal members could vote, often producing ID cards for free, working overtime, to ensure members who did not otherwise have a home address had what they needed to vote. The resulting turnout for tribal members in the 2018 election was higher due to these efforts. However, crisis is not—nor should it be—a "get out the vote" strategy.

Less than two months after the Court struck down the preclearance provisions of the Voting Rights Act, North Carolina state legislators wasted no time passing an omnibus "monster law." State Senator Tom Apodaca (then-Chairman of the North Carolina Senate Rules Committee) said the State did not want the "legal headaches" of preclearance if it was not necessary to determine which portions of the proposal would be subject to federal scrutiny, "so, now we can go with the full bill," he added. He predicted an omnibus voting bill would surface in the

1 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.
2 *Shelby County, Ala. v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 2618 (2013), citing *South Carolina v. Katzenbach*, 383 U.S. 301, 309.
3 *Shelby County, Ala. v. Holder*, 570 U.S. 529, 133 S.Ct. 2612 (2013).

Senate the next week that could go beyond voter ID to include issues such as reducing early voting, eliminating Sunday voting, and barring same-day voter registration.[4]

These are just two examples of the many egregious stories the Subcommittee on Elections heard as it convened hearings across the country examining the state of voting rights and election administration in America.

THE SUBCOMMITTEE ON ELECTIONS

At the outset of the 116th Congress, Speaker of the House Nancy Pelosi and Committee on House Administration Chairperson Zoe Lofgren reconstituted the Committee on House Administration's Subcommittee on Elections, which House Republicans eliminated six years earlier. The Subcommittee is now chaired by Congresswoman Marcia L. Fudge of Ohio. The Subcommittee planned to take Congress to the American people, engage with voters, stakeholders, officials and election administrators, and collect testimony and evidence on the state of voting rights and election administration to ensure every eligible American has equal and fair access to the ballot and the confidence their ballot is counted as cast.

The Subcommittee reviewed the landscape of voting in America post-*Shelby County* to determine whether Americans can freely cast their ballot. The Subcommittee examined arbitrary barriers that have been erected to impede access and block ballots from being counted. The wide-ranging and voluminous testimony received by the Subcommittee form the basis of this report.

Writing for the majority in the 5-4 *Shelby County* decision, Chief Justice John Roberts acknowledged that "voting discrimination still exists; no one doubts that."[5] However, the Court held that Section 4(b) of the Voting Rights Act was unconstitutional and the coverage formula could "no longer be used as a basis for subjecting jurisdictions to preclearance."[6] Chief Justice Roberts held that "nearly 50 years later things have changed dramatically. … The tests and devices that blocked ballot access have been forbidden nationwide for over 40 years.[7]… The [15th] Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."[8]

To collect the contemporaneous evidence called for by the Chief Justice, the Subcommittee on Elections worked over the first 10 months of the 116th Congress, traveling across the country to meet voters where they live and vote. Hearings were held in Atlanta, Georgia; Standing Rock Sioux Reservation, North Dakota; Halifax County, North Carolina; Cleveland, Ohio; Fort Lauderdale, Florida; Birmingham, Alabama; Phoenix, Arizona; and Washington,

4 *NC Voter Bill Moving Ahead with Supreme Court Ruling*, WRAL.com (June 25, 2013), https://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/.
5 *Shelby County, Ala. v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 2619 (2013).
6 *Id.* at p. 2631.
7 *Id.* at p. 2625.
8 *Id.* at p. 2629.

District of Columbia. An inaugural listening session was also held in Brownsville, Texas. The Subcommittee called more than 60 witnesses, gathered several thousand pages of testimony, documents, and transcripts, and hours of oral testimony were delivered before Members of the Subcommittee.

The Subcommittee heard testimony describing polling place closures; frequent polling place movements; cutbacks and restrictions on early voting; voter ID requirements that disenfranchise targeted populations; purges of otherwise eligible voters from the registration rolls; the enormous expense of enforcing the Voting Rights Act through Section 2 litigation; the disenfranchisement of millions of formerly incarcerated Americans; and a lack of access to multilingual ballots and assistance, among the many voter suppressive laws implemented by states post-*Shelby County*. The Subcommittee heard a common refrain across the country that poverty and a lack of access to adequate transportation are significant barriers to voting that, when coupled with state-sponsored voter suppression, can lead to a complete deprivation of the franchise.

The Subcommittee's work took place in six states formerly covered, partially or completely, by the Section 4(b) formula and Section 5 preclearance provisions of the Voting Rights Act, and two states that were never covered. The Subcommittee visited states where there had been reports of barriers to voting in the years since *Shelby County* to get a sense of how Congress can help every American exercise his or her right to vote. For example, North Dakota and Ohio were never required to preclear their voting changes with the Department of Justice. As the Subcommittee found, this does not render the state's voters immune to voter suppression and election administration issues.

In North Dakota, Members heard testimony on issues unique to the Native American communities. The North Dakota legislature passed a voter ID law that disproportionately impacted Native Americans, effectively creating a poll tax and forcing voters to get IDs they would not otherwise need. The North Dakota field hearing also included witnesses and testimony regarding issues in South Dakota, which was a partially covered state under the Voting Rights Act.[9]

Ohio was recently a progressive voting state, after correcting issues from the 2004 election that left voters "effectively disenfranchised" in the words of one court.[10] The state implemented 35 days of in-person early voting and effectively created a week of early, same-date voter registration, dubbed "Golden Week." In 2014, Ohio changed course, reducing early voting hours and days, eliminating Golden Week, and reducing early voting locations, all while constantly altering the rules and procedures around voting and implementing an aggressive voter purge system.

The hearings conducted by the Subcommittee on Elections, detailed in this report, show the right to vote is not yet shared equally among all Americans. As a nation, we have made significant progress, but it is apparent more remains to be achieved before America truly

9 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019).
10 *See Ohio State Conference of the NAACP et al v. Husted et. al.*, 786 F.3d 524, 531 (6th Cir. 2014).

becomes the democracy she strives to be. The right to vote is fundamental to American democracy, yet our country has struggled to provide full, free, and fair access to the ballot box to all her citizens. As we see with each passing election, the struggle is far from over, and matters have too often worsened since *Shelby County*. Since then, voters have gone to the polls without the full protection of the Voting Rights Act for three federal elections, with a fourth rapidly approaching.

FINDINGS

During the field hearings, the Subcommittee heard testimony from lawyers, advocates, elected officials, tribal officials, and voters about the array of tactics used to suppress the votes of targeted communities. Some are more overt than others, but all have the same effect of erecting barriers that impede the free exercise of the right to vote.

Figure 1: Marchers cross the Edmund Pettus Bridge on the march from Selma to Montgomery, Alabama on what became known as "Bloody Sunday" in 1965.

Chapter One of this report outlines the state of voting rights and access to the ballot before the Court significantly undermined the Voting Rights Act in *Shelby County*. On March 7, 1965, Americans were forced to confront the vicious and persistent reality of racially-motivated voter discrimination. On Bloody Sunday, marchers on the Edmund Pettus Bridge in Selma, Alabama were attacked with clubs, whips, and tear gas by state troopers and local lawmen on their 54-mile journey to Montgomery to call attention to the Black struggle for full and equal voting rights. Shortly after Selma, President Lyndon B. Johnson called on Congress to act.

On August 6, 1965, the Voting Rights Act was signed into law, 95 years after the 15th Amendment first granted Black men the right to vote and 45 years after the 19th Amendment granted women the right to vote. Section 2 of the Voting Rights Act applied a nationwide ban on the denial or abridgment of the right to vote based on race or color, and was later amended to include language minorities.[11] Section 4(b) became known as the "coverage formula," setting forth the criteria for determining which states and localities were covered under the

11 L. Paige Whitaker, *Statement for Hearing on "History and Enforcement of the Voting Rights Act of 1965,"* CRS Testimony TE10033, Testimony for Committee on Judiciary, Subcomm. on the Constitution, Civil Rights and Civil Justice (Mar. 12, 2019), *citing* codified as amended at 52 U.S.C. §§ 10301, 10303(f) and Voting Rights Act Amendments of 1975, Pub. L. No. 94-73.

preclearance provisions of Section 5.[12] Sections 4(e) and 4(f)(4), along with portions of Section 2, ensure access for limited-English proficiency voters.[13] Section 5, the "preclearance" provision, required states with a history of discrimination in voting to submit all voting changes for approval by the federal government or judiciary to determine whether they would be discriminatory prior to implementation.[14]

Under Sections 4(b) and 5, Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia were all covered in their entirety. California, Florida, New York, North Carolina, South Dakota, and Michigan each had counties and townships covered under the Voting Rights Act, but were not wholly covered.

Initially scheduled to expire in 1970, Congress voted to amend and expand the Voting Rights Act five times: in 1970, 1975, 1982, 1992, and 2006. The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 passed the House overwhelmingly, the Senate unanimously, and was signed into law by President George W. Bush, extending the Voting Rights Act until 2032.[15]

During the time preclearance was in effect, the Department of Justice reviewed thousands of voting changes, objecting to hundreds that would have a discriminatory effect and limited access to the vote had they been implemented.[16] According to the U.S. Commission on Civil Rights ("USCCR") 2018 Minority Voting Report, from 2006-2013, the Department of Justice issued 30 objections to voting changes. Furthermore, the Department of Justice sent 144 letters informing jurisdictions that the information provided in their submission was insufficient and the Attorney General required more information.[17] Testimony heard by the USCCR and the Subcommittee on Elections illustrated how the process forced jurisdictions to rethink their changes and amend proposals that would have been discriminatory.[18]

In 2013, Section 4(b) of the Voting Rights Act was successfully challenged in *Shelby County*. The Court's decision struck down Section 4(b) as unconstitutional, effectively rendering Section 5's preclearance requirements obsolete and undermining critical enforcement provisions of the Voting Rights Act. Congress has since failed to enact legislation restoring the necessary protections to ensure every American can access the ballot without discrimination and undue barriers. The struggle for free and fair access to the right to vote continues. The poll taxes and literacy tests of pre-1966 may be gone, but without the full protection of Sections 4(b) and 5 of the Voting Rights Act, the nation has seen the development of a new generation of poll taxes and discriminatory tactics.

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12 L. Paige Whitaker, *Statement for Hearing on "History and Enforcement of the Voting Rights Act of 1965,"* CRS Testimony TE10033, Testimony for Committee on Judiciary, Subcomm. on the Constitution, Civil Rights and Civil Justice (Mar. 12, 2019), https://www.crs.gov/Reports/TE10033?source=search&guid=7714a4e4d65c4dfc871ec1865b13ca5a&index=0#fn9.

13 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 28-29, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.

14 *Id.*

15 *Id.* at p. 37.

16 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 28, *citing* DOJ Response to USCCR Interrogatory No. 22.

17 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 28.

18 *Id.* at p. 245.

Chapter Two of this report explores how undermining the Voting Rights Act has made casting a ballot more difficult. The various sections of this chapter cover overt tactics of voter suppression, the more subtle tactics that lead to suppression, and a new generation of voter suppression. This chapter explores the most common voter suppression tactics discussed during the Subcommittee's field hearings, many of which have become more pervasive post-*Shelby County*, as there is no longer any check on these practices.

While the evidence collected by the Subcommittee shows many legacy voter suppression tactics are still pervasive, a new wave of surreptitious tactics has also emerged. To suppress the vote, states have aggressively purged otherwise eligible voters from the voter registration rolls, made cuts to early voting and same-day registration, moved, closed, or consolidated polling places without adequate notice to voters, required exact name or signature match, engaged in discriminatory gerrymandering, and restricted language access and assistance, among other devices. Some of these tactics could be viewed as issues of election administration, and while that may be accurate, when combined with other insidious measures or when allowed to persist without consideration for their discriminatory impact, these changes undeniably result in voter suppression.

Except for North Dakota, which does not have voter registration, Members of the Subcommittee heard evidence of states purging otherwise eligible voters from the voter rolls. Time and again, purging voters from the registration rolls is billed as "list maintenance" and a necessary measure to combat "voter fraud." However, there is no credible evidence of voter fraud in American elections. Nevertheless, a 2018 study by the Brennan Center for Justice ("Brennan Center") found that between 2014 and 2016, states purged more than 16 million voters from the rolls.[19] An updated analysis found that at least 17 million voters were purged nationwide between 2016 and 2018.[20]

Persistent cutbacks and restrictions to early voting opportunities result in longer lines and wait times on Election Day. These cutbacks also disenfranchise those who cannot make it to the polls. Voters who work hourly jobs cannot take multiple hours

Figure 2: Lines of voters waiting outside the Cuyahoga County Board of Elections, Cleveland, Ohio, to cast their ballot on Election Day in 2016; provided by Inajo Davis Chappell at the Ohio Field Hearing.

19 Jonathan Brater, Kevin Morris, Myrna Perez, and Christopher Deluzio, *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018 1.pdf.

20 Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice (Aug. 1, 2019), https://www.brennancenter.org/blog/voter-purge-rates-remain-high-analysis-finds.

off on a workday to stand in line to vote. Additionally, signature match and exact name match requirements can disenfranchise voters, sometimes without their knowledge. In Florida, reports during the 2018 election demonstrated that voters' ballots were rejected for failing to match signatures without any notification sent to voters, providing no opportunity for the voter to correct the signature or contest the rejection.[21] In Georgia, thousands of voter registrations were put on hold because the name on the registration form did not exactly match specific government records.[22]

Laws requiring voters to show specific forms of ID have, unfortunately, become a common voter suppression tactic. In nearly every state, the Subcommittee heard testimony regarding issues with state-imposed voter ID laws. In Texas, North Dakota, and Alabama, witnesses testified that voter IDs are financially burdensome, disproportionately impact minority voters, and effectively impose a poll tax.[23] In North Carolina, the state's attempt to implement a voter ID law was struck down. Subsequently, voter ID was placed on the ballot as a measure and passed as a state constitutional amendment.[24] The state legislature passed implementing legislation and subsequently overrode the Governor's veto. The law is currently being challenged in court but remains in effect for the 2020 election.[25]

Another obstacle is lack of access to multi-lingual ballots, even when required under the Voting Rights Act, as well as assistance at the polls for those who are not proficient in English. In August 2018, a group of voting rights advocacy organizations sued the Florida Secretary of State and the Supervisors of Elections in 32 Florida counties for violating the Voting Rights Act's requirement to provide bilingual voting materials and assistance for Spanish-speaking U.S. citizens.[26]

Finally, the Subcommittee heard testimony at every field hearing describing how reactive litigation under Section 2 of the Voting Rights Act is prohibitively expensive, lengthy, and ineffective at combating voter disenfranchisement. In Texas, Georgia, and North Carolina specifically, the Subcommittee heard testimony describing how the loss of preclearance created an environment in which litigators and stakeholders are forced to expend significant resources to play what was described as a "whack-a-mole" defense against persistent, discriminatory voting changes.[27] Moreover, it is now nearly impossible to know all the voting changes made by states and monitor their potential discriminatory effect without the benefit of Section 5 preclearance. In North Carolina, USCCR Vice-Chair Patricia Timmons-Goodson

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21 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019).

22 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019).

23 *Voting Rights and Election Administration*: Hearings Before the Subcomm. on Elections, 116th Cong. (2019), *see* hearing transcripts for Texas, North Dakota, and Alabama.

24 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), testimony of State Senate Minority Leader Dan Blue.

25 Elizabeth Thompson, *Judges won't block voter ID law for 2020, but lawsuit will continue*, The News & Observer, (July 19, 2019), https://www.newsobserver.com/news/politics-government/article232078502.html.

26 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019); testimony of Juan Cartagena; *see also* Christiaan Perez and Jenifer Fenton, *Voting rights advocates sue to bring bilingual elections to 32 Florida counties*, LatinoJustice (Aug. 16, 2018), https://www.latinojustice.org/en/news/voting-rights-advocates-sue-bring-bilingual-elections-32-florida-counties.

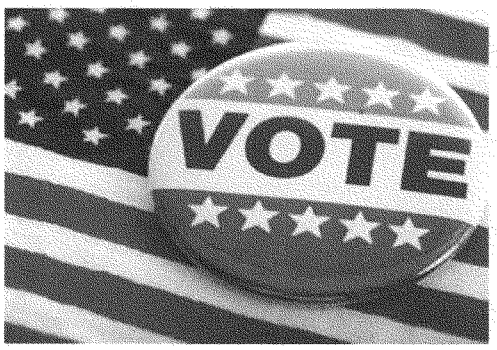
27 *Voting Rights and Election Administration in Texas, Georgia, and North Carolina*: Hearings Before the Subcomm. on Elections, 116th Cong. (2019).

testified there is no longer a database of the changes made in the most at-risk jurisdictions, making it much more difficult to track, combat, and evaluate the impact of changes made to voting laws.[28]

Chapter Three focuses on issues that particularly affect Native American voters.

North Dakota is unique for being the only state with no voter registration – a citizen may simply arrive at the polls on Election Day and cast a ballot.

In 2013, North Dakota required voter IDs to contain the voter's residential address, and expressly excluded Post Office Box numbers as an acceptable form of address. This law, and specifically the residential address requirement, has a disproportionately negative impact on Native American voters.[29]



While the State of North Dakota claims tribal IDs qualify under its law, most tribal IDs do not include a residential address. This is due, in part, to the fact that the United States Postal Service does not provide residential delivery in these rural Native American communities, forcing most tribal members to rely on a Post Office Box instead. If a tribal ID has an address, it is typically the Post Office Box, which does not satisfy North Dakota's restrictive voter ID law. Further, Native Americans as a group are disproportionately homeless and – due to overcrowding in homes, the prevalence of transience, and inconsistent addresses – identifying a consistent, accurate address for an ID remains a challenge.[30]

The voter ID law effectively created a poll tax on Native American voters. A tribal ID generally comes at a fee to cover the costs of printing and provide income for the Tribe. Alysia LaCounte, General Counsel for the Turtle Mountain Band of Chippewa Indians, testified that the unemployment rate on the Turtle Mountain Reservation hovers near 70 percent: "$15 for an ID is milk and bread for a week for a poor family."[31] Many North Dakota Tribes waived these fees so their members could vote in the 2018 midterm election. This equated to an

28 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), testimony of Patricia Timmons-Goodson.

29 Matthew L. Campbell, Jacqueline De León, *Brakebill, et al. v. Jaeger (ND Voter ID Law)*, https://www.narf.org/cases/nd-voter-id/.

30 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), see hearing report.

31 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), testimony of Alysia LaCounte.

unfunded mandate on the Tribes despite their status as sovereign entities with a trust and treaty relationship with the federal government, not the state.[32]

In Arizona, tribal leaders and advocates attested to the difficulties tribal members face when voting on reservations. Rural reservation voters often do not have traditional mailing addresses, creating difficulties in registering to vote, receiving and returning mail-in ballots, and accessing consolidated polling locations when unsure of where to vote. Additionally, access to properly translated voting materials for Native-language speaking voters, as well as proper assistance at the polls, poses a challenge for Native voters. Since *Shelby County*, the state of Arizona has closed hundreds of polling locations, moving toward vote-by-mail and voting centers, which has significantly impacted Native American voters given their heavy reliance on Post Office Boxes, long distances to mail services, and the demonstrated cultural significance of in-person voting on Election Day.[33]

Chapter Four examines how the administration of elections can be improved to ensure that all eligible voters are able to cast their ballots.

General election administration issues existed prior to the *Shelby County* decision, but they are also barriers to voting, especially when compounded with the suppressive, discriminatory tactics deployed in states across the country. A lack of compliance with the National Voter Registration Act ("NVRA") inhibits voters' ability to register to vote. Inconsistent poll worker training and lack of adequate resources can lead to erratic enforcement of voting laws, disenfranchise voters, and lead to the overuse of provisional ballots. Proper poll worker training can make the difference between a voter being denied access to a ballot, casting a provisional ballot, or being turned away completely. Provisional ballots do serve a purpose, giving voters an alternative if prevented from casting a traditional ballot, but they can also disenfranchise voters when misused.

Several states have attempted to force voters to provide proof of citizenship before they are allowed to register to vote. Alabama is one of four states that have attempted to require documentary proof of citizenship when registering to vote, as have Arizona, Kansas, and Georgia. Generally, a sworn statement is considered sufficient to prove citizenship. In Arizona, the state's insistence on requiring documentary proof of citizenship has led to a two-tiered registration system after the Court said states could not require proof of citizenship on the federal voter registration form. An ongoing federal lawsuit has partially blocked the implementation of the unilateral policy decision made by then-Election Assistance Commission ("EAC") Executive Director Brian Newby allowing Alabama, Georgia, and Kansas to require applicants using the federal voter registration form to provide documentary proof of citizenship.[34]

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32 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), testimony of Tribal leaders and designees.

33 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019).

34 Max Feldman and Peter Dunphy, *The State of Voting Rights Litigation (March 2019)*, Brennan Center for Justice (Mar. 25, 2019), https://www.brennancenter.org/analysis/state-voting-rights-litigation-march-2019, *see also League of Women Voters v. Newby* (D.D.C, No. 1:16-cv-00236; D.C. Cir. No. 16-5196).

Millions of Americans are disenfranchised after states strip them of their right to vote following a felony conviction. The Subcommittee heard testimony at multiple hearings about barriers to re-enfranchisement for formerly incarcerated individuals.[35] In various states and D.C., witnesses testified that requiring repayment of fines and fees before re-enfranchisement was a significant burden on low-income and minority Americans. The full impact of efforts to roll back Florida's restoration of voting rights is not yet known, but a report in the Sun Sentinel found that Florida's new law could cost formerly incarcerated persons with a felony conviction more than $1 billion in past fines and fees in just three South Florida counties to regain their right to vote.[36] Mandating otherwise eligible Americans pay all fines and fees before regaining their right to vote, a right they never constitutionally lost, is effectively a modern-day poll tax.

The 2016 and 2018 elections opened a new frontier of voter suppression – the dissemination of misinformation and disinformation by both foreign and domestic actors specifically targeting minority voters to sow division and depress turnout. A bipartisan report by the Senate Intelligence Committee found the Russian Internet Research Agency's social media influence campaign during the 2016 election made an extraordinary effort to target Black Americans, using a variety of tactics to suppress Democratic turnout on an array of social media platforms.[37] The use of fake accounts and bots to spread false information continues and remains a concern for upcoming elections.

The increasing frequency and intensity of natural disasters require effective climate disaster responses to ensure voters displaced by these events are not disenfranchised because of missed voter registration deadlines or polling locations moved due to damage. Finally, conflicts of interest arising from candidates serving as both arbiter and candidate has occurred in multiple elections and raises questions of voter confidence in the process.

CONCLUSION

The federal government has a responsibility to protect the right to vote of every eligible American. Congress must take full stock of the evidence before it, acknowledge widespread voter fraud does not exist, recognize the barriers preventing our constituents from voting, and act to remove them. This report details the Subcommittee's findings to enable Congress to move forward in ensuring the unimpeded right to vote for all Americans.

The right to vote is at the core of what it means to participate in our democracy, and it must be protected.

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35 *Voting Rights and Election Administration in Florida and Alabama*: Hearings Before the Subcommittee. on Elections, 116th Cong. (2019).

36 Dan Sweeney, *South Florida felons owe a billion dollars in fines – and that will affect their ability to vote*, South Florida Sun Sentinel (May 31, 2019), https://www.sun-sentinel.com/news/politics/fl-ne-felony-fines-broward-palm-beach-20190531-5hxf7mveyree5cjhk4xr7b73v4-story.html.

37 Scott Shane and Sheera Frenkel, *Russian 2016 Influence Operation Targeted African-Americans on Social Media*, N.Y. Times (Dec. 17, 2018). https://www.nytimes.com/2018/12/17/us/politics/russia-2016-influence-campaign.html.

CHAPTER ONE

Voting Rights in America Before Shelby County v. Holder (2013)

AMERICA'S FOUNDING

At her founding, America claimed a commitment to equality. Yet in practice, not all men, nor women, were treated equally. In declaring independence from the British Crown in 1776, the founders wrote:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed..."[38]

For more than two centuries, America has struggled to achieve racial equality. During the writing of the Constitution in 1787, the practice of slavery was widespread in many parts of America and would persist for nearly 80 years. During the first apportionment for the House of Representatives, while indentured servants were counted as whole persons, enslaved people were each counted as three-fifths of a person, and "Indians not taxed" were not counted.[39]

In 1857, the Court held in *Dred Scott v. Sandford* that, even if enslaved people were freed, the formerly enslaved and their descendants were each legally three-fifths of a person and not to be recognized as citizens.[40] On January 1, 1863, as the Civil War raged on, President Abraham Lincoln issued the Emancipation Proclamation, declaring "that all persons held as slaves" in the rebelling states, "are, and henceforward shall be free."[41] However, the Proclamation only

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38 U.S. Declaration of Independence (July 4, 1776), National Archives, ***transcription available at*** https://www.archives.gov/founding-docs/declaration-transcript.

39 U.S. Constitution, Art. 1, Sec. 2, National Archives, ***transcription available at*** https://www.archives.gov/founding-docs/constitution-transcript.

> "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

40 *Dred Scott v. Sandford*, 60 U.S. (19 *How.*) 393 (1857).

> "In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument."

41 President Abraham Lincoln (Jan. 1, 1863), Transcript of the Proclamation, National Archives, ***transcript available at*** https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html.

> "That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom."

freed those enslaved persons held in states that had seceded from the Union, leaving enslaved those living in border states.[42]

Slavery was abolished nationwide in 1865, with the passage and ratification of the 13th Amendment,[43] though other vestiges of slavery persisted. In 1868, the 14th Amendment established that all persons born or naturalized in the United States are citizens and forbade states from denying any person due process or equal protection under the law.[44] The 15th Amendment, ratified in 1870, guaranteed all United States citizens the right to vote regardless of "race, color, or previous condition of servitude,"[45] and gave Congress the power to enforce the amendment through appropriate legislation.[46] However, the 15th Amendment did not guarantee the right to vote based on gender. Collectively, the 13th, 14th, and 15th Amendments are known as the "Reconstruction Amendments."

As Black voter registration and participation soared in the post-Civil War Reconstruction Era, efforts to dampen the effects of the Reconstruction Amendments began, resulting in a backlash that would limit access to voting for Black Americans for decades.

Other minority groups also faced restrictions to their citizenship and voting rights. In 1884, the Court held in *Elk v. Wilkins* that the 14th Amendment did not provide citizenship to Native Americans.[47] Not until 1924, with the passage of the Indian Citizenship Act, did Native Americans gain full citizenship and voting rights without impairing the right to remain a member of their tribe.[48] As late as 1948, Arizona and New Mexico had state laws expressly barring many Native Americans from voting.[49] In 1962, Utah became the last state to remove formal barriers and guarantee voting rights for Native American peoples.[50] As detailed in this report, Native Americans still face discrimination and barriers to freely exercising their right to vote.

The United States government has also systematically denied citizenship to Asian Americans. Not until 1898, with the Court's decision in *United States v. Wong Kim Ark*, was it made clear

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42 National Archives, Online Exhibits, ***The Emancipation Proclamation***, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation.

43 U.S. Const. amend. XIII, sec. 1.

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

44 U.S. Const. amend. XIV, sec. 1.

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

45 U.S. Const. amend. XV, sec. 1.

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

46 *Id.* at sec. 2.

> "The Congress shall have power to enforce this article by appropriate legislation."

47 *Elk v. Wilkins*, 112 U.S. 94 (1884).

48 Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253, authorized the Secretary of the Interior to issue certificates of citizenship to Indians.

49 Peter Dunphy, ***The State of Native American Voting Rights***, Brennan Center for Justice (Mar. 13, 2019), https://www.brennancenter.org/blog/state-native-american-voting-rights.

50 *Id.*

that children of non-White immigrants were entitled to birthright citizenship.[51] In the 1920s, the Court held in two cases that Asian immigrants were not "free White people" and therefore ineligible for naturalized citizenship.[52] Not until the repeal of the Chinese Exclusion Act in 1943 and the passage of the McCarran-Walter Act in 1952 were all Asian Americans granted the right to become citizens and therefore eligible to vote.[53]

Women also faced restrictions to their citizenship and voting rights. Women did not gain the right to vote until 1920, with the ratification of the 19th Amendment.[54] However, ratification did not fully extend that right to all women. Native American women did not have citizenship, nor did many Asian women, and Black women still faced post-Reconstruction, Jim Crow Era discrimination at the polls.

To this day, more than 4.4 million residents of the U.S. Territories and the District of Columbia still do not have full voting rights and representation equal to that of their counterparts living in the 50 states.[55] Residents of the U.S. Virgin Islands ("USVI"), the Commonwealth of Puerto Rico, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands ("CNMI") (collectively "the Territories"), along with the District of Columbia ("D.C."), can each select one Delegate (or in the case of Puerto Rico, the Resident Commissioner) to send to the House of Representatives. However, that Delegate or Resident Commissioner does not have the same voting privileges in the House of Representatives as other Members of Congress, and their constituents do not have any representation in the Senate. Together, the Territories and D.C. have a combined population nearly equal to that of Delaware, South Dakota, North Dakota, Alaska, Vermont, and Wyoming.[56] Those states have a combined six Members of Congress and 12 Senators, while in contrast the Territories and D.C. have no voting representation in Congress. In 1961, the 23rd Amendment gave D.C. residents the right to vote for President and Vice President.[57] Residents of the Territories can still only vote for President and Vice President in the primary election, not in the general election.

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51 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 17, *citing United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1884).

52 Terry Ao Minnis and Mee Moua, *50 Years of the Voting Rights Act: The Asian American Perspective*, Asian Americans Advancing Justice | AAJC (Aug. 4, 2015), https://www.advancingjustice-aajc.org/sites/default/files/2016-09/50-years-of-VRA.pdf.

> "Early in America's founding, naturalization was limited to only "free White persons." Two key Court cases from the 1920s – *Ozawa v. U.S.* and *U.S. v. Thind* – held that Asian immigrants were not free White people and therefore, ineligible for naturalized citizenship. Federal policy barred immigrants of Asian descent from becoming U.S. citizens through legislation such as the Chinese Exclusion Act of 1882 (prohibiting immigration of Chinese laborers) and the Immigration Act of 1924 (banning immigration from almost all countries in the Asia Pacific region). It was not until 1943 with the repeal of the Chinese Exclusion Act, that persons of Chinese origin were granted the ability to naturalize. Most other Asians were granted the ability to naturalize by 1952 through the McCarran-Walter Act (Immigration and Nationality Act of 1952) and subsequent amendments in 1965."

53 *Id.*

54 U.S. Const. amend. XIX, sec. 1.

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

55 Aaron Steckelberg and Chiqui Esteban, *More than 4 million Americans don't have anyone to vote for them in Congress*, The Washington Post (Sept. 28, 2017), https://www.washingtonpost.com/graphics/2017/national/fair-representation/?utm_term=.40b8e64885f8.

56 *Id.*

57 U.S. Const. amend. XXIII.

> "The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to

POST-CIVIL WAR RECONSTRUCTION AND THE RISE OF THE JIM CROW ERA

Following the Civil War, America entered what became known as the "Reconstruction Era." From 1865 to 1877, the country attempted to address the inequities of slavery and its legacy while reuniting with the 11 states that had seceded from the Union.[58] Passage of the Reconstruction Amendments paved the way for the first Black Members of Congress to take their seats in 1870.

Hiram Rhodes Revels was elected to fill a vacant Senate seat from Mississippi by the state Senate and Joseph H. Rainey was elected to fill a vacant seat in the House of Representatives in the South Carolina delegation.[59] Black officials were elected at all levels of government and began to be appointed to federal positions, including as ambassadors, Census officials, customs appointments, U.S. Marshals and Treasury agents, and more.[60] In many former Confederate states, Black officeholders were elected in large numbers during the Reconstruction period, including: Alabama (167), Georgia (108), Louisiana (210), Mississippi (226), North Carolina (180), and South Carolina (316).[61]

The Reconstruction Amendments led to Black voter registration rates that surpassed White registration rates in Louisiana, South Carolina, and Mississippi.[62] In Alabama and Georgia, Black citizens were nearly 40 percent of all registered voters.[63] In the 1868 presidential election, more than 700,000 Black citizens voted for the first time.[64] As more Black Americans gained access to the franchise, a more representative government began to take shape.

This exercise of power and voting freedom did not go unchallenged. In 1866, President Andrew Johnson wrote, "This is a country for White men, and by God, as long as I am President, it shall be a government for White men."[65] The Ku Klux Klan ("KKK"), a White supremacist terrorist organization, was founded in Tennessee in 1866 and soon embarked on a "reign of terror" across the South, including lynchings, bombings, and assassinations of

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which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment."

58 Eric Foner, *Reconstruction*, Encyclopedia Britannica (last updated: Aug. 21, 2019), https://www.britannica.com/event/Reconstruction-United-States-history.

59 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 5, *citing* Jennifer E. Manning and Colleen J. Shogan, *African American Members of the United States Congress: 1870-2012*, CRS Report RL30378 at p. 4.

60 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 5, *citing* Eric Foner, *Freedom's Lawmakers: A Directory of Black Officeholders during Reconstruction* (Baton Rouge: Louisiana State University Press, 1996) at p. xv.

"In many of the former Confederate states, hundreds of black officeholders were elected in the Reconstruction period, including Alabama (167), Georgia (108), Louisiana (210), Mississippi (226), North Carolina (180), and South Carolina (316)."

61 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 5.

62 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 16, *citing* Anderson Bellegarde François, *To Make Freedom Happen: Shelby County v. Holder, the Supreme Court, and the Creation Myth of American Voting Rights*, 34 N. ILL. U. L. REV. 529, 543 (2014).

63 *Id.*

64 *Id.*

65 The Nat'l Constitution Center, *Andrew Johnson: The most-criticized president ever?* (July 31, 2019), https://constitutioncenter.org/blog/marking-the-passing-of-maybe-the-most-criticized-president-ever.

political leaders.[66] The KKK was not the only White supremacist organization formed at the time, and horrific violence against Black Americans spread at a shocking rate.[67]

White supremacist organizations are far from a relic of the past. The Southern Poverty Law Center ("SPLC") tracks more than 1,600 extremist groups operating across the country. According to their "Hate Map," there were 1,020 hate groups operating in the United States in 2018.[68] This list includes many of the hate groups, individuals, and symbols present at the deadly Charlottesville, Virginia White supremacist rally in August 2017.[69]

Reconstruction came to an end in 1877. Following the disputed presidential election of 1876 and the Compromise of 1877, the government removed the remaining federal troops from the South.[70] Once federal oversight was removed, southern legislatures began passing laws that institutionalized racial segregation and racial discrimination that suppressed the voting rights of minorities, solidifying White dominance in the political structure, and giving rise to what would become known as the Jim Crow Era.

States, predominantly southern,[71] organized state constitutional conventions with the express intent of enacting policies that would prevent Black Americans from voting. Operating without federal involvement, Mississippi led the way with a new state constitution enacted in 1890.[72] Although the 15th Amendment did not allow for direct disenfranchisement, Mississippi enacted a discriminatory poll tax that disproportionately burdened Black Americans, as well as a literacy test requiring those seeking to register to vote to read a portion of the state constitution and explain it, subject to the discretion of the county clerk, who was nearly, if not always, White.[73] The barriers were not limited to poll taxes and literacy tests. South Carolina followed with a constitutional convention in 1895 that adopted a two-year residence requirement, a poll tax, a literacy test, or ownership of property worth $300, and

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66 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 6, *citing* Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, Publishers, 1988) at p. 342.

67 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 7.

> "In one Louisiana parish, a mob destroyed the Republican newspaper and drove the editor out of town before turning on the local Black population and killing 200. A local sheriff in Camilla, Georgia, led an armed group of 400 Whites to attack a Black election parade and then track down and kill many who had fled to the countryside. In Louisiana alone in the presidential election year of 1868, an estimated 1,081 persons, most of them Black, were killed by state Democrats. The number of Blacks killed in southern cities was likewise shocking: 46 in Memphis and 34 in New Orleans in 1866, 25-30 in Meridian, Mississippi, and 34 in Vicksburg in 1875, and 105 in Colfax, Louisiana on Easter Sunday, 1873."

68 Southern Poverty Law Center, *Hate & Extremism*, https://www.splcenter.org/issues/hate-and-extremism and Hate Map, https://www.splcenter.org/hate-map.

69 Southern Poverty Law Center, *The People, Groups, and Symbols at Charlottesville* (Aug. 17, 2017), https://www.splcenter.org/news/2017/08/15/people-groups-and-symbols-charlottesville, *see also Remarks by President Trump on Infrastructure, The White House* (Aug. 15, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-infrastructure/. Saying there "were very fine people, on both sides" present that day in Charlottesville.

70 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 16.

71 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 8-9 (see Table 2 in source report).

72 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 8.

73 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 17.

the disqualification of convicts.[74] In the former Confederacy, Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, Tennessee, Texas, and Virginia enacted similar barriers.[75]

The state-adopted literacy tests disproportionately disenfranchised Black Americans. For example, at the time these tests were being implemented, over 70 percent of Black citizens were illiterate, compared to less than 20 percent of White citizens.[76] However, states exempted prior (White) registrants and veterans of the Civil War and other wars from literacy test requirements. Black voters also faced significant violence and overt intimidation when attempting to register and vote.[77]

The effects were significant. For example, in Alabama, only 3,000 of the 181,471voting-age Black males were registered in 1900. In Louisiana, there were 130,344 Black citizens registered to vote in 1896 – that number dropped to 5,320 by 1900.[78]

Black Americans were not the only targets of Jim Crow Era voter suppression during this period. Native Americans and Asian Americans were also denied equal voting rights. Additionally, in New York, newly arriving citizens from Puerto Rico had their voting rights hindered by complex English-literacy tests.[79]

Some progress was made through litigation.[80] In 1944, the Court invalidated the Texas "White primary" in *Smith v. Allwright*.[81] White primaries were primary elections in the South where only White voters could vote. Because of the power of the primary process, White primaries essentially prevented Black voters from having any significant effect on elections despite their ability to vote in the general election.[82]

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74 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 8.

75 *Id.* at p. 8-9.

76 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 18, *citing* Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 1 (1965).

77 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 9.

> "Between 1884 and 1900, 2,500 lynchings were reported nationwide and most victims were black. While the barbarism occurred in both North and South, the largest numbers of lynchings occurred in Alabama, Georgia, Mississippi, and Louisiana."

78 *Id.*

79 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 18, *citing* Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 Nat'l Black L.J. 201, 206 (2005); *see also* Voting Rights: Hearings on H.R. Doc. No. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 508-17 (1965) (statement of U.S. Rep. Herman Badillo, Judge Vidal Santaella, and community activist Gilberto Gerena-Valentin); *see also United States v. Cty. Bd. of Elections of Monroe Cty.*, 248 F. Supp. 316, 317 (W.D.N.Y. 1965) (invalidating New York State's English-language literacy test, holding Section 4(e) of the Voting Rights Act prohibiting the condition of Puerto Rican's voting rights on speaking English to be constitutional, and noting that though the Voting Rights Act was "[b]orn out of the civil rights problems currently plaguing the [S]outh ... this Act ... was not designed to remedy deprivations of the franchise in only one section of the country. Rather, it was devised to eliminate second-class citizenship wherever present.").

80 For more case law see also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *citing*

> "The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in *Guinn* v. *United States*, 238 U. S. 347, and *Myers* v. *Anderson*, 238 U. S. 368. Procedural hurdles were struck down in *Lane* v. *Wilson*, 307 U. S. 268. The White primary was outlawed in *Smith* v. *Allwright*, 321 U. S. 649, and *Terry* v. *Adams*, 345 U. S. 461. Improper challenges were nullified in *United States* v. *Thomas*, 362 U. S. 58. Racial gerrymandering was forbidden by *Gomillion* v. *Lightfoot*, 364 U. S. 339. Finally, discriminatory application of voting tests was condemned in *Schnell* v. *Davis*, 336 U. S. 933; *Alabama v. United States*, 371 U. S. 37; and *Louisiana* v. *United States*, 380 U. S. 145."

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

82 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 19, *citing* 321 U.S. 649, 664 (1944); *see also* O. Douglas Weeks, The White Primary: 1944-1948, 42 AM. POL. SCI. REV. 500-10, n.3 (1948) (noting that white primaries were primary elections in the South where only White voters were allowed to vote.

Some states, including Texas, actively defied federal court orders. The Court had repeatedly held that Texas' all-White primary violated the 14th Amendment. The Court first ruled the primary violated the Constitution in 1927 and then again in 1932. The Court was confronted by Texas' actions again in 1953 after the state tried to circumvent the 15th Amendment with another variant of the all-White primary.[83]

The courts proved insufficient in combating discrimination and enforcing the right to vote.

THE CIVIL RIGHTS ERA AND THE VOTING RIGHTS ACT OF 1965

The voting barriers erected in the late-19th and early 20th centuries demonstrated that protections were needed to ensure full access to the right to vote for all Americans. As discriminatory laws were struck down through litigation, new discriminatory laws were implemented to take their place. Federal action proved to be the only remedy.

The Civil Rights Movement began in the 1950s. The Civil Rights Act of 1957 sought to protect voting rights, giving the Attorney General authority to sue local election officials in jurisdictions with a pattern of discriminating against voters and secure preventative relief.[84] This removed the burden from private individuals to sue at their own expense and outlawed intimidation, threats, or coercion that interfered with the right to vote.[85]

This law proved insufficient. Reports from the U.S. Commission on Civil Rights, established under the 1957 Civil Rights Act, documented the persistent discrimination faced by Black voters.[86] The Commission held a hearing in Jackson, Mississippi, where it found Black voter registration was declining and outlined the barriers, such as poll taxes and registration tests, experienced by Black voters.[87]

Since the Democratic Party dominated Southern elections, positions were often determined during the party's primary elections since there was little chance of a Democrat losing in a general election. Therefore, White primaries essentially prevented Black voters from having any significant effect on elections in the South despite their ability to vote in general elections.)

83 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 19, *see also Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); and *Terry v. Adams*, 345 U.S. 461 (1953).

84 The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, pt. IV, § 131(c).

> "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States or in the name of the United States, a civil action or other proper proceeding for preventative relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for the costs the same as a private person."

85 The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, pt. IV, § 131(b).

> "No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possession, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate."

86 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018), *citing* U.S. Commission on Civil Rights, 1961 U.S. Commission on Civil Rights Report Book 1: Voting, (1961) XVI.

87 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 21, *citing* U.S. Commission on Civil Rights, Mississippi (1965).

Subsequent Civil Rights Acts in 1960 and 1964, while milestones at the time, also proved inadequate in protecting against discrimination in voting.[88] At the time, Attorney General Nicholas Katzenbach said the Civil Rights Acts of 1957, 1960, and 1964, when it came to ensuring the right to vote, "had only minimal effect. They [were] too slow."[89]

The Voting Rights Act of 1965 was the culmination of a long, non-violent movement for equal voting rights led by civil rights organizations such as the Southern Christian Leadership Conference (SCLC), launched by Dr. Martin Luther King, Jr. and other civil rights activists, and the Student Nonviolent Coordinating Committee (SNCC). This peaceful movement was often met with violence. Civil rights workers involved in voter registration campaigns were beaten and jailed, and churches, homes, and other buildings were bombed.[90] In 1964, three activists working on SNCC's voter registration campaigns were murdered in Neshoba County, Mississippi.

On March 7, 1965, in Selma, Alabama, when civil rights advocates peacefully marched across Edmund Pettis Bridge to condemn such violence and bring attention to the struggle for equal voting rights, state troopers and local law enforcement viciously attacked them with clubs, whips, and tear gas. That day would become known as "Bloody Sunday." Two days later, Dr. King led a second peaceful march from Selma to Montgomery,[91] at which he critically noted in a speech that, "the Civil Rights Act of 1964 gave Negroes some part of their rightful dignity, but without the vote, it was dignity without strength."[92]

On March 15, 1965, shortly after Bloody Sunday, President Lyndon B. Johnson spoke before a Joint Session of Congress, in a nationally televised address calling on Congress to act. He said:

> "There is no cause for pride in what has happened in Selma. There is no cause for self-satisfaction in the long denial of equal rights of millions of Americans. But there is cause for hope and for faith in our democracy in what is happening tonight. ... Our mission is at once the oldest and the most basic of this country—to right wrong, to do justice, to serve man. ... Our fathers believed that if this noble view of the rights of

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88 *See South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

> "In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil Rights Act of 1957[16] authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. Perfecting amendments in the Civil Rights Act of 1960[17] permitted the joinder of States as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964[18] expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections.
>
> Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the Attorney General during hearings on the Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age Whites ran roughly 50 percentage points or more ahead of Negro registration."

89 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 11, *citing* David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* (New Haven and London: Yale University Press, 1978).

90 *Id.* at p. 11.

91 *Id.*

92 Martin Luther King, Jr., *Address at the Conclusion of the Selma to Montgomery March*, March 25, 1965, The Martin Luther King, Jr. Research and Education Institute, https://kinginstitute.stanford.edu/king-papers/documents/address-conclusion-selma-montgomery-march.

