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Testimony of

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Hearing on Current Conditions: Evidence of Continued Discrimination in Voting and the Need
for Preclearance

The Committee on the Judiciary, U.S. House of Representatives

Subcommittee on the Constitution, Civil Rights and Civil Liberties

September 10, 2019

Thank you for the opportunity to submit this testimony in support of restoring the Voting Rights Act (“VRA” or “Act”), a law that has been an important guardian of American democracy. The Brennan Center for Justice at NYU School of Law strongly supports this Committee’s important efforts to restore and revitalize the Act. My oral testimony will focus on voter purges. In this written testimony, I also highlight additional problems caused by the Supreme Court’s *Shelby County v. Holder* decision² and the concomitant need for an updated VRA.

The VRA is considered the most effective civil rights legislation in the history of our country.³ In June 2013, however, a 5-4 majority of the Supreme Court struck down a key provision of the VRA.⁴ That provision—Section 4(b)—determined which jurisdictions were required to pre-clear any changes to their voting rules with the federal government prior to implementing them.⁵ In his majority opinion, Chief Justice Roberts claimed that the coverage formula was no longer “grounded in current conditions” because the “country has changed” since the formula was first adopted.⁶ By striking down Section 4, the Court effectively mothballed the pre-clearance regime.

The years that have followed provide ample evidence to justify congressional action. State and local jurisdictions have continued to implement discriminatory voting rules,

¹ The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. I am the Director of the Brennan Center’s Voting Rights and Elections Program. I have authored several nationally recognized reports and articles, including *Purges: A Growing Threat to the Right to Vote* (July 2018), *Noncitizen Voting: The Missing Millions* (May 2017), and *Election Day Long Lines: Resource Allocation* (Sept. 2014). My work has been featured in media outlets across the country, including *The New York Times*, *The Wall Street Journal*, *MSNBC*, and others. I have testified previously before Congress, as well as several state legislatures, on a variety of voting rights related issues. I am a lecturer-in-law at Columbia Law School and I have also served as an Adjunct Professor of Clinical Law at NYU School of Law. My testimony does not purport to convey the views, if any, of the New York University School of Law.

² 570 U.S. 529 (2013) (Ex. A).

³ U.S. Dep’t of Justice, “The Effect of the Voting Rights Act,” last modified June 19, 2009, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0> (Ex. A).

⁴ *Shelby Cty.*, 570 U.S. at 556-57.

⁵ *Id.* at 536-40.

⁶ *Id.* at 554, 557.

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disenfranchising voters of color in election after election.⁷ The Brennan Center has documented a particularly disturbing increase in the number of people purged from the voter rolls in states formerly subject to preclearance.⁸ These ongoing problems demand a strong, but measured response. We urge the Committee to act expeditiously to restore the VRA to full strength.

I. The VRA and *Shelby County*

The VRA is the engine of voting equality in our nation. Congress has repeatedly recognized its importance and effectiveness, as well the ongoing need for its protections. Since its initial passage in 1965, Congress has reauthorized, updated, and expanded the VRA four times.⁹ As recently as 2006, Congress reauthorized the VRA with overwhelming bipartisan support and the reauthorization was signed into law by President George W. Bush.¹⁰

For almost half a century, the Section 5 pre-clearance provision was central to the VRA's success. That provision required certain jurisdictions with a history of voting discrimination to obtain approval from the federal government for any voting rules changes before putting them into effect. As the Supreme Court acknowledged in *Shelby County*, the VRA “proved immensely successful at redressing racial discrimination and integrating the voting process.”¹¹ Indeed, Section 5 deterred discriminatory voting rules changes right up until the Court froze its operation. Between 1998 and 2013, Section 5 blocked 86 discriminatory changes (including 13 in the 18 months before *Shelby County* was handed down). It prompted hundreds more changes to be withdrawn, and it prevented even more of those changes from being offered in the first place because policymakers knew they would not get federal approval.¹²

Shelby County gutted Section 5 by invalidating the “coverage formula” that determined which jurisdictions were subject to pre-clearance. Predictably, a flood of discriminatory voting changes followed.

⁷ Wendy Weiser and Max Feldman, *The State of Voting 2018*, Brennan Center for Justice, 2018, available at https://www.brennancenter.org/sites/default/files/publications/2018_06_StateOfVoting_v5%20%281%29.pdf; Brennan Center for Justice, “New Voting Restrictions in America,” last modified July 3, 2019, <https://www.brennancenter.org/new-voting-restrictions-america>; Brennan Center for Justice, “Voting Laws Roundup 2019,” last modified July 10, 2019, <https://www.brennancenter.org/analysis/voting-laws-roundup-2019> (Ex. B).

⁸ Kevin Morris, Brennan Center for Justice, “Voter Purge Rates Remain High, Analysis Finds,” Aug. 1, 2019, <https://www.brennancenter.org/blog/voter-purge-rates-remain-high-analysis-finds>; Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice 2018, 3-5, available at https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.pdf (Ex. C).

⁹ U.S. Dep’t of Justice, “History of Federal Voting Rights Laws,” last modified July 28, 2017, <https://www.justice.gov/crt/history-federal-voting-rights-laws> (Ex. A).

¹⁰ U.S. Senate, “H.R.9 Vote Summary,” July 20, 2006, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212; U.S. House of Representatives, “Final Vote Results for Roll Call 374,” July 13, 2006, <http://clerk.house.gov/evs/2006/roll374.xml>; The White House, Press Release, “Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006,” July 27, 2006, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html> (Ex. A).

¹¹ *Shelby Cty.*, 570 U.S. at 548.

¹² Tomas Lopez, *Shelby County: One Year Later*, Brennan Center for Justice, June 24, 2014, <https://www.brennancenter.org/analysis/shelby-county-one-year-later> (Ex. D).

II. Direct Burdens on Voting Since *Shelby County*

Over the course of the last decade, we have seen a surge in *direct* burdens on the right to vote (in addition to efforts to dilute minority voting power), which the Brennan Center has documented extensively.¹³ The *Shelby County* decision gave the greenlight to states to continue to implement these voting restrictions.

a. Restrictive Voting Laws Implemented Immediately Following *Shelby County*

The damage caused by *Shelby County* started the same day the Supreme Court handed down its opinion, as states put in place voting rules that either were or likely would have been blocked by the federal government under Section 5.

- Within hours of the Court’s decision, Texas moved forward with implementing what was then the nation’s strictest voter identification law, which had been denied preclearance because of its discriminatory impact.¹⁴ Years and years of expensive and burdensome litigation by many dozen lawyers resulted in the federal courts striking down the law as unlawfully discriminatory on two different occasions.¹⁵ But even after all that expense and time, Texas passed a different photo ID law in 2017.¹⁶
- Mississippi also announced that it would move to implement its voter ID law the same day the Court’s decision was handed down.¹⁷ The state had previously submitted the policy for preclearance but had not obtained approval to implement it.¹⁸
- The day after the *Shelby County* decision, Alabama moved forward with its strict voter ID law. The state passed the law in 2011 and would have been required to obtain preclearance, but state officials never submitted the bill for approval.¹⁹ The law is subject to an ongoing lawsuit in the federal courts.²⁰
- Within two months after *Shelby County*, North Carolina enacted a law that imposed a strict photo ID requirement, cut back on early voting, and reduced the window for voter

¹³ Weiser & Feldman, *supra* note 7; Brennan Center for Justice, “New Voting Restrictions in America,” *supra* note 7; Brennan Center for Justice, “Voting Laws Roundup 2019,” *supra* note 7; Wendy Weiser and Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice, 2011, *available at* <http://www.brennancenter.org/publication/voting-law-changes-2012> (Ex. B).

¹⁴ Lopez, *supra* note 12.

¹⁵ Brennan Center for Justice, “Texas NAACP v. Steen (consolidated with Veasey v. Abbott),” last modified Sept. 21, 2018, <https://www.brennancenter.org/legal-work/naacp-v-steen>; *Veasey v. Abbott*, 265 F. Supp. 3d 684, 693 (S.D. Tex. 2017), *rev’d in part*, 888 F.3d 792 (5th Cir. 2018); *Veasey v. Abbott*, 249 F. Supp. 3d 868, 875 (S.D. Tex.), *reconsideration denied*, 265 F. Supp. 3d 684 (S.D. Tex. 2017), *rev’d in part*, 888 F.3d 792 (5th Cir. 2018); *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *aff’d in part, vacated in part, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *on reh’g en banc*, 830 F.3d 216 (5th Cir.), *and aff’d in part, vacated in part, rev’d in part sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (Ex. E).

¹⁶ Brennan Center for Justice, “Texas NAACP v. Steen (consolidated with Veasey v. Abbott),” *supra* note 15.

¹⁷ Press Release, Secretary of State of Mississippi, Statement on Supreme Court Voting Rights Act Opinion, June 25, 2013, <https://www.sos.ms.gov/About/Pages/Press-Release.aspx?pr=422> (Ex. F).

¹⁸ Lopez, *supra* note 12.

¹⁹ *Ibid.*

²⁰ NAACP LDF, “Case: Greater Birmingham Ministries v. Alabama,” last accessed Sept. 3, 2019, <https://www.naacpldf.org/case-issue/greater-birmingham-ministries-v-alabama/> (Ex. G).

registration. Following the decision, a state senator told the press, “now we can go with the full bill,” rather than less a restrictive version.²¹ As in Texas, extensive and protracted litigation resulted in a federal appeals court striking down the law, finding that it targeted African-Americans with “surgical precision.”²²

b. Restrictive Voting Laws Passed in the Years After *Shelby County*

This burst of restrictive voting laws was not contained to the period immediately following *Shelby County*. In the six years since the decision, states have continued to enact burdensome voting laws, in some cases piling restriction on restriction. For example:

- Georgia has repeatedly implemented—and repeatedly been forced to alter—a requirement that voter registration forms match exactly with other state records in order for an individual to be registered.²³ In 2017, the state enacted a “no match, no vote” law, even though only months earlier, the secretary of state agreed in a court settlement to stop a similar procedure that had blocked tens of thousands of registration applications.²⁴ The new law drew a court challenge and a federal district court entered a preliminary injunction prior to the 2018 election, halting its effect with respect to certain impacted voters.²⁵ The state subsequently enacted a law that largely ended the policy.²⁶
- Florida this year passed a law cutting back on the expansive changes made by Amendment 4—a constitutional amendment that restores voting rights to many Floridians with a felony conviction and that was passed overwhelmingly by Florida voters in November 2018. The new law is subject to a series of federal court challenges.²⁷
- North Carolina lawmakers enacted a law in 2018, initially introduced in the middle of the night, cutting back early voting opportunities.²⁸ They also put a constitutional amendment enshrining a photo ID requirement for voting on the 2018 ballot, which subsequently passed, and then rushed to pass implementing legislation prior to a change

²¹ Lopez, *supra* note 12.

²² *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (Ex. H).

²³ Jonathan Brater and Rebecca Ayala, “What’s the Matter with Georgia?,” Brennan Center for Justice, Oct. 12, 2018, <https://www.brennancenter.org/blog/whats-matter-georgia> (Ex. I).

²⁴ *Ibid.*; Press Release, Lawyers’ Committee for Civil Rights Under Law, “Voting Advocates Announce a Settlement of ‘Exact Match’ Lawsuit in Georgia,” Feb. 10, 2017, <https://lawyerscommittee.org/voting-advocates-announce-settlement-exact-match-lawsuit-georgia/> (Ex. J).

²⁵ *Georgia Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (Ex. J).

²⁶ Press Release, Lawyers’ Committee for Civil Rights Under Law, “Georgia Largely Abandons Its Broken ‘Exact Match’ Voter Registration Process, Apr. 5, 2019, <https://lawyerscommittee.org/georgia-largely-abandons-its-broken-exact-match-voter-registration-process/> (Ex. J).

²⁷ Brennan Center for Justice, “*Gruver v. Barton* (consolidated with *Jones v. DeSantis*),” last modified Aug. 3, 2019, <https://www.brennancenter.org/legal-work/gruver-v-barton>; Complaint, *Gruver v. Barton*, No. 1:19-cv-00121 (N.D. Fla. June 28, 2019) (Ex. K). The Brennan Center represents individual returning citizens, the Florida NAACP, and the League of Women Voters of Florida, along with co-counsel at the ACLU, the ACLU of Florida, and the NAACP Legal Defense and Education Fund in one of the cases. That case has been consolidated with others.

²⁸ Max Feldman, “A Familiar Scene in North Carolina as State Lawmakers Introduce New Voting Restrictions,” Brennan Center for Justice, June 15, 2018, <https://www.brennancenter.org/blog/familiar-scene-in-north-carolina-as-state-lawmakers-introduce-new-voting-restrictions> (Ex. H).

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in the partisan composition of the state legislature.²⁹ The voter ID law has drawn a series of state and federal court challenges.³⁰

- Texas, as described above, implemented its strict photo ID law in 2013. After it was repeatedly struck down, the state enacted a new law in 2017. While an improvement over the law that was implemented in 2013, the new law is still harsher than the temporary, court-ordered ID requirements that were in place for the 2016 election.³¹ In addition, this year, the state enacted a new law restricting the use of mobile early voting units.³²
- Virginia enacted a new photo ID law in 2013, which went into effect in 2014. The state also enacted new limits on third-party voter registration in 2013.³³
- Arizona enacted a law in 2016 limiting collection of mail-in ballots and making it a felony to knowingly collect and turn in another voter's completed ballot, even with that voter's permission (with some exceptions).³⁴ This year, the state imposed new restrictions on access to emergency early and absentee voting and extended voter ID requirements to early voting.³⁵

These are only some of the restrictive voting laws that states have enacted since *Shelby County*. Furthermore, many forms of voter suppression are implemented administratively or at the sub-state level. Our research regarding last year's election confirmed that state and local officials continue to develop new tactics to keep people from voting.³⁶

c. Voter Purges After *Shelby County*

One significant, specific area of concern in the wake of *Shelby County* is voter purges—the sometimes-flawed process by which election officials attempt to remove from voter registration lists the names of those ineligible to vote.³⁷ When they are executed properly, purges

²⁹ Lynn Bonner, “NC Senate overrides Cooper’s voter ID veto,” *The News & Observer*, Dec. 18, 2018, <https://www.newsobserver.com/news/politics-government/article223216960.html> (Ex. H).

³⁰ Max Feldman and Peter Dunphy, “The State of Voting Rights Litigation (July 2019),” Brennan Center for Justice, July 31, 2019, <https://www.brennancenter.org/analysis/state-voting-rights-litigation-july-2019> (Ex. L).

³¹ Brennan Center for Justice, “Texas NAACP v. Steen (consolidated with Veasey v. Abbott),” *supra* note 15.

³² Brennan Center for Justice, “Voting Laws Roundup 2019,” *supra* note 7.

³³ Brennan Center for Justice, “New Voting Restrictions in America,” *supra* note 7; Brennan Center for Justice, “Voting Laws Roundup 2013,” last modified Dec. 19, 2013, <https://www.brennancenter.org/analysis/election-2013-voting-laws-roundup> (Ex. B).

³⁴ Brennan Center for Justice, “New Voting Restrictions in America,” *supra* note 7; Brennan Center for Justice, “Voting Laws Roundup 2016,” last modified Apr. 18, 2016, <https://www.brennancenter.org/analysis/voting-laws-roundup-2016> (Ex. B).

³⁵ Brennan Center for Justice, “Voting Laws Roundup 2019,” *supra* note 7; 2019 Ariz. Legis. Serv. Ch. 15 (S.B. 1072); 2019 Ariz. Legis. Serv. Ch. 107 (S.B. 1090) (Ex. M). South Carolina also enacted a voter ID law in 2011. The law obtained pre-clearance after state officials interpreted it to be substantially less restrictive during the course of the pre-clearance litigation. See the materials collected as Exhibit U.

³⁶ Zachary Roth and Wendy Weiser, Brennan Center for Justice, “This Is the Worst Voter Suppression We’ve Seen in the Modern Era,” last modified Nov. 2, 2018, <http://www.brennancenter.org/blog/worst-voter-suppression-weve-seen-modern-era>; Rebecca Ayala, Brennan Center for Justice, “Voting Problems 2018,” last modified Nov. 5, 2018, <https://www.brennancenter.org/blog/voting-problems-2018> (Ex. B).

³⁷ See Myrna Pérez, *Voter Purges*, Brennan Center for Justice 2008 1-3, <https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf> (explaining voter purge process) (Ex. C).

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ensure that the voter rolls are accurate and up-to-date. When they are executed improperly, however, purges disenfranchise legitimate voters—often too close to an election to correct the error—and cause confusion and delay at the polls.

Prior to the *Shelby County* decision, covered jurisdictions were required to pre-clear changes to their purge practices before implementing them.³⁸ This requirement protected voters from ill-conceived purge practices. That protection is now gone. And voter purges are on the rise.

Between 2014 and 2016, states removed almost 16 million voters from the rolls—nearly 4 million more than they removed between 2006 and 2008.³⁹ This growth in the number of removed voters represented an increase of 33 percent, which far outstrips growth in both total registered voters (18 percent) and total population (six percent). Brennan Center research suggests that *Shelby County* has had a profound and negative impact: for the two election cycles between 2012 and 2016, jurisdictions that were previously subject to federal preclearance had purge rates significantly higher than other jurisdictions.⁴⁰ We calculated that 2 million fewer voters would have been purged in that period if previously covered jurisdictions had purged at the same rate as other jurisdictions.⁴¹

Improper purges, and attempts at improper purges, litter our recent history. These purges can have severe consequences for voters. For example:

- Earlier this year, a federal court stopped Texas’s attempt to purge approximately 95,000 purported non-citizens from the voter rolls. Texas relied on stale data and weak comparisons between databases to develop its purge plan. As a result of this attempted purge, Texas’ Secretary of State resigned.⁴²
- In the leadup to the April 2016 primary election, New York election officials improperly removed more than 200,000 names from the voter rolls, giving little notice to those who had been purged.⁴³ During the September 2018 primary, some voters reported that they continued to encounter significant problems at the polls as a result of the purge.⁴⁴
- In 2016, the Arkansas Secretary of State sent the state’s county clerks more than 7,700 names to be removed from the rolls due to felony convictions. The list, however, was

³⁸ See, e.g., *Curtis v. Smith*, 121 F. Supp. 2d 1054, 1060 (E.D. Tex. 2000); Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep’t of Justice to Charlie Crist, Attorney General of Florida (Sept. 6, 2005); Letter from John R. Dunne, Asst. Att’y Gen., Civil Rights Division, U.S. Dep’t of Justice to Debbie Barnes, Chairperson, Dallas County (Alabama) Board of Registrars (June 22, 1990) (interposing Section 5 objection to implementation of new purge practices) (Ex. C).

³⁹ Brater et al., *supra* note 8.

⁴⁰ *Id.* at 3.

⁴¹ *Id.* at 4; see also Kevin Morris and Myrna Pérez, “Florida, Georgia, North Carolina Still Purging Voters at High Rates,” Brennan Center for Justice, Oct. 1, 2018, <https://www.brennancenter.org/blog/florida-georgia-north-carolina-still-purging-voters-high-rates> (Ex. C).

⁴² See the materials collected as Exhibit O.

⁴³ Brater et al., *supra* note 8, at 5-6.

⁴⁴ Ayala, *supra* note 38. See also the materials collected as Exhibit P.

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highly inaccurate. It included some people who had never been convicted of a felony and others with past convictions whose voting rights had been restored.⁴⁵

- In 2013, in Virginia, nearly 39,000 voters were removed from the rolls after the state relied on a faulty database to delete voters who had allegedly moved out-of-state. In some counties, error rates ran as high as 17 percent.⁴⁶
- The same year, Florida officials sought to purge thousands of purported non-citizens people from the rolls, but ultimately suspended the purge. When the state tried the same thing in 2012, its purge list was reduced from 180,000 supposed non-citizens to approximately 2,700. Notably, that purge list contained a disproportionate number of Latino surnames.⁴⁷

Purges tend to be problematic for at least two reasons. First, they happen behind closed doors. As a result, voters often only learn that they have been purged when they show up to the polls. Second, states sometimes rely on faulty data and fail to conduct sufficient research before concluding that a voter is ineligible to vote. Furthermore, improper matching of data between databases in order to identify voters for purging can lead to discriminatory results.⁴⁸ The last election provided a clear example of discriminatory outcomes resulting from improper data matching, albeit outside of the purge context. In the leadup to the 2018 election, approximately 80 percent of Georgia voters not registered because of the state's "no match, no vote" law were people of color.⁴⁹

III. Congress Should Act to Renew and Revitalize the VRA

It is undeniable that our nation has suffered from a long, sorry, and sometimes violent history of racialized voter suppression. The VRA was enacted to confront this suppression head on. Despite the VRA's substantial success over the past five decades, racial discrimination still infects our election system, as the preceding sections make clear. While the *Shelby County* Court was correct that the "country has changed," it has not changed enough to warrant halting preclearance.

Federal courts have repeatedly found that new laws passed after *Shelby County* made it harder for minorities to vote, some intentionally so.⁵⁰ These conclusions have been confirmed by academic studies finding that a state's racial makeup is related to its adoption of voting

⁴⁵ Brater et al., *supra* note 8, at 5. See also the materials collected as Exhibit Q.

⁴⁶ Brater et al., *supra* note 8, at 8. See also the materials collected as Exhibit R.

⁴⁷ Lopez, *supra* note 7. See also the materials collected as Exhibit S.

⁴⁸ Brater et al., *supra* note 8, at 7 (explaining that voters with common names are more likely to match with other individuals in database comparisons and that "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").

⁴⁹ Amended Complaint at 5, *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (No. 1:18-cv-04727); Answer at 5, *Georgia Coal.*, 347 F. Supp. 3d at 1251 (No. 1:18-cv-04727) (Ex. J).

⁵⁰ See, e.g., *McCrary*, 831 F.3d at 214; *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 904-05 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019) (Ex. T); *Veasey*, 71 F. Supp. 3d at 633.

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restrictions.⁵¹ At times they have been confirmed by the public comments of these restrictions' proponents themselves.⁵²

To be clear, voting rights advocates are not going to stand on the sidelines when would-be suppressors act, notwithstanding a weakened VRA. Section 2 of the VRA, which allows private parties and the Justice Department to challenge discriminatory voting practices in court is being readily leaned on to fight racial discrimination in the post-*Shelby* world. In some circumstances, these Section 2 lawsuits have ultimately been successful. But they are not a substitute for pre-clearance. Litigating section 2 cases is far more lengthy and expensive than being involved in the pre-clearance process, and these cases often do not yield results for impacted voters until after an election is over.⁵³

Our case against Texas's 2011 voter ID law illustrates this point.⁵⁴ After the state passed the law, a three-judge federal court prevented the state from implementing it, refusing to preclear the law under Section 5. That decision, however, was vacated after *Shelby County*, leading to years of litigation under Section 2. Even though every court that considered the law found it to be discriminatory (and a federal district court found that it was intentionally discriminatory), the law remained in effect until a temporary, court-ordered remedy was put in place for the November 2016 election. In the meantime, Texans were forced to vote in 3 federal and 4 statewide elections and numerous local elections under discriminatory voting rules. Moreover, litigating the case was extremely expensive. According to news reports, the state spent more than \$3.5 million defending the law through 2016—before the last round of appeals in the case concluded.⁵⁵ Plaintiffs in the case have filed attorneys' fees petitions totaling millions of dollars more.

The Texas case is consistent with other voting discrimination cases since *Shelby County*. For example, a challenge to Alabama's voter ID law was filed in December 15, 2015 and is still ongoing.⁵⁶

Furthermore, courts have permitted potentially discriminatory laws to govern our elections, under the Supreme Court's *Purcell* doctrine, supposedly to avoid disrupting election administration.⁵⁷ Ironically, this approach may *compound* confusion at the polls, by constantly shifting the ground rules that govern elections in a state. Preclearance preempts this disruption by forcing covered jurisdictions to establish that new voting rules are non-discriminatory prior to implementing them.

In short, the *Shelby County* Court has left us with a system that is both ineffective and inefficient. Congress can and should fix this problem. The Supreme Court has repeatedly

⁵¹ See, e.g., Bentele & O'Brien, *Jim Crow 2.0?: Why States Consider and Adopt Restrictive Voter Access Policies*, 11 *Perspective on Politics* 1088 (Dec. 2013) (Ex. B).

⁵² Brennan Center for Justice, "When Politicians Tell the Truth on Voting Restrictions," Aug. 10, 2016, <https://www.brennancenter.org/analysis/when-politicians-tell-truth-voting-restrictions> (Ex. B).

⁵³ Lopez, *supra* note 7.

⁵⁴ The Brennan Center represented the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives, along with the Lawyers' Committee for Civil Rights Under Law and other co-counsel. The case was consolidated with several others.

⁵⁵ Jim Malewitz and Lindsay Carbonell, *Texas' Voter ID Defense Has Cost \$3.5 Million*, *Texas Tribune*, June 17, 2016, <https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/> (Ex. E)

⁵⁶ See NAACP LDF, "Case: Greater Birmingham Ministries v. Alabama," *supra* note 20.

⁵⁷ See, e.g., *Veasey v. Perry*, 769 F.3d 890, 893-96 (5th Cir. 2014) (issuing stay and collecting cases) (Ex. E).

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affirmed congressional power to enact a coverage formula for Section 5 pre-clearance, including in *Shelby County*. We urge Congress to act expeditiously to renew and revitalize the VRA.

Testimony of

Wendy Weiser

Vice President for Democracy at the
Brennan Center for Justice at NYU School of Law¹

Hearing on Oversight of the Voting Rights Act: A Continuing Record of Discrimination

Before the Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights and Civil Liberties
In the United States House of Representatives

May 27, 2021

Thank you for the opportunity to testify in support of strengthening the Voting Rights Act (“VRA”), a law that has played a critical role in safeguarding American democracy against pernicious, persistent threats of discrimination in the election system. The Brennan Center for Justice at NYU School of Law strongly supports this Committee’s efforts to restore and revitalize the VRA, through the John Lewis Voting Rights Advancement Act (“VRAA”).

The VRA is widely considered the most effective civil rights legislation in our nation’s history.² Not only did it dismantle discriminatory voting practices prevalent during the Jim Crow era, but it also served as a bulwark against new discriminatory voting measures in the decades that followed. Unfortunately, in its 2013 decision in *Shelby County v. Holder*,³ the Supreme Court neutered the VRA’s most powerful provisions. Since then, voters in many of the jurisdictions that had previously been protected by the law’s preclearance regime have been battered by a barrage of new voting laws and practices that target and disproportionately harm voters of color, and these pernicious practices have spread elsewhere.⁴

¹ The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. I am the Vice President for Democracy and Director of the Brennan Center’s Democracy Program. I have authored numerous nationally recognized reports and articles on voting rights and elections. My work has been featured in numerous media outlets across the country, including the *New York Times*, the *Washington Post*, the *Los Angeles Times*, the *Boston Globe*, *USA Today*, and *Politico*. I have served as counsel in numerous voting rights lawsuits, including a number of the lawsuits referenced in this testimony. I have testified previously before Congress, and before several state legislatures, on a variety of issues relating to voting rights and elections. My testimony does not purport to convey the views, if any, of the New York University School of Law.

² *The Effect of the Voting Rights Act*, U.S. Dep’t of Justice (June 19, 2009), <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0>.

³ *Shelby County v. Holder*, 570 U.S. 529, 556-57 (2013).

⁴ See, e.g., *Voting Laws Roundup: March 2021*, Brennan Center for Justice (Apr. 1, 2021),

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I submit this testimony to present and highlight evidence of widespread discrimination in the voting process in recent years—evidence that warrants a swift and powerful congressional response. As we previously testified in the 116th Congress, state and local jurisdictions have implemented a staggering number of discriminatory voting practices over the past decade, including targeted purges of the voter rolls, biased redistricting schemes, and laws restricting access to voting. Sadly, without strong national legal protections, the problem is only getting worse.

This year, in states across the country, we see a fierce new assault on the right to vote fueled by the “Big Lie” about widespread voter fraud. Legislators are rushing to enact yet another wave of discriminatory voting restrictions, in what would be the most significant cutback of the right to vote since the Jim Crow era. As in the Jim Crow era, laws that may look neutral on their face are too often designed and applied to target voters of color.⁵ As of the Brennan Center’s March 31, 2021 count, state lawmakers had introduced more than 360 bills in 47 states to curb the vote.⁶ That number is still growing, according to our soon-to-be-published new count,⁷ and is more than four times the number of restrictive bills introduced just two years ago. Already, at least 14 states have enacted new laws with provisions that restrict access to voting.⁸ This amounts to a real time attack on our democracy. Additional threats loom, as states prepare to start their once-in-a-decade redistricting processes for the first time in over a half a century without the full protections of the Voting Rights Act.⁹

These forceful threats to the franchise demand an equally forceful response. Congress has the power to stop this attack on right to vote and protect Americans against further attacks. The Constitution’s Fourteenth and Fifteenth Amendments give Congress the power to remedy and deter discrimination in the voting process. The extraordinary amount of evidence of voting discrimination in recent years, which I highlight below, is more than enough to justify strong congressional action pursuant to this power, including passage of the VRAA. Moreover, the Congress has extremely strong powers under the Elections Clause to set the “times, places and manner” of federal elections—powers the Supreme Court has said include “authority to provide a complete code for congressional elections.”¹⁰ That power should also be used to stop vote suppression and strengthen voting access.

<https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>; Wendy Weiser & Max Feldman, *The State of Voting 2018*, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_State_of_Voting_2018.pdf; *New Voting Restrictions in America*, Brennan Center for Justice (Nov. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america>; *Voting Laws Roundup 2019*, Brennan Center for Justice (July 10, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2019>.

⁵ See discussion *infra* Part I, Sections A-E.

⁶ *Voting Laws Roundup: March 2021*, Brennan Center for Justice (April 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>.

⁷ *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 26, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> (forthcoming).

⁸ *Id.*

⁹ See Michael C. Li, *The Redistricting Landscape, 2021-22*, Brennan Center for Justice, 20 (2021),

https://www.brennancenter.org/sites/default/files/2021-02/2021_2_11_State%20of%20Redistricting.pdf.

¹⁰ *Smiley v. Holm*, 285 U.S. 355, 366 (1932). See also *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

The 2020 presidential contest featured historic levels of voter turnout — the highest in over a century, even in the face of a deadly pandemic.¹¹ But there were also unprecedented efforts to thwart the electoral process and disenfranchise voters, primarily in Black, Latino, and Asian communities, efforts that, as discussed, continue today through an aggressive push to enact restrictive voting laws across the country. The VRAA is a critical tool in combatting this discrimination. We urge the Committee to act expeditiously to pass the VRAA, along with the For the People Act, to root out this discrimination and to protect every American’s freedom to vote.

I. Evidence of Discrimination in Restrictive Voting Policies and Practices

Over the last decade, states have enacted and implemented voting restrictions that target and disproportionately harm racial and ethnic minorities and undermine our democracy. Often legislators have piled restriction on restriction in a manner that maximizes their suppressive impact. A growing body of research shows that many of these restrictions measurably reduce access and participation, especially among voters of color. This section presents and reviews evidence of discriminatory practices and the ways in which they both target and impact voters of color. The Brennan Center has extensively documented new, direct burdens on the right to vote over the past decade.¹² (I attach as Appendix B prior testimony the Brennan Center submitted to Congress on this topic. A compendium of our documentation can be found in Appendices A and C).

A. Voter Purges

First, there is strong evidence of discrimination in state and local practices for purging the voter rolls since the *Shelby County* decision.

Voter purges are the often error-laden process by which election officials try to clean voter rolls by removing the names of people who are not eligible to vote.¹³ Prior to the Supreme Court’s decision in *Shelby County*, jurisdictions that were covered by the VRA’s preclearance provisions were required to get federal approval for changes to their purge practices before

¹¹ Kevin Schaul, et al., 2020 Turnout Is the Highest in Over a Century, November 5, 2020 <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/>.

¹² See, e.g., *Voting Laws Roundup: March 2021*, Brennan Center for Justice (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>; Wendy Weiser & Max Feldman, *The State of Voting 2018*, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_State_of_Voting_2018.pdf; *New Voting Restrictions in America*, Brennan Center for Justice (Nov. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america>; *Voting Laws Roundup 2019*, Brennan Center for Justice (July 10, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2019>. See also, e.g., Wendy Weiser & Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice (2011), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_2012.pdf; *Voting Laws Roundup 2015*, Brennan Center for Justice (June 3, 2015), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2015>; Wendy Weiser & Nhu-Y Ngo, *Voting Rights in 2011: A Legislative Round-Up*, Brennan Center for Justice (July 15, 2011), <https://www.brennancenter.org/our-work/research-reports/voting-rights-2011-legislative-round>.

¹³ Myrna Pérez, *Voter Purges*, Brennan Center for Justice, 1-3 (2008), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voter-Purges-2008.pdf.

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implementing them.¹⁴ This requirement protected voters from ill-conceived, discriminatory purges. That protection is now gone, and voter purges are on the rise. The Brennan Center’s research suggests that race has played a critical role in increased purge rates.

A peer-reviewed study the Brennan Center conducted in 2018, using data from the federal Election Assistance Commission (“EAC”), found that for the two election cycles between 2012 and 2016, jurisdictions that were previously subject to preclearance under the VRA because of their racially discriminatory voting practices had purge rates that were significantly higher than those in other jurisdictions.¹⁵ In other words, the *Shelby County* decision has had a direct, negative impact on purges in precisely the parts of the country with the worst records on voting discrimination against racial and ethnic minorities. Overall, our study found that, between 2014 and 2016, states removed almost 16 million voters from the rolls—nearly 4 million more than they removed between 2006 and 2008.¹⁶ This 33 percent growth far outstripped the growth in the voter population.¹⁷ If those counties had purged at the same rate as other counties, as many as 1.1 million fewer individuals would have been removed from rolls between 2016 and 2018, and 2 million fewer between 2014 and 2016.¹⁸ (I attach a copy of this study in Appendix C.)

The Brennan Center conducted a subsequent analysis in 2019 showing that this elevated purge rate in formerly covered jurisdictions continued through the 2018 election cycle.¹⁹ Assessing 2019 EAC data, we found that between 2016 and 2018 the median purge rates in counties that were previously covered by the VRA was 40 percent higher than in other counties.²⁰ Nationwide at least 17 million voters were purged between 2016 and 2018, a number that is considerably higher than past purge rates. (I attach a copy of this analysis in Appendix C.)

A chart from this 2019 study, previously submitted before the Committee on House Administration, vividly illustrates the apparent impact of the *Shelby County* decision on purge rates in jurisdictions that were formerly covered by Section 5 of the VRA:

¹⁴ See *Curtis v. Smith*, 121 F. Supp. 2d 1054, 1060 (E.D. Tex. 2000); Letter from John Tanner, Chief, Voting Section, Civ. Rts. Div., U.S. Dep’t of Justice, to Charlie Crist, Att’y Gen. of Fla. (Sept. 6, 2005); Letter from John R. Dunne, Asst. Att’y Gen., Civ. Rts. Div., U.S. Dep’t of Justice, to Debbie Barnes, Chairperson, Dallas Cnty. (Ala.) Bd. of Registrars (June 22, 1990) (interposing Section 5 objection to implementation of new purge practices).

¹⁵ Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf.

¹⁶ Brater et al., *Purges*.

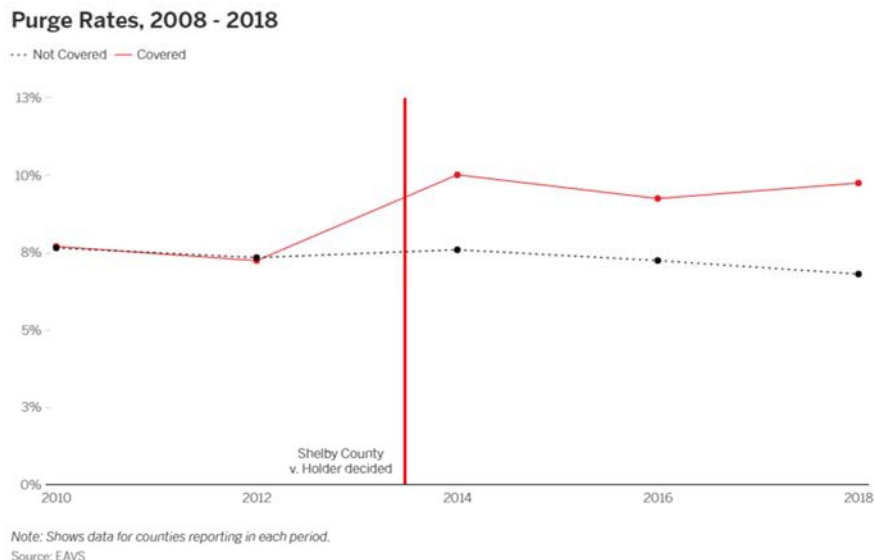
¹⁷ Brater et al., *Purges*.

¹⁸ Brater et al., *Purges*.

¹⁹ Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

²⁰ Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

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As the chart makes clear, despite the fact that formerly covered jurisdictions had comparable purge rates with the rest of the country prior to *Shelby County*, once the preclearance condition was lifted, purge rates in these jurisdictions surged relative to the rest of the country. Comparable data for the 2020 election cycle is not yet available.

Data from Georgia, Texas, Florida, and North Carolina during this period provide further evidence of this troublesome phenomenon. Our research found that Texas purged 363,000 more voters between 2012 and 2014 than it did between 2008 and 2010, while Georgia purged twice as many voters — 1.5 million voters — between the 2012 and 2016 elections as it did between 2008 and 2012.²¹

According to another Brennan Center analysis, the state also saw most of its counties purge more than 10 percent of their voters between 2016 and 2018.²² Between December 2016 and September 2018, Florida purged more than 7 percent of its voters. And between September of 2016 and May 2018, North Carolina purged 11.7 percent of its voter rolls. A disproportionate impact was on voters of color: in 90 out of 100 counties in North Carolina, voters of color were over-represented among the purged group.²³ (I attach a copy of this analysis in Appendix C.)

B. Wait Times to Vote

There is ample evidence that voters of color face significantly longer wait times at the polls than white voters and that discriminatory state and local practices are at least partially responsible for these disparities.

²¹ Brater et al., *Purges*.

²² Kevin Morris & Myrna Pérez, *Florida, Georgia, North Carolina Still Purging Voters at High Rates*, Brennan Center for Justice (Oct. 1, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/florida-georgia-north-carolina-still-purging-voters-high-rates>.

²³ Morris & Pérez, “Florida, Georgia, North Carolina Still Purging Voters.”

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A Brennan Center study of wait times during the 2018 midterm elections found that Latino voters waited on average 46 percent longer, and Black voters 45 percent longer, than white voters to cast their ballots.²⁴ Moreover, Latino and Black voters were more likely than white voters to wait in the longest of lines on Election Day: some 6.6 percent of Latino voters and 7.0 percent of Black voters reported waiting 30 minutes or longer to vote, surpassing the acceptable threshold for wait times set by the Presidential Commission on Election Administration, compared with only 4.1 percent of white voters.²⁵ Multiple additional studies have found similar and persistent racial disparities in wait times over the past decade.²⁶

Some of these disparities can be explained by polling place closures in jurisdictions with high minority populations. A study by the Leadership Conference on Civil and Human Rights uncovered nearly 1,700 polling place closures in jurisdictions formerly covered by Section 5 of the VRA, despite a significant increase in voter turnout in those jurisdictions during the same period.²⁷ A survey of Native Americans in South Dakota by the Native American Voting Rights Coalition found that 32 percent of respondents said that the distance needed to travel to the polls affected their decision to cast a ballot.²⁸

Polling place closures often disproportionately harm voters of color. During the 2020 presidential primary election in Wisconsin, for example, Milwaukee closed all but five of its 182 polling places. A peer-reviewed academic journal article by the Brennan Center's Kevin Morris and Peter Miller found that this closure depressed turnout by more than 8 percentage points overall—and by about 10 percentage points among Black voters.²⁹ This corroborates other academic research showing that polling place closures decrease turnout, and that these effects can fall disproportionately on voters of color.³⁰

²⁴ Hannah Klain et al., *Waiting to Vote: Racial Disparities in Election Day Experiences*, Brennan Center for Justice (2020), https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf.

²⁵ Klain et al., *Waiting to Vote*.

²⁶ See Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 Pol. Sci. Q. 527 (2017); M. Keith Chen et al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data*, Rev. of Econ. & Stat. (2020); David Cottrell et al., *Voting Lines, Equal Treatment, and Early Voting Check-In Times in Florida*, State Pol. & Pol'y Q. (2020).

²⁷ *Democracy Diverted: Polling Place Closures and the Right to Vote*, The Leadership Conference Education Fund (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>. Another example of discriminatory polling place closures can be seen in Georgia's new prohibition on mobile voting sites. Mobile voting (polling sites on wheels that travel to different set locations) — a practice that has only been used in Fulton County, which has the largest Black population in the state — was outlawed by the Georgia legislature this year. See Michael Waldman, *Georgia's Voter Suppression Law*, Brennan Center for Justice (Mar. 31, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/georgias-voter-suppression-law>.

²⁸ Native American Voting Rights Coalition, *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota: Survey Research Report Executive Summary and Policy Reform Recommendations*, Native American Rights Fund (Jan. 2018), <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf>. See also Peter Dunphy, *The State of Native American Voting Rights*, Brennan Center for Justice (Mar. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/state-native-american-voting-rights>.

²⁹ Kevin Morris & Peter Miller, *Voting in a Pandemic: COVID-19 and Primary Turnout in Milwaukee, Wisconsin*, Urb. Aff. Rev. (Apr. 2021); Kevin Morris, *Did Consolidating Polling Places in Milwaukee Depress Turnout?*, Brennan Center for Justice (June 24, 2020), <https://www.brennancenter.org/our-work/research-reports/did-consolidating-polling-places-milwaukee-depress-turnout>.

³⁰ See, e.g., Enrico Cantoni, *A Precinct Too Far: Turnout and Voting Costs*, 12 Am. Econ. J.: Appl. Econ. 61 (2020); Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 Am. Pol. Sci. Rev. 115 (2011).