> man was to flourish it must be rooted in democracy. The most basic right of all was the right to choose your own leaders. The history of this country in large measure is the history of expansion of that right to all of our people. Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument: every American citizen must have an equal right to vote. ... Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books ... can ensure the right to vote when local officials are determined to deny it. In such a case, our duty must be clear to all of us. The Constitution says that no person shall be kept from voting because of his race or his color."[93]

In passing the Voting Rights Act, Congress observed, "there is little basis for supposing that without action, the States and subdivisions affected will themselves remedy the present situation in view of the history of the adoption and administration of the several tests and devices reached by this bill."[94] Congress was presented with a record revealing more than 95 years of pervasive racial discrimination in certain areas of the country.[95] Before enacting the Voting Rights Act, the House and Senate Judiciary Committees each held nine days of hearings and received testimony from a total of 67 witnesses.[96]

Congress found the Department of Justice's attempt to protect the right to vote through case-by-case enforcement to be inadequate, as states determined to discriminate still found ways to defy court orders and enact new laws. The Voting Rights Act called for a new approach – direct federal intervention and prescription to ensure constitutional rights were protected. Key provisions of the bill required certain states to submit to the federal government for oversight and approval — or "preclearance" — of any and all voting changes prior to implementation. In subsequently upholding the constitutionality of the Voting Rights Act, the Court recognized Congress's broad authority to correct the history of discrimination in voting, reiterating that while states have broad powers to determine conditions under which the right to vote is exercised, states are not insulated from federal involvement when "State power is used as an instrument for circumventing a Federally protected right."[97]

Nearly five months after President Johnson's address, on August 6, 1965, he signed the Voting Rights Act of 1965 into law, 95 years after the 15th Amendment first granted Black men the right to vote and 45 years after the 19th Amendment granted women the franchise. The bill passed the House on August 3 (328-74) and the Senate on August 4 (79-18). In the words of President Johnson, the Voting Rights Act was designed to "help rid the Nation of racial discrimination in every aspect of the electoral process and thereby insure the right of all to vote."[98]

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93 President Lyndon Johnson, *President Johnson's Special Message to Congress: The American Promise*, (Mar. 15, 1965), http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise.

94 H. Rept. 109-478 accompanying H.R. 9 Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (109th Congress).

95 *Id.*

96 *South Carolina v. Katzenbach*, 383 U.S. 301, 308-9 (1966).

97 *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966).

98 Communication From the President of the United States Transmitting a Draft of Proposed Legislation Entitled, "A Bill to Enforce the 15th Amendment to the Constitution of the United States," H.R. Doc. 89-120 at p. 1 (1965)

The Voting Rights Act of 1965 was a necessary response to the years of discrimination and voter suppression experienced by Black Americans and other minority voters in the decades following Reconstruction. The Voting Rights Act and its subsequent reauthorizations took several key steps to protect voting rights. First, it prohibited discrimination in voting on the basis of race, creating a standard under which the Attorney General and private citizens could sue states and localities. Second, it created a formula for determining which states would become subject to federal government review of their voting law changes. Third, it required these states to get approval from the federal government or a court before making any changes to voting laws. Fourth, the Voting Rights Act authorized federal election observers and examiners to monitor what was happening in states. Finally, subsequent versions of the Voting Rights Act expanded these protections to include language minorities, prohibiting discrimination in voting on the basis of a person's ability to read and understand the English language.

The original Voting Rights Act placed a nationwide prohibition on states, or any political subdivision, from implementing voting qualifications or prerequisites, standards, practices, or procedures to "deny or abridge the right of any citizen to vote on the basis of race or color."[99] Section 2 allows both the Attorney General and private citizens to sue to enforce the law's protections. The Section 2 standard was expanded during subsequent reauthorizations and does not expire. While Section 2 is still in place and can be used to combat any discriminatory voting standard, practice, or procedure,[100] it is costly, time-consuming, and inadequate without the full complement of an enforceable Section 5.

Section 3 authorized the appointment of federal election examiners to observe voter registration and elections and register voters. Section 3 also contained what became known as the "bail in" provision — if a court finds violations of the 15th Amendment justifying relief, the court could retain jurisdiction over changes in voting laws.[101]

Section 4 created what has become known as the "coverage formula." This set forth the criteria by which jurisdictions with a history of voter discrimination were identified and covered under the preclearance requirements of Section 5.[102] states and localities were covered under the Voting Rights Act if they used any "test or device" as a condition of voter registration on

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99 Voting Rights Act of 1965, Pub. Law No. 89-110, Sec. 2.

"No voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

100 U.S. Department of Justice, *Section 2 of the Voting Rights Act* (updated Sept. 14, 2018), https://www.justice.gov/crt/section-2-voting-rights-act.

101 Voting Rights Act of 1965, Pub. Law No. 89-110, at Sec. 3(c) – Section 3(c) is still in effect and was expanded to include Fourteenth Amendment violations in a later reauthorization.

102 *Id.* at Sec. 4(b).

"(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to when (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

November 1, 1964, and either less than 50 percent of voting age persons living there were registered to vote or less than 50 percent voted in the presidential elections that year.[103]

This provision was justified by the evidence Congress collected, outlining the rampant discrimination and violation of the 14th and 15th Amendments.[104] At the time of enactment, the jurisdictions covered were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 39 counties in North Carolina, and specific counties in Arizona and Hawaii.[105] As Congress amended the Voting Rights Act and added new criteria, the coverage formula encompassed additional states and localities. Furthermore, Section 4 contained a "bail out" provision under which states and localities could seek termination of Voting Rights Act coverage from a three-judge panel in the D.C. District Court.[106]

Section 4 of the Voting Rights Act also prohibited states from discriminating against non-English speakers educated in American schools. States could no longer condition the right to vote on a person's ability to read, write, understand, or interpret something in the English language if they were educated in American-flag schools.[107] Section 4(e)(2) specifically protected the right to vote for people who successfully completed the sixth grade and were educated in schools in any state or territory, the District of Columbia and the Commonwealth of Puerto Rico in a language other than English.[108] Between 1950 and 1963, an average of 50,000 people migrated from Puerto Rico to New York City per year.[109]

Section 5 is the enforcement mechanism for Section 4. Known as "preclearance," Section 5 requires any state or locality encapsulated by Section 4's coverage formula to clear any voting changes with the federal government or the U.S. District Court for the District of

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103 *Id.*

104 *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

> "The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting. ... After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively."

105 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015).

106 U.S. Department of Justice, *Section 4 of the Voting Rights Act* (updated Dec. 21, 2017), https://www.justice.gov/crt/section-4-voting-rights-act#bailout

> Localities within the following States were allowed to bail out from Voting Rights Act coverage by the courts: North Carolina, New Mexico, Maine, Oklahoma, Wyoming, Massachusetts, Connecticut, Colorado, Hawaii, Idaho, Virginia, Texas, Georgia, California, Alabama, and New Hampshire.

See also Voting Rights Act of 1965, Pub. L. No. 89-110 at Sec. 4(a).

107 Voting Rights Act of 1965, Pub. L. No. 89-110 at Sec. 4(e)(1).

> "(e) (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language."

108 *Id.* at Sec. 4(e)(2).

> "(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English."

109 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 18.

Columbia *before* implementation. This effectively froze in place existing voting procedures and created a structure through which all voting changes would need to be analyzed for potential discriminatory effect before they were allowed to proceed.[110] In contrast to Section 2, preclearance is prospective, preventing discrimination before it happens. Preclearance negated the state's ability to circumvent court rulings by allowing the Attorney General or the D.C. Court to block discriminatory laws before voters were disenfranchised, and created an administrative procedure to evaluate proposed voting changes for potential discriminatory effect. It also prevented the state practice of enacting another discriminatory law once the original was struck down by the courts.

Sections 6, 7, and 8 of the Voting Rights Act addressed the appointment of federal election examiners for voter registration and the deployment of federal election observers. Section 6 allowed the Attorney General to request election examiners be deployed to jurisdictions.[111] Section 7 outlines how these examiners shall register voters.[112] Section 8 allows for federal monitors to observe inside polling places and ensure Voting Rights Act compliance on Election Day.[113]

The Voting Rights Act also suspended the use of literacy tests.[114] Further, the law included a congressional finding that poll taxes are a barrier to voting for people of limited means and impose "unreasonable financial hardship upon such a person as a precondition to their exercise of the franchise," bear no reasonable relationship to a legitimate state interest, are used for discriminatory purposes,[115] and are prohibited.[116] While the Voting Rights Act did not explicitly outlaw poll taxes, it did direct the Attorney General to challenge the issue in court. The Court held poll taxes unconstitutional under the 14th Amendment in 1966.[117]

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110 Voting Rights Act of 1965, Pub. L. No. 89-110, at Sec. 5.

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has Page 4 of 26 been submitted by the chief legal officer or the appropriated official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."

111 *Id.* at Sec. 6.

112 *Id.* at Sec. 7.

113 *Id.* at Sec. 8.

114 *Id.* at Sec. 4.

115 *Id.* at Sec. 10.

116 *Id.* at Sec. 11.

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

Held: A State's conditioning of the right to vote on the payment of a fee or tax violates the Equal Protection Clause of the Fourteenth Amendment.

The effects of the Voting Rights Act were immediate and significant. Nearly 1 million Black voters were registered within four years of the Act's passage.[118] More than 50 percent of the Black voting age population in each of the southern states were registered.[119] Additionally, the number of Black officials elected in the South more than doubled following the 1966 elections.[120]

REAUTHORIZATIONS OF AND AMENDMENTS TO THE VOTING RIGHTS ACT

Originally set to expire five years after enactment, the Voting Rights Act was amended and extended by Congress on a bipartisan basis several times. Congress continued to support the underlying policy of the Voting Rights Act while voting to amend, expand, and extend the law five times: in 1970, 1975, 1982, 1992, and 2006.

The Voting Rights Act Amendments of 1970 passed on a bipartisan basis[121] in both the House (272-132) and Senate (64-12) and was signed into law by President Richard Nixon on June 22, 1970.[122] In extending the provisions, Congress reviewed the progress of the previous five years and extended the Voting Rights Act for another five years, and extended the prohibition on literacy and similar tests as a prerequisite to voting or voter registration for 10 years.[123] Congress determined that there had been a lack of enforcement by the Department of Justice over the previous years.[124] The preclearance formula updated the turnout disparities formula, thus updating Section 5's preclearance requirements.[125] The new formula resulted in the inclusion of parts of Alaska, Arizona, California, Idaho, New York, and Oregon under Section 5 preclearance.[126]

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118 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 12, *citing* Guide to U.S. Elections, 6th ed., vol. 1 (Washington, DC: CQ Press, 2010) at p. 33.

119 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 12, *citing* United States Commission on Civil Rights, *Political Participation: A Report of the United States Commission on Civil Rights* (Washington, DC: U.S. Government Publishing Office, 1968) at p. 13.

120 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 12, *citing* David J. Garrow, Protest at Selma at p. 190.

121 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 18, *see* H.R. 4249 – passed the Senate on March 13, 1970 (64-12); House passed the Senate amendments on June 17, 1970 (272-132); signed into law June 22, 1970.

122 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 32.

123 *Id.*

124 H. Rept. 109-478 accompanying H.R. 9 Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (109th Congress), *citing* H.R. Rep. No. 91-397, at 4 (1970).

125 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 32-33; *see also* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, available at: https://www.govinfo.gov/content/pkg/STATUTE-84/pdf/STATUTE-84-Pg314-2.pdf.

> "Sec. 4. Section 4(b) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b) is amended by adding at the end of the first paragraph thereof the following new sentence: "On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968."

126 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 19.

The 1970 updates also abolished durational residency requirements in the presidential elections and directed the states to provide voter registration for eligible voters who apply at least 30 days before an election, as well as allow voters who move within 30 days of an election to vote in their previous precinct or by absentee ballot.[127] Section 301 of the Amendments lowered the voting age to 18 for voting in federal elections.[128] In 1971, the 26th Amendment lowered the voting age from 21 to 18 for all elections.[129]

The Voting Rights Act Extension of 1975 again passed on a bipartisan basis[130] in both the House (341-70) and the Senate (77-12), and was signed into law by President Gerald Ford. The legislation extended the Voting Rights Act for another seven years and expanded the definition of permanently prohibited "tests and devices" to address language minorities.[131] This expanded Sections 5 and 8 to cover jurisdictions where five percent of the voting-age citizens were from a single language minority, election materials were printed only in English, and less than 50 percent of the voting age citizens were registered to vote or voted in the 1972 presidential election.[132] Congress found that "while minority political progress [that] had been made under the Voting Rights Act is undeniable … the nature of that progress has been limited."[133]

The bill also included a requirement for bilingual elections if the illiteracy rate in English was greater than the national illiteracy rate, and a formula for determining when those materials must be provided. Section 203 of the amendments required voting materials be available in the language of the "applicable minority" within the jurisdiction, including Latinos, Asian and Pacific Islanders, Native Alaskans, and Native Americans.[134] The 1975 extension also made permanent the ban on literary tests nationally, directed the Attorney General to enforce the 26th Amendment, and established a federal penalty for voting more than once in a federal election.[135]

The Voting Rights Act Amendments of 1982 again passed with largely bipartisan votes[136] in both chambers (389-24 in the House; 85-8 in the Senate) and was signed into law by President

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127 Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, Sec. 202 Residence Requirements for Voting.

128 Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, Sec. 301(a); *Oregon v. Mitchell*, 400 U.S. 112 (1970) *held* that Congress had the power to lower the voting age to 18-year-old citizens in national elections, such as congressional, senatorial, vice-presidential, and presidential elections, but cannot set the voting age in state and local elections.

129 U.S. Const. amend. XXVI, Sec. 1.

> "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

130 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 19, *see* H.R. 6219 passed the House on June 4, 1975 (341-70); passed the Senate on June 24, 1975 (77-12); and the House agreed to the Senate amendments on July 28, 1975 (346-56); signed into law August 6, 1975.

131 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 33.

132 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 19-20.

133 H. Rept. 109-478 accompanying H.R. 9 Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (109th Congress), *citing* H.R. Rep. No. 94-196, at 7 (1975).

134 Voting Rights Act Extension of 1975, Pub. L. No. 94-73, Sec. 203, https://www.govinfo.gov/content/pkg/STATUTE-89/pdf/STATUTE-89-Pg400.pdf#page=3

135 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 19-20.

136 *Id.* at p. 20-21, *see* H.R. 3112 – passed the House on October 15, 1981 (389-24); passed the Senate with amendments on June 18, 1982 (85-8) following a filibuster; the House approved the Senate amendments by unanimous consent on October 5, 1982; signed into law June 29, 1982.

Ronald Reagan. The law extended preclearance for another 25 years, leaving in place the same coverage formula.[137] Congress found that, "despite the gains in increased minority registration and voting and in the number of minority elected officials … continued manipulation of registration procedures and the electoral process, which effectively exclude minority participation from all stages of the political process" was occurring.[138] Congress reemphasized its intent that, "protection of the franchise extend beyond mere prohibition of official actions designed to keep voters away from the polls ... [and] include prohibition of State actions which so manipulate the elections process as to render the vote meaningless."[139]

The requirement for bilingual elections was also extended for 10 years.[140] Jurisdictions could now also petition to be "bailed out" separately from states.[141] A significant change was also made to Section 2 – plaintiffs could now challenge laws and election practices without needing to prove discriminatory intent, adjusting the burden of proof requirement to necessitate a "results" or "effects" test, lowering the evidentiary burden on the plaintiffs.[142]

This change addressed the Court's ruling in *City of Mobile v. Bolden*, which held that Section 2 required proof of a discriminatory intent to challenge a law.[143] This adjustment also reflected the changing landscape of discrimination in voting laws. Poll taxes and literacy tests were no longer as prevalent as they were pre-Voting Rights Act, but a new generation of discriminatory practices had begun to emerge. This "second generation" of suppression tactics included discriminatory redistricting, annexations, and at-large elections meant to dilute the minority vote.[144] Eliminating the intent requirement made it possible to challenge and prosecute these types of practices that were discriminatory in their application and effect, regardless of their intent.

The Voting Rights Language Assistance Act of 1992, again bipartisan (237-125 in the House; 75-20 in the Senate),[145] was signed into law by President George H. W. Bush. The law extended the bilingual voting assistance requirement until 2007 (another 15 years) and expanded the scope of bilingual voting assistance coverage to include jurisdictions with 10,000 members of a language minority whose members have limited English proficiency ("LEP").[146] This change ensured the protections covered jurisdictions where LEP voters did not make up five percent of the eligible voters, reaching Latino and Asian American voters in

137 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 33.

138 H. Rept. 109-478 accompanying H.R. 9 Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (109th Congress).

139 *Id.*, *citing* H.R. Rep. No. 97-227, at 14 (1982).

140 Voting Rights Act Amendments of 1982, Pub. L. No. 97-205,https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg131.pdf#page=1

141 *Id.*

142 *Id.*

143 *Id.* at p. 35, *see also City of Mobile v. Bolden*, 446 U.S. 55, 75 (1980).

144 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 34-35.

145 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 21, *see* H.R. 4312 – passed the House on June 24, 1992 (237-125); passed the Senate on August 7, 1992 (75-20); signed into law August 26, 1992.

146 Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-334, https://www.congress.gov/bill/102nd-congress/house-bill/4312, *see also* Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 21.

larger cities.[147] The law also included more expansive coverage formulas for language access for Native American voters living on reservations.[148]

The last reauthorization of the Voting Rights Act took place in 2006. President George W. Bush signed H.R. 9, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 into law following a largely bipartisan vote in the House (390-33) and unanimous passage in the Senate on July 13, 2006.[149] Upon signing the reauthorization, President Bush said, "In four decades since the Voting Rights Act was first passed, we've made progress toward equality, yet the work for a more perfect union is never ending. We'll continue to build on the legal equality won by the civil rights movement to help ensure that every person enjoys the opportunity that this great land of liberty offers."[150]

The 2006 reauthorization extended the bulk of the Voting Rights Act for another 25 years, though it did eliminate the ability of federal election examiners to register voters under Section 5.[151] Prior to introducing H.R. 9, the House Committee on Judiciary held 10 oversight hearings before the Subcommittee on the Constitution examining the effectiveness of the temporary provision of the Voting Rights Act over the last 25 years.[152] The Subcommittee heard testimony from 39 witnesses and assembled over 12,000 pages of testimony, documentary evidence and appendices.[153] Additionally, the Subcommittee held two legislative hearings and heard from seven additional witnesses.[154] When combined with the work of the Senate, the two Judiciary Committees held 21 hearings, heard from numerous witnesses, received reports and documents illustrating continued discrimination, and, in all, compiled a legislative record totaling more than 15,000 pages.[155]

In the absence of a full Voting Rights Act, during the first year of the 116th Congress, the Subcommittee on Elections of the Committee on House Administration held eight hearings and one listening session in eight states and the House of Representatives, heard testimony from more than 60 witnesses, and collected more than 3,000 pages of testimony and documents.

147 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 36-37.

148 *Id.* at p. 37.

149 Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CRS Report R43626 (updated July 20, 2015) at p. 22, *see* H.R. 9 – passed the House on July 13, 2006 (390-33); passed the Senate on July 20, 2006 (unanimous); signed into law July 27, 2006.

150 *President Bush Signs Voting Rights Act Reauthorization and Amendments Act of 2006*, The White House, Office of the Press Secretary (July 27, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727.html.

151 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 36-37.

152 H. Rept. 109-478 accompanying H.R. 9 Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (109th Congress).

153 *Id.*

154 *Id.*

155 H. R. Rep. 109–478, at 5, 11–12; S. Rep. 109–295, at 2–4, 15.

THE CONSTITUTIONALITY AND ENFORCEMENT OF THE VOTING RIGHTS ACT AND ITS PROVISIONS

The Court upheld the constitutionality of the Voting Rights Act in 1966, in *South Carolina v. Katzenbach*.[156] Seeking to block its enforcement, the State of South Carolina alleged that provisions of the Voting Rights Act violated the Constitution and infringed on states' rights.

Congress exercised its power to create the law through Section 2 of the 15th Amendment, which gave power to the Congress to create laws necessary to uphold the constitutional prohibition against racial discrimination in voting.[157] The Court held that,

> "After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. ... We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-White Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly '[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.'"[158]

Also, in 1966, the Court held in *Katzenbach v. Morgan* that Section 4(e) of the Voting Rights Act was a proper exercise of Congress's powers under Section 5 of the 14th Amendment, rendering New York's English literacy requirements unenforceable to the extent they conflicted with the Voting Rights Act.[159]

Prior to 2013, any voting change in a jurisdiction covered under Section 4 was subject to review. Many of these changes include current issues discussed in this report, including: redistricting, closing or moving polling locations, new procedures for purging voters from the rolls, English-language literacy tests, voter ID laws, cutting early voting or same-day registration, and any other changes to voting procedures. The goal of the Voting Rights Act and its enforcement mechanisms was to block the implementation of racially discriminatory voting practices and prevent these practices from disenfranchising voters.

From 1982 to 2006, there were more than 700 objections to voting changes under the Voting Rights Act's Section 5 preclearance provisions because the Department of Justice or the U.S. District Court for the District of Columbia considered them to be racially discriminatory.[160] More than 800 proposed changes were also withdrawn or amended after the Department of Justice requested additional information.[161] During the 2006 reauthorization, "Congress found there were more Department of Justice objections [blocking proposed voting changes under

156 *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).
157 *Id.*
158 *Id.* at p. 328.
159 *Katzenbach v. Morgan*, 384 U.S. 641 (1966).
160 H.R. Rep. No. 109-478, at 21 (2006); H.R. Rep. No. 109-478, at 40-41 (2006).
161 H.R. Rep. No. 109-478, at 645 (2006).

Section 5 due to determinations that they would be discriminatory] between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490)."[162]

During the 2006 Voting Rights Act reauthorization, the Department of Justice reported receiving between 4,000 and 6,000 submissions annually from jurisdictions covered by the Voting Rights Act.[163] The Judiciary Committee found that, "The changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process. This increased activity shows that attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future."[164] During the 2006 reauthorization of the Voting Rights Act, Congress received testimony from the National Commission on the Voting Rights Act that the number of elected officials serving in the original six states covered by the temporary provisions of the Voting Rights Act (Louisiana, Mississippi, South Carolina, Virginia, Georgia, and Alabama) increased by approximately 1,000 percent since 1965.[165]

Section 2, in concert with Sections 4 and 5, also proved a powerful tool to protect the right to vote and enforce the Voting Rights Act. At its enactment, Section 5 left in place long-standing, racially discriminatory practices that were not already struck down because they were not enacted *after* 1965. Preclearance was prospective and did not preclear existing voting laws.[166] For example, when Black voters wanted to challenge Mississippi's historic dual voter registration system that had been enacted a century before, they had to do so under Section 2.[167] After the success of this case, when Mississippi tried to resurrect the dual system, it was successfully challenged under Section 5.[168] Section 2 is also critical to protecting the voting rights of Americans living in states not covered under Section 5 preclearance. Section 2 is still in effect nationwide, the implications of which will be discussed in greater detail later in this report.

Over the lifetime of the Voting Rights Act, states and localities have been "bailed in" under the coverage formula, as well as successfully petitioned to "bail out." As of 2013, Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia were covered in their entirety.[169] California, Florida, New York, North Carolina, South Dakota, and Michigan each contained covered counties or townships, but the state as a whole was

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162 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 45, *citing Shelby Cty.*, 570 U.S. at 571 (Ginsburg, J., dissenting) ("On that score, the record before Congress was huge. In fact, Congress found there were more DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490)."); Voting Rights Act: Evidence of Continued Need: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 172 (2006).

163 H. Rept. 109-478 accompanying H.R. 9 Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (109th Congress).

164 *Id.*

165 *Id.*

166 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 30.

167 *Id., citing Mississippi State Chapter of Operation PUSH v. Allain*, 674 F. Supp. 1245, 1247 (N.D. Miss. 1987).

168 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 31.

169 U.S. Department of Justice, *Jurisdictions Previously Covered by Section 5* (updated Aug. 6, 2015), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5.

not.[170] From 1967 until 2013, sixteen jurisdictions in North Carolina, New Mexico, Maine, Oklahoma, Wyoming, Massachusetts, Connecticut, Colorado, Hawaii, Idaho, Virginia, Texas, Georgia, California, Alabama, and New Hampshire successfully availed themselves of the Section 4 bailout mechanism and were no longer individually subject to Section 5.[171]

This section is not designed to be an exhaustive examination of the various provisions of the Voting Rights Act or the relevant case law.

SHELBY COUNTY AND THE UNDERMINING OF THE VOTING RIGHTS ACT

Following the 2006 reauthorization, the Voting Rights Act was again challenged in *Northwest Austin Utility District Number One v. Holder*.[172] Though the Court specifically did not rule on the constitutionality of Section 5 of the Voting Rights Act, the majority raised significant concerns.[173] These concerns served as a predicate to the Court's actions in 2013.[174]

On June 25, 2013, the Court struck down Section 4(b) of the Voting Rights Act, finding the coverage formula unconstitutional in the 5-4 decision in *Shelby County*.[175] The Court specifically did not rule on the constitutionality of Section 5 preclearance, only the formula determining which jurisdictions were subject to coverage. The decision effectively returned the United States to a reactive state of voting rights protection, eliminating the proactive protections that had worked for decades to ensure equal access to the ballot.

The *Shelby County* decision changed the landscape of voting rights and efforts to prevent discriminatory voting laws. Striking down Section 4(b) effectively rendered Section 5 inoperable. The Department of Justice no longer has the authority to review proposed voting changes before they go into effect, leaving it to voters and litigators to identify when discrimination has occurred and to undertake the lengthy and costly process of challenging

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170 *Id.*

171 U.S. Department of Justice, *Section 4 of the Voting Rights Act* (updated Dec. 21, 2017), https://www.justice.gov/crt/section-4-voting-rights-act#bailout.

172 *Northwest Austin Utility District Number One v. Holder*, 557 U.S. 193, 129 S.Ct. 2504 (2009).

173 *Id.* at p. 2506.

> "The historic accomplishments of the Voting Rights Act are undeniable, but the Act now raises serious constitutional concerns. The preclearance requirement represents an intrusion into areas of state and local responsibility that is otherwise unfamiliar to our federal system. Some of the conditions that the Court relied upon in upholding this statutory scheme in *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769, and *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119, have unquestionably improved. Those improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success, but the Act imposes current burdens and must be justified by current needs. The Act also differentiates between the States in ways that may no longer be justified."

174 *Id.* at p. 2511.

> "Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. ... These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not adequate justification to retain the preclearance requirements."

175 *Shelby County, Ala. v. Holder*, 570 U.S. 529, 133 S.Ct. 2612 (2013); Chief Justice Roberts writing for the majority, Justice Ginsberg writing for the dissent.

these laws in court. States and localities are no longer required to collect and evaluate racial impact data when making changes to voting laws.

Chief Justice Roberts, writing for the majority, acknowledged that "voting discrimination still exists, no one doubts that."[176] While acknowledging that the progress made was "largely because of the Voting Rights Act," the question, Roberts said, was "whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements;"[177] "The [15th] Amendment is not designed to punish for the past; its purpose is to ensure a better future."[178]

In declaring Section 4(b) unconstitutional, the Roberts Court held that the coverage formula in the 2006 reauthorization "could no longer be used as a basis for subjecting jurisdictions to preclearance,"[179] finding that 40 years had passed since the enactment of the original Voting Rights Act and the 2006 law ignored these developments in the coverage formula "keeping the focus on decades-old data relevant to decades-old problems, rather than on current data reflecting current needs."[180] *Shelby County* did not rule on Section 5 itself, nor did it affect the permanent, nationwide ban on racial discrimination in Section 2. Additionally, Chief Justice Roberts said, "Congress may draft another formula based on current conditions," leaving open the possibility that the Court could find an updated formula to be constitutional.[181]

Section 5 prohibited retrogression — going backwards by restricting access to the polls for minority voters.[182] The Court's decision in *Shelby County* has left voters across America vulnerable to the discrimination and disenfranchisement the Voting Rights Act sought to eradicate.[183] The American people have now gone to the polls in three federal elections without the full protections of the Voting Rights Act. The next chapters of this report illustrate how, without the full protection of the Voting Rights Act and support of the Department of Justice,[184] states have retrogressed, limiting access to the polls and suppressing the vote of Americans of color.

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176 *Id.* at p. 2619.

177 *Id.*, *citing Northwest Austin*, "the Act imposes current burdens and must be justified by current needs."

178 *Id.* at p. 2629.

179 *Id.* at p. 2631.

180 *Id.* at p. 2628-29.

181 *Id.* at p. 2631.

> "Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley*, 502 U.S., at 500-501, 112 S.Ct. 820. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."

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

> "By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from 'undo[ing] or defeat[ing] the rights recently won" by Negroes. ... Section 5 was intended "to ensure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques. ...
>
> In other words, the purpose of § 5 has always been to ensure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

183 For a summary of the impact of the *Shelby County* decision, *see* U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 59.

184 U.S. Department of Justice, *Fact Sheet on Justice Department's Enforcement Efforts Following Shelby County Decision*. https://www.justice.gov/crt/file/876246/download

CHAPTER TWO

The State of Voting Rights and Election Administration post-Shelby County

THE CURRENT LANDSCAPE

"As a people, the most important right that we have is the right to vote. ... Other rights, even the most basic, are illusory if the right to vote is undermined."

— Irving Joyner, NCCU School of Law

The Court's decision in *Shelby County* fundamentally undermined the manner in which voting rights are protected and enforced across America, including pursuant to the 14th and 15th Amendments. Before *Shelby County*, all voting changes in covered jurisdictions had to be cleared through the Department of Justice or the Federal Court in the District of Columbia.[185]

Now, without the Section 4(b) coverage formula, no jurisdiction falls under Section 5 preclearance, rendering this critical portion of the Voting Rights Act effectively unenforceable. Previously covered states are now free to enact discriminatory and suppressive laws that may have otherwise been denied under a preclearance review. This leaves the voting rights of millions of Americans vulnerable to suppression and disenfranchisement.

Shelby County opened the door for a new generation of voter suppression. Its effects were sudden.

Hours after *Shelby County*, Texas revived a previously blocked voter ID law. Within days, Alabama announced it would move to enforce a photo ID law it had previously refused to submit to the Department of Justice for preclearance. Within months, New York broke from past practices and declined to hold special elections to fill 12 legislative vacancies, denying 800,000 voters of color representation.[186]

In North Carolina, State Senator Tom Apodaca announced the state's General Assembly leadership no longer had to worry about the "legal headache" of preclearance, and the state

185 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 45-46, *citing* 52 U.S.C. § 10304(a), *see also* 28 C.F.R. § 51.10; *Allen v. State Bd. of Elections*, 393 U.S. 544, 548-89 (1969).

"First, under Section 5, any voting law, practice, or procedure was subject to preclearance review prior to *Shelby County*..."

186 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019); written testimony of Deuel Ross at p. 4.

moved ahead with a law to remake the state's elections system.[187] Less than two months after *Shelby County*, the North Carolina General Assembly passed, and the Governor signed into law, what became known as the "monster law,"[188] a sweeping voter suppression bill requiring strict forms of voter ID, cuts to early voting, and eliminating key election administration practices, including:

- One of two "Souls to the Polls" Sundays (these are early voting events, traditionally held the Sunday before Election Day and heavily utilized by Black faith communities to get voters to the polls);
- Same-day voter registration;
- Out-of-precinct voting which allowed voters to cast provisional ballots if they appeared at the wrong precinct but in the correct county; and
- Preregistration of 16- and 17-year old voters.[189]

Litigation against the law, captioned *NC NAACP v. McCrory*, demonstrated there was no legitimate reason for North Carolina's law. It was enacted specifically to target minority voters.[190] The court characterized H.B. 589 as "the most restrictive voting law North Carolina has seen since the era of Jim Crow"[191]

Before *Shelby County*, the Department of Justice issued over 50 objection letters under Section 5 from 1980 to 2013 regarding proposed voting changes in North Carolina, including several after 2000.[192] During the same period, plaintiffs brought 55 successful Section 2 cases in North Carolina.[193] Post-*Shelby County*, the monster law attempted to usher in a suite of suppressive laws that could have almost certainly not passed preclearance scrutiny, crafted in such a

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187 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Tomas Lopez at p. 2, *see also* Laura Leslie, *NC voter ID bill moving ahead with Supreme Court ruling*, WRAL (June 25, 2013), http://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/.

188 Sari Horwitz, *How North Carolina Became the Epicenter of the Voting Rights Battle*, The Washington Post (April 27, 2016), https://www.washingtonpost.com/world/national-security/how-north-carolina-became-the-epicenter-of-the-voting-rights-battle/2016/04/26/af05c5a8-0bcb-11e6-8ab8-9ad050f76d7d_story.html.

189 *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 216-218 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

190 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Caitlin Swain at p. 5-6, *citing NC NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

> "Finding in favor of plaintiffs, the court concluded that '[t]he new provisions target African Americans with almost surgical precision' and 'impose cures for problems that did not exist.' 'Upon receipt of [racially disaggregated data on voting patterns and usage],' the Fourth Circuit found that 'the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.'
>
> '[W]ith race data in hand,' the General Assembly had crafted a photo ID requirements that excluded the specific types of photo IDs that it knew Black voters disproportionately lacked, and enacted other provisions after learning that Black voters used early voting at a much higher rate than Whites, Black voters specifically used the first week of early voting more heavily than Whites, Black voters voted out-of-precinct at higher rates than whites and thus benefited more from the partial counting of those ballots, and Black youth used preregistration at higher rates than Whites. ... This case 'comes as close to [including] a smoking gun as we are likely to see in modern times,' the court explained, '[when] the State's very justification for a challenged statute hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.'"

191 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Caitlin Swain at p. 2, *citing NC NAACP v. McCrory*, 831 F.3d 204, 227 (4th Cir. 2016).

192 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 70-71.

193 *Id.*

"Prior to Shelby, covered jurisdictions had to provide notice to the federal government – which meant notice to the public – before they could implement changes in their voting practices or procedures. Such notice is of paramount importance, because the ways that the voting rights of minority citizens are jeopardized are often subtle. They range from the consolidation of polling places so as to make it less convenient for minority voters to vote, to the curtailing of early voting hours that makes it more difficult for low-income people of color to vote, to the disproportionate purging of minority voters from voting lists under the pretext of "list maintenance."

— Kristen Clarke, Lawyers' Committee for Civil Rights Under Law

discriminatory manner a three-judge panel found they "target[ed] African Americans with almost surgical precision" and "impose[d] cures for problems that did not exist."[194]

By 2016, 14 states had enacted new voting restrictions for the first time, including previously covered states such as Alabama, Arizona, Mississippi, South Carolina, Texas, and Virginia.[195] In 2017, two additional states, Arkansas and North Dakota, enacted voter ID laws.[196] In 2018, Arkansas, Indiana, Montana, New Hampshire, North Carolina, and Wisconsin enacted new restrictions on voting, ranging from restrictions on who can collect absentee ballots, to cuts to early voting, restrictions on college students, and enshrining voter ID requirements in a state constitution.[197]

In 2018, more than 60 percent of Florida's voters passed a ballot initiative automatically restoring the voting rights of more than 1 million formerly incarcerated individuals with past felony convictions. Amendment 4 would apply once an individual had completed his or her sentence, including parole and probation, except for murder or felony sex offenses. In 2019, the Florida legislature passed, and the Governor signed a new law effectively overruling the will of more than 60 percent of the state's voters, requiring all formerly incarcerated individuals to pay fines and fees before they can be re-enfranchised.[198]

194 *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 216-218 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399.

195 *New Voting Restrictions in America*, Brennan Center for Justice (last updated July 3, 2019), https://www.brennancenter.org/new-voting-restrictions-america.

In 2016, the 14 states with new voting restrictions in place for the presidential election were: Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.

196 *Id.*

197 *Id.*

198 Amendment 4 passed overwhelmingly, yet the Florida State Legislature passed S.B. 7066 and Governor DeSantis signed it into law in 2019. The law is currently being challenged in court, *see also Voting Laws Roundup 2019*, Brennan Center for Justice (July 10, 2019),

Also in 2019, Arizona enacted laws extending voter ID requirements to early voting and emergency early and absentee voting.[199]

Without the full protection of the Voting Rights Act, voters and litigators are left to rely primarily on lawsuits to protect the franchise. Section 2 of the Voting Rights Act provides a private right of action to sue in cases of voting rights violations. However, as discussed in this report, Section 2 litigation has been time consuming and costly, and is only available to block existing or newly instituted discriminatory policies or procedures. Since *Shelby County*, the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") alone has been involved in 41 cases related to discriminatory practices in voting or adverse effects on the voting rights of minority voters.[200] Twenty-four of these actions have been filed since January 20, 2017.[201] By contrast, the Department of Justice has filed no cases in that time.[202]

In the same timeframe, the American Civil Liberties Union ("ACLU") has opened more than 60 new voting rights matters, including cases filed, amicus briefs, and investigations.[203] The organization currently has more than 30 active matters.[204] Between the 2012 and 2016 presidential elections, the ACLU and its affiliates won 15 voting rights victories protecting more than 5.6 million voters in 12 states, collectively home to 161 members of the House and 185 Electoral College votes.[205] Between the *Shelby County* decision and the September 2018 issuance of the U.S. Commission on Civil Rights' report entitled "An Assessment of Minority Voting Rights Access in the United States" at least 23 states had enacted newly restrictive statewide voter laws.[206]

Reliance on Section 2 also shifts the burden to the citizen, rather than the state or local government seeking to enact a change to its voting laws, to prove disenfranchisement. Suppressive laws can potentially disenfranchise voters for years before they are identified,

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https://www.brennancenter.org/analysis/voting-laws-roundup-2019.

199 *Voting Laws Roundup 2019*, Brennan Center for Justice (July 10, 2019), https://www.brennancenter.org/analysis/voting-laws-roundup-2019, *see also* S.B. 1072 and S.B. 1090.

200 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 4.

201 *Id.*

> "... Since *Shelby County*, the Lawyers' Committee has been involved in 41 cases relating to discriminatory practices in voting or adverse effects on the voting rights of minority voters.... Twenty-four of these actions were filed since January 20, 2017—which is twenty-four more cases than instituted by the current administration's Department of Justice. Not including the four cases where we sued the federal government, in twenty-nine of the thirty-seven (78.3%) cases we have been opposed by state or local jurisdictions that were covered by Section 5, even though far less than half of the country was covered by Section 5. Importantly, we have achieved substantial success—measured by final judgment, advantageous settlement, or effective injunctive relief in three-quarters of these cases."

202 *Id.*

203 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Dale Ho at p. 2.

204 *Id.*

205 *Id.* at p. 2-3.

206 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Catherine Lhamon at p. 36.

> "Drawing from Commission research and investigations and memoranda from 13 of the Commission's State advisory committees who analyzed voting discrimination in Alabama, Alaska, Arizona, California, Illinois, Indiana, Kansas, Louisiana, Maine, New Hampshire, Ohio, Rhode Island, and Texas, this report documents current conditions evidencing ongoing discrimination in voting. On every measure the Commission evaluated, the information the Commission received underscores that discrimination in voting persists."

challenged, and litigated to a conclusion. In addition, the Department of Justice has also interpreted *Shelby County* to mean it can now only send election observers if ordered by a court,[207] removing a critical tool for gathering evidence of voting discrimination and firsthand knowledge.

The 2014 midterm was the first election since the passage of the Voting Rights Act in 1965 that Americans went to register and cast their votes without the full might of the federal government protecting their right to do so.

In 2018, more than 50 percent of eligible Americans cast a ballot in the midterm elections.[208] The U.S. Census Bureau reported voter turnout was up among all voting age and major racial and ethnic groups.[209] 2018 saw the highest midterm turnout in four decades.[210] The increased turnout resulted in reports of long lines stretching for multiple hours; voting machines that did not work or were not plugged in; and polling locations that did not open on time or were moved. There is no way to know how many voters were disenfranchised because they had to leave the line or were turned away inside the polling place. It is also unknown how many voters were forced to cast a provisional ballot because of haphazard enforcement of voting regulations, or a lack of proper poll worker training, or their name was improperly removed from the voter rolls.

The Committee on House Administration Subcommittee on Elections held hearings in communities across the country, collecting contemporaneous data that clearly illustrates the ongoing attempts to suppress the votes of minority communities. The hearings provided clear evidence that discrimination and suppression are alive and well – the overt poll taxes and literacy tests as experienced during the Jim Crow Era may be resigned to the past, but discrimination in voting is not. Across the country, the Subcommittee on Elections heard testimony and gathered evidence of ongoing voter suppression. Six years after the Court's decision in *Shelby County*, Americans, including policymakers, have a more in-depth understanding of the measures taken by states to restrict and subvert the right to vote. Lawsuits over discriminatory voting changes lay bare the persistent opposition that some states and localities have toward equal access to the ballot. Furthermore, the evidence is clear that Sections 4(b) and 5 of the Voting Rights Act remain just as critical to protecting the right to vote and enforcing the 14th and 15th Amendments as they were in 1965.

Voters now face pervasive subtle and overt suppression tactics, many (if not all) of which would have been vetted through a transparent and thorough process under Section 5. Under current law, these changes can be enacted under the cover of darkness, with little to no public notice and no evaluation of the potential impact on voters. This chapter explores these tactics, highlighting testimony received at Subcommittee hearings, as well as how voter suppression

207 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 9-10, https://www.uscer.gov/pubs/2018/Minority_Voting_Access_2018.pdf, *see also* U.S. Dep't of Justice, Fact Sheet on Justice Department's Enforcement Efforts Following *Shelby County* Decision, https://www.justice.gov/crt/file/876246/download.

208 Jordan Misra, *Voter Turnout Rates Among All Voting Age and Major Racial and Ethnic Groups Were Higher Than in 2014*, U.S. Census Bureau, Behind the 2018 U.S. Midterm Election Turnout (April 23, 2019), https://www.census.gov/library/stories/2019/04/behind-2018-united-states-midterm-election-turnout.html.

209 *Id.*

210 *Id.*

techniques have evolved. This chapter also examines the role of Section 2 litigation (one of the key remaining tools in the Voting Rights Act arsenal). It examines the critical role it still plays in helping protect the right to vote, but also examines the limitations in relying on Section 2 to address the disenfranchisement that a full Voting Rights Act would have prevented.

In Brownsville, Texas, Mimi Marziani of the Texas Civil Rights Project testified that, "long lines and late openings are, unfortunately, such a common feature of Texas elections that they are deemed 'typical' by election officials."[211] Ms. Marziani further testified that, in Harris County, home to the city of Houston, numerous polling places opened more than an hour late on Election Day.[212] The county had to be sued to keep the polls open longer to compensate.

"[A]t the Pittman Park voting station, we received calls lines that were reportedly 300 people deep with a wait time of 3.5 hours. Long lines and broken or inoperable voting machines also led to people getting turned away or given provisional ballots. Ultimately, I was involved in advocacy and litigation to extend the hours of several polling locations in Fulton County, Georgia, that particularly impacted Atlanta University Center students at Morehouse, Spelman, and Clark Atlanta University at the Booker T. Washington High School polling place locations."

— Gilda Daniels, Advancement Project

In Georgia, Gilda Daniels of the Advancement Project testified that at the Pittman Park voting sites they received calls that lines were "reportedly 300 people deep with a wait time of 3.5 hours."[213] Ultimately, Ms. Daniels testified she was involved in advocacy and litigation to extend hours of several polling locations in Fulton County, Georgia.[214] The League of Women Voters of Georgia submitted testimony that voters in Gwinnett County and Atlanta precincts waited at least four hours to cast their vote.[215] Voters in Georgia experienced issues with the voting rolls, receiving and returning absentee ballots, and being forced to cast provisional ballots.

Witnesses testified that elections officials refused to provide provisional ballots, citing a paper shortage.[216]

211 *Voting Rights and Election Administration in Texas*: Listening Session Before the Comm. on House Administration, 116th Cong. (2019), written testimony of Mimi Marziani.

212 *Id.*

213 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Gilda Daniels at p. 5.

214 *Id.*

215 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019); written testimony submitted for the record by Tracy Adkison, League of Women Voters of Georgia.

216 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019); written testimony of Stacey Abrams at p. 2.

"In counties, polling locations ran out of provisional and back-up paper ballots. Frustrated voters received inaccurate information regarding their rights; and thousands of voters were forced to vote using provisional ballots due to long lines. An untold number simply gave up, unable to bear the financial cost of waiting in line because Georgia does not guarantee paid time off to vote."

"Voters, many of whom were first time voters, experienced numerous issues with being located on the voting rolls, receiving and returning absentee ballots, and were given a disturbing number of provisional ballots rather than being allowed to vote unhindered. In some areas, elections officials refused to provide provisional ballots, citing a shortage of paper."

— Stacey Abrams, Fair Fight

States and localities should be prepared for elections, no matter how high the turnout, and federal and state laws and regulations should support a robust democracy – not make it difficult for eligible voters to exercise the franchise.

After the Court struck down Section 4(b) and rendered Section 5 effectively inoperable, many states and counties, which were once required to clear any proposed voting changes through the Department of Justice or federal court before they could go into effect, have moved to restrict access to the ballot. Some states made overt moves to restrict access to the franchise implementing barriers such as: discriminatory gerrymandering that dilutes minority voting power, cutbacks or elimination of early voting, forcing more people to miss work in order to cast their vote, creating longer lines at polling locations on Election Day, and impeding voters that rely on others for transportation, frequently changing rules and regulations that confuse poll workers and voters, and denying access to language assistance.

"... when you deny things like early voting ... you are undermining people who every day of their lives have to fight just to exist and may not be able to be off on Election Day."

— Rev. Dr. William Barber II

Other changes may seem innocuous on their face, such as consolidating or moving polling locations, coloring voter purges as "list maintenance," or requiring specific forms of voter identification to be presented when voting. However, without Section 5 preclearance, none of these changes were evaluated for their potential discriminatory effect before implementation. As the testimony and evidence collected during the Subcommittee's hearings demonstrate, these voting changes jeopardize millions of Americans' right to vote and have a disparate impact on the ability of minority voters to cast a ballot.

Much of the testimony and evidence the Subcommittee received demonstrates that states use a combination of these tactics. In Ohio, for example, the state has cut back early voting, eliminated what was once referred to as "Golden Week" (when voters could register and vote

on the same day), consolidated early voting sites, and purged thousands of voters from the registration rolls, among other things.[217]

In Florida, a lack of language access and language assistance remains a critical barrier to voting.[218] In Alabama, the home of *Shelby County* and the infamous Bloody Sunday, the state is still attempting to suppress the vote of minority communities through implementation of strict voter ID requirements, attempts to require proof of citizenship for voter registration, and polling place closures.[219]

When compounded with poverty, a lack of adequate transportation, and/or other socioeconomic constraints, these tactics result in the disenfranchisement of thousands of otherwise eligible voters. This refrain was heard time and again, across all field hearings.

Some argued over the course of the field hearings that "voter turnout is up," so there must not be a problem. As this report demonstrates, that sentiment is inaccurate. Overcoming barriers to exercise the right to vote does not excuse the barriers' existence. The will and stamina that voters take to overcome suppressive laws is not an excuse to keep the unjust barriers in place. Congress and the American people made that clear nearly 55 years ago with the passage of the Voting Rights Act and its five subsequent reauthorizations.

> *"We ought to be celebrating increased turnout wherever it exists. And we also ought to be recognizing that, across the board, in this country, we have very, very low turnout for voters. And that is, in itself, a concern."*
>
> — Catherine Lhamon, U.S. Commission on Civil Rights

Others posit that purging voter rolls, requiring voter ID, and banning people from putting a neighbor's ballot in the mail is necessary to prevent voter fraud. Voter fraud has long been a red herring in the attempt to suppress the right to vote. The Subcommittee received testimony and evidence of how purge processes often inaccurately sweep up people who are, in fact, eligible to vote and disproportionately affect minority voters and naturalized citizens. There have been very few, if any, cases of in-person voter fraud, which is the only type of fraud voter ID would purportedly prevent.

The Subcommittee received no testimony in Arizona, a state that has seen a large shift toward mail-in ballots, warranting its suppressive ban on "ballot harvesting" that recently became law. In North Carolina's Ninth Congressional District, the recent issues with ballot collection were the result of election fraud, not voter fraud. Despite repeated unsubstantiated claims, there were no accounts of voter fraud in California's vote-by-mail and ballot collection system in the 2018 election.

217 *Voting Rights and Election Administration in Ohio*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019).
218 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019).
219 *Voting Rights and Election Administration in Alabama*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019).

In Ohio, Inajo Davis Chappell, a member of the Cuyahoga County Board of Elections for the last 12 years, testified in her personal capacity that she believes the "constant clamoring about rampant voter fraud is [also] discouraging voter participation."[220] Ms. Chappell went on to say, "my experience in administering elections in Cuyahoga County over the last twelve years permits me to say with confidence that claims of voter fraud in the elections process are wholly without merit. Indeed, the voter fraud narrative is a patently false narrative."[221]

As U.S. Commission on Civil Rights Chair Catherine Lhamon testified, "[N]ot only was there no evidence given to the Commission about widespread voter fraud, the data and the research that is bipartisan reflect that voter fraud is vanishingly rare in this country. ... [A]nd so, it is duplicative and also harmful to initiate strict voter ID, among other kinds of requirements, in the name of combating voter fraud."[222] The very real issue at hand is the lack of access to the ballot and the increase in discriminatory, suppressive voting laws faced by voters. As a guardian of democracy, this is where Congress's focus must lie.

VOTER SUPPRESSION EFFORTS ACROSS AMERICA

The post-*Shelby County* voting rights landscape has seen the rise of a new generation of voter suppression tactics. Some may appear sensible on their face, but in their intent and practical impact, they discriminate, frustrate, and ultimately suppress the votes of targeted communities. Some of these laws amount to a modern-day poll tax, such as requiring voter ID that is difficult and prohibitively expensive to obtain or requiring formerly incarcerated individuals to pay all fines and fees before their right to vote is restored.

The denial of, or lack of availability of, multi-language access or assistance at the polls disenfranchises voters whose right to those services is still protected under the Voting Rights Act. Discriminatory and over-aggressive methods of purging voter rolls disenfranchise

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220 *Voting Rights and Election Administration in Ohio*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019); written testimony of Inajo Davis Chappell at p. 3.

221 *Id.*

222 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Catherine Lhamon answering Congressman Pete Aguilar at p. 51-52.

"**Mr. Aguilar:** But this is becoming hyper-political. And some of my colleagues across the aisle are conflating voter fraud with legitimate exercising of our electoral process. And they have blamed losses, congressional losses, on this, basically telling folks that thousands of ballots just kind of show up, the inference being that individuals are just grabbing other people's ballots. I mean, you know, it is just becoming hyper-political.

So, can you talk a little bit about ballot harvesting? And is there evidence? Was there any testimony given to you and your Commission supporting claims of widespread voter fraud that a lot of my colleagues have used, obviously, to pass increased voter suppression laws?

Ms. Lhamon: Not only was there no evidence given to the Commission about widespread voter fraud, the data and the research that is bipartisan reflect that voter fraud is vanishingly rare in this country.

So, the concerns about that type of vote misuse both have existing criminal penalties in the Voting Rights Act for voting twice and State and Federal penalties for the kinds of voter fraud that already exist. And so it is duplicative and also harmful to initiate strict voter ID, among other kinds of requirements, in the name of combating voter fraud.

But, also, the existence of voter fraud, as I mentioned, essentially does not exist. And the testimony, both that we at the Commission received and also that our State advisory committees received across the many States that investigated this question, just don't find the existence of voter fraud at all."

otherwise eligible voters, often without their knowledge until they arrive at the polls and are turned away or forced to cast a provisional ballot that may not be counted.

Some states require an exact signature match for a ballot to be accepted, a challenge for elderly and disabled voters. This is often enforced by a lay-person with no training in handwriting analysis. Thousands of Georgia voters had their registrations put on hold because the name on the registration form did not "exact match" the name on file with certain government records. Hundreds of polling locations have closed since *Shelby County* was decided, early voting hours have been cut, and same-day registration has been eliminated in some instances. Discriminatory gerrymandering has once again diluted the vote and voice of minority populations.

This chapter will explore the most common voter suppression tactics discussed during the Subcommittee's field hearings, which have become more pervasive post-*Shelby County,* as there is no longer any check on these practices (other than costly litigation and ballot measures):

- Purging voter registration rolls
- Cutbacks to early voting
- Polling place closures and movements
- Voter Identification (voter ID) requirements
- Use of exact match and signature match
- Lack of language access and assistance
- Discriminatory gerrymandering

Purging Voter Registration Rolls

Voter purges refer to the process by which election officials attempt to remove the names of allegedly ineligible voters from the voter registration lists.[223] Voter purges have taken various forms in recent years, and when done improperly, disenfranchise otherwise eligible voters and increase the risk that minority voters will be disproportionately impacted. Often this happens too soon before an election for a voter to correct the error.

Florida has attempted to purge voters based on alleged ineligibility; Georgia came under increased scrutiny for placing voter registrations on hold and purging voters based on minor errors under the "exact match" procedures; North Carolina purges voters based on challenges by private parties; Florida and Pennsylvania purge voters based on felony convictions; and Georgia, and Ohio purge voters based on inactivity, to name a few.[224] While states must

223 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Michael Waldman at p. 3.

224 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 145-157.

maintain accurate voter rolls, practices of purging voters from rolls have raised serious concerns in recent years. Some states enacted unnecessary restrictions on voter registration and requirements to remain on the rolls, while others have purged otherwise eligible voters based on exaggerated assertions of non-citizens registering to vote and on the use of faulty databases.

The Brennan Center for Justice found that between 2014 and 2016, states removed almost 16 million voters from the registration rolls.[225] This purge rate resulted in almost 4 million more names being purged from the rolls between 2014 and 2016 than between 2006 and 2008.[226] The purge rate outpaced growth in voter registration (18 percent) or population (6 percent).[227] The Brennan Center calculated that 2 million fewer voters would have been purged between 2012 and 2016 if jurisdictions previously covered by Section 5 of the Voting Rights Act had purged their voter rolls at the same rate as other non-covered jurisdictions.[228]

Follow-on research by the Brennan Center found that at least 17 million voters were purged nationwide between 2016 and 2018.[229] According to testimony from Michael Waldman, President of the Brennan Center, the median purge rate was 40 percent higher in jurisdictions previously covered by Section 5 of the Voting Rights Act than elsewhere.[230] Had the purge rate in previously covered jurisdictions been consistent with the rest of the country, as many as 1.1 million fewer people would have been purged from the rolls.[231]

Federal law governing purges allows a voter's name to be removed from the voter rolls on the following grounds: (1) disenfranchising criminal conviction; (2) mental incapacity; (3) death; and (4) change in residence.[232] Additionally, individuals who were never eligible may be removed. Voters may be removed at their own request (even if they remain eligible).[233]

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225 Jonathan Brater, Kevin Morris, Myrna Perez, and Christopher Deluzio, *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.1.pdf.

226 *Id.*

> "Almost 4 million more names were purged from the rolls between 2014 and 2016 than between 2006 and 2008. This growth in the number of removed voters represented an increase of 33 percent — far outstripping growth in both total registered voters (18 percent) and total population (6 percent)."

227 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Michael Waldman at p. 3.

228 *Id.*

229 Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice (updated: Aug. 21, 2019), https://www.brennancenter.org/blog/voter-purge-rates-remain-high-analysis-finds.

230 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Michael Waldman at p. 3.

231 *Id.*, *citing* Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice (Aug. 1, 2019). https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds.

232 National Voter Registration Act of 1993, H.R. 2, 103rd Cong. (1993), 52 U.S.C. §20507.

> "The law discusses five categories of removal from voter rolls: (1) request of the registrant; (2) disenfranchising criminal conviction; (3) mental incapacity; (4) death; and (5) change in residence. The NVRA sets forth a series of specific requirements that apply to purges of registrants believed to have changed residence. The law also contains a series of additional proscriptions on state practices. For example, it provides that list maintenance must be uniform, nondiscriminatory, and in accordance with the Voting Rights Act. It also prohibits systematic voter purges (those programs that remove groups of voters at once) within 90 days of a federal election. The Act also has provisions that apply on Election Day if a voter has changed address. Voters who have moved within a jurisdiction are permitted to vote at either their new or old polling place (states get to choose), while purged voters — mistakenly believed to have moved — who show up on Election Day have the right to correct the error and cast a ballot that will count."

233 *Id.*, *see also* Ohio State Advisory Committee to the U.S. Comm'n on Civil Rights, *Voting Rights in Ohio* (May 2018) at p. 9, https://www.usccr.gov/pubs/2018/06-27-OH-Voting-Rights.pdf.

Notably, the statute does not allow states to purge voters solely based on inactivity. The Department of Justice supported plaintiffs who successfully challenged state purge practices until the change in presidential administrations following the 2016 election. The new administration reversed course on a brief filed by the Obama administration in support of plaintiffs challenging Ohio's purge practice, and instead filed a brief in support of Ohio.[234]

In 2018, the Ohio Advisory Committee to the U.S. Commission on Civil Rights Advisory Memorandum stated that Ohio is currently one of the most aggressive states in purging voter registrations.[235] The Court's decision in *Husted v. A. Philip Randolph Institute*, which upheld Ohio's practice,[236] paved the way for states to conduct more aggressive voter purges. Under Ohio law, voters were being removed from the voter rolls based on failure to vote. Voters who miss a single federal election are flagged to receive a postage prepaid notice to confirm the voter still lives at the same address. If the voter fails to respond to that notice and does not vote within the next four years (two federal elections), the state removes them from the voter rolls, citing change of residence, with no further notice. If a person attempts to vote after her registration has been canceled, she is given a provisional ballot. The provisional ballot is not counted for the current election cycle, but the envelope containing the provisional ballot, if filled out correctly, can double as a voter registration form, re-registering the voter for the next election cycle.[237] As of publication of the Ohio State Advisory Memorandum, Ohio had purged more than 2 million people since 2011 for failure to vote in two consecutive elections.[238]

On June 11, 2018, the Court ruled that Ohio's purge law was permissible.[239] The Court's decision was based on its interpretation of the National Voter Registration Act and did not address any possible claims regarding a Section 2 discrimination claim.[240] The *Husted* decision effectively punishes voters for failing to vote, contrary to how the law was written and the system is intended to function. In practice, if a voter skips voting in the midterms and one presidential election, they are placed into the process for purging.

A 2016 Reuters analysis of Ohio's voter purge found that "in predominantly African American neighborhoods around Cincinnati, 10 percent of registered voters had been removed due to inactivity since 2012, compared to just four percent in the suburban Indian Hill. The study

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234 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 155, *citing*

> "After the 2016 presidential election, the DOJ changed its position in this case through a brief filed in Aug. 2017, signed by no career staff. Brief for the United States as Amicus Curiae in Support of Petitioner-Defendant, *Husted v. A. Philip Randolph Inst.*, https://www.justice.gov/sites/default/files/briefs/2017/08/07/16-980_husted_v_randolph_institute_ac_merits.pdf. In the meantime, 17 former DOJ leaders including former Attorney General Eric Holder and career voting rights attorneys filed an amicus before the Supreme Court, arguing that the NVRA protects the right to vote and the right not to vote, and clearly prohibits removals for inactivity, noting that "from 1994 until the Solicitor General's brief in this case, the DOJ had repeatedly interpreted the NVRA to prohibit a state from using a registrant's failure to vote as the basis for initiating the Section 8(d) voter-purge process." Brief for Eric Holder et al. as Amici Curiae in Support of Respondents, *Husted v. A. Philip Randolph Inst.* at 31."

235 Ohio State Advisory Committee to the U.S. Comm'n on Civil Rights, *Voting Rights in Ohio* (May 2018) at p. 9, https://www.usccr.gov/pubs/2018/06-27-OH-Voting-Rights.pdf.

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

237 *Id.*

238 *Id.*

239 *Husted* v. *A. Philip Randolph Institute*, 138 S.Ct. 1833 (2018).

240 *Id.*

further found that more than 144,000 people were removed from the rolls in Ohio's three largest counties, which includes the cities of Cleveland, Cincinnati, and Columbus – hitting hardest neighborhoods that are low-income and have a high proportion of Black voters."[241] Ohio's Secretary of State Frank LaRose recently revealed errors in the state's purge list as groups found tens of thousands of people were wrongfully on the list.[242]

The purported rationale behind these purges often exaggerates the alleged problem of non-citizens voting, while the practical result is the removal of otherwise eligible citizens from the voting rolls. Sometimes, this concern is perpetuated by public officials who may have ulterior political motives. The words of election officials have a significant impact on the public's trust in the voting process. In Texas, the Secretary of State made wildly inaccurate claims about non-citizens registering to vote.

On January 25, 2019, Texas Secretary of State David Whitley issued an advisory to county voter registrars about non-citizens and voter registration.[243] In an accompanying press release, Secretary Whitley claimed that "approximately 95,000 individuals identified by [the Texas Department of Public Safety (DPS)] as non-U.S. citizens have a matching voter registration record in Texas" and "58,000 of whom have voted in one or more Texas elections."[244]

This claim was demonstrably false. Within a week, the facts bore out that many of these voters were in fact naturalized citizens who had already confirmed their citizenship.[245] As Kristen Clarke of the Lawyers' Committee testified, "the list was based on DMV data that the state knew was flawed and would necessarily sweep in thousands of citizens who completed the naturalization process after lawfully applying for a Texas drivers' license."[246] According to testimony from Dale Ho of the ACLU, in Harris County, Texas alone, about 60 percent of the 30,000 voters flagged had already confirmed their citizenship.[247] Advocates sued, challenging the purge process; the case settled immediately and Texas abandoned the process.[248] The court

241 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 12-13, *citing* Andy Sullivan & Grant Smith, *Use It or Lose It: Occasional Ohio Voters May Be Shut Out in November*, Reuters (Jun. 2, 2016), https://www.reuters.com/article/us-usa-votingrights-ohioinsight/use-it-or-lose-it-occasional-ohio-voters-may-be-shut-out-in-november-idUSKCN0YO19D.

242 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 13, *see also* Andrew j. Tobias, *Ohio Secretary of State Frank LaRose says Ohio's system of maintaining voter registrations rife with problems*, Cleveland.com (updated Sept. 25, 2019), https://www.cleveland.com/open/2019/09/ohio-secretary-of-state-frank-larose-says-ohios-system-of-maintaining-voter-registrations-rife-with-problems.html, and *Ohio Was Set to Purge 235,000 Voters. It Was Wrong About 20%.*, N.Y. Times (Oct. 14, 2109), https://www.nytimes.com/2019/10/14/us/politics/ohio-voter-purge.html.

243 Election Advisory No. 2019-02, *Use of Non-U.S. Citizen Data obtained by the Department of Public Safety*, (Jan. 25, 2019), https://www.sos.texas.gov/elections/laws/advisory2019-02.shtml.

244 Press Release, *Secretary Whitely Issues Advisory on Voter Registration List Maintenance Activity*, Texas Secretary of State (Jan. 25, 2019), https://www.sos.texas.gov/about/newsreleases/2019/012519.shtml.

245 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Dale Ho at p. 17.

246 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 8.

247 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Dale Ho at p. 17.

248 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 8, *citing Texas League of United Latino American Citizens v. Whitley*, No. 5:19-cv-00074 (W.D. Tex. Feb. 27, 2019).

found that Texas "created a mess" which "exemplified the power of the government to strike fear and intimidate the least powerful among us."[249]

Purges have also been implemented in Georgia, where then-Secretary of State Brian Kemp's office purged approximately 1.5 million registered voters between 2012 and 2016. Between 2016 and 2018, Georgia purged more than 10 percent of its voters.[250] Secretary of State Kemp then ran for Governor of Georgia in 2018, winning by 54,723 votes, a 1.4 percentage point margin.[251] In October 2019, Georgia officials announced they would be removing approximately 300,000 names from the voter rolls, almost four percent of those registered to vote.[252]

Between 2000 and 2012, the state of Florida was repeatedly charged with allegations it engaged in systematic purges impacting voters of color.[253] In 2012, Florida attempted to remove voters who were allegedly non-citizens from its voter rolls by comparing rolls to driver's license data, an unreliable method as Florida's driver's license databases do not reflect citizenship.[254] Utilizing this method, the state identified over 180,000 "questionable" voters before eventually cutting it down to 2,600.[255] In addition, the purge had suspicious timing as it took place within 90 days of the 2012 election.[256] According to the U.S. Commission on Civil Rights:

> "The vast majority of voters on Florida's 2012 purge list were people of color.[257] The data in a federal complaint alleging Section 2 violations (based on Florida voter registration data) showed that 87 percent were voters of color: 61 percent were Hispanic (whereas 14 percent of all registered voters in Florida were Hispanic); 16 percent were Black (whereas 14

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249 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript Dale Ho at p. 17.

> "There is a similar story in Texas. In January, Texas Attorney General Ken Paxton tweeted, in capital letters, "voter fraud alert," claiming that almost 100,000 registrants in Texas were noncitizens. But that was false. Within a week, it came out that many of these voters were naturalized citizens who had already confirmed their citizenship. In Harris County alone, this translated to about 60 percent of 30,000 voters flagged there. And as to the remaining 12,000, an audit of 150 names chosen at random yielded no noncitizens.
>
> Civil rights organizations, including MALDEF, the ACLU, and the Texas Civil Rights Project, sued to stop Texas from purging these voters. The court found that Texas, quote, created a mess, which, quote, exemplified the power of the government to strike fear and intimidate the least powerful among us. The case was settled with Texas taxpayers on the hook for $450,000 in costs and attorneys' fees. Texas Secretary of State David Whitley departed from office in disgrace."

250 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Gilda Daniels at p. 5.

> "Between 2016 – 2018, Georgia purged more than 10 percent of its voters, nearly 670,000 registrations were cancelled in 2017 alone."

251 Mark Niesse, *Georgia certifies election results after nearly two weeks of drama*, AJC (Nov. 17, 2018), https://www.ajc.com/news/state--regional-govt--politics/georgia-certifies-election-results-after-nearly-two-weeks-drama/VOUIvFPmmzxad39XQFuoPP/.

252 Nicholas Casey, *Georgia Plans to Purge 300,000 Names From Its Voter Rolls*, N.Y. Times (Oct. 30, 2019), https://www.nytimes.com/2019/10/30/us/politics/georgia-voter-purge.html.

253 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 145.

254 *Id.*

255 *Id.* at p. 147.

256 Patrik Jonsson, *Court rules Florida voter purge illegal, but will it stop GOP voting tweaks?*, The Christian Science Monitor (Apr. 2, 2014), https://www.csmonitor.com/USA/Justice/2014/0402/Court-rules-Florida-voter-purge-illegal-but-will-it-stop-GOP-voting-tweaks.

257 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Judith Browne Dianis at p. 3.

percent of all registered voters were Black); 16 percent were White (whereas 70 percent of registered voters were White); and 5 percent were Asian American (whereas only 2 percent of registered voters were Asian)."[258]

In ensuing litigation, Florida was blocked from continuing this practice. In 2014, then-Governor, now Senator, Rick Scott again attempted to purge alleged non-citizens from the voter rolls using the Department of Homeland Security's Systematic Alien Verification for Entitlements ("SAVE") database. Use of the SAVE database is also highly problematic as it is not updated to include all naturalized citizens.[259] This faulty method of purging voter rolls has a disproportionate impact on people of color.

Judith Browne Dianis, Executive Director of the Advancement Project, testified in Florida that the Advancement Project's research found 87 percent of Florida's purge list comprised people of color, and more than 50 percent of the list was Latino.[260] Florida has again moved aggressively to purge voters: an estimated seven percent of voters have been purged in the last two years.[261]

In Alabama, since taking office in 2015, Secretary of State John Merrill has purged 780,000 voters from the state's rolls.[262] In 2017, more than 340,000 additional voters were listed as inactive, a precursor to being removed from the rolls if the voter does not vote in the next four years.[263] Nancy Abudu, Deputy Legal Director, Voting Rights at the Southern Poverty Law Center testified that, although Alabama law allows voters placed on the inactive list to update their voter registration and cast a regular ballot even on the day of the election, Southern Poverty Law Center employees on the ground as part of the Alabama Voting Rights Project, "spoke to dozens of voters who were forced to cast provisional ballots because of their 'inactive' status."[264]

New York has also had issues with improperly removing otherwise eligible voters from the rolls. In November 2016, the Lawyers' Committee and Common Cause filed suit alleging the New York City Board of Elections (NYCBOE) had purged voters from the rolls in violation of the National Voter Registration Act.[265] Earlier in 2016, NYCBOE had confirmed that more than 126,000 Brooklyn voters were removed from the rolls between the summer of 2015 and the April 2016 presidential primary election.[266] After the State of New York and the Department of Justice entered the case, the NYCBOE agreed to place persons who were removed from the rolls or were on inactive status back on the rolls if they met certain

258 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 147-148.

259 *Id.* at p. 148.

260 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Judith Browne Dianis at p. 68.

261 *Id.*

262 *Voting Rights and Election Administration in Alabama*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Nancy Abudu at p. 4.

263 *Id., also citing* Maggie Astor, *Seven Ways Alabama Has Made It Harder to Vote*, N.Y. Times (2018). https://www.nytimes.com/2018/06/23/us/politics/voting-rights-alabama.html

264 *Id.* at p. 4-5.

265 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 7.

266 *Id.*

requirements. Subsequently, a Consent Decree was negotiated whereby the NYCBOE agreed to comply with the NVRA before purging anyone from the rolls and subject itself to four years of monitoring and auditing.[267]

In 2016, Arkansas purged thousands of voters due to supposed felony convictions, but the lists used to conduct the purge where highly inaccurate and included many voters who had never committed a felony or whose voting rights had been restored.[268]

Improper purges are exacerbated by the use of inaccurate databases. The SAVE database is at times used to verify immigration status when an individual interacts with a state, however SAVE does not include a comprehensive and definitive listing of U.S. citizens and states have been cautioned against using it to check voter eligibility.[269] Additionally, driver's license databases have proven inaccurate for verifying voter registration lists.[270]

States have also attempted to address voters rolls through coordinated information sharing. Two systems developed to facilitate this are the Interstate Voter Registration Crosscheck Program ("Crosscheck") and the Electronic Registration Information Center ("ERIC"). Crosscheck was created by the State of Kansas and has been found to have high error rates.[271] The system includes data from registered voters in participating states and compares their first names, last names, and date of birth to generate lists of voters who may be registered to vote in more than one state.[272] The system has proved highly problematic. A 2017 study found that, if applied nationwide, Crosscheck would "impede 300 legal votes for every double vote prevented."[273] Several states have left the program in recent years or stopped using it.[274] Since Kris Kobach lost his election for governor of Kansas in 2018, the future of the Crosscheck system has become uncertain and data has not been loaded into Crosscheck since 2017 due to security concerns.[275]

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267 *Id.*, *citing Common Cause/New York v. Board of Elections in City of New York*, No. 1:16-cv-06122 (E.D.N.Y. 2017).

> "On November 3, 2016, the Lawyers' Committee and another civil rights organization filed suit alleging that the New York City Board of Elections (NYCBOE) had purged voters from the rolls in violation of the NVRA. Earlier in the year, the NYCBOE had confirmed that more than 126,000 Brooklyn voters were removed from the rolls between the summer of 2015 and the April 2016 primary election. After entry of the State of New York and the U.S. Department of Justice in the case, the NYCBOE agreed to place persons who were on inactive status or removed from the rolls back on the rolls if they lived at the address listed in their voter registration file and/or if they had voted in at least one election in New York City since November 1, 2012 and still lived in the city. Subsequently, the parties negotiated a Consent Decree, under which the NYCBOE agreed to comply with the NVRA before removing anyone from the rolls, and to subject itself to a four-year auditing and monitoring regimen."

268 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Michael Waldman at p. 4.

269 *Id.*, written testimony of Dale Ho at p. 8-9.

270 *Id.* at p. 12.

271 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 109.

272 *Id.* at p. 109-110.

273 Jonathan Brater, Kevin Morris, Myrna Pérez, and Christopher Deluzio, *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice (2018) at p. 7-8, https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf, *citing* Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections* (working paper, Stanford University et al., 2017), 3, 26, https://scholar.harvard.edu/files/morse/files/1p1v.pdf.

274 *Id.* at p. 7-8.

275 Sherman Smith, *ACLU Calls on Kansas to end 'misery' of Crosscheck voter registration system*, The Topeka Capital-Journal (Mar. 28, 2019), https://www.cjonline.com/news/20190328/aclu-calls-on-kansas-to-end-misery-of-crosscheck-voter-registration-system.

The ERIC system uses far more data points than Crosscheck to attempt to identify when voters move, including voter registration data, DMV licensing information, Social Security Administration data, and National Change of Address information.[276] As of July 2019, 28 states and the District of Columbia participate in ERIC.[277]

This problem could be ameliorated by implementing same-day registration. Dale Ho testified that states that have Election Day registration "tend to have turnout that is about 5 to 10 percentage points higher than the states that don't."[278] Allowing voters to same-day register could ensure that voters who are erroneously purged from the rolls are not forced to cast a provisional ballot that may never be counted or do not vote at all.

Cutbacks to Early Voting

In the 2016 election cycle, 23,024,146 Americans used in-person early voting.[279] Since 2010, several states have reduced the hours and/or days of early, in-person voting available to voters.[280] The USCCR Minority Voting Report found cuts to early voting can cause long lines with a disparate impact on voters of color.[281] Long lines at the polls during the 2012 elections led to the creation of the Presidential Commission on Election Administration (PCEA). The PCEA found that "over five million voters in 2012 experienced wait times exceeding one hour and an additional five million waited between a half hour and an hour."[282] According to the National Conference of State Legislatures, 39 states (including three that mail ballots to all voters) and the District of Columbia allow any qualified voter to cast an in-person vote during a designated early voting period prior to Election Day with no excuse or justification needed.[283] Eleven states have no early voting and an excuse is required to request an absentee ballot.[284] Since 2010, at least seven states have reduced in-person early voting, limiting the days and hours sites are open, and closed locations, all of which disproportionately impacts voters of color.[285]

One of the most severe examples of cuts to early voting was examined at the Subcommittee's field hearing in Ohio. For nearly a decade, Ohio expanded voters' access to the ballot before reversing course and drastically constricting access, limiting early voting and creating frequent

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276 *Id.* at p. 8.

277 National Conference of State Legislatures, *Voter List Accuracy* (Aug. 22, 2019), http://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx.

278 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Dale Ho at p. 25.

279 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 158.

280 *Id.* at p. 159.

281 *Id.*

282 *Id.* at p. 160, *citing* U.S. Election Assistance Commission, Presidential Commission on Election Administration, EAC (Jan. 2014), https://www.eac.gov/election-officials/pcea/.

283 National Conference of State Legislatures, *Absentee and Early Voting* (July 30, 2019), http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

284 *Id.*

285 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 6.

The seven states are: Florida, Nebraska, North Carolina, Ohio, Tennessee, Wisconsin, and West Virginia; *see* Tim Lau, *Early Voting Numbers Soar as Midterms Approach*, Brennan Center for Justice (Oct. 29, 2018), https://www.brennancenter.org/blog/early-voting-numbers-soar-midterm-elections-approach.

confusion for voters. During the 2004 general election, Ohio voters faced exceptionally long lines which left them (in the words of one court) "effectively disenfranchised."[286] Ohio established early, in-person voting largely in response to the well-documented problems of the 2004 general election. The Sixth Circuit summarized the problems in *League of Women Voters of Ohio v. Brunner* as:

> "Voters were forced to wait from two to twelve hours to vote because of inadequate allocation of voting machines. Voting machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others. At least one polling place [sic], voting was not completed until 4:00 a.m. on the day following Election Day. Long wait times caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities or because a physical disability prevented them from standing in line. Poll workers received inadequate training, causing them to provide incorrect instructions and leading to the discounting of votes. In some counties, poll workers misdirected voters to the wrong polling place, forcing them to attempt to vote multiple times and delaying them by up to six hours."[287]

In response, Ohio adopted a measure allowing 35 days of in-person early voting. Ohio law allows voter registration up to 30 days before the Election Day, essentially creating five days in which voters could register and vote at the same time, a practice which became known as Golden Week. In 2014, the state eliminated Golden Week, claiming it would help combat voter fraud,[288] despite no evidence of widespread fraud. In May 2016, the U.S. District Court of the Southern District of Ohio found that the elimination of Golden Week violated the Constitution and Section 2 of the Voting Rights Act by placing a disproportionate burden on minority voters.[289] In August 2016, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit reversed the ruling. Just hours before Golden Week was slated to begin, the Court declined to intervene, eliminating critical access for voters.[290]

"Because of the limit to this one location, voting lines are long, especially during the presidential election cycle. During periods of heavy voting, long lines can be wrapped around the building and down the street for several blocks."

— Inajo Davis Chappell, Cuyahoga County Board of Elections Member

In 2014, then-Secretary of State, now Lieutenant Governor, Jon Husted also issued a directive eliminating Sunday

286 *Ohio State Conference of the NAACP et al v. Husted et. al.*, 768 F.3d 524, 531 (6th Cir. 2014).
287 *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008).
288 Adam Liptak, *Supreme Court Won't Restore 'Golden Week' Voting in Ohio*, N.Y. Times (Sept. 13, 2016), https://www.nytimes.com/2016/09/14/us/politics/supreme-court-wont-restore-golden-week-voting-in-ohio.html.
289 *The Ohio Organizing Collaborative, et al. v. Husted et al.* Case No. 2:15-cv-1802 (U.S. District Court, Southern District of Ohio, Eastern Division).
290 Adam Liptak, *Supreme Court Won't Restore 'Golden Week' Voting in Ohio*, N.Y. Times (Sept. 13, 2016), https://www.nytimes.com/2016/09/14/us/politics/supreme-court-wont-restore-golden-week-voting-in-ohio.html.

voting, except the Sunday before the election, and evening voting after 5 p.m.[291] In addition to eliminating Golden Week, Ohio allows each county only one early, in-person voting site, regardless of population size. Cuyahoga County, with a population of more than 1.2 million people,[292] is allotted the same, single early voting site as the smallest counties in the state, such as Vinton County with a population of just over 13,100 people.[293]

In 2014, the Brennan Center gathered stories from Ohio organizers and religious leaders illustrating how last-minute changes caused confusion and limited voters' access to the polls. That year many pastors and elected officials said confusion about early voting made it more difficult to coordinate their efforts.[294] In 2015, state officials and voting rights advocates settled a separate ongoing lawsuit over early voting hours, which restored one day of Sunday voting and added early voting hours on weekday evenings. The settlement remained in place through 2018.[295]

Figure 3: Lines of voters waiting to cast a ballot during 2018 early voting in Cleveland, Ohio. Photo provided by Inajo Davis Chappell at the Ohio Field Hearing.

At the Ohio field hearing, Inajo Davis Chappell testified that the Secretary of State, Ohio Legislature, and Ohio Association of Election Officials decided in 2014 that uniformity in the rules governing elections in all 88 counties would be the key organizing principle for the 88 county boards of election in Ohio.[296] Uniform rules have been adopted and implemented in a manner that limits, rather than expands, ballot access.[297] Secretary Husted claimed he was creating uniformity, so all Ohioans had the same opportunity

291 DeNora Getachew, *Voting 2014: Stories from Ohio*, Brennan Center for Justice (Dec. 5, 2014), https://www.brennancenter.org/analysis/voting-2014-stories-ohio.

292 U.S. Census Bureau, *Quick Facts: Cuyahoga County, Ohio* (as of July 1, 2018), https://www.census.gov/quickfacts/cuyahogacountyohio.

293 U.S. Census Bureau, *Quick Facts: Vinton County, Ohio* (as of July 1, 2018), https://www.census.gov/quickfacts/fact/table/vintoncountyohio,cuyahogacountyohio/PST045218.

294 DeNora Getachew, *Voting 2014: Stories from Ohio*, Brennan Center for Justice (Dec. 5, 2014), https://www.brennancenter.org/analysis/voting-2014-stories-ohio.

295 New Voting Restriction in America, Significant Voting Restrictions in America Since 2010 Election, Brennan Center for Justice (last updated: July 3, 2019), https://www.brennancenter.org/new-voting-restrictions-america.

296 *Voting Rights and Election Administration in Ohio*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Inajo Davis Chappell at p. 1-2.

297 *Id.* at p. 2.

to vote; however, uniformity has the effect of disadvantaging citizens who live in more populous counties.

In one of the largest counties in Ohio, Cuyahoga County, early voting (both in-person and vote-by-mail) represents 35-40 percent of the votes cast in elections in Cuyahoga County since 2010.[298] Ms. Chappell testified that, "in effect, early in-person voting is restricted to one location for all counties, regardless of size."[299] She testified that in limiting early voting to one location, the location in Cuyahoga County is the central elections office building which is downtown, and at which they "have significant space constraints, parking is limited and the site is congested and difficult to manage during periods of heavy voting."[300]

In Florida, voters – particularly voters of color – used early voting in high numbers.[301] However, in 2011 Florida enacted H.B. 1355, which cut early voting and eliminated the final Sunday of early voting.[302] Ms. Dianis testified that the cuts to early voting "led to long lines and massive wait times on Election Day that year – wait times that were two to three times longer in Black and Latino precincts than in White precincts."[303]

In July 2018, a federal court struck down Florida's ban on early voting at public colleges. Hannah Fried, National Campaign Director of All Voting is Local, testified that a post-election analysis published by the Andrew Goodman Foundation found that "nearly 60,000 voters cast early in-person ballots at campus sites that advocates, including [All Voting is Local], helped secure" in the aftermath of the court's decision.[304] However, Florida's only public Historically Black University was the only major public campus without an early voting site.[305] The study, written by Professor Daniel A. Smith of the University of Florida, examined on-campus early voting in Florida during the 2018 general election and found high rates of campus early voting among groups historically disenfranchised, including:

- almost 30 percent of campus early vote ballots were cast by Hispanic voters, compared to just under 13 percent of early ballots cast at non-campus locations, and

298 *Id.*

299 *Id.* at p. 2.

300 *Id.*

301 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Judith Browne Dianis at p. 2.

302 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Judith Browne Dianis at p. 68.

303 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Judith Browne Dianis at p. 3.

304 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 6.

> "In July 2018, when a federal court struck down Florida's ban on early voting at public colleges, AVL worked with partners to secure early voting sites on college campuses throughout the state, with a focus on students of color. In particular, AVL helped place an early voting site at the predominantly Hispanic Florida International University. A post-election analysis published by the Andrew Goodman Foundation found that nearly 60,000 voters cast early in-person ballots at campus sites that advocates, including AVL, helped to secure. However, Florida A&M University (FAMU) – the state's sole public Historically Black University – was the only major public campus without an early voting location."

305 *Id.*

- more than 22 percent of campus early vote ballots were cast by Black voters, compared to 18 percent of early ballots cast at non-campus locations.[306]

In Texas, just before the 2018 election, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") filed a motion for a temporary restraining order on behalf of Black students at the historically Black university ("HBCU") Prairie View A&M University in Waller County, Texas.[307] The students sought to stop cuts to early voting hours—cuts that would have left Prairie View without any early voting opportunities on weekends, evenings, or during the first week of early voting. In response to the ongoing litigation, County officials agreed to add several hours of early voting in Prairie View for the 2018 election.[308]

In Georgia, state elected officials have repeatedly tried to eliminate early voting on Sundays, days that many Black churches utilize for Souls to the Polls initiatives. Sean Young, Legal Director of the ACLU of Georgia testified that in 2014, a state representative criticized his county elections officials for allowing Sunday voting at a convenient location because "this location is dominated by African American shoppers and it is near several large African American mega churches," and that he would "prefer more educated voters."[309] Legislators in the state continue to introduce legislation preventing early voting on Sundays and advocates have had to work repeatedly to defeat them without the backstop of Section 5 evaluations.

In North Carolina, leading up to the 2016 presidential election, at least 17 counties made significant cuts to early voting days and hours,[310] and early voter turnout among Black voters

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306 *Id.* at p. 6-7, *see also* Dr. Daniel A. Smith & ElectionSmith, Inc., *On-Campus Early In-Person Voting in Florida in the 2018 General Election* (Aug. 9, 2019), https://andrewgoodman.org/wp-content/uploads/2019/08/On-Campus-Early-In-Person-Voting-in-Florida-in-the-2018-General-Election-FINAL-8-9.pdf.

"The Andrew Goodman study, written by Professor Daniel A. Smith of the University of Florida, found high rates of campus early voting among historically disenfranchised groups, including:

- almost 30 percent of campus early vote ballots were cast by Hispanic voters, compared to just under 13 percent of early ballots cast at non-campus locations
- more than 22 percent of campus early vote ballots were cast by Black voters, compared to 18 percent of early ballots cast at non-campus locations."

307 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Deuel Ross at p. 6.

"LDF also has several pending cases in formerly covered states opposing voting changes under Section 2 or the U.S. Constitution. For instance, on the eve of the 2018 election, LDF filed a motion for a temporary restraining order on behalf of Black students at the historically Black Prairie View A&M University in Waller County, Texas. County officials have long discriminated against Black students in Prairie View. In 2018, the students sought to stop cuts to early voting hours, which would have left Prairie View without any early voting opportunities on weekends, evenings, or during the first week of early voting. In response to LDF's ongoing case, however, county officials agreed in 2018 to add several hours of early voting in Prairie View."

308 *Id.*

309 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Sean J. Young at p. 3, *see also* Roth, Zachary, *GOPer opposes early voting because it will boost black turnout*, MSNBC (Sept. 10, 2014), http://www.msnbc.com/msnbc/goper-fran-millar-opposes-early-voting-because-it-will-boost-black-turnout.

310 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 6, *citing* Insightus, *Super-Suppressors: The 17 North Carolina Counties that are Strangling Early Voting to Death* (Oct. 28, 2019), https://www.insight-us.org/blog/super-suppressors-the-17-north-carolina-counties-that-are-strangling-early-voting-to-death/, *see also Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Tomas Lopez at p. 4.

"In 2016, in an attempt to blunt the impact of the Fourth Circuit's decision to restore the first week of early voting, many of the Republican-led county BOEs adopted early voting plans with fewer hours and sites during the first restored week. There were dramatic reductions in early voting hours in Guilford (-660), Mecklenburg (-282), Brunswick (-165), Craven (-141), Johnston (-124), Robeson (-121), and Jackson (-113) counties. Of those, Guilford, Craven, and Robeson counties were previously covered

declined almost nine percent statewide compared to 2012.[311] Additionally, the North Carolina legislature passed a 2018 law requiring counties to stage early voting for the same hours across all sites.[312]

As in Ohio, while uniformity presents theoretical benefits, Tomas Lopez, Executive Director of Democracy North Carolina testified that it has, in practice, reduced the availability of early voting.[313] Counties, especially low-resourced areas, had previously made early voting available at different times across a variety of locations during the early voting window, but "the 2018 law makes it impossible by requiring counties that are early voting sites to be open for the same amount of hours if they are open during the week."[314] As such, "the most popular way to cast a ballot in North Carolina," via early voting, is rendered less available.[315] Post-*Shelby County*, neither the state, nor any of the previously covered counties in North Carolina were required to conduct any analysis of how these changes would impact minority voters and whether or not they would have a discriminatory impact.

Congressman G. K. Butterfield (D-NC-01), a member of the Subcommittee on Elections, noted that in Halifax County, a previously covered county, there is presently only one early voting site to serve the entire county—a county with a poverty rate of 28 percent and in which one in eight households lack transportation.[316] In 2012, 2014, and 2016, there were three early voting sites, but after the 2018 uniformity law, the county is left with one.[317] In the 2018 midterm election, turnout was up across the state of North Carolina except in three counties, one of which was Halifax County.[318] The 2018 law had wide-ranging consequences. Forty-three counties reduced the number of early voting sites in 2018 compared to 2014 and 51 counties reduced the number of weekend days offered.[319] On October 28, 2019, state and

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under Section 5 of the Voting Rights Act, and Mecklenburg and Johnston have significant Black voting populations, 33% and 16% of all registered voters (as of October 22, 2016) respectively."

311 *Id.*, *citing* Zachary Roth, *Black Turnout Down in North Carolina After Cuts to Early Voting*, NBC News (Nov. 7, 2016), https://www.nbcnews.com/storyline/2016-election-day/black-turnout-down-north-carolina-after-cuts-early-voting-n679051.

312 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript Tomas Lopez at p. 14-15.

313 *Id.* at p. 15.

314 *Id.*

315 *Id.*

"So, we have 43 counties reducing the number of early voting sites in 2018 compared to the last midterm, 51 that have reduced the number of weekend days offered, 67 that have reduced the number of weekend hours. In 8 counties where a majority of voters are Black, 4 have reduced sites, 7 have reduced weekend days, and all 8 reduced the number of weekend hours during early voting, and none saw increases in sites or weekend options."

316 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Congressman G. K. Butterfield at p. 7.

317 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Tomas Lopez at p. 15.

318 *Id.*

319 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Tomas Lopez at p. 4-5.

"This has produced several consequences in practice:

- 43 counties reduced the number of early voting sites in 2018 compared to 2014.
- 51 counties reduced the number of weekend days offered.
- 67 counties – over two-thirds of North Carolina's 100 counties – reduced the number of weekend hours.
- Of the eight counties where a majority of voters are Black, four reduced sites, seven reduced weekend days, and all eight reduced the number of weekend hours during early voting. None saw increases in sites or weekend options.

national Democrats filed a lawsuit challenging the restrictions on early voting put in place in 2018.[320] These restrictions also eliminated early voting the Saturday before Election Day, a day on which Democrats and Black Americans tend to vote and on which more than 6.9 percent (135,000) of early voters cast their ballot.[321]

Alabama continues to have no early, in-person voting. Alabama's Secretary of State, John Merrill, is opposed to any additions, telling a local media outlet in 2018, "[T]here is no future for early voting as long as I'm Secretary of State."[322]

Kristen Clarke, President and Executive Director of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") highlighted an instance in Utah that required litigation after San Juan County, Utah made a decision in 2014 to move to all-mail balloting, but allowed in-person early voting at a single location, noting that location was "easily accessible to the White population, but three times less accessible to the sizable Navajo population, who had to drive on average three hours to get to the polling place."[323] The case was settled with the establishment of three polling locations on Navajo Nation land.[324]

Early, in-person voting is a method of accessing the ballot disproportionately used by voters of color. When states target early voting for cutbacks and changes, it can have a disproportionate impact on minority communities that would have otherwise been protected by a Section 5 review.

Polling Place Closures and Movements

A 2019 study published by The Leadership Conference Education Fund examined 757 (nearly 90 percent) of the approximately 860 counties (or county-level equivalent) once covered by Section 5 and found 1,688 polling place closures between 2012 and 2018.[325] The study found 69 percent of the polling place closures occurred after the 2014 midterm election despite increased voter turnout.[326]

Prior to *Shelby County*, states and localities were required to notify voters well in advance of polling location closures, to prove that those changes would not have a disparate impact on minority voters, and to provide data to the Department of Justice about the impact.[327] Now,

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- A ProPublica and WRAL analysis of Early Voting sites elimination found that about 1 in 5 rural voters saw the distance to an Early Voting site increase by more than a mile — and in some counties, like Halifax, the average distance between voters and Early Voting sites increased by as much as 6 miles."

320 Meg Cunningham, *In North Carolina, legal actions could have a big impact in the upcoming 2020 election*, Yahoo! News (Oct. 31, 2019), https://news.yahoo.com/north-carolina-legal-actions-could-big-impact-upcoming-081111085--abc-news-topstories.html.