A number of recently passed voting laws and pending bills are likely to exacerbate these disparities. The recently passed Georgia law notoriously makes it a crime to provide food or water to voters waiting in line to vote (though it allows election workers to provide self-service water).³¹ Reporting from last year indicated that Black Georgians faced far longer waits than white Georgians in the June primary,³² and a report from ProPublica and Georgia Public Broadcasting indicated that this was largely due to closed polling places.³³ A new law in Florida may similarly restrict the ability to provide snacks and water.³⁴ According to our recently published Voting Laws Roundup, new laws in Iowa and Montana reduce polling place availability: the Iowa law requires polls to close earlier on Election Day, while the Montana law allows more polling places to qualify for reduced hours.³⁵ A bill pending in Michigan, which has already passed in one chamber, would almost double the number of voters that can be assigned to one precinct, likely meaning much longer lines to vote on Election Day.³⁶ This will likely be felt most acutely in minority-rich cities, which experienced especially long lines last year.³⁷ Bills advancing in Nevada, Texas, South Carolina could likewise result in polling place closures.³⁸

C. New Voting Restrictions Before This Year

Shortly before the *Shelby County* decision, the Brennan Center documented a new trend of state legislation seeking to make it harder to vote in advance of the 2012 election.³⁹ Fortunately, many of the restrictive voting laws passed at that time never went into effect because they were blocked by Section 5 of the VRA; many others were repealed, invalidated or blunted

³¹S.B. 202, 156th Gen. Assemb., Reg. Sess., § 33 (Ga. 2021).

³² Mark Niese & Nick Thieme, *Extreme Voting Lines Expose where Georgia Primary Failed*, Atlanta Journal-Constitution (July 28, 2020), <https://www.ajc.com/politics/extreme-voting-lines-expose-where-georgia-primary-failed/YQUMSTEBVFAY7CR7UQQEHSVLI/>.

³³ Stephen Fowler, *Why Do Nonwhite Georgia Voters Have to Wait in Line for Hours? Their Numbers Have Soared, and Their Polling Places Have Dwindled*, ProPublica (October 17, 2020) <https://www.propublica.org/article/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-their-numbers-have-soared-and-their-polling-places-have-dwindled>.

³⁴ S.B. 90, 2021 Leg., Reg. Sess., § 29 (Fla. 2021); *See also*, Eliza Sweren-Becker, *Florida Enacts Sweeping Voter Suppression Law*, Brennan Center for Justice (May 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/florida-enacts-sweeping-voter-suppression-law>.

³⁵Iowa S.F. 413, 89th Gen. Assemb., Reg. Sess., § 36 (Iowa 2021); MT S.B. 196, 2021 Leg., Reg. Sess., § 1 (Mont. 2021).

³⁶ MI H.B. 4134, 101st Leg., Reg. Sess., § 658 (Mich. 2021).

³⁷ *See, e.g.*, Kevin Quealy & Alicia Parlapiano, *Election Day Voting in 2020 Took Longer in America's Poorest Neighborhoods*, N.Y. Times (Jan. 4, 2021), <https://www.nytimes.com/interactive/2021/01/04/upshot/voting-wait-times.html>; Beth LeBlanc et al., *Long Lines, Hour-Long Waits Prompt Criticism at Michigan Polls*, The Detroit News (Mar. 10, 2020), <https://www.detroitnews.com/story/news/politics/2020/03/10/michigan-localities-juggling-rise-same-day-voter-registration/5004002002/>.

³⁸ S.B. 84, 81st Leg., Reg. Sess., § 1 (Nev. 2021); S.B. 236, 124th Gen. Assemb., Reg. Sess., § 1 (S.C. 2021); S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021). The Senate version of S.B. 7 in Texas includes a provision (Section 3.06) that would require counties with populations of one million to distribute polling places according to the share of registered voters in each state House district relative to the total number of eligible voters. For more information on the impact of this provision on polling place closures, *see* Alexa Ura et al., *Polling Places for Urban Voters of Color Would Be Cut under Texas Senate's Version of Voting Bill Being Negotiated with House*, Tex. Tribune (May 23, 2021), <https://www.texastribune.org/2021/05/23/texas-voting-polling-restrictions/>.

³⁹ Wendy R. Weiser & Lawrence Nordon, *Voting Law Changes in 2012*, Brennan Center for Justice (2011), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_2012.pdf.

by courts.⁴⁰ After the *Shelby County* decision, we documented a new spike in voting restrictions, as multiple previously covered states seized upon the lack of federal oversight to put in place discriminatory laws and policies.⁴¹ This push to pass restrictive voting laws has continued unabated ever since.⁴² Many of these new laws have targeted and disproportionately impacted voters of color, as we have continuously documented.⁴³ The problem goes beyond legislation; we have also documented a range of other new discriminatory voting practices in recent years.⁴⁴

The number of discriminatory voting practices over the past decade is too voluminous to detail in this testimony. Instead, I highlight a few recent examples:

a. Strict Voter ID Laws

New strict voter ID laws implemented over the last decade have further targeted voters of color and restricted their ability to exercise their right to vote. Federal courts in at least four states have found that strict voter ID laws were racially discriminatory, and in some cases, that such laws were intentionally discriminatory.

In 2011, bills were introduced in 34 states to implement stricter voter ID requirements; nine of those passed, but most were blocked by Section 5 or judicial decisions.⁴⁵ Pennsylvania enacted a

⁴⁰ Wendy R. Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, Brennan Center for Justice (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_Election_Update.pdf

⁴¹ Tomas Lopez, 'Shelby County': One Year Later, Brennan Center for Justice (June 24, 2014), <https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>; *Voting Laws Roundup 2013*, Brennan Center for Justice (December 19, 2013), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2013>; *Voting Laws Roundup 2014*, Brennan Center for Justice (Dec. 18, 2014), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2014>.

⁴² Wendy Weiser & Erik Opsal, *The State of Voting in 2014*, Brennan Center for Justice (June 17, 2014), <https://www.brennancenter.org/our-work/research-reports/state-voting-2014>; *Voting Laws Roundup 2015*, Brennan Center for Justice (June 3, 2015), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2015>; *Voting Laws Roundup 2016*, Brennan Center for Justice (April 18, 2016), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2016>; *Voting Laws Roundup 2017*, Brennan Center for Justice (May 10, 2017), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2017>; *Voting Laws Roundup 2018*, Brennan Center for Justice (April 2, 2018), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2018>; *Voting Laws Roundup 2019*, Brennan Center for Justice (July 10, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2019>; *Voting Laws Roundup 2020*, Brennan Center for Justice (February 4, 2020), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2020>; *Voting Laws Roundup 2021*, Brennan Center for Justice (Jan. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-january-2021>. See also Wendy Weiser & Max Feldman, *The State of Voting 2018*, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_State_of_Voting_2018.pdf.

⁴³ See articles cited *supra* notes 38-40.

⁴⁴ See, e.g., Rebecca Ayala, *Voting Problems 2018*, Brennan Center for Justice (Nov. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/voting-problems-2018>; Peter Dunphy, *When It Comes to Voter Suppression, Don't Forget About Alabama*, Brennan Center for Justice (Nov. 5, 2018), Rebecca Ayala & Jonathan Brater, *What's the Matter with Georgia?*, Brennan Center for Justice (Oct. 12, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/whats-matter-georgia>; Wendy R. Weiser & Margaret Chen, *Voter Suppression Incidents*, Brennan Center for Justice (Nov. 3, 2008), <https://www.brennancenter.org/our-work/research-reports/voter-suppression-incidents-2008>.

⁴⁵ Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice, (2011), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_2012.pdf; Wendy R. Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, Brennan Center for Justice (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_Election_Update.pdf.

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strict photo ID law in 2012, only to have it struck down as unconstitutional by a state court in 2014.⁴⁶

Efforts to tighten voter ID requirements rose after the *Shelby County* decision and have continued since.⁴⁷ In 2013, at least five states—Alabama, Mississippi, North Carolina, North Dakota, Virginia and Texas—implemented or began to enforce strict photo ID laws, most of which had previously been blocked by the Department of Justice due to their discriminatory impact. The Texas and North Carolina laws were both struck down by federal courts as discriminatory. The Fourth Circuit Court of Appeals famously said that North Carolina’s voter ID law disenfranchised Black voters “with almost surgical precision.”⁴⁸

The Texas’ law disenfranchised all voters who lacked one of scant few forms of ID—notably including firearms permits, which are disproportionately held by white Texans, while excluding student IDs and IDs issued by state agencies. A federal district court found that more than 600,000 registered Texas voters—and many more unregistered but eligible voters—lacked an accepted form of ID, and that “a disproportionate number of African-Americans and Hispanics populate that group of potentially disenfranchised voters.”⁴⁹ The court further held that, not only did the law have the effect of discriminating against African-American and Hispanic voters, but it was intentionally enacted for that very purpose. The Fifth Circuit Court of Appeals *en banc* ultimately affirmed that the law had the result of discriminating on the basis of race.⁵⁰

North Dakota has passed new voter ID restrictions three times in the past eight years. In 2013, the state strictly limited voters to one of four acceptable forms of ID, all of which were required to contain the voter’s street address, notwithstanding that 19 percent of Native Americans—many of whom lived on reservations without street addresses—lacked qualifying IDs.⁵¹ The law was amended in 2015 to exclude college identification certificates that had long been used by student voters. In 2016, finding that the law discriminated against Native American voters, a federal district court enjoined the law, requiring North Dakota to provide a “fail safe” alternative for voters who could not obtain a qualifying ID without reasonable effort.⁵² In 2017, North Dakota again amended its law, but retained the residential address requirement. A federal court enjoined the new law in 2018, concluding that it had a “discriminatory and burdensome impact on Native Americans,”⁵³ although the injunction was stayed on appeal.⁵⁴ Finally, in 2020, the parties to the litigation reached a settlement allowing Native American voters who do not have a residential street address to vote.⁵⁵

Wisconsin’s strict photo ID law, passed in 2011, has been repeatedly blocked as

⁴⁶ *Applewhite v. Commonwealth of Pennsylvania*, 330 M.D. 2012 (Pa. Commw. Ct. 2014).

⁴⁷ See, e.g., *Election 2016: Restrictive Voting Laws by the Numbers*, Brennan Center for Justice (Sept. 28, 2016), <https://www.brennancenter.org/our-work/research-reports/election-2016-restrictive-voting-laws-numbers#legalchallengestorestrictivephotoidlaws>.

⁴⁸ *N.C. State Conf. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

⁴⁹ *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014).

⁵⁰ *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

⁵¹ *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. 2018).

⁵² *Brakebill v. Jaeger*, 2016 WL 7118548 (D.N.D. 2016).

⁵³ *Brakebill v. Jaeger*, 2018 WL 1612190 (D.N.D. 2018).

⁵⁴ *Brakebill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019).

⁵⁵ *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. 2020).

discriminatory and reinstated by both state and federal courts over an 8-year period. Likewise, a voter ID law passed in North Carolina after the prior version was struck down in 2016 was initially blocked as racially discriminatory by both state and federal courts, though the Fourth Circuit Court of Appeals vacated the injunction shortly after the November 2020 election.⁵⁶

Efforts to suppress the vote through strict voter ID laws continue unabated to the present day. As of April 1, 2020, new voter ID requirements accounted for nearly a quarter of the 361 restrictive voting bills proposed by state legislatures in 2021. There is little question why state legislatures have so doggedly focused on imposing and tightening voter ID requirements: research has shown time and again that such laws operate to disproportionately exclude voters of color.⁵⁷ For instance, a recent study conducted at the University of California San Diego concluded that voter ID laws “disproportionately reduce voter turnout in more racially diverse areas.”⁵⁸

b. Restrictions on Voter Registration

In 2017, Georgia enacted an “exact match” law mandating that voters’ names on registration records must perfectly match their names on approved forms of identification.⁵⁹ The state enacted the law, even though only months earlier, the Secretary of State agreed in a court settlement to stop a similar procedure, which had blocked tens of thousands of registration applications.⁶⁰ A Brennan Center analysis of the policy found that, in the months leading up to the 2018 election, roughly 70 percent of Georgia voters whose registrations were blocked by the policy were people of color.⁶¹ The state subsequently enacted a law that largely ended the policy because of litigation challenging the matching program.⁶²

In recent years, some states have imposed new restrictions on the voter registration process which take aim at organizing efforts to boost participation by voters of color and low-income voters. After the Tennessee Black Voter Project collected more than 90,000 new voter registration forms in the leadup to the 2018 election, Tennessee enacted a law inflicting civil penalties on groups that employed paid canvassers if they submitted incomplete or inaccurate voter registration forms.⁶³

⁵⁶ *N.C. State Conf. NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020).

⁵⁷ See, e.g., *Research on Voter ID*, Brennan Center for Justice (Apr. 11, 2017), <https://www.brennancenter.org/our-work/research-reports/research-voter-id>; Dan Hopkins,

What We Know About Voter ID Laws, FiveThirtyEight (Aug. 21, 2018, 7:07 AM),

<https://fivethirtyeight.com/features/what-we-know-about-voter-id-laws/>; *Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification*, Brennan Center for Justice (Nov. 2006), https://www.brennancenter.org/sites/default/files/2020-09/download_file_39242.pdf.

⁵⁸ Christine Clark, *Skewing the Vote: Voter ID Laws Discriminate Against Racial and Ethnic Minorities, New Study Reveals*, UC San Diego News Center, (Jun. 25, 2020), <https://ucsdnews.ucsd.edu/feature/skewing-the-vote>.

⁵⁹ Jonathan Brater & Rebecca Ayala, *What’s the Matter with Georgia?*, Brennan Center for Justice, (Oct. 12, 2018), <https://www.brennancenter.org/blog/whats-matter-georgia>.

⁶⁰ Press Release, Lawyers’ Committee for Civil Rights Under Law, “Voting Advocates Announce a Settlement of ‘Exact Match’ Lawsuit in Georgia,” Feb. 10, 2017, <https://lawyerscommittee.org/voting-advocates-announce-settlement-exact-match-lawsuit-georgia/>.

⁶¹ Jonathan Brater & Rebecca Ayala, *What’s the Matter with Georgia?*, Brennan Center for Justice, (Oct. 12, 2018), <https://www.brennancenter.org/blog/whats-matter-georgia>.]

⁶² *Georgia Largely Abandons Its Broken ‘Exact Match’ Voter Registration Process*, Lawyers’ Committee for Civil Rights Under Law, (Apr. 5, 2019), <https://lawyerscommittee.org/georgia-largely-abandons-its-broken-exact-match-voter-registration-process/>.

⁶³ Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, Brennan Center for Justice (January 16 2020),

c. Cutbacks to Early Voting

Over the past decade, multiple states have reduced early voting days or sites used disproportionately by voters of color. In Ohio and Florida, for example, legislatures eliminated early voting on the Sundays leading up to Election Day after African American and Latino voters conducted successful “souls to the polls” voter turnout drives on those days.⁶⁴ Federal courts have struck down early voting cutbacks in North Carolina, Florida, and Wisconsin because they were intentionally discriminatory.⁶⁵ In Florida, after a federal court mitigated but did not fully block a law rolling back early voting days, voters of color experienced disproportionate harms.⁶⁶ A study by Professors Daniel Smith and Michael Herron found that voters who had previously cast their ballot on the Sunday before Election Day in 2008—a day that Black voters relied on at three times the rate as white voters—were disproportionately less likely to cast a valid ballot on any day in the 2012 general election, when voting was no longer available on that day.⁶⁷ Similar efforts continue today.

d. Disenfranchisement of Individuals With Past Criminal Convictions in Florida

In 2019, Florida lawmakers passed a bill that made the right to vote for people with felony convictions contingent on the repayment of all legal financial obligations, including fines, fees, and restitution.⁶⁸ The bill was a clear attempt to undermine a constitutional amendment passed by voters in 2018 that finally put an end to a 150-year-old policy of permanent disenfranchisement initially intended to evade mandate of the Fifteenth Amendment.⁶⁹ Given the systemic racial inequality built into Florida’s criminal justice system, as well as the racial wealth and wage gaps in the state, it was plain that the bill would produce discriminatory results.

These results were made clear in litigation challenging the law. Expert testimony demonstrated that a staggering 774,000 Floridians were disenfranchised by the pay-to-vote

<https://www.brennancenter.org/our-work/analysis-opinion/whats-matter-georgia>; Amy Gardner, *How a Large-Scale Effort to Register Black Voters Led to a Crackdown in Tennessee*, Washington Post (May 24, 2019), https://www.washingtonpost.com/politics/how-a-large-scale-effort-to-register-black-voters-led-to-a-crackdown-in-tennessee/2019/05/24/9f6cee1e-7284-11e9-8be0-ca575670e91c_story.html.

⁶⁴ See David G. Savage, *Federal Judge Orders Ohio to Keep Its Early Balloting in Place*, L.A. Times, Aug. 31, 2021, <https://www.latimes.com/politics/la-xpm-2012-aug-31-la-pn-ohio-early-voting-judge-20120831-story.html>; Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 Election L. J. 331, <https://www.liebertpub.com/doi/pdf/10.1089/elj.2012.0157>.

⁶⁵ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016); *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016); *Federal Court Blocks Discriminatory Early Voting Changes in Florida*, Brennan Center for Justice (Aug. 21, 2012), <https://www.brennancenter.org/our-work/analysis-opinion/federal-court-blocks-discriminatory-early-voting-changes-florida>.

⁶⁶ *Florida v. United States*, 885 F. Supp. 2d. 299 (D.D.C. 2012); Wendy Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, Brennan Center for Justice (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_Election_Update.pdf.

⁶⁷ Michael C. Herron & Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, 67(3) Pol. Rsch. Q. 646, <https://www.jstor.org/stable/24371899>; see also Wendy Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, Brennan Center for Justice (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_Election_Update.pdf.

⁶⁸ 2019 Fla. Sess. Law Serv. Ch. 2019-162 (C.S.S.B. 7066).

⁶⁹ See Erika Wood, *Florida: An Outlier in Denying Voting Rights*, Brennan Center for Justice, 4–7 (Dec. 16, 2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Florida_Voting_Rights_Outlier.pdf.

requirement, but that Black Floridians were both more likely to owe money and more likely to owe more money than their white counterparts.⁷⁰ In fact, more than 334,000 of those disenfranchised—or roughly 43 percent—were Black,⁷¹ even though less than 17 percent of all Floridians are Black.⁷² Despite these plainly discriminatory results, a federal court ultimately held that the plaintiffs had not met the high burden of proving that the law was enacted with a racially discriminatory purpose, but said “the issue [was] close and could reasonably be decided either way.”⁷³

While a number of courts have held that felony disenfranchisement laws cannot be challenged under the Voting Rights Act because Congress did not intend to reach these laws,⁷⁴ this latest example of the race discrimination produced by Florida’s disenfranchisement law shows why Congress should take them into account this time. Many criminal disenfranchisement laws, including Florida’s, are rooted in deeply prejudiced 19th-century efforts to prevent the Fifteenth Amendment from taking full effect.⁷⁵ These laws also continue to disproportionately harm voters of color: According to data from the Sentencing Project, African Americans are disenfranchised at 3.7 times the rate of the rest of the population.⁷⁶

D. Restrictive Voting Laws Enacted This Year

As the Brennan Center has documented extensively, state legislators across the country have recently escalated efforts to enact new voting restrictions.⁷⁷ In many cases, the racially discriminatory causes and effects of seemingly race-neutral laws are hard to miss.

⁷⁰ Second Supplemental Report of Daniel A. Smith, Ph.D., *Jones v. DeSantis*, No. 4:19-cv-300 (N.D. Fl. 2020), ECF No. 334-1, 15–16, <https://www.brennancenter.org/sites/default/files/2020-05/Smith%20Second%20Supplemental%20Report.pdf>.

⁷¹ *Id.* at 16–17.

⁷² *Census QuickFacts: Florida*, U.S. Census Bureau (2019), <https://www.census.gov/quickfacts/FL>.

⁷³ *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1235 (N.D. Fl. 2020), *rev'd on other grounds sub nom. Jones v. Gov. of Florida*, 975 F.3d 1016 (2020). A number of courts have held that felony disenfranchisement laws cannot be challenged under the Voting Rights Act on the basis of discriminatory results because Congress did not intend to reach these laws with the original law or subsequent renewals. *See Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (collecting cases). Thus, Plaintiffs must prove intentional discrimination by the state legislature in order to challenge felony disenfranchisement laws. *Id.*; *see also Johnson v. Gov. of State of Florida*, 405 F.3d 1214, 1218, 1234 (11th Cir. 2005).

⁷⁴ *See Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (collecting cases). As a result, Plaintiffs must prove intentional discrimination by the state legislature in order to challenge felony disenfranchisement laws. *Id.*; *see also Johnson v. Gov. of State of Florida*, 405 F.3d 1214, 1218, 1234 (11th Cir. 2005). Congress has previously recognized how “inordinately difficult” it is to prove that laws have a discriminatory purpose. *See Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (quoting S. Rep. 97-417, 36, 1982 U.S.C.C.A.N. 177, 214). It is for this reason that Congress designed the VRA to protect against discriminatory policies even without proof of discriminatory intent. *Id.*

⁷⁵ Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, Brennan Center for Justice, 2 (May 9, 2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Disenfranchisement_History.pdf.

⁷⁶ Christopher Uggen, et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, Sentencing Project, 4 (Oct. 30, 2020) <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

⁷⁷ *Voting Laws Roundup: January 2021*, Brennan Center for Justice (Jan. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-january-2021>; *Voting Laws Roundup: February 2021*, Brennan Center for Justice (Feb. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2021>; *Voting Laws Roundup: March 2021*, Brennan Center for Justice (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>.

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For example, Georgia recently passed legislation that restricts voting access in multiple ways, including by reducing access to mail voting.⁷⁸ According to a recent Brennan Center analysis, this law was put in effect immediately after Black voters dramatically increased their use of mail voting and it will disproportionately harm Black voters.⁷⁹ Specifically, our study found that, although white voters still made up most of all mail voters in 2020, their share of the vote-by-mail electorate dropped from 67 percent in 2016 to 54 percent in 2020; the Black share, meanwhile, surged from 23 percent to 31 percent.⁸⁰ Nearly 30 percent of Georgia’s Black voters cast their ballot by mail in 2020, but just 24 percent of white voters did so.⁸¹ In other words, Georgia’s new law reducing absentee voting access appears to be tied to Black voters’ increased use of absentee voting. Measures making it harder to vote by mail have similarly been enacted in thirteen other states, including Florida and Iowa, and are moving through legislatures in at least 18 other states.⁸²

Even when voters of color can equally access and cast absentee ballots, states like Arizona, Georgia, Florida, Idaho, Kansas, and Montana have enacted policies that mean their votes are less likely to be counted—such as signature matching requirements, vote-by-mail ID mandates, and postage costs.⁸³ Several studies have found that absentee ballots cast by voters of color have in recent years been rejected at much higher rates than those cast by their white counterparts.⁸⁴ One study, published in the *Election Law Journal* (a leading legal resource on election issues), found that in Florida, in both the 2018 and 2016 federal elections, absentee ballots returned by African American and Latino voters were twice as likely to be rejected as those cast by white voters.⁸⁵ A similar phenomenon has been documented in a study of Florida’s 2020 presidential primary conducted by the ACLU of Florida,⁸⁶ and in a Brennan Center study of Georgia’s 2020 primaries.⁸⁷

⁷⁸ Michael Waldman, *Georgia’s Voter Suppression Law*, Brennan Center for Justice (Mar. 31, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/georgias-voter-suppression-law>. Ga. S.B. 202 (2021).

⁷⁹ Kevin Morris, *Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most*, Brennan Center for Justice (Mar. 6, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>. Also, in Arizona, Governor Doug Ducey recently signed SB 1485, a bill that makes it harder to vote by mail. Under the new law, any voters who did not cast an early voting ballot in two consecutive election cycles will be removed from the state’s Permanent Early Voting List. Voters cut from the list will no longer automatically receive their mail ballots and will have to request them. Jane C. Timm, *Arizona Gov. Ducey Signs New Law That Will Purge Infrequent Mail Voters From State’s Ballot List*, NBC News (May 11, 2021), <https://www.nbcnews.com/politics/elections/arizona-legislature-passes-law-purge-infrequent-mail-voters-n1267025>.

⁸⁰ Kevin Morris, *Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most*, Brennan Center for Justice (Mar. 6, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>.

⁸¹ Kevin Morris, *Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most*, Brennan Center for Justice (Mar. 6, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>.

⁸² *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 26, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

⁸³ *Voting Laws Roundup: March 2021*, Brennan Center for Justice (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021#rbe>.

⁸⁴ See, e.g., Sophie Chou & Tyler Dukes, *In North Carolina, Black Voters’ Mail-In Ballots Much More Likely to Be Rejected Than Those From Any Other Race*, ProPublica (Sept. 23, 2020), <https://www.propublica.org/article/in-north-carolina-black-voters-mail-in-ballots-much-more-likely-to-be-rejected-than-those-from-any-other-race>.

⁸⁵ Anna Baringer et al., *Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus*, *Election Law Journal: Rules, Politics, and Policy*, Vol. 19, No. 3 (Sept. 17, 2020), <https://www.liebertpub.com/doi/full/10.1089/elj.2020.0658>.

⁸⁶ Daniel A. Smith, *Vote-By-Mail Ballots Cast in Florida*, ACLU of Florida (Sept. 19, 2018), <https://www.aclufl.org/en/publications/vote-mail-ballots-cast-florida>.

⁸⁷ Kevin Morris, *Digging Into the Georgia Primary*, Brennan Center for Justice (Sept. 10, 2020),

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A report, based on data collected by Professor Michael Bitzer, of absentee ballots cast in the North Carolina 2020 primary found that ballots cast by Black voters were rejected at three times the rate as those cast by white voters.⁸⁸

Georgia’s new law, Senate Bill 202, also prohibits voters from casting a ballot at the wrong precinct — including votes for the contests that the voter is actually eligible to participate in — unless it is after 5:00 p.m., thus barring out-of-precinct voting for most of Election Day.⁸⁹ A Brennan Center analysis of the legislation found that the proposed policy change would disproportionately affect minority voters, where residents tend to move more frequently.⁹⁰ The case of Fulton County in 2020 illustrates this: Fulton County’s population is 44% Black and roughly 67% of provisional ballots cast in Fulton County were cast out of precinct. By contrast, Georgia’s population as a whole is 31% Black, and statewide just 44% of provisional ballots were cast out of precinct. Because Black voters live in neighborhoods with much higher rates of in-county moves, they are likely to be hit especially hard by the near-total elimination of out-of-precinct voting. This policy change could impact thousands of voters across the state.⁹¹

* * *

Lawmakers have typically justified new voting restrictions by the purported need to safeguard against voter fraud. But occasionally politicians reveal more troubling—and discriminatory—motives. At a May 2016 trial on Wisconsin’s voting restrictions, for example, former Republican legislative staffer Todd Allbaugh testified that some Wisconsin legislative leaders were “giddy” that the state’s new strict voter ID law could keep minority and young voters from the polls. Similarly, in 2012, in response to a state-level battle over early voting hours, Doug Puisse, chairman of Franklin County, Ohio’s Republican Party, told the Columbus Dispatch, “I guess I really actually feel we shouldn’t contort the voting process to accommodate the urban — read African-American — voter turnout machine.”

Those pushing these discriminatory vote suppression measures are increasingly saying the quiet part out loud, openly acknowledging that the goal of the measures is to subtract voters — particularly voters of color — from the electorate. In one instance a few months ago, an Arizona legislator made headlines when he said that he did not think everyone should vote.⁹² “Quantity is important but we have to look at quality as well,” said Rep. John Kavanaugh.⁹³ Meanwhile, Texas bill SB7 (poised to pass in the coming days) originally included language that it was meant to

<https://www.brennancenter.org/our-work/research-reports/digging-georgia-primary>.

⁸⁸ Sam Levine, *Black Voters’ Mail-In Ballots Being Rejected at Higher Rate*, *Guardian* (Oct. 17, 2020),

<https://www.theguardian.com/us-news/2020/oct/17/black-voters-mail-in-ballots-rejected-higher-rate-north-carolina>.

⁸⁹ Ga. Code Ann. § 21-2-418(a) (2021); *see also* Ga. S.B. 202 § 34 (2021).

⁹⁰ Kevin Morris, *Georgia’s Attempt to Limit out-of-Precinct Voting Will Hurt Black Neighborhoods*, Brennan Center for Justice (Mar. 16, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-attempt-limit-out-precinct-voting-will-hurt-black-neighborhoods>.

⁹¹ *See generally* Mark Niese, *How Georgia’s Voting Law Works*, *Atlanta Journal-Constitution* (May 6, 2021), <https://www.ajc.com/politics/how-georgias-new-voting-law-works/GF6PLR44PNESPKR5FXCBE7VEOY/>.

⁹² Timothy Bella, *A GOP Lawmaker Says the ‘Quality’ of a Vote Matters. Critics Say That’s ‘Straight out of Jim Crow.’*, *Washington Post* (Mar. 13, 2021), <https://www.washingtonpost.com/politics/2021/03/13/arizona-quality-votes-kavanaugh/>.

⁹³ Timothy Bella, *A GOP Lawmaker Says the ‘Quality’ of a Vote Matters. Critics Say That’s ‘Straight out of Jim Crow.’*, *Washington Post* (Mar. 13, 2021), <https://www.washingtonpost.com/politics/2021/03/13/arizona-quality-votes-kavanaugh/>.

protect the “purity of the ballot box,” a phrase from the state’s constitution used to justify all-white primaries in the Jim Crow era. It was removed only after it was called out during a contentious March 9 hearing on the bill.⁹⁴

E. Racial Discrimination in Redistricting

Racial discrimination in redistricting is widespread and well-documented. During the 2010 redistricting cycle, discriminatory conduct occurred not only in 2011-2012, when most states and localities drew their new districts, but also after the *Shelby County* decision.

a. Statewide Redistricting

Early in the decade, a three-judge federal court denied preclearance of Texas’ congressional redistricting plan after finding not only that the plan resulted in “retrogression,” making it demonstrably harder for minority voters to effectively participate in elections, but also that the record contained “more evidence of discriminatory intent than we have space, or need, to address.”⁹⁵ For example, in one district, lawmakers “consciously replaced many of the district’s active Hispanic voters with low-turnout Hispanic voters in an effort to strengthen the voting power of [the district’s] Anglo citizens.”⁹⁶

In a number of other states, maps were passed after *Shelby County* only later to be invalidated as discriminatory racial gerrymanders. Specifically, over the past five years, federal courts found that Alabama,⁹⁷ Virginia,⁹⁸ North Carolina,⁹⁹ and Texas¹⁰⁰ had engaged in illegal racial gerrymandering in violation of the Fourteenth Amendment in congressional or legislative redistricting. In North Carolina, for example, a federal court found that the redrawing of the state’s congressional map in 2011 was “a textbook example of racial predominance” that resulted in the

⁹⁴ Hannah Knowles, *A Texas Bill Drew Ire for Saying It Would Preserve ‘Purity of the Ballot Box.’ Here’s the Phrase’s History.*, Washington Post (May 9, 2021), <https://www.washingtonpost.com/history/2021/05/09/texas-purity-ballot-box-black/>.

⁹⁵ *Texas v. United States*, 887 F. Supp. 2d 133, 161 n.32 (D.D.C. 2012) (denying preclearance of both Texas’ 2011 state house and congressional plans under Section 5).

⁹⁶ *Id.* at 155. Because Texas did not obtain preclearance in time for the 2012 elections, a federal court in San Antonio ordered changes to Texas’ congressional plan that included creation of an additional minority coalition district in the Dallas-Fort Worth region and changes to other districts to address the deliberate retrogression of the electoral power of communities of color. *Perez v. Abbott*, 253 F. Supp. 3d 864 (W.D. Tex. 2017).

⁹⁷ *Alabama Legis. Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017) (finding that the use of race predominated in the drawing of 12 state legislative districts without sufficient justification).

⁹⁸ *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 180 (E.D. Va. 2018) (finding that the legislature failed to satisfy its burden to prove that the “predominant use of race was narrowly tailored to achieve a compelling state interest” in drawing 11 legislative districts); *Page v. Virginia State Bd. of Elections*, No. 13cv678, 2015 WL 3604029, at *16 (E.D. Virginia 2015) (finding that defendants failed to show that the congressional plan was narrowly tailored to further Virginia’s interest in complying with the Voting Rights Act).

⁹⁹ *Covington v. North Carolina*, 316 F.R.D. 117, 165, 176 (M.D.N.C. 2016) *aff’d*, 137 S. Ct. 2211 (2017) (finding that “race was the predominant factor motivating the drawing of all challenged districts”); *Harris v. McRory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) *aff’d sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017) (finding that “race predominated in CD 1 and CD 12” and “defendants have failed to establish that this race-based redistricting satisfies strict scrutiny”).

¹⁰⁰ *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (holding that “HD90 is an impermissible racial gerrymander”).

unconstitutional packing of Black voters into two districts.¹⁰¹

This discrimination has often been difficult to root out. In North Carolina, for example, a Brennan Center study found that the new congressional plan adopted by the state after the district court's racial gerrymandering ruling had virtually the same electoral effects as the original map.¹⁰²

In several of the above-referenced states, racial discrimination in redistricting was also used by states as a tool for partisan gerrymandering. For instance, one Brennan Center study showed that North Carolina and Virginia's schemes to pack Black voters into congressional districts, which were later found to be racial gerrymanders, also functioned to maximize overall Republican seats.¹⁰³ Another Brennan Center study found that Texas's enacted 2011 congressional map would have given Republicans a four-seat advantage in the state's congressional delegation by failing to create any new electoral opportunities for fast-growing communities of color who had accounted for 90 percent of Texas' population gain between 2000 and 2010.¹⁰⁴

The targeting of communities of color for partisan advantage is nothing new. Historically, both Democrats and Republicans have minimized the electoral power of communities of color in order to gain partisan advantages in map-drawing, particularly in the South, where there is continued residential segregation and a high correlation between race and political preference.¹⁰⁵ This discriminatory targeting is likely to continue—and be exacerbated—in the upcoming redistricting cycle in light of the Supreme Court's 2019 ruling that partisan gerrymandering claims are non-justiciable in federal court.¹⁰⁶

b. Local redistricting

Racial discrimination in redistricting is also well-documented at the local level, both as it relates to the drawing of district lines as well as in the use of at-large elections. Since *Shelby County* was decided, courts have found numerous instances where Section 2 of the Voting Rights Act was violated in connection with county and municipal redistricting—including in Kern County,

¹⁰¹ *Harris v. McRory*, 159 F. Supp. 3d 600, 611, 627 (M.D.N.C. 2016) *aff'd sub nom.* *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

¹⁰² Laura Royden, Michael Li, Yuriy Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice, 25 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Extreme_Gerrymandering_Midterm_2018.pdf.

¹⁰³ Laura Royden, Michael Li, Yuriy Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice, 23-25 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Extreme_Gerrymandering_Midterm_2018.pdf.

¹⁰⁴ Michael Li & Laura Royden, *Minority Representation: No Conflict with Fair Maps*, Brennan Center for Justice, 15-16 (2017), https://www.brennancenter.org/sites/default/files/2019-09/Minority-Representation-Analysis_0.pdf.

¹⁰⁵ Michael Li & Laura Royden, *Minority Representation: No Conflict with Fair Maps*, Brennan Center for Justice, 3 (2017), https://www.brennancenter.org/sites/default/files/2019-09/Minority-Representation-Analysis_0.pdf. Prior to the 1990s, Democrats in the South strategically divided Black communities among districts in order to protect white Democratic incumbents and prevent election of Republicans. *Id.*

¹⁰⁶ *Rucho v. Common Cause*, 139 S. Ct. 2484(2019).

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California;¹⁰⁷ Virginia Beach, Virginia;¹⁰⁸ East Ramapo Central School District, New York;¹⁰⁹ Sumter County, Georgia;¹¹⁰ Ferguson-Florissant School District, Missouri;¹¹¹ Albany County, New York;¹¹² and Yakima, Washington.¹¹³

Similarly, a review by the Brennan Center of preclearance letters issued by the Department of Justice from 2010 onward identified at least 13 instances where the Department denied preclearance to a proposed redistricting plan at the county or municipal level.¹¹⁴ For example, Green County, Georgia enacted a redistricting plan for its Board of Commissioners and Board of Education that eliminated both of the county’s Black ability-to-elect districts, which the Department of Justice concluded was “unnecessary and avoidable.”¹¹⁵

More recently, in the aftermath of *Shelby County*, both Galveston County, Texas and Pasadena, Texas revived redistricting plans that had previously been blocked by the Department of Justice.¹¹⁶ In Pasadena, a federal court later found that the adoption of this plan, which changed how members of the city council were elected, had been motivated by discriminatory animus.¹¹⁷

c. Attempts to Manipulate Who Counts in Redistricting

In recent years, there has also been a concerted effort, led by prominent conservative activists and donors, to persuade states and local governments to exclude children and non-citizens from the population base used to draw electoral districts, drawing on a 2016 Supreme Court decision that left open the question of whether drawing districts based on something other than total population would be constitutionally permitted.¹¹⁸ There is strong evidence that the goals of this effort are explicitly discriminatory. Thomas Hofeller, a leading Republican redistricting strategist who helped draw maps after the 2010 census in Alabama, Florida, North Carolina, and Texas that were later struck down by courts as discriminatory, wrote in a memo made public after his death

¹⁰⁷ *Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1144 (E.D. Cal. 2018) (concluding that “Latino voters in Kern County have been deprived of an equal opportunity to elect representatives of their choice, in violation of § 2 of the Voting Rights Act”).

¹⁰⁸ *Holloway v. City of Va. Beach*, 2021 WL 1226554 (E.D. Va. 2021) (finding that at-large election scheme violated Section 2 of the Voting Rights Act).

¹⁰⁹ *Clerveaux v. East Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021) (affirming lower court’s finding that school board’s use of an at-large system violated Section 2 of the Voting Rights Act).

¹¹⁰ *Wright v. Sumter Cnty. Bd. of Elections and Registration*, 979 F.3d 1282 (11th Cir. 2020) (affirming lower court’s finding that district map violated Section 2 of the Voting Rights Act).

¹¹¹ *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018) (affirming lower court’s finding that the school board election system violated Section 2 of the Voting Rights Act).

¹¹² *Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302 (N.D.N.Y. 2015) (finding that the county legislature’s districts violated Section 2 of the Voting Rights Act).

¹¹³ *Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014) (finding that the at-large city council election system violated Section 2 of the Voting Rights Act).

¹¹⁴ *Instances Where DOJ Preclearance Was Denied to Proposed Redistricting Plans*, Brennan Center for Justice (May 24, 2021), <https://www.brennancenter.org/our-work/research-reports/instances-where-doj-preclearance-was-denied-proposed-redistricting-plans>.

¹¹⁵ Objection Letter from Thomas E. Perez, Assistant Att’y Gener, to Greene Cnty., Ga., at 2 (Apr. 13, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120413.pdf.

¹¹⁶ Tomas Lopez, *Shelby County: One Year Later*, Brennan Center for Justice (June 24, 2014), https://www.brennancenter.org/sites/default/files/analysis/Shelby_County_One_Year_Later.pdf.

¹¹⁷ *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

¹¹⁸ *Evenwel v. Abbott*, 577 U.S. 937 (2016).

that drawing districts on the basis of adult citizens would be “advantageous to Republicans and non-Hispanic Whites [sic].”¹¹⁹

The most advanced of these efforts to change the population basis used to draw districts has been in Missouri. Lawmakers behind a recently adopted constitutional amendment contend that the amendment would allow the state to draw legislative districts based only on the adult citizen population.¹²⁰ Lawmakers and political consultants in Texas, Arizona, Florida, and Tennessee have also reportedly explored drawing legislative districts on the basis of adult citizens in the upcoming redistricting cycle.¹²¹

Even if the Supreme Court holds that drawing districts based on a subset of the population rather than total population is permitted under the U.S. Constitution, courts have long recognized that these alternative schemes often have an impermissible discriminatory impact on communities of color.¹²² What was true in the 1970s and 1980s is only truer now as the country has become more diverse, with a majority of children under 1 years old now non-white.¹²³

Indeed, a recent Brennan Center study found that communities of color would bear the brunt of a change in Missouri, if effectuated.¹²⁴ Our analysis found that 28 percent of Missouri’s Black population, 54 percent of its Asian population, and 54 percent of its Latino population would go uncounted if only adult citizens were considered in redistricting. This is in comparison to only 21 percent of Missouri’s white population that would be excluded. The result would be that whiter, rural areas would gain representation, while districts with large Black and sizeable Latino population in the Kansas City and St. Louis areas would need to be significantly reconfigured. Specifically, three of the four majority-Black senate districts in Missouri would be underpopulated under adult citizen apportionment.¹²⁵ The impact in other more diverse and demographically younger states, like Texas, would be even more extreme.

II. The Need for a New Voting Rights Act

The passage of the VRA in 1965 was a major step in addressing and remedying our country’s long history of racialized vote suppression. It delivered on the promise made at the

¹¹⁹ 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>.

¹²⁰ David Daley, *The Coming Redistricting Showdown in Missouri Will Be Huge*, The Hill, Nov. 10, 2020, <https://thehill.com/opinion/campaign/525007-the-coming-redistricting-showdown-in-missouri-will-be-huge>.

¹²¹ See Ari Berman, *Trump’s Stealth Plan to Preserve White Electoral Power*, Mother Jones, Jan/Feb 2020, <https://www.motherjones.com/politics/2020/01/citizenship-trump-census-voting-rights-texas/>; see also Justin Miller, *Republicans Come to Texas to Prepare for the 2021 Redistricting Battle*, Texas Observer, Aug. 20, 2019, <https://www.texasobserver.org/republicans-come-to-texas-to-prepare-for-the-2021-redistricting-battle/>.

¹²² See e.g. *Kilgarlin v. Martin*, 252 F.Supp.404, 411 (S.D. Tex. 1966) (finding that apportionment based on qualified electors was unconstitutional and a violation of the Voting Rights Act); *Terrazas v. Clements*, 581 F. Supp. 1319, 1328 (N.D. Tex. 1983) (finding in court-approved settlement that apportionment under the Texas Constitution based on “qualified electors rather than population dilutes the voting strength of racial and ethnic minorities”).

¹²³ William H. Frey, *Less Than Half of US Children Under 15 Are White, Census Shows*, Brookings Institute (June 24, 2019), <https://www.brookings.edu/research/less-than-half-of-us-children-under-15-are-white-census-shows/>.

¹²⁴ Yuriy Rudensky & Gabriella Limón, *Gerrymandering Away Missouri’s Future*, Brennan Center for Justice (Sept. 18, 2020), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-away-missouris-future>.

¹²⁵ Yuriy Rudensky & Gabriella Limón, *Gerrymandering Away Missouri’s Future*, Brennan Center for Justice (Sept. 18, 2020), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-away-missouris-future>.

passage of the 15th Amendment that Americans should be free from racial discrimination when voting. It provided safeguards to block new and mutating forms of vote suppression and the teeth to enforce those protections. Without these mechanisms over the last 8 years, discriminatory voting laws have proliferated. The VRAA would restore and modernize the protections against race discrimination that existed pre-*Shelby*, and move us closer to voting equality.