321 *Id.*

322 John Sharp, *After Midterms, will Alabama reform the way you vote?*, AL.com (Nov. 18, 2018), https://www.al.com/election/2018/11/after-midterms-will-alabama-reform-the-way-you-vote.html.

323 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 9.

324 *Id., citing Navajo Nation Human Rights Comm'n v. San Juan County*, 216CV00154, 2017 WL 3976564, at *1 (D. Utah Sept. 7, 2017).

325 The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* (Sept. 2019) at p. 12, http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf.

326 *Id.* at p. 12.

327 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 169.

notification is no longer required, and the Department of Justice is not required to evaluate the impact of changes.

There may be legitimate reasons for closing, consolidating, or moving polling locations, but without the disparate impact data, community consultation, and evaluation to support these changes, there is no way to ensure these closures do not discriminate against minority voters. If Section 5 of the Voting Rights Act was still enforceable, covered jurisdictions would need to collect and analyze this data and submit it to the Department of Justice for approval *before* closing, consolidating, or moving polling locations.

Polling place closures can lead to long lines and extreme wait times and can require voters to drive for miles to reach a polling place. Closing, moving and consolidating polling locations impacts all voters. The Subcommittee heard testimony detailing how decreased access to polling places increases the burden on the voter, leading to long lines and sometimes overly burdensome travel.

Georgia closed nearly 214 polling places from 2012 to 2016.[328] Georgia's population is 31 percent Black and nine percent Latino.[329] The Leadership Conference report identified Georgia as a state of concern because "its counties have closed higher percentages of voting locations than any other state in our study."[330]

"Last August, in Randolph County, the Board of Elections tried to close 7 out of 9 polling places in a county whose population is 60% Black, affecting thousands of voters on the eve of the state's high-profile 2018 general election. ... Located in the southwest corner of the state, Randolph County is part of what is known as the Black Belt. [Our] client read the small notice that the county board placed in the legal section of a local weekly paper and reached out for [our] help. With less than two weeks to protect the voter rights of the Randolph County citizens, the ACLU of Georgia immediately implemented a three-pronged strategy that incorporated legal, media, and on-the-ground community organizing."

— Sean J. Young, ACLU of Georgia

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328 The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* (Sept. 2019) at p. 12, http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf.
329 *Id.* at p. 14.
330 *Id.* at p. 18.

Gilda Daniels, Director of Litigation at the Advancement Project, testified that many of those voting precincts were in communities of color and disadvantaged areas.[331] In August 2018, the Board of Elections in Randolph County, Georgia, attempted to close seven of nine polling places in a county whose population is 60 percent Black. The ACLU of Georgia became involved after their client "read the small notice that the county board placed in the legal section of a local weekly paper and reached out" for help.[332] The county ultimately reversed its decision to close over 75 percent of the county's polling places. In the course of their work, the ACLU of Georgia learned "that the board had hired a consultant handpicked by the Secretary of State who had been recommending polling place closures in counties that were almost all disproportionately Black."[333]

Additionally, in Georgia, the Board of Elections in County violated state law requiring proper public notice in its attempt to close polling places in neighborhoods that were over 80 percent Black, affecting over 14,000 voters.[334] In Irwin County, the Board of Elections attempted to close the only polling place in the county's sole Black neighborhood, potentially impacting thousands of voters. This was contrary to the recommendations of the non-partisan Association of County Commissioners of Georgia and all while keeping open a polling place at the Jefferson Davis Memorial Park, a 99 percent White neighborhood.[335]

Despite these issues in the lead-up to the 2018 midterms, Georgia has continued efforts to close and move polling places. In testimony provided in Washington, D.C., Hannah Fried, Director of All Voting is Local, drew attention to the fact that on September 3, 2019, the City Council of Jonesboro, Georgia voted to move the city's only polling location to its police department, "without providing the public notice required by Georgia law and without taking into consideration the possible deterrent effect to voters of color."[336]

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331 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Gilda Daniels at p. 5.

332 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Sean J. Young at p. 2.

333 *Id.*

334 *Id.* at p. 2-3.

> "In Fulton County, the Board of Elections violated state law that required proper public notice in its attempt to close polling places in neighborhoods that were over 80% African-American, affecting over 14,000 voters. *See* Exhibit 3 (proposed polling place changes and number of voters of each race affected). Just to put this into perspective, that was the same year that Atlanta had a high-profile mayoral election that was decided by less than 1,000 votes.
>
> Even after the ACLU of Georgia testified about the discriminatory impact, the board voted to close the polls. The ACLU of Georgia then filed a successful lawsuit over the board's violation of the state's public notice law—which we had to put together within days, to nullify the decision. After the ACLU of Georgia nullified the decision through the courts, a coalition of community organizers had to quickly recruit dozens of neighborhood canvassers who worked tirelessly over several days to organize overwhelming opposition. It was only after this furious amount of activity compressed in less than a one-month timeframe that the local board of elections unanimously reversed its prior decision."

335 *Id.* at p. 3.

> "In Irwin County, the Board of Elections tried to close the only polling place that existed in the only Black neighborhood of the county, affecting thousands of voters, contrary to the recommendations of the non-partisan Association of County Commissioners of Georgia... The board alleged that it wanted to close this polling place to save costs, all while keeping open a polling place located at the Jefferson Davis Memorial Park in a neighborhood that was 99% White. After the ACLU of Georgia threatened litigation, the board rejected this discriminatory proposal. The ACLU of Georgia only learned about these proposed closures in this rural Georgia county because one of its members just happened to live in the area and alert us to it."

336 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 4, *see also* Mark Niesse, *Groups Oppose Moving Voting Precinct to Jonesboro Police Station*, Atlanta

Texas has closed at least 750 polling locations since *Shelby County*;[337] 590 of these closures took place after the 2014 midterm election.[338] Six of the 10 largest polling place closures nationwide were in Texas;[339] 14 Texas counties closed at least 50 percent of polling places post-*Shelby County*.[340] The State of Texas is 39 percent Latino and 12 percent Black.[341]

Arizona, a state where 30 percent of the population is Latino, four percent is Native American, and four percent is Black, has the most widespread reduction in polling places, closing 320 locations since 2012.[342] Post-*Shelby County*, Arizona no longer must analyze and report on the potential disparate impact of these actions on Black, Latino, Native American, and Asian American voters. Four of the top 10 counties with the largest number of poll closures are in Arizona.[343]

The Leadership Conference found:

> "Almost every county (13 of 15 counties) [in Arizona] closed polling places since preclearance was removed—some on a staggering scale. Maricopa County, which is 31 percent Latino, closed 171 voting locations since 2012—the most of any county studied and more than the two next largest closers combined. Many Arizona counties shuttered significant numbers of polling places, including Mohave, which is 16 percent Latino (–34); Cochise, which is 35 percent Latino (–32); and Pima, which is 37 percent Latino (–31)."[344]

One reason Arizona may have closed so many polling places is because Arizona, along with Texas, has moved to a "vote center" model of voting.[345] Under this model, voters are not assigned a specific polling place, but instead can cast a ballot at a polling place of his or her choosing.[346] Arizona and Texas are the only previously covered states that have made clear moves to implement this program. While this could enhance access to voting, this model often leads to massive reductions in polling places.

For example, in 2014, Graham County, Arizona which is 33 percent Latino and 13 percent Native American, closed half of its polling places when it converted to vote centers.[347]

Journal-Constitution (Oct. 8, 2019), https://www.ajc.com/news/state--regional-govt--politics/groups-oppose-moving-voting-precinct-jonesboro-police-station/rgeerwVyqS17uDWs0bp5vL/.

337 The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* (Sept. 2019) at p. 26, http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf.

338 *Id.*

339 *Id.*

> "After top-ranked Maricopa County in Arizona, the next six largest polling place closers by number were Texas counties: Dallas (–74), which is 41 percent Latino and 22 percent African American; Travis (–67), which is 34 percent Latino; Harris (–52), which is 42 percent Latino and 19 percent African American; Brazoria (–37), which is 30 percent Latino and 13 percent African American; and Nueces (–37), which is 63 percent Latino."

340 *Id.*

341 *Id.* at p. 14.

342 *Id.*

343 *Id.* at p. 16.

344 *Id.* at p. 17.

345 *Id.* at p. 23.

346 *Id.*

347 *Id.*, *citing* Jon Johnson, County Chooses Vote Centers Over Polling Precincts, E. Ariz. Courier (Jun. 9, 2014), https://www.eacourier.com/news/county-chooses-vote-centers-over-polling-precincts/article_32a76a5a-ee88-11e3-a42b-001a4bcf887a.html.

Additionally, Cochise County, Arizona which is 35 percent Latino, closed nearly two-thirds of its polling places once the county converted to vote centers – from 49 in 2012 to 17 in 2018.[348] Gila County, which is 16 percent Native American and 19 percent Latino also closed almost half its polling places (33 in 2012 to 17 in 2018).[349]

In the March 2016 presidential primary, Maricopa County, Arizona received national attention when reports surfaced that frustrated voters waited as long as five hours to cast a ballot.[350] At the time, there were 60 polling locations – roughly one polling location for every 21,000 voters.[351] In part, this was due to Maricopa County officials' approval of a plan to cut polling locations by 85 percent compared to 2008 and 70 percent compared to 2012.[352]

Tribal leaders and Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic at the Sandra Day O'Connor School of Law, testified in Arizona that the move toward mail-in voting, closure of polling locations, and consolidation to voting centers disenfranchise Native voters. Native American voters face barriers such as lack of access to transportation, lack of residential addresses, lack of access to mail, and distance.[353] Only 18 percent of Arizona's reservation voters outside of Maricopa and Pima Counties have physical addresses and are able to receive mail at home.[354]

Professor Ferguson-Bohnee testified that Arizona counties that do not have vote centers require that voters be in the proper precinct in order for their ballot to be counted. However, poll workers sometimes give voters provisional ballots without disclosing that their ballot will not be counted if they are in the incorrect precinct.[355] Both President Jonathan Nez of the Navajo Nation and Governor Stephen Roe Lewis of the Gila Indian River Community testified that the lack of traditional addresses and regular mailing services make Arizona's move toward mail-in ballots difficult for Native voters. Both President Nez and Governor Lewis testified that their members prefer in-person voting, and that it is a time of gathering within the community.[356]

In North Dakota, Roger White Owl, Chief Executive Officer of the Mandan Hidatsa and Arikara Nation ("MHA Nation") testified that MHA Nation does not have enough polling places:

In 2012, Graham had 18 polling sites; today, it has half that — six vote centers and three precincts.

348 *Id.*

349 *Id.*

350 Arizona State Advisory Committee to the U.S. Comm'n on Civil Rights, ***Voting Rights in Arizona*** (July 2018) at p. 2, https://www.uscer.gov/pubs/2018/07-25-AZ-Voting-Rights.pdf.

351 *Id., citing* Anne Ryman, Rob O'Dell, and Ricardo Cano, ***Arizona primary: Maricopa County had one polling site for every 21,000 voters***, The Republic (Mar. 22, 2016), http://www.azcentral.com/story/news/politics/elections/2016/03/22/live-arizona-primary-coverage-presidentialpreference-election/82096726/, *see also Past Polling Place Detail Report for 2016 Presidential Preference Election*. Maricopa County Recorder Website, https://recorder.maricopa.gov/pollingplace/pastppdetailresults.aspx?view=PPE&election=PRESIDENTIAL+PREFE%20RENCE+ELECTION%2c+3%2f22%2f2016&ElectNo=1290&Type=C.

352 *Id.* at p. 2.

353 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 2.

354 *Id.* at p. 3.

355 *Id.* at p. 7.

356 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of President Jonathan Nez and Governor of Stephen Roe Lewis.

> "Two important polling places on our Four Bear segment and Mandaree segments were recently closed. Four Bears is one of the major economic hubs in our capital. With only a couple polling places, many Tribal members had to drive 80 to 100 miles round trip to cast their vote. This is unacceptable."[357]

In Alaska, at one point a polling place was "moved away from a village, and thereafter, Native Alaskan voters could only access their polling place by plane."[358] Additionally, Catherine Lhamon, Chair of the U.S. Commission on Civil Rights, testified that the Commission's Louisiana Advisory Committee received testimony which "demonstrated that the racial makeup of an area is a predictor of the number of polling locations in that area and that there are fewer polling locations per voter in a geographical area if it has more Black residents."[359]

In Ohio, during the November 2018 elections, All Voting is Local and other organizations partnered to coordinate non-partisan election protection. During their determination of where to deploy poll observers in Cuyahoga County (Cleveland), All Voting is Local observed that several polling places had been consolidated and precincts moved.[360] Ms. Fried testified that, after the 2018 election, All Voting is Local determined that between 2016 and 2018, "there was a reduction of 41 polling locations countywide, with 15.7 percent of all precincts experiencing a change in location."[361] All Voting is Local found "majority Black communities were particularly harmed," and that data from the Election Protection hotline and nonpartisan observers showed that Cuyahoga County had "more than twice the number of reports of voters at the wrong polling location compared to two other large Ohio counties, Franklin and Hamilton."[362] Ohio has never been a covered state under the Voting Rights Act.

Furthermore, the Subcommittee received testimony that polling locations across the country have been moved to places where many voters may feel intimidated to cast a ballot, including police stations. Elena Nunez, Director of State Operations and Ballot Measure Strategies at Common Cause testified that, in 2016, election officials in Macon, Georgia tried to move a voting precinct to a police station in a largely Black community.[363] Additionally, in September

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357 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Roger White Owl at p. 21.

358 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Catherine Lhamon at p. 38, *see also* U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018), *citing* Natalie Landreth, *Why Should Some Native Americans Have to Drive 163 Miles to Vote?*, The Guardian, (June 10, 2015), https://www.theguardian.com/commentisfree/2015/jun/10/native-americans-voting-rights ("[I]magine if you had to take a plane flight to the nearest polling place because you cannot get to it by road, which was the case for several Native communities in 2008, when the state of Alaska attempted a "district realignment" to eliminate polling places in their villages. And that's just half the trip").

359 *Id.*

360 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 5.

> "In November 2018 in Ohio, All Voting is Local partnered with the Lawyers' Committee for Civil Rights Under Law and state partners such as the NAACP Cleveland Branch to coordinate nonpartisan Election Protection. In determining where to deploy poll observers in Cuyahoga County (Cleveland), AVL noticed that several polling locations had been consolidated and precincts had been moved. After the election, AVL determined that between 2016 and 2018, there was a reduction of 41 polling locations countywide, with 15.7 percent of all precincts experiencing a change in location."

361 *Id.*

362 *Id.*

363 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Elena Nunez at p. 2.

2019, in Jonesboro, Georgia, the nearly all-White city council announced it would move a polling place to a police station in a locality that is 60 percent Black.[364] Ahead of the 2018 election, the President took to his Twitter account to threaten the use of law enforcement to observe polling locations, potentially intimidating and deterring voters.[365]

Ms. Fried testified that election officials too often close polling places with "little notice to, or meaningful input from, the communities they serve."[366] Ms. Fried also testified there are processes put in place throughout the country, such as "thoughtful studies of the impact on voters from all backgrounds, approval of proposed changes from diverse cross-sections of the community, and outreach to impacted voters through mailed and emailed correspondence, text messages, and public service announcements on local radio," that could ensure polling place reductions do not discriminate against voters of color.[367] Without these safeguards in place, and without Section 5, "widespread polling place closures create barriers to the ballot box that are incredibly difficult, if not impossible, to overcome."[368]

The rampant closure of polling places is exactly the type of suppressive voting changes the Voting Rights Act was designed to prevent. If the full force of the law was in effect, states and localities would be required to perform the requisite evaluation of racial impact data, correct for disparate impacts, and justify to the Department of Justice how such a widespread closure of polling locations is not discriminatory. A robust democracy requires all eligible voters have access to the ballot box; traveling long distances and waiting in protracted lines is not true access.

Voter Identification

Voter ID requirements have become a ubiquitous, next-generation poll tax in the 21st century. Requiring voters to show state-specified ID in order to vote is an increasingly common suppression tactic in both previously covered and non-covered jurisdictions. Proponents of voter ID requirements argue that such identification is necessary to prevent voter fraud. However, widespread voter fraud has repeatedly proven to be a myth.[369] These ID

"The Brennan Center's research has shown that, in terms of in-person voter impersonation, you are more likely to be struck by lightning than to commit voter fraud in the United States."

—Michael Waldman, Brennan Center for Justice

364 *Id.*
365 *Id.* at p. 2-3.
366 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 4.
367 *Id.*
368 *Id.*
369 *See* Justin Levitt, *The Truth About Voter Fraud*, Brennan Center for Justice (2007), https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud, *see also Project: The Myth of Voter Fraud*, Brennan Center for Justice, https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud.

laws place an unnecessary and often discriminatory burden on voters and lack a legitimate governmental purpose.[370]

In the post-*Shelby County* landscape, no state or locality is required to evaluate a new voter ID law for discriminatory impact on voters. The Subcommittee repeatedly heard testimony from witnesses describing how voter ID laws are financially burdensome, effectively create a new poll tax, and disproportionately impact minority and low-income voters. In nearly every scenario, obtaining a new ID to vote is not free. Even in cases where the state claims the new IDs are "free," the documents required to obtain an ID, such as a birth certificate, marriage license, or other documents often cannot be obtained without paying a fee for copies.[371] Not only do the documents cost money, or the IDs themselves come at a cost, but the transportation and time associated with traveling to and from the DMV or other government agencies often comes at a cost insurmountable for many low-income voters. Imposing a cost on accessing the ballot is a poll tax.

In North Carolina, the day after the *Shelby County* decision, the North Carolina General Assembly amended a pending bill to make the state's voter ID laws stricter.[372] This was a provision of the monster law, which was ultimately found to be racially discriminatory. Since the federal courts invalidated North Carolina's monster law, the state has moved to resurrect the law via piecemeal approach, including a voter ID requirement. The North Carolina General Assembly introduced, and voters passed, a ballot measure amending the North Carolina Constitution to require photo ID from voters casting in-person ballots, with exceptions.[373] Tomas Lopez testified that, while voters approved broadly worded constitutional language, the North Carolina General Assembly enacted implementing legislation closely mirroring the invalidated voter ID statute during a lame-duck session after an election in which the majority party had lost its ability to override gubernatorial vetoes.[374] The North Carolina legislature later overrode the Governor's veto to enact the voter ID law.[375]

North Carolina Senate Minority Leader Dan Blue further testified the new voter ID law "puts a tremendous burden on the State and Local Boards of Election without the funding to back

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370 *Voting Rights and Election Administration*: Hearings Before the Subcomm. on Elections, 116th Cong. (2019), *see* Texas Listening Session; Georgia Field Hearing; North Dakota Field Hearing; North Carolina Field Hearing; Alabama Field Hearing; Arizona Field Hearing.

371 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 92, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf, *citing* Richard Sobel, *The High Cost of 'Free' Photo Voter Identification Cards*, Harv. L. Sch. Inst. For Race & Justice (June 2014), https://today.law.harvard.edu/wp-content/uploads/2014/06/FullReportVoterIDJune20141.pdf.

> "Despite any potential benefits, many opponents of voter ID laws equate these laws to the poll taxes of the Jim Crow era. They argue that even if the ID itself is offered free of charge, there are other costs citizens must pay in order to receive these IDs. For instance, expenses for documentation (e.g., birth certificate), travel, and wait times are significant—especially for low-income voters (who are often voters of color)—and they typically range anywhere from $75 to $175. According to Professor Richard Sobel, even after being adjusted for inflation, these figures represent far greater costs than the $1.50 poll tax outlawed by the 24th Amendment in 1964."

372 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 60.

373 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Tomas Lopez at p. 2.

374 *Id.*, *see also* S.L. 2018-144.

375 Emily Birnbaum, *North Carolina Enacts Voter ID Law, Overriding Dem Governor's Veto*, The Hill (Dec. 19, 2018), https://thehill.com/homenews/state-watch/422183-north-carolina-enacts-voter-id-law-overriding-dem-governors-veto.

up these obligations" and said the law will cost $17 million to implement.[376] The newlaw has language allowing the use of student IDs for voting. However, at the time of the hearing,[377] of the over 100 eligible institutions, only 37 community colleges, colleges, and universities had submitted the necessary documentation to the State Board of Elections to have their IDs approved for voting in 2020 – of those, 11 were denied, including the University of North Carolina flagship school at Chapel Hill and one HBCU.[378] At the time of this writing, many North Carolina college and university student IDs are still not approved as qualified IDs for voting.

In 2011, before the Court invalidated the Voting Rights Act's preclearance formula, then-Texas Governor Rick Perry signed into law S.B. 14, one of the strictest photo identification laws in the country. Because Texas was subject to preclearance requirements, the law did not go into immediate effect. In 2012, a federal court rejected Texas' law and denied preclearance on the grounds that S.B. 14 discriminated against Black and Latino voters.[379] Less than one year later, after the Court decided *Shelby County*, then-Attorney General Greg Abbott, now Governor Abbott, declared within hours that the state would implement its restrictive voter ID law.[380] This despite the previous federal court ruling that held that the same Texas law could not receive preclearance due to its retrogressive effects on people of color.[381]

According to the Brennan Center for Justice, approximately 1.2 million eligible voters in Texas lacked the specific form of ID that S.B. 14 required.[382] This included 555,000 eligible Latino voters and 180,000 eligible Black voters.[383] Latino voters were 242 percent more likely than White voters to lack the required ID, and Black voters were 19 percent more likely than White voters to lack the required ID.[384] Moreover, more than one in five low-income voters lacked the required Texas photo ID.[385] Litigants immediately sued, arguing that Texas' law racially discriminated against eligible voters and was passed with a discriminatory purpose. In a 2016 ruling rejecting the law, the Fifth Circuit Court of Appeals rejected lawmakers' argument that the bill would stop voter fraud, finding only two convictions for in-person voter fraud out of 20 million ballots cast in the decade before the law was passed in 2011.[386]

In 2017, Texas passed a new law photo ID law–S.B. 5–which is slightly less strict than S.B. 14. This new identification law, now in place, still requires photo ID. However, if a voter lacks one of the acceptable photo IDs, they may provide an alternative non-photo document (options include bank statements and utility bills, among other documents) and execute an

376 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, State Senator Dan Blue at p. 35.

377 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019).

378 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Tomas Lopez at p. 3.

379 *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012).

380 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Gilda Daniels at p. 3.

381 *Id.*

382 Carson Whitelemons, *Texas Photo ID Trial Update: Case Background*, Brennan Center for Justice (Sept. 2, 2014), http://www.brennancenter.org/blog/texas-voter-id-trial-begins.

383 *Id.*

384 *Id.*

385 *Id.*

386 *Veasey, et. al. v. Abbott*, No. 14-41127 (5th Cir. 2016) at p. 27.

accompanying "reasonable impediment declaration" explaining why they do not have the requisite photo ID. The Fifth Circuit Court of Appeals upheld S.B. 5 in 2018.[387]

According to the Texas Advisory Committee to the U.S. Commission on Civil Rights, "there are intimidating criminal sanctions associated with incorrectly executing the affidavit necessary to claim the 'reasonable impediment' exception to the ID law and stakeholders are concerned that this will deter voters who in fact fall under the ID law's exception."[388]

In North Dakota, the Subcommittee heard an egregious example of how voter ID laws target and disenfranchise protected communities. North Dakota enacted a voter ID law that had a significantly disproportionate impact on the state's Native American communities.

North Dakota has had voter ID laws in place since 2004.[389] At the North Dakota field hearing, Jacqueline De León, Staff Attorney at the Native American Rights Fund (NARF) testified that, prior to changes to the law in 2013 the state's voter ID law was "likely the most friendly in the nation."[390] North Dakota's voter ID law, while always containing residential address requirements, had built-in fail-safes that allowed voters to cast their ballot if a poll worker could vouch for their identity or the voter signed an affidavit, under penalty of perjury, that they were qualified to vote.[391] The affidavit fail-safe was in place for nearly a century in North Dakota,[392] and provided critical protections for Native American voters who lack residential addresses.

North Dakota debated a new voter ID law in 2011 that would have eliminated these fail-safes. Throughout consideration, concerns about disenfranchisement were raised on both sides of the debate. State Senator Sorvaag noted that "[w]e don't want people voting if they are not suppose [sic] to vote but we don't want to disenfranchise people either by making the process too [sic] cumbersome."[393] In response to concerns raised by state senators, the legislature was notified that "some Native Americans would have a difficult or impossible time obtaining an ID that required a street address."[394] The state legislature ultimately decided not to enact the proposed changes.[395]

Despite all the concerns raised in 2011, the North Dakota state legislature moved ahead with new restrictive voter ID requirements in 2013.[396] H.B. 1332 "significantly altered the voter

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387 *Veasey v. Abbott*, No. 17-40884 (5th Cir. 2018).

388 Advisory Memorandum, Texas Advisory Committee to the U.S. Commission on Civil Rights (July 10, 2018) at p. 10, https://www.usccr.gov/pubs/2018/07-23-TX-Voting-Rights.pdf.

389 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 2, *citing North Dakota Again Passes Discriminatory Voter ID Law*, Native American Rights Fund (May 9, 2017), https://www.narf.org/north-dakota-voter-id-law/.

390 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 2.

391 *Id.*

392 *Id.*

393 *Id.* at p. 3, *citing Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 1 (N.D. Apr. 12, 2011) (statement of Sen. Ronald Sorvaag, S. Comm. On Political Sub.); the North Dakota State Legislature ultimately rejected the proposed 2011 voter ID law 38-8 given the concerns about disenfranchisement.

394 *Brakebill* First Amend. Compl. ¶ 35, ECF No. 77.

395 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 2-3.

396 *Id.* – "The North Dakota legislature passed the most restrictive voter ID and address requirements in the nation."

ID requirements and eliminated the 'fail-safe' voucher and affidavit provisions" that had long protected voters.[397] Ms. De León further testified the legislature never analyzed whether the Native American voters who lacked addresses in 2011 still lacked addresses. Many Native voters still lack the required addresses to this day. The state legislature utilized a "hoghouse" amendment, a parliamentary procedure replacing the entire text of an unrelated bill with the new text, in order to pass the bill without debate and circumvent input from the public and impacted agencies.[398]

During the 2014 election, North Dakota voters were only allowed to vote with a North Dakota Driver's License or non-driver's identification card, a tribal government ID, or an alternative form of ID prescribed by the Secretary of State.[399] Ms. De León testified that, "as expected, the impact on the Native American vote in 2014 was severe."[400] The voter ID law was amended again the following legislative session, further restricting the forms of qualifying ID.[401] NARF sued North Dakota on the grounds that the law disenfranchised Native American voters and the U.S. District Court in North Dakota agreed, granting an injunction and requiring the state to provide an affidavit failsafe.[402]

North Dakota again amended the voter ID law in 2017. Rather than providing the affidavit failsafe mandated by the District Court, the legislature implemented a provisional ballot.[403] This allowed voters without a valid ID to vote, but the ballot would be thrown out unless the voter could return with a qualifying ID within six days of the election.[404] Prior to passage, State senators raised concerns that the new law did little to mitigate the discriminatory impact of the law. The legislature chose to move forward, knowing the disparate impact it would have on the Native American community.[405] Post Office (P.O.) Boxes are utilized significantly by the Native American community — requiring IDs have a residential address disproportionately impacts Native American voters.

Despite efforts to overturn this suppressive requirement, the law remains in effect today. Voters are still required to present a qualifying ID that lists a residential address in order to vote. As the Subcommittee learned at the North Dakota field hearing, obtaining a new ID with a residential address is overly burdensome for many Native American residents.

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397 *Brakebill* First Amend. Compl. ¶ 49, ECF No. 77.

398 *Voting Rights and Election Administration in the Dakotas:* Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 2-3, *citing Brakebill* First Amend. Compl. ¶ 54, ECF No. 77.

399 *Id.* at p. 4, *citing* N.D. Cent. Code § 16.1-05-07.

400 *Id.* at p. 4.

401 *Id., citing Brakebill* First Amend. Compl. ¶ 87-89, ECF No. 77.

402 *Id.* at p. 4

"Following NARF's investigation, in 2016, NARF filed suit on behalf of seven Turtle Mountain plaintiffs that were disenfranchised by the laws. NARF showed that the law disenfranchised Native American voters and violated both the U.S. and North Dakota Constitutions as well as the Voting Rights Act. The U.S. District Court in North Dakota agreed, granting an injunction in favor of the Native American plaintiffs. The Court found that the law violated the U.S. Constitution and required that North Dakota provide a fail-safe mechanism for the 2016 general election. In his decision, Judge Hovland stated, "it is clear that a safety net is needed for those voters who simply cannot obtain a qualifying ID with reasonable effort." The injunction required that the state provide an affidavit fail safe, allowing voters without proper ID to sign an affidavit swearing to their qualifications, similar to the law in place for nearly a century."

403 *Id.* at p. 4-5.

404 *Id.* at p. 5, *citing* N.D. Cent. Code § 16.1-01-04.1 (2017).

405 *Id., citing Brakebill* First Amend. Compl. ¶ 72, ECF No. 77.

Native Americans in North Dakota face a housing crisis across the reservations. Tribal leaders testified that their reservations face significant poverty, unemployment, and homelessness. Many tribal members do not have stable, permanent housing and move from home to home frequently. Many also live in multi-generational homes or in homes that have not been adequately addressed by the state. Addresses listed on IDs made for the 2018 election may become outdated by 2020, and tribes cannot keep issuing new IDs for free.

Chairwoman Myra Pearson of the Spirit Lake Tribe testified that 47.8 percent of residents live below the poverty line, compared to the national average of 13.8 percent. Many members do not have an ID since they do not need one to live day-to-day and IDs cost money.[406] A tribal ID for a Spirit Lake member ordinarily costs $11, but the tribe waived the cost leading up to the election. The tribe issued 655 ID cards between October 22, 2018 and November 8, 2018, costing the tribe $7,315.[407]

"Understand that the fee of $15 is not exorbitantly high, but $15 is milk and bread for a week for a poor family."

—Alysia LaCounte, Turtle Mountain Band of Chippewa Indians

Alysia LaCounte, General Counsel to the Turtle Mountain Band of Chippewa Indians testified that the Tribe currently has an unemployment rate around 69.75 percent.[408] Generally, the Turtle Mountain Band of Chippewa Indians charges $15 for a tribal ID. As Ms. LaCounte testified, while the fee for an ID may not seem high, for many the fee poses a choice between voting and feeding a family.[409]

Issuing 2,400 new IDs at no charge was burdensome for the Tribe. The undertaking took a significant amount of financial resources and time. Ms. LaCounte testified that, while the Tribe

406 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Chairwoman Myra Pearson at p. 1.

"Many of our members struggle with housing instability, unemployment, and poverty. In 2015, a survey of 285 people living on the Spirit Lake Reservation indicated that 38 percent of people have an individual income of under $5,000, and 73 percent have an income of under $20,000 a year. 47.8 percent of the residents live below the poverty line, as compared to the national average of 13.8 percent. 41 percent reported that they had been homeless at some point in their lives. The Candeska Cikana Community College estimated in September 2014 that there are around 300 homeless people residing on or around the reservation, but also noted that estimate might be conservative due to many members not signing up for housing assistance.

Given these realities, and the fact that many parts of the reservation have not been thoroughly addressed, many members do not have ID since they do not need one to live their lives and they cost money. If the members have IDs at all, they hold tribal IDs that list their address as a P.O. Box if they have one. There are many streets on the reservation that are not labeled, and there are many houses which lack numbers. And even if the county 911 coordinator has assigned a residential address to someone's home, many are never notified of this address. Mail services do not extend to certain parts of the reservation. For example, in Fort Totten all residents receive their mail through a P.O. Box. There is no U.S. Postal Service delivery to residents in this area so they must rely on a P.O. Box to conduct their affairs."

407 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript Chairwoman Myra Pearson at p. 12-13.

Normally, the Tribe issues 30 ID cards per month.

408 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Alysia LaCounte at p. 1.

409 *Id.* at p. 2.

does not comment on the intent of the law, "its practical implication acted to disenfranchise the people of the Turtle Mountain Band of Chippewa Indians."[410]

Similar facts were echoed by Charles Walker, Judicial Committee Chairman of the Standing Rock Sioux Tribe. Mr. Walker testified that many people on Standing Rock do not have an ID. It is not necessary for everyday life, most people know each other, and many do not have a vehicle.[411] The family poverty rate in Sioux County, North Dakota is 35.9 percent and the nearest Driver's License Site is approximately 40 miles away.[412]

> *"... are you going to eat or are you going to vote? When you have to choose between having supper for your children or grandchildren or multigenerational living units, you are going to choose to take care of your family first."*
>
> —Charles Walker, Standing Rock Sioux Tribe

Additionally, the Tribe normally charges a $5 fee to print a new ID, a fee they waived so members could obtain an ID to vote. In the lead up to the 2018 election, the Standing Rock Sioux Tribe issued "807 new tribal IDs between October 15, 2018 and November 6, 2018."[413] The Tribe could have charged a fee for 486 of those IDs, meaning the Tribe lost "nearly $2,500 in income."[414]

Furthermore, the United States Postal Service does not always operate in the rural areas of Reservations. For many people, even if the 911-system or the state government has assigned them an address, it may never have been communicated to them.[415] Many voters move from home to home because they do not have housing of their own. Even though they remain within the reservation, they do not have a consistent address.[416] Mr. Walker further testified the "failsafe mechanisms" in the latest iteration of the voter ID law do not address the problems Native American voters face. If a voter does not have a legitimate residential address, they likely do not have a utility bill or other document required to satisfy the failsafe.[417]

Roger White Owl, Chief Executive Officer of MHA Nation testified the Tribe estimates 75-80 percent of the tribal members who received a new ID leading up to the November 6, 2018

410 *Id.* at p. 3.

411 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Charles Walker at p. 3.

412 *Id.*

413 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Charles Walker at p. 9.

414 *Id.* – By comparison, the tribal enrollment office averages only 47 IDs a month.

415 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Charles Walker at p. 3.

416 *Id.*

> "We also have a significant portion of the population that is moving from home to home because they do not have housing of their own, which means that even though they remain within in the reservation, they do not have a consistent address. This makes the residential address requirement especially burdensome."

417 *Id.*

election did not have another form of ID that would have complied with North Dakota's law; many still do not have an ID that would allow them to vote.[418]

This disparate, discriminatory impact is the type of voting barrier the Voting Rights Act was enacted to prevent. The North Dakota voter ID law is a poll tax on many Native Americans, a practice Congress outlawed decades ago.

Alabama also enacted a voter ID law. The law was enacted in 2011, but implementation was delayed pending the decision in *Shelby County*, meaning Alabama was not required to seek preclearance nor prove the law would not have a discriminatory impact. Alabama's law requires voters to present one of eleven forms of identification to vote either in-person or absentee, or be positively identified by two election officials.[419] If a voter does not have an approved voter ID and cannot be positively identified, the voter may cast a provisional ballot.[420] The voter has until 5:00 p.m. on the Friday following Election Day to present "a proper form of photo identification to the Board of Registrars."[421] Republicans in Alabama and proponents of the law said strict ID was needed to guard against voter fraud, while some Democrats and opponents argued the law was aimed at making it harder for the poor, elderly and minorities to vote.[422] The day after the *Shelby County* decision, Alabama announced it would implement the photo ID law for the 2014 election.[423]

On its face, the Alabama voter ID law could appear not to have a discriminatory intent or purpose. However, the Subcommittee heard testimony at the Alabama field hearing of the discriminatory intent underlying its passage. Nancy Abudu of the Southern Poverty Law Center testified the "bill's proponents in the state legislature had long been explicitly clear about the racist intent behind the legislation."[424] A State Senator who worked for years to pass voter ID told local media his photo ID law would "undermine Alabama's 'Black power structure,' and that the absence of a voter ID law 'benefits Black elected officials.'"[425]

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418 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Roger White Owl at p. 3.

> "Between the time of the Eight Circuit decision and the November 6, 2018 election our Tribal Enrollment Office issued 456 new IDs to tribal members. Normally we issue about 150 to 200 IDs a month. This burdened our system, limited our ability to provide other important services to tribal members, and the MHA Nation absorbed the cost of issuing these IDs. We estimate the about 75 to 80 percent of the tribal members who received a new ID during this time did not have another form of ID that would have complied with North Dakota's law. Even with all of this additional work, about one-third of our members still do not have a tribal ID."

419 *Voting Rights and Election Administration in Alabama*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jenny Carroll at p. 1-2.

420 *Id.*

421 *Id.*

422 Kim Chandler, *State has yet to seek preclearance of photo voter ID law approved in 2011*, AL.com (pub. June 12, 2013; updated March 7, 2019), https://www.al.com/wire/2013/06/photo_voter_id.html.

423 NAACP Legal Defense and Education Fund Inc., *Democracy Defended: Analysis of Barriers to Voting in the 2018 Midterm Elections* (Sept. 6, 2019), https://www.naacpldf.org/wp-content/uploads/Democracy_Defended__9_6_19_final.pdf.

424 *Voting Rights and Election Administration in Alabama*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Nancy Abudu at p. 2-3.

425 *Id.* at p. 3, *citing* John Sharp, *After Midterms, Will Alabama Reform the Way You Vote?*, al.com (Nov. 18, 2018), https://www.al.com/election/2018/11/after-midterms-will-alabama-reform-the-way-you-vote.html, in a supplemental submission for the record, Ms. Abudu highlighted addition racist statements made by the former State Senator long seen as a leader on voter ID and photo ID:

> "The Alabama NAACP and Greater Birmingham Ministries challenged Alabama's 2011 photo ID law as a violation of the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment given its disproportionate and discriminatory impact on Black voters. In the plaintiffs' opposition to the state's motion for summary judgment, they presented evidence showing that as

Jenny Carroll, Professor of Law and Chair of the Alabama State Advisory Committee to the U.S. Commission on Civil Rights testified that her Committee "heard testimony that suggests that the reality is that Alabama's voter identification law creates impediments for the poor and rural voter who may have limited access to locations that can issue identification, may lack the underlying documentation necessary to receive such identification, or have neither the time nor transportation to gain such identification."[426]

Ms. Abudu testified the voter ID laws do have a disparate impact on communities of color, "Black and Latinx voters are about twice as likely as White voters to lack an acceptable form of identification."[427] The NAACP LDF estimated 118,000 registered voters in Alabama lacked the necessary ID, or almost five percent of registered voters.[428] A study by Dr. Zoltan Hajnal at the University of California, San Diego found that turnout in Alabama's most racially diverse counties declined by almost five percentage points after implementation of the voter ID law when comparing the 2012 and 2016 presidential elections.[429]

Even though the state claims "free state-issued photo IDs" are available, there are costs associated with obtaining the documents required to obtain an ID such as birth certificates and the transportation necessary to get to and from agencies to retrieve documents, and time off from work to do so.

In October 2015, Governor Robert Bentley drastically increased the burden of voter ID requirements by moving to close 31 driver's license issuing offices, predominantly located in Alabama's rural "Black Belt" in response to a budget dispute.[430,431] A 2012 Brennan Center

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the debate over voter identification continued throughout the late 90s and 2000s, Sen. Dixon repeatedly made racist statements about voter identification and Black voter turnout. For example, in 2001, five years after the original "black power structure" comment, Sen. Dixon said publicly that voting without photo identification "benefits black elected leaders and that's why they're opposed to it."5 In 2010, fourteen years after the quote included in SPLC's testimony, the FBI recorded Sen. Dixon and other state legislators planning to defeat a gambling referendum because they believed its presence on the ballot would increase Black voter turnout. Sen. Dixon reportedly said, "if we have a referendum in the state every black in this state will be bused to the polls." He then added, "every black, every illiterate" would be "bused on HUD financed buses." Finally, he predicted that coach buses "will meet at the gambling casino to get free certificates for blacks."

426 *Voting Rights and Election Administration in Alabama*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jenny Carroll at p. 1-2.

427 *Voting Rights and Election Administration in Alabama*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Nancy Abudu at p. 3, *citing* Debbie Elliott, *Judge Throws Out Challenge to Alabama Voter ID Law*, NPR (Jan. 10, 2018), https://www.npr.org/sections/thetwo-way/2018/01/10/576868379/judge-throws-out-challenge-to-alabama-voter-id-law.

428 *Id.*

429 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Deuel Ross at p. 6.

"And, in 2015, LDF brought a lawsuit challenging Alabama's discriminatory photo voter ID law. Among other evidence, LDF showed that a state senator who had for over a decade led the effort to enact a strict photo ID law had promised that it would undermine Alabama's "black power structure" and that other legislative sponsors had been recorded planning ways to discourage Black people from voting. A study by Dr. Zoltan Hajnal at the University of California, San Diego, comparing the 2012 and 2016 presidential elections, found that, after Alabama implemented its ID law, turnout in its most racially diverse counties declined by almost 5 percentage points, which is even more than the drop in similarly diverse counties in other states. This case is currently pending on appeal before the Eleventh Circuit."

430 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 173-74.

431 Adam Gitlin and Christopher Famighetti, *Closing Driver's License Office in Alabama*, Brennan Center for Justice (Oct. 7, 2015), https://www.brennancenter.org/blog/closing-drivers-license-offices-alabama.

In an analysis of the planned closures, the Brennan Center found:

- 26.3 percent of the total Alabama population is African American.

report found that more than a quarter of voting-age citizens in Alabama lived more than 10 miles from an ID-issuing office and did not have vehicle access.[432] Public pressure resulted in a partial reversal. Rather than permanently closing the offices, the State decided to keep the offices open one day a month, still severely restricting access to photo ID.[433]

The U.S. Department of Transportation launched an investigation which eventually resulted in the Department of Transportation and the State of Alabama entering into a settlement agreement. The investigation alleged Alabama's closure of the 31 DMV offices disparately occurred in the "Black Belt" and disproportionately impacted Black and Latino voters in violation of the Civil Rights Act.[434] The Department of Transportation's investigation found that:

> "African-Americans in the Black Belt region are disproportionately underserved by ... [the state's] driver's licensing services, causing 'a disparate and adverse impact on the basis of race, in violation of Title VI.'"[435]

The agreement reopened and fully restored the hours of driver's license offices in nine predominantly Black counties in the Black Belt. The agreement also requires Alabama to seek pre-approval from the Department of Transportation before initiating any office closures or other reductions in service.

Arizona recently expanded the scope of its photo ID requirement. If a voter casts a ballot by mail, the voter's signature on the envelope serves as the required ID.[436] For years, early in-person voting was conducted in the same manner. However, in the spring of 2019, the Arizona state legislature passed S.B. 1072, a new law requiring a photo ID for in-person, early voting, in addition to a voter's signature.[437] Now, voters who cast an early, in-person ballot must produce both a photo ID and a matching signature. Without Section 5, the state was not required to evaluate if this new law was racially neutral.[438]

- Currently, in 11 Alabama counties, African Americans comprise more than 50 percent of the population. Driver's license offices will close in eight of these counties, which will leave only three majority-African American counties with a driver's license office.
- Under Alabama's plan, license-issuing offices will close in all six counties in which African Americans comprise over 70 percent of the population.
- Conversely, 40 license-issuing offices will remain open in the 55 Alabama counties in which Whites comprise more than 50 percent of the population.
- In 2012, the Brennan Center reported that 32 percent of Alabama's voting-age population lived more than 10 miles away from the nearest license issuing office that was open more than two days per week.

See also Alabama Field Hearing, written testimony of Nancy Abudu at p. 3.

432 Keesha Gaskins and Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, Brennan Center for Justice (Update July 29, 2012), https://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf.

433 NAACP Legal Defense and Education Fund Inc., *Democracy Defended: Analysis of Barriers to Voting in the 2018 Midterm Elections* (Sept. 6, 2019), https://www.naacpldf.org/wp-content/uploads/Democracy_Defended__9_6_19_final.pdf.

434 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 173-74.

435 *Id.*

436 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Alex Gulotta at p. 4.

437 *Id.*

438 *Id.*

Additionally, LDF filed an amicus brief in a case before the Arkansas Supreme Court in 2014 in a successful challenge to the state's voter ID law.[439] According to testimony from Deuel Ross, Senior Counsel at NAACP LDF, "LDF offered unique evidence that 1,000 ballots were rejected because of this law."[440] Ms. Fried testified that, in Wisconsin, "the All Voting is Local campaign assisted hundreds of Wisconsin voters through the arduous process of getting an ID, which can include providing officials with a birth certificate or passport, filling out multiple forms, and repeat trips to the DMV" in the lead-up to the 2018 election.[441] Wisconsin enacted a strict voter ID law in 2011, and a recent study by the University of Wisconsin-Madison found 6 percent of registered voters in Dane and Milwaukee counties who did not vote in the 2016 general election were prevented from doing so because they did not have the requisite ID.[442] Additionally, the study found 11.2 percent of registered voters who did not vote in the 2016 election were deterred by the ID law; the study's author noted 11.2 percent represents the lower bound of those voters affected.[443] The study also found that the law does not impact all voters equally, impacting low-income and Black voters more severely.[444]

Brenda Wright, Senior Advisor for Legal Strategies at Demos said, "a lot of harm has been done in the name of combating voter fraud."[445] One example cited is the disenfranchisement of a group of nuns following the implementation of Indiana's voter ID law. The nuns did not have driver's licenses, they did not have passports, and they had to be turned away from the polls, even though the poll worker was a nun who lived with them at the convent and they had always voted at that polling place.[446] Chasing the specter of non-existent voter fraud should not prevent otherwise eligible voters from casting their ballot.

Exact Match and Signature Match

Exact Match

In the lead up to the 2018 midterm elections, Georgia put on hold 53,000 voter registrations due to lacking an "exact match" in name, Social Security number, or other discrepancies.[447] While the population of Georgia is 32 percent Black, Black voters were more than 70 percent

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439 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Deuel Ross at p. 7, *citing* Martin v. Kohls 444 SW 3d 844 (Ark. 2014).

440 *Id.*, *citing* Amicus Curiae Brief by *NAACP LDF, et al., Martin v. Kohls*, 2014 WL 4950020 (Aug. 11, 2014).

441 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 11.

442 *Id.*, *citing* Kenneth R. Meyer & Michael G. DeCresenzo, *Supporting Information: Estimating the Effect of Voter ID on Nonvoters in Wisconsin in the 2016 Presidential Election* (Sept. 25, 2017), https://elections.wisc.edu/wp-content/uploads/sites/483/2018/02/Voter-ID-Study-Supporting-Info.pdf.

443 *Id.*

444 *Id.* at p. 11-12.

"More troubling still, the impact of Wisconsin's strict photo ID law is not felt equally by all Wisconsin voters. This same study further found that the law deterred:

- 21.1 percent of low-income registrants (household income under $25,000) compared to 7.2 percent for those over $25,000 and 2.7 percent of high-income registrants (over $100,000 household income)
- 27.5 percent of African-American registrants compared to 8.3 percent of White registrants."

445 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Brenda Wright responding to questions from Congressman Pete Aguilar at p. 54.

446 *Id.*

447 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Gilda Daniels at p. 4-5.

of the names on the hold list. Eighty percent of applicants on the list were Black, Asian, or Latino voters.[448]

Civil rights organizations have sued the State of Georgia three times to stop this exact match practice.[449] The state's exact match practice required information on voter registration forms to exactly match information about the applicant on Social Security Administration or the state's Department of Driver's Services (DDS) databases.[450] In 2019, the Georgia legislature amended the exact match law to permit applicants who fail the exact match process for reasons of identity to become active voters, but made no changes to reform the process that continues to inaccurately flag U.S. citizens as non-citizens.[451]

Signature Match

Some states have moved to an "exact match" for voters' signatures, both on in-person and absentee ballots.[452] Some state laws require the voter's signature on file to match the signature on one's ballot, a practice Elena Nunez testified has been used increasingly to arbitrarily disenfranchise voters.[453] Georgia law provides that election officials are required "to reject absentee ballots (and absentee ballot applications) if the absentee ballot signature does not match the signature elections officials have on file."[454] Signature laws such as Georgia's "primarily affect the disabled, the elderly, and people of color."[455]

In Florida, ballots can be marked "invalid" because of a missing signature or signature mismatch.[456] Eighty-three thousand votes in the 2018 election were rejected for signature mismatch.[457] In Florida, Andrew Gillum, former Mayor of Tallahassee and 2018 Gubernatorial candidate testified that, in a recent case regarding whether Florida's law allowing county election officials to reject vote-by-mail and provisional ballots for mismatched signatures passes constitutional muster, Judge Mark Walker of the Northern District of Florida found it did not.[458] Additionally, the ACLU of Florida and the University of Florida produced a report analyzing the 2014 and 2016 elections, which found younger and ethnic minority voters were

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"In an effort to capture voters of color, Georgia held 53,000 voter registrations, due to lacking an "exact match" in name, Social Security number and other minor discrepancies, e.g., an extra space, a missing hyphen or other typographical errors in the spelling or spacing of their names."

448 *Id.*

449 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 6.

450 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 6.

451 *Id., citing Third Sector Development, et al. v. Kemp, et al.*, No. 2014CV252546, 2014 WL 5113630 (Fulton Cty. Super. Ct. Ga. Oct. 10, 2014); *Georgia State Conference of NAACP, et al., v. Brian Kemp, et al.*, No. 2:16-cv-00219 (N.D. Ga. Sept. 14, 2016); *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018).

452 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Elena Nunez at p. 4.

453 *Id.*

454 Max Feldman and Peter Dunphy, *The State of Voting Rights Litigation (December 2018)*, Brennan Center for Justice, https://www.brennancenter.org/analysis/state-voting-rights-litigation-december-2018.

455 Mark Joseph Stern, *Federal Judge Bars Georgia From Disenfranchising Voters On the Basis of Amateur Handwriting Analysis*, Slate (Oct. 24, 2018), https://slate.com/news-and-politics/2018/10/georgia-brian-kemp-signature-mismatch.html.

456 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Andrew Gillum.

457 *Id.* at p. 1.

458 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Andrew Gillum at p. 16.

much more likely to have their vote-by-mail ballots rejected and less likely to have their vote-by-mail ballots cured when flagged for a signature mismatch.[459] Nancy Batista, Florida State Director of Mi Familia Vota, testified her own mail-in ballot was voided due to a signature mismatch in the primary election, even though she had not changed her signature since high school.[460]

In striking down Florida's signature matching law, Judge Walker found Florida's practice of curing signature mismatch had "no standards, an illusory process to cure and no process to challenge the rejection" and was therefore unconstitutional.[461] Judge Walker further noted that it was problematic that the boards are staffed by laypersons who are not required to undergo formal handwriting-analysis education or training.

In 2017, California was sued by the ACLU for invalidating tens of thousands of voters' vote-by-mail ballots without warning.[462] At issue was a state law allowing election officials with no expertise in handwriting to reject vote-by-mail ballots without providing notice if they feel the signature on the envelope did not match the one on file.[463] The complaint filed by the ACLU alleged as many as 45,000 ballots were rejected in the 2016 general election due to perceived signature mismatch.[464] In 2018, a judge in San Francisco ruled the state must notify voters before rejecting their mail-in ballots for signature concerns.[465]

Language Access and Assistance

Over time, the protections of the Voting Rights Act were expanded to prohibit discrimination against language minority, or limited-English proficiency (LEP), voters. These sections were not overturned by *Shelby County*, and they remain key components of the Voting Rights Act. As this report shows, more must be done to ensure states and localities are following through on the legal protections afforded language minority voters. As this section will illustrate, we are falling short on those protections still enshrined into law.

Sections 4(e) and 4(f)(4), along with Sections 203 and 208, are considered the "language minority" provisions of the Voting Rights Act.[466] Section 4(e) provides rights to U.S. citizens educated "in American flag schools" in a language other than English.[467] This provides specific protections to citizens educated in Puerto Rico in Spanish, prohibiting the conditioning of their right to vote on the ability to read, write, understand, or interpret English. This

459 *Id.*

460 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Nancy Batista at p. 19.

461 David Smiley and Steve Bosquet, *Judge gives thousands of voters with rejected ballots time to fix signature problems*, Miami Herald (Nov. 15, 2018), https://www.miamiherald.com/news/politics-government/election/article221698270.html.

462 *ACLU Challenges California's Voter Signature-Matching Law* (Aug. 24, 2017), https://www.aclunc.org/news/aclu-challenges-california-s-voter-signature-matching-law.

463 *Id.*, filing *La Follette v. Padilla*.

464 *La Follette v. Padilla Complaint* (CA Court of Appeals), https://www.aclu.org/legal-document/la-follette-v-padilla-complaint.

465 Billy Kobin, *California voters with sloppy signatures must have a chance to correct them, court rules*, The Sacramento Bee (Mar. 6, 2018), https://www.sacbee.com/news/politics-government/capitol-alert/article203746944.html.

466 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 28-29.

467 52 U.S.C. § 10303(e).

protection exists within all 50 states, whether the voter lives in a jurisdiction covered under the population threshold of Section 203 or not.[468]

Section 203 of the Voting Rights Act requires that language access for limited-English proficient (LEP) voters be equal to that of English-speaking voters. Section 203 was created during the 1975 reauthorization of the Voting Rights Act after congressional findings of discrimination and intimidation of voters with limited-English proficiency. The Voting Rights Act's language access requirements were not affected by the *Shelby County* ruling. According to data from the 2018 American Community Survey, nearly 22 million adult U.S. citizens speak Spanish; approximately 6,320,000 of whom are not fluent in English.[469] Another 5,089,000 adult citizens speak another language and are not fluent in English.[470] Arturo Vargas of NALEO testified that, "Americans who depend upon language assistance are becoming more diverse and more geographically dispersed, and these factors heighten the importance of effective language assistance."[471]

Section 203 requires the Director of the Census Bureau to publish his or her determinations as to which political subdivisions are subject to the minority language assistance provisions. The Census Bureau makes this determination every five years, the last being in December 2016.[472] Under the 2006 reauthorization of the Voting Rights Act, the language minority assistance provisions were extended until August 5, 2032. In its 2016 evaluation, the Census Bureau found 263 jurisdictions met the threshold of coverage under Section 203.[473] Between 2011 and 2016, 15 additional counties and cities were added to the list of localities required to provide language assistance materials, as well as four new states.[474,475] Political subdivisions within Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wisconsin currently fall under Section 203 coverage.[476]

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468 52 U.S.C. § 10303(e)(1), *see also* U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 29.

469 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Arturo Vargas at p. 4.

470 *Id.*

471 *Id* at p. 4-5.

472 Federal Registrar, Voting Rights Act Amendments of 2006, Determinations Under Section 203 (pub. Dec. 5, 2016), https://www.federalregister.gov/documents/2016/12/05/2016-28969/voting-rights-act-amendments-of-2006-determinations-under-section-203.

473 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 187.

> "The Census found "68,800,641 eligible voting-age citizens in the covered jurisdictions, or 31.3% of the total U.S. citizen voting-age population." Moreover, 16,621,136 Latino, 4,760,782 Asian, and 357,409 American Indian and Alaska Native voting-age citizens live in the covered jurisdictions."

474 Section 203 applies in jurisdictions in which (1) more than 5 percent of citizens of voting age are members of a single language minority group and are LEP; or in which over 10,000 citizens of voting age meet the same criteria; or in Indian Reservations in which a whole or part of the population meets the 5 percent threshold; and (2) the literacy rate of the citizens in the language minority as a group is higher than the national illiteracy rate. See 52 U.S.C. § 10503(b)(2)(A)(i) and (ii).

475 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Arturo Vargas at p. 5.

476 Federal Registrar, Voting Rights Act Amendments of 2006, Determinations Under Section 203 (pub. Dec. 5, 2016), https://www.federalregister.gov/documents/2016/12/05/2016-28969/voting-rights-act-amendments-of-2006-determinations-under-section-203.

The importance of the Voting Rights Act's language access provisions and continued lack of compliance with language access requirements was highlighted during the Subcommittee's field hearing in Broward County, Florida. Florida has a rapidly growing Puerto Rican population.[477] As of 2016, in addition to statewide coverage for Florida, 10 counties are required to provide Spanish-language assistance under Section 203 of the Voting Rights Act.[478] The first time Florida was covered under Section 203 for Spanish was 2011.[479] Despite this, no significant changes for Spanish speakers were made to the materials produced by the Florida Division of Elections.[480] Anjenys Gonzalez-Eilert, Program Director of Common Cause Florida, testified that the first time the Division of Elections made a statewide Voter Registration and Voting Guide in Spanish available was just three weeks before the August 2014 primary.[481] Language minority voters must rely on programs like Google translate to access the Division of Elections website.[482]

"It is remarkable that it takes a coalition of voting rights organizations and individuals to sue in federal court to seek minimal compliance with the plain language of a venerable 53-year-old law."

— Judge Mark Walker, Northern District of Florida

Juan Cartagena, President and General Counsel of LatinoJustice, testified that, though Florida is a covered state, "it usually takes litigation to force Florida election officials to abide by the will of Congress."[483] Florida was sued in 2000 by the Department of Justice for failure to provide the proper language materials and in 2009 by LatinoJustice for failure to provide required assistance to voters from Puerto Rico.[484] Again, in *Rivera Madera v. Detzner (*now *Lee)*, LatinoJustice and others sued 32 Florida counties in August 2018 for failing to comply with Section 4(e) of the Voting Rights Act. In his order, Judge Mark Walker made a telling observation about the state of voting rights protection in Florida: "It is remarkable that it takes a coalition of voting rights

477 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Juan Cartagena at p. 2.

"Based on 2017 Census data Florida now has the highest number of Puerto Rican residents than any other state in the country at 1,128,225 and it grew by over 30% since 2010. Among all Latino populations in Florida Cubans are still the plurality at 28.5% with Puerto Ricans second at 21% ..."

478 *Id.* at p. 3.

Broward, DeSoto, Hardee, Hendry, Hillsborough, Lee, Miami-Dade, Orange, Osceola, Palm Beach Pinellas, Polk and Seminole counties are covered under the Voting Rights Act.

479 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Anjenys Gonzalez-Eilert at p. 3.

480 *Id.* at p. 4.

481 *Id.*

482 *Id.*

483 *Voting Rights and Election Administration in Florida:* Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Juan Cartagena at p. 3.

484 *Id., discussing* a 2002 Department of Justice suit against Osceole County resulting in a settlement to stop the discriminatory failure to provide voting access to Spanish-speaking voters under Section 2; also discussing a 2009 LatinoJustice suit against Volusia County to provide Spanish-language assistance to Puerto Rican voters under Section 4(e), which was settled.

organizations and individuals to sue in federal court to seek minimal compliance with the plain language of a venerable 53-year-old law."[485]

As Mr. Cartagena further explained, the population on the island of Puerto Rico is roughly 65 percent Spanish-language dominant.[486] In Puerto Rico, all government proceedings happen in Spanish, and voter turnout for elections is upwards of 80 percent.[487] This makes the language access protections afforded to Puerto Ricans educated on the island of Puerto Rico under Section 4(e) critical to their ability to fully participate in elections in the 50 states.

In Georgia, only Gwinnett County has been designated under Section 203,[488] but all localities are also required under Section 4(e) to provide Spanish language materials to U.S. citizens from Puerto Rico. During his testimony in Georgia, Sean Young noted, for example, that Hall County was obligated to provide these materials – but the board refused.[489]

Section 203 of the Voting Rights Act requires Arizona to provide election materials and assistance in Spanish, Navajo, and Apache.[490] As of 2016, at least 10 of Arizona's 15 counties must comply with Section 203 by providing translated election materials in Spanish or Native American languages.[491] Providing only written materials in multiple languages may not serve all voters. Some Native languages are not traditionally written, and a written ballot sent to an interpreter may not be the proper way to ensure adequate language access. Some voters may need a physical polling place so voters can obtain oral language assistance,[492] which can be difficult depending on the distance to the polls and access to transportation. Plaintiffs in San Juan County, Utah, alleged the county failed to meet the standard set forth in Section 203 for Navajo speakers. A settlement reached by the Lawyers' Committee and partner organizations requires the county to provide in-person language assistance on the Navajo reservation for 28 days prior to each election through the 2020 general election and take additional action to ensure quality interpretation of election information and materials.[493]

According to the U.S. Census, Asian Americans are the nation's fastest growing racial group; there are now 22.6 million Asian Americans living in the U.S.[494] Asian Americans are not monolithic, instead consisting of a multitude of cultures and languages. According to John C. Yang, President and Executive Director of Asian Americans Advancing Justice | AAJC,

485 *Id.* at p. 4, *citing Rivera Madera v. Detzner*, Slip Op. at p. 25 (Sept. 7, 2018).

486 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Juan Cartagena at p. 85.

487 *Id.*

488 Federal Registrar, Voting Rights Act Amendments of 2006, Determinations Under Section 203 (pub. Dec. 5, 2016), https://www.federalregister.gov/documents/2016/12/05/2016-28969/voting-rights-act-amendments-of-2006-determinations-under-section-203.

489 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Sean J. Young at p. 40.

490 Federal Registrar, Voting Rights Act Amendments of 2006, Determinations Under Section 203 (pub. Dec. 5, 2016), https://www.federalregister.gov/documents/2016/12/05/2016-28969/voting-rights-act-amendments-of-2006-determinations-under-section-203.

491 Arizona State Advisory Committee to the U.S. Comm'n on Civil Rights, *Voting Rights in Arizona* (July 2018) at p. 2, https://www.usccr.gov/pubs/2018/07-25-AZ-Voting-Rights.pdf.

492 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 193.

493 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 9.

494 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of John C. Yang at p. 2.

"[T]he country's fastest growing Asian American ethnic groups were South Asian, with the Bangladeshi and Pakistani American populations doubling in size between 2000 and 2010. Chinese Americans continue to be the largest Asian American ethnic group, numbering nearly 3.8 million nationwide in 2010, followed in size by Filipino, Indian, Vietnamese, and Korean Americans."[495]

Mr. Yang testified that a major obstacle facing Asian American voters is the language barrier. Nationally, about three out of every four Asian Americans speak a language other than English at home and one-third of the population is limited-English proficient (LEP).[496] Access to properly translated materials and assistance at the polls is essential to allowing Asian Americans full access to the vote, "when properly implemented, Section 203 increases civic engagement among Asian American citizens."[497]

Additionally, Section 208 is critical to ensuring every citizen has access to the assistor of their choice when voting. Section 208 provides voters the right to assistance in the voting booth from a person of the voter's choice because of blindness, disability, or inability to read or write, and has been used as an important complement to Section 203.[498] Section 208 protections have been interpreted to include a right to in-person assistance for LEP voters.[499] While Section 203 does not apply nationwide, Section 208 does. As Mr. Yang testified, "all citizens who have difficulty with English, no matter where they live or what their native language is, have the right through Section 208 to an assistor of their choice to help them in the voting booth."[500]

Language accessibility remains a fundamental component to ensure access to the ballot. The language access provisions of the Voting Rights Act are critical to ensuring free and fair access to the ballot box. While these provisions were not struck down in *Shelby County*, the Subcommittee's hearings clearly show a need for better implementation. This will continue to be important as new American populations move about the country, bringing new localities under compliance requirements.

Discriminatory Gerrymandering

At nearly every hearing, the Subcommittee heard about the use of gerrymandering as a suppression tool and the effect gerrymandering can have on diluting the voting power and voice of minority voters. This is especially true of states where partisan legislatures are responsible for drawing maps. Discriminatory gerrymandering and vote dilution affect elections from school boards to congressional districts.

After *Shelby County*, redistricting plans are no longer precleared, meaning states with and without a history of racial discrimination can implement new districts for state and federal

495 *Id.*
496 *Id.* at p. 5.
497 *Id.* at p. 8.
498 *Id.* at p. 10.
499 *See, e.g., U.S. v. Berks County, P.A.*, 250 F. Supp. 2d 525, 538 (E.D. Pa. 2003).
500 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of John C. Yang at p. 2.

offices following the 2020 census that could be in effect for several election cycles, while simultaneously being challenged in court as discriminatory. If the Supreme Court had not gutted Section 4(b), covered states would have been required to send their new district lines for preclearance approval *before* implementation and before any discriminatory impact occurred.

North Carolina has been particularly egregious in its use of redistricting to dilute and suppress voters' power. In 2016, after the District Court ruled against the state's maps, North Carolina Republican legislators drew new maps, this time admitting the purpose of the maps was partisan.[501] In 2017, the Court upheld the lower court's rejection of two North Carolina congressional maps on the grounds that North Carolina's Republican-controlled legislature relied too heavily on race in drawing the maps.[502]

According to Tomas Lopez of Democracy North Carolina, North Carolina's maps have been the subject of continuous litigation since the 2011 redistricting.[503] Mr. Lopez went on to say that this continuous litigation "suggests the current remedies against gerrymandering are ineffective; if the courts take nearly a decade to address the problem, and legislatures are able to avoid penalties for their bad behavior, then the incentive to distort the maps will only be reinforced."[504]

In 2019, the Court decided another case involving North Carolina's gerrymandered maps. In a case combined with a partisan gerrymandering case originating in Maryland, the Court ruled that federal judges have no power to stop politicians from drawing electoral districts based on partisan power.[505] The Majority abdicated the role of the Court in deciding when partisan gerrymandering has crossed constitutional bounds, with Chief Justice Roberts writing, "but the fact that such gerrymandering is incompatible with democratic principles does not mean that the solution lies with the federal judiciary."[506] In writing for the dissent, Justice Kagan strongly disagreed, writing that "the gerrymanders here – and others like them – violated the constitutional rights of many hundreds of thousands of American citizens."[507]

The Court's decision jeopardizes the rights of millions of minority voters. By ceding the field to state courts, the Court fails to set a national protection standard, leaving the rights of voters open to 50 different interpretations of what a gerrymandered district looks like.

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501 Adam Liptak, *Partisan Gerrymandering Returns to a Transformed Supreme Court*, N.Y. Times (March 18, 2019), https://www.nytimes.com/2019/03/18/us/politics/gerrymandering-supreme-court.html.

502 *Cooper v. Harris*, 581 U.S. __ (2017), *see also* Adam Liptak, *Justices Reject 2 Gerrymandered North Carolina Districts, Citing Racial Bias*, N.Y. Times (May 22, 2017), https://www.nytimes.com/2017/05/22/us/politics/supreme-court-north-carolina-congressional-districts.html?module=inline.

503 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Tomas Lopez at p. 8.

504 *Id.*

505 Robert Barnes, *Supreme Court says federal courts don't have a role in deciding partisan gerrymandering claims*, The Washington Post (June 27, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-says-federal-courts-dont-have-a-role-in-deciding-partisan-gerrymandering-claims/2019/06/27/2fe82340-93ab-11e9-b58a-a6a9afaa0e3e_story.html, *see also Rucho v. Common Cause*, 588 U.S. ___ (2019).

Chief Justice Roberts writing for the majority: "We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts ... Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."

506 *Id.*

507 *Id.*

Without the full protection of the Voting Rights Act requiring states and localities with a history of discriminatory practices to preclear their new maps, states could arguably create discriminatory maps, but color them in the rhetoric of party affiliation, not race.

Despite the Court's decision to render federal courts powerless to act, on October 28, 2019, a North Carolina state court again threw out the state's congressional district maps, saying the record of partisan intent was so extensive that opponents of the maps were poised to show "beyond a reasonable doubt" that the maps were unconstitutionally gerrymandered to favor the Republican Party over the Democratic Party, and North Carolina voters would be irreparably harmed if the 2020 elections were held using these maps.[508]

One of the map's primary drafters, Republican State Representative David Lewis was quoted in 2016 as saying he wanted maps drawn that would give a partisan advantage to 10 Republicans and three Democrats because "I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."[509] The same three-judge panel struck down most of the State Legislature's maps in September as an impermissible partisan gerrymander.[510] Republicans decided to redraw the maps, which were approved by the same court on October 28.[511]

In a separate yet related case, hard drives belonging to Thomas Hofeller, a consultant who helped draw North Carolina's maps, were recently discovered. The recovered data outlined the significant role racial discrimination played in drawing legislative maps. Hofeller played a critical part in the administration's attempt to add a citizenship question to the 2020 census,[512] which is the constitutionally mandated instrument that counts all persons living in the United States and whose data congressional representation is based upon when states draw their legislative districts.

Hofeller's hard drives included files proving he wrote a 2015 study which concluded that "adding a citizenship question to the census would allow Republicans to draft even more extreme gerrymandered maps to stymie Democrats."[513] Hofeller also wrote a significant portion of the Department of Justice's letter claiming the citizenship question was needed to enforce the Voting Rights Act of 1965, a justification later used by the Administration.[514]

Critics of the proposed policy argued that it would likely depress responses from minority groups and non-citizens, leading to a potential undercount and skewing the results. Maps are traditionally drawn based on a state's total population, not just the population of voting-age citizens. Following his analysis of Texas state legislative districts, Mr. Hofeller concluded such maps "would be advantageous to Republicans and non-Hispanic Whites," diluting the power of the state's Hispanic residents.[515]

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508 Michael Wines, *State Court Bans Using North Carolina House Map in 2020 Elections*, N.Y. Times (Oct. 28, 2019), https://www.nytimes.com/2019/10/28/us/north-carolina-gerrymander-maps.html?action=click&module=Top%20Stories&pgtype=Homepage.

509 *Id.*

510 *Id.*

511 *Id.*

512 Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. Times (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html.

513 *Id.*

514 *Id.*

515 *Id.*

In a 5-4 decision, the Court blocked the addition of a citizenship question to the 2020 census, upholding the lower court's decision to remand the case back to the agency, writing, "[A]ltogether, the evidence tells a story that does not match the Secretary's explanation for his decision."[516] Secretary of Commerce Wilbur Ross had stated his reason was to better enforce the Voting Rights Act, but the Court found, "[U]nlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the Voting Rights Act enforcement rationale—the sole stated reason—seems to have been contrived."[517]

In North Dakota, tribal leaders raised concerns that, though there is only one at-large representative at the federal level, their reservations are divided in such a way during state-level redistricting that no Native American can win a seat representing the tribal lands.[518] State Representative Ruth Buffalo is the only Native American serving in the North Dakota State House. Representative Buffalo represents District 27—Fargo, North Dakota—which is 370 miles from her traditional homelands of the Fort Berthold Reservation.[519] The District that represents Fort Berthold encompasses a White population that overwhelms the Native American population.[520]

In Alabama, Georgia, Ohio, and Texas, the Subcommittee heard additional testimony regarding the impact of discriminatory gerrymandering. An attempted move to at-large districts in a City Council race in Alabama was denied by the Department of Justice on the grounds it was racially discriminatory and gave rise to the lawsuit that became *Shelby County*.[521] In the Texas case *Veasey v. Abbott*, the court found that "[i]n every redistricting cycle since 1970, Texas has been found to have violated the Voting Rights Act with racially gerrymandered districts."[522] Since Texas came under Section 5 preclearance in 1965, it has been barred by law from discriminating against minority voters, yet Federal judges have ruled at least once every decade since then that Texas violated federal protections for voters in redistricting.[523]

As described in this report, the ACLU of Georgia engaged in a lawsuit to overturn a discriminatory gerrymandering plan in Sumter County, Georgia, that would take five years to resolve.[524] Deuel Ross of NAACP LDF testified that, in 2015, in Fayette County, Georgia, "the County Commission tried to revert to an at-large voting system in a special election to replace a Black Commissioner who had died unexpectedly."[525] LDF filed a lawsuit under Section 2 of the Voting Rights Act to stop this move and require the election to use single-member

516 *Department of Commerce v. New York*, 588 U.S. ___ (2019).
517 *Id.* at p. 5.
518 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), see hearing transcript.
519 *Id.*
520 *Id.*
521 *Voting Rights and Election Administration in Alabama*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019).
522 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 77, *see also Veasey v. Abbott*, 71 F. Supp. 3d at 636 (2017).
523 Alexa Ura, *How a decade of voting rights fights led to fewer redistricting safeguards for Texas voters of color*, The Texas Tribune (Sept. 10, 2019), https://www.texastribune.org/2019/09/10/texas-enters-2021-redistricting-fewer-safeguards-voters-color/.
524 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Sean J. Young at p. 1-2.
525 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Deuel Ross at p. 5-6.

districts, allowing Black voters to again elect the candidate of their preference.[526] In Emanuel County, the Lawyers' Committee represented plaintiffs who alleged the boundaries for seven school board districts "impermissibly diluted the voting strength of African American voters by 'packing' them into one district."[527] A negotiated settlement resulted in the creation of two majority-minority single-member districts.[528]

In Arizona, Professor Ferguson-Bohnee testified that, without Section 5 review, tribes are concerned the Redistricting Commission may not consider retrogression when drawing the maps since the state is no longer required to seek preclearance.[529] Tribes participated in the previous round of redistricting and defended the single majority-minority Native American legislative district. Tribal communities remain concerned they may lose the limited opportunity to elect candidates of their choice in state government.[530] The testimony collected during the Subcommittee's field hearings clearly demonstrates that discriminatory gerrymandering is rampant. Without the pre-*Shelby County* protections in place, the maps drawn after the 2020 census are likely to exacerbate this problem and it will take years for courts to remedy the issue. In the meantime, citizens will continue to be denied meaningful representation.

Section 2 Litigation

While important components of the Voting Rights Act were overturned by the *Shelby County* decision, many critical elements remain, including the ability to pursue litigation under Section 2. Section 2 allows both the Attorney General and private citizens to challenge a practice or procedure on discriminatory grounds. This standard was expanded during subsequent reauthorizations, allowing plaintiffs to challenge laws and election practices without needing to prove discriminatory intent and adjusting the burden of proof requirement to a "results or effects" test, reducing the burden on the plaintiffs.[531] Section 2 applies nationwide and does not expire.

At each field hearing, the Subcommittee heard that while critical, litigation under Section 2 of the Voting Rights Act is not, and cannot, be an adequate remedy on its own. Section 2 was designed as a tool for the Attorney General and private citizens to enforce 14th and 15th Amendment protections nationwide. After the *Shelby County* decision, Section 2 is one of the few mechanisms left for enforcing the right to vote and preventing voting changes that have a disparate impact on, and reduce the ability of, minority citizens to vote.

The U.S. Commission on Civil Rights, in their 2018 statutory Minority Voting Access report, found the number of Section 2 cases increased fourfold following the *Shelby County*

526 *Id., citing* Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs, 118 F.Supp.3d 1338 (ND Ga. 2015)
527 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 11.
528 *Id.*
529 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 8.
530 *Id.*
531 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report (Sept. 2018)* at p. 35.

decision.[532] The Department of Justice has litigated far fewer enforcement suits than private groups. At the time of the report's publishing, the Department of Justice had filed four of the 61 Section 2 cases since the *Shelby County* decision, including one case about the required language access measures, and no cases on the right to voting assistance.[533] There is disagreement over whether the Department of Justice is failing to adequately enforce the Voting Rights Act or voting discrimination has decreased.[534] As this report clearly demonstrates, discrimination in voting has not decreased.

Additionally, USCCR Vice-Chair Patricia Timmons-Goodson testified that, from the USCCR's perspective, the loss of Section 5 preclearance has made tracking voting changes more difficult; "at one point, there was a single source or a limited number of places that we could go to get that information, but when it is left to individual citizens and organizations to do the filing, it makes it far more difficult to track them."[535] Illustrative of the scope of changes voters and advocates now have to track and potentially reactively litigate against, the Department of Justice reported that in just the three years before *Shelby County*, between 2010-2013, it considered 44,790 voting changes under Section 5.[536]

Section 2 lawsuits can be very lengthy, often taking years to fully litigate. This can result in discriminatory laws that may have otherwise been prevented from implementation under Section 5 remaining in place for multiple election cycles, denying voters access to the ballot while lawsuits move through the court process. According to Dale Ho, Director of the ACLU's Voting Rights Project, "in 10 recent Section 2 cases that resulted in favorable outcomes for [our] clients, more than 350 federal, state, and local government officials were elected under regimes that were later found by a court to be racially discriminatory or were later abandoned by the jurisdiction."[537]

Section 2 also reverses the burden of proof, requiring the federal government or citizens to prove the voting change is discriminatory and harms minority voters, rather than the burden being on the state or locality to prove they are not violating peoples' constitutional right to vote. Kristen Clarke of the Lawyers' Committee testified that, "although Section 2 of the Voting Rights Act remains a viable weapon in the fight against racial discrimination in voting, it is nowhere near as potent a weapon as was Section 5."[538] These challenges are only exacerbated by the shifting priorities of the Department of Justice. Ms. Clarke testified that,

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532 *Id.* at p. 9.

533 *Id.* at p. 10.

534 *See Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Minority witness Logan Churchwell.

535 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Patricia Timmons-Goodson at p. 47.

536 U.S. Department of Justice, *Section 5 Changes By Type and Year, Total Section 5 Changes Received By The Attorney General 1965 Through 2013* (updated Aug. 6, 2015), https://www.justice.gov/crt/section-5-changes-type-and-year-2.

537 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Dale Ho at p. 3.

538 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 4.

as of the date of the Subcommittee's Washington, D.C. hearing, the current administration has not filed a single Section 2 lawsuit.[539]

Overreliance on Section 2 forces private citizens to recognize when they are discriminated against and muster the resources to challenge the state or local government. In every state the Subcommittee visited, witnesses provided testimony outlining just how burdensome relying on Section 2 to protect voting rights can be.

"The ACLU of Georgia's litigation in Sumter County perfectly illustrates the damage that the Shelby decision has caused. In 2011, 67 percent of the Sumter County Board of Education was African American. Then, the General Assembly proposed a plan that would reduce that percentage to 28 percent. The DOJ did not preclear the plan, but then the Shelby County decision was handed down, and that discriminatory plan was put into effect immediately. So, the ACLU filed a voting rights lawsuit under Section 2. And last summer, after 5 years of litigation, the Federal District Court issued a ruling finding that the plan was discriminatory and violated the Voting Rights Act. That is 5 years of time consuming litigation, hundreds if not thousands of attorney hours, and thousands of dollars in expert fees. That is 5 years of discriminatory elections taking place over and over again in Sumter County. And that is 5 years in which African American school children and their parents did not have their interests adequately represented in the board. And we are 2 years away from another round of redistricting, in which all of this can happen again. If the preclearance requirement were in place, none of this would have happened and that plan wouldn't have seen the light of day."

— Sean J. Young, ACLU of Georgia

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539 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Kristen Clarke at p. 29-30.

In Atlanta, Georgia, Sean Young, Legal Director, ACLU of Georgia, gave testimony about the ACLU of Georgia's litigation in Sumter County.[540] The Department of Justice did not preclear a redistricting plan that would have diluted the Black population of the Sumter County Board of Education from 67 percent in 2011 to 28 percent. Following the *Shelby County* decision, the discriminatory plan was put into effect immediately. The Section 2 suit filed by the ACLU went on for five years, requiring "hundreds if not thousands of attorney hours," and costing "thousands of dollars in expert fees."[541] All the while, years of voting took place under these discriminatory practices. Gilda Daniels, Litigation Director at the Advancement Project reiterated the time and expense of Section 2, saying "Section 2 cases last an average of three years, and cost more than $1 million."[542]

In North Carolina, Caitlin Swain, Co-Director of Forward Justice, estimated the recent Section 2 litigation in North Carolina cost more than $10 million on the plaintiff's side alone.[543] Ms. Swain continued, saying the cost more than doubled when including nonprofit groups, as well as the State's costs associated with outside counsel representing the Governor and the General Assembly.[544] When the state is sued, the state's costs are then often borne disproportionately by the taxpayers,[545] placing burdens on the voter at both ends of the lawsuit. Deuel Ross, of the NAACP LDF, testified that it has been found that voting rights cases take up the sixth most judicial resources in terms of cases.[546]

In North Dakota, Jacqueline De León, Staff Attorney at NARF, testified that Section 2 litigation is very expensive and "it is prohibitively expensive for a small organization like NARF to reach every single instance of discrimination that is happening across the country."[547] In NARF's 2016 challenge to the North Dakota voter ID law, the total sought for Plaintiffs' attorneys' fees and litigation expenses was $1,132,459.41. This included attorneys' fees and litigation expenses, including expert reports. The case necessitated thousands of attorney hours over almost two years to build a legal record and respond to the State's defense of the law.[548]

In Ohio, Naila Awan, Senior Counsel at Demos, testified that Plaintiff-side expenses in bringing Section 2 litigation often reach the six- and seven-figure range.[549] In Alabama,

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540 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Sean J. Young at p. 26.

541 *Id.*

542 *Id.*, hearing transcript, Gilda Daniels at p. 53.

543 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Caitlin Swain at p. 46.

544 *Id.*

545 *Id.*

546 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Deuel Ross at p. 31.

547 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Jacqueline De León at p. 64.

548 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 4.

> "The effort and resources necessary to mount this legal challenge were significant. The total sought for Plaintiffs' attorneys' fees and litigation expenses was $1,132,459.41. This sum represents $832,977 in attorneys' fees and $299,482.41 in litigation expenses, including expert reports. Thousands of attorney hours over almost two years were expended in order to build a legal record and respond to numerous motions filed by the State in defense of the law."

549 *Voting Rights and Election Administration in Ohio*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), supplemental written statement for the record, Naila Awan.

Attorney James Blacksher testified it would cost "at least hundreds of thousands of dollars" to bring a successful case challenging polling place changes.[550] Mr. Blacksher further testified that it "cost us millions of dollars in the last go-around of redistricting the House and Senate of Alabama" to challenge discriminatorily gerrymandered maps.[551] Mr. Blacksher elaborated that, "in fact, today, it is impossible for private counsel like [him] to bring one of these [Section 2] lawsuits without substantial assistance, financial and legal, from big law firms."[552]

In Arizona, Professor Ferguson-Bohnee testified she has been involved in several Section 2 cases in the State of Arizona, one after the 2000 redistricting on behalf of the Navajo Nation and another on the voter ID litigation brought on behalf of the Navajo Nation and other Native American citizens in the State.[553] Currently, there is ongoing Section 2 litigation in Arizona Federal District Court dealing with the lack of access to early voting, voter registration, and noncompliance with Section 203 of the Voting Rights Act.[554] In the two decades Professor Ferguson-Bohnee has been working on voting litigation in the State of Arizona, the Department of Justice has not initiated any Section 2 cases on behalf of Arizona Tribes.[555] Additionally, Professor Ferguson-Bohnee testified that "Tribes have limited resources to bring voting litigation,"[556] and that Section 2 cases can cost up to $1 million.[557]

As the Subcommittee's hearings illustrate, Section 2 is a critical tool for protecting the right to vote and preventing discrimination, but, alone, it is not enough.

CONCLUSION

Without federal protections, new and old barriers to voting have emerged. Improperly purging voter registration rolls can disproportionately impact minority voters and recently naturalized citizens, and lead to the disenfranchisement of otherwise eligible voters. Cutbacks to early voting have a disparate impact on minority communities, working people, students, and the poor, leading to long wait times voters often cannot endure. In the post-*Shelby County* era, previously covered jurisdictions have closed over one thousand polling places. Jurisdictions not previously covered have also closed, moved, or consolidated polling places, leading to voter confusion and disenfranchisement. After the *Shelby County* decision, states and localities are no longer required to evaluate these decisions for their potential discriminatory impact.

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550 *Voting Rights and Election Administration in Alabama*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, James Blacksher at p. 26-27.

551 *Id.* at p. 27.

552 *Id.* – at the time of the hearing, Mr. Blacksher testified he had four cases where he was local counsel "for the NAACP Legal Defense Fund, who is challenging photo ID; for the Campaign Legal Center, who is challenging the felon disenfranchisement; for the Lawyers' Committee for Civil Rights, who is challenging the at-large election of the Alabama Supreme Court; and the SEIU, Service Employees International Union..."

553 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Patty Ferguson-Bohnee at p. 54-55.

554 *Id.* at p. 55.

555 *Id.* at p. 56.

556 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 8.

557 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Patty Ferguson-Bohnee at p. 55-56.

Voter ID requirements disproportionately impact minority voters who are less likely than White voters to have the required ID. Voter ID also creates a modern-day poll tax, requiring voters to purchase an ID to vote or, even in cases in which states purport to provide free IDs, the requisite underlying documents are often not free for voters. There are also costs associated with time off from work and transportation required to reach the agency dispensing the IDs. The use of exact match and signature match requirements can disenfranchise voters. The language access provisions of the Voting Rights Act remain intact, but far more needs to be done to ensure limited-English proficiency voters have access to the properly translated materials and assistance they need to fully participate in the election process. Finally, discriminatory gerrymandering persists, diluting the vote and voice of minority communities. As the 2020 Census approaches, followed swiftly by a cycle of redistricting, a lack of preclearance puts at risk the state, local, and federal representation of communities for the next decade.

While Section 2 is a vital tool to protecting the right to vote, it is not a panacea. Litigation under Section 2 requires a significant investment of time and resources, neither of which most voters have. Without a proactive Section 5, and without a Department of Justice actively protecting the right to vote, advocates and litigators are left to fill in the gap. Section 2 is also a reactive solution, only to be deployed after a discriminatory practice or procedure is instituted. A case can take years to litigate, leaving voters vulnerable while the court process unfolds. To truly protect the right to vote, Congress must act proactively to protect a right as fundamental as participation in the democratic process.

CHAPTER THREE
Obstacles Faced by Native American Voters

BACKGROUND

Native Americans have historically faced significant barriers to full participation in our democracy. This land's original inhabitants were disenfranchised at the time of our nation's founding, and since then their votes and voices have been systematically suppressed. When the Constitution was written and ratified, it provided for representation of "the whole number of free Persons," fully including indentured servants who were mostly White, but counting enslaved persons as only three-fifths of a person and excluding "Indians not taxed."[558] Native Americans were not considered citizens in the 1800s, were specifically excluded from the 14th Amendment, and were not granted full voting rights until the 1920s. Even after these advances, it took decades for every state to fully comply with federal guarantees.

For many years, Native Americans were denied the same rights as other Americans. The Court distinguished tribal nations from sovereign foreign nations or official parts of the United States, instead considering them domestic dependent nations.[559] In 1856, Attorney General Caleb Cushing outlined the federal government's rationale as to why domestic subjects could not be made citizens absent a treaty or specific congressional act, explaining that general naturalization statutes did not apply to Native Americans because "Indians are not foreigners" and have no other allegiance, but are "within our allegiance, without being citizens of the United States."[560] This meant Native Americans did not have access to the same naturalization process as immigrants, nor did they have the same rights as other natural-born citizens. It was effectively impossible for Native Americans to realize the same rights as other American citizens, including the right to vote.

When emancipated enslaved people were granted citizenship rights under the 14th Amendment in 1868, the U.S. government interpreted the Amendment to exclude Native Americans on reservations.[561] The Reconstruction amendments and implementing legislation excluded Native Americans, rationalizing that tribal members were in fact citizens of Indian nations, not the United States,[562] and were ineligible to vote.[563] Then-Michigan Senator Jacob Howard said,

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558 U.S. Const., Art. I, § 2, cl. 3.

> "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

559 *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), *see also* Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, Ariz. St. L. J. 47:1099.

560 Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, Ariz. St. L. J. 47:1099, *citing* Relation of Indians to Citizenship, 7 Op. Att'y Gen. 746, 749-50 (1856).

561 Natalie A. Landreth, Matthew L. Campbell, Jacqueline De León, *A History of Native Voting Rights*, Native American Voting Rights Coalition, https://www.narf.org/cases/voting-rights/.

562 Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, Ariz. St. L. J. 47:1099 at p. 1102.

563 *Id.*

"I am not yet prepared to pass a sweeping act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation, are to become my fellow-citizens and go to the polls and vote with me[.]"[564] The 14th Amendment itself expressly states that Native Americans did not count for the purposes of representative apportionment.[565]

The Civil Rights Act of 1866 also specifically excluded Native Americans. Under this law, tribal citizens were "subjects of" the United States, but not "subject to" the jurisdiction of the United States and therefore not citizens.[566] In 1884, the Court held that Native Americans could not become citizens through naturalization or birth.[567] When women gained the right to vote under the 19th Amendment, it enfranchised predominantly White women because many Native American women still lacked citizenship.[568]

It was not until 1924, under the Indian Citizenship Act, that Native Americans won full citizenship and voting rights without impairing their right to remain a tribal member.[569] Prior to passage of the Indian Citizenship Act, obtaining citizenship required tribal members to sever tribal ties, renounce tribal citizenship, and assimilate to the dominant culture.[570] Native Americans had been denied citizenship and the right to vote "based on the underlying trust relationship between the federal government and the tribes and their status as tribal citizens."[571] With the passage of the Indian Citizenship Act, a Native American who is a citizen of the United States is also a citizen of his or her state of residence.[572] However, some states continued to deny Native Americans the right to vote in state and federal elections through the same suppressive tactics used to disenfranchise other minority voters, including poll taxes, literacy tests, and intimidation.[573]

In 1928, Peter Porter and Rudolph Johnson of the Gila River Indian Community, were denied the right to register to vote in Pinal County.[574] The County recorder deemed Porter and Johnson unqualified to vote for two reasons: (1) they resided on the reservation and thus not within the State of Arizona; and (2) as Native Americans they remained under guardianship of the federal government and under Arizona law, individuals under guardianship were not entitled to vote in Arizona elections for state and federal officers.[575]

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564 Natalie A. Landreth, Matthew L. Campbell, Jacqueline De León, *A History of Native Voting Rights*, Native American Voting Rights Coalition, *citing* the Congressional Globe. May 30, 1866 at p. 2895, https://www.narf.org/cases/voting-rights/.

565 U.S. Const. amend. XIV.

566 Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, Ariz. St. L. J. 47:1099 at p. 1103.

567 *Elk v. Wilkins*, 112 U.S. 94, 103 (1884).

568 U.S. Const. amend. XIX – passed by Congress June 4, 1919; ratified August 18, 1920.

569 Indian Citizenship Act, Pub. L. No. 68-175, 43 U.S. Stat. 253 (1924).

Authorized the Secretary of the Interior to issue certificates of citizenship to Indians.

570 Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, Ariz. St. L. J. 47:1099 at p. 1103-4.

571 *Id.* at p. 1103.

572 *Id.*

573 *Id.*

574 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Governor Stephen Roe Lewis at p. 1-2.

575 *Id.*, *see also* Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, Ariz. St. L. J. 47:1099 at p. 1108.