A. Preclearance Was an Effective Tool Against Discrimination in the Voting Process

The VRA's pre-*Shelby* preclearance requirement was highly successful in stopping voting discrimination in covered jurisdictions. It prevented discriminatory laws and practices from going into effect and deterred states from adopting new ones. Between 1998 and 2013, Section 5 blocked 86 discriminatory changes, including 13 in the 18 months before *Shelby County*.¹²⁶ It prompted jurisdictions to withdraw hundreds of potential discriminatory changes, and it dissuaded them from offering even more such changes in the first place.¹²⁷ The Supreme Court acknowledged in *Shelby County* that the VRA, when fully in force between 1965 and 2006, "proved immensely successful at redressing racial discrimination and integrating the voting process."¹²⁸

Without Section 5 preclearance, there is no longer an adequate check against discriminatory laws and practices. The policies implemented in the immediate aftermath of the *Shelby County* decision make clear that Section 5 was holding back discriminatory measures. Within hours of the Court's decision, Texas moved forward with implementing what was then the nation's strictest voter identification law, a law that had been previously denied preclearance because of its discriminatory impact.¹²⁹ Mississippi announced that it would move to implement its voter ID law—which had been held up in preclearance review—the same day the Court's decision was handed down.¹³⁰ The state had also previously submitted the policy for preclearance but had not obtained approval to implement it.¹³¹ The day after the *Shelby County* decision, Alabama moved forward with its strict voter ID law, after having postponed submitting it for preclearance for almost two years.¹³² And within two months after *Shelby County*, North Carolina enacted a law that imposed a strict photo ID requirement, cut back on early voting, and reduced the window for voter registration. The state legislature had initially been considering a narrower voter ID bill, but after the decision, a state senator admitted publicly, "now we can go with the full bill," rather than less a restrictive version.¹³³

¹²⁶ Wendy Weiser & Alicia Bannon, *An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice (2018),

<https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20Solutions%202018.%20Democracy%20Agenda.pdf>; Tomas Lopez, '*Shelby County*': *One Year Later*, Brennan Center for Justice (June 24, 2014),

<https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>.

¹²⁷ *Id.*; Tomas Lopez, '*Shelby County*': *One Year Later*, Brennan Center for Justice (June 24, 2014),

<https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>.

¹²⁸ *Shelby County v. Holder*, 570 U.S. 529, 548 (2013).

¹²⁹ Tomas Lopez, '*Shelby County*': *One Year Later*, Brennan Center for Justice (June 24, 2014),

<https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>.

¹³⁰ Press Release, Secretary of State of Mississippi, Statement on Supreme Court Voting Rights Act Opinion, June 25, 2013, <https://www.sos.ms.gov/About/Pages/Press-Release.aspx?pr=422>.

¹³¹ Tomas Lopez, '*Shelby County*': *One Year Later*, Brennan Center for Justice (June 24, 2014),

<https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>.

¹³² *Id.*

¹³³ *Id.*

The experience of Pasadena, Texas, where the Latino population increased from 19 percent in 1990 to more than 48 percent in 2010, is illustrative. Prior to *Shelby County*, the City of Pasadena had an eight-member city council, all elected from single-member districts.¹³⁴ Only days after *Shelby County*, the City began a process to change the composition of the council so that two members would be elected from at large districts. When asked why he was pushing the change, the City's mayor told reporters "because the Justice Department can no longer tell us what to do."¹³⁵ A federal judge later found that adoption of the arrangement had been motivated by discriminatory animus toward the city's fast-growing and increasingly politically effective Latino community.¹³⁶

The implication is clear: Section 5 shielded voters from retrogressive laws designed to limit voting rights. Since *Shelby County*, voters of color have disproportionately suffered under the laws implemented. With discriminatory voting practices proliferating in many states, this strong tool is again needed.

B. Preclearance Is a More Effective Tool Than After-the-Fact Litigation

Section 2 of the VRA, which allows private parties and the Justice Department to challenge discriminatory voting practices in court, remains in effect after *Shelby*, but it is no substitute for preclearance.

First, litigation is a far lengthier and more expensive process than preclearance, and lawsuits often do not yield results for voters until after an election is over.¹³⁷ Too often, this means that elections are conducted under a discriminatory law. The votes lost in those tainted elections cannot be reclaimed.

Our longstanding lawsuit against Texas' voter ID law, discussed above, illustrates this point.¹³⁸ After the state passed the law, the Department of Justice objected to it,¹³⁹ and a three-judge federal court prevented the state from implementing it.¹⁴⁰ That decision, however, was vacated after *Shelby County*, leading to years of litigation. Every court that considered the law found it to be discriminatory¹⁴¹ (and a federal district court found that it was intentionally discriminatory),¹⁴² but the law remained in effect until a temporary remedy was put in place for the

¹³⁴ *Patino v. City of Pasadena*, 230 F.Supp.3d 667, 681 (S.D. Tex. 2017).

¹³⁵ *Id.* at 722.

¹³⁶ *Id.* at 724.

¹³⁷ Objection Letter from Thomas E. Perez, Assistant Att'y Gen, to Keith Ingram, Dir. of Elections at Off. of the Tex. Sec'y of State (March 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_120312.pdf.

¹³⁸ The Brennan Center represented the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives, along with the Lawyers' Committee for Civil Rights Under Law and other co-counsel. The case was consolidated with several others.

¹³⁹ Objection Letter from Thomas E. Perez, Assistant Att'y Gen, to Keith Ingram, Dir. of Elections at Off. of the Tex. Sec'y of State (March 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_120312.pdf.

¹⁴⁰ *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012).

¹⁴¹ See *Texas NAACP V. Steen (consolidated with Veasey v. Abbott)*, Brennan Center for Justice (Sept. 21, 2018), <https://www.brennancenter.org/our-work/court-cases/texas-naacp-v-steen-consolidated-veasey-v-abbott>.

¹⁴² *Veasey v. Perry*, 71 F. Supp. 3d 627, 698-704 (S.D. Tex. 2014). The Court determined that the law had a discriminatory purpose under Section 2 of the VRA and the 14th and 15th Amendments because "racial discrimination was a motivating factor" in its passage. It reached this determination by looking at several factors. First, in six years of debate, no impact study or analysis was conducted to determine whether it would impair minority voting rights, despite legislative opponents' demands for one. Second, proponents of the law also departed from normal legislative procedure

November 2016 election.¹⁴³ In the meantime, Texans were forced to vote in several hundred federal, statewide, and local elections under discriminatory voting rules.¹⁴⁴ There are other examples of litigation victories well after voters suffered injury; for example, a challenge to the Alabama voter ID law mentioned above was filed on December 15, 2015.¹⁴⁵ The law was upheld by the Eleventh Circuit, which granted summary judgement to the state of Alabama, in July 2021.¹⁴⁶

Litigation is also inferior to preclearance because courts have used the Supreme Court’s so-called *Purcell* doctrine to deny relief when it is most needed—right before an election.¹⁴⁷ The *Purcell* doctrine provides that courts should avoid changing election rules in the period right before to an election because of the possibility of voter confusion and administrative difficulty. Under the doctrine, dozens of court rulings that removed barriers to voting during the pandemic were reversed in 2020, creating a perverse incentive for wrongdoers to adopt discriminatory changes close to an election to avoid judicial oversight. Preclearance would negate the opportunity to abuse this doctrine.

Moreover, the effectiveness of voting rights litigation can be seriously undermined in the future because of new and growing efforts within states to make it harder to challenge discriminatory voting laws in courts. A recent Brennan Center study found that state lawmakers in 26 states have introduced legislation targeting courts and threatening judicial independence; in 8 of those states, legislators have specifically targeted election cases.¹⁴⁸

C. The VRAA Will Thwart or Mitigate Future Discriminatory Voting Laws, Policies and Practices

The VRAA is designed to respond to the discriminatory practices I have described today, in a way that is responsive to the Supreme Court’s concerns. Notably, through its “geographic coverage” provisions, it modernizes the formula used to determine which jurisdictions will be subject to preclearance, drawing on a recent history of discrimination in voting. This updated formula targets discrimination as it exists in 2021.

to pass it, instead saying there was an “emergency” that required immediate resolution. Third, the law did not actually directly address the problems it claimed to address. For example, to fight non-citizen voting, the law approved the use of a small number of IDs, including some legally issued to non-citizens. Fourth and fifth, legislative history and contemporaneous statements showed that the bill’s proponents understood the impact the law would have on minority voters. Additionally, the Court found that the law produced a discriminatory result in violation of Section 2 of the VRA and constituted an unconstitutional poll tax.

¹⁴³ Michael Wines, *Texas Agrees to Soften Voter ID Law After Court Order*, N.Y. Times, Aug. 3, 2016, <https://www.nytimes.com/2016/08/04/us/texas-agrees-to-soften-voter-id-law-after-court-order.html>.

¹⁴⁴ Adam Liptak, *Supreme Court Allows Texas to Use Strict Voter ID Law in Coming Election*, N.Y. Times, Oct. 18, 2014, <https://www.nytimes.com/2014/10/19/us/supreme-court-upholds-texas-voter-id-law.html>.

¹⁴⁵ *Greater Birmingham Ministries v. Alabama*, 161 F. Supp. 3d 1104, 1107 (N.D. Ala. 2016).

¹⁴⁶ *Greater Birmingham Ministries v. Alabama*, 992 F.3d 1299 (11th Cir. 2021).

¹⁴⁷ See, e.g., *Veasey v. Perry*, 769 F.3d 890, 893-96 (5th Cir. 2014) (issuing stay and collecting cases).

¹⁴⁸ Patrick Berry et al., *Legislative Assaults on State Courts — 2021*, Brennan Center for Justice (May 19, 2021), <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2021>. See also, Patrick Berry and Alicia Bannon, *Lawmakers Are Targeting the Courts That Could Shoot Down Voter Suppression Laws*, Wash. Post (May 19, 2021), <https://www.washingtonpost.com/outlook/2021/05/19/voter-suppression-laws-states/>.

In addition, the VRAA introduces limits on measures that have historically been used to discriminate against voters of color.¹⁴⁹ This “known practices” provision uses the wealth of evidence accrued since passage of the original VRA to identify categories of changes that will be always subject to preclearance when made in jurisdictions that meet minority population thresholds. A report by the Mexican American Legal Defense and Educational Fund, Asian Americans Advancing Justice, and NALEO Educational Fund found that nearly two-thirds of preclearance denials between 1990 and 2013 related to changes in methods of election, redistricting, annexations, polling place relocations, and interference with language assistance.¹⁵⁰ Each of these types of laws, and several others, would be covered under the VRAA.

The VRAA also provides for notice to be given to the public when certain election changes are made in close proximity to federal elections, restores the federal observer program, and makes it easier for those challenging discriminatory voting laws in court to obtain relief.

These provisions are more than justified and well-tailored to the record of discrimination before Congress. In requiring preclearance in the places with greatest record of discrimination and for the measures most likely to be discriminatory, the VRAA “link[s] coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement,” as the Supreme Court in *Shelby County* said the Voting Rights Act must.¹⁵¹ The bill is well equipped to attack the kinds of discriminatory practices we have seen implemented over the last few years.

For more than fifty years, the VRA has been a principal engine of voting equality in our country. Congress has repeatedly recognized its importance and effectiveness, as well the ongoing need for its protections. Since its initial passage in 1965, Congress reauthorized, updated, and expanded the VRA four times.¹⁵² The law has always enjoyed broad bipartisan support. In 2006, Congress reauthorized the law’s preclearance provisions with unanimous support in the Senate and overwhelming bipartisan support in the House.¹⁵³ It should do so again. The American public, across all demographic groups, strongly supports the VRA; according to a 2014 poll, 81 percent of voters support the Act, and 69 percent support restoring it.¹⁵⁴ The VRAA is the best vehicle for accomplishing this.

D. Nationwide Preclearance Is Not a Viable Approach

Some have suggested that the VRAA should be replaced with a bill that institutes

¹⁴⁹ Voting Rights Advancement Act, H.R. 4, 116th Cong. §4(b) (2019).

¹⁵⁰ Erin Hastings, et al., *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Voters*, 14 (Nov. 2019), <https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf>.

¹⁵¹ *Shelby Cty. v. Holder*, 570 U.S. 529, 546 (2013).

¹⁵² *History of Federal Voting Rights Laws*, U.S. Dep’t of Just. (last updated July 28, 2017), <https://www.justice.gov/crt/history-federal-voting-rights-laws>.

¹⁵³ The 2006 reauthorization of the Voting Rights Act passed the U.S. House of Representatives 390-33, and the U.S. Senate 98-0. *Actions Overview: H.R. 9 – 109th Congress (2005-2006)*, U.S. Congress, <https://www.congress.gov/bill/109th-congress/house-bill/9/actions>; Press Release, White House, *Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006* (July 27, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html>.

¹⁵⁴ Press Release, Leadership Conf. on Civ. and Hum. Rts., *New Voting Rights Act Polling Shows Strong Bipartisan Support Nationwide* (Sept. 30, 2014), <https://civilrights.org/2014/09/30/new-voting-rights-act-polling-shows-strong-bipartisan-support-nationwide/>.

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nationwide preclearance for all voting changes. That novel proposal contemplates a powerful tool against voting discrimination across the country; unfortunately, it is not viable. The current approach—a modern geographic coverage formula for preclearance coupled with coverage of designated practices known to be discriminatory—is better tailored to address modern threats to voting, consistent with the Supreme Court’s guidance. Any gaps can and should be addressed through other legislative tools.

First, as discussed above, the current approach in the VRAA has been carefully designed to meet the conditions the Supreme Court articulated for congressional legislation enforcing the 14th and 15th Amendments. It is closely tailored to a wealth of evidence of modern discrimination in the voting process—including evidence presented before this Committee. As a result, I am confident that it is an appropriate exercise of Congress’s enforcement clause powers and will survive constitutional attacks.

There is strong reason to fear, on the other hand, that a nationwide preclearance approach would not survive a constitutional challenge before the current Supreme Court. Although the 14th and 15th Amendments were intended to give Congress broad powers to craft legislation to remedy and prevent discrimination in the voting process, the Supreme Court has interpreted that power more narrowly with respect to preclearance. Specifically, it has made clear that there needs to be a strong justification for Congress either to require states to submit proposed legislation for preclearance, or to treat states differently from one another.¹⁵⁵ To justify preclearance, the Court has further required Congress to develop a detailed record that provides strong evidence that the requirement targets real and current threats of unconstitutional discrimination in the voting process. Congress has done so with respect to jurisdictions and practices with a recent history of discrimination. Unfortunately, it would be extremely difficult for Congress to make a similar showing with respect to every voting jurisdiction and every voting practice nationwide. As Harvard Law School Professors Guy Uriel Charles and Lawrence Lessig wrote in a recent essay, a nationwide preclearance approach would therefore “certainly fail the Supreme Court’s test,” at least under the current Court.¹⁵⁶

Second, it would be difficult to administer a nationwide preclearance program, at least without a substantial expansion of capacity in the Department of Justice and the federal courts. What is more, the VRAA already includes new provisions that apply nationwide: the “known practices” provisions that require all jurisdictions that meet certain population thresholds to submit for preclearance any voting changes that fall within a list of practices Congress determined to be discriminatory. This provision has been closely tailored to address the strong evidence of discrimination before Congress.

To be clear, even if it were feasible, nationwide preclearance would not obviate the need for further congressional legislation to combat recent attacks on Americans’ freedom to vote. As explained below, the preclearance requirement is extremely powerful, but standing alone, it will not address the full range of the vote suppression problem facing the country. More would still be needed.

¹⁵⁵ See *Shelby County v. Holder*, 570 U.S. 529 (2013); *NAMUDNO v. Holder*, 557 US __ (2009).

¹⁵⁶ Guy-Uriel Charles & Lawrence Lessig, *The Democrats are Walking Right Into a Trap on Voting Rights*, Slate (May 24, 2021, 2:19 PM), <https://slate.com/news-and-politics/2021/05/democrats-joe-manchin-voting-rights-trap.html>.

III. The VRAA and the For the People Act

Although passing the VRAA is critical to protecting American voters, it is not enough. To fully protect voters and stop the current wave of voter suppression in the states, Congress must also pass and send to President Biden for his signature the For the People Act, comprehensive democracy reform legislation designated as H.R. 1 in the House and S. 1 in the Senate.

Division A of the For the People Act—which derives from the federal Voter Empowerment Act written and long championed by Rep. John Lewis¹⁵⁷—would set a basic federal foundation for voting access to fill critical gaps the VRAA cannot fully address. It would require states to modernize voter registration, including instituting same-day and automatic voter registration, along with strong protections to keep eligible voters from being purged from the rolls. It would also require states to allow two weeks of early voting (including on weekends) and no excuse voting by mail. And it would restore voting rights to formerly incarcerated citizens once they complete their sentences, increase legal protections against voter intimidation and deceptive practices intended to suppress the vote, and take a variety of other steps to protect the freedom to vote. Finally, it would ban partisan gerrymandering and take other steps to protect racial and language minorities in the congressional redistricting process. All of these provisions and many others are summarized in the Brennan Center’s online annotated guide to the bill.¹⁵⁸ (Divisions B and C of the For the People Act contain much needed campaign finance and ethics reforms, which the Brennan Center also strongly supports.¹⁵⁹)

The VRAA and the For the People Act address different facets of the problem of voter suppression. The VRAA focuses on race discrimination in voting and would restore and update the federal preclearance process. Its protections are largely prospective; they mostly cover *changes* in voting rules. Thus, a restrictive bill passed before the VRAA’s enactment would not be covered. The For the People Act would, on the other hand, override previously-enacted state laws and previously-adopted practices to the extent that they conflict with its provisions.

Moreover, the VRAA’s preclearance process is by its nature targeted, and it would not apply to every voting change in every jurisdiction. Its geographic coverage depends on statutory triggers that turn on the existence of documentary evidence of voting discrimination, such as successful lawsuits or consent decrees.¹⁶⁰ This means that places without a significant recent history of trying to restrict access to the ballot will not be covered until the violations add up.¹⁶¹

¹⁵⁷ See Voter Empowerment Act, H.R. 1275, 116th Congress (2019), <https://www.congress.gov/bill/116th-congress/house-bill/1275>.

¹⁵⁸ See *Annotated Guide to the For the People Act of 2021*, Tit. I, subtit. A, D, E, H, I, Tit. II, subtit. F, Brennan Center for Justice (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>.

¹⁵⁹ *Hearing on S. 1, The For the People Act, Before the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), https://www.rules.senate.gov/imo/media/doc/Testimony_Waldman.pdf.

¹⁶⁰ The Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. § 3 (2019), <https://www.congress.gov/bill/116th-congress/house-bill/4>.

¹⁶¹ For instance, in Iowa and Montana, both states that have long sought to making voting accessible, legislators have

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Some jurisdictions that have in recent years restricted access to voting, like Wisconsin and Ohio, have never previously been subject to preclearance.¹⁶² Unfortunately, attacks on voting rights are becoming increasingly common even in places that do not have a history of discrimination. The For the People Act fills those gaps since all of its provisions apply nationwide.

Finally, preclearance does not cover all discriminatory practices—including those that discriminate on bases other than race, such as laws targeting student voters. It also has not been effective at combatting increasingly common partisan and racial gerrymandering that targets communities of color based on their real or perceived voting patterns, at least when those gerrymanders did not reduce the number of districts where communities of color could elect their preferred candidates.¹⁶³ By banning partisan gerrymandering by statute, the For the People Act would help ensure that communities of color are not used as a tool for partisan advantage. Preclearance also depends on the willingness and ability of the Department of Justice to fully enforce the Voting Rights Act. While that has historically been a priority in both Democratic and Republican administrations, there have been instances where even blatantly discriminatory laws were precleared.¹⁶⁴

The For the People Act's safeguards provide another critical backstop against vote suppression. According to the Brennan Center's analysis, it would preempt many of the worst restrictive voting bills being proposed and enacted in states across the country this year.¹⁶⁵ Its protections would make it easier for everyone to vote, and virtually all of them address barriers that disproportionately affect Black, Latino, and Asian voters.

recently enacted a number of new restrictions, including tighter identification requirements in both states, limits on early voting in Iowa, and elimination of same-day voter registration in Montana. Stephen Gruber-Miller, *Gov. Kim Reynolds Signs Law Shortening Iowa's Early and Election Day Voting*, Des Moines Reg. (Mar. 9, 2021), <https://www.desmoinesregister.com/story/news/politics/2021/03/08/iowa-governor-kim-reynolds-signs-law-shortening-early-voting-closing-polls-earlier-election-day/6869317002/>; Amy Beth Hanson, *Montana Governor Approves Ending Same-Day Voter Registration*, Associated Press (Apr. 19, 2021), <https://apnews.com/article/elections-montana-voter-registration-voting-5ee83eb24b3339610cfaee3570a16e4f>; Brianne Pfannenstiel, *Branstad Signs Controversial Voter ID Bill into Law*, Des Moines Reg. (May 5, 2017), <https://www.desmoinesregister.com/story/news/politics/2017/05/05/branstad-signs-controversial-voter-id-bill-into-law/311568001/>.

¹⁶² In the 2010 cycle of redistricting, for example, the Department of Justice precleared legislative and/or congressional redistricting plans in Alabama, Florida, North Carolina, and Virginia that courts later found to be racial or partisan gerrymanders. See *Status of Statewide Redistricting Plans*, U.S. Department of Justice (2020), <https://www.justice.gov/crt/status-statewide-redistricting-plans>. See also *Jurisdictions Previously Covered by Section 5*, U.S. Dep't of Justice (Sept. 11, 2020), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>; Michael Powell & Peter Slevin, *Several Factors Contributed to 'Lost' Voters in Ohio*, Washington Post (Dec. 15, 2004), <https://www.washingtonpost.com/archive/politics/2004/12/15/several-factors-contributed-to-lost-voters-in-ohio/73aefa72-c8e5-4657-9e85-5ec8b2451202/>; Claire Campbell & Laura Schultz, *Wisconsin GOP's Voting Restrictions Impact Black Residents*, Wis. State J. (Oct. 26, 2020), https://madison.com/wsj/news/local/govt-and-politics/wisconsin-gops-voting-restrictions-impact-black-residents/article_1b3af4d2-d5a7-594b-87be-7a368001c32d.html.

¹⁶³ See *Annotated Guide to the For the People Act of 2021*, Tit. II, subtit. E, Brennan Center for Justice (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>.

¹⁶⁴ For instance, in 2005 political appointees at the Justice Department overruled career staff in the Civil Rights Division and precleared Georgia's new voter identification requirements, despite abundant evidence that they would disparately harm voters of color. See Dan Eggen, *Criticism of Voting Law Was Overruled*, Washington Post (Nov. 17, 2005) https://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504_pf.html.

¹⁶⁵ Gareth Fowler et al., *Congress Could Change Everything*, Brennan Center for Justice (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/congress-could-change-everything>.

None of this is to deny the critical importance of the Voting Rights Act—a necessary and proven tool to combat persistent discrimination in voting. (The For the People Act itself contains findings reaffirming Congress’s commitment to restore the Voting Rights Act by passing the VRAA.¹⁶⁶) Indeed, no single bill—not even a bill as comprehensive as the For the People Act—could envision and preempt every discriminatory voting restriction a state or locality might seek to pass. The VRAA ensures that Americans will still be protected from discriminatory voting changes that Congress did not foresee or include in the For the People Act. Both laws are necessary to guarantee all Americans a baseline level of voting access, free from discriminatory efforts to block their path to the voting booth or dilute or nullify their votes.

IV. Conclusion

Recent federal elections make clear that discriminatory voter suppression is an ongoing problem—a problem that will not subside without congressional action. The John Lewis Voting Rights Advancement Act will provide a powerful tool to combat discriminatory measures that inhibit voting rights for individuals across the country. And the For the People Act will establish baseline national rules for voting access for all Americans—rules that cannot be manipulated for discriminatory reasons or partisan gain. We urge Congress to act quickly and enact these historic pieces of legislation.

¹⁶⁶ *Annotated Guide to the For the People Act of 2021*, Tit. II, subtit. A, Brennan Center for Justice (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>.

Testimony of

Kevin Morris

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Hearing on Voting in America: The Potential for Polling Place Quality and Restrictions
on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot

Before the Committee on House Administration,
Subcommittee on Elections
In the United States House of Representatives

June 11, 2021

Thank you for the opportunity to testify in support of strengthening the Voting Rights Act (“VRA”), a law that has played a critical role in safeguarding American democracy against pernicious, persistent threats of discrimination in the election system. The Brennan Center for Justice at NYU School of Law strongly supports this Committee’s efforts to restore and revitalize the VRA, through the John Lewis Voting Rights Advancement Act (“VRAA”).

In the nearly 8 years since the coverage formula of the VRA was struck down in the *Shelby County v. Holder* decision,² access to the ballot box has become more challenging for racial and ethnic minorities. The *Shelby County* decision opened the door for many discriminatory practices, such as strict voter ID laws. This testimony focuses in particular on three ways in which polling place issues increase the cost of casting a ballot for racial and ethnic minorities.

1. Voters of color face much longer lines than white voters across the country. Counties with fewer electoral resources per voter—including fewer polling places—have seen the longest lines. These counties with the fewest resources also grew less white over

¹ The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. I am a quantitative researcher in the Voting Rights and Elections Program. I have authored numerous nationally recognized reports and articles on voting rights and elections. My work has been featured in numerous media outlets across the country, including the *New York Times*, the *Washington Post*, and the *Los Angeles Times*. My research has been published in such academic journals as the American Political Science Association’s flagship *American Political Science Review*. My testimony does not purport to convey the views, if any, of the New York University School of Law.

² *Shelby County v. Holder*, 570 U.S. 529, 556-57 (2013).

- approximately the last decade.³ Trends in population growth indicate that resource allocation will exacerbate—not mitigate—these wait time disparities. Worse still, state laws are ineffective at ensuring minimum resource requirements.
2. Polling place closures are especially harmful to turnout, and especially the turnout of racial and ethnic minorities. This was made clear during the Covid-19 pandemic, when Milwaukee, Wisconsin, closed the overwhelming majority of their polling places for the 2020 presidential primary. This caused a major decline in turnout—a decline that was even larger for Black voters.⁴
 3. These problems have likely been compounded by changes in voter purge practices attributable to the *Shelby County* decision. Following the invalidation of the VRA’s coverage formula, formerly covered jurisdictions began purging their voters at significantly higher rates. Within these jurisdictions, increased purge rates were associated with higher numbers of provisional ballots⁵—causing potential slowdowns for *all* voters in a given polling place, even if they were not personally removed due to a wrongful purge.⁶

The need for the VRAA has only increased in the aftermath of the 2020 election. The current atmosphere makes clear just how urgent the task of restoring the VRA is. In recent months, legislatures across the country have moved to enact the most sweeping restrictions on voting rights since Reconstruction ended.⁷ The result then was a century of Jim Crow rule.⁸ Now more than ever, a strong Voting Rights Act is necessary.

Disparities in Election Day Experiences

Over the past decade, scholars have consistently noted that racial minorities wait longer to cast their ballots on election day than white voters. The Brennan Center showed that voters of color waited in longer lines in 2018 by leveraging self-reported wait time in national survey data,⁹ and these disparities have also been demonstrated in past elections using other surveys,¹⁰

³ Hannah Klain et al., *Waiting to Vote: Racial Disparities in Election Day Experiences*, Brennan Center for Justice (2020), 10-11, https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf.

⁴ Kevin Morris and Peter Miller, “Voting in a Pandemic: COVID-19 and Primary Turnout in Milwaukee, Wisconsin,” *Urban Affairs Review*, (April 2021); Kevin Morris, *Did Consolidating Polling Places in Milwaukee Depress Turnout?*, Brennan Center for Justice (2020), <https://www.brennancenter.org/our-work/research-reports/did-consolidating-polling-places-milwaukee-depress-turnout>.

⁵ Brater et al., *Purges*, 26-27.

⁶ Lawrence Norden, *How to Fix Long Lines*, Brennan Center for Justice, (2013), https://www.brennancenter.org/sites/default/files/2019-08/Report_How_to_Fix_Long_Lines.pdf.

⁷ Amy Gardner, Kate Rabinowitz, and Harry Stevens, “How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters,” *Washington Post*, March 11, 2021, <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/>.

⁸ Alex Cohen and Wilfred U. Codrington III, *The Promise and Pitfalls of the 15th Amendment Over 150 Years*, Brennan Center for Justice (Feb. 3, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/promise-and-pitfalls-15th-amendment-over-150-years>.

⁹ Klain et al., *Waiting to Vote*, 6.

¹⁰ Charles Stewart III, “Waiting to Vote in 2012,” *Journal of Law and Politics* 28, no. 4 (Summer 2014): 457-58.

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cell-phone data,¹¹ and administrative data.¹² These gaps cannot be explained solely by differences in income, age, or education, and these gaps are large: our report showed that in 2018, Black and Latino voters were more than one-and-a-half times as likely to wait 30 or more minutes as white voters.¹³ Importantly, recent work indicates that the consequences of long lines are further-reaching than just inconvenience on Election Day: work from Stephen Pettigrew indicates that each hour spent waiting to vote reduces turnout in subsequent elections by around 1% and that non-white voters are seven times more likely to wait more than an hour to vote than white voters.¹⁴

In our recent report, we demonstrated that across the country, how election administrators allocate resources on Election Day is significantly related to voters' experiences.¹⁵ Using resource data collected by the U.S. Election Assistance Commission's Election Administration and Voting Survey and wait time data reported to the Cooperative Congressional Election Study, we demonstrated that jurisdictions with fewer resources per voter—including polling places, poll workers, and voting machines—saw longer lines on Election Day in 2018. Voters who lived in counties with the most overburdened polling places reported waiting, on average, more than twice as long as voters who lived in counties with the fewest voters per polling place—even after controlling for relevant sociodemographic characteristics.¹⁶ Our study, which was national in scope, joined other studies that found that polling place resources are important determinants of wait times at lower geographic scales.¹⁷ (I attach our report as Appendix A.)

Although voters of color continued to report longer wait times than white voters in 2018, they were not concentrated in counties with fewer polling places, poll workers, and voting machines per voter than white voters.¹⁸ Equalizing the *distribution* of polling place resources, in other words, is insufficient to equalize voters' experience on Election Day. To ensure equitable Election Day experiences and end the excessive lines and wait times faced by minority voters, administrators need to distribute relatively more and higher-quality resources in neighborhoods of color. This dynamic plays out especially clearly when it comes to language assistance. Our

¹¹ M. Keith Chen et al., "Racial Disparities in Voting Wait Times: Evidence from Smartphone Data," *Review of Economics and Statistics* (Dec. 11, 2020): 1–27.

¹² Christopher Famighetti, Amanda Melillo, and Myrna Pérez, *Election Day Long Lines: Resource Allocation*, Brennan Center for Justice (2014), 5-8, https://www.brennancenter.org/sites/default/files/2019-08/Report_ElectionDayLongLines-ResourceAllocation.pdf; David Cottrell, Michael C. Herron, and Daniel A. Smith, "Voting Lines, Equal Treatment, and Early Voting Check-In Times in Florida," *State Politics & Policy Quarterly* (August 2020).

¹³ Klain et al., *Waiting to Vote*, 8.

¹⁴ Stephen Pettigrew, "The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout," *Electoral Studies* 71 (June 2021): 1–17.

¹⁵ Klain et al., *Waiting to Vote*, 10-13.

¹⁶ Klain et al., *Waiting to Vote*, 4, 17.

¹⁷ Michael C. Herron and Daniel A. Smith, "Precinct Resources and Voter Wait Times," *Electoral Studies* 42 (June 2016): 249–63.

¹⁸ Using county-level measures can mask considerable differences in the *quality* of these resources: work from Barreto and colleagues shows that polling places in minority neighborhoods in Los Angeles in 2004 were lower quality, even if they were not fewer in number. Matt A. Barreto, Mara Cohen-Marks, and Nathan D. Woods, "Are All Precincts Created Equal?: The Prevalence of Low-Quality Precincts in Low-Income and Minority Communities," *Political Research Quarterly* 62, no. 3 (Sept. 2009): 445–58.

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research at the Brennan Center indicates that counties that have significant and growing populations of voters whose first language is not English, but have not met the threshold to provide language assistance under Section 203 of the VRA, usually provide little-to-no language assistance, leaving some communities under-resourced.¹⁹ Voters whose poll workers do not speak their language are at a serious disadvantage, even if their polling places are staffed with the same number of workers. Similarly, voters navigating ballots that are not written in their primary language may take longer to vote, leading to longer lines. Other research has demonstrated the importance of language access, showing that Section 203 coverage can increase turnout among citizens who speak little English.²⁰

It is important to note that while voters of color in 2018 did not live in jurisdictions with fewer resources per voter, the population growth of voters of color over the preceding decade was concentrated in jurisdictions where there were fewer resources. A ten-percentage point decrease in the share of a jurisdiction that was non-Hispanic white between 2009 and 2018 was associated with more than 100 additional votes cast per polling place on Election Day in 2018.²¹ The implications of these findings are stark: although voters of color already face the longest lines, on average, they make up a growing share of the jurisdictions with the fewest electoral resources. We also found that there were fewer resources available per voter in 2018 in areas where real incomes shrank or grew slowly, relative to areas with faster income growth.²² For example, our study shows that counties where real incomes grew had 470 voters per polling place on Election Day in 2018, compared to 590 for counties where real incomes declined.²³

There are two reasons why federal action is needed. First, although more than half of all states have statutes detailing minimum standards for the number of polling places and over a dozen have statutes setting minimum numbers of voting machines or poll workers per voter,²⁴ many states simply do not comply with their own laws. For example, my team uncovered evidence that more than 40% of precincts in Illinois had more registered voters assigned than allowed under state law, as did nearly a quarter of precincts in Michigan. According to our analysis, 31 out of South Carolina's 46 counties had more voters per machine than allowed under state law.²⁵ Even where county-level averages are in compliance, individual polling places can miss the minimum standards. For instance, although the *average* number of voters per machine in Hall County, Georgia, in 2018 did not exceed state maximums, the maximum was exceeded in 1 out of 3 precincts in that county. In short, states are not effective enforcers of their own resource requirements, and voters of color consistently pay the price in long lines.

¹⁹ Klain et al., *Waiting to Vote*, 9

²⁰ Daniel J. Hopkins, "Translating into Votes: The Electoral Impacts of Spanish-Language Ballots," *American Journal of Political Science* 55, no. 4 (2011): 814–30.; Bernard L. Fraga and Julie Lee Merseth, "Examining the Causal Impact of the Voting Rights Act Language Minority Provisions," *Journal of Race, Ethnicity, and Politics* 1, no. 1 (March 2016): 31–59.

²¹ Klain et al., *Waiting to Vote*, 24.

²² Klain et al., *Waiting to Vote*, 10.

²³ Klain et al., *Waiting to Vote*, 10–11.

²⁴ Klain et al., *Waiting to Vote*, 11.

²⁵ Klain et al., *Waiting to Vote*, 11.

The second reason is that state legislatures seem poised to take steps to exacerbate the problem. Around the country, the 2021 legislative session has been marked by a number of bills that threaten to reduce the number of polling places and undermine how they are resourced. Bills have been enacted in Iowa and Montana that will result in reduced polling place availability;²⁶ a bill that has already passed the House in Michigan would significantly increase the number of voters that can be assigned to one precinct;²⁷ and bills have passed in Georgia and Iowa that reduce early voting days or complicate absentee voting,²⁸ leading to more voters—and longer lines—on Election Day. Given our findings that fewer resources are linked with longer wait times,²⁹ this pattern is deeply troubling. Moreover, the new Georgia law will make waiting in these lines more uncomfortable by outlawing the provision of snacks and water to those waiting in line at a polling place to cast their ballot.³⁰

The implications of these bills are clear: voters of color in various states across the country will likely have to wait in even longer lines than in the past. A reinvigorated Voting Rights Act is necessary to address this issue.

Polling place consolidation also hurts turnout—especially for voters of color

Nowhere are the participatory consequences of election administration clearer than in the consolidation of polling places. There are few topics on which there is near-unanimity among political scientists, but the negative turnout effect of closing polling places is one of them.³¹ Advocates have similarly made the point that some communities, such as those who are part of a minority language group or who have difficulty marking their own ballots, face unique costs from closed polling places.³²

The lack of federal preclearance due to the *Shelby County* decision has allowed formerly covered jurisdictions to close polling places without federal oversight. And these jurisdictions did just that, closing some 1,700 polling places between 2012 and 2018, according to a study examining approximately 90% of the formerly covered jurisdictions.³³ Although some of these closures coincided with expansive voting reforms such as vote-center models, in which voters

²⁶ S.F. 413, 89th Gen. Assemb. (Iowa 2021); S.B. 196, 67th Leg. (Mont. 2021).

²⁷ H.B. 4134, 2021 Sess. (Mich. 2021).

²⁸ S.B. 202, 2021 Gen. Assemb. (Ga. 2021); S.F. 413, 89th Gen. Assemb. (Iowa 2021);

²⁹ Klain et al., *Waiting to Vote*, 10-13.

³⁰ S.B. 202, 2021 Gen. Assemb. (Ga. 2021).

³¹ Henry E. Brady and John E. McNulty, “Turning Out to Vote: The Costs of Finding and Getting to the Polling Place,” *American Political Science Review* 105, no. 1 (2011): 115–34; Enrico Cantoni, “A Precinct Too Far: Turnout and Voting Costs,” *American Economic Journal: Applied Economics* 12, no. 1 (January 2020): 61–85; Martha E. Kropf and David C. Kimball. *Helping America Vote: The Limits of Election Reform*. New York: Routledge, 2012); John McNulty, Conor Dowling, and Margaret Ariotti. “Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters,” *Political Analysis* 17, no. 4 (2009): 435–55; Moshe Haspel, and H. Gibbs Knotts. “Location, Location, Location: Precinct Placement and the Costs of Voting,” *Journal of Politics* 67, no. 2 (2005): 560–73.

³² Raúl Macías and Myrna Pérez, “Voters Need Safe and Sanitary In-Person Voting Options,” Brennan Center for Justice (March 31, 2020), <https://www.brennancenter.org/our-work/research-reports/voters-need-safe-and-sanitary-person-voting-options>.

³³ “Democracy Diverted: Polling Place Closures and the Right to Vote,” Leadership Conference on Civil and Human Rights, September 2019, <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

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can cast a ballot at any polling place in their county, the closures should have been subject to federal oversight given these jurisdictions' checkered histories. Indeed, there is some evidence that these closures may have had racially disparate impacts: a survey by the Native American Voting Rights Coalition found that nearly 1 in 3 Native Americans in South Dakota—where 30% of Native Americans live in counties formerly covered under Section 4(b) of the VRA³⁴—said that the distance needed to travel to the polls affected their decision to cast a ballot.³⁵

As our peer-reviewed research demonstrates, the disenfranchising potential of polling place consolidation was thrown into stark relief in the 2020 presidential primary when Milwaukee, Wisconsin, shuttered the overwhelming majority of their polling places.³⁶ The weeks leading up to the presidential primary in Wisconsin were marked by extreme confusion due to the coronavirus pandemic. Ultimately, the City of Milwaukee only opened 5 polling places for the presidential primary, compared with more than 180 on Election Day during recent elections, due to a severe shortage of poll workers. Local reporting made clear that the April 8 primary was plagued with very long lines in the city.³⁷ By contrast, the surrounding municipalities saw much less consolidation.³⁸ These surrounding municipalities, it should be noted, are far less Black than Milwaukee City: according to 2019 5-year ACS estimates, Milwaukee City is 38% Black, compared with just 5.6% of the rest of Milwaukee County.³⁹

To test the effects of the polling place consolidation on turnout, we compared the 2020 primary turnout of Milwaukee voters to the 2020 primary turnout of voters who were demographically very similar and lived just outside of the City's border—in other words, who lived in a municipality with substantially fewer closed polling places. Despite a surge in absentee voting, these closures still reduced turnout by nearly 9 percentage points.⁴⁰ As I show in Figure 1, this is not due to a different underlying propensity to vote: we selected suburban controls with identical turnout to the Milwaukee voters in the 2016 presidential and 2018 federal primaries. The turnout gap in 2020, we argue, is directly attributable to the consolidation of polling places. Even more troubling, the effects of these closures were larger for Black residents of

³⁴ U.S. Census Bureau. (2019). *2015-2019 American Community Survey 5-Year Estimates*, Table B03002, retrieved using the Census Bureau API.

³⁵ "Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota," The Native American Voting Rights Coalition, January 2018, <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf>; Peter Dunphy, "The State of Native American Voting Rights," Brennan Center for Justice (March 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/state-native-american-voting-rights>.

³⁶ Morris and Miller, "Voting in a Pandemic"; Morris, *Did Consolidating Polling Places in Milwaukee Depress Turnout?*

³⁷ Mary Spicuzza. "A Very Sad Situation for Voters': Milwaukeeans Brave Wait Times as Long as 2 1/2 Hours, Top Election Official Says," *Milwaukee Journal Sentinel*, April 7, 2020, <https://www.jsonline.com/story/news/politics/elections/2020/04/07/wisconsin-election-milwaukee-voters-brave-long-wait-lines-polls/2962228001/>.

³⁸ Morris and Miller, "Voting in a Pandemic."

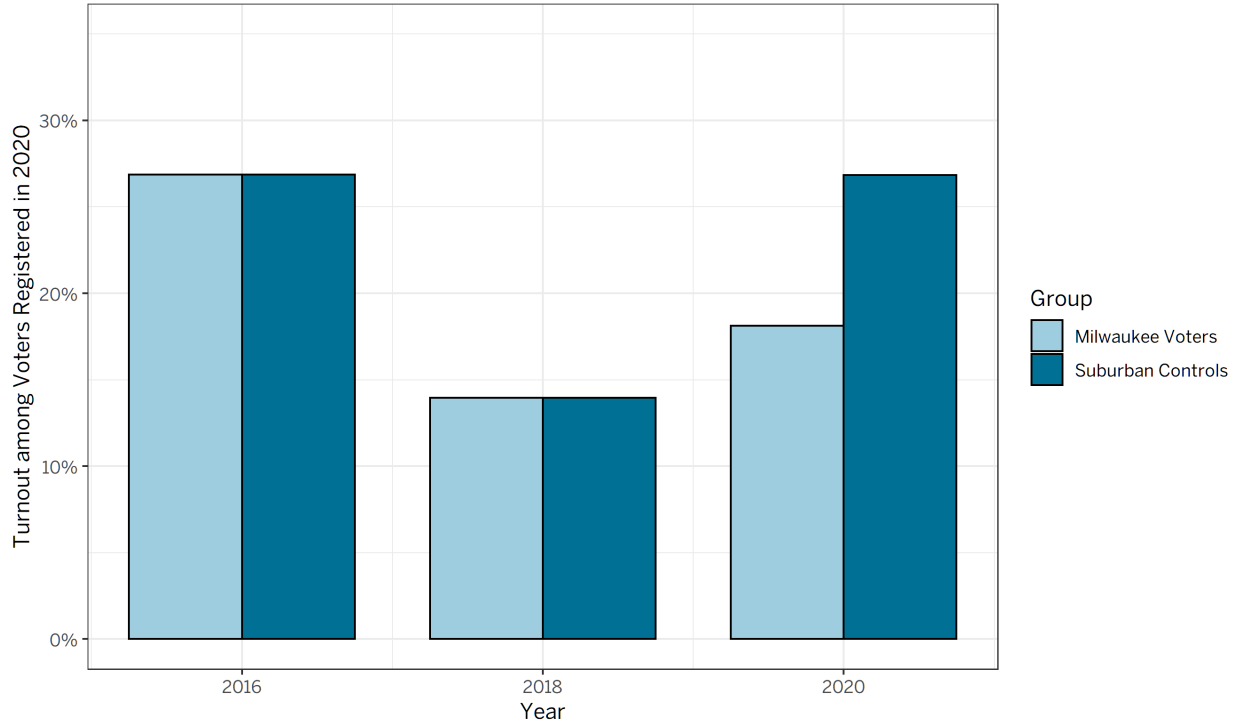
³⁹ U.S. Census Bureau. (2019). *2015-2019 American Community Survey 5-Year Estimates*, Table B03002, retrieved using the Census Bureau API.

⁴⁰ Morris and Miller, "Voting in a Pandemic."

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Milwaukee.⁴¹ This joins other research showing that polling place closures decrease turnout,⁴² especially for voters of color.⁴³ (I attach our study as Appendix B.)

Figure 1: Turnout in Primary Elections
Milwaukee Voters and Their Suburban Controls



Polling place accessibility in neighborhoods of color has come under attack from legislatures around the country this year—especially in states that were formerly covered under Section 4(b) of the Voting Rights Act. Georgia ultimately abandoned a plan to shutter polling places on Sundays, a day disproportionately popular among Black voters,⁴⁴ and Texas legislators attempted to pass a bill that would ban Sunday morning voting. Although the Texas bill has been temporarily defeated, the Governor has promised a special session for the purpose of passing restrictive voting legislation.⁴⁵ Texas similarly floated another provision, as part of the same omnibus election bill, which would have resulted in the relocation of polling places in urban counties away from minority neighborhoods and into whiter ones.⁴⁶ These Texas proposals join

⁴¹ Morris and Miller, “Voting in a Pandemic.”

⁴² Brady and McNulty, “Turning Out to Vote.”

⁴³ Cantoni, “A Precinct Too Far.”

⁴⁴ Kevin Morris. “Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most,” Brennan Center for Justice, March 6, 2021, <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>; Daniel Dale and Dianne Gallagher, “Fact check: What the new Georgia elections law actually does,” CNN (March 31, 2021), <https://www.cnn.com/2021/03/31/politics/fact-check-georgia-voting-bill-law-elections-explained/index.html>.

⁴⁵ Nick Corasaniti, “Texas Democrats Stymie G.O.P. Voting Bill, for Now,” *New York Times* (May 31, 2021), <https://www.nytimes.com/2021/05/31/us/politics/texas-voting-bill.html>.

⁴⁶ Alexa Ura, Chris Essig, and Madison Dong, “Polling Places for Urban Voters of Color Would Be Cut under Texas Senate’s Version of Voting Bill Being Negotiated with House,” *The Texas Tribune*, May 23, 2021, <https://www.texastribune.org/2021/05/23/texas-voting-polling-restrictions/>.

policies that were in place for the 2020 election, when each county was limited to a single drop box, regardless of population. According to one academic study, this disproportionately increased travel times for voters of color in Harris and Travis Counties.⁴⁷

Voter Purges in the Wake of *Shelby County*

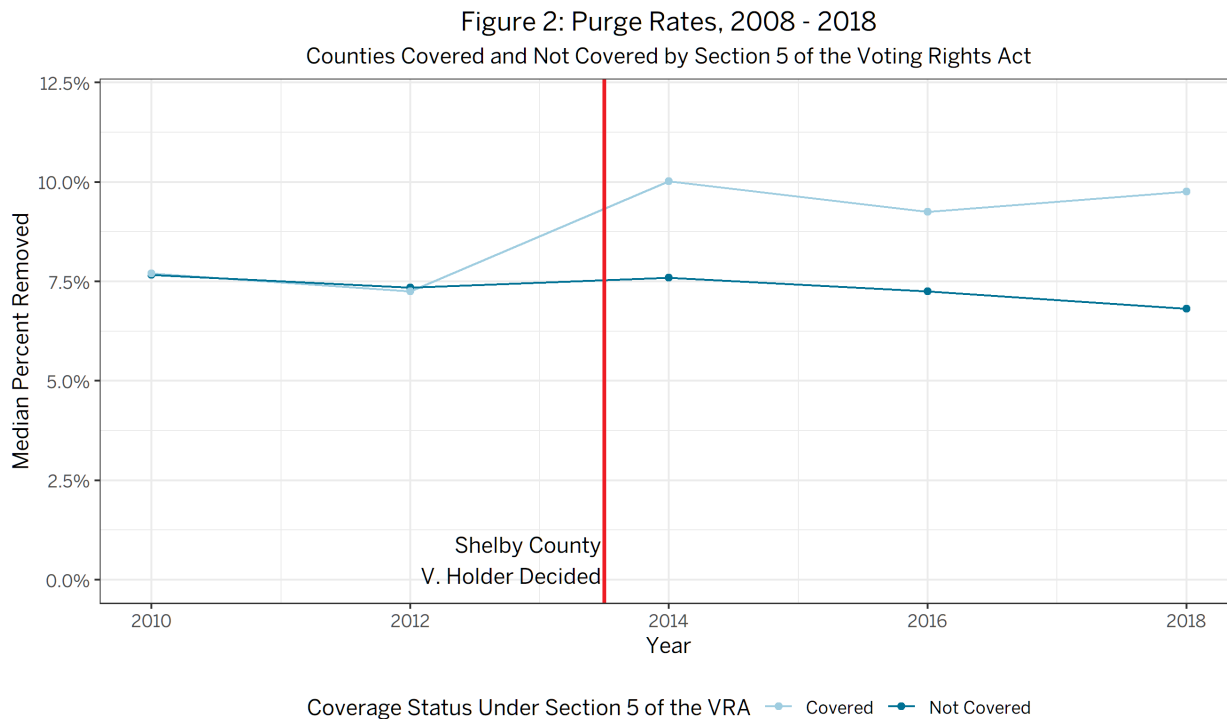
Increases in voter purges attributable to the *Shelby County* decision have also led to a deterioration in polling place quality in formerly covered jurisdictions. Before the coverage formula in Section 4(b) of the VRA was struck down, covered and uncovered jurisdictions removed—or “purged”—voters from their rolls at roughly comparable rates. For the two-year election cycles ending in 2014 and 2016, however—which includes the election cycle in which *Shelby County* was decided—there was a significant uptick in purge rates among jurisdictions formerly covered by the VRA’s preclearance condition.⁴⁸ This gap in purge rates continued through the 2018 election cycle.⁴⁹ Put differently, this means that the end of the preclearance condition did not result in a one-time “catch up” of voter list maintenance, but rather ushered in a new era in which the voter list maintenance practices of formerly covered jurisdictions were substantially more aggressive than other demographically-similar jurisdictions that were not covered under the VRA. Figure 2 makes this trend clear: as late as 2018, the median purge rate in formerly covered jurisdictions was 40% higher than in jurisdictions not covered at the time of the *Shelby County* decision. Simply put, *Shelby County* allowed and effected increased voter purges in counties with demonstrated histories of racially discriminatory voting rules. (I attach these studies in Appendix C.)

⁴⁷ Alex Karner and Dana Rowangould, “Access to Secure Ballot Drop-off Locations in Texas,” *Findings* (May 2021), <https://findingspress.org/article/24080-access-to-secure-ballot-drop-off-locations-in-texas>.

⁴⁸ Brater et al., *Purges*, 3-4.

⁴⁹ Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

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Source: EAVS

Notes: Shows data for counties reporting in each period.
Each point corresponds to 2-year election cycle ending with that year's federal election.

While voter purges are problematic for the eligible citizens who are wrongly removed from the rolls and are often thus prevented from participating, their inaccurate removals also cause ripples in their communities. When voters who show up at their polling place are not on the rolls, poll workers may spend additional time trying to locate the voter's record, causing delays for others in line. Moreover, purged voters are often required to cast provisional ballots if the poll worker cannot confirm their eligibility to vote. Indeed, we found that among formerly covered jurisdictions, provisional ballot rates were higher where the purge rate was higher.⁵⁰ Because voters who cast provisional ballots can take twice as long to cast their ballot as traditional voters,⁵¹ these purges can create cascading delays for all voters in a given polling place.⁵²

The increased voter purge rates attributable to *Shelby County*, then, affect both the individuals incorrectly removed and their neighbors. It bears repeating that the jurisdictions that saw their purge rates increase after *Shelby County* were covered under Section 4(b) of the VRA because they had a history of discrimination in voting practices. While our national analysis found that *overall* purge rates increased in formerly covered jurisdictions, there is some evidence

⁵⁰ Brater et al., *Purges*.

⁵¹ Douglas M. Spencer and Zachary S. Markovits, "Long Lines at Polling Stations? Observations from an Election Day Field Study," *Election Law Journal: Rules, Politics, and Policy* 9, no. 1 (March 2010): 3–17; Norden, *How to Fix Long Lines*.

⁵² Norden, *How to Fix Long Lines*, 2.

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of racialized voter purges at the individual level in specific jurisdictions. For example, in North Carolina, we found that voters of color were overrepresented among voters purged between September 2016 and May 2018 in 90 of the state’s 100 counties.⁵³ (I attach this study in Appendix C.) Similarly, recent research by Huber et al. on voter purges in Wisconsin also finds that voters of color are particularly vulnerable to inaccurate removals.⁵⁴

Conclusion

The Voting Rights Act was dealt a severe blow in the Supreme Court’s 2013 decision in *Shelby County v. Holder*.⁵⁵ For the past 8 years, racial and ethnic minorities have lacked the full protections of the Voting Rights Act meant to ensure that states make good on the central promise of our democracy: that each citizen be given a voice in her government. The nullification of the preclearance formula has left racial minorities unprotected even as they face longer lines on Election Day and are seeing their population swell in under-resourced counties; it has allowed election administrators to unilaterally consolidate polling places, resulting in turnout declines that are especially acute among communities of color; and increased purge rates in formerly covered jurisdictions have led to more time-consuming provisional ballots being cast. In the aftermath of the 2020 election, the stakes are higher than ever before, as hundreds of regressive bills have been introduced in statehouses across the country, with at least 22 bills enacted into law.⁵⁶ The John Lewis Voting Rights Advancement Act is needed to ensure that racial and ethnic minorities can participate fully and equally in the American democratic project.

⁵³ Kevin Morris and Myrna Pérez, *Florida, Georgia, North Carolina Still Purging Voters at High Rates*, Brennan Center for Justice (October 1, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/florida-georgia-north-carolina-still-purging-voters-high-rates>.

⁵⁴ Gregory A., Huber et al., “The Racial Burden of Voter List Maintenance Errors: Evidence from Wisconsin’s Supplemental Movers Poll Books,” *Science Advances* 7, no. 8 (February 17, 2021): 7-8.

⁵⁵ *Shelby County*, 570 U.S. at 556-57.

⁵⁶ *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

**TESTIMONY OF
MICHAEL WALDMAN
PRESIDENT
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
HEARING ON
VOTING IN AMERICA: A NATIONAL PERSPECTIVE ON
THE RIGHT TO VOTE, METHODS OF ELECTION,
JURISDICTIONAL BOUNDARIES, AND REDISTRICTING
THE COMMITTEE ON HOUSE ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS
U.S. HOUSE OF REPRESENTATIVES**

June 24, 2021

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Chair Butterfield, Ranking Member Steil, and members of the Subcommittee:

Thank you for the opportunity to testify in support of strengthening the Voting Rights Act (“VRA”).¹ The Act was perhaps the most effective civil rights law in our nation’s history. It should be modernized and restored to full strength. To that end, the Brennan Center strongly supports the John Lewis Voting Rights Advancement Act (“VRAA”).

The House considers this measure at a time of crisis for our democracy. Legislatures across the country are moving to enact curbs on voting, proposed laws that uncannily target people of color. The VRAA would restore the strength of the Voting Rights Act. It would modernize its coverage formula and do so in a way reflecting the Supreme Court’s strictures. Once again, any future legislatures that seek to enact racially discriminatory voting rules would find their actions subject to the strictest of legal scrutiny. The VRAA works in tandem with H.R.1, the For the People Act, which would set national standards and preempt existing discriminatory state laws. The VRAA is vital to restoring the promise of equality in representation in our democracy.

I. VOTER SUPPRESSION SINCE *SHELBY COUNTY*

The Voting Rights Act was widely considered the most effective civil rights legislation in our nation’s history.² It ended Jim Crow era voting practices and blocked new discriminatory voting measures. For nearly five decades, the law’s central feature was the Section 5 preclearance provision, which required states with a history of discriminatory voting practices to obtain advance approval from the federal government for changes to voting rules. Between 1998 and 2013, Section 5 blocked 86 discriminatory changes, including 13 in the 18 months before *Shelby County*.³ It prompted jurisdictions to withdraw hundreds of potential discriminatory changes, and it dissuaded them from offering even more such changes in the first place.⁴ As recently as 2006, Congress reauthorized the VRA with overwhelming bipartisan support.⁵ President George W. Bush proudly signed it into law.⁶

¹ The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to strengthen the systems of democracy and justice so they work for all Americans. Michael Waldman, president of the Center since 2005, is the author of *The Fight to Vote* (Simon & Schuster: 2016). Brennan Center experts and staff contributed to the preparation of this written testimony. Special thanks to Alan Beard, Andrew Garber, Maya Efrati, and Sam Linn. This testimony does not purport to convey the views, if any, of NYU School of Law.

² *The Effect of the Voting Rights Act*, U.S. Department of Justice (June 19, 2009), <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0>.

³ Wendy Weiser & Alicia Bannon, *An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice (2018), <https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20Solutions%202018.%20Democracy%20Agenda.pdf>; Tomas Lopez, ‘*Shelby County*’: *One Year Later*, Brennan Center for Justice, June 24, 2014, <https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>.

⁴ Tomas Lopez, ‘*Shelby County*’: *One Year Later*, Brennan Center for Justice (June 24, 2014), <https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>.

⁵ The vote was unanimous in the Senate and 390–33 in the House. See U.S. Senate, “H.R.9 Vote Summary,” July 20, 2006, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212; U.S. House of Representatives, “Final Vote Results for Roll Call 374,” July 13, 2006, <http://clerk.house.gov/evs/2006/roll374.xml>.

⁶ White House, Press Release, *Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006* (July 27, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html>.

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In 2013, in *Shelby County v. Holder*, the U.S. Supreme Court gutted this crucial piece of the Voting Rights Act.⁷ Chief Justice Roberts argued that times had changed, and that the coverage formula in Section 4 was thus out-of-date. In doing so, the Court removed a key tool, passed by Congress under its authority, to protect voters. In dissent, Justice Ginsburg famously responded, “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.” What we have seen since is a relentless storm, bearing down on communities of color and the most vulnerable.

EIGHT YEARS OF IMPACT

Shelby County loosed a flood of discriminatory voting rules, contributing to a now nearly decade-long trend in the states of restrictive laws, which the Brennan Center has documented extensively.⁸ (I attach Appendix B as prior testimony the Brennan Center submitted to Congress on this topic. A compendium of our documentation can be found in Appendix A).

Voter Purges

Improper purges disenfranchise legitimate voters and cause confusion at the polls. States can take steps to clean up voter rolls, but abusive purges can remove duly registered citizens, often without their knowledge. Alarming, purges have surged in states once subject to federal oversight under the VRA.⁹ States once covered by Section 5 saw purges at a 40 percent higher rate than the rest of the country.¹⁰ This disparity continued over several election cycles, suggesting something much more troubling than mere cleanup of voter lists. All told, more than 17 million voters were removed from the rolls nationwide between 2016 and 2018 alone.¹¹ (I attach a copy of this analysis in Appendix C.)

Polling Place Closures

Polling place closures in jurisdictions previously covered by Section 5 of the VRA — often jurisdictions with high minority populations — have become another major barrier to access. A study by the Leadership Conference on Civil and Human Rights uncovered nearly 1,700 polling place closures in jurisdictions formerly covered by Section 5, despite a

⁷ *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁸ See, e.g., Wendy Weiser and Max Feldman, *The State of Voting 2018*, Brennan Center for Justice (2018), <https://www.brennancenter.org/our-work/research-reports/state-voting-2018>; Brennan Center for Justice, *New Voting Restrictions in America*, (Nov. 19, 2019), <https://www.brennancenter.org/new-voting-restrictions-america>; *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 26, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>; Wendy Weiser and Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice (2011), <http://www.brennancenter.org/publication/voting-law-changes-2012>.

⁹ Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice (July 20, 2018), 3–5, <https://www.brennancenter.org/publication/purges-growing-threat-right-vote>.

¹⁰ Kevin Morris, *Purge Rates Remain High*, Brennan Center (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

¹¹ *Id.*

significant rise in voter turnout during the same period.¹² Polling place closures often disproportionately harm voters of color. During the 2020 presidential primary election in Wisconsin, for example, Milwaukee closed all but five of its 182 polling places. A peer-reviewed academic journal article by the Brennan Center’s Kevin Morris and Peter Miller found that this closure depressed turnout by more than 8 percentage points overall — and by about 10 percentage points among Black voters.¹³

Strict Voter ID Laws

Since *Shelby County*, several states have enacted new strict voter ID laws that target voters of color.¹⁴ In 2013, at least six states—Alabama, Mississippi, North Carolina, North Dakota, Virginia, and Texas—implemented or began to enforce strict photo ID laws, most of which had previously been blocked by the Department of Justice due to their discriminatory impact. Federal courts in at least four states have found that strict voter ID laws were racially discriminatory, including the Texas and North Carolina laws. The Fourth Circuit Court of Appeals famously said that North Carolina’s law disenfranchised Black voters “with almost surgical precision.”¹⁵

Curbs on Voter Registration

Since *Shelby County*, some states have imposed new restrictions on the voter registration process that take aim at organizing efforts to boost participation by voters of color and low-income voters. For example, in 2017, Georgia enacted an “exact match” law mandating that voters’ names on registration records must perfectly match their names on approved forms of identification.¹⁶ A Brennan Center analysis of the policy found that, in the months leading up to the 2018 election, roughly 70 percent of Georgia voters whose registrations were blocked by the policy were people of color.¹⁷ Similarly, in 2018, Tennessee responded to a major get-out-the-vote effort by enacting a law inflicting civil penalties on groups that employed paid canvassers if they submitted incomplete or inaccurate voter registration forms.¹⁸

¹² *Democracy Diverted: Polling Place Closures and the Right to Vote*, The Leadership Conference Education Fund (Sept. 2019), 10, <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

¹³ Kevin Morris & Peter Miller, *Voting in a Pandemic: COVID-19 and Primary Turnout in Milwaukee, Wisconsin*, Urb. Aff. Rev., (Apr. 13, 2021), <https://journals.sagepub.com/doi/full/10.1177/10780874211005016>; Kevin Morris, *Did Consolidating Polling Places in Milwaukee Depress Turnout?*, Brennan Center for Justice (June 24, 2020), <https://www.brennancenter.org/our-work/research-reports/did-consolidating-polling-places-milwaukee-depress-turnout>.

¹⁴ See, e.g., *Election 2016: Restrictive Voting Laws by the Numbers*, Brennan Center for Justice (Sept. 28, 2016), <https://www.brennancenter.org/our-work/research-reports/election-2016-restrictive-voting-laws-numbers#legalchallengestorestrictivephotoidlaws>.

¹⁵ *N.C. State Conf. NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

¹⁶ Jonathan Brater & Rebecca Ayala, *What’s the Matter with Georgia?*, Brennan Center for Justice (Oct. 12, 2018), <https://www.brennancenter.org/blog/whats-matter-georgia>.

¹⁷ *Id.*

¹⁸ Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, Brennan Center for Justice (January 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression>; Amy Gardner, *How a Large-Scale Effort to Register Black Voters Led to a Crackdown in Tennessee*, Washington Post (May 24, 2019), https://www.washingtonpost.com/politics/how-a-large-scale-effort-to-register-black-voters-led-to-a-crackdown-in-tennessee/2019/05/24/9f6cee1e-7284-11e9-8be0-ca575670e91c_story.html.

Cutbacks to Early Voting

Multiple states have also reduced early voting days or sites used disproportionately by voters of color. In Ohio and Florida, for example, legislatures eliminated early voting on the Sundays leading up to Election Day after African American and Latino voters conducted successful “souls to the polls” voter turnout drives on those days.¹⁹ Federal courts have struck down early voting cutbacks in North Carolina, Florida, and Wisconsin because they were intentionally discriminatory.²⁰ Similar efforts continue today.

TODAY’S VOTER SUPPRESSION WAVE

Today, controversy rages across the country as state legislators move to enact restrictive voting laws, the most significant such effort since the Jim Crow era. Make no mistake: if the Voting Rights Act were at full strength, it would have blocked or blunted much of this push for voter suppression laws. As restored by the VRAA, a strong law would apply to future abusive voting law changes. In states with a significant history of discrimination in voting, new changes in vote by mail, early voting, and voter registration, among others, could not take effect without being precleared by the Justice Department or a federal court in Washington, D.C. This extra layer of scrutiny would make a huge difference to protect citizens’ right to vote.

As of May 14, 2021, lawmakers had introduced more than 389 bills in 48 states to curb the vote.²¹ This is more than four times the number of restrictive bills introduced just two years before.²² Crucially, these are not backbenchers tossing a bill in the hopper in the hope of getting a good day on Twitter. Already, at least 17 states have enacted new laws with provisions that restrict access to voting.

As in previous eras, these laws and proposals purport to be racially neutral. In fact, often they precisely target voters of color.

- Georgia’s recent law made it harder to vote by mail. For years, Georgia voters cast ballots in this way without controversy. (Indeed, Republican legislators took the lead in enacting no-excuse absentee balloting sixteen years ago.) More recently, however, Black voters began to use vote by mail in greater numbers. (Democrats overall in 2020 used

¹⁹ See David G. Savage, “Federal Judge Orders Ohio to Keep Its Early Balloting in Place,” *Los Angeles Times*, August 31, 2012, <https://www.latimes.com/politics/la-xpm-2012-aug-31-la-pn-ohio-early-voting-judge-20120831-story.html>; Michael C. Herron & Daniel A. Smith, “Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355,” 11 *Election Law Journal* 331, <https://www.liebertpub.com/doi/pdf/10.1089/elj.2012.0157>.

²⁰ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016); *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016); *Federal Court Blocks Discriminatory Early Voting Changes in Florida*, Brennan Center for Justice (Aug. 21, 2012), <https://www.brennancenter.org/our-work/analysis-opinion/federal-court-blocks-discriminatory-early-voting-changes-florida>.

²¹ *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>.

²² *Voting Laws Roundup 2019*, Brennan Center for Justice (July 10, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2019>.

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vote by mail at a markedly higher rate than before. Republicans were more likely to choose to vote on Election Day.²³) Now the legislature has enacted a measure to curb voting by mail. Its original proposal, which was changed only days before a final vote, would actually have effectively ended vote by mail for those under 65.²⁴

- Georgia’s newly enacted law also prohibits voters from casting a ballot at the wrong precinct unless it is after 5:00PM, thus barring out-of-precinct voting for most of Election Day.²⁵ A Brennan Center analysis of the legislation found that Black voters live in neighborhoods with much higher rates of in-county moves and thus are more likely to be hit especially hard by this new rule.²⁶
- Other current proposals would make it less likely that voters of color can have their ballots counted — including signature matching requirements, vote-by-mail ID mandates, and postage costs.²⁷ Several studies have found that absentee ballots cast by voters of color have in recent years been rejected at much higher rates than those cast by their white counterparts.²⁸ A study published in the *Election Law Journal* found that in Florida, in both the 2018 and 2016 federal elections, absentee ballots returned by African American and Latino voters were twice as likely to be rejected as those cast by white voters.²⁹ Studies regarding Florida’s 2020 presidential primary,³⁰ Georgia’s 2020 primaries,³¹ and North Carolina’s 2020 primaries have resulted in similar findings.³²
- In Texas, the legislature was minutes away from enacting new voting rules when Democratic lawmakers walked out and denied a quorum. Governor Greg Abbott has promised to call a special session of the legislature to complete its task.³³ As the

²³ Charles Stewart III, *How We Voted in 2020: A First Look at the Survey of the Performance of American Elections. Version 0.1*, 3-4 MIT Election Data + Science Lab (Dec. 15, 2020), <http://electionlab.mit.edu/sites/default/files/2020-12/How-we-voted-in-2020-v01.pdf>.

²⁴ Mark Niesse, “Georgia voting limits bill may preserve Sunday and no-excuse absentee voting,” *Atlanta Journal-Constitution*, March 18, 2021, <https://www.ajc.com/politics/georgia-voting-limits-bill-may-preserve-sunday-and-no-excuse-absentee/YZF24BYJG5C73KXKARJ6RMFHUY/>.

²⁵ Ga. Code Ann. § 21-2-418(a) (2021); see also Ga. S.B. 202 § 34 (2021).

²⁶ Kevin Morris, *Georgia’s Attempt to Limit out-of-Precinct Voting Will Hurt Black Neighborhoods*, Brennan Center for Justice (Mar. 16, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-attempt-limit-out-precinct-voting-will-hurt-black-neighborhoods>.

²⁷ *Voting Laws Roundup: March 2021*, Brennan Center for Justice (April 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021#rbe>.

²⁸ See, e.g., Sophie Chou & Tyler Dukes, *In North Carolina, Black Voters’ Mail-In Ballots Much More Likely to Be Rejected Than Those From Any Other Race*, ProPublica (Sept. 23, 2020), <https://www.propublica.org/article/in-north-carolina-black-voters-mail-in-ballots-much-more-likely-to-be-rejected-than-those-from-any-other-race>.

²⁹ Anna Baringer et al., *Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus*, *Election Law Journal: Rules, Politics, and Policy*, Vol. 19, No. 3 (Sept. 17, 2020), <https://www.liebertpub.com/doi/full/10.1089/elj.2020.0658>.

³⁰ Daniel A. Smith, *Vote-By-Mail Ballots Cast in Florida*, ACLU of Florida (Sept. 19, 2018), <https://www.aclufi.org/en/publications/vote-mail-ballots-cast-florida>.

³¹ Kevin Morris, *Digging Into the Georgia Primary*, Brennan Center for Justice (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/digging-georgia-primary>.

³² Sam Levine, “Black Voters’ Mail-In Ballots Being Rejected at Higher Rate,” *The Guardian* (Oct. 17, 2020), <https://www.theguardian.com/us-news/2020/oct/17/black-voters-mail-in-ballots-rejected-higher-rate-north-carolina>.

³³ Amanda Ruis, “Special session expected after Texas House Democrat walkout over SB 7,” *Fox 7 Austin*, May 31, 2021, <https://www.fox7austin.com/news/special-session-expected-after-texas-house-democrat-walkout-over-sb-7>.

Washington Post aptly summarized, the “measure would have made it harder to vote by mail, empowered partisan poll watchers and imposed stiff penalties on election administrators.”³⁴ It would also prohibit drive-up voting and other steps used heavily by Black and Latino voters in 2020.³⁵

- In Arizona, the Governor recently signed a law that makes it harder for voters to vote by mail. Any voter who did not cast an early voting ballot in two consecutive election cycles will be removed from the permanent early voting list.³⁶ The Arizona House has also advanced a bill that would require county recorders to refer voters who return a mail ballot with a mismatched signature to prosecutors. This would turn common, harmless mistakes into potential crimes.³⁷ These policies would be subject to preclearance under Section 5 but for the Court’s ruling in *Shelby County*.

II. BEHIND THE BIG LIE

Why are these laws being pushed? Proponents claim they are needed to thwart “voter fraud” and preserve “election integrity.” These arguments are animated by the Big Lie — the notion that the 2020 election was stolen, riddled with fraud. Such assertions animated the push for discriminatory voting laws well before Donald Trump’s most outlandish claims.

The animus behind these fraud claims becomes clearer when we realize these assertions are, simply, *false*. They are a conspiracy theory, often one with barely disguised racial subtext. Such theories cannot be allowed to guide policy, let alone justify laws that would make it harder for our fellow Americans to vote.

Voter fraud in the United States is vanishingly rare. You are more likely to be struck by lightning than to commit in-person voter impersonation, for example.³⁸ A comprehensive analysis from the *Washington Post* found only 31 credible instances of voter fraud between 2000 and 2014 — out of one billion ballots cast.³⁹

These conspiracy theories have been debunked repeatedly. In 2016, Donald Trump insisted, “I won the popular vote if you deduct the millions of people who voted illegally,” and

³⁴ Elise Viebeck, “Here’s where GOP lawmakers have passed new voting restrictions around the country,” *Washington Post*, June 2, 2021, <https://www.washingtonpost.com/politics/2021/06/02/state-voting-restrictions/#texas-1>

³⁵ *Id.*

³⁶ *Arizona Governor Signs Bill Restricting Mail Voting*, Brennan Center for Justice (May 11, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/brennan-center-statement-arizona-governor-signs-bill-restricting-mail>.

³⁷ Marian K. Schneider, *Arizona Bill Would Refer Mismatched Mail Ballot Signatures to Prosecutors*, Brennan Center for Justice (May 28, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/arizona-bill-would-refer-mismatched-mail-ballot-signatures-prosecutors>.

³⁸ Brennan Center for Justice, *The Myth of Voter Fraud* (March 20, 2021), <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud>; *Debunking the Voter Fraud Myth*, Brennan Center for Justice (January 31, 2017), <https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth>.

³⁹ Justin Levitt, “A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast,” *Washington Post*, August 6, 2014, <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>.

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claimed there were three to five million illegal voters.⁴⁰ He established a commission to prove his claim. It collapsed without finding any evidence.⁴¹ In 2020, the election was confirmed to be smoothly run and extraordinarily secure.⁴² Indeed, the Department of Homeland Security deemed the election the “most secure in American history.”⁴³ In the frenzy of lawsuits brought to overturn the results, 60 courts considered claims, and rejected them. Trump’s attorneys, under oath, were forced to confess repeatedly they could press no charges of fraud. Federal Judge Stephanos Bibas, appointed by President Trump, ruled definitively on behalf of a three-judge appeals court panel: “Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”⁴⁴ Attorney General William Barr confirmed that there was no widespread election fraud.⁴⁵ Privately to the president, he used a more colorful barnyard epithet.⁴⁶

Ultimately, such fraud fears provide a pretext for discriminatory laws. This did not start with Donald Trump. Rather, over years, the myth has built momentum as the basis for a drive to curb the vote. Few remember it now, for example, but Attorney General Alberto Gonzales was forced to resign in a scandal in 2007 when he fired U.S. Attorneys after they refused to prosecute nonexistent voter fraud.⁴⁷ The roar about voter fraud had one significant consequence: it made it seem to be a real problem. If not, why was everyone talking about it? The courts have allowed fear of admittedly rare misconduct, largely imagined, to justify laws that affect actual voters.⁴⁸ Election integrity is important, of course. But efforts to protect it should target actual problems (such as cyber security risks). Instead, the clamor about illegal voting is used to justify measures that target not misconduct, but voters and their rights. Going back over a century, claims about fraud especially target lower income, lower status voters. In the 19th century such assertions

⁴⁰ Cleve R. Wootson, Jr., “Donald Trump: ‘I won the popular vote if you deduct the millions of people who voted illegally,’” *Washington Post*, November 27, 2016, <https://www.washingtonpost.com/news/the-fix/wp/2016/11/27/donald-trump-i-won-the-popular-vote-if-you-deduct-the-millions-of-people-who-voted-illegally/>.

⁴¹ Ed Pilkington, “Trump Scraps His Widely Denounced Commission on Voter Fraud,” *The Guardian*, January 4, 2018, <https://www.theguardian.com/us-news/2018/jan/03/donald-trump-election-integrity-commission-dissolved-kobach>

⁴² Jen Kirby, *Trump’s own officials say 2020 was America’s most secure election in history*, *Vox*, November 13, 2020, <https://www.vox.com/2020/11/13/21563825/2020-elections-most-secure-dhs-cisa-krebs>; Christina A. Cassidy, Anthony Izaguirre, and Julie Carr Smyth, *States cite smooth election, despite Trump’s baseless claims*, *Associated Press*, November 11, 2020, <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-general-elections-elections-4060823b211ce91959b26f46efb73636>.

⁴³ Cybersecurity and Infrastructure Security Agency, Department of Homeland Security, Joint Statement From Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees, November 12, 2020, <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

⁴⁴ Aaron Blake, *The Most Remarkable Rebukes of Trump’s Legal Case: From the Judges He Hand-Picked*, *Washington Post*, December 14, 2020, <https://www.washingtonpost.com/politics/2020/12/14/most-remarkablerebuked-trumps-legal-case-judges-he-hand-picked/>.

⁴⁵ Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, *Associated Press*, December 1, 2020, <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>.

⁴⁶ Jonathan Swan, *Trump Turns on Barr*, *Axios*, January 18, 2021, <https://www.axios.com/trump-barr-relationshipoff-the-rails-b33b3788-e7e9-47fa-84c5-3a0016559eb5.html>.

⁴⁷ Steven Lee Myers and Philip Shenon, “Attorney General Alberto R. Gonzales Resigns,” *The New York Times*, August 24, 2007, <https://www.nytimes.com/2007/08/27/washington/27cnd-gonzales.html>; Dana Milbank, “Maybe Gonzales Won’t Recall His Painful Day on the Hill,” *Washington Post*, April 20, 2007, <https://www.washingtonpost.com/wp-dyn/content/article/2007/04/19/AR2007041902571.html?nav=E8>; *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, U.S. Department of Justice (2008), <https://www.justice.gov/opr/page/file/1206601/download>.

⁴⁸ See, e.g., *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

targeted Black voters in the South, and Catholic and immigrant voters in the North. Today — spoken or implied — such claims target voters of color and immigrants.

Increasingly, the racial subtext of the Big Lie pokes to the surface. Those who push discriminatory measures have begun to openly acknowledge that the goal of the measures is to subtract voters — particularly voters of color — from the electorate. In one instance a few months ago, an Arizona legislator made headlines when he said that he did not think everyone should vote.⁴⁹ At a hearing on a proposed voting bill, Rep. John Kavanaugh explained, “Quantity is important but we have to look at quality as well.”⁵⁰ Meanwhile, Texas bill SB7 originally included language that it was meant to protect the “purity of the ballot box,” a phrase from the state’s constitution used to justify all-white primaries in the Jim Crow era.⁵¹ It was removed only after it was called out during a contentious May 9 debate on the bill.⁵²

III. CONGRESS SHOULD SWIFTLY PASS THE VRAA

The VRAA is designed to respond to discriminatory practices in a way that is responsive to the Supreme Court’s concerns. Notably, through its “geographic coverage” provisions, it modernizes the formula used to determine which jurisdictions will be subject to preclearance, drawing on a recent history of discrimination in voting. This updated formula targets discrimination as it exists in 2021.

In addition, the VRAA introduces limits on measures that have historically been used to discriminate against voters of color.⁵³ This “known practices” provision uses the wealth of evidence accrued since passage of the original VRA to identify categories of changes that will always be subject to preclearance when made in jurisdictions that meet minority population thresholds. A report by the Mexican American Legal Defense and Educational Fund, Asian Americans Advancing Justice, and NALGO Educational Fund found that nearly two-thirds of preclearance denials between 1990 and 2013 related to changes in methods of election, redistricting, annexations, polling place relocations, and interference with language assistance.⁵⁴ Each of these types of laws, and several others, would be covered under the VRAA.

The VRAA also provides for notice to be given to the public when certain election changes are made in close proximity to federal elections, restores the federal observer program, and makes it easier for those challenging discriminatory voting laws in court to obtain relief.

⁴⁹ Timothy Bella, *A GOP Lawmaker Says the ‘Quality’ of a Vote Matters. Critics Say That’s ‘Straight out of Jim Crow,’* Washington Post, March 13, 2021, <https://www.washingtonpost.com/politics/2021/03/13/arizona-quality-votes-kavanaugh/>.
⁵⁰ *Id.*

⁵¹ S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021); TEX. CONST., art. 6, § 4.

⁵² Hannah Knowles, “A Texas Bill Drew Ire for Saying It Would Preserve ‘Purity of the Ballot Box.’ Here’s the Phrase’s History,” *Washington Post*, May 9, 2021, <https://www.washingtonpost.com/history/2021/05/09/texas-purity-ballot-box-black/>.

⁵³ Voting Rights Advancement Act, H.R. 4, 116th Cong. §4(b) (2019).

⁵⁴ Erin Hustings, et al., *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Voters*, 14 (2019), <https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf>.

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These provisions are more than justified and well-tailored to the record of discrimination before Congress. In requiring preclearance in the places with the greatest record of discrimination and for the measures most likely to be discriminatory, the VRAA “link[s] coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement,” as the Supreme Court in *Shelby County* said the Voting Rights Act must.⁵⁵ The bill is well equipped to attack the kinds of discriminatory practices we have seen implemented over the last few years.

Congress has the constitutional authority to enact this measure. The vast trove of evidence gathered by this committee and others in Congress provides ample constitutional justification for this legislation. The text, structure, and history of the relevant constitutional provisions confirm Congress’ preeminent role in protecting the right to vote. The Fifteenth Amendment’s Section 2 makes clear “Congress shall have power to enforce this article by appropriate legislation.” Similarly, the Fourteenth Amendment states, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” The drafters of these amendments chose their words carefully. They chose not to rely on the courts alone to enforce equal protection or voting rights.

The VRAA would work in tandem with another piece of legislation: the For the People Act (H.R.1). H.R.1 sets national standards for fair, secure, and accessible elections; the VRAA is targeted at the pernicious problem of states with a history of racial discrimination in voting. H.R.1 would override existing discriminatory state laws; the VRAA would establish preclearance for future such laws. Both are vitally needed to strengthen our democracy.

John Lewis with countless others brought the Voting Rights Act into being through physical and moral courage. He worked ardently on this legislation, and it carries his name and honors his legacy. He was intimately involved, too, in writing H.R.1. When it counted—in the streets or in the halls of Congress — John Lewis acted to move our nation toward its best self, toward its democratic ideals. This generation of lawmakers can do the same by restoring the Voting Rights Act in his name and protecting the right to vote for all Americans.

⁵⁵ *Shelby County*, 570 U.S. at 546.

Testimony of

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Hearing on the Implications of *Brnovich v. Democratic National Committee*
and Potential Legislative Responses

Before the House Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
In the United States House of Representatives

July 16, 2021

Thank you for the opportunity to testify about the Supreme Court’s recent decision in *Brnovich v. Democratic National Committee* and how Congress should respond. The Brennan Center for Justice at NYU School of Law is disappointed by the damage the Court has done yet again to one of the greatest pieces of legislation this body ever passed, the Voting Rights Act of 1965. We share this committee’s concern about the impact the Court’s decision will have and applaud your prompt consideration of the proper congressional response. It will take the efforts of many—organizers, advocates, and voters themselves—to ensure that voting rights are protected in the wake of the decision. But only Congress can provide voters the legal protections they need, restore the Voting Rights Act to its former glory, and pass the For the People Act to set a new standard for open elections, free from discrimination, across the country.

I. Congress must once again meet the moment and protect voting rights.

In 1965, our democracy was in crisis. In fact, for its entire history our nation had failed to truly live up to the ideals of democracy and political equality so powerfully written into the Declaration of Independence and Preamble to our Constitution. And for almost a century, it had failed to live up to the promise of the Fifteenth Amendment, that the right to vote would not be denied or abridged on account of race. But in 1965, thanks to the heroism and sacrifice of so many, including your former colleague, Congressman John Lewis, the world finally saw these failures as a crisis. And Congress met the moment, passing a transformative law that finally set the country on a path towards an inclusive democracy that provided people of color and Native Americans the opportunity to participate equal to that of their fellow citizens.²

¹ The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. I am the Acting Director of the Voting Rights and Elections Program. My testimony does not purport to convey the views, if any, of the New York University School of Law.

² Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

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In 1982, after the Supreme Court undermined the effectiveness of that law with a decision that made it harder to challenge discriminatory voting rules and electoral and districting schemes by requiring proof of discriminatory intent,³ Congress met the moment once again. With the 1982 amendments to the Voting Rights Act, Congress made clear that it intended the law to reach all race discrimination, not just the rules that were plainly motivated by bigotry.⁴ The Supreme Court recognized this call to eliminate racism from our elections, applying the “totality of the circumstances” test Congress provided for evaluating whether state action produced discriminatory results in *Thornburg v. Gingles* in 1986 and for decades thereafter.⁵

Now, in 2021, our democracy is once again in crisis. Voters, who turned out in record numbers last fall, are facing a backlash wave of restrictive voting laws more significant than we have seen since before the Voting Rights Act was enacted.⁶ As of June 21, 17 states had enacted 28 laws restricting voting access.⁷ And this is just the latest wave in an almost decade-long trend of restrictive action following the Supreme Court’s 2013 *Shelby County v. Holder* decision.⁸ In fact, the Court has issued a series of decisions that have dealt blow after blow to voting rights, and *Brnovich* is just the latest.⁹ While the *Shelby County* decision helped open the floodgates of efforts to roll back voting rights, the *Brnovich* decision weakened one of the tools we might otherwise use to stem the tide. As it has before, Congress must meet this moment.

II. The *Brnovich* opinion undermines Congress’s goals of addressing race discrimination in voting and does harm to Section 2’s effectiveness.

In its opinion in *Brnovich*, the Court’s majority ignores the clear intention of Congress in crafting Section 2: to provide a powerful tool to root out race discrimination in voting and representation. The majority also departs from decades of precedent enforcing Section 2 according to that intention. The opinion does not provide a new rule to guide the application of Section 2 by lower courts, but instead creates a new set of so-called “guideposts” that are poorly designed to identify and eradicate discriminatory policies and practices.¹⁰

³ See *Mobile v. Bolden*, 446 U.S. 55 (1980).

⁴ “This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2.” S. Rep. 97-417, at 2 (1982).

⁵ *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986).

⁶ *Voting Laws Roundup: May 2021* (hereinafter “Voting Laws Roundup”), Brennan Center for Justice, accessed July 13, 2021, available at <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

⁷ *Id.*

⁸ *The Effects of Shelby County v. Holder*, Brennan Center for Justice, (Aug. 6, 2018), available at <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.

⁹ See, e. g., *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).

¹⁰ *Brnovich v. Democratic National Committee*, 594 U.S. ___, slip. op. at 13 (2021).