Congress' passage of the Nationality Act of 1940 reaffirmed the citizenship of Native Americans.[576] As late as 1948, Arizona and New Mexico enforced state laws expressly barring many Native Americans from voting.[577] Professor Patty Ferguson-Bohnee testified that, historically, despite the Indian Citizenship Act in 1924 and the Arizona Supreme Court affirming the right of Native Americans to vote in *Harrison v. Laveen*,[578] the right to vote for Native Americans was still not secure.[579] Native American voters continued to be disenfranchised by literacy tests for decades.[580] Many Native voters did not vote because they were illiterate and could not speak English; English literacy tests were the biggest obstacle preventing Native Americans from voting.[581] Illiteracy rates for Native Americans in 1948 were estimated at 80 to 90 percent.[582] In 1970, the right was finally affirmed when the Court upheld the ban on literacy tests.[583]

A recent study conducted by the Native American Voting Rights Coalition[584] found that low levels of trust in government, lack of information on how and where to register, long distances to register and to vote, low levels of internet access, hostility towards Native Americans, and intimidation are obstacles to Native American voter participation in Arizona.[585] Research by the National Congress of American Indians indicates the voter turnout rate among American Indian and Alaska Native registered voters is five to 14 percentage points lower than the rate of many other racial and ethnic groups.[586]

The Subcommittee on Elections held field hearings in North Dakota and Arizona, gathering testimony and evidence from tribal leaders, litigators, and advocates about the barriers Native American communities continue to face when attempting to cast a ballot. These two hearings were not an exhaustive evaluation of the barriers faced by Native American voters but provided critical insight and testimony on the barriers faced by voters living on reservations

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576 Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, Ariz. St. L. J. 47:1099 at p. 1103-4, *see* footnote 69:

> Congress revised and codified the nationality laws of the United States. Section 201(b) of the Nationality Act of 1940 affirmed that "[a] person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe... shall be nationals and citizens of the United States at birth." Nationality Act of 1940, Pub. L. No. 76-853, § 201(b), 54 Stat. 1137, 1138.

577 Peter Dunphy, *The State of Native American Voting Rights*, Brennan Center for Justice (Mar. 13, 2019), https://www.brennancenter.org/blog/state-native-american-voting-rights.

578 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 2.

579 *Id.*

580 Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, Ariz. St. L. J. 47:1099 at p. 1112.

581 *Id.*

582 *Id. citing* Tucker et al., *supra* note 84, at 285 (citing DVD: The History of Indian Voting In Arizona (Inter Tribal Council of Arizona, Inc. 2004)). In the 1960s, about half of the Navajo voting age population could not pass a literacy test. *See* MCCOOL ET AL., *supra* note 13, at 19.

583 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 2, *see also Oregon v. Mitchell*, 400 U.S. 112 (1970).

584 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019); written testimony of Patty Ferguson-Bohnee at p. 4, *see also* Native American Voting Rights Coalition, *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota* (Jan. 2018), https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf.

585 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Patty Ferguson-Bohnee at p. 34-35.

586 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 7, *citing* National Congress of American Indians, *Top 10 States with the Highest Populations of Voting-Age Natives*, Native Vote (2018), http://www.ncai.org/initiatives/campaigns/NCAI_NativeVoteInfographic.pdf.

and the need for consultation with tribes when crafting voting laws. The Native American Rights Fund and their collaborative partners conducted a series of independent hearings and plan to publish their finding in a forthcoming report.

This chapter focuses on barriers to voting as expressed and experienced by the Native American community. Their barriers include: nontraditional addresses that lead to issues with voter ID laws, vote-by-mail, and voter registration requirements; lack of access to early voting, polling locations, and resources for on-reservation voting; vote dilution due to gerrymandering; and lack of language access materials and assistance in Native languages. Some barriers are similar to those experienced by non-Native voters and discussed elsewhere in this report, while others are unique to the experience of Native Americans.

VOTING RIGHTS ACT PROTECTIONS FOR NATIVE AMERICANS

The Voting Rights Act of 1965 prohibited discrimination in voting on the basis of race.[587] As discussed earlier, Sections 4(b) and 5 of the Voting Rights Act required covered states to seek preclearance for changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."[588] Native American voters were included as a protected class when the federal government was reviewing proposed voting changes for potential discrimination.[589]

Subsequently, the 1975 amendments to the Voting Rights Act created Section 203 which required voting materials be provided in the language of the "applicable minority language group," including Native Americans and Native Alaskans.[590] Section 203 includes a formula for determining which jurisdictions are required to provide bilingual materials and assistance.[591]

The 1992 amendments to the Voting Rights Act expanded the coverage formulas for language access to include not only jurisdictions where five percent of eligible voters have limited-English proficiency (LEP), but also those that have at least 10,000 LEP citizens who are members of a single language minority group. The amendments also expanded language access coverage formulas for Native Americans living on Indian Reservations.[592] Additionally, Section 208 allows a disabled or LEP individual to bring an assistant of their choosing to help them vote.

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587 Voting Rights Act of 1965, Pub. Law No. 89-110, Sec. 2.

"No voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

588 52 U.S.C. § 10304(a).

589 *Id.*

590 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 34.

591 *Id.*

592 *Id.* at p. 36-37, *citing* James Thomas Tucker, Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act, N.Y.U. J. Leg. & Pub. POL'Y 215 (2016), http://www.nyujlegis.org/wp-content/uploads/2012/11/TUCKER-ENFRANCHISING-LANGUAGE-MINORITY-CITIZENS-TEH-BILINGUAL-ELECTION-PROVISIONS-OF-THE-VOTING-RIGHTS-ACT.pdf.

Arizona was brought under Voting Rights Act preclearance following the 1975 reauthorization, which expanded coverage to more fully include language minority populations, including Latino, Asian American, and Native American populations.[593] North Dakota was never covered under Sections 4(b) and 5, however, neighboring South Dakota was a partially-covered state, with two counties covered.[594]

Native Americans have been particularly hurt by the *Shelby County* decision, and it is clear that Section 2 litigation alone is not an adequate protection of the right to vote for tribal members. In North Dakota, Jacqueline De León testified that the lawsuit challenging North Dakota's discriminatory voter ID law in 2016 cost over $1.1 million in plaintiff's attorneys' fees and litigation expenses and took thousands of attorney hours to develop.[595] Professor Ferguson-Bohnee testified that she has been involved in several Section 2 cases in the State of Arizona, including one after the 2000 redistricting cycle on behalf of the Navajo Nation and another regarding voter ID brought on behalf of the Navajo Nation and other Native American citizens in Arizona. She is also involved in ongoing litigation in Federal District Court regarding the lack of access to early voting, voter registration, and noncompliance with Section 203 of the Voting Rights Act.[596] However, Professor Ferguson-Bohnee went on to note that in the two decades she has been working on voting litigation in the State of Arizona, the Department of Justice has not initiated any cases on behalf of tribes.[597] Tribes have limited resources and Section 2 is not a viable replacement for Section 5 oversight given that a Section 2 case can cost up to $1 million.[598]

ONGOING BARRIERS FACED BY NATIVE AMERICANS

"Native Americans do not have equal access to voter registration. Many voters must travel long distances off-reservation to register to vote, in some cases 95 miles one way."

— Patty Ferguson-Bohnee, Sandra Day O'Connor School of Law

Nontraditional Addresses, Voter ID, and Vote-by-Mail

Many Native Americans living on tribal reservations lack traditional street addresses. This is a problem the Subcommittee heard in both North Dakota and Arizona. When states require voter IDs to have a street address rather than allowing Post Office Boxes, it disenfranchises voters who live in multi-family homes,

593 U.S. Department of Justice, *History of Federal Voting Rights Laws: The Voting Rights Act of 1965* (updated July 28, 2017), https://www.justice.gov/crt/history-federal-voting-rights-laws.

594 U.S. Department of Justice, *Jurisdictions Previously Covered by Section 5* (last updated Aug. 6, 2015), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5.

595 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 4.

596 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019); hearing transcript, Patty Ferguson-Bohnee at p. 54.

597 *Id.* at p. 56.

598 *Id.* at p. 55-56.

have unstable housing situations, or live in rural areas that have not been provided traditional street addresses.

For example, Professor Ferguson-Bohnee testified that, in Arizona only, "18 percent of reservation voters outside of Maricopa and Pima Counties have physical addresses and receive mail at home."[599]

North Dakota

To vote in North Dakota, voters must present a residential address on one of the following IDs: a North Dakota Driver's License or nondriver's identification card, a tribal government ID, or an alternative form of identification prescribed by the Secretary of State, which included a student identification certificate or a long-term care identification certificate.[600] North Dakota's voter ID law has been amended multiple times over the last several years. As the evidence below illustrates, these changes have a disparate impact on North Dakota's Native American voters.

In 2011, concerns over disenfranchising voters led the state Senate, on a bipartisan basis, to vote 38-8 to reject changes to the state's voter ID law that would have eliminated long-standing fail-safe provisions that provided critical protections, especially for Native American voters who lacked a qualifying residential street address.[601] However, following the 2012 election, in which Senator Heidi Heitkamp won the North Dakota Senate race, the state changed course, enacting strict changes to its voter ID requirement in 2013 and eliminating the fail-safe mechanisms that had protected voters.[602] Senator Heitkamp narrowly won her 2012 Senate race by less than 3,000 votes, or just fewer than one percentage point, which media outlets at the time and witnesses at the Subcommittee hearing attributed to the voters of the Native American community.[603]

The fail-safe mechanisms that were eliminated by the 2013 law had allowed a voter to cast their ballot if a poll worker could vouch for their identity or the voter signed an affidavit, under penalty of perjury, that they were qualified to vote.[604] This fail-safe system worked well, particularly for the tribal communities. Tribal leaders testified that their members serve as poll workers and can vouch for almost every person within their small communities.[605] Prior to passing the new law, the North Dakota state legislature failed to analyze whether the Native American voters who lacked addresses during the 2011 legislative debate still lacked

599 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 3, *citing Democratic Nat'l Comm. V. Reagan*, 329 F. Supp. 3d at 869-70.

600 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 4.

601 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 2-3.

602 *Id.* at p. 3.

603 *Id.* at p. 2, *see also* hearing transcript.

604 *Id.* at p. 2.

605 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Charles Walker at p. 2.

addresses in 2013.[606] In fact, the state still had data from previous legislative debates indicating that many Native Americans lacked proper street addresses.

The legislature nevertheless passed a law restricting the acceptable forms of ID and eliminating the poll worker voucher and affidavit fail-safes, aware that such a requirement would disenfranchise Native American voters. Indeed, many Native American voters continue to lack addresses to this day.[607] Jacqueline De León testified that the legislature used a hoghouse amendment, a parliamentary procedure in which an unrelated bill was replaced with the voter ID bill, for the purposes of enabling the legislature to pass the bill without public hearings.[608] North Dakota State Representative Corey Mock objected to the passage of the bill without debate because it would "completely change the way North Dakota handles voters" and circumvent input from the public and agencies impacted by the bill.[609]

In the 2015 legislative session, North Dakota again amended its voter ID laws, further restricting the forms of acceptable ID.[610] In 2016, NARF filed suit on behalf of Turtle Mountain plaintiffs that were disenfranchised by the laws.[611] The U.S. District Court in North Dakota found for the voters, finding the law violated both the U.S. and North Dakota constitutions as well as the Voting Rights Act and required North Dakota to provide a fail-safe mechanism for the 2016 election.[612]

"Bottom line, members of Standing Rock Sioux Tribe feel that the North Dakota ID law was meant to target them and dissuade them from exercising their constitutional right to vote. It was hurtful to our members to be excluded this way, and our community remains outraged."

— Charles Walker, Standing Rock Sioux Tribe

In April 2017, the North Dakota enacted H.B. 1369, preserving the previously enacted strict voter ID requirements, requiring a street address, and failing to preserve the affidavit option as required by the court.[613] The legislature instead allowed for a provisional ballot.[614] While a provisional ballot would allow voters without a proper ID to cast a ballot, the ballot would ultimately be thrown out if the voter could not return with a qualifying ID within six days of the election.[615] This failed to address disenfranchisement concerns for

606 *Voting Rights and Election Administration in the Dakotas:* Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 3; see also *Brakebill* First Amend. Compl. ¶ 64.

"The Legislature required residential addresses despite being warned in the previous Legislative session by Deputy Secretary of State Jim Silirum that Native Americans in particular would be disproportionately impacted by such a change."

607 *Id.* at p. 3.
608 *Id.* at p. 3, *see also Brakebill* First Amend. Compl. ¶ 54-59.
609 *Id.* at p. 3.
610 *Id.* at p. 4.
611 *Id.*
612 *Id.*
613 *Id.* at p. 4-5.
614 *Id.*
615 *Id.*

voters who are otherwise qualified to vote but could not obtain a qualifying ID or who had no residential address to put on an ID.[616] NARF again filed suit on behalf of voters. Ultimately, on September 27, 2018, the Court denied an emergency appeal and allowed a decision by the Eighth Circuit Court of Appeals to stand, allowing the state to implement the strict voter ID for the 2018 election.[617]

The law in place for the 2018 election required a residential address and did not allow for the use of a Post Office Box. The impact on Native American voters and response from the community was significant. Tribal leaders, litigators, and advocates testified about the barriers requiring a residential street address places on their tribal members. The resources marshalled to ensure voters received an ID, compounded with the burden it placed on the tribes to comply, amounted to an unfunded mandate and a poll tax.

Chairwoman Myra Pearson of the Spirit Lake Tribe said, "many of our members struggle with housing instability, unemployment, and poverty."[618] The Candeska Cikana Community College estimated in September 2014 that there are approximately 300 homeless people residing on or around the Spirit Lake reservation, but that estimate may be an undercount, as not all homeless tribal members sign up for housing assistance.[619] A 2015 survey of 285 people living on the Spirit Lake Reservation indicated that 38 percent of people have an income under $5,000, and 73 percent have an income less than $20,000 per year.[620]

Many parts of the Spirit Lake reservation have not been provided acceptable forms of street addresses and many members do not have ID, nor do they need one to live their lives.[621] If members do have IDs, they are predominantly tribal IDs that list a Post Office Box. The United States Postal Service does not deliver to certain parts of the reservation, and if the county 911 coordinator has assigned a residential address to someone's home, they may never be notified of that address.[622]

"The Tribe does not have the resources to indefinitely provide adequate IDs to tribal members in order to vote in all future elections."

— Chairwoman Myra Pearson, Spirit Lake Tribe

Chairwoman Pearson testified to the effort undertaken by the Tribe to ensure every possible voter obtained state sanctioned ID. Between October 22, 2018 and November 8, 2018, the Tribal Enrollment Office was open overtime. Robin Smith, Director of the Enrollment Department for the Spirit Lake Tribe, worked 21.25 hours of overtime, costing the Tribe additional money in overtime

616 *Id.* at p. 5.
617 *Id.* at p. 6.
618 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Chairwoman Myra Pearson at p. 1.
619 *Id.* at p. 1.
620 *Id.*
621 *Id.*
622 *Id.*

pay for the Director of the Enrollment Department.[623] The Tribe also waived the traditional $11 fee for the ID.[624]

The Spirit Lake Tribe purchased a new printer and supplies, incurring costs upwards of $3,500.[625] The Tribe issued 665 ID cards between October 22 and November 8.[626] Typically, the Tribe issues approximately 30 IDs per month. The fee waiver cost the Spirit Lake Tribe $7,315 in income.[627]

Issuing IDs also proved difficult. When tribal staff encountered an individual without a street address, staff would attempt to determine an address or contact a 911 coordinator.[628] If an applicant was homeless or relied on a Post Office Box, staff would attempt to determine where the individual stayed most recently and most often.[629] One tribal member made three separate visits to finally obtain an acceptable address.[630] Given that Spirit Lake tribal IDs expire every five years and many residents move frequently, there are concerns the voter ID law will disenfranchise tribal residents and continue doing so in a discriminatory manner.

"... we are not a wealthy tribe, we have scrapped and scrimped to survive these past 200 years. With this understanding the government waived fees for Tribal Identifications to meet the requirements to allow our members to vote."

— Alysia LaCounte, Turtle Mountain Band of Chippewa Indians

The Turtle Mountain Band of Chippewa Indians faced similar struggles. Unemployment on the Turtle Mountain reservation hovers at 69.75

623 *Id.* at p. 2.

"In order to ensure that its members had valid IDs the Tribe chose to extend its hours at the Tribal Enrollment Office. Between October 22, 2018 and November 8, 2018, the enrollment office was open from 8:00AM until as late as 7:00PM, depending on need. Robin Smith, the Director of the Enrollment Department for the Spirit Lake Tribe, had to work through her lunch break on a regular basis in order to ensure that needs were met. Ms. Smith worked a total of 21.25 hours of overtime between this timeframe at a rate of $37.50/hr., which cost the Tribe an additional $796.88."

624 *Id.*

625 *Id.*

"In order to meet the needs of the members and the additional requests for IDs, the Tribe purchased a new printer for $2,655.95 and $1,105.78 worth of supplies such as ink and the cards themselves. The Tribe issued a total of 665 ID cards between October 22, 2018 and November 8, 2018. Normally the Tribe issues about 30 IDs per month. Due to the fee waiver, the Tribe lost $7,315.00 in income during that time."

626 *Id.*

627 *Id.*

628 *Id.*

629 *Id.* at p. 2.

"There were several difficulties in issuing the IDs. For instance, if a person was homeless or relied on a P.O. Box number because they did not have a consistent address, the enrollment staff would have to find out where the individual stayed most recently and most often. Usually, the individual would give a relative or a friend's house. Enrollment staff would then have to look up the relative or friend and verify with that person that the individual had stayed there. In other instances, members would arrive and not know their physical address. In those circumstances, enrollment staff had to assist the member in determining their physical address. This process involves checking internal records about the physical addresses of other members that live at the same residence. If that did not determine an address, staff would then call the Benson County 911 coordinator to determine the address or have an address assigned."

630 *Id.* at p. 3.

percent, along with a high poverty rate.[631] To ensure members could vote in the 2018 election, the Tribal government enacted a law enabling voters to receive tribal IDs for free.[632] Generally, Turtle Mountain Tribal IDs cost $15.[633] As discussed in Chapter 2, $15 may not seem like a significant expense, but to a tribal member it can mean a week's worth of milk and bread.[634] The Tribe issued 2,400 new ID cards,[635] at an estimated cost of at least $36,000.

"The first day of free tribal IDs our ID machine melted down the actual physical IDs because it became too hot. As a result, we sought assistance through any means necessary, social media, news outlets, and moccasin telegraph."

— Alysia LaCounte, Turtle Mountain Band of Chippewa Indians

Alysia LaCounte testified that the use of addresses and street names began only recently on the Turtle Mountain Reservation – "uniform addressing, and numbering of residences only occurred within the last ten years."[636] Most private residences still lack a house number. The Tribe experienced numerous technical difficulties issuing 2,400 IDs. Still, the Tribe undertook significant efforts to ensure everyone who wanted one could obtain an ID and vote. The Tribal college opened a help line, the Tribe purchased new machines to produce the IDs and placed them throughout the community, staff worked 14 hours a day for two weeks before the election, and they held get-out-the-vote rallies.[637] Organizing a response to this discriminatory law required a great amount of time and resources.

The people of Mandan Hidatsa and Arikara Nation ("MHA Nation") faced similar obstacles. The MHA Nation has more than 5,600 members of voting age that live on or near the Reservation.[638] Until 2016, the Tribe allowed members to list a Post Office Box as their address on their tribal ID cards, as MHA Nation also has parts of the reservation with homes without assigned street addresses.[639] Following the decisions of the Eighth Circuit Court of Appeals and the Court, the Tribe began allowing tribal members to exchange their IDs with Post Office Boxes for new IDs with residential street addresses free of charge.[640] Shortly thereafter, the Tribe began issuing new, free tribal IDs to members for any reason.[641]

631 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Alysia LaCounte at p. 1.
632 *Id.* at p. 2.
633 *Id.*
634 *Id.*
635 *Id.*
636 *Id.*
637 *Id.* at p. 3.
638 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Roger White Owl at p. 1-2.
639 *Id.* at p. 2-3.
640 *Id.* at p. 3.
641 *Id.*

"Once again, the MHA Nation was forced to bear the burden of federal laws, policies and decisions giving improper authority to the State over elections on our Fort Berthold Indian Reservation."

— Roger White Owl, MHA Nation

"In many cases we could not identify an address for someone even when looking at a map of their house. Or, they may have given me a family member's house address where they are currently staying. This is not voter fraud. This is the result of unworkable state laws being applied to our Reservation."

— Roger White Owl, MHA Nation

Roger White Owl, Chief Executive Officer of MHA Nation, testified their efforts were slowed by a lack of staff resources to do the unexpected work and significant distances separating communities.[642] Between September 24, 2018 and November 6, 2018, MHA Nation issued 456 new IDs. In contrast, they typically issue about 150 to 200 IDs a month.[643] Mr. White Owl testified, "some tribal members had to drive for hours just to get a new ID."[644] MHA Nation estimated about 75 to 80 percent of the tribal members who received a new ID leading up to the election did not have an ID that complied with North Dakota's law.[645] Furthermore, the addresses on the new IDs may not be accurate in future years, as "about one in four tribal members who came in for a new ID did not know their residential address."[646]

Despite these efforts, Mr. White Owl said roughly one-third of MHA Nation members still do not have a tribal ID. The Tribe was also unable to count the number of members who never received a new ID, were discouraged from voting, or were unable to vote due to the new voter ID law.[647] In addition to the ID barriers voters were required

642 *Id.*

643 *Id.*

"Between the time of the Eight Circuit decision and the November 6, 2018 election our Tribal Enrollment Office issued 456 new IDs to tribal members. Normally we issue about 150 to 200 IDs a month. This burdened our system, limited our ability to provide other important services to tribal members, and the MHA Nation absorbed the cost of issuing these IDs. We estimate the about 75 to 80 percent of the tribal members who received a new ID during this time did not have another form of ID that would have complied with North Dakota's law. Even with all of this additional work, about one-third of our members still do not have a tribal ID."

644 *Id.*

645 *Id.*

646 *Id.*

"In addition, many of the current residential addresses that we used to make these IDs may not be accurate in future years. About one in four tribal members who came in for a new ID did not know their residential address. In many cases we could not identify an address for someone even when looking at a map of their house. Or, they may have given me a family member's house address where they are currently staying. This is not voter fraud. This is the result of unworkable state laws being applied to our Reservation."

647 *Id.* at p. 3.

to surmount, MHA Nation had to provide buses to bring voters to the polls after two polling locations were closed, requiring some members to travel 30 to 45 miles to vote.[648]

The people of the Standing Rock Sioux Tribe faced a similar challenge. Charles Walker testified that many people on Standing Rock do not have an ID because "it is simply not necessary for everyday life."[649] The family poverty rate in Sioux County, North Dakota, is 35.9 percent.[650] The nearest driver's license site is approximately 40 miles away.[651] Generally, unless a member is elderly, the Tribe charges for an ID to fund the cost of staff time and printing.

The United States Postal Service does not always operate in the rural areas of the Standing Rock Reservation. Like other reservations, many members use and share Post Office Boxes, many of the homes are not marked with house numbers, and many streets lack signage. Even if the state government has an address listed for a residence, it may never have been communicated to the homeowners.[652] Charles Walker testified the state also uses multiple addressing systems, so an address may be different across different government agencies.[653] Additionally, Alysia LaCounte testified that the 911 system fails to enumerate unit numbers, making proper addressing difficult.[654] Chairwoman Pearson testified that she has lived at the same home for more than 20 years, and a company could not verify her address for a delivery.[655] A significant portion of the population also moves from home to home because they do not have housing of their own, meaning they do not have a consistent address even if they remain within the reservation.[656]

During the 2018 election cycle, the Standing Rock Sioux Tribe waved a $5 fee usually charged to members under age 60 for a new ID. The Tribe issued 807 new tribal IDs between October 15, 2018, and November 6, 2018.[657] During this time, the Tribe would have charged a fee for 486 of those IDs. As a result, the Tribe lost nearly $2,500 in income and spent almost $500 to print them.[658] Previously, the Fort Yates office printed an average of only 47 IDs per month.[659]

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648 *Id.* at p. 3-4.

649 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Charles Walker at p. 3.

650 *Id.*

651 *Id.*

652 *Id.*

653 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Charles Walker at p. 8.

654 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Alysia LaCounte at p. 16-17.

655 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Chairwoman Myra Pearson at p. 13-14.

656 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Charles Walker at p. 3.

657 *Id.* at p. 4.

> "This election cycle the Tribe responded by expending valuable resources to try to make sure that our members were not disenfranchised. We normally charge a $5 fee to print new IDs for any tribal member under the age of 60; we waived this fee leading up to the election. We issued 807 new tribal IDs between October 15, 2018 and November 6, 2018. We would have charged a fee to print 486 of these IDs, which means we lost nearly $2,500 in income and spent almost $500 to print all of these IDs."

658 *Id.* at p. 4-5.

659 *Id.*

"Simply put, it is a massive hurdle for many on the Standing Rock Reservation to figure out their actual residential address."

—Charles Walker, Standing Rock Sioux Tribe

The North Dakota legislature claimed changes to the voter ID law were necessary to prevent voter fraud. None of the witnesses testifying at the North Dakota field hearing cited any risk of voter fraud. In fact, the Subcommittee heard the opposite – "There is little to no risk of voter fraud on the Standing Rock Reservation, and there has never been an issue with it before with more lenient voter ID laws."[660] Implementation of a strict voter ID requirement runs counterintuitive to North Dakota's lack of a voter registration requirement,[661] and witnesses at the hearing reiterated that they do not want a voter registration requirement.[662]

There is also evidence the new fail-safe mechanism does not address the problems faced by Native American voters. While the law allows voters to supplement a non-qualifying ID with a utility bill, bank statement, check, or government issued document, this fails to address the issues faced by voters who could not reasonably obtain an ID or who had no residential address to place on the ID.[663] If the issue is a lack of residential address, the voter likely does not have a utility bill or other document addressed to that address.[664] Each tribal leader who testified at the North Dakota field hearing highlighted the high levels of housing insecurity, homelessness, and poverty experienced by residents on their reservations. These factors contribute to the likelihood that residents will not have utility bills with an address on them.

Additionally, if a voter casts a set-aside ballot on Election Day because they could not obtain an address in time for the election, there is little evidence suggesting they would be able to do so in the six days following the election as the law now requires.[665]

The state failed to offer any resources to help tribes provide IDs that complied with the new law. Mr. Walker testified that the state has not offered any money or assistance in complying with the law, no effort to update the addressing system, make it 911-compliant, or mark unmarked homes.[666] Additionally, there was a lack of communication between tribes and the state as to what addresses the state would accept.

660 *Id.* at p. 4.

661 North Dakota is the only state without a voter registration requirement.

662 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019).

663 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jacqueline De León at p. 5.

664 *Id.* at p. 4.

"Further, the "failsafe mechanisms" in the latest iteration of the voter ID law do not actually address the problems that Indian voters face. If the problem is simply a lack of legitimate residential address, they likely do not have a utility bill or some other document addressed to that address. The same is true for the set-aside ballots; if a voter couldn't obtain an address in time for the election, there is little evidence to suggest that they would be able to do so in the six days following the election."

665 *Id.* at p. 4.

666 *Id.* at p. 5.

"Access to the polls and participation in the political process are impacted by isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, the digital divide, and distance."

— Patty Ferguson-Bohnee, Sandra Day O'Connor School of Law

Arizona

The State of Arizona is home to 22 federally recognized Native American Tribes and 21 reservations.[667] Roughly 27 percent of the land in the state is tribal land, and more than five percent of the state's population is Native American.[668] The poverty rate for Native Americans in Arizona is 35.7 percent.[669] Comparatively, Non-Hispanic Whites in Arizona experience a poverty rate of 10.9 percent.[670] Native Americans in Arizona are more likely to work multiple jobs, lack reliable transportation, and lack adequate childcare resources.[671] These factors, when compounded with barriers erected by the state, can impact a Native voter's ability to access the ballot.

Native Americans in Arizona also face significant homelessness or near homelessness due to extreme poverty and a lack of affordable housing.[672] Many residents also lack traditional street addresses. In Arizona, only 18 percent of reservation voters outside of Maricopa and Pima Counties have physical addresses and receive mail at home.[673] Many Native American voters in Arizona, similar to North Dakota, rely on Post Office Boxes to receive their mail. Some tribal members must travel up to 140 miles round trip to receive mail.[674]

Professor Ferguson-Bohnee testified the lack of formal addresses in Indian Country makes it "especially hard for voters to comply with address requirements to register to vote or to produce identification in order to vote on Election Day."[675] President Jonathan Nez , of the Navajo Nation, testified a majority of Navajo citizens residing on the reservation do not have traditional street addresses, with the reservation having at least 50,000 unmarked properties.[676]

667 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 2.
668 *Id.* at p. 2.
669 *Id.* at p. 3.
670 *Id.* – the national poverty rate for Native Americans is 26.8%.
671 *Id.* at p. 3, *citing Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 704 (9th Cir. 2018), *reh'g en banc granted*, 911 F.3d 942 (9th Cir. 2019) (Dissent, Thomas).
672 *Id.* – A study by Housing and Urban Development found that between 42,000 and 85,000 people in tribal areas are couch surfers, staying with friends or relatives only because they had no place of their own.
673 *Id.* at p. 3.
674 *Id.* at p. 3-4.
675 *Id.* at p. 4.
676 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of President Jonathan Nez at p. 1.

"Some of the highest rates of near homelessness and overcrowding in Indian Country is found in Arizona. This lack of permanent housing impacts the ability of these tribal members to have a permanent physical address, yet this should not impede their ability to exercise their right to vote."

— Patty Ferguson-Bohnee, Sandra Day O'Connor School of Law

Arizona's voter registration forms allow a space for an individual to draw a map location of their home, but these maps often do not allow for enough detail to properly locate their residence, resulting in registrars assigning voters to incorrect precincts.[677] Incorrect precincts can result in longer travel times, the county rejecting ballots, or the county failing to process their registration form.[678]

For residents of the Navajo Nation, which spans three states, a voter's Post Office Box could be in a different state or county than their residence.[679] President Nez stated that "a discrepancy in the state or county location between an individual's [Post Office] Box and their physical residence leads to difficulties for individual Navajos in registering to vote."[680] Multiple family members also share Post Office Boxes, which can lead to lost or delayed ballots and other voter notifications. Additionally, the number of Post Office Boxes per location is limited.

If a voter is unable to secure a Post Office Box or is removed from their family box, they may have to travel 30 to 40 miles to the next closest post office, at times in addition to the 30 miles they already traveled to reach their local post office.[681] President Nez testified that some Navajo citizens must drive more than 100 miles to register to vote.[682] Governor Stephen Roe Lewis, of the Gila River Indian Community, testified that non-traditional addresses and inaccurate poll address lists present barriers to voting for their members as well. Governor Lewis testified, "Reservation voters in Maricopa County were assigned standard addresses prior to the 2012 General Election, which changed their voting precincts. Unfortunately, these changes were neither communicated in advance nor delivered clearly to voters."[683] This resulted in frustrated voters being turned away from the polling location without casting a ballot. In very few instances, voters cast a provisional ballot.[684]

The move toward mail-in ballots, online registration, and voting centers in Arizona has a significant impact on Native American voters. As has been discussed extensively, Native

677 *Id.* at p. 1.
678 *Id.*

"In 2012, Apache County, Arizona purged 500 Navajo voters because their addresses were deemed 'too obscure.'"

679 *Id.* at p. 2.
680 *Id.*
681 *Id.* at p. 2-3.
682 *Id.* at p. 3.
683 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Governor Stephen Roe Lewis at p. 4-5.
684 *Id.*

voters living on reservations have limited access to adequate addressing, Post Office Boxes, and postal services that limit utilization of vote-by-mail. Additionally, less than half of homes on tribal lands in Arizona have reliable broadband internet access, limiting access to online voter registration for Native Americans living on reservations.[685] Individuals with non-traditional addresses cannot use the online voter registration system.[686]

Voter ID is also a problem for Native American voters in Arizona. Even valid tribal IDs can be (and are) rejected on Election Day due to insufficient poll worker training or issues arising from nonstandard addresses.[687] During the 2006 election, 428 Navajos voted using provisional ballots that went uncounted because they could not verify their identification.[688] The Navajo Nation sued, alleging a violation of Section 2 and the case was settled to expand the acceptable forms of ID.[689] Governor Lewis explained that, in 2012, voter ID laws were strictly enforced on the Pinal County portion of the Reservation and "many Community voters were turned away from the polls when their address did not match the voter rolls at the polls." In very few instances, voters were offered and allowed to cast a provisional ballot, but the majority who were turned away were denied a ballot altogether.[690] It was later discovered that Community members' addresses did not match the rolls because the County had reassigned the physical addresses of all Community voters to match the service center where they vote, and no voter's address matched the rolls.[691]

In 2019, the State enacted a law requiring voters show ID if they vote early in-person, resulting in an additional burden on voters who chose in-person early voting as opposed to voting by mail. Previously, voters could vote early in-person without showing an ID. Voters who vote early by mail still do not have an ID requirement.[692] Professor Ferguson-Bohnee testified this violates equal protection and disproportionately impacts Native American voters, specifically Native language speakers who only receive language assistance in person.[693] Professor Ferguson-Bohnee also testified that poll workers sometimes provide voters provisional ballots without telling voters it will not count if they are in the wrong precinct.[694]

In addition to proper addressing issues, Election Day is a culturally significant event for tribal members. President Nez testified that "when there is a day of elections, it is a day to bring everybody together, to catch up with family member(s), to catch up on politics, and it

685 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019); hearing transcript, Patty Ferguson-Bohnee at p. 35.
686 *Id.*
687 *Id.* at p. 36.
688 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 6.
689 *Id.*
690 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Governor Stephen Roe Lewis at p. 4.
691 *Id.*
692 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Patty Ferguson-Bohnee at p. 36.
693 *Id.* at p. 36.
694 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 7.

is really a social event."[695] The Navajo Nation held Navajo elections alongside County, State, and Federal elections. State Senate Bill 1154, which would change the elections to the first Tuesday in August, significantly impacts voter turnout and tribal elections, because tribes will be forced to move their elections to maintain voter turnout or Tribal members will have to travel to vote two times a year.[696]

Election Day is similarly important to the Gila River Indian Community—it centers around family and community.[697] The Tribe sponsors traditional meals at polling sites while community members "proudly come out and vote as their right as U.S. citizens but also members of sovereign nations[.]"[698] Governor Lewis testified that a significantly smaller percentage of Gila River Indian Community members vote by mail than among the general population.

Recently, Arizona enacted H.B. 2023, which prohibits the gathering of ballots and places heavy penalties on individuals who turn in ballots other than their own unless they meet certain stringent exceptions – like being a family member or caretaker. Proponents of this ban argue it is intended to combat voter fraud, however neither President Nez nor Governor Lewis had ever heard of issues relating to voter fraud on their respective reservations.[699] When questioned about how significant a problem "ballot harvesting" is in Arizona at the Arizona Field Hearing, State Senator Michelle Ugenti-Rita stated that "maybe a dozen" people came to speak with her about the alleged problem of "ballot harvesting" before she created the current law.[700] The

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695 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, President Jonathan Nez at p. 16-17.

696 *Id.* at p. 18.

697 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Governor Stephen Roe Lewis at p. 20.

698 *Id.*

699 *Id.* at p. 28-29.

700 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, State Senator Michelle Ugenti-Rita at p. 75-76.

"**Chairwoman Fudge**: ... Secondly, and I think, to the senator, I understand clearly what you have been saying to me. I am just curious, how many people came to you about the harvesting that it was so important an issue that you needed to take it to make a law?

Ms. Ugenti-Rita: Yes. Thank you, ma'am. Generally speaking, probably maybe a dozen.

Chairwoman Fudge: And what is the size of the State of Arizona?

Ms. Ugenti-Rita: It is — the population?

Chairwoman Fudge: Yes.

Ms. Ugenti-Rita: 6.5 million, but there is no correlation between the two, if that is what you are trying to—

Chairwoman Fudge: Well, no. That is your decision. My thinking is that if 12 people come, and you are going to make a law that affects 6-1/2 million people, I think that that is a problem, but that is just — I am not asking to debate it. That is my opinion.

The other thing that I really do want to address, and I am solely truly not trying to pick on you, but you just have said some things that I think concern me. Let me just say to you that mailing a bill is not a right. Voting is. You cannot compare those two things, because voting is a right given to us by the Constitution —I am not asking you a question — by the Constitution of the United States. And I can promise you that if my neighbor wanted me to mail their bill, I could, but I can't take their ballot. You cannot compare those two things.

Because what I know is there was a time in this Nation where being a good neighbor meant something. We helped elderly people. We helped sick people. We helped the people who were disabled. We helped people. Now what we have done is say, I can't help you if you have a problem. That is — and I don't see that harvesting has been a major problem anywhere other than in North Carolina. It is the only place that I am aware of that it ever has been a problem. So, we continue to find solutions for problems that don't exist."

population of the State of Arizona is approximately more than 7 million people.[701]

Similarly, at the time North Dakota was contemplating a voter ID requirement in 2013, there were also no instances of voter fraud during the 2012 election.[702] There were only two probable cases of double voting arising during the 2016 election.[703]

Additionally, President Nez and Governor Lewis raised a concern that laws enacted without consideration of cultural differences can disenfranchise tribal voters. The definition of "family" is different for Native American families than it is for Anglo-centric families. Barring certain individuals from turning in ballots without input from the tribes has a deleterious effect on their ability to participate in government and the democratic process.[704]

Alaska

The Alaska State Advisory Committee to the U.S. Commission on Civil Rights included an evaluation of Alaska's proposed shift to vote by mail and its potential impact on Alaskan Native voters. The Committee included findings in its recent report despite the state's position that it is not moving to a vote-by-mail process at this time. As a shift toward vote by mail has happened elsewhere across the country, it is important that jurisdictions evaluate how this change would impact the most rural communities in America.

Mail delivery is a significant issue in Alaska. The State Advisory Committee reported serious concerns regarding the interest in vote by mail, as mail delivery is slow in Alaska and can take up to two to three weeks.[705] Mail delivery often relies on air service, and testimony before the State Advisory Committee revealed that some villages may be inaccessible by air for several weeks at a time due to inclement weather.[706] Voters faced similar issues with Post Office Boxes as expressed by rural tribal communities in Arizona. Post Office Boxes are often shared, sometimes with multiple families. As such, voters may not be receiving sufficient or complete election-related materials.[707]

The United States Postal Service transfers mail from villages to a central hub in Anchorage, where it is then postmarked. Rural residents who vote in a village and mail their ballot on time may not have their ballots counted because they are postmarked late.[708] A shift to vote by mail requires reliable postal services, which many rural voters cannot access. States conducting elections via vote-by-mail are still required to comply with Section 203 language requirements. Prior to implementing a vote-by-mail system, tribes must be consulted to ensure their voters can avail themselves of all necessary avenues to cast a ballot and receive that ballot adequately translated.

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701 United States Census Bureau, *Quick Facts: Arizona* (July 1, 2018), https://www.census.gov/quickfacts/AZ.

702 *Brakebill First Amend. Compl.* at p. 17.

703 *Id.* at p. 29.

704 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Governor Stephen Roe Lewis and President Jonathan Nez at p. 29-31.

705 Alaska State Advisory Committee, *Alaska Native Voting Rights: A Report of the Alaska Advisory Committee to the U.S. Commission on Civil Rights* (June 2019), https://www.usccr.gov/pubs/2019/09-19-AK-SAC-Voting-Report.pdf.

706 *Id.*

707 *Id.*

708 *Id.*

LACK OF ACCESS TO THE POLLS AND RESOURCES

The closing of polling locations, lack of on-reservation sites, distance from reservations, and lack of resources can impose unreasonable difficulties for Native Americans seeking to cast a ballot.

During the 2018 elections, two long-standing voting locations were closed within the Fort Berthold Reservation in North Dakota.[709] North Dakota State Representative Buffalo argued that if the state's elected representatives "more accurately reflected the MHA people, they would have known that these were important voting sites and would not have shut them down."[710]

In Arizona, eight tribes are located across two or more counties, subjecting one reservation to two or more sets of local election policies. Four reservations span three counties, increasing the disparate standards of election requirements with which they must comply and compounding the difficulties for tribal voters.[711] In parts of the Navajo Nation, only one in 10 families owns a vehicle, limiting transportation options and access to services.[712]

> *"One of the most egregious examples of lack of access to in-person early voting involves the Kaibab Paiute Tribe. Kaibab Paiute residents must travel over 280 miles one way to participate in early voting. These voters do not have a polling location on or near the reservation on Election Day."*
>
> — Patty Ferguson-Bohnee, Sandra Day O'Connor School of Law

President Nez highlighted how transportation challenges affect a voter's access to the polls, especially when polling places are located at great distances. In 2018, Apache County had only two early voting locations on the Navajo Nation, in the southern part of the reservation.[713] Community members from the Teec Nos Pos Chapter of Navajo Nation, located near the Utah border, were forced to drive 95 miles each way to cast an early ballot.[714]

The Leadership Conference's report on polling place closures found that Arizona closed 320 polling locations

709 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Ruth Buffalo at p. 1.

710 *Id.*

"In the recent mid-term election of 2018, two traditional voting precincts were shut down within the exterior boundaries of the Fort Berthold Reservation 1) Dunn County North Fox precinct located in Mandaree at the St. Anthony Church 2) McKenzie County Four Bears precinct. If the county representatives more accurately reflected the MHA people, they would have known that these were important voting sites and would not have shut them down."

711 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 2.

712 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of President Jonathan Nez at p. 8.

713 *Id.*

714 *Id.*

since 2012.[715] After *Shelby County*, Arizona is no longer required to analyze and report on the potential disparate impact of these closures on Native American voters. Nearly every county has closed polling places since preclearance was removed.[716] Professor Ferguson-Bohnee testified that, while every county has in-person early voting off-reservation, there are limited opportunities for in-person early voting on-reservation.[717] In 2016, 10 reservations had some form of in-person early voting. Only five reservations had in-person early voting in 2018.[718]

A lack of adequate resources is a common issue heard from tribal witnesses. Four Directions, Inc.,[719] sued and assisted in suits in multiple states after state and county public officials refused to provide satellite voting offices on American Indian Reservations, violating Section 2 of the Voting Rights Act.[720] The court found in *Sanchez v. Cegavske* that tribes and tribal citizens are not required to fund equal access to the ballot box by counties,[721] O.J. Semans testified Four Directions has found "Secretaries of State and local officials do not believe they are under any obligation under Section 2 to provide equal access to in-person voter registration locations, in-person early voting locations, and in-person Election Day polling places on American Indian Reservations."[722] Voting options such as mail-in ballots are not an adequate substitute for access to polling locations and early voting, and a lack of these alternatives disenfranchises Native voters.

Four Directions was successful in 2014, and to the present, in persuading the South Dakota Board of Elections to utilize HAVA funds to pay for satellite voting offices on Indian Reservations in South Dakota.[723] However, Mr. Semans detailed several instances in which officials declined to establish satellite voting locations on reservations, both with funding offered and without, even when voting locations are available to state residents not living on reservations.[724] Mr. Semans testified that Standing Rock Chairman Mike Faith made a written request to North Dakota Secretary of State Jaeger to establish early voting on Standing Rock – which was available in Fargo, Bismarck, Manda, Grand Forks, and Minot, North Dakota – on October 28, 2018.[725] Secretary Jaeger declined the request, highlighting a need for Congress to act by providing HAVA funding for Indian Country. Mr. Semans recommended Congress

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715 The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* (Sept. 2019) at p. 12, http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf.

716 *Id.* at p. 17.

717 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Patty Ferguson-Bohnee at p. 35.

718 *Id.*

719 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of O.J. Semans, Sr. at p. 1-2.

> "Four Directions, Inc. is a nonprofit organized to benefit the social welfare of Native American citizens by conducting extraordinarily successful Native voter registration and get-out-the-vote drives, voter protection programs, and improved Native voter access through litigation, litigation threats, and persuasion with local and state government officials in Nevada, Arizona, North Carolina, Montana, Minnesota, North Dakota, and South Dakota over the past 16 years."

720 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of O.J. Semans at p. 5.

721 *Id.* at p. 7.

722 *Id.* at p. 7.

723 *Id.* at p. 4.

724 *Id.* at p. 7-9.

725 *Id.* at p. 8.

appropriate additional HAVA funds explicitly for "in-person equal access to the ballot box for Native voters living on tribal lands."[726]

President Nez testified there are limited resources available for providing information to Navajo citizens. The Navajo reservation is rural, and they lack broadband capability to allow for better information on elections and changes in election law.[727] Governor Lewis highlighted the need for improved poll worker training. The Gila River Indian Community found "numerous instances of poll workers not even offering provisional ballots as an option for Community members" when issues arise.[728] Proper training along with cultural sensitivity could address these election administration issues to ensure tribal voters can cast their ballot with assistance from poll workers.

At the Subcommittee's hearing in Washington, D.C., USCCR Chair Catherine Lhamon testified that the Native American Rights Fund highlighted one polling place which was moved away from a village. As a result, Native Alaskan voters' only option to travel to their polling place was by plane.[729] A 2015 investigation by the Department of Justice found Native voters had to travel farther distances than White voters in a number of states.[730] Subsequently, the Department of Justice proposed legislation to require jurisdictions "whose territory includes part or all of an Indian reservation, an Alaska Native village, or other tribal lands to locate at least one polling place in a venue selected by the tribal government," and to require an equal number of resources at those polling sites.[731] This bill, known as the Native American Voting Rights Act, has yet to pass Congress.

In the Alaska State Advisory Report, the State Committee noted that some rural Alaska Native villages have unreliable internet service or may lack access to broadband internet, which is often necessary to meaningfully participate in elections. The Report highlighted that "an Alaska Native elder walked two miles from her home to the nearest public library that had internet access to download the necessary election forms to participate in early voting."[732]

VOTE DILUTION

Representative Ruth Buffalo is the only Native American representative in the North Dakota State House. The district she represents is 370 miles from her traditional homelands of the

726 *Id.* at p. 9 – Four Directions estimates $20 million in HAVA per election cycle would likely provide the financial resources necessary.