A. The Court’s majority departs from longstanding precedent that was guided by congressional intent and aimed at identifying discriminatory results.

The first mistake of the *Brnovich* majority was to shift the focus of its analysis away from what Congress intended: an evaluation of how voting rules interact with the persistent effects of race discrimination on our society.

The 1982 Amendments to Section 2 clarified that the law was meant to reach voting rules and electoral and districting schemes that produced discriminatory results, even if there was not definitive proof that they were motivated by a discriminatory purpose.¹¹ More specifically, Congress wanted to ensure that the law accounted for the way that facially neutral policies interacted with the real-life effects of race discrimination. Congress designed the “totality of the circumstances” test to require courts to consider “the impact of the challenged practice and the social and political context in which it occurs” by conducting “a searching practical evaluation of the ‘past and present reality.’”¹²

Four years later, when the Supreme Court first interpreted the amended Section 2 in *Thornburg v. Gingles*, the Court embraced guidance from the Senate Judiciary Committee report on the 1982 amendments.¹³ That report gave some examples of the circumstances that might be relevant when evaluating allegedly discriminatory results—examples that have become known as the “Senate Factors.”¹⁴ The Senate Factors guided courts in conducting the “intensely local appraisal” of how race functioned in the jurisdiction in order to determine whether a disparate impact could in fact be deemed a “discriminatory result,” or if it was merely a statistical anomaly.

After *Gingles*, federal courts consistently used this non-exclusive list of relevant factors to assess both “vote dilution” and “vote denial” claims¹⁵ under Section 2.¹⁶ In “vote denial” cases, courts applied the Senate Factors to assess whether a disparate burden on a protected class of voters imposed by a challenged policy or practice is “caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.”¹⁷

In *Brnovich*, the majority departs substantially from this precedent—and from the congressional intent that spawned it. The majority acknowledges that certain of the Senate

¹¹ S. Rep. 97-417, at 2 (1982).

¹² *Id.* at 30, 67.

¹³ *Gingles*, 478 U.S. at 44.

¹⁴ S. Rep. No. 97-417, at 28, 29.

¹⁵ The *Gingles* decision arose in the context of a claim of “vote dilution,” i.e., a claim that a policy diluted the power of minority votes. By contrast, a claim of “vote denial,” like the claim in *Brnovich*, alleges that a policy placed a burden on the ability of minority voters to vote.

¹⁶ See, e.g., *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); *Mich. APRI v. Johnson*, 833 F.3d 656 (6th Cir. 2016); *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016).

¹⁷ See, e.g., *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

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Factors may be relevant to applying the discriminatory results test, and expressly states that it is not creating a new test for evaluating claims,¹⁸ but then ignores the Senate Factors entirely in its own analysis. The opinion expressly downplays the importance of taking the persistent “differences in employment, wealth, and education” created by centuries of discrimination into account,¹⁹ focused instead on a set of five new “guideposts.”²⁰

Contrary to the central mission of the “totality of the circumstances” test, these guideposts are not focused on the past and present race discrimination in the jurisdiction or how the challenged voting rule interacts with it to produce racially disparate burdens on voting.

B. The Court’s new “guideposts” are poorly designed and will make it difficult to identify and root out race discrimination in voting.

Due in large part to their departure from congressional intent, the Court’s guideposts are simply poor tools for evaluating whether voting policies and practices produce discriminatory results.

The first guidepost is “the size of the burden imposed by a challenged voting rule.”²¹ The majority says that Section 2’s prohibition of the “denial or abridgment” of the right to vote does not reach what are merely the “usual burdens of voting.”²² But in applying this guidepost, the majority uses it to bat away what are actually severe burdens for some voters as “mere inconveniences.” While dropping a ballot into the mail may impose nothing more than the “usual burdens of voting” on many voters, there was ample evidence in the record in this case that this was not true for many others, including, in particular, Native American voters. Only 18% of Native American voters in Arizona’s rural counties receive home mail delivery, many have to travel long distances to get to a mailbox or a polling place, and many do not have cars to help them make those trips.²³ As Justice Kagan notes, “what is an inconsequential burden for others is for these citizens a severe hardship.”²⁴

The second guidepost is “the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982.”²⁵ The majority uses 1982 as the benchmark for evaluating the burden imposed by a voting rule because that was the year Congress last amended Section 2. Of course, Congress was not satisfied with voting practices in 1982—that is why it amended Section 2 to make it a more effective tool for challenging those practices. Consider what it would mean to cement the status quo of 1982 into place: in the presidential election that preceded the 1982 amendments to Section 2, there was a 12.3-point gap between the

¹⁸ *Brnovich*, slip. op. at 20.

¹⁹ *Id.* at 25.

²⁰ *Id.* at 13.

²¹ *Id.* at 16.

²² *Id.*

²³ *Id.* at 36 (Kagan, J., dissenting).

²⁴ *Id.* at 38.

²⁵ *Id.* at 17.

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turnout rates of white, non-Hispanic citizens and Black citizens.²⁶ By 2016, this gap had shrunk to 5.9 points—and in 2012, Black voters actually turned out at a higher rate than their white counterparts.²⁷ Unfortunately, racial gaps in registration and voting persist today, especially in midterm years, but we have taken great strides in the last forty years.

Moreover, looking to the practices in place in 1982 is simply not a helpful standard for rooting out discrimination today. Thankfully, voting practices have come a long way since 1982, when early voting was essentially non-existent and election officials could scarcely imagine electronic pollbooks and online voter registration. But new and improved systems can still discriminate against voters of color, and asking whether a system existed in 1982 does not answer the question of whether it provides voters of color an equal opportunity to vote today.

The third guidepost is the “size of any disparities in a rule’s impact on members of different racial or ethnic groups.”²⁸ The majority says that “[s]mall disparities are less likely than large ones to indicate that a system is not equally open.”²⁹ But the Court’s application of this principle, if taken to its logical extreme, would allow a truly discriminatory policy to stand so long as it did not disenfranchise too many voters. Additionally, while the Court provides no bright line for what sort of disparity is “too small” to raise a concern, it suggests a willingness to turn a blind eye to policies that disenfranchise thousands of voters. Because the out-of-precinct voting policy at issue in Arizona results in the disenfranchisement of less than one percent of Arizonans, the majority dismisses the fact that thousands of voters of color and Native American voters in Arizona had their ballots thrown out at a rate twice that of white voters.³⁰

The fourth guidepost requires courts to “consider the opportunities provided by a State’s entire system of voting when assessing the burden imposed by a challenged provision.”³¹ The majority’s application of this guidepost seems to allow a jurisdiction to impose restrictions on one method of voting so long as there is another available. This logic relies on an unrealistic view of how burdens impact voters. A voter whose ballot is tossed out because she showed up at the wrong polling place on Election Day does not suffer less because she could have voted early. And restrictions on a method of voting that is particularly accessible for certain voters because of the realities of their lives—like ballot collection is for rural Native American voters in Arizona—are not canceled out by the availability of other, less accessible methods.

The fifth and final guidepost is “the strength of the state interests served by a challenged voting rule.”³² As phrased, this guidepost is not exactly new. In fact, it is built into one of the Senate Factors, which requires an assessment of whether the connection between the state

²⁶ See U.S. Census Bureau, *Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964 to 2018*, available at <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html>.

²⁷ See *id.*

²⁸ *Brnovich*, slip. op. at 18.

²⁹ *Id.*

³⁰ *Id.* at 10.

³¹ *Id.* at 18.

³² *Id.* at 19.

interest and the rule in question is “tenuous.”³³ The Court’s application of this guidepost, however, suggests that the mere invocation of the specter of voter fraud is enough to justify a discriminatory policy. This is not the first time the Court has accepted a state’s claim that its restrictive voting laws were aimed at preventing voter fraud. But the Court’s embrace of this pretextual justification for race discrimination is particularly troubling at this moment. For years now, the idea that our elections are haunted by rampant voter fraud has been so thoroughly debunked and exposed as a lie that it is scarcely worth rehashing here.³⁴ But the true threat that this lie poses to our democracy has only become more clear in the months that led up to the *Brnovich* decision, when the lie became a rallying cry for violent mobs attacking the Capitol in an attempt at overturning the valid results of the 2020 presidential election.

C. The Court’s guideposts make it harder to challenge the modern-day approach to vote suppression.

The majority’s guideposts are particularly harmful because they downplay the significance of the hallmarks of modern voter suppression. Thanks to the Voting Rights Act, these days we rarely see blatantly race-based disenfranchisement of broad swaths of the electorate. Instead, as Congress noted in 2006, “discrimination today is more subtle.”³⁵ The *Brnovich* majority makes it harder to challenge these more subtle practices.

As Justice Kagan points out, in modern times, one of the “subtle” ways to accomplish discrimination “is to impose ‘inconveniences,’ especially a collection of them, differentially affecting members of one race.”³⁶ In state after state, in the name of so-called “election integrity,” legislatures have sliced away at each of the methods of voting available, sometimes through a series of cumulative changes to policy and other times through omnibus bills that make a number of changes across the system. They shave away access to mail voting by shortening the timeframe to request a ballot, limiting the methods for returning one, or imposing stricter signature requirements. They cut back on in-person voting by limiting early voting hours or requiring strict photo ID to vote. They trim voters from the rolls through laws that make faulty purges more likely or by limiting same-day registration.³⁷ While any one change might appear minor at first blush, the end result is death by a thousand cuts.

³³ S. Rep. No. 97-417, at 29.

³⁴ See e.g., *Brnovich v. DNC*, Amicus Brief of Empirical Elections Scholars In Support of Respondents, available at https://www.supremecourt.gov/DocketPDF/19/19-1257/166851/20210120181228016_19-1257%20Amici%20Curiae%20Brief.pdf; Wendy R. Weiser, *The False Narrative of Vote-by-Mail Fraud*, Brennan Center for Justice, (Apr. 10, 2020), available at <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>; *Resources on Voter Fraud Claims*, Brennan Center for Justice, (Jun. 26, 2017), available at <https://www.brennancenter.org/our-work/research-reports/resources-voter-fraud-claims>; Douglas Keith and Myrna Pérez, *Noncitizen Voting: The Missing Millions*, Brennan Center for Justice, (May 5, 2017), available at https://www.brennancenter.org/sites/default/files/2019-08/Report_2017_NoncitizenVoting_Final.pdf; Justin Levitt, *The Truth About Voter Fraud*, Brennan Center for Justice, (Nov. 9, 2007), available at https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf.

³⁵ 109 Cong. Rec. H5159 (daily ed. Jul. 13, 2006) (statement of Rep. Jackson Lee).

³⁶ *Brnovich*, slip. op. at 23 (Kagan, J., dissenting).

³⁷ See generally Voting Laws Roundup.

A 2013 law passed by North Carolina in the wake of the *Shelby County* decision provides a perfect example. It imposed a strict photo identification requirement to vote, cut back on early voting, eliminated same-day registration and preregistration for 16- and 17-year-olds, and prohibited out-of-precinct voting. The Fourth Circuit Court of Appeals struck the law down as intentionally discriminatory, finding that it “target[ed] African Americans with almost surgical precision.”³⁸ But using the majority’s guideposts for assessing whether the law produced discriminatory results—typically a less difficult standard to prove than discriminatory intent—a skeptical court might view some of these restrictions, standing alone, as imposing a “mere inconvenience.” After all, many of them were restrictions of voting policies that did not even exist in 1982. And because each individual policy might only impact particular segments of the electorate, the burden they impose on voters of color may be too easily dismissed as a “small disparity.” And of course North Carolina claimed that it passed the law to prevent voter fraud, a claim the *Brnovich* majority is all too willing to accept without scrutiny. The fact that this North Carolina law that was unquestionably discriminatory bears many of the characteristics that prompt skepticism when following the majority’s guideposts demonstrates how ineffective those guideposts are at identifying discrimination.

These small, surgically precise cuts may not disenfranchise as many voters as literacy tests once did, but even those that defend them acknowledged the significance of their impact. When Justice Barrett asked the lawyer representing the Arizona Republican Party what its interest was in keeping the state’s out-of-precinct rule on the books, he responded candidly that striking it down would put his party “at a competitive disadvantage.”³⁹ In other words, while the Supreme Court might not have thought the policy impacted enough voters to matter, the parties to the election thought otherwise.

III. Congress must strengthen the Voting Rights Act in multiple ways and put new protections in place through the For the People Act.

For the second time in less than a decade, the Supreme Court has done significant damage to the Voting Rights Act. To remedy the harm done by the *Shelby County* decision, we urge Congress to restore preclearance in the John Lewis Voting Rights Advancement Act. In light of the *Brnovich* decision, it is now also critical that Congress strengthen Section 2. But restoring the Voting Rights Act, while critical, is not enough. Congress must also pass the For the People Act in order to create a new national standard for voting and take some common tactics for restricting voting access off the table.

A. Pass the John Lewis Voting Rights Advancement Act to restore preclearance.

For decades, Section 5 of the Voting Rights Act, which requires jurisdictions with a history of race discrimination to submit changes to voting rules to the federal government for preclearance to ensure they are not discriminatory, was perhaps the most effective legislative remedy for civil rights violations in the history of our nation. It prevented discriminatory policies from ever going into effect. The Supreme Court rendered Section 5 inoperable through its decision in *Shelby County*. In order to provide protection against race discrimination in voting,

³⁸ *North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

³⁹ Transcript of Oral Argument at 37-38, *Brnovich*, 594 U.S. ___ (No. 19-1257).

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we urge Congress first to restore preclearance by passing the John Lewis Voting Rights Advancement Act. I refer this committee to the testimony of my colleague Wendy Weiser and others for a more detailed explanation of the urgency of passing that legislation.⁴⁰ For these purposes, suffice it to say that as voters face the most aggressive attack on voting rights in recent history, it is crucial that they not have to rely on filing and litigating lawsuits to stop discriminatory rules and practices after harm has already occurred.

B. Strengthen Section 2 to provide full protection against race discrimination in voting.

We strongly recommend that Congress also strengthen Section 2, and to do so in a detailed way so as to prevent courts from undermining congressional intent to give full protections against race discrimination in voting. Below I outline some key goals for such legislation and possible approaches to accomplish those goals.

1. Establish appropriate considerations for determining whether a voting rule produces discriminatory results.

One goal for a legislative fix for the harm done by the *Brnovich* decision is to ensure that the wrongheaded considerations put forth in the Court’s opinion will not prevent the identification of truly discriminatory voting practices. In the *Brnovich* decision, the Court undermines the effectiveness of the “totality of the circumstances” test by creating a new set of guideposts that betray the spirit of Section 2. One way to limit the damage done by the Court and to prevent courts from doing damage to future legislation is to be more explicit about the considerations that are relevant to determining whether a voting rule produces discriminatory results.

One approach toward this goal can be to provide a list of relevant factors in the statute akin to the Senate Factors, which courts looked to for so many years as part of the totality of circumstances test. Congress could draw on the Senate Factors themselves, but it need not be limited by them in crafting guidance for an effective analysis of the totality of the circumstances.

But whatever guidance Congress provides, it should make explicit the central role that historical and current discrimination must play in the courts’ analysis of Section 2 claims. It should reject the idea that we must simply accept pervasive structural inequality and institutional racism and its attendant impact on voting. Indeed, one purpose of a “results test” is to prevent bad actors from crafting facially neutral rules that take advantage of background racial and social conditions to accomplish discriminatory objectives while disguising any discriminatory intent. That is often how classic discriminatory devices like poll taxes and literacy tests functioned to accomplish their shameful objective. The question of how policies interact with those background conditions should be at the heart of the analysis.

⁴⁰ *Hearing on Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties, 117th Cong. (2021)* (testimony of Wendy Weiser, Vice President, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>.

2. Limit the undue deference courts give states in justifying policies that produce disparate burdens.

Congress understood in 1982 that it would often be all too easy for states to offer up “non-racial rationalizations” for discriminatory policies.⁴¹ That is one of the reasons it created a results test. Justice Kagan is correct that “[t]hroughout American history, election officials have asserted anti-fraud interests in using voter suppression laws.”⁴² The fact is that almost every piece of discriminatory voting legislation ever has been justified as an attempt to prevent fraud. Yet we know that our laws are already effective at preventing fraud and that recent suggestions that widespread voter fraud exists are a lie. Just this past year, the federal Cybersecurity and Infrastructure Security Agency (CISA) issued a statement declaring that the 2020 election “was the most secure in American history.”⁴³ Still, we are witnessing politicians attempt to justify the most aggressive legislative efforts to restrict the right to vote in generations by claiming that they seek to root out fraud.

If the Voting Rights Act is to be fully effective, Congress must make clear that the urgent, current threats to our democracy are race discrimination and efforts to abridge the right to vote, not widespread voter fraud. Thus, when a policy imposes a disparate burden on the right to vote of minority voters, courts should be skeptical of—not deferential to—state claims that the policy is necessary to protect election integrity.

There are a number of ways Congress might communicate the proper way of weighing disparate burdens and state interests. For years, federal courts evaluating Section 2 claims were quite effective at taking legitimate state interests, including the interest of preventing fraud, into account, while still evaluating whether the law or rule in question actually served those interests. So, one possible solution is to write some version of the ninth Senate Factor into the statute, directing courts to consider the tenuousness of the relationship between the policy at issue and the stated interest. Congress can also make explicit that a policy that imposes a disparate burden violates Section 2 if there are less discriminatory alternatives for accomplishing the claimed objective. Another option would be to require the jurisdiction defending a policy that produces a disparate burden to prove that the policy in question actually serves its stated interest. Congress might also consider using some combination of these options.

3. Make clear that there is no tolerable level of race discrimination in voting.

Running throughout the *Brnovich* decision is an assumption that there are some discriminatory burdens on voting rights that Congress did not intend to reach—either because they impact a small number of voters, they fall short of completely denying the right to vote, or they burden only one method of voting but not another. The text of Section 2 already makes clear

⁴¹ S. Rep. No. 97-419, at 37.

⁴² *Brnovich*, slip. op. at 27 (Kagan, J., dissenting).

⁴³ “Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees,” Cybersecurity & Infrastructure Security Agency (Nov. 12, 2020), available at <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

that “the denial *or abridgment* of the right of *any citizen*” to vote on account of race is illegal.⁴⁴ But the *Brnovich* decision suggests that Congress must provide even more clarity. New amendments to Section 2 must make clear that any amount of race discrimination in voting is too much.

A test can take account of smaller racial disparities while still considering the totality of the circumstances—it need not be a “pure” disparate impact test. The statute should make clear that truly discriminatory results cannot be ignored because relatively few people were denied the right to vote on account of race. It should also clarify that a discriminatory voting policy cannot be excused simply because a jurisdiction can point to other policies or methods of voting it provides that are not discriminatory.

C. Pass the For the People Act to set a new national standard for elections.

Congress must do more than simply restore and strengthen the Voting Rights Act, however. To fully address the problem of voter suppression, it is also critical to enact the For the People Act, which we applaud the House for passing in March.⁴⁵ Division A of that bill, derived from the federal Voter Empowerment Act written and long championed by Representative Lewis, would set basic federal standards for voting access nationwide, filling critical gaps that the Voting Rights Act cannot. By requiring states to, among other things, modernize voter registration, allow two weeks of early voting and vote by mail, restore voting rights to formerly incarcerated citizens, and refrain from partisan gerrymandering, the For the People Act would take some of the most common tactics for restricting voting rights off the table. These tactics have often been used to target the same communities protected by the Voting Rights Act, but the For the People Act’s broad protections will also benefit many other groups, like student voters, who are not the focus of the Voting Rights Act’s safeguards. Setting a baseline standard for federal voting access will also help guard against uneven enforcement of anti-discrimination measures. Moreover, a national standard will make clear to the Court that it should not use 1982’s voting standards as a benchmark against which to evaluate today’s laws.

IV. Conclusion

With these goals in mind, we urge Congress to meet the moment once again, restore the Voting Rights Act to its former glory, shore it up against future judicial erosion, and supplement it with national voting standards in the For the People Act. Thank you again for the opportunity to contribute to this conversation.

⁴⁴ 52 U.S.C. § 10301 (emphasis added).

⁴⁵ See Leadership Conference on Civil and Human Rights, Letter of Support – The For the People Act and the John Lewis Voting Rights Advancement Act (June 8, 2021), available at <https://civilrights.org/resource/letter-of-support-the-for-the-people-act-and-the-john-lewis-voting-rights-advancement-act/>; see also *Hearing on Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>.

TESTIMONY OF

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HEARING ON OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL
LEGISLATIVE REFORMS

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL
LIBERTIES
IN THE UNITED STATES HOUSE OF REPRESENTATIVES

AUGUST 16, 2021

Thank you for the opportunity to testify in support of strengthening the Voting Rights Act (“VRA”), a law that has played a critical role in safeguarding American democracy against pernicious, persistent threats of discrimination in the election system. The Brennan Center for Justice at NYU School of Law strongly supports this Committee’s efforts to restore and revitalize the VRA, through the John Lewis Voting Rights Advancement Act (“VRAA”).

The VRA is widely considered the most successful civil rights legislation in our nation’s history.² Unfortunately, the Supreme Court has seriously hampered its effectiveness. First, in *Shelby County v. Holder*,³ the Court rendered inoperable the law’s preclearance provisions, which had stopped many discriminatory voting practices from ever going into effect in selected jurisdictions with a history of discrimination. More recently, in *Brnovich v. DNC*,⁴ the Court sharply limited voters’ ability to challenge discriminatory practices under the nationwide protections against voting discrimination in Section 2 of the law. Although these decisions have seriously wounded the VRA, they also make clear that Congress has the power to restore and bolster the law.⁵

The need to strengthen the VRA is especially urgent now, as a decade’s worth of efforts

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² U.S. Department of Justice, “The Effect of the Voting Rights Act,” June 19, 2009, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0>.

³ *Shelby County v. Holder*, 570 U.S. 529, 556-57 (2013).

⁴ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

⁵ *Shelby County*, 570 U.S. at 557 (“Congress may draft another formula based on current conditions.”); *see generally Brnovich*, 141 S. Ct. 2321 (holding premised on an interpretation of the current text of Section 2).

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to restrict voting rights have reached a fever pitch. As I previously testified,⁶ states across the country are rapidly passing new laws rolling back voting access—many of them targeting voters of color. These new laws are being implemented on top of a host of other discriminatory voting practices that have been put in place or attempted in recent years. We are also headed into a redistricting cycle, following last week’s release of Census data, that is expected to be characterized by racial discrimination and severe gerrymandering targeting communities of color.⁷

The VRAA is designed to address these current problems and meet current needs, while taking account of the concerns the Supreme Court identified with the 2006 reauthorization of the law. I submit this testimony to supplement the record of persistent race discrimination in voting that creates the need for the VRAA, and to explain how the VRAA is an appropriate, carefully tailored exercise of congressional authority to combat that discrimination.

I. New Evidence that Race Discrimination in Voting, and its Effects, Persist

Despite the progress made in the decades following the VRA’s initial enactment, race discrimination in voting is still a very real—and in some places a growing—problem. The record this Committee has amassed in recent months, including evidence submitted by the Brennan Center, shows overwhelming evidence of contemporary voting discrimination.⁸ While the evidence shows that race discrimination in voting is widespread, it also shows that it is especially powerful and persistent in certain geographic areas, including in a number of states that were previously covered by Section 5 of the VRA because of their past histories of discrimination in voting.

Our recent research provides even more evidence of the impact and persistence of discrimination in voting, underscoring the acute need for the VRAA.

A. Persistent Racial Turnout Gaps

A recently published analysis by the Brennan Center’s Kevin Morris and Coryn Grange demonstrates that turnout among nonwhite voters remains significantly lower than that among white voters.⁹ Even with record overall turnout in the 2020 election, there was a significant

⁶ See *Hearing on the Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. On Judiciary, Subcomm. On the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>; *Hearing on Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, Before the H. Comm. On House Administration, Subcomm. On Elections*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/2021-06-22%20Waldman%20-%20Testimony.pdf>.

⁷ Michael Li, *The Redistricting Landscape, 2021-22*, Brennan Center for Justice, 2021,

<https://www.brennancenter.org/our-work/research-reports/redistricting-landscape-2021-22>.

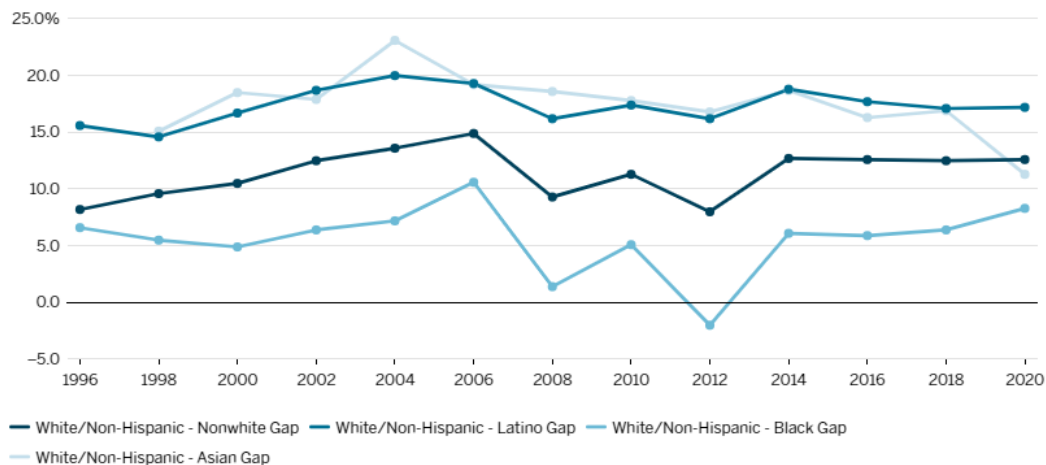
⁸ See Michael Waldman, testimony on *Voting in America; Hearing on Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot, Before the Comm. on House Administration, Subcomm. on Elections*, 117th Cong. (2021) (testimony of Kevin Morris, Researcher, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/Morris%20-%20Written%20Testimony.pdf>; Wendy Weiser, testimony on *Oversight of the Voting Rights Act*.

⁹ Kevin Morris and Coryn Grange, “Large Racial Turnout Gap Persisted in 2020,” Brennan Center, August 6, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election>.

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turnout gap between white and nonwhite voters.¹⁰ Overall, 70.9 percent of eligible white voters cast ballots in the 2020 election, compared to only 58.4 percent of nonwhite voters.¹¹ In fact, as the graph below—reproduced from the Brennan Center’s published analysis—demonstrates, the turnout gap between white and nonwhite voters has gone virtually unchanged since 2014, and it has grown since its modern-era lows in 2008 and 2012.¹² And even when the gap between Black and white voters was closing—a trend that has sadly reversed course in recent years—Latino and Asian American voters lagged far behind their white counterparts in participation.¹³ (This is true of Native American voters as well, though their numbers are too small for inclusion in the census data.)

Voter Turnout Gap by Race, 1996-2020



Source: U.S. Census Bureau

While our research does not examine whether or the extent to which voter suppression efforts caused this gap to persist—and at some points, widen—it does demonstrate that the temporary closure of the Black-white voting gap in 2008 and 2012 was anomalous. This is particularly significant in light of the *Shelby County Court*’s reliance on evidence that this gap had supposedly closed by 2013 to question Congress’s justification for preclearance.¹⁴

B. Larger Turnout Gaps in Previously Covered Jurisdictions

According to more recent census data, described in a new Brennan Center analysis by Coryn Grange, Peter Miller, and Kevin Morris,¹⁵ the growth in the racial turnout gaps since 2012 is even starker in the states likely to be subject to preclearance under the VRAA. In recent years,

¹⁰ Morris and Grange, “Large Racial Turnout Gap Persisted.”

¹¹ Morris and Grange, “Large Racial Turnout Gap Persisted.”

¹² Morris and Grange, “Large Racial Turnout Gap Persisted.” The white-nonwhite turnout gap in 2020 was 12.5 percent in 2020, an increase from a recent low of 8 percent in 2012.

¹³ Morris and Grange, “Large Racial Turnout Gap Persisted.”

¹⁴ 570 U.S. at 536, 547-49.

¹⁵ Coryn Grange, Kevin Morris, and Peter Miller, “Turnout Gaps in Jurisdictions Previously Covered by Section 5 of the Voting Rights Act,” Brennan Center for Justice, Aug. 20, 2021, <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights>(hereinafter “Turnout Gaps”).

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white voter turnout has vastly exceeded nonwhite turnout in virtually every state previously subject to preclearance, and in some areas, the progress made in the decades leading up to *Shelby County* has all but vanished.

Our analysis finds that, after hitting historic lows immediately before *Shelby County* in 2012, the white-Black turnout gap has significantly grown in almost every state previously covered by the VRA.¹⁶ In South Carolina, for example, the white-Black turnout gap has grown by 21 percentage points since 2012, to 15 percent.¹⁷ In Texas and Virginia, the gap has grown by 13 percentage points, to 11 percent and 13 percent, respectively.¹⁸ In Louisiana, the gap has grown by 11 percentage points, to 7 percent.¹⁹ And in North Carolina, which was not covered in its entirety but had a number of covered political subdivisions, the gap has grown by 17 percentage points, to 3 percent.²⁰ These are dramatic shifts in only eight years. In most of the states mentioned here, the turnout gap between Black and white voters grew from a slight gap *in favor* of Black voters to a significant gap in favor of white voters.

The data also indicates that the post-*Shelby County* racial turnout gaps are more than a Black and white issue.²¹ The total white-nonwhite turnout gap has grown since 2012 in all of the eight states likely to be covered under the VRAA.²² And the racial turnout gap is especially large for Hispanics. In Georgia and Virginia, for example, the non-Hispanic white-Hispanic turnout gap was 26 percentage points in 2020.²³ In Texas, it was 19 percentage points.²⁴

C. Discriminatory Voting Barriers in 2020

In addition to a growing turnout gap among white and nonwhite voters, the 2020 election saw a proliferation of discriminatory voting barriers. A new report by the Brennan Center's Will Wilder catalogs the wide range of barriers, disparate burdens, and discrimination voters of color faced during the 2020 election cycle.²⁵ These included new restrictive voting laws, racially discriminatory voter roll purges, disparities in mail delivery and in mail ballot processing times that were exacerbated by the Covid-19 pandemic, long lines and closed polling places, racially-targeted voter intimidation, and targeted misinformation campaigns.²⁶

¹⁶ The white-Black turnout gap has grown in six states likely to be covered by the VRAA: Alabama, Georgia, Louisiana, South Carolina, Texas, and Virginia. In Florida and Mississippi, the white-Black turnout gap has remained somewhat steady. *See* Grange et al, "Turnout Gaps."

¹⁷ Grange et al, "Turnout Gaps."

¹⁸ Grange et al, "Turnout Gaps."

¹⁹ Grange et al, "Turnout Gaps."

²⁰ Grange et al, "Turnout Gaps."

²¹ Grange et al, "Turnout Gaps."

²² Grange et al, "Turnout Gaps." There is sufficient data to conclude that the gap has increased for Blacks, Hispanics, and Asians in Florida, Georgia, North Carolina, South Carolina, and Texas. In Alabama, Louisiana, and Mississippi, the sample sizes in the available census data are too small for Hispanic and Asian voters to make an overall white-nonwhite turnout gap estimation that is distinct from the white-Black turnout gap in those states.

²³ Grange et al, "Turnout Gaps."

²⁴ Grange et al, "Turnout Gaps." In California, which is close to meeting the coverage requirements in the VRAA, the turnout gap was 20 percentage points.

²⁵ Will Wilder, *Voter Suppression in 2020*, Brennan Center for Justice, Aug. 20, 2021, Parts II – III, <https://www.brennancenter.org/our-work/research-reports/voter-suppression-2020>.

²⁶ *See generally* Wilder, *Voter Suppression in 2020*.

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Perhaps more than in any other year in recent history, elected officials and political operatives were direct about their intentions to shrink the electorate in 2020, at times with explicit or thinly-veiled references to race.²⁷ These statements of discriminatory intent are important context for the range of discriminatory results seen in 2020.

As we have previously testified, the push to disenfranchise voters of color continued after the election, as the Trump campaign and others filed frivolous lawsuits aimed at tossing out the votes of Black voters in urban centers and other voters of color.²⁸ This litigation and the lies used to justify it helped spur on violent attacks on the Capitol.²⁹ The same lies laid the rhetorical groundwork for a new wave of restrictive voting legislation this year unlike anything we have seen since the VRA's enactment in 1965. Our most up-to-date research shows that 18 states enacted 30 new laws restricting access to voting between January 1 and July 14, 2021.³⁰

D. Discriminatory Plans to Reduce Representation

The Brennan Center's recent report, "Representation for Some," authored by Yuriy Rudensky et al., offers additional evidence of the growing risk of race discrimination in voting.³¹ This study analyzes the impact of a voting change that is being pushed in a number of states—namely, the exclusion of non-citizens and children under 18 from the population base used to draw electoral districts. Using data from Texas, Georgia, and Missouri, the report finds that adopting an adult citizen redistricting base would have a substantial and disparate effect on communities of color, particular Latino communities.

While to date no state has adopted an adult citizen redistricting base, these findings are relevant to Congress's inquiry because there is an ongoing effort to adopt such a change, including in states that were previously subject to preclearance and would likely be covered under the VRAA. This change is being pursued with the express knowledge that its principal impact would be to disadvantage communities and voters of color. For example, Thomas Hofeller, a prominent conservative redistricting strategist who helped draw maps after the 2010 census in Alabama, Florida, North Carolina, and Texas that were later struck down by courts as discriminatory, indicated in a memo shared with conservative strategists that changing the apportionment base would be "advantageous to Republicans and non-Hispanic Whites."³² The substantial risk that states and localities will adopt a discriminatory adult citizen redistricting base further underscores the need for robust protections under the Voting Rights Act.

²⁷ Wilder, Voter Suppression in 2020, Part II.

²⁸ Wilder, Voter Suppression in 2020, Part VII.

²⁹ Michael Waldman, "Trump's Big Lie Led to Insurrection," Brennan Center for Justice, January 12, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/trumps-big-lie-led-insurrection>.

³⁰ Brennan Center for Justice, "Voting Laws Roundup: July 2021," July 22, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021>.

³¹ Yuriy Rudensky et al., "Representation for Some," Brennan Center, July 29, 2021, <https://www.brennancenter.org/our-work/research-reports/representation-some>.

³² See Rudensky et al., Representation for Some.

II. The VRAA's Preclearance Provisions Effectively Target the Problem of Voting Discrimination

The VRAA's preclearance provisions are well designed to target the persistent problem of voting discrimination in a manner consistent with constitutional requirements. The bill includes a coverage formula that will effectively remedy and deter illegal discrimination without casting the net so widely that it imposes burdens on jurisdictions where ordinary litigation is sufficient to stop discrimination.³³ It does so by carefully targeting coverage to jurisdictions and conduct where discrimination is most prevalent, reflecting current conditions and recent historical experience, as the original formula did in 1965.³⁴ It introduces a geographic coverage formula that triggers only in jurisdictions with recent histories of verifiable voting discrimination. It also establishes limited nationwide preclearance for certain practices that have been used frequently to discriminate against voters of color.

A. The VRA's Preclearance Provisions Are Necessary and Warranted

These preclearance provisions are well justified by the extensive record before Congress.

First, the record before Congress makes clear that preclearance is, unfortunately, still necessary to root out persistent discrimination. As we have previously testified (and as the Supreme Court previously recognized), litigation is emphatically not enough to prevent discrimination where it is repeated; preclearance is necessary. Litigation is costly, slow, and often allows discriminatory rules to govern pending a decision. In some cases, like our recently completed lawsuit challenging Texas's strict voter ID law, multiple elections occur under discriminatory practices before a judicial resolution alters or eliminates them.³⁵ A favorable decision in such a case cannot un-suppress lost votes, reallocate spent resources, or restore confidence in citizens whose efforts to register and vote were wrongfully denied. Preclearance, by comparison, is a fast process that prevents certain discriminatory measures from taking effect in the first place. The pre-*Shelby* regime showed the effectiveness of cutting off discriminatory laws and practices at the pass rather than leaving citizens to pick up the burden of challenging them.³⁶ The last eight years have shown the harm that can be done without the specter of

³³ See *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976))).

³⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (“The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”).

³⁵ See, e.g., Brennan Center for Justice, “Texas NAACP V. Steen (consolidated with Veasey v. Abbott),” last modified Sept. 21, 2018, <https://www.brennancenter.org/our-work/court-cases/texas-naacp-v-steen-consolidated-veasey-v-abbott>. In this case, a voter ID law that went into effect in 2013 governed until a temporary remedy was enacted before the November 2016 election and the legislature altered it in 2017. In the meantime, every court that considered the law found it to be discriminatory.

³⁶ Between 1998 and 2013, Section 5 preclearance blocked 86 discriminatory changes from going into effect, including 13 in the 18 months before *Shelby County*. Wendy Weiser and Alicia Bannon, *An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice (2018), <https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20Solutions%202018.%20Democracy%20Agenda.pdf>. For state-by-state chronological listings of Section 5 objections, see U.S. Department of Justice, “Section 5 Objection Letters,” accessed August 13, 2021, http://www.justice.gov/crt/records/vot/obj_letters/index.php.

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preclearance deterring and blocking harmful laws.³⁷ Indeed, in many jurisdictions, as soon as a discriminatory law or practice was successfully challenged, the legislature or other public officials took steps to put another voting restriction in its place. As voting barriers have proliferated, so have voting rights lawsuits, reaching unprecedented highs in recent years.³⁸ Without congressional action, this trend shows no signs of abating.

Second, the record before Congress shows the importance of applying preclearance to elections at the federal, state, and local levels. Discriminatory laws and practices do not just plague federal elections. They also exist in school board, county commission, and state house elections, as the extensive testimony compiled by Professor Peyton McCrary shows.³⁹ These elections have significant consequences; they can determine issues ranging from the educational resources provided to minority voters' children to whether representatives of minority communities are present at the redistricting table. Unless all eligible voters are able to participate in all elections free from discrimination, our society is not achieving the promise of equal justice for all.

Third, as discussed below, the record before Congress supports the application of a geographic coverage formula to target jurisdictions where voting discrimination is most rampant. And while I do not cover this in my testimony, I believe that the record also supports a practice-based trigger to target practices that are frequently applied to discriminate against minority voters. Requiring preclearance for certain voting practices that are known to be inherently discriminatory is an effective way to target the VRAA as efficiently as possible at the worst forms of discrimination.⁴⁰

B. The VRAA's Geographic Coverage Formula Is Well Designed to Target and Root Out Rampant Discrimination

While discrimination in voting is widespread overall, the record before this Committee shows that certain jurisdictions tend to perpetrate voting discrimination much more than others. It is therefore appropriate for Congress to include a geographic-based trigger for preclearance so as to focus remedial attention on the places where discrimination is persistent and pervasive.

The VRAA's geographic coverage formula is effectively designed to target places where discrimination is recent, widespread, and persistent.

³⁷ Michael Waldman, testimony on *Voting in America*.

³⁸ The Brennan Center maintains a tracker of recent voting rights lawsuits. See Brennan Center for Justice, "Voting Rights Litigation Tracker 2020," <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020>; Brennan Center for Justice, "Voting Rights Litigation Tracker 2021," <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021>. Professor Richard Hasen has long tracked the growth in voting rights and election-related lawsuits. See, e.g., Richard Hasen, "The Democracy Canon," 62 Stan. L. Rev. 69 (2009).

³⁹ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

⁴⁰ See, e.g., Terry Ao Minnis *et al*, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities' Votes*, AAJC, MALDEF, & NALEO Educational Fund, November 2019, <https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf>; *Hearing on the Need to Enhance the Voting Rights Act: Practice-Based Coverage, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Thomas Saenz, President and General Counsel, MALDEF), <https://www.maldef.org/2021/07/hearing-on-the-need-to-enhance-the-voting-rights-act-practice-based-coverage/>.

i. The formula relies on the best evidence of discrimination. The formula identifies those jurisdictions where the problem of discrimination is the greatest by focusing on the best evidence for determining where there is a problem to remedy: a jurisdiction's recent violations of laws prohibiting race discrimination. Specifically, the VRAA looks to law violations reflected in court orders, DOJ objection letters, or settlements that were either entered by a court or contained an admission of liability and lead to a change in voting practices. The volume of litigation in and of itself is a probative way to identify where persistent discrimination is taking place; where a jurisdiction is repeatedly discriminating against its citizens, one would expect those citizens to file repeated lawsuits.

But the mere filing of a lawsuit is not enough to trigger coverage under the VRAA; there must also be formal findings that a violation occurred. In other words, the bill looks to objective indicia that discrimination actually occurred. Not surprisingly, legal findings of voting discrimination are more common in jurisdictions that were previously covered under the VRA's preclearance regime. As Professors Morgan Kousser and William Kenan testified, more than five out of every six successful voting rights lawsuits between 1957 and 2019 occurred in places that were previously covered, even though for most of that time preclearance prevented the implementation of discriminatory laws in those jurisdictions.⁴¹

ii. The formula's high numeric threshold for violations over a 25-year review period identifies persistent patterns of discrimination. The VRAA sets numeric thresholds to capture only those states with an established pattern of discriminatory conduct. Specifically, as previously introduced, the bill would capture only those states with 10 violations, at least one of which was statewide, or 15 total violations, over the prior 25 years. These high numeric thresholds mean that the VRAA's geographic coverage for preclearance will apply only to those jurisdictions that continue to exhibit discrimination despite successful litigation. In other words, the preclearance coverage formula is specifically tailored to remedy race discrimination where case-by-case litigation has proven ineffective or inefficient.⁴² (While the bill's requirement of 10 separate, independent findings of discrimination is helpful to identify the states where the problem has been most difficult to root out, it also means that some states with quite a bit of discrimination will not be covered unless the discrimination continues over time.⁴³ In those states, voters will have to rely on the other remedies in the VRA.)

The geographic coverage formula's 25-year review period is necessary to assess which of those jurisdictions with current records of discrimination also exhibit a persistent, longstanding

⁴¹ *Legislative Proposals to Strengthen the Voting Rights Act, Before the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties*, 116th Cong. 8 (2019) (statement of J. Morgan Kousser, William R. Kenan, Jr. Professor of History and Social Science, California Institute of Technology), <https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf>.

⁴² *Katzenbach*, 383 U.S. at 328 (holding that preclearance "was clearly a legitimate response" by Congress to the fact that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits").

⁴³ See *Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms*, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties, 117th Cong. (2021) (testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School). Peyton McCrary's testimony, discussed further *infra*, demonstrates that states with reasonable records of discrimination such as Montana (five violations) and Virginia (eight violations) are still unlikely to be covered.