727 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, President Jonathan Nez at p. 8.

728 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Governor Stephen Roe Lewis at p. 5.

729 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Catherine Lhamon at p. 5, *see also* U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 178.

730 *Id.*

731 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 179.

732 Alaska State Advisory Committee, *Alaska Native Voting Rights: A Report of the Alaska Advisory Committee to the U.S. Commission on Civil Rights* (June 2019), https://www.usccr.gov/pubs/2019/09-19-AK-SAC-Voting-Report.pdf.

Fort Berthold Reservation.[733] She testified that if she were to run for elected office on the Fort Berthold Reservation, the district would not be majority Native American due to the way the district is drawn, as the White population overwhelms the Native population.[734] Furthermore, the reservation is divided into six counties, effectively diluting the Native American presence to the point that they have no representation among county seats.[735]

In Arizona, tribes have fought to preserve the sole majority-minority Native American state legislative district.[736] In the 2010 redistricting cycle, Arizona's Redistricting Commission consulted an expert to ensure district maps did not retrogress. As a result, Arizona's maps received preclearance on its first submission for the first time since it became a covered jurisdiction.[737] There is concern that the Commission might not consider retrogression in the next cycle, as the state is no longer required to seek preclearance approval, leading to tribal communities losing their limited opportunity for elected representation.[738]

LANGUAGE ACCESS

Arizona

In Arizona, the language access provisions of Section 203 of the Voting Rights Act mandate coverage of several Native languages for minority language access assistance.[739] In 2000, Arizona was required to provide bilingual registration and voting materials in six different Native American languages, while after 2015 only two were still required.[740] Arizona is currently required to provide language assistance for Navajo and Apache speakers.[741]

The Navajo language is widely spoken by Navajo voters and is covered under Section 203 of the Voting Rights Act.[742] The State is required to provide all elections materials in English and Navajo. Professor Ferguson-Bohnee testified only one of nine covered jurisdictions in 2016 subject to Section 203 for Native American languages provided translated voter registration

733 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Ruth Buffalo at p. 1.

734 *Id.* at p. 1.

735 *Id.*

736 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Patty Ferguson-Bohnee at p. 55.

737 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 8.

738 *Id.*

739 Federal Registrar, Voting Rights Act Amendments of 2006, Determinations Under Section 203 (pub. Dec. 5, 2016), https://www.federalregister.gov/documents/2016/12/05/2016-28969/voting-rights-act-amendments-of-2006-determinations-under-section-203.

740 Austen Bundy, *Distance, language can still pose challenge to Native American Voting*, Cronkite News Arizona PBS (May 14, 2018), https://cronkitenews.azpbs.org/2018/05/14/distance-language-can-still-pose-challenge-to-native-american-voting/. *see also* Federal Registrar, Voting Rights Act Amendments of 2006, Determinations Under Section 203 (pub. Dec. 5, 2016), https://www.federalregister.gov/documents/2016/12/05/2016-28969/voting-rights-act-amendments-of-2006-determinations-under-section-203.

741 Federal Registrar, Voting Rights Act Amendments of 2006, Determinations Under Section 203 (pub. Dec. 5, 2016), https://www.federalregister.gov/documents/2016/12/05/2016-28969/voting-rights-act-amendments-of-2006-determinations-under-section-203.

742 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of President Jonathan Nez at p. 1.

information in the covered language.[743] Furthermore, "potential voters had to travel 95 miles one way to obtain in-person voter registration assistance."[744]

Written language materials are only one form of assistance. Some Native languages are not traditionally written, they are spoken. Moving to predominantly vote-by-mail and providing voting materials in only written translations disenfranchises voters who need a physical polling place so voters can obtain oral language assistance.[745]

Alaska

In a recently submitted report, the Alaska State Advisory Committee to the U.S. Commission on Civil Rights examined Alaska's implementation and compliance with the *Toyukak v. Mallott* settlement and order related to language access.[746] Alaska has been required to provide language access materials to limited-English proficiency voters since the 1975 extension of the Voting Rights Act. Alaska was subject to statewide Section 5 requirements at the time of *Shelby County*.[747] In the last 30 years, Alaska has undergone, and lost, two court cases regarding compliance with Section 203.[748]

In July 2013, two Alaska Native citizens and four tribal governments sued the Lieutenant Governor of Alaska and the Division of Elections for failing to provide effective language assistance to limited-English proficient Alaska Native voters in certain areas covered by Section 203.[749] They alleged the state failed to produce an Official Election Pamphlet and other pre-election information in any of the covered Alaska Native languages, effectively denying an opportunity to meaningfully participate in elections.[750] The State reached a settlement to provide materials in Yup'ik and Gwich'in and make additional election administration changes.[751]

During the August 2016 primary election, federal observers visited 19 villages and found no translated voting materials available in six villages, while others were severely lacking in

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743 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Patty Ferguson-Bohnee at p. 4-5, *citing* Indian Legal Clinic, Arizona Native Vote – Election Protection Project: 2016 Final Report at 34.

744 *Id.*

745 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 193.

746 Alaska State Advisory Committee, *Alaska Native Voting Rights: A Report of the Alaska Advisory Committee to the U.S. Commission on Civil Rights* (June 2019), https://www.usccr.gov/pubs/2019/09-19-AK-SAC-Voting-Report.pdf.

Toyukak v. Mallott is only the second Section 203 case fully tried and the first one since the Reagan Administration.

747 U.S. Department of Justice, *Jurisdictions Previously Covered by Section 5* (last updated Aug. 6, 2015), https://justice.gov/crt/jurisdictions-previously-covered-section-5.

748 U.S. Department of Justice, *Language Minority Citizens: Section 203 of the Voting Rights Act* (updated Feb. 26, 2018), https://www.justice.gov/crt/language-minority-citizens.

"Section 203 provides: "Whenever any State or political subdivision [covered by the section] provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language."

749 Alaska State Advisory Committee, *Alaska Native Voting Rights: A Report of the Alaska Advisory Committee to the U.S. Commission on Civil Rights* (June 2019) at p. 36, https://www.usccr.gov/pubs/2019/09-19-AK-SAC-Voting-Report.pdf, *citing* Complaint, *Toyukak v. Mallott*, No. 3:13-cv-00137-SLG (D. Alaska September 8, 2015), (Dkt. No. 1).

750 *Id.*

751 *Id.*

translated materials.[752] Observers returned for the general election and found six of 12 polling locations had no translated sample ballot for voters. Testimony before the State Advisory Committee noted that while progress has been made, much work still needs to be done.[753]

CONCLUSION

It was not until 1924 that Native Americans gained equal citizenship and the right to vote. Despite this, Native American voting rights were not fully affirmed until the Court outlawed literacy tests in 1970. Today, Native American voters still face barriers to their full and equal exercise of the franchise.

Unique voting barriers faced by Native Americans must be properly considered before states and localities implement voting changes. Native Americans living on reservations experience high rates of poverty and homelessness, a lack of traditional addresses, difficulties obtaining required IDs and registering to vote, and long distances to travel to polling locations, among other issues.

The issues discussed in this Chapter are just a small cross-section of issues faced by Native voters and do not constitute an exhaustive evaluation of barriers faced by Native American voters. Native voters are considered a protected class under the Voting Rights Act. Testimony shows that tribes must be consulted as changes to voting laws and procedures are considered. The federal government must bear in mind the historic government-to-government relationship between tribes and the federal government, re-evaluate whether states should dictate how elections are administered on reservations, and consider tribal needs in crafting federal voting laws.

752 Alaska State Advisory Committee, *Alaska Native Voting Rights: A Report of the Alaska Advisory Committee to the U.S. Commission on Civil Rights* (June 2019) at p. 36, https://www.usccr.gov/pubs/2019/09-19-AK-SAC-Voting-Report.pdf.

> "Dr. Tucker testified that there was a lack of translated written materials required under the Toyukak Order despite reporting from the Division of Elections that the majority of materials had been translated. For example, when federal observers visited 19 villages during the August 2016 primary election, they found: no translated voting materials were available in six villages (Alakanuk, Kotlik, Arctic Village, Beaver, Fort Yukon, and Venetie); the 'I voted' sticker was the only material in an Alaska Native language in Marshall and Mountain Village; in Emmonak, the Yup'ik glossary was the only translated material available; and 10 villages had a sample ballot written in Yup'ik but only two (Koliganek and Manokotak) had written translations of the candidate lists."

753 *Id.*

CHAPTER FOUR

Election Administration Barriers Hindering the Right to Vote

How elections are administered significantly impacts a voter's experience and access to the ballot. Congress has passed legislation to alleviate burdens and ease access, including the National Voter Registration Act (NVRA) of 1993 and the Help America Vote Act (HAVA) of 2002. These laws were intended to increase access to voter registration opportunities and improve voting systems and voter access. As the Subcommittee learned over the course of its hearings, many issues facing election administration have not been adequately addressed, including:

- General election administration, such as:
  - Lack of compliance with the National Voter Registration Act (NVRA);
  - Attempts to add documentary proof of citizenship requirements;
  - Inconsistent poll worker training;
  - Lack of adequate resources; and
  - The use (and potential overuse) of provisional ballots
- Continued disenfranchisement of American citizens, including those that:
  - Were formerly incarcerated; and
  - Those in prison/jail
- Misinformation and disinformation campaigns
- Climate disaster response
- The conflict of interest presented when individuals serve as both candidate in and arbiter of the same election

GENERAL ELECTION ADMINISTRATION

Failure to Comply with the National Voter Registration Act (NVRA)

The NVRA, commonly referred to as the "motor-voter" law, was enacted by Congress in 1993 and requires states to establish voter registration procedures for federal elections that enable all eligible voters to register to vote when applying for a driver's license both by mail and at public assistance or disability agencies.[754] The NVRA also created a federal mail-based form

754 U.S. Commission on Civil Rights, *Increasing Compliance with Section 7 of the National Voter Registration Act, A Briefing Before the United States Commission on Civil Rights* (Aug. 2016), https://www.usccr.gov/pubs/docs/NVRA-09-07-16.pdf.

for voter registration that all states are required to accept.[755] Various proposals were introduced in Congress during the 1970s and 1980s to set national standards for voter registration,but passage of the NVRA in 1993 marked the first comprehensive federal effort to address voter registration.[756]

Brenda Wright of Demos testified that "the requirement of pre-registration to exercise the right to vote is still the number one barrier to participation in our democracy. Fifty to 60 million eligible voters, disproportionately people of color, young people, and low-income people, remain unregistered."[757] Failure to properly comply with and enforce the NVRA hinders access to the franchise. Ms. Wright further testified that, in the November 2016 general election, nearly 1 in 5 people who were eligible but did not vote cited registration issues as their main reason for not doing so.[758]

"The experience of one Black mother of two from Irving is illustrative. After moving to a new neighborhood, Totysa Watkins went online to update her driver's license and checked "yes" in response to a question in the online form asking whether she wanted to register to vote. She did not learn that, in fact, her attempt at registration would not count under the State's policies until she showed up at the polling place in 2014, children in tow."

— Mimi Marziani, Texas Civil Rights Project

As the Subcommittee learned in Texas, the state has failed to comply with the NVRA. Mimi Marziani testified at the Texas listening session that, "Texas does not offer simultaneous voter registration, as required by the NVRA, to the 1.5 million Texans who update their driver's licenses online each year."[759] Failure to properly implement the NVRA makes registering to vote and keeping accurate, up-to-date voter rolls more difficult for both voters and the state. It places a heavier burden on voters who are frequent movers, applicants who tend to be poorer, younger and – in Texas– more often people of color.[760]

755 National Voter Registration Act of 1993, P.L. 103-31, May 20, 1993, 107 Stat. 77; 52 U.S.C. Ch. 205.

756 Sarah J. Eckman, *Federal Role in Voter Registration: The National Voter Registration Act of 1993 and Subsequent Developments*, CRS Report R45030 (updated Jan. 23, 2019).

757 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Brenda Wright at p. 7-8.

758 *Id.* at p. 8, *citing* Census Bureau, Current Population Survey, November 2016 Voting and Registration Supplement. Reasons cited for not voting include "did not meet registration deadlines," "did not know where or how to register," and "did not meet residency requirements/did not live here long enough."

759 *Voting Rights and Election Administration in Texas*: Listening Session Before the Comm. on House Administration, 116th Cong. (2019); written testimony of Mimi Marziani at p. 4.

760 *Id.*

"The experience of one Black mother of two from Irving is illustrative. After moving to a new neighborhood, Totysa Watkins went online to update her driver's license and checked "yes" in response to a question in the online form asking whether she wanted to register to vote. She did not learn that, in fact, her attempt at registration would not count under the State's policies until she showed up at the polling place in 2014, children in tow. Ms. Watkins told [us], "I felt that my voice was taken away from me

The Lawyers' Committee, along with other civil rights organizations, brought actions to enforce Sections 5 and 7 of the NVRA, which require states to provide voter registration assistance to individuals visiting motor vehicle and public assistance agencies. North Carolina settled one case in 2018 by agreeing to substantial improvements in how the department of motor vehicle and social services agencies offer and process voter registration applications.[761] The Lawyers' Committee also successfully challenged Georgia's runoff election voter registration in 2017 for violating Section 8 of the NVRA.[762] At the time, Georgia required voters register approximately three months before the federal runoff election – the NVRA deadline is set at 30 days.[763]

In Washington, D.C., Brenda Wright of Demos testified there have been no actions to enforce Section 5 or Section 7 of the National Voter Registration Act.[764] Deuel Ross testified that NAACP LDF was successful in a 2014 suit against the Louisiana Secretary of State in which the Fifth Circuit ruled the Secretary is responsible for enforcing compliance with the NVRA across relevant state agencies.[765]

Attempts to Add Documentary Proof of Citizenship Requirements

All states require proof of citizenship to register to vote. However, an attestation of citizenship under penalty of perjury has generally been considered sufficient.[766] Some states have attempted to add stricter proof of citizenship requirements to voter registration forms, purporting to combat non-citizens voting in American elections. These claims have been proven false.

Alabama, Arizona, Kansas, and Georgia have enacted laws requiring voters produce documentary proof of citizenship when registering to vote. Additionally, former Election Assistance Commission (EAC) Executive Director Brian Newby attempted to allow Alabama, Georgia, and Kansas to require stringent proof of citizenship instruction when registering to vote using the federal form. The court has currently stopped this practice from moving forward. According to a 2017 analysis by the Brennan Center, between five and seven percent of the citizen voting age population, millions of otherwise eligible voters, do not have ready

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when my vote wasn't counted. Voting has always been something I value and is a right I have instilled in my children. Texas should not be able to take that away."

761 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 5, *citing Action NC, et al. v. Kim Westbrook Strach, et al.*, No. 1:15-cv-01063 (M.D.N.C. 2018).

762 *Id.*, *citing Georgia State Conference NAACP v. Georgia*, No. 1:17-CV-1397 (N.D. Ga. May 4, 2017).

763 *Id.*

764 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Brenda Wright at p. 42.

765 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Deuel Ross at p. 7, *citing Scott v. Schedler*, 771 F.3d 831 (5th Cir. 2014)

766 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Dale Ho at p. 4, *citing* As the Tenth Circuit has noted, *see Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016), Congress chose to rely on an attestation to establish eligibility for a wide range of federal programs. *See*, e.g., 7 U.S.C. § 2020(e)(2)(B)(v) (requiring state applications for Supplemental Nutrition Assistance Program aid be signed under penalty of perjury as to the truth of the information contained in the application and the citizenship or immigration status of household members); 26 U.S.C. § 6065 (requiring that any tax "return, declaration, statement, or other document" be "verified by a written declaration that it is made under the penalties of perjury"); 42 U.S.C. § 1395w–114(a)(3)(E)(iii)(I) (requiring "an attestation under penalty of perjury" as to assets for receipt of prescription drug plan subsidies); 42 U.S.C. § 1436a(d)(1)(a) (requiring an attestation of citizenship or "satisfactory immigration status" for the receipt of housing assistance).

access to documents that would prove their citizenship.[767] This rate is twice as high among citizens earning less than $25,000 per year.[768] Arizona, along with Kansas, sued the EAC seeking to require the agency to modify the federal voter registration form to require proof of citizenship.

In 2013, the Court held that requiring proof of citizenship was inconsistent with the NVRA.[769] Arizona contends the Court's ruling in *Arizona v. The Inter Tribal Council of Arizona* applies only to federal elections,[770] and created a two-tiered registration system allowing individuals to register with the federal registration form for federal elections, while requiring voters in state and local elections to meet a new, strict citizenship requirement.[771] Civil rights organizations sued, alleging the two-tiered system is an unconstitutional burden on the right to vote.

The ensuing settlement allows the state to continue requiring proof of citizenship to register in state elections, but requires the state to treat federal and state registration forms the same and check motor vehicle databases for citizenship documentation prior to limiting residents to vote only in federal elections.[772] In 2013, the Lawyers' Committee intervened on behalf of the Inter Tribal Council of Arizona to defeat yet another attempt by Arizona and Kansas to modify the state-specific instructions of the federal mail voter registration form to require applicants residing in those states submit proof of citizenship in accordance with state law.[773]

Under Arizona's documentary proof of citizenship law, only limited forms of documents were accepted. While copies of passports and birth certificates could be submitted by mail, naturalization papers were required to be original papers and must be presented in person or be verified with the federal government.[774]

Notwithstanding the litigation history and precedent established around proof of citizenship requirements, Alabama, Georgia, and Kansas again requested changes be made in 2016 to the federal form allowing documentary proof of citizenship requirements.[775] Then-EAC Executive

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767 Ian Vandewalker, *Analysis: The Effects of Requiring Documentary Proof of Citizenship to Register to Vote*, Brennan Center for Justice (July 19, 2017), https://www.brennancenter.org/our-work/research-reports/effects-requiring-documentary-proof-citizenship.

768 *Id.*

769 *See Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 15 (2013).

770 NAACP Legal Defense and Education Fund, *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder* (June 2019) at p. 20-21, https://www.naacpldf.org/wp-content/uploads/June-2019-Democracy-Diminished-Report.pdf.

771 Arizona State Advisory Committee to the U.S. Comm'n on Civil Rights, *Voting Rights in Arizona* (July 2018) at p. 3-4, https://www.usccr.gov/pubs/2018/07-25-AZ-Voting-Rights.pdf.

772 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 6, *citing League of United Latin Am. Citizens Arizona v. Reagan*, No. CV17-4102, 2018 WL 5983009 (D. Ariz. Nov. 14, 2018).

773 *Id.*, *citing Kobach v. U.S. Election Assistance Commission*, 772 F. 3d 1183 (10th Cir. 2015).

774 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 128.

> "Arizona submitted its documentary proof of citizenship rules for preclearance under Section 5, and in 2005, the Attorney General precleared them. Arizona was immediately subject to litigation under Section 2, and a preliminary injunction was issued, but that was overturned by the Supreme Court in October 2016. The Section 2 claim was also ultimately unsuccessful on the merits. Therefore, although Arizona was later blocked from including documentary proof of citizenship on the Federal Form through separate litigation, it was allowed to keep the rules on the state form."

775 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 132.

Director Brian Newby unilaterally acted to change the instructions accompanying the federal voter registration form to respond to these states' request.[776]

In February 2016, the Brennan Center and others filed suit on behalf of the League of Women Voters and state affiliates (*League of Women Voters v. Newby*) challenging the letter sent by EAC Executive Director Brian Newby in January 2016 allowing Alabama, Georgia, and Kansas to require applicants using the federal voter registration form to provide documentary proof of citizenship.[777] In September 2016, the D.C. Circuit Court of Appeals enjoined the EAC from changing the federal voter registration form. In February 2017, the court remanded the matter to the EAC to determine whether Mr. Newby had authority to allow states to require proof of citizenship. The preliminary injunction remains in place and a final decision is pending.[778] Documentary proof of citizenship is not currently on the federal form.

Kansas enacted a requirement in 2011 that voter registration applicants submit a copy of a legal document establishing U.S. citizenship, such as a birth certificate or a passport.[779] At the time, Kansas was the only state to require a copy of a physical citizenship document to register to vote.[780] The Kansas law went into effect in 2013 and, as Dale Ho testified, the law had a significant effect on the ability of Kansas residents to register to vote.[781]

Little more than three years after the law had gone into effect, 30,732 voter registration applications (approximately 12 percent of the total applications submitted) had been denied.[782] The ACLU challenged the law. Kansas' then-Secretary of State Kris Kobach claimed there were more than 18,000 non-citizens registered to vote in Kansas, but Kobach's own expert witness during trial estimated that of the 30,000 people whose registrations were blocked, more than 99 percent were in fact United States citizens.[783] In a 2016 preliminary injunction, Judge Jerome Holmes of the Tenth Circuit Court of Appeals found the law had caused a

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776 NAACP Legal Defense and Education Fund, *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder* (June 2019) at p. 20-21, https://www.naacpldf.org/wp-content/uploads/June-2019-Democracy-Diminished-Report.pdf.

777 Max Feldman and Peter Dunphy, *The State of Voting Rights Litigation (March 2019)*, Brennan Center for Justice (Mar. 25, 2019), https://www.brennancenter.org/analysis/state-voting-rights-litigation-march-2019, *see League of Women Voters v. Newby* (D.D.C, No. 1:16-cv-00236; D.C. Cir. No. 16-5196).

778 *Id.*

779 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Dale Ho at p. 4.

> "Kansas's law went into effect in 2013, and the effects were devastating for voter registration in the state. By March 2016, after the law had been in effect for a little more than three years, a total of 30,732 voter registration applicants had been denied registration, representing "approximately 12% of the total voter registration applications submitted since the law was implemented." It was as if one out of every eight voter registration applications were thrown in the trash. An analysis by political scientist Michael McDonald from the University of Florida determined that affected voters were disproportionately under the age of 30 (43.2% of rejected registration applicants) and unaffiliated with a political party (53.4% of rejected applicants). And voter registration drives ground to a halt, as the League of Women Voters reported that, after the law went into effect, the number of completed registrations it collected from drives fell by 90%."

780 *Id.*, *see also* footnote 10: Three states have similar laws: Alabama, Arizona, and Georgia. Alabama and Georgia have never enforced their respective documentary proof-of-citizenship laws and have indicated no definitive plans to do so; Arizona's law is less stringent, and can be satisfied with a driver's license number, in lieu of a copy of a document. *See* A.R.S. § 16-166(F)(1).

781 *Id.*

782 *Id.*, *citing* Fish v. Kobach, 309 F. Supp. 3d 1048, 1068 (D. Kan. 2018).

783 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Dale Ho at p. 16-17.

> "The court found that the number of non-citizens on the list was, in fact, statistically indistinguishable from zero."

"mass denial of a fundamental constitutional right," and partially blocked the law for the 2016 election.[784] At trial in 2018, evidence presented by the State of Kansas from its own investigation showed that, only 39 non-citizens had been registered to vote in Kansas over the last 19 years—about two per year, which could be "largely explained by administrative error, confusion, or mistake."[785]

The cost of adding a proof of citizenship question is not limited to the potential disenfranchisement of voters. Taxpayers often bear the brunt of litigation costs as well. As Dale Ho testified, four separate lawsuits were needed to block the Kansas law. These suits were not without cost. Secretary Kobach was sanctioned for concealing relevant documents - "taxpayers paid a thousand dollar fine for that" behavior.[786] The court also found Kobach willfully disobeyed a preliminary injunction, writing, "Kansas taxpayers paid approximately $26,000 for that."[787] Additionally, the court found "a pattern of flaunting disclosure and discovery rules" ordering Secretary Kobach to take several hours of continuing legal education.[788]

"In 2011, Kansas passed a law requiring voter registration applicants submit a citizenship document, like a birth certificate or a passport. It sounds innocuous, but the effects were devastating. Over 3 years, more than 30,000 voter registration applicants were denied, about 12 percent of all applications during that period. One was our client Donna Bucci, who did not possess a copy of her birth certificate and couldn't afford one. Another was our client Wayne Fish, who was born on a decommissioned Air Force Base in Illinois and spent 2 years searching for his birth certificate. Two others were our clients Tad Stricker and T.J. Boynton, who actually showed their birth certificates at the DMV, which then failed to forward them along with their voter registration applications. All four were disenfranchised in the 2014 midterms."

— Dale Ho, ACLU Voting Rights Project

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784 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Dale Ho at p. 5.

785 *Id.* at p. 6, *citing Fish v. Kobach*, 309 F. Supp. 3d 1048, 1092 (D. Kan. 2018).

786 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Dale Ho at p. 17.

787 *Id.*

788 *Id.*

Poll Worker Training

The individuals working polling locations each election cycle, the training they receive, and the manner in which they administer election laws are critical to ensuring equal access to the ballot. A poll worker's understanding of voting rights, election administration rules, and language access can make the difference between a voter successfully casting a ballot, being forced to cast an unnecessary provisional ballot that may never be counted, or never casting a ballot at all.

In Arizona, Governor Stephen Roe Lewis of Gila Indian River Community testified that poll workers are often not trained in a culturally appropriate manner to work within tribal populations and do not effectively help and inform tribal voters who may not understand how to best handle issues at the polls.[789]

In Florida, Ms. Gonzalez-Eilert highlighted how more stringent training for poll workers could reduce the improper issuance of provisional ballots. For example, when workers do not check whether a vote-by-mail ballot has been received by the Supervisor of Elections' office, they erroneously issue a provisional ballot when a voter should have been provided a regular ballot.[790] Additionally, there is currently no set of standardized instructions for poll workers to refer to in the Polling Procedures Manual for Language Assistance, which could help poll workers assist limited-English proficiency voters.[791]

Mr. Yang testified language minority voters are often denied much-needed and federally required assistance at polling places for a variety of reasons, including poll workers who do not fully understand voting rights laws.[792] Specifically, poll workers have denied Asian Americans their right to an assistor of their choice or asked for ID when it is not needed.[793] Additionally, poll workers have been hostile to, or discriminated against, Asian American voters at the polls.[794]

In Ohio, a State General Assembly bill considered reducing the number of poll workers per precinct from four to two. Elaine Tso, Chief Executive Officer of Asian Services In Action, Inc. (ASIA, Inc.) testified would "disproportionately impact anyone who needed additional

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789 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Governor Stephen Roe Lewis at p. 3.

790 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Anjenys Gonzalez-Eilert at p. 4.

791 *Id.* at p. 4.

792 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of John C. Yang at p. 6.

793 *Id.*

> "For example, during the 2012 general election, a poll worker in New Orleans [mistakenly] thought only LEP voters of languages covered by Section 203 of the VRA were entitled to assistance in voting under Section 208. Since Vietnamese was not a Section 203-covered language either for the county or the state, the poll worker denied LEP Vietnamese voters the assistance of their choice when voting."

794 *Id.*

> "Poll workers have also been hostile to, or discriminated against, Asian American voters at the polls. For example, sometimes only Asian American voters have been singled out and asked for photo identification whether it was legally mandated or not. During the 2008 election, in Washington, D.C., an Asian American voter was required to present identification several times, while a White voter in line behind her was not similarly asked to provide identification. Also, in 2008, poll workers only asked a Korean American voter and his family, but no one else, to prove their identity in Centreville, VA."

assistance at the polls, whether that is inviting a helper for a limited English proficient voter or anyone who needs an accommodation of some sort, because that would need some approval from a poll worker."[795] Inajo Davis Chappell testified that the Board of Elections hires "a huge group of individuals to work the polls." Moving the marathon day of voting to the weekend may help improve the number and quality of poll workers they are able to recruit.[796]

Lack of Resources

A lack of adequate resources impacts a voter's ability to access the polls, as well as the ability of states and localities to carry out elections. This includes the lack of accessible polling locations for voters with disabilities.

Michelle Bishop, Voting Rights Specialist for the National Disability Rights Network (NDRN), testified at a Washington, D.C. hearing that, according to an ongoing Government Accountability Office (GAO) study, only 40 percent of polling places surveyed had an accessible path of travel in 2016,[797] an all-time high, and up from just 16 percent in 2000.[798] Accessibility at voting stations is decreasing, with 65 percent deemed inaccessible in 2016.[799] In 2016, after GAO combined architectural access data with voting station data, only 17 percent of polling places in America were considered fully accessible for voters with disabilities.[800]

The large shift in polling place closures discussed in Chapter Two does not only impact minority voters, but also voters with disabilities.[801] Ms. Bishop testified that some jurisdictions are claiming "lack of ADA compliance," including "grossly inflated cost estimates for bringing polling places into compliance with the ADA" as a pretext for closing polling locations.[802] Disability rights advocates and the Department of Justice do not advocate for closing polling locations due to lack of ADA compliance, but instead prefer low-cost best practices to ensure accessible polling places.[803]

The Help America Vote Act and the resources it provides are critical to increasing accessibility. Ms. Bishop testified, that "immediately preceding the passage of the Help America Vote Act, the gap in voter participation between those with and without disabilities was closer to 20 percent;" in 2018, it was 4.7 percent.[804]

In Florida, Ms. Gonzalez-Eilert testified that county election offices are funded by the Board of County Commissioners and augmented by federal HAVA funds via grants from the states.

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795 *Voting Rights and Election Administration in Ohio*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Elaine Tso at p. 29-30.

796 *Voting Rights and Election Administration in Ohio*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Inajo Davis Chappell at p. 70.

797 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Michelle Bishop at p. 2.

798 *Id.*

799 *Id.*

800 *Id.* at p. 2-3.

801 *Id.* at p. 3.

802 *Id.*

803 *Id.*

804 *Id.* at p. 4.

The state's original HAVA funds are projected to be fully expended at the end of Fiscal Year 2020, leaving a hole in election resources.[805]

Michael Waldman of the Brennan Center testified his organization's study found that, in the 2012 election, voters in precincts with more minority voters experienced longer waits and tended to have fewer voting machines.[806] A more recent study led by economist Keith Chen of the University of California – Los Angeles, found voters in Black neighborhoods waited longer to cast a ballot than voters in White neighborhoods, and were approximately 74 percent more likely to wait longer than half an hour.[807]

Ms. Bishop testified, "congressional funding is sorely needed to ensure that elections officials can continually acquire, maintain, and improve their polling locations and equipment."[808] O.J. Semans of Four Directions testified in North Dakota that "Congress should urge the EAC to make clear to States that the funds added to HAVA in 2018 by Congress can be used to improve the administration of federal elections, and therefore can be used to fund satellite offices on American Indian Reservations."[809]

Use and Potential Overuse of Provisional Ballots

HAVA also created a fail-safe in the voting process if voters do not bring ID to the polls, providing for the use of provisional ballots.[810] Provisional ballots are offered to voters who believe they are eligible to vote, but are turned away at the polls.[811] HAVA does not require states to count provisional ballots, but administrators must notify voters as to whether the ballot was counted.[812] Voters may cast a provisional ballot because their name does not appear in the poll book, they lack proper identification, or have recently moved or changed their name.[813]

Ms. Hannah Fried testified that, "widespread polling place changes lead to the overuse of provisional ballots."[814] All Voting is Local's analysis of 717 former Section 5-covered counties found that voters in counties with polling place closures are more likely to be asked to cast

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805 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Anjenys Gonzalez-Eilert at p. 5.

806 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Michael Waldman at p. 7, *citing* Christopher Famighetti et al., *Election Day Long Lines: Resource Allocation*, Brennan Center for Justice (2014), at p. 1-2, https://www.brennancenter.org/sites/default/files/2019-08/Report_ElectionDayLongLines-ResourceAllocation.pdf.

807 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 2, *citing* M. Keith Chen, Kareem Haggag, Devin G. Pope, Ryne Rohla, *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data* (Sept. 4, 2019), https://arxiv.org/abs/1909.00024.

808 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Michelle Bishop at p. 107.

809 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of O.J. Semans, Sr. at p. 3-4.

810 U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at p. 86-87, *citing* Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 32 U.S.C., 56 U.S.C.), https://www.eac.gov/assets/1/6/HAVA41.PDF.

811 *Id.*

812 *Id.*

813 *Voting Rights and Election Administration in Ohio*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Mike Brickner at p. 5.

814 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Hannah Fried at p. 69.

provisional ballots.[815] Ms. Fried testified further that, "HAVA contemplated that provisional ballots would be used as a failsafe, but they are less likely to be counted than a regular ballot. Their overuse is the canary in the coal mine, signaling systemic problems that result in voters not knowing where or how to vote."[816]

In Philadelphia County, Pennsylvania, which is 41 percent Black, voters are five times more likely to be given a provisional ballot than voters in Allegheny, which is 12.7 percent Black, or Berks, which is four percent Black.[817] In 2018, at Ohio's two Historically Black Colleges and Universities (HBCUs), voters cast a "disproportionate number of provisional ballots and were twice as likely to have their ballots rejected than voters countywide."[818]

Mike Brickner, Director of All Voting is Local in Ohio, testified that Ohioans, particularly people of color, face high rejection rates for provisional ballots.[819] While the number of provisional ballots cast in Ohio has decreased recently, Ohio still has one of the highest overall numbers of provisional ballots cast.[820] In a study of Franklin County, one of Ohio's largest counties, All Voting is Local found "people of color, millennials, and low-income voters were all significantly more likely to cast a provisional ballot."[821] In the 2018 general election, over one in five provisional ballots rejected statewide came from Franklin County.[822] In Greene County, home to one of Ohio's HBCUs, nearly half the ballots cast in the precinct that serves Central State University were provisional ballots.[823]

In Arizona, when individuals are unable to produce required identification at the polls when voting early in-person or on Election Day they are forced to use a provisional ballot. However, individuals who vote early by mail do not have to show ID to have their ballot counted.[824] This means that provisional ballot voters without the required ID in-person would have been able to vote using a regular ballot if they had voted by mail. Additionally, Professor Ferguson-Bohnee testified that counties in Arizona that do not have vote centers require voters to vote in their proper precinct in order to have their voters counted, but poll workers sometimes give provisional ballots to voters without telling them they will not count if they are at the wrong precinct.[825]

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815 *Id.*
816 *Id.*
817 *Id.* at p. 70.
818 *Id.*
819 *Voting Rights and Election Administration in Ohio*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Mike Brickner at p. 2.
820 *Id.* at p. 5.
821 *Id.*

> "Franklin County accounts for 10.93 percent of the state's electorate, only slightly trailing Cuyahoga County. Depending on where one lives in the county, voters have very different experiences with provisional ballots. In 2018, the countywide rate of provisional ballots cast was 1.84 percent. However, All Voting is Local's analysis found people of color, millennials, and low-income voters were all significantly more likely to cast a provisional ballot. Of the three polling locations near Franklin County's Ohio State University campus, nearly one in ten voters cast a provisional ballot. On campus at the Ohio Union, nearly 65 percent of the provisional ballots cast were rejected by the board of elections."

822 *Id.*
823 *Id.* at p. 5-6.
824 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Alex Gulotta at p. 4.
825 *Id.*, written testimony of Patty Ferguson-Bohnee at p. 7.

CONTINUED DISENFRANCHISEMENT OF AMERICAN CITIZENS

Disenfranchisement of Formerly Incarcerated Persons

Each year, millions of Americans who are no longer incarcerated are denied their constitutional right to vote because of a past felony conviction. The number of Americans disenfranchised because of a felony conviction has risen substantially as the U.S. prison population has grown, rising from 1.17 million in 1976 to 6.1 million in 2016.[826] The Sentencing Project estimates more than 6 million Americans were ineligible to vote in the 2018 midterm elections because of a felony conviction.[827] The Sentencing Project further estimated that nearly 4.7 million of these individuals are not incarcerated, but live in one of the 34 states that, at the time of the election, prohibited voting by people on probation, parole, or who have completed their sentence.[828]

The United States' criminal justice system disproportionately targets, arrests, sentences, and incarcerates people of color.[829] According to The Sentencing Project, disenfranchisement policies for felony convictions also disproportionately impact communities of color.[830] Voting-age Black Americans are four times more likely to lose their right to vote than the rest of the population.[831] Black Americans and Whites use drugs at similar rates, yet the imprisonment rate of Black Americans for drug charges is almost six times that of Whites.[832] Because of these disparities in the criminal justice system, felony disenfranchisement law have stripped one in every 13 Black Americans of their right to vote, four times the disenfranchisement rate of non-Black Americans.[833]

Eleven states continue restricting voting rights even after a person has served his or her prison sentence and is no longer on probation or parole – these individuals account for over 50

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826 Jean Chung, *Felony Disenfranchisement: A Primer*, The Sentencing Project (June 27, 2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.

827 The Sentencing Project, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement: 2016* (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/.

828 Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reforms*, The Sentencing Project (Oct. 17, 2018), https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms/.

829 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Brenda Wright at p. 9, *citing see* Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework Symposium on Pursuing Racial Fairness in Criminal Justice: Twenty Years after McCleskey v. Kemp*, Columbia Human Rights Law Review 39 (2007): 261–86; Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford: Oxford University Press, 2006); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012); NAACP Criminal Justice Fact Sheet, https://www.naacp.org/criminal-justice-fact-sheet/; and *Everyone's America: 26 state policies for a race-forward, populist agenda to empower all Americans*, Demos 2018: 176, https://www.demos.org/research/everyones-america.

830 *Id.*

831 *Id.*

832 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Brenda Wright at p. 9-10.

833 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Brenda Wright at p. 10.

> "As of June 2019, only two states, Maine and Vermont, did not restrict the right to vote of anyone with a felony conviction, including allowing those in prison to vote. In the 2016 elections, approximately 2.5 percent of all Americans who would otherwise be able to vote could not vote due to felony convictions; that number jumps to 7.4 percent for African Americans. Communities of color therefore experience reduced political power and the underrepresentation of their interests in government. Ending felony disenfranchisement would help bring equality and equity to the democratic process. Encouraging voting has also been found to aid with reentry and thus promote public safety."

percent of disenfranchised persons.[834] Four states, Florida, Kentucky, Iowa, and Virginia, have constitutions that permanently disenfranchise citizens with felony convictions and grant the governor authority to restore voting rights.[835] Iowa and Kentucky permanently disenfranchise anyone convicted of a felony. Florida recently passed Amendment 4 which restores the rights of more than one million Floridians, while in Virginia, the restoration of voting rights is dependent upon the governor.

Some states have moved to re-enfranchise formerly incarcerated individuals, while others continue to restrict the constitutional rights of otherwise eligible Americans. In North Carolina, state law restores the right to vote automatically upon completion of a sentence for a felony conviction, however the bar continues based on a person's probation or parole status, including when fines and fees are not fully paid, which Caitlin Swain of Forward Justice testified results in both confusion and discriminatory denial of the right to vote.[836]

Prior to 2018, Florida was among four states that permanently denied voting rights to every citizen with a felony conviction,[837] one of the most punitive disenfranchisement policies in the nation. The power to restore voting rights was delegated to the Governor, who was able to set his own clemency policy. Former Governor Rick Scott's clemency policy was among the most restrictive in years. After nearly five years in office (by December 2015), Governor Scott had restored the rights of fewer than 2,000 individuals, while more than 20,000 applications remained pending.[838]

Between 2010 and 2016, the number of disenfranchised Floridians grew from 150,000 to approximately 1.68 million.[839] Fully 10 percent of Florida's voting population was excluded from voting, including one in five Black Americans.[840] According to Advancement Project's Democracy Rising report, 43-44 percent of Florida's Returning Citizen (persons' released from incarceration and reentering the community) population is Black, while the state's Black population is only about 17 percent.[841] The vast majority of those denied the right to vote due to a criminal record are no longer incarcerated, have served their time and living in the communities with no voice in how they are governed.[842] Twenty-seven and one half percent of the country's disenfranchised, formerly incarcerated citizen population lives in Florida.[843]

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834 Jean Chung, *Felony Disenfranchisement: A Primer*, The Sentencing Project (June 27, 2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.

835 Brennan Center for Justice, *Voting Rights Restoration Efforts in Florida* (May 31, 2019), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida.

836 *Voting Rights and Election Administration in North Carolina*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Caitlin Swain at p. 3.

837 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Judith Browne Dianis at p. 4.

838 Brennan Center for Justice, *Voting Rights Restoration Efforts in Florida*, (Apr. 11, 2019), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida.

839 Advancement Project, *Democracy Rising*, (Mar. 19, 2019), https://advancementproject.org/resources/democracyrising/, ***see also*** Brennan Center for Justice, https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida.

840 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Judith Browne Dianis at p. 4.

841 Advancement Project, *Democracy Rising*, (Mar. 19, 2019), https://advancementproject.org/resources/democracyrising/.

842 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Judith Browne Dianis at p. 4.

843 Advancement Project, *Democracy Rising*, (Mar. 19, 2019), https://advancementproject.org/resources/democracyrising/.

> *"We were unambiguous as voters, seeing as that amendment gained more votes than the sitting Governor, more votes than me, and, again, won with a historic 64 percent of the voters casting ballots saying that we were going to be a State that didn't judge people forever by their worst day."*
>
> — Andrew Gillum, Forward Florida

In 2018, as noted above, after years of advocacy, Florida voters approved Amendment 4 by nearly 65 percent of the statewide vote. The passage of Amendment 4 intended to restore the franchise to 1.4 million Floridians. The Amendment became effective on January 8, 2019. On May 3, 2019, the State Legislature undermined the will of the voters with legislation requiring individuals to pay all fines and fees *before* their rights are restored, or have them forgiven by a judge.[844] S.B. 7066 was signed into law by Governor Ron DeSantis on June 28, 2019.[845] The exact amount of fines and fees owed statewide is unclear, but the South Florida Sun Sentinel estimated in May 2019 that the amount exceed more than $1 billion in just three of Florida's counties.[846] This amounts to a modern-day poll tax. In June 2019, NAACP LDF and others filed a lawsuit to halt the implementation of S.B. 7066.[847]

On October 19, 2019, a federal judge ruled the state cannot prevent formerly incarcerated persons with a felony conviction from voting, even if they fail to pay court-ordered fines and fees.[848] U.S. District Judge Robert Hinkle ruled that the state can ask that the fines be paid, but cannot bar anyone from voting if they cannot afford it, writing "when an eligible citizen misses an opportunity to vote, the opportunity is gone forever; the vote cannot later be cast. So, when the state wrongly prevents an eligible citizen from voting, the harm is irreparable."[849] The ruling only applies to the 17 individuals named in the lawsuit, but the Florida Supreme Court is slated to hear a separate suit on the issue in November 2019.[850]

This problem extends beyond Florida. The 1901 Alabama constitution permits disenfranchisement of individuals convicted of crimes involving "moral turpitude." Until

844 Brennan Center for Justice, *Gruver v. Barton (consolidated with Jones v. DeSantis)* (Aug. 3, 2019), https://www.brennancenter.org/legal-work/gruver-v-barton.

845 *Id.*

846 Dan Sweeney, *South Florida felons owe a billion dollars in fines – and that will affect their ability to vote*, South Florida Sun Sentinel (May 31, 2019), https://www.sun-sentinel.com/news/politics/fl-ne-felony-fines-broward-palm-beach-20190531-5hxf7mveyree5cjhk4xr7b73v4-story.html.

847 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Deuel Ross, *see also* NAACP LDF Press Release, Groups File Motion for Preliminary Injunction to Block SB7066 (Aug. 8, 2019), https://www.naacpldf.org/press-release/groups-file-motion-for-preliminary-injunction-to-block-sb7066/.

848 Lori Rozsa, *Judge rules Florida can't block felons from voting, even if they have unpaid fines*, The Washington Post (Oct. 19, 2019), https://www.washingtonpost.com/politics/judge-rules-florida-cant-block-felons-from-voting-even-if-they-have-unpaid-fines/2019/10/19/81ba7452-f274-11e9-8693-f487e46784aa_story.html.

849 *Id.*

850 *Id.*

2017, the state of Alabama did not define which crimes involved "moral turpitude," leaving who was to be disenfranchised open to interpretation by individual county voter registrars.[851]

In 2016, Greater Birmingham Ministries and disenfranchised individuals challenging the state's disenfranchisement process in court. Plaintiffs argued that the state's disenfranchisement of individuals convicted of a "felony involving moral turpitude" and its conditional restoration of voting rights based on the payment of fines, court costs, fees, and restitution violates the U.S. Constitution and Section 2 of the Voting Rights Act.[852]

In 2017, Governor Ivey signed a law defining moral turpitude and restoring voting rights to many people with previous felony convictions.[853] In 2017, the court allowed part of the plaintiff's case to move forward, challenging that the "moral turpitude" provision of the Alabama Constitution violates the 8th, 14th, and 15th Amendments as well as the Ex Post Facto clause of the Constitution, and that the fees and fines provision of state law violates the 14th Amendment.[854] The case remains pending.

Despite the recent law standardizing and limiting disenfranchisement crimes, Professor Carroll, Chair of the Alabama State Advisory Committee to the USCCR testified that studies suggest 286,266 people (7.62 percent) of Alabama's voting age population are disenfranchised.[855] The law affected close to 60,000 Alabamians. However, Secretary of State Merrill reportedly refused to publicize the change or inform those who had been re-enfranchised and incorrectly stated that eligibility was dependent on paying all outstanding fines and fees, a statement he later clarified.[856] The Alabama Voting Rights Project submitted supplemental written testimony that, in their efforts to assist more than 2,500 Alabamians with past convictions in regaining their right to vote, they have encountered many individuals who are now eligible under the 2017 law but were unaware because Alabama has not promoted or explained the change.[857]

Arizona has the eighth highest rate of felon disenfranchisement in America.[858] According to testimony from Darrell Hill of the ACLU of Arizona, over 220,000 potential voters, or 4.25 percent of Arizona's voting-age population are ineligible due to a felony conviction.[859] Arizona's rate of felony disenfranchisement has nearly tripled over the last 25 years.[860] Disenfranchisement laws disproportionately impact minority voters, with more than one in

851 Alabama State Advisory Committee to the U.S. Commission on Civil Rights, *Access to Voting in Alabama: A Summary of Testimony received by the Alabama Advisory Committee to the United States Commission on Civil Rights* (June 2018) at p. 16.