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pattern of discrimination justifying preclearance. This time period encompasses two redistricting cycles and a sufficient number of electoral cycles to identify patterns of discrimination. The length of the review period justifies the high numeric threshold for violations, and vice versa.

iii. The formula limits coverage to states with recent discrimination. The geographic coverage formula is also designed to ensure that only those states with a continuing, current problem of discrimination are covered. As discussed further below, the 25-year review period works in tandem with other provisions of the bill to ensure that jurisdictions will only be covered if they have committed violations recently. First, states that meet the coverage threshold are only subject to preclearance for 10 years, after which older violations will no longer be considered. Second, as also discussed below, states that do not have any violations within the past 10 years can easily bail out of preclearance, and Congress can streamline the bail-out process even further.

As a factual matter, the formula will not cover jurisdictions that only committed violations a long time ago, nor will it cover jurisdictions that only committed a small number of violations over a short period of time.

Based on Peyton McCrary's testimony submitted for this hearing, the VRAA will likely cover eight states, all of which were covered under the VRA pre-*Shelby County*: Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas.⁴⁴ Assuming Congress also authorizes coverage of political subdivisions with at least three of their own violations, the following local jurisdictions would also be covered, only one of which was previously covered (because it was within a covered state): Los Angeles County, California, Cook County, Illinois, Westchester County, New York, Cuyahoga County, Ohio, and Northampton County, Virginia.⁴⁵ Each of these states and political subdivisions has large minority populations. (Mr. McCrary's testimony also concludes that California, New York, and Virginia are close to coverage.⁴⁶ Were California or New York to have one statewide violation, it would bring either state into coverage. While Virginia only has eight violations by Mr. McCrary's count, two statewide, that number could rise to 10 if Congress drafts the bill to count independent findings of violations within one case or objection letter as independent violations.)

Each of the covered states has at least one violation within the past decade, and most have multiple violations. In addition, each covered state has seen violations spread over a long time period; in no state are the violations concentrated in a time period shorter than 14 years.⁴⁷ Each state is treated equally,⁴⁸ and each has an equal opportunity to roll out of preclearance if it stops engaging in a pattern of discrimination.

⁴⁴ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*. Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Texas were covered in their entirety. Florida and North Carolina were not covered in their entirety, but contained numerous political subdivisions that were covered.

⁴⁵ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

⁴⁶ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

⁴⁷ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

⁴⁸ It would be helpful for the legislation to correct for a difference that arises in states that have areas without any organized local government or local election administration units but rather administer nearly all elections at the state level—currently only Alaska. These states would fare differently than other states under the current VRAA coverage formula with respect to certain violations. Specifically, if multiple unorganized Census areas in Alaska fail to provide adequate language materials or assistance in the same election, that would count as only one violation against Alaska, whereas in other states it would constitute multiple independent violations—one against each local

iv. The formula appropriately targets local jurisdictions where discrimination is prevalent. The VRAA’s geographic coverage formula is designed to cover states with consistent patterns of discrimination. Some have argued that subjecting political subdivisions within states to preclearance based on violations committed by the state itself and by other subdivisions is not fair. However, as I explain here, doing so is both reasonable on principle and consistent with past practice.

Local jurisdictions do not exist in isolation. They are embedded within larger communities and larger jurisdictions, including states. From a legal standpoint, as I discuss further below, political subdivisions are “mere creatures of the State”; as one court noted, “no legal distinction exists between State and local officials” for the purpose of preclearance.⁴⁹ Our electoral system distributes election administration responsibility between local and state election officials. When a person votes, their selections for local, state, and federal offices are often recorded on the same ballot, and they are subject to the same policies and burdens when casting each of these votes. Perhaps more importantly, when a voter casts their ballot, they are participating in and affected by a political culture that does not necessarily stop at their town or county’s borders. When this political culture has a demonstrated record of discrimination, it is not unreasonable to presume that all jurisdictions within it should be subject to preclearance.⁵⁰ Indeed, state officeholders that engage in discriminatory practices are elected by people within each of the state’s political subdivisions.

Past practice under the VRA demonstrates that state coverage is a reasonable way to identify local jurisdictions where discrimination is prevalent. The VRA previously subjected states and all their political subdivisions to preclearance based on statewide turnout figures and the use of tests and devices, regardless of the specific figures and practices within each subdivision. In practice, this successfully identified those jurisdictions where discrimination was most likely to occur. A quick review of the Justice Department’s objections to voting policies demonstrates that the vast majority of objections were to local-level policies in covered states.⁵¹ For example, the Department of Justice objected to at least 104 voting changes in Alabama while preclearance was in effect in that state; all but 18 of these objections were to local- and county-level policies spread across a wide variety of political subdivisions.⁵²

Peyton McCrary’s analysis of the states likely to be covered under the VRAA shows that it is fair to conclude that discrimination pervades the local jurisdictions in those states as well. According to his testimony, every jurisdiction likely to be covered by the VRAA has at least one statewide violation, violations across at least five local jurisdictions in a broad geographic area, and violations distributed across the entire 25-year period.⁵³ Take Georgia for example. Professor

jurisdiction. To ensure that each state is treated similarly, we propose correcting for that difference, perhaps via a provision that provides, in states that administer nearly all local elections at the state level, that independent violations in each subdivision will count as independent violations.

⁴⁹ *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990).

⁵⁰ I use the word “presumptively” because, as I discuss further *infra*, jurisdictions with no actual record of recent discrimination will be able to avoid preclearance through the VRAA’s bailout process.

⁵¹ U.S. Department of Justice, “Section 5 Objection Letters,” accessed August 14, 2021, <https://www.justice.gov/crt/section-5-objection-letters>.

⁵² Department of Justice, “Section 5 Objection Letters.”

⁵³ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

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McCrary estimates that Georgia has 25 total violations over the 25-year period. These include four statewide violations and violations involving 19 different cities, counties, and school boards.⁵⁴ In other words, the formula captures geographic areas where discrimination is widespread, persistent, and continues to the present day, regardless of the political subdivisions.

v. *The VRA's bail-out provisions prevent over-inclusion.* The bail-out provisions in Section 4(a) of the VRA ensure that local jurisdictions where discrimination is not prevalent will not be unfairly subject to coverage. Political subdivisions that have not engaged in discriminatory conduct for ten years can petition for relief from the preclearance process even if the state as a whole and its other subdivisions are still covered.

The VRA's bail-out process is easy and efficient. Since 1997, 50 jurisdictions across seven states have successfully bailed out of preclearance, according to the Department of Justice.⁵⁵ All but one of these jurisdictions (the Northwest Austin Municipal Water District No. 1) did so via a consent decree with the Department of Justice, without contested litigation.⁵⁶ Since the 1982 amendments to the VRA, every jurisdiction that requested bailout succeeded.⁵⁷ According to election law expert Gerry Hebert, who represented the majority of jurisdictions that bailed out between the implementation of the 1982 amendments and *Shelby County*, the bailout process became more efficient over time as more jurisdictions used it.⁵⁸

Congress has an opportunity to make the bailout process even more efficient by creating an administrative bailout process that largely circumvents judicial review. We recommend that Congress create an administrative process for jurisdictions to seek bailout without having to file an action in court. Political subdivisions without recent violations could file requests directly with the Department of Justice. If the Department of Justice agrees that the jurisdiction qualifies for bailout under the VRA's criteria, the Attorney General could publish a Federal Register Notice that the jurisdiction is eligible for administrative bailout. If there are no objections within a specified time period, the jurisdiction could be bailed out automatically via a second Federal Register Notice, without any judicial action. Jurisdictions that are denied or face local opposition to bailout would still be able to use the existing bailout mechanism by filing an action in the District Court for the District of Columbia. Because the objective bailout criteria from the 1982 amendments closely mirror the preclearance criteria in the VRAA, Congress could also automatically "grandfather in" all jurisdictions that bailed out under the 1982 amendments pre-*Shelby County* out of coverage, unless they commit the requisite number of new violations to subject them to future coverage.

⁵⁴ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

⁵⁵ U.S. Department of Justice, "Section 4 of the Voting Rights Act," accessed August 13, 2021, <https://www.justice.gov/crt/section-4-voting-rights-act>.

⁵⁶ *Id.* The exception was a utility district in Texas, which was ultimately bailed out after a Supreme Court ruling in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

⁵⁷ Brief for Jurisdictions That Have Been Bailed Out as Amici Curiae Supporting Respondents at 14, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

⁵⁸ J. Gerald Hebert, "An Assessment of the Bailout Provisions of the Voting Rights Act," in *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power*, ed. Ana Henderson (Berkeley: Berkeley Public Policy Press, 2007), https://www.law.berkeley.edu/files/ch_10_herbert_3-9-07.pdf.

III. The VRAA's Geographic Coverage Formula Is a Constitutional Exercise of Congress's Powers

The VRAA's geographic coverage formula, updating Section 4(b) of the VRA, is constitutional under Supreme Court precedent. As an initial matter, the Supreme Court has repeatedly held that the preclearance regime in Section 5 of the VRA is constitutional⁵⁹—and it remains constitutional today. The Court has upheld preclearance under the Fourteenth and Fifteenth amendments, which give Congress significant leeway to craft broad remedial legislation to protect against racial discrimination in voting. These amendments permit Congress to remedy and to deter voting rights violations by prohibiting conduct that is not itself strictly unconstitutional.⁶⁰ Although the Court has recognized that preclearance is an extraordinary legislative approach that stretches ordinary principles of federalism,⁶¹ it has also affirmed that such “strong medicine”⁶² is necessary and constitutionally justified to address pervasive and persistent race discrimination in voting.⁶³

As I discuss above and as the record before Congress makes clear, such discrimination remains pervasive today, especially in the jurisdictions that would likely be covered under the VRAA. In expressing doubt about the continued need for preclearance roughly a decade ago, the Supreme Court observed that “[v]oter turnout and registration rates now approach parity,” “[b]latantly discriminatory evasions of federal decrees are rare,” and “minority candidates hold office at unprecedented levels.”⁶⁴ Simply put, these observations no longer hold true. Today, the registration and turnout gaps between white voters and voters of color are substantial and persistent, especially in jurisdictions likely to be covered.⁶⁵ Indeed, the gaps between Hispanic and Non-Hispanic white voters rivals the registration and turnout gaps between Black and white voters from 1965.⁶⁶ It is not rare to see states pile voting restriction after voting restriction, even as earlier restrictions are struck down by the courts in what amounts to judicial whack-a-mole.⁶⁷ And while there are more minority candidates than ever before, minorities are still dramatically underrepresented relative to their population in the halls of congress, state legislatures, and state courts, with some states trending toward less, not more, minority representation.⁶⁸ In short, the justification for preclearance remains powerful.

⁵⁹ *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the constitutionality of the 1965 preclearance regime); *Georgia v. United States*, 411 U.S. 526 (1973) (upholding the constitutionality of the 1970 preclearance regime); *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding the constitutionality of the 1975 preclearance regime); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999) (upholding the constitutionality of the 1982 preclearance regime).

⁶⁰ See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 223–224 (2009).

⁶¹ *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 211.

⁶² *Shelby County*, 570 U.S. at 535.

⁶³ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

⁶⁴ See *Nw. Austin Municipal Util. Dist. No. One*, 557 U.S. at 202; see also *Shelby County*, 570 U.S. at 535.

⁶⁵ Morris and Grange, “Large Racial Turnout Gap Persisted.”

⁶⁶ Morris and Grange, “Large Racial Turnout Gap Persisted.”

⁶⁷ See, e.g., Brennan Center, “Voting Laws Roundup.”

⁶⁸ See Katherine Schaeffer, “The Changing Face of Congress in 7 Charts,” Pew Research Center, March 10, 2021, <https://www.pewresearch.org/fact-tank/2021/03/10/the-changing-face-of-congress/>; Renuka Rayasam et al., “Why State Legislatures Are Still Very White — and Very Male,” Politico, Feb. 22, 2021, <https://www.politico.com/interactives/2021/state-legislature-demographics/>; Janna Adelstein and Alicia Bannon, “State Supreme Court Diversity — April 2021 Update,” Brennan Center, April 20, 2021, <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-april-2021-update>.

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The VRAA’s primary mode of imposing preclearance—its geographic coverage formula—is likewise constitutional. In *Shelby County*, the Supreme Court explained that there are constraints on when and how Congress can adopt preclearance. Most significantly, the Court said that any attempt to target states for preclearance coverage “must be justified by current needs”⁶⁹ and the formula rationally related to the problem it is trying to address.⁷⁰ Relying on this principle, the *Shelby County* Court struck down the prior geographic coverage formula, finding that it was improper for Congress to rely on obsolete practices, such as literacy tests, along with outdated information, such as 1960s- and 1970s-era voter registration rates, rather than current conditions and voting rights violations.⁷¹ The old coverage formula, the Court observed, bore no “no logical relation to the present day.”⁷² And the record of voting discrimination before Congress, according to the Court, “played no role in shaping” the coverage formula.⁷³ But even as the Court struck down the prior coverage formula, it invited Congress to craft an updated coverage formula responding to these concerns.⁷⁴ Under the Court’s recent precedents, therefore, a formula that is justified by current needs and is sufficiently related to the problem it targets should pass constitutional muster.

The VRAA’s updated coverage formula clearly meets that test. It is “rational in both practice and theory,” as the *Shelby County* Court explained was required, and its remedies are “aimed at areas where voting discrimination has been most flagrant.”⁷⁵ The VRAA’s preclearance regime draws on *recent* history of racial discrimination in voting. The updated formula looks to voting discrimination over the past 25 years, and it ensures that only states that have violations in the past 10 years will be covered. This 25-year time period, which covers two redistricting cycles and up to five presidential elections, is tailored to identify those jurisdictions with a persistent record of discrimination—precisely what the Court requires to justify disparate geographic coverage. A shorter period of review would not be long enough to identify a sustained pattern of misconduct and could risk subjecting to preclearance states and jurisdictions with only sporadic violations. Indeed, as discussed above, all the potentially covered jurisdictions have a steady and consistent stream of violations, showing that the formula is in fact well-tailored.⁷⁶

Critical features of the coverage formula, moreover, ensure that the VRAA captures only current violators, not just jurisdictions that had problems 25 years ago. Two particular features of the VRAA make that so. First, the VRAA covers jurisdictions for only ten years at a time. After ten years of coverage, jurisdictions are automatically freed from preclearance, unless their continuing violations merit renewed coverage. So, jurisdictions that improve their recent records of discrimination will systematically drop out of coverage, while jurisdictions that have increased instances of discrimination will enter it. Thus, the VRAA has an implicit sunset

⁶⁹ *Shelby County*, 570 U.S. at 536; *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203.

⁷⁰ *Shelby County*, 570 U.S. at 546 (citing *South Carolina v. Katzenbach*, 383 U.S. at 330 (concluding that original geographic coverage formula was “rational in both practice and theory” in 1966)).

⁷¹ *Shelby County*, 570 U.S. at 531.

⁷² *Shelby County*, 570 U.S. at 554.

⁷³ *Shelby County*, 570 U.S. at 554.

⁷⁴ *Shelby County*, 570 U.S. at 557 (“Congress may draft another formula based on current conditions.”).

⁷⁵ *Shelby County*, 570 U.S. at 546.

⁷⁶ This 25-year window is also shorter than that previously upheld by the Supreme Court. For example, the Supreme Court upheld the 1982 coverage formula that subjected jurisdictions to 25 years of preclearance based on data from 1972, meaning that certain jurisdictions were covered in 2007 based on conditions that existed more than 35 years earlier, no matter what happened in the interim. See *Lopez v. Monterey Cty.*, 525 U.S. 266, 284-85 (1999).

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provision: when a jurisdiction no longer engages in a pattern of discrimination in voting, it will no longer be subject to coverage. And should the day come when voting discrimination no longer plagues our country, the VRAA will become dead letter, no longer subjecting any states or localities to preclearance. In addition to the ten-year coverage period, the VRAA's bail-out regime ensures that any jurisdiction without violations over the past decade will be able to quickly and efficiently escape preclearance. And the proposed modifications to the bail-out regime that I discuss above would further ensure that the coverage formula is laser-focused on present-day discrimination. This responsive focus on current conditions is exactly what the Court asked for in *Shelby County*.

The VRAA modernizes the coverage formula and, as the *Shelby* Court requested, uses a “narrowed scope” to reflect both current problems and progress made to date.⁷⁷ While the states that are likely to be covered under the VRAA's updated formula were all previously covered, some states that were previously covered—Alaska, for example—will likely not be covered.⁷⁸ And it is not surprising that the list of states with a past history of discrimination overlaps substantially with the list of states with current problems of persistent discrimination. On the other hand, the local jurisdictions that will be captured by this formula are largely jurisdictions that were not previously covered. They are all jurisdictions with large and growing minority populations. This shows that Congress has indeed updated the law to be dynamic and responsive to modern conditions. Clearly, the record before this Congress is playing a substantial “role in shaping the statutory formula” that will be included in the VRAA.⁷⁹

The VRAA also tracks discrimination more directly than the coverage formula struck down in *Shelby County*. The VRAA's coverage formula “limit[s] its attention to the geographic areas where immediate action seem[s] necessary”—specifically, areas where there is actual “evidence of actual voting discrimination,” that are “characterized by voting discrimination ‘on a pervasive scale.’”⁸⁰ To that end, the VRAA's touchstone is not registration and turnout numbers—it is actual, proven acts of discrimination. Such acts are self-evidently “relevant to voting discrimination.”⁸¹ By linking coverage to objective findings of discrimination, the VRAA targets only those places where proven discrimination against voters of color persists. In this regard, the VRAA's coverage formula is similar to the uncontroversial bail-in provision found in Section 4 of the VRA: covering those states and localities where there are, in the words of the 1965 House Report, “pockets of discrimination.”⁸²

Concerns regarding the coverage formula's potential overbreadth are misplaced. As noted above, the coverage formula effectively targets geographic areas where discrimination is prevalent, and the bail-out regime would enable any political subdivision without discrimination to escape preclearance. The prior geographic coverage formula that the Supreme Court repeatedly upheld subjected all political subdivisions to preclearance based on a statewide inquiry. In any event, the Supreme Court has made clear time and again that the benefits of state

⁷⁷ *Shelby County*, 570 U.S. at 546.

⁷⁸ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

⁷⁹ *Shelby County*, 570 U.S. at 554.

⁸⁰ *Shelby County*, 570 U.S. at 546 (quoting *Katzenbach*, 383 U.S. at 328).

⁸¹ *Shelby County*, 570 U.S. at 546.

⁸² H.R. Rep. No. 89-439, at 13 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2444.

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sovereignty do not extend to its political subdivisions.⁸³ This is because “the law ordinarily treats municipalities as creatures of the State.”⁸⁴ On this basis, one district court held it reasonable to bring all subdivisions and a state itself into preclearance based on a pattern of violations by some of its subdivisions.⁸⁵ In reviewing a request to bail the state of Arkansas and all its subdivisions into coverage for certain electoral processes, that court found that because “[c]ities, counties, and other local subdivisions are mere creatures of the State” that the State may “create or abolish . . . at will,” “no legal distinction exists between State and local officials” for the purpose of preclearance.⁸⁶ The court also found that because the use of the relevant voting practice was clearly a “pattern” and a “systematic and deliberate attempt to reduce black political opportunity,” it was reasonable to hold all other jurisdictions in the state to the preclearance requirement.⁸⁷ The Supreme Court has never questioned this approach to sub-state preclearance.

* * * * *

Although not the focus of my testimony, there are two other points relevant to the VRAA’s constitutionality. First, in addition to the geographic coverage formula, the VRAA also features a practice-based preclearance regime with nationwide application. This practice-based preclearance regime singles out often discriminatory practices—such as changes in methods of election, annexations, polling place relocations, and interference with language assistance—for federal oversight. Because it has no specific geographic scope and does not impose continuing coverage, it does not implicate, much less offend, the principle of equal sovereignty articulated in the *Shelby County* opinion.

Second, separate and apart from the Fourteenth and Fifteenth Amendments, Congress has extremely strong powers under the Elections Clause to set the “times, places and manner” of federal elections—powers the Supreme Court has said include “authority to provide a complete code for congressional elections.”⁸⁸ Congress has invoked those powers to enact voting legislation like the National Voter Registration Act, which the Supreme Court has determined permissibly overlays a “superstructure of federal regulation atop state voter-registration systems.”⁸⁹ And just a few years ago, the Supreme Court approvingly discussed how Congress has used the Elections Clause to “enact[] a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections.”⁹⁰ The Elections Clause, therefore, independently justifies the VRAA to the extent that it regulates federal elections. The Supreme Court’s concerns in *Shelby County*—which were based on Court’s interpretation of the Fourteenth and Fifteenth Amendments—have no bearing on the constitutionality of the VRAA as it pertains to federal elections.

⁸³ See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (holding that state sovereign immunity does not extend to political subdivisions).

⁸⁴ *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 365 (2009) (Breyer, J., concurring in part and dissenting in part).

⁸⁵ *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990).

⁸⁶ *Jeffers*, 740 F. Supp. at 591.

⁸⁷ *Jeffers*, 740 F. Supp. at 594-95.

⁸⁸ *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

⁸⁹ *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 4 (2013).

⁹⁰ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019).

IV. Congress Should Restore and Strengthen Section 2 of the VRA in the Wake of the Supreme Court’s Recent *Brnovich* Decision

As my colleague Sean Morales-Doyle recently testified at length,⁹¹ we also strongly urge Congress to use this opportunity to restore Section 2 of the Voting Rights Act in the wake of the Supreme Court’s recent decision in *Brnovich v. Democratic National Committee*.⁹² Section 2 is critical for fighting voting discrimination in jurisdictions not subject to preclearance (and for fighting certain forms of voting discrimination in covered jurisdictions as well). The *Brnovich* decision seriously diminished Section 2’s strength, making it much less effective a tool for rooting out modern discriminatory voting laws and practices.⁹³ In doing so, it undermined Congress’s clear intent in 1982 to create a powerful remedy to attack electoral laws and practices that interact with the ongoing effects of discrimination to produce discriminatory results in the voting process.⁹⁴

There are a number of approaches to restoring Section 2 to its full strength, but they all share two basic features. First, they would codify the so-called “Senate Factors” that courts have long used to assess whether a voting law or practice results in unlawful discrimination under Section 2, and make clear that courts should consider those factors in both vote dilution (redistricting) and vote denial (vote suppression) cases.⁹⁵ Second, they would disclaim the artificial limitations the *Brnovich* opinion placed on courts considering Section 2 claims—such as the suggestion that voting practices that were in place in 1982 should be treated as presumptively valid under Section 2, and the suggestion that unequal access to one method of voting can be excused if other methods of voting are freely available. These two fixes would ensure that Section 2 comports with both Congress’s original intent in amending Section 2 in 1982 and with prior practice in federal courts. The Supreme Court was clear in *Brnovich* that its ruling was based in statutory interpretation.⁹⁶ Congress can therefore easily correct the Court’s misinterpretation and restore Section 2 to its intended strength.

While the *Brnovich* decision applies only to “vote denial” claims, it is important that any statutory fix address “vote dilution” or redistricting claims as well. Section 2 has long been a vital tool for ensuring fair electoral maps. According to a recent Brennan Center analysis, Section 2 has played a critical role in addressing discrimination in redistricting, as evidenced by the more than 20 successful redistricting cases since the 2006 reauthorization of the VRA.⁹⁷

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⁹¹ *Hearing on the Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Sean Morales-Doyle, Acting Director, Voting Right and Elections Program, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-07/2021-07-15%20Morales-Doyle%20-%20Testimony.pdf>

⁹² 141 S. Ct. 2321 (2021).

⁹³ See Morales-Doyle testimony.

⁹⁴ See Morales-Doyle testimony.

⁹⁵ S. Rep. No. 97-417, at 28–29; see also *Thornburg v. Gingles*, 478 U.S. 30, 44–45 (1986)

⁹⁶ *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. ___, slip. op. at 14 (2021) (“Today, our statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise here.”).

⁹⁷ *The Use of Section 2 to Secure Fair Representation*, Brennan Center for Justice (Aug. 13, 2021), <https://www.brennancenter.org/our-work/research-reports/use-section-2-secure-fair-representation>.

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The VRAA would work in tandem with another piece of legislation, the For the People Act (H.R.1). H.R.1 sets national standards for fair, secure, and accessible elections; the VRAA targets jurisdictions and practices with a history of discrimination. H.R.1 would override existing discriminatory state laws and practices and replace them with a fair alternative; the VRAA would establish preclearance for future such laws and practices. Both are vitally needed to strengthen our democracy.

V. Conclusion

As the record before this Committee shows, the scourge of voting discrimination has exploded across the country, and it is especially acute and pervasive in selected jurisdictions. The John Lewis Voting Rights Advancement Act is carefully crafted to target and root out that discrimination where it is most persistent. The VRAA's preclearance provisions are not only eminently reasonable, justified, and consistent with the Constitution; they are also necessary to stem the relentless rise of discriminatory voting changes. Those preclearance provisions, coupled with new provisions to strengthen Section 2 of the VRA, would restore the VRA to its full strength before the Supreme Court dramatically weakened the law in *Shelby County* and *Brnovich*. That strength is badly needed now. We strongly urge Congress to enact the VRAA, as well as the For the People Act, into law.

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**TESTIMONY OF
WENDY WEISER**

**VICE PRESIDENT FOR DEMOCRACY AT THE
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW¹**

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

BEFORE THE SENATE JUDICIARY COMMITTEE

October 6, 2021

¹ The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice. I am the Vice President for Democracy and Director of the Brennan Center's Democracy Program. I have authored numerous nationally recognized reports and articles on voting rights and elections. My work has been featured in academic journals and numerous media outlets across the country. I have served as counsel in many voting rights lawsuits, including lawsuits under Sections 2 and 5 of the Voting Rights Act. I have testified previously before Congress, and before several state legislatures, on a variety of issues relating to voting rights and elections, including the Voting Rights Act. My testimony does not purport to convey the views, if any, of the New York University School of Law.

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Thank you for the opportunity to testify in support of strengthening the Voting Rights Act (“VRA”), a law that has played a critical role in safeguarding American democracy against persistent discrimination in the election system. The Brennan Center for Justice at NYU School of Law strongly supports Congress’s efforts to restore and revitalize the VRA, through the John R. Lewis Voting Rights Advancement Act (the “Act” or “John Lewis Voting Rights Act”).²

The need to strengthen the Voting Rights Act is urgent. A decade’s worth of efforts to restrict voting rights sharply escalated this year, with at least 19 states passing 33 laws in 2021 to make it harder for Americans to vote, according to the Brennan Center’s latest count released this week.³ Many of these new state laws target voters of color,⁴ piling layer upon layer of discriminatory voting practices and exacerbating persistent racial and ethnic disparities in voting access. Even during the 2020 general election, an election with historically high turnout, participation remained starkly unequal: 70.9 percent of white voters cast ballots, compared to 58.4 percent of voters of color.⁵

At the same time, we are at the start of a redistricting cycle that is expected to be rife with racial discrimination and severe gerrymandering targeting communities of color.⁶ Indeed,

² I, along with my Brennan Center colleagues, have previously testified in support of the John Lewis Voting Rights Act and I incorporate that testimony herein. See *Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-WeiserW-20210816.pdf>; *Hearing on the Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>; *Hearing on Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*, 117th Cong. (2021) (testimony of Kevin Morris, Researcher, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/Morris%20-%20Written%20Testimony.pdf>; *Hearing on Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, Before the H. Comm. on House Administration, Subcomm. on Elections*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/2021-06-22%20Waldman%20-%20Testimony.pdf>; *Hearing on the Implication of Brnovich v. Democratic National Committee and Potential Legislative Responses, Before the H. Comm. On Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Sean Morales-Doyle, Acting Director, Voting Rights and Elections Program, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210716/113905/HHRG-117-JU10-Wstate-Morales-DoyleS-20210716.pdf>.

³ Brennan Center for Justice, “Voting Laws Roundup: October 2021,” October 4, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021>.

⁴ See, e.g., Brennan Center for Justice, “How New State Voting Laws could Impact Voters,” September 1, 2021, <https://www.brennancenter.org/our-work/research-reports/how-new-state-voting-laws-could-impact-voters>,

⁵ Kevin Morris and Coryn Grange, “Large Racial Turnout Gap Persisted in 2020,” *Brennan Center for Justice*, August 6, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election>.

⁶ Michael Li, “The Redistricting Landscape, 2021-22,” *Brennan Center for Justice*, 2021, <https://www.brennancenter.org/our-work/research-reports/redistricting-landscape-2021-22>.

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the redistricting state plans released to date are proving the predictions correct.⁷ This wave of vote suppression and redistricting abuse is part of an alarming effort to whittle down the American electorate and subvert the democratic process. It strikes at the foundation of our democracy and demands a response.

Unfortunately, the current Voting Rights Act is not sufficient to meet the challenge, in part because the U.S. Supreme Court has seriously hampered its effectiveness. In its 2013 decision in *Shelby County v. Holder*,⁸ the Court gutted the law's most powerful provision, the preclearance requirement of Section 5. For decades, preclearance had stopped hundreds of discriminatory voting practices from ever going into effect in states and localities where discrimination was most pervasive.⁹ More recently, in *Brnovich v. Democratic National Committee*, the Court further weakened the ability of voters to combat voting discrimination by making it harder to challenge discriminatory practices in court under the nationwide protections in Section 2 of the law.¹⁰

Although *Shelby County* and *Brnovich* seriously damaged the Voting Rights Act, both decisions make clear that Congress has the power to restore and bolster the law. In *Shelby County*, the Court invited Congress to reinstate Section 5 preclearance by crafting a new coverage formula that was responsive to current conditions.¹¹ In *Brnovich*, a decision based on statutory interpretation, the Court made clear that Congress is responsible for shaping Section 2 of the law.¹² And in both cases, the Court recognized that the Fourteenth and Fifteenth Amendments gave Congress the power to design a robust VRA to root out the entrenched

⁷ In Ohio, for example, the state's newly enacted legislative maps create a durable Republican supermajority by, in part, targeting and diluting the voting strength of Black and Muslim communities. See Michael Waldman, "Ohio's New Voting Maps Violate Its Own Constitution," *Brennan Center for Justice*, September 29, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/ohios-new-voting-maps-violate-its-own-constitution>. Meanwhile, in Texas, the state senate just this week passed a redistricting plan for that body that aggressively fractures minority communities in Tarrant County, joining large portions of the Latino and Black communities in Fort Worth to a district spanning seven rural counties and destroying a functioning coalition or crossover district. See *Hearing of Senate Select Comm. on Redistricting*, September 24, 2021 (testimony of Michael C. Li, Senior Counsel, Brennan Center for Justice), https://www.brennancenter.org/sites/default/files/2021-09/Texas%20Senate%20Select%20Committee%20on%20Redistricting%2009.24.21_0.pdf. Similarly, the state's proposed congressional plan would not create any new electoral opportunities for Latino, Black, or Asian communities, despite the fact that communities of color accounted for over 95 percent of the state's population growth last decade. See James Barragán et al., "Texas reduces Black and Hispanic majority congressional districts in proposed map, despite people of color fueling population growth," *The Texas Tribune*, September 27, 2021 <https://www.texastribune.org/2021/09/24/texas-congressional-redistricting/>.

⁸ 570 U.S. 529, 556–57 (2013).

⁹ For example, between 1999 and 2005, 153 voting changes were withdrawn and 109 were superseded by altered submissions. See Myrna Pérez and Vishal Agraharkar, "If Section 5 Falls: New Voting Implications," 5, *Brennan Center for Justice*, June 12, 2013, https://www.brennancenter.org/sites/default/files/2019-08/Report_Section_5_New_Voting_Implications.pdf. That figure does not include the hundreds of voting changes that were deterred because jurisdictions knew they would not withstand VRA review. See also *Shelby Cty.*, 570 U.S. at 571 (Ginsburg, J., dissenting) (noting that VRA stopped almost 1200 voting laws in covered areas from taking effect between 1965 and 2006).

¹⁰ 141 S. Ct. 2321 (2021).

¹¹ *Shelby Cty.*, 570 U.S. at 557 ("Congress may draft another formula based on current conditions.").

¹² See generally *Brnovich*, 141 S. Ct. 2321 (holding premised on an interpretation of the current text of Section 2).

problem of race discrimination in voting.¹³ That is precisely what Congress has done in the John Lewis Voting Rights Act.

My testimony today explains how the John Lewis Voting Rights Act is an appropriate, carefully tailored exercise of congressional authority to combat the ongoing scourge of voting discrimination. First, I argue that geographic coverage for preclearance is essential to stopping voting discrimination because the problem is especially acute and intractable in certain states and localities. Second, I argue that the bill's geographic coverage formula is extremely well designed to identify the regions where voting discrimination is most persistent, pervasive, and current, hewing closely to the standards Supreme Court articulated in *Shelby County*. In particular, I explain why it is appropriate and necessary for the formula to include a twenty-five-year review period (coupled with a ten-year coverage period and strong bail-out provisions), to take account of consent decrees as key evidence of voting rights violations, and to subject political subdivisions in covered states to preclearance. Finally, I explain why Congress must also restore Section 2 of the Voting Rights Act, to ensure powerful tools to fight voting discrimination in jurisdictions not subjected to preclearance.

The crisis facing our democracy today can only be solved by Congress. Congress has broad authority under the Constitution to ensure free and fair access to the ballot box and equal voting power for all Americans. We strongly urge you to exercise that power to pass the John Lewis Voting Rights Act, alongside the Freedom to Vote Act (S. 2747), to protect Americans from ongoing and novel attempts to sabotage elections and discriminate in the voting process.

I. Geographic Preclearance Is Necessary Because Discrimination is Especially Widespread and Persistent in Certain Jurisdictions

The John Lewis Voting Rights Act would revive the law's preclearance requirements for voting changes in two sets of circumstances: (1) when those changes are made in jurisdictions where voting discrimination is particularly pervasive and persistent ("geographic coverage"), and (2) when the voting changes at issue are of a type frequently adopted for discriminatory purposes wherever they occur ("known practices coverage").

To determine which jurisdictions would be subject to geographic coverage, the Act replaces the previous static coverage formula with an updated, dynamic formula that covers jurisdictions based on a recent, widespread, and persistent record of violations of the law against race discrimination in voting. Specifically, the formula counts the jurisdiction's legal violations reflected in court orders, objection letters by the Department of Justice, and settlements, consent decrees, or other agreements that indicate there was discrimination and led to a change in voting practices. A state is only covered if there have been fifteen violations in the state in the last twenty-five years, or ten violations if at least one of them was a violation by the state itself. A subdivision is only covered if it commits three violations in the same period.

Historian Peyton McCrary, who served in the Department of Justice for 26 years, previously testified in the House Judiciary Committee to the exhaustive study he conducted

¹³ *Id.* at 2331; *Shelby Cty.*, 570 U.S. at 553.

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analyzing the number of violations committed in each state and locality.¹⁴ Based on the standards articulated in the House of Representatives' version of the bill in the 116th Congress, Professor McCrary concluded that eight states were likely to be covered under that formula (Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas)¹⁵ and that three more states were on the cusp (California, New York, and Virginia).¹⁶ He also found that five counties would likely be covered under the earlier bill.¹⁷ Under the standards in the bill currently before the Senate, the Brennan Center estimates that Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia would likely be covered, along with Cook County, Illinois, and that Alabama and Florida are on the cusp. The record before Congress shows that preclearance is sorely needed in these states and localities, and that race discrimination in voting is a much more significant problem in these jurisdictions than in the rest of the country.

In 1965, Congress wisely recognized that it could not rely on a mere prohibition on “tests and devices” to effectively stamp out racial discrimination in jurisdictions that were determined to keep voters of color from the polls. Nor could it rely solely on affirmative litigation under Section 2 of the VRA, which is costly, slow, and often allows discriminatory rules to govern pending a decision.¹⁸ As I describe below, certain jurisdictions continue to demonstrate a determination to restrict voting access and to do so in ways that target voters of color. They adapt their discriminatory tactics to adjust to court decisions, demographic shifts, and voting habits. As a result, Congress cannot rely solely on legislation that targets pre-identified discriminatory practices or litigation to stop voting discrimination. So long as states and localities remain determined to discriminate, only preclearance can effectively remedy race discrimination in these jurisdictions.

A. Voting Discrimination is Widespread in States Likely to be Covered

The Brennan Center and others have submitted reams of evidence of recent and persistent race discrimination in states likely to be covered by the John Lewis Voting Rights Act. That evidence was collected in the June 24, 2021 testimony of Brennan Center president, Michael

¹⁴ Peyton McCrary is a Professorial Lecturer at George Washington University Law School, where he co-teaches a course on voting rights. He served as a Historian with the Voting Section of the Department of Justice's Civil Rights Division for 26 years, from 1990 to 2016. He has worked extensively as a consultant and expert witness in voting rights litigation and has published at least twenty book chapters, journal articles, and law review articles on the subject. See *Hearing on the Oversight of the Voting Rights Act: Potential Legislative Reforms Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-McCraryJ-20210816.pdf>.

¹⁵ *Id.* at Exhibit 1.

¹⁶ *Id.* at Exhibit 2. Note that Virginia would, in fact, almost certainly be covered under the House bill that passed earlier this summer, because of changes between that bill and the one from 2019.

¹⁷ Those are: Los Angeles County, California; Cook County, Illinois; Westchester County, New York; Cuyahoga County, Ohio; and Northampton County, Virginia. *Id.* at Exhibit 3.

¹⁸ See Wendy Weiser, testimony on *Oversight of the Voting Rights Act: A Continuing Record of Discrimination* (detailing why Section 2 litigation is inadequate and inefficient).

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Waldman, before the House of Representatives,¹⁹ as well as in prior testimony I and my colleagues delivered before Congress this year.²⁰ It was also collected in the extensive reports that the Leadership Conference on Civil and Human Rights submitted laying out the record of discrimination in these states,²¹ among other testimony.

But perhaps the most compelling evidence of the extent of discrimination in those states is the list of voting rights violations that will be considered under the new formula itself. Professor McCrary found that there were a staggering 143 violations over the last 25 years in the eight states likely to be covered by the 2019 formula, and another 32 violations in the three states that were close to meeting the coverage requirements (for a total of 175 violations).²² (Professor McCrary prepared his analysis based on the definition of violations in the 2019 version of the bill that passed the House; because that definition was expanded somewhat this year, the number of violations is likely even larger.) Under the formula in the bill before this Senate, the Brennan Center estimates that there are more than 150 violations over the past 25 years in the 11 states over or near the threshold for coverage.

B. The Problem of Voting Discrimination is Worse in States Likely to Be Covered

There is also ample evidence that the scourge of voter suppression is worse in the states and localities expected to be covered than in the rest of the country. Again, the list of state violations illustrates this clearly. Professor McCrary's analysis found 143 violations over the past 25 years in the 8 states likely to be covered under the 2019 bill, but only 54 combined violations

¹⁹ Michael Waldman, testimony on *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*.

²⁰ See *Hearing on S.1, The For the People Act, Before the S. Comm. on Rules & Administration*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice),

<https://www.brennancenter.org/sites/default/files/2021-03/2021-03-22%20Waldman%20-%20Testimony.pdf>;

Wendy Weiser, testimony on *Oversight of the Voting Rights Act: A Continuing Record of Discrimination*; Kevin Morris testimony on *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*; Michael Waldman, testimony on *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*; Sean Morales-Doyle, testimony on *The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses*; Wendy Weiser, testimony on *Oversight of the Voting Rights Act: Potential Legislative Reforms*.

²¹ *Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Wade Henderson, Interim President and CEO, The Leadership Conference on Civil and Human Rights and Exhibits 1a–10, incorporated by reference therein), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816.pdf>; see also Exhibits 1a–10, <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4688>.

²² *Hearing on the Oversight of the Voting Rights Act: Potential Legislative Reforms Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-McCraryJ-20210816.pdf> at Ex. 1. AL (14), FL (10), GA (25), LA (16), MS (18), NC (11), SC (15), TX (34); CA (12), NY (12), VA (8).

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in the 39 states not above or close to the threshold for coverage.²³ In fact, there were more violations in Georgia and Texas alone than there were in those 39 states combined.²⁴ The Brennan Center estimates that under the current bill before the Senate, the 7 states that are likely to meet the coverage threshold have at least 120 total violations over the past 25 years, while the 39 states that are not close to coverage have fewer than 50.

In addition, the Brennan Center has submitted multiple studies for the record that demonstrate that vote suppression and discriminatory voting outcomes are worse in the states likely to be covered by preclearance:

- After the *Shelby County* decision, jurisdictions formerly subject to preclearance increased their voter purge rates more than noncovered jurisdictions. Two million fewer voters would have been purged between 2012 and 2016 if formerly covered jurisdictions continued to remove voters at the same rate as noncovered jurisdictions.²⁵ And 1.1 million fewer individuals would have been removed from voter rolls between 2016 and 2018 if formerly covered jurisdictions continued to remove voters at the same rate as non-covered jurisdictions.²⁶
- Racial and ethnic turnout gaps are growing faster in the eight states likely to be subject to preclearance than in the rest of the country. Seven of these states had white-nonwhite turnout gaps that grew more than the national rate of 4.6 percentage points between 2012 and 2020. South Carolina’s gap widened the most, expanding by a staggering 21.2 percentage points in that period.²⁷
- This rapid growth is a complete reversal of a trend that the Supreme Court pointed to in the *Shelby County* decision as evidence that racial discrimination was abating.²⁸ In 2012, seven of these eight states had Black voter turnout higher than that of white voters, and the Court noted that the Black-white gap was closed or closing. In 2020, the reverse was true—in only one of the eight states was Black turnout higher than white turnout. Louisiana, South Carolina, and Texas had higher turnout gaps in 2020 than at any point in the past 24 years.²⁹

²³ *Id.* at Ex. 2. AK (2), AR (2), AZ (4), CO (2), HI (1), IL (4), MA (5), MI (3), MO (1), MT (5), NE (2), NV (1), NJ (2), NM (3), ND (2), OH (4), PA (2), SD (2), TN (2), WA (3), WI (1), WY (1). In addition, Professor McCrary lists no violations for CT, DE, ID, IN, IA, KS, KY, ME, MD, MN, NH, OK, OR, RI, UT, VT, WV.

²⁴ *Id.*

²⁵ Kevin Morris et al, “Purges: A Growing Threat to the Right to Vote,” 3–4, *Brennan Center for Justice*, July 20, 2018, <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote>.

²⁶ Kevin Morris, “Voter Purge Rates Remain High, Analysis Finds,” *Brennan Center for Justice*, August 1, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

²⁷ Kevin Morris, Peter Miller, and Coryn Grange, “Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act,” *Brennan Center for Justice*, August 20, 2021, <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights> (see chart detailing “White-Nonwhite Turnout Gap Since *Shelby County*, 2012-2020 Presidential Election”).

²⁸ *Shelby Cty.*, 570 U.S. at 548 (“Census Bureau data from the most recent election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent.”).