852 Max Feldman and Peter Dunphy, *The State of Voting Rights Litigation (March 2019)*, Brennan Center for Justice (March 25, 2019), https://www.brennancenter.org/analysis/state-voting-rights-litigation-march-2019.

853 ACLU of Alabama, Crimes of Moral Turpitude (last revised May 1, 2018), https://www.aclualabama.org/en/crimes-moral-turpitude.

854 *Id.*

855 *Voting Rights and Election Administration in Alabama*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Jenny Carroll at p. 10-11.

856 Peter Dunphy, *When It Comes to Voter Suppression, Don't Forget About Alabama*, Brennan Center for Justice (Nov. 5, 2018), https://www.brennancenter.org/blog/when-it-comes-voter-suppression-dont-forget-about-alabama.

857 *Voting Rights and Election Administration in Alabama*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony for the record of Alabama Voting Rights Project at p. 2.

858 *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Darrell Hill at p. 7.

859 *Id.* at p. 7.

860 *Id.* at p. 8.

10 Black adults ineligible to vote in Arizona.[861] Additionally, over 115,000 of those voters ineligible because of a felony conviction have completed their sentence, probation and/or parole.[862] Several aspects of the process for rights restoration are prescribed by statute, but others are left to the discretion of state and county officials.[863] In April 2019, Governor Doug Ducey signed a law alleviating requirements that people convicted of a first-time felony offense pay outstanding fines in order to have their rights automatically restored.[864]

In 2018, Texas charged Crystal Mason with illegally voting in the 2016 presidential election. Ms. Mason had been recently released from prison and was still on community supervision at the time of the elections but was never informed she could not vote. Ms. Mason was indicted on a charge of illegally voting in Tarrant County, Texas, found guilty, and sentenced to five years in prison – for voting while on probation.[865] In Texas, the right to vote is restored upon completion of a sentence, including prison, parole, and probation.

The point at which the right to vote is restored for formerly incarcerated individuals varies widely from state to state and, in some instances, is subject to the whim of the Governor. In Iowa, then-Governor Vilsack issued an Executive Order in 2005 automatically restoring voting rights for all persons who had completed their sentence. This order was subsequently rescinded by Governor Branstad in 2011.[866] New York Governor Andrew Cuomo used his clemency power in 2018 to restore the voting rights of approximately 35,000 New Yorkers under parole supervision and vowed to continue the practice as new residents enter the parole system.[867] Between 2016 and 2018, then-Governor Terry McAuliffe used his power to individually restore the right to vote to 173,000 Virginians who had completed their sentence.[868] In contrast, current Governor Ralph Northam has only restored the voting rights of just over 22,000 individuals during his two years in office.[869]

Disenfranchisement of Incarcerated Persons

Several million Americans are also disenfranchised while currently incarcerated. According to the Sentencing Project, 2.2 million people reside in America's prisons or jails, an increase of 500 percent over the last 40 years, making the United States the world's leader in incarceration.[870] More than 1 million are disenfranchised because of a felony conviction. Incarceration and disenfranchisement disproportionately affect communities of color.

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861 *Id.*

862 *Id.*

863 *Id.*

864 The Sentencing Project, ***Disenfranchisement News: Arizona eliminates "poll tax" for people with first-time felony offenses*** (Aug. 9, 2019), https://www.sentencingproject.org/news/disenfranchisement-news-arizona-eliminates-poll-tax-people-first-time-felony-offenses/.

865 Meagan Flynn, ***Texas woman sentenced to 5 years in prison for voting while on probation***, The Washington Post (Mar. 20, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/03/30/texas-woman-sentenced-to-5-years-in-prison-for-voting-while-on-probation/.

866 Jean Chung, ***Felony Disenfranchisement: A Primer***, The Sentencing Project (June 27, 2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/

867 *Id.*

868 *Id.*

869 Associated Press, ***Northam says he's restored voting rights to more than 22k felons***, The Virginia-Pilot (Oct. 10, 2019), https://www.pilotonline.com/government/virginia/vp-nw-northam-voting-rights-felons-20191010-jes7c5l4mncv3kdgsyslucolge-story.html.

870 The Sentencing Project, ***Criminal Justice Facts***, https://www.sentencingproject.org/criminal-justice-facts/.

People of color make up 37 percent of the U.S. population, but 67 percent of the country's incarcerated population.[871] As of June 2019, only two states, Maine and Vermont, did not restrict the right to vote of anyone with a felony conviction, including allowing those in prison to vote.[872]

Prison-based gerrymandering has also long distorted democratic representation. The United States Census counts incarcerated persons as residents of the prison where they are incarcerated, rather than as a resident of their home community.[873] Whole prisons are counted as resident populations in electoral districts, yet in all but two states the people incarcerated within those prisons for felony convictions are denied the right to vote.[874] Ms. Wright testified, because prisons are often located far from the home community of incarcerated persons, counting them in this manner "awards disproportionate representation to rural or semi-rural communities containing prisons at the expense of representation for the home communities of incarcerated persons."[875]

When a state does allow incarcerated persons the right to vote, they typically cannot vote as residents of the prison where they are counted for Census purposes, but instead must vote absentee in the community where they resided before incarceration.[876] Ms. Wright also testified that the practice of prison gerrymandering "defies most state constitutions and statutes, which explicitly state that incarceration does not change a person's legal residence."[877]

Additionally, in Ohio, Naila Awan of Demos testified that, under Ohio law, registered voters arrested and held in Ohio jails after the absentee ballot request deadline and detained through Election Day are prevented from obtaining and casting an absentee ballot.[878] Demos, along with partner organizations, filed a challenge to this practice which is estimated to disenfranchise approximately 1,000 voters each election.[879]

Each election, millions of otherwise eligible Americans are prevented from casting a ballot due to prior convictions or current incarceration. When a citizen is incarcerated, we do not take their citizenship from them, yet we continue to deny their basic right of participation in our democracy.

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871 *Id.*

872 *Id.*

873 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Brenda Wright at p. 42-43.

874 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Brenda Wright at p. 11.

875 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Brenda Wright at p. 43.

876 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Brenda Wright at p. 11.

877 *Id.* at p. 11.

878 *Voting Rights and Election Administration in Ohio*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Naila Awan at p. 9.

879 *Id.* at p. 9.

MISINFORMATION AND DISINFORMATION

Top U.S. intelligence and law enforcement officials have repeatedly warned of the need to bolster our election security, including guarding against interference from foreign powers using misinformation and disinformation campaigns to disseminate incorrect information and sow division among our electorate. Special Counsel Robert Mueller concluded in his March 2019 report on the investigation into Russian election interference that the "Russian government interfered in the 2016 presidential election in sweeping and systematic fashion."[880]

The report detailed how Russian operatives used social media and cyberattacks to influence the 2016 presidential election. As to involvement in future American elections, Special Counsel Mueller testified before the House Permanent Select Committee on Intelligence that "[t]hey're doing it as we sit here."[881] Interference is not limited to the Russian government, nor is it limited to foreign state actors.

The tactics utilized during 2016 included efforts to mislead and deceive voters about the mechanics and requirements of voting and participating in elections. For example, automated social media accounts targeted Black and Latino voters with information claiming incorrectly that voters could "vote from home" for Hillary Clinton.[882] Researchers found that some Russian tactics of "malicious misdirection" included "Twitter-based text-to-vote scams" and "tweets designed to create confusion about voting rules."[883]

In a recently released bipartisan report, the Senate Select Committee on Intelligence detailed the extent to which the Russian government specifically targeted minority voters. The panel found, "[N]o single group of Americans was targeted by [Internet Research Agency] information operatives more than African-Americans. By far, race and related issues were the preferred target of the information warfare campaign designed to divide the country in 2016."[884] The Senate report's finding supports the earlier assessment by the United States intelligence community that one of the IRA's information warfare campaign goals was to undermine public faith in the democratic process.[885]

The dissemination of misinformation and disinformation did not end with the presidential election in 2016. During the 2018 midterms, misinformation campaigns were used to attempt to deter voters, and some organizations sent incorrect information to voters. In late October, the Republican National Committee (RNC) sent a mailer to registered voters in Montana stating they could mail absentee ballots postmarked the day before Election Day as long

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880 Special Counsel Robert S. Mueller, III, *Report on the Investigation Into Russian Interference in the 2016 Presidential Election*, Vol. I at p. 1, https://www.justice.gov/storage/report.pdf.

881 Transcript of the Hearing: *Former Special Counsel Robert S. Mueller III on the Investigation Into Russian Interference in the 2016 Presidential Election* (July 24, 2019), U.S. House of Representatives, Permanent Select Committee on Intelligence at p. 66.

882 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Elena Nunez at p. 3-4.

883 New Knowledge, *The Tactics & Tropes of the Internet Research Agency* (Dec. 17, 2018) at p. 8, https://cdn2.hubspot.net/hubfs/4326998/ira-report-rebrand_FinalJ14.pdf.

884 Report of the Select Committee on Intelligence, *United States Senate on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Vol. 2: Russia's Use of Social Media, with Additional Views*, https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf.

885 *Id.*

as they were received by election officials by November 16 (10 days after Election Day). Montana state law requires that absentee ballots must be received by 8:00 p.m. on Election Day.[886] In Montana, a mailer was sent to 90,000 voters incorrectly stating they were not registered to vote.[887]

In her testimony, Elena Nunez detailed how, in Missouri, the state Republican Party sent mailers to 10,000 voters with incorrect information about when their absentee ballots were due.[888] Voters in some states received text messages with incorrect information about their polling locations, as a result, some appeared at wrong location and were subsequently turned away.[889] In Texas, "thousands of students who live on campus at Prairie View A&M had been incorrectly told to register to vote using an address in a different precinct and would need to fill out a change-of-address form before casting a ballot."[890]

Michael Waldman testified that in a recent analysis for the Brennan Center, University of Wisconsin Professor Young Mie Kim documented hundreds of messages on Facebook and Twitter designed to discourage or prevent people from voting in the 2018 election.[891]

CLIMATE DISASTER RESPONSE

As climate change continues to intensify, so have natural disasters. With Election Day in November, voter registration deadlines and early voting have fallen victim to hurricane season. In 2012, Hurricane Sandy damaged polling places in New Jersey, necessitating backup plans for polling stations.[892] In 2019, voters in North Carolina's special congressional elections received conflicting messages. Voters were encouraged to cast their ballots during early voting to avoid potential disruptions from Hurricane Dorian.[893] However, North Carolina counties then made changes to early voting schedules with some shutting down early voting sites or shifting hours.[894]

Florida has been struck by several natural disasters during election season in recent years. Hurricanes Matthew (2016) and Michael (2018) both arrived around the voter registration deadline in Florida – 29 days before Election Day.[895] Hurricane Irma (2017) arrived around

886 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Elena Nunez at p. 3, *see also* https://billingsgazette.com/news/local/mailer-promoting-absentee-voting-in-montana-has-wrong-information-elections/article_5485a8b4-2500-52f6-bd11-6688cc818008.html.

887 *Id.*

888 *Id.*

889 *Id.*

890 *Id.*, *citing* https://www.texastribune.org/2018/10/16/Prairie-View-voter-registration/.

891 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Michael Waldman at p. 7, *see also* Young Mie Kim, *Voter Suppression Has Gone Digital* (Nov. 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/voter-suppression-has-gone-digital.

892 Michael Cooper, *Disruption From Storm May Be Felt at the Polls*, N.Y. Times (Nov. 2, 2012), https://www.nytimes.com/2012/11/03/us/politics/hurricane-sandy-threatens-to-disrupt-voting-on-election-day.html.

893 Associated Press, *NC voters encouraged to cast early ballots as Dorian looms* (Sept. 1, 2019), https://apnews.com/e95781c884c34efd983b675b7f4f01ab.

894 Dan Kane, *Dorian halts early voting in some NC counties for special congressional elections*, The News & Observer (Sept. 4, 2019), https://www.newsobserver.com/news/weather-news/article234728472.html.

895 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Anjenys Gonzalez-Eilert at p. 5.

special and municipal elections.[896] It is likely hurricanes will continue to impact Florida throughout future election seasons.

Florida has had inconsistent election practices dealing with hurricanes. The Secretary of State has been reluctant to extend registration deadlines as a result of recent hurricanes and court action had to be taken.[897] Preparations were made by the governor ahead of Hurricane Michael for the election, but without proper communications and consultation that these preparations and changes can still negatively impact voters. Ms. Gonzalez-Eilert testified 90 percent of the Black community in Panama City were not close to the six voting centers set up to replace precinct voting.[898] After the Supervisor of Elections was contacted by organizations, a vote center was provided for only one day, the day before the election.[899]

In 2016, Chatham County, Georgia was hit by Hurricane Matthew, just a few days before voter registration closed. Almost half the residents lost power during the storm and the county was subject to mandatory evacuation, yet the Governor and then-Secretary of State Brian Kemp refused to extend the voter registration deadline.[900] The Lawyers' Committee sought and obtained emergency relief to extend the registration deadline.[901] Chatham County has over 200,000 voting age citizens, more than 40 percent of whom are Black.[902] The relief obtained by the Lawyers' Committee allowed over 1,400 primarily Black and Latino citizens to vote.[903]

Standardizing election procedures specifically to deal with natural disaster scenarios will help ensure no voter is disenfranchised because of a missed deadline or closed polls. The Election Assistance Commission held its inaugural meeting of the Disaster Preparedness and Recovery Working Group on April 10, 2019, to share information and lay the groundwork for future materials from the Commission designed to assist election officials facing disasters.[904]

CONFLICTS OF INTEREST: CANDIDATES AS ELECTION ADMINISTRATORS

The 2018 Governor's race in Georgia forced a reexamination of the roll of Secretaries of State running elections when that Secretary is running for office in the same election. Then-Secretary of State Brian Kemp refused to step down or recuse himself from the election administration roll while he simultaneously ran for Governor of Georgia.

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896 *Id.*
897 *Id.* at p. 5-6.
898 *Id.*
899 *Id.*
900 *Voting Rights and Election Administration in America:* Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Kristen Clarke at p. 5.
901 *Id. citing Georgia Coalition for the Peoples' Agenda, et al., v. John Nathan Deal, et al.* (S.D. Ga., No. 4:16-cv-0269-WTM-GRS, October 12, 2016).
902 *Id.*
903 *Id.*
904 Disaster Preparedness and Recovery, U.S. Election Assistance Commission, https://www.eac.gov/election-officials/disaster-preparedness-and-recovery/.

As discussed in this report, the State of Georgia and former Secretary Kemp have a record of aggressive purge practices and other actions that undermined confidence in fair election administration. At one point during the gubernatorial campaign, now-Governor Kemp said at a public event that his opponent's (Stacey Abrams) campaign's voter turnout effort "continues to concern us, especially if everybody uses and exercises their right to vote."[905] Throughout the gubernatorial race, then-Secretary Kemp declined to recuse himself from managing the election.[906]

Former President Jimmy Carter criticized Kemp for refusing to step down, calling Kemp's refusal "counter to the most fundamental principle of democratic elections—that the electoral process be managed by an independent and impartial election authority."[907]

The NAACP LDF urged Kemp to recuse himself, noting his voter suppression tactics "would appear to create needless barriers to the exercise of the fundamental right to vote and abridge the ability of voters of color to elect their candidates of choice in violation of the Voting Rights Act of 1965 and to vote free from racial discrimination in violation of the 14th and 15th Amendments and other laws."[908] Kemp eventually resigned his post as Secretary of State after claiming victory in November 2018, while ballots were still being counted.[909] The Georgia race raised serious concerns regarding Secretaries of State maintaining oversight of the very races in which they are also a candidate.

In Kansas, Secretary of State Kris Kobach campaigned for Governor of Kansas while maintaining his position as Secretary, overseeing the election and initially refusing to recuse himself from the possibility of overseeing a recount.

This issue predates the 2018 election. During the 2000 presidential election in Florida, Republican Katherine Harris served as both the Secretary of State overseeing the recounts and as co-chair of George W. Bush's Florida campaign. The Gore campaign accused Harris of a conflict of interest in the manual recount efforts.[910] The Florida State Attorney General also headed the Gore campaign.[911] Harris' decision to certify George W. Bush the winner led to Democrats suing to enforce a recount, ultimately leading to the infamous case of *Bush v. Gore*, in which the Court ruled that no alternative method of recount could be established in a timely manner and ultimately made George W. Bush president.[912]

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905 Jamil Smith, *Exclusive: In Leaked Audio, Brian Kemp Expresses Concern Over Georgians Exercising Their Right to Vote*, (Oct. 23, 2018), https://www.rollingstone.com/politics/politics-news/brian-kemp-leaked-audio-georgia-voting-745711/.

906 Alan Blinder, *Brian Kemp Resigns as Georgia Secretary of State, with Governor's Race Still Disputed*, N.Y. Times (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/us/georgia-brian-kemp-resign-stacey-abrams.html.

907 *Id.*

908 Letter from Sherrilyn Ifill (NAACP-LDF) et al. to Secretary Brian P. Kemp (Oct. 12, 2018), https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Letter-to-Georgia-Secretary-of-State-Kemp-re-Recusal_10.12.2018-final_0.pdf

909 Alan Blinder, *Brian Kempt Resigns as Georgia Secretary of State, with Governor's Race Still Disputed*, N.Y. Times (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/us/georgia-brian-kemp-resign-stacey-abrams.html

910 *Bush v. Gore*, Encyclopedia Britannica, https://www.britannica.com/event/Bush-v-Gore.

911 *Id.*

912 Ron Elving, *The Florida Recount Of 2000: A Nightmare That Goes On Haunting*, NPR (Nov. 12, 2018), https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting.

CONCLUSION

Problems in election administration existed before *Shelby County* and they persist as barriers to accessing the ballot. When compounded with the suppressive, discriminatory tactics being deployed throughout states, election administration affects voters' ability to access the polls. Voter registration hurdles, inadequate funding to states to maintain and secure their election infrastructure, poll worker training, overuse of provisional ballots, disenfranchisement of formerly incarcerated people, and protecting elections in the face of natural disasters continue to be areas of concern.

CONCLUSION

THE PURPOSE OF THE SUBCOMMITTEE'S HEARINGS

"Voting discrimination still exists; no one doubts that," Chief Justice Roberts said in *Shelby County*.[913] While the Chief Justice acknowledged discrimination exists, he went on to write that the question at hand was whether "extraordinary measures" in the Voting Rights Act were necessary.[914] The *Voting Rights and Election Administration* hearings held by the Subcommittee on Elections of the Committee on House Administration show the answer to that question is an unequivocal yes. Discrimination in voting does still exist, as detailed in this report, as well as the supporting testimony and documents gathered by the Subcommittee. Without the protections of federal oversight, it is nearly impossible to recognize and combat every instance of voter suppression and discrimination.

As Justice Ginsburg pointed out in her dissent, "[T]he Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed."[915] When the Court struck down Section 4(b) of the Voting Rights Act in 2013, the Court rendered the protective structure of Section 5 effectively unenforceable. This decision unleashed a modern-day era of discrimination against minority voters and voter suppression tactics. After *Shelby County*, the nation saw an increase in voter suppression. Previously covered states began passing and implementing laws that would have or had already failed the preclearance process. States that were not covered enacted laws of their own as the Court signaled an end to the longstanding federal protection of the right to vote.

Without congressional action, the right to vote for millions of Americans is left vulnerable to suppressive laws and discriminatory tactics outlawed by Congress and the courts decades ago. Congress has a duty to act. At the beginning of the 116th Congress, Speaker of the House Nancy Pelosi and Committee on House Administration Chairperson Zoe Lofgren reconstituted the Committee on House Administration's Subcommittee on Elections which House Republicans eliminated six years earlier. The Subcommittee, which is now chaired by Congresswoman Marcia L. Fudge, determined that its first priority would be collecting evidence illustrating the state of voting rights and election administration in America. The Subcommittee then worked to take Congress to the people, collecting stories and evidence from voters and advocates working to combat these tactics within the states and on a national scale.

The Subcommittee on Elections examined the landscape of voting rights and election administration in America post-*Shelby County* to determine whether Americans can freely

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913 *Shelby County, Ala. v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 2619 (2013).

914 *Id.*, *also citing Northwest Austin*, 557 U.S., at 203.

> "The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put a short time ago, 'the Act imposes current burdens and must be justified by current needs.'"

915 *Id.*, Justice Ginsberg writing for the dissent.

cast their ballot and if not, what barriers lay in their way. As the Subcommittee held hearings throughout the country, Members of Congress heard time and again that states, both formerly covered and not, have implemented tactics that suppress the votes of minority communities, students, and the poor.

The Subcommittee on Elections held one listening session and eight hearings across eight states and in Washington, D.C. to gather the testimony and evidence analyzed in this report. The Subcommittee heard from 68 witnesses, 66 called by the Majority and 2 called by the Minority, and gathered more than 3,000 pages of testimony and documents. The evidence gathered proves the need for congressional action to protect the right to vote.

FINDINGS

Discrimination in Voting Still Exists

In evaluating the state of minority voting rights in its 2018 statutory report, the U.S. Commission on Civil Rights found on a unanimous and bipartisan basis that race discrimination in voting has been pernicious and endures today, voter access issues and discrimination continue today for voters with disabilities and limited-English proficiency, and the right to vote "has proven fragile and to need robust statutory protection in addition to Constitutional protection."[916] Following *Shelby County*, the elimination of the coverage formula and subsequent unenforceability of the preclearance requirement means voters in previously covered jurisdictions with "long histories of voting discrimination have faced discriminatory voting measures that could not be stopped prior to elections because of the cost, complexity and time limitations of the remaining statutory tools;"[917] and that *Shelby County* effectively signaled a loss of critical federal voting rights supervision.

The Subcommittee heard testimony and collected documents outlining persistent discrimination in voting law changes such as purging voter registration rolls, cut backs to early voting, polling place closures and movements, voter ID requirements, implementation of exact match and signature match requirements, lack of language access and assistance, and discriminatory gerrymandering of districts at the state, local, and federal level.

Improperly executed, "list maintenance" can result in voter purges that have a disproportionate and discriminatory impact on minority voters. At least 17 million voters were purged nationwide between 2016 and 2018.[918] The State of Ohio won a case before the Court, allowing it to implement a purge policy that effectively punishes voters for failing to vote.[919]

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916 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of U.S. Commission on Civil Rights Chair Catherine Lhamon at p. 2-3.

917 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of U.S. Commission on Civil Rights Chair Catherine Lhamon at p. 2-3, *see also* U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* (Sept. 2018)

918 Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice (updated Aug. 21, 2019), https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds.

919 *Husted v. A. Philip Randolph Institute*, 584 U.S. (2018).

Yet, Ohio's Secretary of State recently admitted the program was rife with error.[920] In multiple states, eligible citizens were wrongfully flagged as potential non-citizens and placed on a purge list.[921] While states must maintain accurate voter rolls, there are ways to do so that do not have a disproportionate impact on minority voters.

Millions of Americans take advantage of in-person early voting. Despite the high rate of utilization, some states have moved to cut back on early voting, while the Secretary of State in Alabama refuses to endorse early voting. Ohio not only cut back the early voting that had been implemented to alleviate egregiously long lines in previous elections, it eliminated a full week in which voters were able to register and cast their ballot on the same day. Some states have cut early voting on college campuses, while others still have specifically targeted "Souls to the Polls" Sundays traditionally utilized by predominantly Black churches. In Florida, it was estimated that more than 200,000 Floridians did not vote in 2012 due to long lines resulting from cuts to early voting.[922] Increased access to early voting is a simple yet substantial way to increase access to the ballot and states should halt efforts to eliminate days Americans can cast their ballots.

Since the *Shelby County* decision, hundreds of polling places have been closed in states previously covered under Section 5. Post-*Shelby County*, states and localities are no longer required to perform disparate impact analyses to determine whether these actions will have a discriminatory impact on voters. Since 2012, Georgia has closed more than 200 polling locations, Texas has closed at least 750, and Arizona has closed 320.[923] In Arizona, the closure of polling places, coupled with a movement toward vote-by-mail and voting centers, has had an outsized impact on Native American voters that should be evaluated and taken into consideration before policy changes are made.

Voter ID has been championed as a necessary move to combat alleged voter fraud by its proponents. While there is no credible evidence of widespread, in-person voter fraud – the only type of fraud voter ID would prevent – these policies continue to be implemented across the country and have a discriminatory impact on minority voters. Voter IDs are financially burdensome for low-income voters, effectively imposing a second-generation poll tax. Even when proponents claim that "free" IDs are available, the IDs are not truly free: acquiring such IDs often requires an applicant to provide underlying documents they may not have and that cost money to obtain and the time and transportation necessary to complete the process is a

920 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried at p. 13, *see also* Andrew j. Tobias, *Ohio Secretary of State Frank LaRose says Ohio's system of maintaining voter registrations rife with problems*, Cleveland.com (updated Sept. 25, 2019), https://www.cleveland.com/open/2019/09/ohio-secretary-of-state-frank-larose-says-ohios-system-of-maintaining-voter-registrations-rife-with-problems.html, and Nicholas Casey, *Ohio Was Set to Purge 235,000 Voters. It Was Wrong About 20%.*, N.Y. Times (Oct. 14, 2109), https://www.nytimes.com/2019/10/14/us/politics/ohio-voter-purge.html.

921 Jonathan Brater, Kevin Morris, Myrna Perez, and Christopher Deluzio, *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.1.pdf.

922 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019); written testimony of Judith Browne Dianis at p 4-5, citing Scott Powers and David Damron, *Analysis: 201,000 in Florida didn't vote because of long lines*, Orlando Sentinel (Jan. 29, 2013), https://www.orlandosentinel.com/business/os-xpm-2013-01-29-os-voter-lines-statewide-20130118-story.html.

923 The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* (Sept. 2019) at p. 26, http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf.

cost many voters cannot pay. In North Dakota, Native American voters were significantly and disproportionately impacted by the state's voter ID law requiring a residential street address, since many Native Americans have unstable housing situations or live in homes that do not have street addresses, while many tribal members use Post Office Boxes.

Some states have implemented "exact match" requirements, requiring that a voter's name and information on his or her registration form exactly match the form of their name on file with certain state agencies. In Georgia, this resulted in the voter registration forms of more than 50,000 predominantly Black, Asian, or Latino voters, being put on hold by the Secretary of State's office.[924] Other states have carried exact match requirements over to signature match requirements, both on in-person and absentee ballots. When enforced by poll workers who are untrained in handwriting analysis, these policies have arbitrarily disenfranchised voters; sometimes without their knowledge.

The language access provisions of the Voting Rights Act remain intact despite the decision in *Shelby County*, but that does not mean they are being properly followed or enforced. In Florida, 32 counties were sued in August 2018 to force compliance with Section 4(e) of the Voting Rights Act. The Judge made a telling observation, noting "[I]t is remarkable that it takes a coalition of voting rights organizations and individuals to sue in federal court to seek minimal compliance with the plain language of a venerable 53-year-old law."[925] More needs to be done to ensure states and localities are following through on the legal protections afforded to language minority voters.

Some jurisdictions are still attempting to dilute the voice and vote of minority communities through discriminatory gerrymandering. Before *Shelby County,* preclearance required covered jurisdictions to submit their redistricting plans to the Department of Justice or the U.S. District Court for the District of Columbia for approval before implementation. After *Shelby County*, redistricting plans are no longer subject to preclearance. This means states with a history of racial discrimination can implement new political boundaries for districts for state and federal offices following the 2020 census that could be in effect for several election cycles, since as discussed in this report, it could take years of litigation to challenge those redrawn boundaries in court as discriminatory under Section 2.

Election Administration Needs Improvement

Problems in election administration existed before *Shelby County*, but today, new barriers to voting are compounded by the suppressive, discriminatory tactics being deployed across the country. The Subcommittee received testimony on election administration issues that include, but are not limited to: voter registration hurdles, a lack of funding for states to maintain and secure their election infrastructure, insufficient poll worker training, overuse of provisional ballots, disenfranchisement of formerly incarcerated people, and protecting elections in the face of natural disasters.

924 *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Gilda Daniels at p. 4-5.

925 The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* (Sept. 2019) at p. 4, http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf, *citing Rivera Madera v. Detzner*, Slip Op. at p. 25 (Sept. 7, 2018).

Congress passed the National Voter Registration Act in 1993, but more needs to be done to ensure states follow the law and voters are being properly registered. Congress must ensure states have proper funding to carry out critical election duties through Help America Vote Act (HAVA) funds. This includes funding to replace outdated voting equipment and other functions. Funding for proper training of poll workers is critical. The Subcommittee heard numerous times how the actions and interpretations of a poll worker can mean the difference between a voter being able to cast a ballot, being forced to cast a provisional ballot, or being turned away entirely.

Congress should make it clearer that proof of citizenship requirements above and beyond the traditional use of an affidavit were not the intent of Congress. HAVA requires election officials offer a voter a provisional ballot in the event of a question concerning their eligibility.[926] Uneven implementation of election laws and inadequate training of poll workers, among other factors, lead to the overuse of provisional ballots. As Hannah Fried, Director of All Voting is Local, testified, provisional ballots should be used as a "last resort" for voters who encounter a problem that cannot be resolved at the time they cast their ballot.[927] They are less likely to be counted than a regular ballot and every effort should be made to ensure voters cast ballots that will be counted.

We must also address the continued disenfranchisement of formerly incarcerated individuals and the inherent discrimination at hand when otherwise eligible Americans are denied their right to vote. Nearly 6 million American citizens are disenfranchised due to a prior felony conviction, while millions more are incarcerated. Maine and Vermont are the only states that allow incarcerated individuals to vote while in prison but, while the census counts them as residents of the location where they are serving their sentence, they vote absentee in the district in which they previously resided. Disenfranchisement of incarcerated or formerly incarcerated persons is not mandated by the Constitution or federal law, and the formerly incarcerated are not stripped of their citizenship. If the fundamental measure of eligibility to vote is citizenship, perhaps all citizens should be allowed to vote.

A new generation of attacks on voting emerged during the 2016 election. Top U.S. intelligence and law enforcement officials have repeatedly warned about the need to bolster our elections, including guarding against interference from foreign powers using misinformation and disinformation campaigns to disseminate incorrect information and sow division. The Senate Intelligence Committee published a report detailing how the Russian Internet Research Agency (IRA) specifically targeted Black Americans with disinformation campaigns meant to suppress and divide voters. During the 2018 election, hundreds of messages on Facebook and Twitter were documented, designed to discourage or prevent people from voting in the 2018 midterm election.[928]

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926 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Hannah Fried.

927 *Id.* at p. 9.

928 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Michael Waldman at p. 7, *see also* Young Mie Kim, *Voter Suppression Has Gone Digital* (Nov. 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/voter-suppression-has-gone-digital

Finally, as climate change intensifies, natural disasters have become more severe. With Election Day in November, voter registration deadlines and early voting have been impacted by hurricane season, with mixed levels of protection from state officials. As the frequency and intensity of natural disasters escalate, standardized election procedures and protections for these events would ensure voters are not disenfranchised by circumstances beyond their control.

Section 2 is an Insufficient Replacement for Section 5

Section 2 of the Voting Rights Act was, and remains, a critical tool in the fight to protect the right to vote. However, Section 2 was not intended to work in isolation. It was intended to work in concert with the other vital provisions of the Act, including Section 5. Without the full force of those provision in effect as Congress intended, Section 2 is a reactive, inadequate substitute for the proactive preclearance regime. Section 2 lawsuits can be very lengthy, often taking years to fully litigate and can be very expensive. This can result in discriminatory laws, that may have otherwise been blocked from being implemented in the first place under Section 5, remaining in place for multiple election cycles and denying voters access to the ballot while lawsuits move through the court process.

Section 2 also reverses the burden of proof, requiring the federal government, citizens, and advocates to prove the voting change is discriminatory and harms minority voters, rather than the burden being on the state or locality to prove they are not violating the constitutional right to vote, as was the case under preclearance. In the wake of *Shelby County*, civil rights and voting rights organizations have filed numerous lawsuits seeking to protect the right to vote, while the current Administration's Department of Justice has not filed any Section 2 lawsuits and reversed its position in others. Section 2 cases require resources the average voter simply does not have. On average, these cases can cost millions of dollars and take two to five years to be completed.[929]

Voter Turnout is Up, In Spite of Suppressive Practices

A familiar refrain heard from proponents of suppressive voter measures is that voter turnout is up, so the laws passed by states must not be suppressive as advocates and voters claim. In the first election following *Shelby County*, in 2014, voter turnout was the lowest since World War II.[930] Although the 2018 election saw the highest voter turnout since 1914, this has been attributed to historic voter enthusiasm.[931] This is despite the suite of suppressive, discriminatory laws states have enacted throughout the country – not because of them. While

929 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Deuel Ross at p. 22.

930 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Michael Waldman at p. 46, *see also* Jose A. DelReal, *Voter turnout in 2014 was the lowest since WWII* (Nov. 10, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/11/10/voter-turnout-in-2014-was-the-lowest-since-wwii/.

931 Pew Research Center, *Voter Enthusiasm at Record High in Nationalized Midterm Environment* (Sept. 26, 2018), https://www.people-press.org/2018/09/26/voter-enthusiasm-at-record-high-in-nationalized-midterm-environment/, *see also* Jens Manuel Krogstad, Luis Noe-Bustamante and Antonio Flores, *Historic highs in 2018 voter turnout extended across racial and ethnic groups*, Pew Research Center (May 1, 2019), https://www.pewresearch.org/fact-tank/2019/05/01/historic-highs-in-2018-voter-turnout-extended-across-racial-and-ethnic-groups/.

voter turnout is up, nearly 50 percent of Americans did not vote in the last election.[932] Without such restrictive and suppressive barriers in place, turnout could have been higher.

Prior to passage of the Voting Rights Act of 1965, Black Americans who were able to cast a ballot overcame immense barriers to do so. That some voters overcame the barriers put between them and the ballot box, does not excuse or make those barriers just.

Throughout American history, wholly unjust practices were held to be legal, until the American people overcame them. After long, hard-fought battles, they were no longer legal. Slavery was legal, but slavery was not just. Jim Crow was legal, but Jim Crow was not just. Separate but equal was legal, but separate but equal was not just. Suppressive voting laws were at times legal, but they were deemed unjust by the American people and the passage of the Voting Right Act and subsequent reauthorizations. Every eligible American is entitled to the unfettered, unabridged right to vote.

To the extent that turnout was up in 2018, it was the result of a concerted effort by advocates and individuals to cast their ballot despite the obstacles before them. Native American tribes in North Dakota spent considerable resources to ensure their members could vote, despite an unjust voter ID law.[933] Turnout among Native American voters remains below the 50 percent threshold that was the basis for enacting the Voting Rights Act.[934] When turnout increases, states and localities should not be closing polling locations, potentially creating long lines and unacceptable wait times many voters cannot endure. Polling conducted ahead of the 2018 elections by Advancement Project, in collaboration with the NAACP and African American Research Collaborative showed that voters of color were driven to vote by widespread attacks on people of color and their access to democracy.[935]

As Catherine Lhamon, Chair of the U.S. Commission on Civil Rights stated, "we ought to be celebrating increased turnout wherever it exists. And we also ought to be recognizing that, across the board, in this country, we have very, very low turnout for voters. And that is, in itself, a concern."[936]

In a democracy, government should enable its citizens to easily register and cast their ballots. These voter suppression measures are fundamentally anti-democratic as they have shifted the burden onto individuals and advocacy groups to find the means and resources to overcome them.

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932 Jordan Misra, *Voter Turnout Rates Among All Voting Age and Major Racial and Ethnic Groups Were Higher Than in 2014* (Apr. 23, 2019), https://www.census.gov/library/stories/2019/04/behind-2018-united-states-midterm-election-turnout.html.

933 *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), testimony of Tribal leaders, advocates and litigators throughout.

934 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Catherine Lhamon at p. 56.

935 *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), written testimony of Judith Browne Dianis at p. 5, *citing* https://www.africanamericanresearch.us/survey-results.

936 *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), hearing transcript, Catherin Lhamon responding to Congressman Rodney Davis at p. 57.

MOVING FORWARD

The fundamental right to vote is under attack. The Court's decision in *Shelby County* has served to accelerate the process, giving a green light to historically discriminatory jurisdictions to implement laws once put on hold because they could not clear federal administrative review. Some may seem innocuous on their face, but these laws have a disparate impact on minority voters. Without the full protection of the Voting Rights Act, states are no longer required to perform an analysis of their proposals' effect or justify their actions to a neutral clearing house.

Some states are taking positive steps to protect voting rights. According to the Brennan Center's *Voting Laws Roundup*, 688 pro-voter bills were introduced in 46 states during their 2019 legislative sessions, leading to reforms across the country.[937] For example, New York passed a package of voting reforms including early voting, pre-registration for 16- and 17-year-olds, portability of registration records, consolidated dates for state and federal primaries, and requiring ballots to be distributed to military voters further in advance.[938] Additionally, New York passed constitutional amendments permitting same-day registration and no-excuse absentee voting, which need to be passed again and ratified by the voters.[939]

In Colorado, the state enacted a law restoring voting rights to individuals on release from incarceration and expanded automatic voter registration (AVR).[940] Maine also enacted AVR. Nevada enacted immediate rights restoration to people on release from incarceration, authorized same-day registration, and other reforms. New Mexico also enacted same-day voter registration.[941] Delaware enacted early in-person voting, Virginia enacted no-excuse early in-person voting, and Washington enacted a Native American voting rights act.[942] In March 2018, Washington State's Governor signed AVR into law, along with Election Day registration, pre-registration for 16- and 17-year-old, and a state-level Voting Rights Act.[943] In April 2018, New Jersey's Governor also signed AVR into law. Prior to authorizing AVR, New Jersey launched electronic voter registration in 2007 and allowed 17-year-olds to pre-register to vote.[944]

THE ROLE OF CONGRESS

Article I, Section 4, of the Constitution expressly empowers the Congress with significant

937 Brennan Center for Justice, *Expert Brief: Voting Laws Roundup 2019* (last updated July 10, 2019), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2019.
938 *Id.*
939 *Id.*
940 *Id.*
941 *Id.*
942 *Id.*
943 Brennan Center for Justice, *Voting Laws Roundup 2018* (Apr. 2, 2018), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2018.
944 Brennan Center for Justice, *VRM in the States: New Jersey* (June 28, 2018), https://www.brennancenter.org/our-work/research-reports/vrm-states-new-jersey.

authority to enact legislation regulating "time, place, and manner" of elections.[945] Although that provision makes states primarily responsible for administering congressional elections, it vests ultimate power in Congress.[946]

The Congress has a clear role in protecting the right of every eligible American to cast his or her ballot. Congress charted a path with the passage of the Voting Rights Act of 1965, one the courts upheld until 2013. The Voting Rights Act was repeatedly reauthorized on a bipartisan basis over the following decades, as Congress continued to hold hearings and gather evidence documenting that ongoing discrimination continued to necessitate congressional action to protect the constitutional right to vote. It is time again to fulfill this obligation.

As the Subcommittee found and has thoroughly documented, the evidence is clear: discrimination in voting still exists. Moreover, states are enacting new suppressive laws that force voters to overcome new hurdles at every turn. Every eligible American has the basic right to participate in our democracy. Even without the full protection of the Voting Rights Act or a Department of Justice that argues cases on behalf of the voter, Congress must uphold its responsibility.

Congress has the constitutional authority to regulate the time, place and manner of federal elections.[947] Congress also has a responsibility to conduct oversight, to gather evidence to inform the legislative process, and to ensure constitutional rights are protected and federal laws are carried out in a manner consistent with congressional intent.[948] Protecting the right to vote is no exception to this responsibility.[949]

The evidence detailed in this report demonstrates the clear need for congressional action. It is time to fulfill the responsibility Congress has abdicated since June 2013 and protect the right to vote for every eligible American.

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945 U.S. Const. Art. I, sec. 4, National Archives, transcript available at https://www.archives.gov/founding-docs/constitution-transcript.

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

946 Nat'l Const. Ctr., Michael T. Morley & Franita Tolson, *Common Interpretation: Elections Clause*, https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/750.

947 U.S. Const. Art. I, sec. 4, National Archives, *transcript available at* https://www.archives.gov/founding-docs/constitution-transcript.

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

948 U.S. Const. Art. I, sec. 1.

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

949 The power to conduct investigations, while not explicitly laid out in the Constitution, has long been understood to reside in the "legislative powers" of U.S. Const. Art. I, sec. 1, *see also McGrain v. Daugherty*, 273 U.S. 135 (1927).

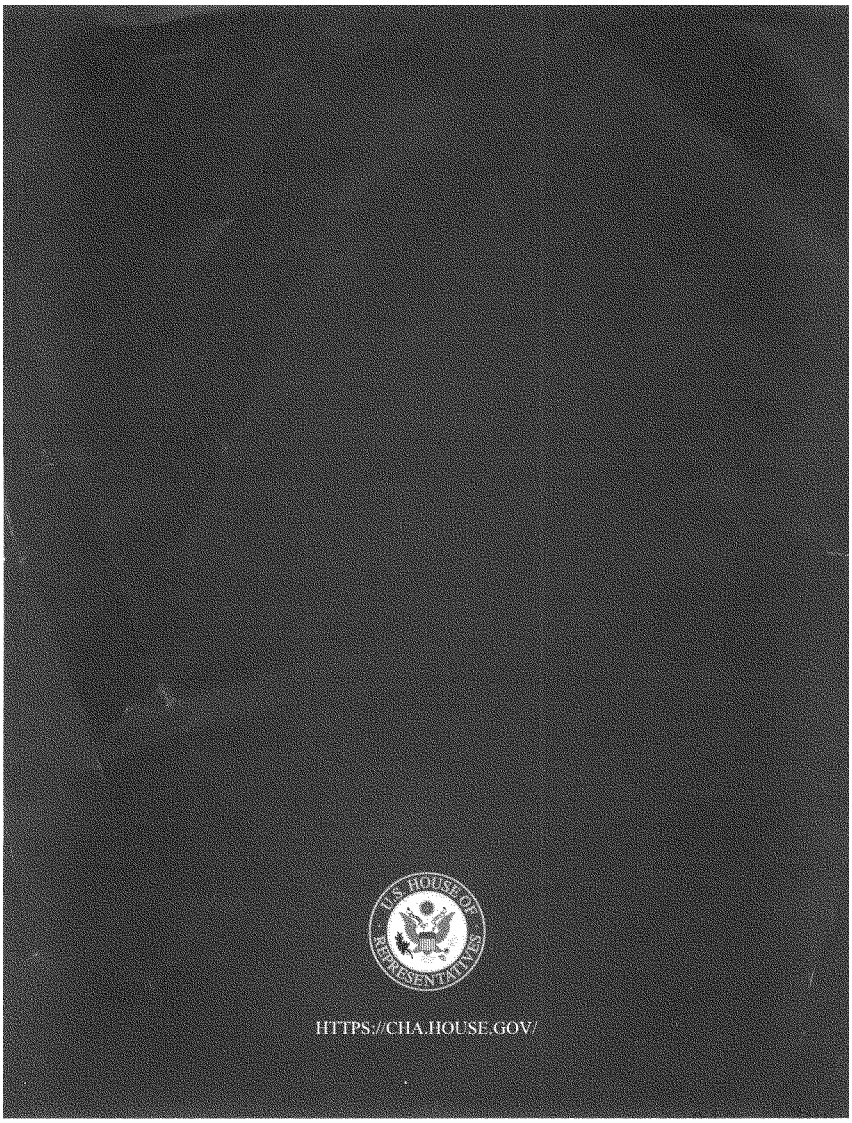
> "In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures. ...
>
> We are of opinion that the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified."

In a bipartisan manner, Congress passed the Voting Rights Act of 1965 and reauthorized and expanded protections in 1970, 1975, 1982, 1992, and most recently in 2006. The last reauthorization, in 2006, passed the House of Representatives 390-33, passed the Senate unanimously, and was signed into law by Republican President George W. Bush. As the Court acknowledged in *Shelby County*, a federal district court subsequently found that "the evidence before Congress in 2006 was sufficient to justify reauthorizing" Section 5 and continuing the Section 4(b) coverage formula, and the Court of Appeals for the D.C. Circuit affirmed that decision.[950]

When the Court disagreed – in the face of the overwhelming evidence Congress gathered demonstrating a long history of discriminatory voting practices, its reliance on that record to forge bipartisan congressional intent to take action, and two lower court decisions upholding the reauthorized Voting Rights Act – the Court's conclusions were based on the determination that "Nearly 50 years later, things have changed dramatically."[951] While Congress and the lower courts clearly disagreed with that assessment at the time, as the Subcommittee found, in the wake of *Shelby County*, it is ironically the Court's decision that has precipitated a dramatic change in conditions. This report details a wide range of new discriminatory practices that suppress the vote and not only justify but demand renewed congressional action.

America is not great because she is perfect, America is great because she is constantly working to repair her faults. It is time to repair this fault and recommit to the ideal that every eligible American has the right to vote, free from discrimination and suppression. The Voting Rights Act proved a powerful tool for protecting the cornerstone of American democracy, the right to vote, and to do so freely and fairly. Congress must honor this principle and basic right.

950 *Shelby County, Ala. v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 2622 (2013).
951 *Shelby County, Ala. v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 2625 (2013).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