²⁹ Morris, Miller, and Grange, “Racial Turnout Gap Grew.”

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- The worst “monster” vote suppression bills passed this year—omnibus bills that restrict voting in multiple ways—were in Texas and Georgia, two states expected to be covered by preclearance.³⁰ North Carolina—another state likely to be covered—modeled this practice of adopting a “monster” vote suppression law when it began working on its omnibus bill the day after the *Shelby County* decision was handed down in 2013.³¹ The bill was later struck down as racially discriminatory.³² Florida, which could soon come into coverage because of its multiple violations (and which would likely be covered under the House version of the bill), also passed a “monster” bill this year. Iowa, which will likely not be covered, did the same.
- According to 2019 testimony by Professor J. Morgan Kousser, 82.6 percent of successful Section 2 actions since the passage of Voting Rights Act in 1965 concerned jurisdictions previously subject to preclearance.³³

C. Absent Preclearance, Voting Discrimination Remains Intractable in States Likely to be Covered

Further, the record in the formerly covered jurisdictions since the *Shelby County* decision demonstrates both that these jurisdictions continue to pose a high risk of discrimination absent preclearance and that they were appropriately targeted for coverage in the first place. As soon as the Supreme Court invalidated the previous coverage formula in *Shelby County*, many of these jurisdictions rushed to enact intentionally discriminatory laws.³⁴ Infamously, Texas announced less than 24 hours after the decision that it would implement an extremely restrictive voter identification requirement that had previously been blocked by preclearance and was later found by a court to be intentionally discriminatory.³⁵ Less than two months later, North Carolina, enacted its omnibus voting law that prompted the oft-repeated finding by the Fourth Circuit Court of Appeals that the law was intentionally discriminatory and “target[ed] African Americans with almost surgical precision.”³⁶ It took years of resource-intensive litigation to

³⁰ Brennan Center for Justice, “Voting Laws Roundup: October 2021.”

³¹ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); see also Brennan Center for Justice, “Voting Laws Roundup 2013,” December 19, 2013, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2013>.

³² *McCrory*, 831 F. 3d at 215.

³³ *Legislative Proposals to Strengthen the Voting Rights Act, Before the H. Comm. On Judiciary, Subcomm. On the Constitution, Civil Rights & Civil Liberties*, 116th Cong. (2019) (testimony of Professor J. Morgan Kousser, California Institute of Technology), <https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf>. Professor Kousser included settlements and consent decrees as successes. He also found that 81.7 percent of successful voting rights actions brought under the Fourteenth or Fifteenth Amendments, and Section 2, Section 203, or Section 208 of the VRA concerned jurisdictions previously subject to preclearance.

³⁴ Tomas Lopez, “Shelby County: One Year Later,” *Brennan Center for Justice*, June 24, 2014, <https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>; see also *Bronovich*, 594 U.S. ___, slip. op. at 9 (2021) (Kagan, J., dissenting).

³⁵ “Statement by Texas Attorney General Greg Abbott,” June 25, 2013, <https://perma.cc/SL53-AFSG>; *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc).

³⁶ *McCrory*, 831 F.3d. at 214. *McCrory* was not the only case where a federal court found that a jurisdiction acted with discriminatory intent post-*Shelby County*. In 2017, the Southern District of Texas found that the city of Pasadena, Texas’s post-*Shelby County* city council electoral scheme was enacted with an intent to discriminate against Latino voters. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 721 (S.D. Tex. 2017) (“Each *Arlington Heights* factor supporting finding discriminatory intent . . . is present in this case.”).

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block these laws; during those years, millions of voters faced unconstitutional barriers to the right to vote, with more burdens directed at minority voters.

This recent history demonstrates that, for jurisdictions with an extensive record of voting discrimination, preclearance is a necessary tool for rooting out that discrimination. As the record amply shows, lawmakers and officials in those states tend to be both persistent and creative in their efforts to discriminate against voters of color. Many of the states and localities likely to be covered under preclearance have now piled voting restriction upon voting restriction, even as earlier restrictions have been struck down by the courts in what amounts to judicial whack-a-mole.³⁷ In other words, they engage in exactly the sort of “ingenious discrimination” that President Johnson described as he called for passage of the VRA in 1965.³⁸ This ingenuity is why case-by-case adjudication and practice-based preclearance are insufficient tools, on their own, for preventing discrimination as it is practiced today.

For example, even after a voter ID law was struck down by a federal court in 2017 because it was found it to be discriminatory (and intentionally so), the state of Texas adopted different restrictive laws when it returned to session in both 2019 and 2021. This year, for instance, the legislature’s omnibus voting law prohibits practices like 24-hour voting and drive-through polling places that have been used by local election officials in the state’s large, diverse counties to facilitate voting. The new law also creates over-broad and vague criminal offenses that will chill efforts of those seeking to assist voters to ensure real, practical access to the ballot, making it more difficult for voters with limited English proficiency to obtain the help they need (and to which they are entitled under federal law)—a burden that will fall disproportionately on Latino and Asian voters.³⁹

Georgia too has persisted in its efforts to suppress the vote. From the enactment of the nation’s first strict voter ID law in 2005⁴⁰ through the passage of the “monster” bill S.B. 202 in 2021,⁴¹ the state legislature has repeatedly enacted laws to make voting harder.⁴² The Secretary of State has also adopted aggressive policies blocking registrations by eligible voters or

³⁷ See, e.g., *Veasey*, 830 F.3d 216 (invalidating strict voter ID law that had previously been blocked by preclearance), but see TX S.B. 5 (2017) (imposing similar but less strict voter ID requirements), TX H.B. 1888 (2019) (restricting mobile early voting), TX S.B. 2930 (2021) (limiting voters who can vote by mail), TX S.B. 1111 (2021) (increasing risk of faulty voter purges), TX S.B. 1 (2021) (omnibus bill with several restrictive provisions).

³⁸ Lyndon B. Johnson, “Special Message to the Congress: The American Promise,” *The American Presidency Project*, March 15, 1965, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise>.

³⁹ Complaint for Declaratory and Injunctive Relief, *LUPE v. Abbott*, (W.D. Tex 2021) (No. 5:21-cv-844).

⁴⁰ GA Act No. 53 (H.B. 244) (2005).

⁴¹ GA S.B. 202 (shortening window to apply for a mail ballot, prohibiting the unsolicited distribution of mail ballot applications, limiting the availability of mail ballot drop boxes, and imposing harsher voter ID requirements on mail voting).

⁴² See also GA H.B. 92 (2011) (cutting back early voting); GA H.B. 268 (2017) (making voter registration more difficult).

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removing them from the rolls.⁴³ And when litigation has halted or stalled one law or practice, the legislature has been quick to replace it with another.⁴⁴

But Georgia’s lawmakers are not just dogged in their efforts to engage in vote suppression and discrimination; they are also adaptive and innovative. In 2020, the demographics of mail voting shifted dramatically. The percentage of mail voters that were white dropped precipitously while the percentage of mail voters who were Black surged.⁴⁵ Nearly 30 percent of Georgia’s Black voters cast their ballot by mail in 2020, while just 24 percent of white voters did.⁴⁶ The legislature’s response was quick: just months after the 2020 elections, it passed S.B. 202, a bill that placed a number of new restrictions on mail voting.⁴⁷ S.B. 202 also included a number of fairly novel restrictions, such as a ban on handing out water and snacks to voters waiting in line—a particularly sinister method of burdening voters of color by exploiting the fact that they already wait in disproportionately long lines to cast their ballots.⁴⁸ In short, Georgia provides another example of “ingenious discrimination” that requires Congress to act.

* * *

In short, a robust preclearance regime is necessary to combat the ongoing assault on voting in key states and localities. If preclearance had been in effect in Georgia and Texas and the other likely covered states this year, as it was before *Shelby County*, the restrictive voting bills that these states recently enacted would not have been able to go into effect unless and until the states proved that those laws would not discriminate against racial, ethnic, or language

⁴³ Stanley Augustin, “Voting Advocates Announce a Settlement of ‘Exact Match’ Lawsuit in Georgia,” *Lawyers’ Committee for Civil Rights Under Law*, February 10, 2017, <https://www.lawyerscommittee.org/voting-advocates-announce-settlement-exact-match-lawsuit-georgia/>; Morris, “Purges: A Growing Threat to the Right to Vote;” Morris, “Purge Rates Remain High.”

⁴⁴ When a federal court blocked Georgia’s original voter ID law, *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1366, 1370 (N.D. Ga. 2005), the legislature passed an amended law in 2006. That law was also temporarily enjoined, *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006), but eventually upheld by the district court and the Eleventh Circuit, in part, after the state conducted a voter education campaign. *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1380 (N.D. Ga. 2007); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009). When litigation spelled an end to the Secretary’s “exact match” registration policy, Stanley Augustin, “Voting Advocates Announce a Settlement of ‘Exact Match’ Lawsuit in Georgia,” *Lawyers’ Committee for Civil Rights Under Law*, February 10, 2017, <https://www.lawyerscommittee.org/voting-advocates-announce-settlement-exact-match-lawsuit-georgia/>, the Georgia legislature enacted a similar policy into law only months later, GA H.B. 268 (2017), which it has since largely abandoned after further litigation, Stanley Augustin, “Georgia Largely Abandons its Broken Exact Match Voter Registration Process,” *Lawyers’ Committee for Civil Rights Under Law*, April 5, 2019, <https://www.lawyerscommittee.org/georgia-largely-abandons-its-broken-exact-match-voter-registration-process/>.

⁴⁵ Kevin Morris, “Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most,” *Brennan Center for Justice*, March 16, 2021, <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>.

⁴⁶ *Id.*

⁴⁷ GA S.B. 202 (shortening window to apply for a mail ballot, prohibiting the unsolicited distribution of mail ballot applications, limiting the availability of mail ballot drop boxes, and imposing harsher voter ID requirements on mail voting).

⁴⁸ See Hannah Klain, et al., “Waiting to Vote: Racial Disparities in Election Day Experiences,” 4, *Brennan Center for Justice*, 2020, https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf (finding that Latino and Black voters were more likely than white voters to report long wait times, and waited longer generally).

minorities. Preclearance will also be critical to protecting communities of color from discriminatory decision-making during the redistricting process at the congressional, state, and local levels this year.

II. The Geographic Coverage Formula Meets the Constitutional Standards Set by the Supreme Court in *Shelby County v. Holder* and is Necessary to Root Out Discrimination

The Supreme Court has repeatedly affirmed Congress' broad powers under the Fourteenth and the Fifteenth Amendments to craft legislation to root out discrimination in voting.⁴⁹ But, as the extensive record before this Congress shows, existing legal protections are currently woefully insufficient “to remedy the ‘insidious and pervasive evil’ of racial discrimination”⁵⁰ as states and localities across the country step up their attacks on voting rights. A preclearance regime is the sort of “strong medicine” that is necessary and constitutionally justified to combat the pervasive race discrimination in voting, especially in those areas where discrimination is most persistent.⁵¹

Indeed, many of the touchpoints for justifying preclearance that the Supreme Court identified in *Shelby County* are present today, especially in the jurisdictions that would likely be covered under the John Lewis Voting Rights Act. Apart from the anomalous surge in Black voter turnout in 2012, there is and has long been a dramatic racial voter turnout gap.⁵² In addition, states consistently engage in “[b]latantly discriminatory evasions of federal decrees,” passing new voter restrictions soon after old ones are struck down by the courts.⁵³ And minority candidates remain dramatically underrepresented relative to their population in legislatures and courts across the country.⁵⁴ In short, the justification for preclearance remains powerful.

As the Court explained in *Shelby County*, a geographic coverage formula must be rationally related to the problem it is trying to address and “justified by current needs.”⁵⁵ The updated coverage formula clearly meets that test.

First, the formula is more than “sufficiently related to the problem that it targets.”⁵⁶ Indeed, in targeting jurisdictions for coverage, the Act’s formula relies on the best evidence available to determine where the problem of discrimination is greatest: established violations of law. Rather than relying on proxies like the old formula, this formula identifies discrimination by looking to specific findings of violations of federal voting rights laws, as described in Section I. A high volume of litigation in and of itself is a probative way to identify where persistent

⁴⁹ *Katzenbach*, 383 U.S. 301 (1966) (upholding the constitutionality of the 1965 preclearance regime); *Georgia v. United States*, 411 U.S. 526 (1973) (upholding the constitutionality of the 1970 preclearance regime); *City of Rome*, 446 U.S. 156 (1980) (upholding the constitutionality of the 1975 preclearance regime); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999) (upholding the constitutionality of the 1982 preclearance regime); *Shelby Cty.*, 570 U.S. at 553; *Brnovich.*, 141 S. Ct. at 2331.

⁵⁰ *Shelby Cty.*, 570 U.S. at 535 (quoting *Katzenbach* at 309).

⁵¹ *Id.*

⁵² *See id.* at 540.

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ *Id.* at 536; *see also Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203.

⁵⁶ *Shelby Cty.*, 570 U.S. at 551.

discrimination is taking place; where a jurisdiction is repeatedly discriminating against its citizens, one would expect those citizens to file repeated lawsuits. The Act goes further and actually requires successful litigation. Requiring actual violations of the law to build a record of discrimination ensures that jurisdictions will only fall into coverage because of objective evidence produced by the Department of Justice or sanctioned by a federal court. And, as I flesh out in greater length below, consent decrees are one of those critical pieces of evidence of discrimination.

Second, the Act’s formula is justified by current needs. It “limit[s] its attention to the geographic areas where immediate action seem[s] necessary” by requiring that a jurisdiction show a pattern of proven instances of voter discrimination in recent years.⁵⁷ By looking at proven acts of discrimination, which are self-evidently “relevant to voting discrimination,” the law targets only those places where proven discrimination against voters of color not only exists, but exists “on a pervasive scale.”⁵⁸ And through other design mechanisms, described below, the law targets only those jurisdictions where the problem of discrimination is “current” and persistent.

For these reasons, and for the reasons set forth below, the Act’s preclearance regime is more than justified to target the constitutional evil of race discrimination in voting.

A. The Review Period Is Well-Tailored to Identify States and Localities Where Discrimination Is a Persistent, Acute, and Current Risk

The Act’s review formula is well-designed to identify and cover those jurisdictions where voting discrimination is pervasive, systematic, and recent. It provides for a dynamic and limited review period and considers objective, verifiable evidence to identify jurisdictions with a recent pattern of voting discrimination. Its key design features—a rolling 25-year review period, a 10-year coverage period, and a streamlined process for jurisdictions that have not committed discriminatory acts in the past 10 years to be released from coverage—ensure that the law targets only those jurisdictions where the problem of discrimination is current and persistent.

1. Twenty-Five Years Is a Well-Established Review Period

First, the Act’s preclearance coverage formula uses a 25-year review period to determine which states will be subject to up to 10 years of preclearance coverage. It covers states where, in the previous 25 years, the state and its political subdivisions have committed 10 voting rights violations if at least one violation was committed by the state, or in which political subdivisions within the state have committed 15 voting rights violations.

This framework for identifying pervasive patterns of discriminatory activity within a state is consistent with the history of the Voting Rights Act, which has long relied on 25-year increments. Congress twice previously determined that 25 years is an appropriate benchmark for preclearance coverage. In 1982, it reauthorized the preclearance provisions of the VRA for 25

⁵⁷ *Id.* at 546 (quoting *Katzenbach*, 383 U.S. at 328).

⁵⁸ *Id.* (quoting *Katzenbach*, 383 U.S. at 308).

years until 2007.⁵⁹ In 2006, it again reauthorized the law for an additional 25 years.⁶⁰ Congress overwhelmingly passed these extensions—indeed, the Senate vote in 2006 was unanimous.⁶¹

In twice extending preclearance coverage for 25 years, Congress necessarily determined that discriminatory conditions at the beginning of that period were probative of a high risk of discrimination over the next 25 years. In fact, the 25-year review period in this bill is actually *shorter* than the effective review period previously adopted by Congress in 1982. The 1982 VRA reauthorization subjected states and localities to preclearance coverage through 2007 based on discriminatory activity from 1972, effectively using a review period of 35 years.

Twenty-five years is also a judicially-approved period. The Supreme Court affirmed the constitutionality of the 1982 VRA reauthorization—including its 25-year extension—in *Lopez v. Monterey County*.⁶² And while the Court did later strike down the preclearance coverage formula that Congress reauthorized in 2006, it did not base its decision on the length of the coverage period Congress chose.⁶³

2. The Coverage Formula Is Fine-Tuned to Identify Persistent Discrimination

The Act’s formula is well-tailored to capture jurisdictions where voting discrimination is persistent and ongoing by combining a representative review period with a high threshold for coverage.

First, the review period needs to cover a long enough time period to identify jurisdictions with a persistent pattern of discrimination, when federal election and redistricting cycles happen in two-, four-, six- and ten- year increments. Twenty-five years fits the bill: it covers two redistricting cycles, four senate elections, and six presidential elections. That is enough time to ensure that a jurisdiction is not covered based on a small number of recent violations, but rather based on a consistent pattern of violations. The Supreme Court has recognized that it is appropriate to look to multiple elections to identify patterns of polarized voting, which is key to understanding and addressing voting discrimination.⁶⁴ The same principle applies to patterns of discrimination.

Professor McCrary’s analysis bears out the reasonableness of this approach: each of the covered states has at least one violation within the past twelve years, as well as at least one

⁵⁹ History of Federal Voting Rights Laws, U.S. Dep’t of Just. (last updated July 28, 2017), <https://www.justice.gov/crt/history-federal-voting-rights-laws>.

⁶⁰ *Id.*

⁶¹ The 2006 reauthorization of the Voting Rights Act passed the U.S. House of Representatives 390-33, and the U.S. Senate 98-0. Actions Overview: H.R. 9 – 109th Congress (2005–2006), U.S. Congress, accessed October 5, 2021, <https://www.congress.gov/bill/109th-congress/house-bill/9/actions>; see also Actions Overview: H.R. 3112 – 97th Congress (1981-1982), U.S. Congress, accessed October 5, 2021, <https://www.congress.gov/bill/97th-congress/house-bill/3112/actions>; Office of the Press Secretary, “Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006,” *George W. Bush White House*, July 27, 2006, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html>.

⁶² 525 U.S. 266 (1999).

⁶³ *Shelby Cty.*, 570 U.S. 529.

⁶⁴ *Thornburg v. Gingles*, 478 U.S. 30, 52–53 (1986).

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violation by the state—as opposed to only violations by subdivisions—and most have multiple violations.⁶⁵ In addition, each covered state has seen violations spread over a long time period; in no state are the violations concentrated in a time period shorter than 13 years.⁶⁶

Second, the review period works together with the bill’s high numeric thresholds for violations to capture only places where the problem is longstanding and persistent. Requiring 15 violations before a state is covered—or 10 where at least one was committed by the state itself—guarantees that states only come into coverage when they have repeatedly engaged in discrimination. For example, North Carolina and its subdivisions received six violations through DOJ objection letters between 1996-2011 (one of which contains multiple independent violations).⁶⁷ Since the *Shelby County* decision in 2013, courts have entered three more judgments against the state for discriminatory voting laws (one of which contained several independent violations).⁶⁸ A shorter period of review would not be long enough to identify such a sustained pattern of misconduct. (A shorter review period would require a lower numeric threshold to be applied in any practical reality, as 10 violations in 15 years would be a shockingly high number of violations in such a short time period.)

Third, including a formula shorter than 25 years will miss repeat redistricting offenders due to the once-a-decade nature of redistricting. A 25-year review period, for example, reveals that Texas not only enacted discriminatory redistricting plans after the 2010 census but that it also did so after the 2000 census, in some cases discriminatorily targeting the same districts in *both* decades.⁶⁹ Congress should address such clear patterns of discrimination, and only a 25-year review period ensures that it can.

Fourth, a 25-year review period helps compensate for the lack of record-building and enforcement of voting rights over the last decade since *Shelby County*. Since 2013, litigation has been the only means for jurisdictions to accrue violations that count towards coverage. Litigation is a far cry from the preclearance process when it comes to identifying discrimination. It is reactive, costly, and time consuming. Litigants can only accomplish the kind of in-depth review of a policy required under the preclearance process *after* they file suit, which they can only do *after* they have identified a harmful policy. Even then, successful challenges often take years to make their way through the courts and the appeals process.

⁶⁵ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

⁶⁶ *Id.*

⁶⁷ *Id.*; see also Thomas E. Perez to Robert T. Sonnenberg, Esq., April 30, 2012, <https://www.justice.gov/crt/voting-determination-letter-84> (DOJ objection letter issuing three violations against proposed comprehensive changes to school district reorganization).

⁶⁸ *Id.*; see also *North Carolina Conf. of NAACP v. McCrory*, 831 F. 3d 204 (4th Cir. 2016) (issuing five violations against an omnibus voting bill).

⁶⁹ *Texas v. United States*, 887 F.Supp.2d 133 (2012) (finding intentional discrimination in Texas congressional and state senate plans and retrogression in the 23rd Congressional District, among others); Ralph F. Boyd, Jr. to Geoffrey Connor, November 16, 2001, <https://www.justice.gov/crt/voting-determination-letter-26> (objecting to the Texas House of Representatives redistricting plan); *LULAC v. Perry*, 548 U.S. 399, 439-40 (2006) (discussing Texas’ dismantling the 23rd Congressional District in 2003 in response to increased Latino political effectiveness)..

3. At the Same Time, the Bill Targets Only Recent Discrimination

There are three additional design features of the John Lewis Voting Rights Act that make sure it only captures jurisdictions with a current risk of discrimination.

First, the Act’s framework is not frozen in time. It provides for a rolling review period, so that only states with a recent record of discrimination are covered. Once a violation is more than 25 years in the past, it will no longer count against the state. Not only does this ensure that only recent violations are used to trigger preclearance, it also provides a significant incentive for states on the cusp of coverage to straighten up their acts.

Second, preclearance coverage, even if triggered, lasts only for 10 years. After 10 years, DOJ reanalyzes the state’s record of violations over the previous 25 years. If the jurisdiction no longer meets the threshold number of violations, it exits coverage. This is in contrast to the prior preclearance formula, which only allowed states to exit coverage via the “bailout” process in Section 4(c) of the law or upon expiration of the provision’s 25-year renewal.

Third, as in the past, once a jurisdiction has not had any violations within the past decade, it is eligible to seek “bailout” from preclearance coverage. Thus, for example, if a state’s last violation was in 2011, it would be eligible for bailout in 2022. Prior to Shelby County, the bailout process was efficient and effective; since 1997, 50 jurisdictions across seven states have successfully bailed out of preclearance, according to the Department of Justice.⁷⁰ All but one of these jurisdictions did so via a consent decree with the Department of Justice, without contested litigation.⁷¹ The Act further streamlines the bailout process to make it easier for eligible jurisdictions to seek and obtain bailout expeditiously.

In short, these provisions of the geographic coverage formula work together to ensure that preclearance coverage is limited to jurisdictions with recent, pervasive, and continuing records of discrimination.

B. It Is Necessary and Appropriate to Cover Local Jurisdictions

The John Lewis Voting Rights Act appropriately covers all subdivisions in covered states. The evidence from past practice under the VRA demonstrates that doing so is necessary to root out discrimination. Indeed, the vast majority of DOJ objection letters in states previously covered as a whole were directed to local and county governments within those states rather than to the state itself.⁷² For example, all but 18 of the 104 voting changes that the Department of Justice objected to in Alabama while preclearance was in effect were to policies adopted in the state’s political subdivisions.⁷³ Similarly, in Louisiana, of the 13 voting changes that the

⁷⁰ 5 U.S. Department of Justice, “Section 4 of the Voting Rights Act,” accessed August 13, 2021, <https://www.justice.gov/crt/section-4-voting-rights-act>.

⁷¹ *Id.* The exception was a utility district in Texas, which was ultimately bailed out after a Supreme Court ruling in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

⁷² U.S. Department of Justice, “Section 5 Objection Letters,” accessed October 5, 2021, <https://www.justice.gov/crt/section-5-objection-letters>.

⁷³ U.S. Department of Justice, “Section 5 Objection Letters,” accessed October 5, 2021, <https://www.justice.gov/crt/voting-determination-letters-alabama>.

Department of Justice objected to during the 25-year review period, all but one of those were local and county-level policies.⁷⁴

The analysis of voting rights violations by Professor McCrary further demonstrates that discrimination pervades the local communities in the states likely to be covered. Every jurisdiction that Professor McCrary deemed likely to be covered by the John Lewis Voting Rights Act has at least one statewide violation, violations across at least five local jurisdictions in a broad geographic area, and violations distributed across the 25-year period.⁷⁵ Take Georgia, for example. Professor McCrary estimates that Georgia has 25 total violations over the 25-year period. These include four statewide violations and violations involving 19 different cities, counties, and school boards.⁷⁶

That discrimination is prevalent in political subdivisions of covered states is no surprise. After all, the state and local government officials who perpetrate voting discrimination are all elected by or responsive to the same voters. When an area has a demonstrated record of discrimination, it is not unreasonable to presume that it pervades the political culture and that all jurisdictions within it are likely to be at significant risk of the same behavior.⁷⁷

Moreover, although legislative acts by a state are high visibility affairs, it is harder to monitor the actions of the thousands of political subdivisions in a state in real time to identify discrimination. Absent preclearance for subdivisions, adverse changes enacted by local jurisdictions are much more likely to slide under the radar. And when they are found out and brought to light, the burden then falls on cash-strapped local groups to seek to block the change in court through a lengthy, time-consuming, and expensive process. Preclearance would level the playing field and make it harder for repeat offenders to evade sanction.

For these reasons, covering subdivisions is a well-established and court-approved approach under the Voting Rights Act. As noted above (*see supra* Sec. II), the Supreme Court repeatedly upheld the prior geographic coverage formula, including the provisions that consistently required all political subdivisions to seek preclearance based on a statewide inquiry. That choice is just as justified and necessary today.

C. **Consent Decrees Are Important, Judicially-Approved Tools for Fighting Discrimination and Should Count as Violations**

It is appropriate and necessary to count consent decrees as evidence of discrimination. That is because as legal remedies, consent decrees are just as forceful and authoritative as the other types of violations counted in the VRA, including final judgments, DOJ objection letters, and other settlements. They cause changes in voting laws or practices to eliminate discrimination and protect voting rights and are enforceable in court.

⁷⁴ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*. As there have been no DOJ objection letters since the *Shelby County* decision, all 13 of these objections took place by 2013.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ I use the word “presumptively” because, as I discuss further *infra*, jurisdictions with no actual record of recent discrimination will be able to avoid preclearance through the Act’s bailout process.

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Consent decrees are strong indicators of states and localities where voting discrimination has occurred. Before entering a consent decree, a court must first determine that the agreement “‘is fair, adequate and reasonable’ and ‘is not illegal, a product of collusion, or against the public interest.’”⁷⁸ In so doing, “the court must assess the strength of the plaintiff’s case.”⁷⁹ A proposed decree is substantively fair if “it requires that a party bear the cost of the harm for which it is legally responsible.”⁸⁰ Applying this fairness analysis in the voting context, courts do not enter consent decrees unless there is a reasonable likelihood that a violation has occurred.⁸¹ Courts do not simply “rubber stamp” consent decrees.⁸² To the contrary, courts often reject proposed consent decrees for any number of reasons, demonstrating just how serious the inquiry is.⁸³ When a court enters a consent decree, it agrees to exercise ongoing jurisdiction and to supervise the parties’ implementation and compliance with that decree; it would not do so absent a clear showing that such supervision is needed.

Consent decrees have long been vital tools to stamp out discrimination. Indeed, past practice shows that many egregious voting rights violations have ended in consent decrees. For example, the *Dillard* cases in Alabama challenging discriminatory redistricting schemes in the mid-1980s resulted in a consent decree negotiated by plaintiffs and a class of defendants that resulted in voting changes in 197 political subdivisions.⁸⁴ This led to significant increases in Black elected officials throughout the state. In 1985, the year the litigation began, there were only 264 Black elected officials in political subdivisions in Alabama. By 1989, that number had risen to almost 560.⁸⁵ Other examples of consent decrees remedying blatant discrimination abound. In Long County, Georgia, a consent decree required the county to reform its voter challenge procedures after candidates baselessly challenged the citizenship status of voters solely because they had Hispanic or Spanish surnames.⁸⁶ Alameda County, California agreed to a consent decree in 2011 requiring it to provide language access materials required by Section 203 of the VRA—a consent decree that was necessary because it had failed to provide them

⁷⁸ *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)).

⁷⁹ *United States v. North Carolina*, 180 F.3d at 581; see also *League of Women Voters of Va. v. Virginia State Bd. of Elec.*, 481 F. Supp. 580, 586 (W.D. Va. 2020); *Dillard v. City of Foley*, 926 F. Supp. 1053, 1062 (M.D. Ala. 1995).

⁸⁰ *United States v. Duke Energy Carolinas, LLC*, 499 F. Supp. 3d 213 (M.D.N.C. 2020) (quoting *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 86 (1st Cir. 1990)).

⁸¹ See, e.g., *Dillard*, 926 F. Supp. at 1063–64.

⁸² See, e.g., *U.S. S.E.C. v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014).

⁸³ See, e.g., *United States v. New York Housing Authority*, 347 F. Supp. 3d 182, 216–17 (S.D.N.Y. 2018) (rejecting a proposed consent decree because entering it was “not fair and reasonable and . . . its entry would dissuade the public interest.”); *Conservation Northwest v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013) (vacating a consent decree because it would have “effectively amended [agency rules] without going through” proper administrative procedures); *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 270 (8th Cir. 2011) (vacating a consent decree because it improperly circumvented state law obligations, stating that litigants “cannot consent to do something that they lack the power individually to do”); *Phelps-Roper v. Heineman*, 710 F. Supp. 2d 890, 898–900 (D. Neb. 2010) (noting that “[e]ntry of a consent decree is a judicial act and is left to the district court’s informed discretion” and refusing to enter the proposed decree that would have barred police officers from arresting plaintiff because the court would not “place its judicial force behind a decree that expressly purport[ed] to abrogate” the city’s duty to arrest lawbreakers).

⁸⁴ See Jerome Gray and James U. Blacksher, “The Dillard Cases and Grassroots Black Political Power,” *Cumberland Law Review* 46 (2016): 312.

⁸⁵ *Ibid.*

⁸⁶ *United States v. Long County*, No. 2:06-cv-040, Dkt. No. 6 (S.D. Ga. 2006), available at <https://www.justice.gov/crt/united-states-district-court-southern-district-georgia-brunswick-division>.

according to the terms of a 1995 settlement.⁸⁷ Although they are strong indicators of discrimination, because they are court orders rather than private agreements, the vast majority of consent decrees do not contain admissions of liability.

Finally, counting consent decrees as violations does not create undesirable incentives. *First*, it does not create an incentive for plaintiffs to litigate weak claims because courts cannot enter consent decrees absent a strong case from the plaintiffs. A jurisdiction that believes it has a winning case would not agree to alter its voting policy based on a weak claim, regardless of the coverage formula. *Second*, counting consent decrees does not encourage defendants to litigate unnecessarily because all methods of resolving a lawsuit against a discriminatory law—judicial decisions, consent decrees, or settlements—count towards coverage. If a jurisdiction thinks it is likely to lose a voting discrimination case, it makes more sense to enter a consent decree rather than expend resources to litigate to a final judgment, as that judgment would still count towards coverage. *Third*, federal court rules ensure that plaintiffs cannot bully defendants into accepting consent decrees to avoid long litigation. For example, the possibility of court sanctions strongly discourages litigation of frivolous claims. On the other hand, *excluding* consent decrees from the coverage formula would create an undesirable incentive for plaintiffs to continue litigating strong claims to final judgment, where winning could result in greater relief and a judgment counting towards coverage. Such outcomes would waste party and judicial resources.

In short, consent decrees are vital components of any geographic coverage formula designed to identify where discrimination is occurring. We recommend that they be included without qualification.

III. The John Lewis Voting Rights Act Restores the Strength of Section 2, a Vital Tool to Stop Voter Discrimination Not Prevented By Preclearance

The Act's amendments to Section 2 of the VRA are critical to restore the ability to fight voting discrimination that is not prevented by preclearance. The Supreme Court's recent *Brnovich v. DNC* decision diminished Section 2's strength, making it a much less effective tool for rooting out modern discriminatory voting laws and practices. The decision undermined Congress's clear intent in creating a powerful remedy to attack electoral laws and practices that interact with the ongoing effects of discrimination to produce discriminatory results in the voting process. However, the Supreme Court was explicit that its *Brnovich* ruling was based in statutory interpretation. Congress can therefore easily correct the Court's misinterpretation and restore Section 2 to its intended strength.

While the evidence is clear that voting discrimination is most pervasive in jurisdictions likely to be covered under the geographic coverage formula, the problem is by no means limited to those jurisdictions. As noted above, even though there were far fewer violations in states unlikely to be covered based on Professor McCrary's analysis of the 2019 bill, there were still 54 violations in those states in the last 25 years.⁸⁸ In fact, the problem is growing nationwide, as we

⁸⁷ *United States v. Alameda County*, No. 3:11-cv-3262, Dkt. No. 21 (N.D. Cal. 2011), available at <https://www.justice.gov/crt/case-document/file/1176851/download>.

⁸⁸ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*, Exhibit 2 (finding 54 violations during the review period in states not likely to be covered).

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are witnessing a wave of voter suppression that is both larger and more widespread than any in recent memory. So far in 2021, 19 states have enacted 33 laws making it harder to vote.⁸⁹ Most of those are not likely to be covered under the formula in the bill before this Committee.⁹⁰ Among these are the “monster” vote suppression bills passed in Florida and Iowa (though Florida is close to meeting the threshold for coverage). The Brennan Center has also submitted to the congressional record a report summarizing the many instances of race-based vote suppression during the 2020 election and its aftermath, which demonstrates that voting discrimination extends well beyond states likely to be covered.⁹¹ Preclearance alone cannot prevent all of these discriminatory laws and practices, but a robust Section 2 gives voters an opportunity to fight them.

We also know from past cases that Section 2 has been an effective tool for advancing voting rights across the country. According to a recent Brennan Center analysis, there were more than 20 successful redistricting cases just since 2006.⁹² And while Professor Kousser’s 2019 review of successful voting rights actions demonstrated that they were concentrated in previously covered jurisdictions, he identified 225 successful Section 2 actions in non-covered jurisdictions.⁹³

As the Brennan Center has been tracking, voting rights advocates continued to file suits under Section 2 in 2020 and 2021, including in jurisdictions not likely to be covered.⁹⁴ Although these cases are much harder to win after the *Brnovich* decision, at least one of the cases filed in a jurisdiction not likely to be covered by the Act has been successful so far—*Blackfeet Nation v. Stapleton*.⁹⁵ That case also provides a reminder about the significant role that Section 2 plays in addressing discrimination against Native American voters, the majority of whom live outside jurisdictions likely to be covered by preclearance.⁹⁶ The suit ended in a settlement providing an in-person voting location on the Blackfeet Indian Reservation.⁹⁷ The *Brnovich* case itself also concerned practices that imposed an outsized burden on those living on reservations. (Because the geographic coverage formula will only provide limited protection to Native American voters,

⁸⁹ Brennan Center for Justice, “Voting Laws Roundup: October 2021.”

⁹⁰ *Ibid.*; Peyton McCrary, testimony on *Oversight of the Voting Rights Act*, 18–25.

⁹¹ William Wilder, “Voter Suppression in 2020,” *Brennan Center for Justice*, August 20, 2021, https://www.brennancenter.org/sites/default/files/2021-08/2021_08_Racial_Voter_Suppression_2020.pdf.

⁹² Brennan Center for Justice, “The Use of Section 2 to Secure Fair Representation,” August 13, 2021, <https://www.brennancenter.org/our-work/research-reports/use-section-2-secure-fair-representation>.

⁹³ Morgan Kousser, testimony on *Legislative Proposals to Strengthen the Voting Rights Act*.

⁹⁴ The Brennan Center tracked voting rights litigation across the country in 2020 and 2021 and found that plaintiffs brought 36 suits under Section 2 last year, when there were essentially no jurisdictions subject to preclearance. Twenty-one of these suits were filed against jurisdictions that are not likely to be covered by the Act. *See* Brennan Center for Justice, “Voting Rights Litigation Tracker 2020,” July 8, 2021, <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020>. So far in 2021, there have been Section 2 suits filed in Florida (which is not likely to be covered), Georgia, and Texas. *See* Brennan Center for Justice, “Voting Rights Litigation Tracker 2021,” August 2, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021>.

⁹⁵ *Blackfeet Nation v. Stapleton*, No. 4:20-cv-00095 (D. Mont. 2020).

⁹⁶ Census Bureau, “Decennial Census Data: Race,” <https://data.census.gov/cedsci/table?q=redistricting&tid=DECENNIALPL2020.P1&hidePreview=true>, last accessed October 5, 2021.

⁹⁷ *Blackfeet Nation*, No. 4:20-cv-00095, Dkt. No. 10 (D. Mont., Oct. 15, 2020), available at <https://storage.courtlistener.com/recap/gov.uscourts.mtd.65114/gov.uscourts.mtd.65114.10.0.pdf>.

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the Brennan Center also wholeheartedly supports the inclusion of the Native American Voting Rights Act in the John Lewis Voting Rights Act.)

The revised Section 2 has two critical components to fight discriminatory voting laws and practices. *First*, it would codify the standard long used by most appellate courts for analyzing cases (the standard that the Supreme Court radically cut back in *Brnovich*). Under the previously applicable standard, first articulated by the Supreme Court in *Thornburg v. Gingles*,⁹⁸ courts conducted the “totality of the circumstances” analysis required by the 1982 Amendments to the VRA by looking to a non-exhaustive list of relevant factors set forth in this Committee’s report on those amendments (known as the “Senate Factors”).⁹⁹ In *Brnovich*, the Court departed from the clear intent of Congress, and this Committee, by suggesting that the Senate Factors were of limited relevance in evaluating “vote denial” claims.¹⁰⁰

In turning away from the Senate Factors, the Supreme Court did not just depart from Congress’s intent, it also departed from a well-established test that was well designed to target discrimination. Under that test, courts examined “the impact of the challenged practice and the social and political context in which it occurs” by conducting “a searching practical evaluation of the ‘past and present reality.’”¹⁰¹ They conducted an “intensely local appraisal” of how race functioned in the jurisdiction to determine whether a racially disparate impact should in fact be deemed a “discriminatory result,” or if it was merely a statistical anomaly.¹⁰² In “vote denial” cases,¹⁰³ courts applied the Senate Factors to assess whether a challenged policy or practice that resulted in a disparate burden on a protected class of voters was “caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.”¹⁰⁴ The test did not stop every discriminatory practice.¹⁰⁵ In fact, even under the *Thornburg v. Gingles* standard, it was already difficult and expensive to bring a successful action under Section 2.¹⁰⁶ But it was an effective test used for years in almost every circuit that

⁹⁸ 478 U.S. 30, 44.

⁹⁹ See, e.g., *Veasey*, 830 F.3d 216; *Mich. APRI v. Johnson*, 833 F.3d 656 (6th Cir. 2016); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016).

¹⁰⁰ 141 S. Ct. at 2340.

¹⁰¹ S. Rep. No. 97-417 at 30, 67.

¹⁰² *Thornburg*, 478 U.S. at 79 (quoting S. Rep. No. 97-417 at 190).

¹⁰³ See, e.g., *Veasey* 830 F.3d 216; *Mich. APRI*, 833 F.3d 656; *League of Women Voters of NC*, 769 F.3d 224; *Gonzalez*, 677 F.3d 383; *Sanchez*, 214 F. Supp. 3d 961.

¹⁰⁴ See, e.g., *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

¹⁰⁵ See, e.g., *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (denying a Section 2 challenge to a voter ID law despite the fact that voters of color were far more likely to lack the requisite ID than white voters and assuming *arguendo* that the Senate Factors applied).

¹⁰⁶ Between the *Shelby County* decision and 2018, only 61 cases were filed under Section 2 nationwide. Only 23 of these were successful, and only 9 of those 23 alleged “vote denial” claims. Successfully litigating a Section 2 “vote denial” claim is difficult and expensive, and thus rare. See Br. of State and Local Election Officials, 15–19, *Brnovich v. Democratic National Committee*, 594 U.S. ____ (2021), available at https://www.supremecourt.gov/DocketPDF/19/19-1257/166687/20210119142504286_Brnovich%20-%20State%20and%20Local%20Officials%20Amicus%20with%20Appendix.pdf.

considered a Section 2 vote denial case.¹⁰⁷ Under that test, courts would engage with the way that race—and modern race discrimination—actually functioned and interacted with voting in a particular jurisdiction. In *Brnovich*, the Court did the opposite, expressly diminishing the importance of taking into account the persistent “differences in employment, wealth, and education” created by centuries of discrimination.¹⁰⁸ By codifying the Senate Factors, the John Lewis Voting Rights Act will refocus courts on the facts that matter.

Second, the Act expressly disclaims the so-called “guideposts” that the *Brnovich* majority created. Those guideposts make it more difficult for courts to identify and prohibit race discrimination in voting. As opposed to the Senate Factors, which directed courts to determine how race interacts with other factors to produce voting disparities, these guideposts downplay the significance of the hallmarks of modern voter suppression.¹⁰⁹ The guideposts suggest that truly discriminatory practices should be ignored if they impact a relatively small number of voters, ignoring the fact that modern vote suppression is often accomplished by layering a series of discriminatory provisions on top of one another.¹¹⁰ One guidepost inexplicably freezes the voting practices of 1982 in time as a benchmark against which to judge modern practices, even though there was no early voting and virtually no mail voting in 1982, and there was plainly still a problem with race discrimination at the time.¹¹¹ Finally, the Court’s guideposts sanction a state legislature’s use of the specter of voter fraud to justify discriminatory rules.¹¹²

The John Lewis Voting Rights Advancement Act corrects course, putting courts back on the path originally intended by Congress in its quest to root out discrimination from our nation’s elections. The Act restores a body of federal case law that effectively complemented the preclearance regime for decades to accomplish marked improvements to our democracy.

IV. Conclusion

As the record before this Committee shows, the scourge of voting discrimination has exploded across the country, and it is especially acute and pervasive in selected jurisdictions. The John R. Lewis Voting Rights Advancement Act is carefully crafted to target and root out that discrimination where it is most persistent. The Act’s preclearance provisions are not only eminently reasonable, justified, and consistent with the Constitution; they are also necessary to stem the relentless rise of discriminatory voting changes. Those preclearance provisions, coupled with new provisions to strengthen Section 2 of the VRA, would restore the VRA to its full strength before the Supreme Court dramatically weakened the law in *Shelby County* and *Brnovich*. That strength is badly needed now.

¹⁰⁷ See, e.g., *Veasey* 830 F.3d 216; *Mich. APRI*, 833 F.3d 656; *League of Women Voters of NC*, 769 F.3d 224; *Gonzalez*, 677 F.3d 383; *Sanchez*, 214 F. Supp. 3d 961. In *Frank v. Walker*, 768 F.3d at 755, the Seventh Circuit assumed for the sake of argument that the Senate Factors applied, but expressed skepticism about the test.

¹⁰⁸ 141 S. Ct. at 2343.

¹⁰⁹ See Sean Morales-Doyle, testimony on *The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses*.

¹¹⁰ *Brnovich*, 141 S. Ct. at 2338–39.

¹¹¹ *Id.* at 2338.

¹¹² *Id.* at 2340.

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Both Sections 2 and 5 of the Act would work in tandem with another critical piece of legislation, the Freedom to Vote Act (S. 2747),¹¹³ to protect voting rights for every American. The Freedom to Vote Act would set national bright-line standards for fair, secure, and accessible elections, including universal access to early and mail voting, automatic and same day voter registration, and a ban on partisan gerrymandering. These and other key provisions address barriers that disproportionately affect Black, Latino, Asian, and Native voters, but without requiring litigants to prove racial discrimination, which is not always feasible. And by making it easier for everyone to vote, they would also address harmful voting restrictions not covered by the VRAA—such as those targeting students and other young voters. The Freedom to Vote Act would immediately override existing discriminatory laws and practices, in most cases allowing them to be addressed prior to an election, which will not always be possible even under Section 2. And the VRAA would provide a mechanism to challenge discriminatory changes that were not previously anticipated in the Freedom to Vote Act’s national standards. In short, both bills are necessary to guarantee all Americans the freedom to vote.¹¹⁴

We strongly urge Congress to enact the John Lewis Voting Rights Act, as well as the Freedom to Vote Act, into law.

¹¹³ S. 2747, 117th Cong. (2021).

¹¹⁴ For more on why it is essential to pass both the John Lewis Voting Rights Act and the reforms in the Freedom to Vote Act, see Letter of Support – The For the People Act and the John Lewis Voting Rights Advancement Act (June 8, 2021), <https://civilrights.org/resource/letter-of-support-the-for-the-people-act-and-the-john-lewis-voting-rights-advancement-act/>.

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**TESTIMONY OF
WENDY R. WEISER**

**VICE PRESIDENT FOR DEMOCRACY AT THE
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW¹
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
SELECT COMMITTEE TO INVESTIGATE THE
JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL**

April 8, 2022

¹ The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to strengthen the systems of democracy and justice so that they work for all Americans. I am the Vice President for Democracy and Director of the Brennan Center’s Democracy Program, which among other issues focuses on voting rights and election administration. I have authored numerous nationally recognized reports, studies, and articles on voting rights and elections. My work has been featured in academic journals and media outlets across the country. I have served as counsel in many voting rights lawsuits and have testified previously before Congress, and before several state legislatures, on a variety of issues relating to election administration. My testimony does not purport to convey the views, if any, of the New York University School of Law. I thank Lauren Miller, Counsel at the Brennan Center, for her substantial assistance in preparing this testimony.

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Chairman Thompson and Members of the Select Committee:

Thank you for the opportunity to submit this testimony to discuss the disinformation about the 2020 presidential election that fueled the violent January 6, 2021 attack on the U.S. Capitol (the “insurrection”) and how that disinformation continues to threaten voting and elections in America.

On behalf of the Brennan Center for Justice, I thank this Committee for its investigation into one of the most shameful and alarming attacks on American democracy in our nation’s history. As you know, the insurrection’s motivating theory was that the 2020 presidential election was “stolen” from former President Donald Trump.² This “Big Lie” relies on disproven³ and racially-charged allegations of widespread voter fraud,⁴ ballot irregularities,⁵ and conspiracies to otherwise “rig” the election.⁶ The 2020 election is over, but the Big Lie continues to wreak havoc on our elections. My testimony will explain how the same disinformation about voter fraud and the 2020 election that drove the January 6 insurrection is fueling ongoing efforts to undermine voting rights and sabotage the electoral process across the country, as well as efforts to attack election officials and otherwise undermine impartial election administration.

Part I of my testimony walks through evidence of how the Big Lie is driving two anti-democratic trends in the states: the swift, aggressive push to restrict access to voting rights and the novel push to enable partisan actors to interfere in election administration. In the 12 months following the insurrection, 19 states passed 34 restrictive voting bills, or bills that make it more difficult to vote, according to the Brennan Center’s count.⁷ This was a significant escalation over years past. At the same time, state lawmakers pressed a new species of legislation—election sabotage bills—which enable partisan actors to interfere with or manipulate elections by changing who runs elections, counts the votes, and how. At least 11 election sabotage laws

² “Transcript of Trump’s Speech at Rally before US Capitol Riot,” Associated Press, January 13, 2021, <https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27>; Brian Naylor, “Read Trump’s Jan. 6 Speech, a Key Part of Impeachment Trial,” National Public Radio, February 10, 2021, <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>; Lauren Leatherby et al., “How a Presidential Rally Turned into a Capitol Rampage,” *New York Times*, January 12, 2021, <https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html>; and Southern Poverty Law Center, *The Road to Jan. 6: A Year of Extremist Mobilization*, <https://www.splcenter.org/news/2021/12/30/road-jan-6-year-extremist-mobilization>.

³ Daniel Funke, “Fact Check: How We Know the 2020 Election Results Were Legitimate, Not ‘Rigged’ as Donald Trump Claims,” *USA Today*, January 6, 2022, <https://www.usatoday.com/story/news/factcheck/2022/01/06/fact-check-donald-trump-2020-election-results/9115875002/>; “Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees,” Cybersecurity and Infrastructure Security Agency, November 12, 2020, accessed April 8, 2022, <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>; and Brennan Center for Justice, *It’s Official: The Election Was Secure*, 2020, <https://www.brennancenter.org/our-work/research-reports/its-official-election-was-secure>.

⁴ Donald Trump, interview by Maria Bartiromo, *Sunday Morning Futures*, Fox News, November 29, 2020, <https://vimeo.com/485180163>.

⁵ “Tweets of November 16, 2020,” American Presidency Project, UC Santa Barbara, November 16, 2020, accessed April 8, 2022, <https://www.presidency.ucsb.edu/documents/tweets-november-16-2020>.

⁶ American Presidency Project, “Tweets.”

⁷ Brennan Center for Justice, *Voting Laws Roundup: December 2021*, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>.

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passed in nine states in 2021.⁸ This anti-democratic push continues today; as of the Brennan Center's January 14, 2022 count, state lawmakers had introduced, pre-filed, or carried over more than 250 restrictive voting bills⁹ and 41 election sabotage bills.¹⁰ These bills are much more closely connected to the push to overturn the 2020 election than many realize.

My testimony will establish, first, that many of these new restrictive voting and election sabotage bills stem directly from the false allegations made in lawsuits brought by former President Trump's campaign and his supporters in their bid to change the 2020 election results. Second, it will demonstrate that the state lawmakers leading this legislative charge are among the same individuals who rejected the 2020 election results. Almost all of them made public statements connecting their support for restrictive voting legislation to disinformation about the legitimacy of the 2020 election or widespread voter fraud. Already, the voting legislation that they succeeded in passing is creating tangible, negative effects on voters and disproportionately impacting voters of color.

Part II of my testimony will describe two ways in which the Big Lie is driving attacks on impartial election administration. First, false claims about voter fraud and the legitimacy of the 2020 election are triggering attacks on our nation's election administrators, leading an unprecedented number to contemplate quitting. A recent Brennan Center survey found that one in six election officials have experienced threats because of their job, and nearly one in three know of at least one colleague who has left their position due to safety concerns, increased threats, or intimidation.¹¹ Second, my testimony lays out how the Big Lie is politicizing election administration in other ways. Among other things, 2022 candidates for election administration positions are embracing election denial in their pitch to voters and donors. Races that feature election denial have seen massive increases in contributions, particularly from out-of-state donors. These trends pose a serious risk to impartial election administration in America.

In short, there is ample evidence that the disinformation that fueled the January 6 insurrection continues to undermine our election system. With 2022 primaries in progress, and the 2024 presidential election around the corner, the dangers to American democracy loom large.

This Committee's work is critical to repairing the breach in the fabric of our nation caused by the January 6 insurrection. It is critical to ensuring that the perpetrators of the violent insurrection are held accountable, and its victims receive justice. It also is critical to ensuring that this reprehensible history does not repeat itself. And it is critical to ensuring that the Big Lie that fueled the insurrection does not continue to grow and further damage our democracy.

⁸ Will Wilder, Derek Tisler, and Wendy R. Weiser, *The Election Sabotage Scheme and How Congress Can Stop It*, 2021, Brennan Center for Justice, 3–6, <https://www.brennancenter.org/our-work/research-reports/election-sabotage-scheme-and-how-congress-can-stop-it>.

⁹ Brennan Center for Justice, *Voting Laws Roundup: February 2022*, 2022, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022>.

¹⁰ Brennan Center, *Voting Laws Roundup: February 2022*.

¹¹ Brennan Center for Justice, *Local Election Officials Survey (March 2022)*, 2022, 6, 19, <https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-march-2022>.

I. The Same Election Denial Claims and Rhetoric That Fueled the Insurrection Are Driving Damaging Vote Suppression and Election Sabotage Efforts

Since the 2020 election, the country has witnessed two aggressive, anti-democratic developments in state legislatures. First, efforts to suppress voting have soared. In 2021 alone, at least 19 states passed 34 restrictive voting laws, or laws that make it more difficult to vote¹²—the largest number that the Brennan Center has seen in any year since it first began tracking voting legislation in 2011.¹³ Indeed, between 2011 and 2021, at least 33 states passed 97 restrictive voting bills, and more than a third of those laws passed last year alone.¹⁴ This legislative push was nationwide; overall, legislators introduced more than 400 restrictive voting bills in 49 states in 2021.¹⁵ This trend continues in 2022. As of the Brennan Center’s January 14, 2022 count, state lawmakers had introduced, pre-filed, or carried over more than 250 restrictive voting bills.¹⁶ The provisions in these bills range from curtailing access to mail voting and enacting new or stricter voter ID requirements, to imposing new barriers for voters and limiting or eliminating same-day voter registration.¹⁷ These numbers continue to grow.

Second, states have seen a dramatic spike in legislation that would enable partisan actors to meddle in election administration and vote counting processes—otherwise known as “election sabotage” bills. The Brennan Center identified at least 11 election sabotage laws passed in nine states in 2021,¹⁸ including laws in two states that allow partisan actors to remove election officials from their positions and replace them close to an election,¹⁹ laws in six states that create criminal penalties for election officials who take certain steps to make it easier for individuals to vote,²⁰ and laws in three states that empower partisan poll watchers to interfere in the vote counting process.²¹ Our January 14, 2022 count found that legislators in at least 13 states already

¹² Brennan Center, *Voting Laws Roundup: December 2021*.

¹³ Brennan Center, *Voting Laws Roundup: December 2021*.

¹⁴ Brennan Center, *Voting Laws Roundup: December 2021*; Brennan Center for Justice, *Voting Laws Roundup 2020*, 2020, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2020-0>; Brennan Center for Justice, *Voting Laws Roundup 2019*, 2019, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2019>; Brennan Center for Justice, *Voting Laws Roundup 2018*, 2018, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2018>; Brennan Center for Justice, *Voting Laws Roundup 2017*, 2017, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2017>; Brennan Center for Justice, *Voting Laws Roundup 2016*, 2016, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2016>; Brennan Center for Justice, *Voting Laws Roundup 2015*, 2015, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2015>; Brennan Center for Justice, *Voting Laws Roundup 2014*, 2014, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2014>; Brennan Center for Justice, *Voting Laws Roundup 2013*, 2013, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2013>; Brennan Center for Justice, *Election 2012: Voting Laws Roundup*, 2012, <https://www.brennancenter.org/our-work/research-reports/election-2012-voting-laws-roundup>; and Wendy R. Weiser and Nhu-Y Ngo, *Voting Rights in 2011: A Legislative Round-Up*, 2011, <https://www.brennancenter.org/our-work/research-reports/voting-rights-2011-legislative-round>.

¹⁵ Brennan Center, *Voting Laws Roundup: December 2021*.

¹⁶ Brennan Center, *Voting Laws Roundup: February 2022*.

¹⁷ Brennan Center, *Voting Laws Roundup: December 2021*; and Brennan Center, *Voting Laws Roundup: February 2022*.

¹⁸ Wilder, Tisler, and Weiser, *Election Sabotage Scheme*, 3–6.

¹⁹ Wilder, Tisler, and Weiser, *Election Sabotage Scheme*, 3.

²⁰ Wilder, Tisler, and Weiser, *Election Sabotage Scheme*, 5.

²¹ Wilder, Tisler, and Weiser, *Election Sabotage Scheme*, 5.

had pre-filed and introduced an unprecedented 41 such bills that would threaten the people and processes that make elections work.²² These provisions range from allowing any citizen to initiate or conduct biased election audits; to imposing new criminal or civil penalties on election officials for making unintentional errors; to allowing partisan actors to remove election officials from office.²³ These numbers also continue to grow.

The Brennan Center has been chronicling and studying these negative developments. Specifically, two recent analyses demonstrate that the same false allegations of a stolen election that drove the insurrection are driving these ongoing efforts to undermine voting rights and sabotage electoral processes. One analysis examined the text of restrictive voting and election sabotage legislation to show that it closely maps onto the same allegations made in lawsuits brought by former President Trump and his supporters in the wake of the 2020 election—all of which were unsuccessful. The second analysis reviewed the rhetoric of those legislators leading restrictive voting and election sabotage efforts to establish that these bills rest upon the same debunked rhetoric of widespread voter fraud that fueled the insurrection.

A. There Is Strong Evidence That the False Claims That Fueled the Insurrection Are Fueling Vote Suppression and Election Sabotage Legislation

For more than a decade, the Brennan Center has tracked and reported on new laws that make it more difficult for individuals to vote.²⁴ From the outset, baseless claims of voter fraud fueled this legislative movement.²⁵ Following the 2020 election, former President Trump and his supporters used this same rhetoric to conjure up claims of a “stolen” election and launch a full-scale effort to overturn the presidential election results in key states, including through a flurry of unsuccessful lawsuits discussed in section i below. In the wake of that failed effort, election denial proponents began rapidly introducing and passing state bills that restrict access to voting and make it easier for partisan actors to meddle in election administration. Our research demonstrates that this unprecedented legislative push was driven in significant part by claims that the 2020 election was stolen, as reflected by the similarity between the false claims made in lawsuits and the new legislative provisions, as well as by the public statements made by legislative sponsors concerning the legitimacy of the 2020 election and widespread voter fraud.

It is well established that voter fraud, while pernicious, is vanishingly rare in U.S. elections.²⁶ Courts universally rejected lawsuits seeking to overturn the 2020 election result based upon false theories of fraud.²⁷ Election officials and experts of all political persuasions

²² Brennan Center, *Voting Laws Roundup: February 2022*.

²³ Brennan Center, *Voting Laws Roundup: February 2022*.

²⁴ Brennan Center, *Voting Laws Roundup: February 2022*.

²⁵ Brennan Center for Justice, *Debunking the Voter Fraud Myth*, 2017, <https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth>; Brennan Center, *Refuting the Myth of Voter Fraud*; and “The Myth of Voter Fraud,” Brennan Center for Justice, accessed April 8, 2022, <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud>.

²⁶ Brennan Center, *Refuting the Myth of Voter Fraud*.

²⁷ Rosalind S. Helderman and Elise Viebeck, “‘The Last Wall’: How Dozens of Judges across the Political Spectrum Rejected Trump’s Efforts to Overturn the Election,” *Washington Post*, December 12, 2020, <https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4->

overwhelmingly agree that the 2020 election was one of the most secure in modern history.²⁸ Nevertheless, false claims about widespread voter fraud and the legitimacy of the 2020 election continue to drive legislation and policy efforts in the states.

i. Comparison of False Legal Claims about the 2020 Election and State Legislation Introduced and Passed in 2021

In the days before and after the 2020 election, former President Trump’s campaign and his supporters filed a blizzard of unsuccessful lawsuits in an attempt to alter the election’s outcome.²⁹ These lawsuits made a variety of allegations that the election was rife with fraud and irregularities. A recent Brennan Center analysis demonstrates that the false allegations contained in these suits map directly onto many provisions in the wave of new restrictive voting and election sabotage measures passed in 2022.

The analysis focuses on those lawsuits that raised false claims of fraud and attempted to disrupt or overturn the election, which were filed in 17 states.³⁰ Although courts rejected these suits,³¹ in 2021 legislators in 16 of the 17 states where suits were filed introduced bills to restrict access to voting.³² The majority of lawsuits filed before or immediately after the 2020 election centered on allegations that the mail voting process was not secure, despite well-settled evidence to the contrary.³³ Not surprisingly, the most common theme of new restrictive voting legislation last year was, in turn, an effort to restrict mail voting.³⁴

In fact, the connections between the 2020 litigation claims and the 2021 restrictive voting bills were much more specific than that. In 15 of the 16 states with both litigation and legislation, at least one provision in a new restrictive voting bill can be directly traced to a specific false claim made in a 2020 election lawsuit in that state.³⁵ The similarities remain just as strong when looking only at the most extreme category of lawsuits: those filed after Election Day seeking to overturn the results or block certification of an election. These lawsuits, filed in at least 12 states,

[25dc9f4987e8_story.html?utm_campaign=wp_todays_headlines&utm_medium=email&utm_source=newsletter&w_pisrc=nl_headlines](https://www.brennancenter.org/our-work/analysis-opinion/25dc9f4987e8_story.html?utm_campaign=wp_todays_headlines&utm_medium=email&utm_source=newsletter&w_pisrc=nl_headlines).

²⁸ Cybersecurity and Infrastructure Security Agency, “Joint Statement”; and Brennan Center, *It’s Official: The Election Was Secure*.

²⁹ “Voting Rights Litigation Tracker 2020,” Brennan Center for Justice, July 28, 2020, accessed April 8, 2022, <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020>.

³⁰ Katie Friel and Will Wilder, *Finding the Same Misinformation in Anti-Voter Lawsuits and Anti-Voter Legislation*, Brennan Center for Justice (forthcoming), <https://www.brennancenter.org/our-work/research-reports/finding-same-misinformation-anti-voter-lawsuits-and-anti-voter>. The Brennan Center’s analysis focused exclusively on those 2020 election lawsuits that relied on false claims about voter fraud and sought to disrupt or overturn the election. The analysis included lawsuits filed before the election that relied on false fraud claims and sought to enjoin certain methods of voting or have certain categories of votes cast out. It also included lawsuits filed after the election that used false claims of fraud to seek to invalidate certain categories of votes or overturn the election entirely. The analysis excluded cases filed by *pro se* litigants that made vague allegations of fraud that were not specific to any state or jurisdiction.

³¹ Helderman and Viebeck, “The Last Wall.”

³² Friel and Wilder, *Finding the Same Misinformation*.

³³ Wendy R. Weiser, “The False Narrative of Vote-by-Mail Fraud,” Brennan Center for Justice, April 10, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>.

³⁴ Friel and Wilder, *Finding the Same Misinformation*.

³⁵ Friel and Wilder, *Finding the Same Misinformation*.

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relied heavily upon spurious claims of fraud that courts ultimately rejected.³⁶ Yet in 11 of these 12 states, a provision contained in a 2021 restrictive voting bill directly mirrors false claims made in those suits.³⁷

In Arizona, for example, one 2020 lawsuit contested the results of the presidential election based in part upon an unproven claim that out-of-state voters cast ballots in Arizona.³⁸ The case was dismissed, but in 2021 Arizona legislators introduced a bill to expand voter roll purges in an effort to remove hypothetical out-of-state voters from the voter rolls.³⁹ Similarly, multiple cases in Wisconsin challenged election officials' decision to accept absentee ballots without a photo ID during the pandemic based upon the state's exemption to the voter ID requirement for individuals who are "indefinitely confined."⁴⁰ In 2021, legislators introduced two bills to repeal the exemption.⁴¹

In some states, the connections between 2020 litigation claims and 2021 legislative efforts were especially pronounced. In Georgia, for instance, litigation pushed four spurious claims to cast doubt upon the election results: (i) poll watchers were deliberately blocked from observing ballot processing, creating doubt in the accuracy of the counting process; (ii) the state's use of drop boxes increased the risk of fraud; (iii) absentee ballots generally threaten election integrity and lead to fraud; and (iv) private foundations used grant funding to gain undue influence over election officials.⁴² These claims were unsuccessful, and yet the Georgia legislature reinforced them by signing into law Senate Bill 202, which: (i) expands legal rights of poll watchers to observe elections without constraints by election administrators; (ii) limits the availability of drop boxes; (iii) significantly restricts access to mail voting by imposing stricter identification requirements for absentee voters and narrows the window to apply for absentee ballots; and (iv) prohibits local election administrators from accepting funding from private sources.⁴³

Pennsylvania illustrates the connection between baseless lawsuits challenging the integrity of the 2020 election and 2021 election sabotage provisions. Many of the legal challenges in Pennsylvania falsely claimed that the state's certification of the 2020 election was somehow invalid.⁴⁴ Although unfounded, these claims did influence Pennsylvania legislators, who introduced at least five resolutions in 2021 directly aimed at invalidating the results of the 2020 election.⁴⁵ Legal challenges in the state also made allegations of fraud as to the state's "notice and cure" practice, by which election officials notify voters if there is an issue with their

³⁶ Friel and Wilder, *Finding the Same Misinformation*.

³⁷ Friel and Wilder, *Finding the Same Misinformation*.

³⁸ Friel and Wilder, *Finding the Same Misinformation*; and Pet. For Elec. Cont., *Stevenson v. Ducey*, No. CV2020-096490 (Ariz. Super. Ct. 2020).

³⁹ Friel and Wilder, *Finding the Same Misinformation*; and H.B. 2358, 55th Leg., Reg. Sess. (Ariz. 2021).

⁴⁰ Friel and Wilder, *Finding the Same Misinformation*; and Pls.' Compl., *Feehan v. Wis. Elections Commission*, 2020 WL 7630410 (E.D. Wis. 2020).

⁴¹ Friel and Wilder, *Finding the Same Misinformation*. S.B. 204, 2021 Leg., Reg. Sess. (Wis. 2021). One of the two bills (Wis. S.B. 204) was passed by the legislature but subsequently vetoed by the governor.

⁴² Friel and Wilder, *Finding the Same Misinformation*.

⁴³ Friel and Wilder, *Finding the Same Misinformation*; and S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

⁴⁴ Friel and Wilder, *Finding the Same Misinformation*.

⁴⁵ Friel and Wilder, *Finding the Same Misinformation*.

mail-in ballot and provide the voter with an opportunity to fix the mistake.⁴⁶ While those claims were rejected, legislators subsequently introduced a bill to prohibit election officials from providing any opportunity for voters to cure their mail ballots.⁴⁷

ii. Analysis of Public Statements by Proponents of Restrictive Voting and Election Sabotage Legislation

A second recent Brennan Center analysis examined public statements made by sponsors and key proponents of restrictive voting and election sabotage legislation in the states and found that those sponsors justified their legislation using the same discredited claims of a widespread fraud and a stolen election that fueled the insurrection. The analysis focused on two sets of public rhetoric: (i) statements made by the chief sponsors and co-sponsors of the 13 most restrictive new laws passed in 2021; and (ii) statements concerning all 25 such bills introduced in Georgia and all 31 introduced in Pennsylvania in 2021, as these two states saw some of the most aggressive restrictive voting and election sabotage bills.⁴⁸ In total, the analysis uncovered relevant statements for 58 bills⁴⁹ made in legislative proceedings, at campaign events, to reporters, and on social media, with striking results.

We found, first, that the vast majority of the 58 bills were sponsored by legislators who publicly questioned the validity of the 2020 election, including the chief sponsors of 10 of the 13 most restrictive new state laws.⁵⁰ For example, Arkansas Representative Mark Lowery, who served as the chief sponsor of legislation enhancing voter ID requirements,⁵¹ notably stated that he “believe[s] Donald Trump was elected president” in 2020 and signed a letter asking for audits of the 2020 election in every state and decertification of any result declared “prematurely and inaccurately.”⁵²

Similarly, sponsors of 20 of the 25 restrictive bills introduced in Georgia last year questioned the election’s outcome, mostly by suggesting that the surge in absentee ballots in 2020 led to fraud.⁵³ Representative Barry Fleming, Chair of the Georgia House Special Committee on Elections formed in the wake of the 2020 election, suggested in an op-ed that unreliable mail ballots changed the outcome of certain races in 2020.⁵⁴ He argued that

⁴⁶ Friel and Wilder, *Finding the Same Misinformation*.

⁴⁷ Friel and Wilder, *Finding the Same Misinformation*.

⁴⁸ Andrew Garber, *Election Denial Rhetoric from Sponsors of State Voter Suppression Legislation*, Brennan Center for Justice (forthcoming), <https://www.brennancenter.org/our-work/research-reports/election-denial-rhetoric-sponsors-state-voter-suppression-legislation>. The analysis excluded legislation with more minor voting restrictions and mixed legislation that included both provisions that restricted voting access and expanded it.

⁴⁹ Garber, *Election Denial Rhetoric*. In total, the analysis reviewed 68 bills (one of which is a Georgia bill that was counted both in the list of the most restrictive new laws and in the list of restrictive voting bills in Georgia). Fifty-eight of these 68 bills contained relevant public statements from their sponsors.

⁵⁰ Garber, *Election Denial Rhetoric*.

⁵¹ H.B. 1112, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

⁵² Garber, *Election Denial Rhetoric*.

⁵³ Garber, *Election Denial Rhetoric*.

⁵⁴ Garber, *Election Denial Rhetoric*; and Barry Fleming, “Guest Column: Republican Party Wins on Election Day, and Future Is Bright,” *Augusta Chronicle*, November 15, 2020, <https://www.augustachronicle.com/story/opinion/columns/guest/2020/11/15/guest-column-republican-party-wins-on-election-day-and-future-is-bright/43155971/>.

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“Democrats [were] relying on the always-suspect absentee balloting process to inch ahead in Georgia and other close states” and proceeded to compare mail ballots to “the shady part of town down near the docks you do not want to wander into because the chance of being shanghaied is significant.”⁵⁵ He added: “Expect the Georgia Legislature to address that in our next session in January [2021].”⁵⁶ Representative Fleming later shepherded Senate Bill 202—an omnibus vote suppression and election sabotage package—through the House and served as the lead sponsor on two other restrictive bills.⁵⁷

And in Pennsylvania, sponsors of 25 of the 31 restrictive bills introduced in 2021 questioned the 2020 election’s integrity.⁵⁸ Representative Russ Diamond, for instance, wrote a Facebook post alleging that there were “troubling discrepancies between the numbers of total votes counted and total numbers of voters who voted in the 2020 General Election.”⁵⁹ He also believed that officials counted 200,000 extra votes and considered certifying Pennsylvania’s election results to have been “absolutely premature, unconfirmed, and in error.”⁶⁰ Representative Diamond subsequently sponsored five bills to restrict voting access in 2021 and served as the lead sponsor on four.⁶¹

Second, sponsors of many vote suppression and election sabotage bills introduced last year expressly connected those bills to false claims about the 2020 election. Sponsors of six of the 13 most restrictive bills made connections between voter fraud and the bill at hand.⁶² For example, when introducing Senate Bill 1111, which would have limited the types of addresses at which voters register to vote and otherwise enhances ID requirements,⁶³ Texas Senator Paul Bettencourt maintained that the “November 2020 election demonstrated the lack of transparency and lack of integrity within the election process.”⁶⁴ Along with six other “election integrity” bills that he filed, Senator Bettencourt posited that Senate Bill 1111 would help “to make sure the problems we faced in 2020 will not happen again.”⁶⁵ In Pennsylvania, Senator Doug Mastriano—who was present on Capitol grounds on January 6, held hearings in which Rudy Giuliani spread false claims of voter fraud, attempted to lead a partisan audit of the 2020 election, and reportedly claimed that he saw “better elections in Afghanistan”⁶⁶—went on to co-author a memorandum in support of Senate Bill 515, which would repeal no-excuse mail voting.⁶⁷ The memo echoed his earlier rhetoric by claiming that the bill would “once again restore confidence in our democracy and shine a light into the shadow of doubt that has been cast over Americans’ most democratic process.”⁶⁸ Likewise in Georgia, sponsors of nine of the

⁵⁵ Fleming, “Guest Column: Republican Party Wins.”

⁵⁶ Fleming, “Guest Column: Republican Party Wins.”

⁵⁷ Garber, *Election Denial Rhetoric*; and S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

⁵⁸ Garber, *Election Denial Rhetoric*.

⁵⁹ Garber, *Election Denial Rhetoric*.

⁶⁰ Garber, *Election Denial Rhetoric*.

⁶¹ Garber, *Election Denial Rhetoric*.

⁶² Garber, *Election Denial Rhetoric*.

⁶³ Garber, *Election Denial Rhetoric*; and S.B. 1111, 87th Leg., Reg. Sess. (Tex. 2021).

⁶⁴ Garber, *Election Denial Rhetoric*.

⁶⁵ Garber, *Election Denial Rhetoric*.

⁶⁶ Garber, *Election Denial Rhetoric*.

⁶⁷ Garber, *Election Denial Rhetoric*.

⁶⁸ Garber, *Election Denial Rhetoric*.

state’s 25 restrictive bills argued that the provisions in those bills were intended to address purported 2020 election fraud.⁶⁹

Finally, and not surprisingly, our analysis found that sponsors of every piece of introduced and enacted legislation publicly justified their legislation as measures to address voter fraud and election integrity—often in language mirroring that used by proponents of conspiracy theories relating to the 2020 election.⁷⁰ This language included, for example, trying to “restore or confirm confidence in the election process” or creating “an election where legal votes count, and illegal votes do not.”⁷¹

* * *

In short, the connections uncovered by the Brennan Center’s research demonstrate that the same election denial that drove litigation and rhetoric to overturn the 2020 election result played a critical role in driving restrictive voting and election sabotage efforts in 2021.

B. Restrictive Voting Legislation Fueled by Disinformation about the 2020 Election and Voter Fraud Is Harming Voters, and Disproportionately Voters of Color

The spike in restrictive voting legislation in 2021 already is harming voters, with a disproportionate amount of this harm falling on voters of color. First, existing research has found measurable, negative turnout effects for many of the types of provisions passed in 2021.⁷² For example, multiple social science studies have found that measures that create stricter voter ID requirements or limit polling place access markedly depress voter turnout, with larger effects for voters of color.⁷³ Other studies have found that reducing early in-person voting opportunities can reduce turnout,⁷⁴ as do earlier registration deadlines⁷⁵ and policies leading to long lines on Election Day.⁷⁶ Where empirical studies have not found a negative turnout impact, that does not mean harm is not occurring, but rather that it cannot be measured by existing empirical tools—or that large amounts of resources have been invested to overcome these barriers and maintain turnout levels.

Second, as new laws begin to take effect, there is mounting evidence that they already are disenfranchising voters. In Texas, for example, Senate Bill 1 creates a more stringent voter ID requirement pursuant to which voters must provide their driver’s license number or partial social

⁶⁹ Garber, *Election Denial Rhetoric*.

⁷⁰ Garber, *Election Denial Rhetoric*.

⁷¹ Garber, *Election Denial Rhetoric*.

⁷² See, e.g., Brennan Center for Justice, *The Impact of Voter Suppression on Communities of Color*, 2022, <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color>.

⁷³ Brennan Center, *Impact of Voter Suppression on Communities of Color*.

⁷⁴ Hannah L. Walker, Michael C. Herron, and Daniel A. Smith, “Early Voting Changes and Voter Turnout: North Carolina in the 2016 General Election,” *Political Behavior* 41 (2019); and Ethan Kaplan and Haishan Yuan, “Early Voting Laws, Voter Turnout, and Partisan Vote Composition: Evidence from Ohio,” *American Economic Journal: Applied Economics* 12(1) (2020).

⁷⁵ Greg Vonnahme, “Registration Deadlines and Turnout in Context,” *Political Behavior* 34 (2012).

⁷⁶ Stephen Pettigrew, “The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout,” *Electoral Studies* 71 (2021).

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security number that matches the county’s own files.⁷⁷ Already, the new law led to the rejection of thousands of mail-in ballots in the March 2022 primary election.⁷⁸ In Texas’s largest counties, rejection rates ranged from between six and almost 22 percent—significantly higher than the state’s one percent rejection rate in the 2020 election cycle.⁷⁹ Similarly, after the passage of mail voting restrictions in Georgia Senate Bill 202, voters in the state’s 2021 local elections were 45 times more likely to have their mail ballot applications rejected—and ultimately not vote as a result—than in 2020.⁸⁰ These examples represent just a small slice of the surge in new restrictive voting legislation.

Further, these new laws target and fall most harshly on voters of color. There is a growing body of social science research proving that restrictive voting laws disproportionately impact voters of color.⁸¹ There also is mounting evidence that the laws passed this year are especially like to have, and already are having, that effect.

For example, new laws making mail voting more difficult target and already are harming voters of color. Black voters—who make up about a third of the electorate in Georgia—comprised half of all late ballot application rejections in the state during 2021 local elections.⁸² In Florida, an analysis of drop box usage amongst different groups revealed that the state’s new restrictions on this voting method will impose greater burdens on Black voters than on other groups.⁸³ And in Arizona, the state’s shorter window for voters to add missing signatures to mail ballots will especially harm Navajo voters, many of whom would have to travel hundreds of miles to an election office to add their signature.⁸⁴

There also is significant evidence that laws restricting voters from receiving help when voting or registering to vote disproportionately impact voters of color.⁸⁵ Black and Latino voters are more likely to depend upon the help of third-party organizations to register and vote in Florida.⁸⁶ As a result, the state’s new limits on these organizations will create a disproportionate impact on them as compared to white voters.⁸⁷ Similarly, many Native American voters in Montana rely upon paid ballot collectors, as they often have infrequent mail service and limited

⁷⁷ S.B. 1., 87th Leg., 1st Spec. Sess. (Tex. 2021)

⁷⁸ Kevin Morris, Coryn Grange, and Zoe Merriman, *The Impact of Restrictive Voting Legislation*, Brennan Center for Justice, 2022, <https://www.brennancenter.org/our-work/research-reports/impact-restrictive-voting-legislation>.

⁷⁹ Morris, Grange, and Merriman, *Restrictive Voting Legislation*.

⁸⁰ Ryan Little and Ari Berman, “We Uncovered How Many Georgians Were Disenfranchised by GOP Voting Restrictions. It’s Staggering.” *Mother Jones*, January 28, 2022, <https://www.motherjones.com/politics/2022/01/gop-voting-law-disenfranchised-georgia-voters/>.

⁸¹ Brennan Center, *Impact of Voter Suppression on Communities of Color*.

⁸² Morris, Grange, and Merriman, *Restrictive Voting Legislation*.

⁸³ Morris, Grange, and Merriman, *Restrictive Voting Legislation*; and S.B. 90, 2021 Leg., Reg. Sess. (Fla. 2021).

⁸⁴ Morris, Grange, and Merriman, *Restrictive Voting Legislation*; S.B. 1003, 55th Leg., Reg. Sess. (Ariz. 2021); and Navajo Nation, Office of the President and Vice President, “Navajo Nation Leaders Urge Arizona Governor to Veto Voter Suppression Bill,” news release, April 30, 2021, <https://www.navajonns.gov/News%20Releases/OPVP/2021/Apr/FOR%20IMMEDIATE%20RELEASE%20-%20Navajo%20Nation%20leaders%20urge%20Arizona%20Governor%20to%20veto%20voter%20suppression%20bill.pdf>.

⁸⁵ Morris, Grange, and Merriman, *Restrictive Voting Legislation*.

⁸⁶ Morris, Grange, and Merriman, *Restrictive Voting Legislation*.

⁸⁷ Morris, Grange, and Merriman, *Restrictive Voting Legislation*; and Fla. S.B. 90.

access to locations at which they can submit their ballot.⁸⁸ A new state law bans the use of paid ballot collectors, creating a more burdensome voting process for many Native Americans, especially those with disabilities or who may lack access to transportation.⁸⁹

Further, new voter identification laws will disproportionately harm voters of color. For example, although Black registered voters account for only 30 percent of Georgia’s registered voters, they comprise more than half of those registrants without a qualifying state ID number or driver’s license under Senate Bill 202.⁹⁰ This is consistent with existing research that shows the racial turnout gap grows when states enact strict voter ID laws.⁹¹

These disparate impacts are not coincidental. There is a growing body of evidence that the push to restrict access to voting in the states is inextricable from race. Social science studies over the past decade have linked restrictive voting legislation to increases in political participation or population growth by voters of color.⁹² Forthcoming Brennan Center research provides evidence that the disinformation fueling restrictive voting legislation is perceived as race-based and that racial resentment is one of the most significant factors driving efforts to make voting more difficult.

II. The Same Election Denial That Drove the Insurrection Threatens Impartial Election Administrators

In addition to these ongoing threats to voting rights and electoral processes, disinformation about the 2020 election and voter fraud also is driving a wave of attacks on impartial election administrators. This risks triggering an election official retention crisis as experienced and capable officials leave or are forced out of their positions. Election denial also is politicizing—and nationalizing—the races by which these election officials are chosen, raising fears about who will replace the officials from both parties⁹³ who worked tirelessly to hold the line against election sabotage during the 2020 election.

⁸⁸ Morris, Grange, and Merriman, *Restrictive Voting Legislation*.

⁸⁹ Morris, Grange, and Merriman, *Restrictive Voting Legislation*; and H.B. 530, 2021 Leg., Reg. Sess. (Mont. 2021).

⁹⁰ Morris, Grange, and Merriman, *Restrictive Voting Legislation*.

⁹¹ Brennan Center, *Impact of Voter Suppression on Communities of Color*.

⁹² Brennan Center, *Impact of Voter Suppression on Communities of Color*; Daniel R. Biggers and Michael J. Hanmer, “Understanding the Adoption of Voter Identification Laws in the American States,” *American Politics Research* 45 (2017); Keith G. Bentele and Erin E. O’Brien, “Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies,” *Perspectives on Politics* 11 (2013); and Angela Behrens, Christopher Uggen, and Jeff Manza, “Ballot Manipulation and the ‘Menace of Negro Domination’: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002,” *American Journal of Sociology* 109 (2003).

⁹³ The 2020 Democracy Fund/Reed College Survey of Local Election Officials found that 44 percent of local election officials surveyed identified as Republican, compared to 33 percent who identified as Democrat and 22 percent who described themselves as Independent (among the 72 percent of respondents who shared their party identification). Paul Gronke et al., “Pursuing Diversity and Representation Among Local Election Officials,” *Democracy Fund*, May 20, 2021, <https://democracyfund.org/idea/pursuing-diversity-and-representation-among-local-election-officials/>.

A. Disinformation about the 2020 Election and Voter Fraud Is Driving Attacks on Election Officials and Pushing Them out of Their Positions

Election officials are facing unprecedented levels of threats and harassment. These attacks, which range from vigilante threats and intimidation to overt political interference and threats of prosecution, are forcing impartial, experienced election workers across the country to question their personal safety. Many of these attacks stem from the same election denial that fueled both the insurrection and the surge in restrictive voter and election sabotage legislation discussed above.

i. Vigilante Threats and Harassment

In the wake of the 2020 election, threats and harassment against state and local election officials have skyrocketed.⁹⁴ A recent survey of local election officials conducted by the Brennan Center reveals that one in six local election officials have experienced threats, ranging from racist and gendered harassment to death threats that named the election official's spouse and children.⁹⁵ More than three in four local election officials said that threats have increased in recent years, and nearly one in three know of at least one election worker who has left their job at least in part because of fears for their safety.⁹⁶ These findings reaffirm previous research conducted by the Brennan Center, which detailed patterns of harassment and interference directed at all levels of state and local election administration following the 2020 election.⁹⁷

Many of these attacks are traceable to the same stolen election allegations that fueled the insurrection. The violent threats against election workers have often explicitly invoked the baseless narratives of widespread election fraud and a stolen election. One email threatening to bomb polling places in Georgia declared that “no one at these places will be spared unless and until Trump is guaranteed to be POTUS again.”⁹⁸ In another case, a 63-year-old city clerk—who now carries a handgun out of fear for her safety—recalls a man who harassed her on the street and yelled “why did you allow Trump to lose? Why did you cheat?”⁹⁹ Election officials themselves have attributed increasing threats against them to disinformation; nearly two in three respondents in the Brennan Center's survey of local election officials believe that false information is making their job more dangerous.¹⁰⁰

Threats and harassment driven by election denial have continued at a dangerous pace into 2022. A recent POLITICO review across major social media platforms revealed a “flood” of

⁹⁴ Brennan Center for Justice and Bipartisan Policy Center, *Election Officials Under Attack*, 2021, <https://www.brennancenter.org/our-work/policy-solutions/election-officials-under-attack>, 3–5.

⁹⁵ Brennan Center, *Local Election Officials Survey*, 6; Linda So and Jason Szep, “Exclusive—Two Election Workers Break Silence after Enduring Trump Backers’ Threats,” Reuters, December 10, 2021, <https://www.reuters.com/article/us-usa-election-threats-georgia-exclusiv-idCAKBN2IP0VZ>; and James Verini, “He Wanted to Count Every Vote in Philadelphia. His Party Had Other Ideas,” *New York Times Magazine*, December 16, 2021, <https://www.nytimes.com/2020/12/16/magazine/trump-election-philadelphia-republican.html>.

⁹⁶ Brennan Center, *Local Election Officials Survey*, 5, 19.

⁹⁷ Brennan Center and Bipartisan Policy Center, *Election Officials Under Attack*.

⁹⁸ Linda So, “Trump-Inspired Death Threats Are Terrorizing Election Workers,” Reuters, June 11, 2021, <https://www.reuters.com/investigates/special-report/usa-trump-georgia-threats/>.

⁹⁹ Kyung Lah and Kim Berryman, “This Grandmother Has Overseen Dozens of Elections in Her City. And after 2020, She Carries a Gun,” CNN, January 21, 2022, <https://www.cnn.com/2022/01/21/politics/michigan-wisconsin-election-worker-intimidation/index.html>.

¹⁰⁰ Brennan Center, *Local Election Officials Survey*, 12.

recent posts promoting 2020 stolen election theories, including posts that used violent imagery and explicitly discussed attacking election officials.¹⁰¹ In February, the Department of Homeland Security issued an advisory warning that election fraud disinformation could motivate violent attacks on democratic institutions, including election workers, in the months preceding the 2022 midterm elections.¹⁰² As 2022 elections approach, these threats continue to directly impact the lives of election officials.

ii. Political Interference and Threats of Prosecution

The aftermath of the 2020 election also sparked a barrage of political attacks against election officials. These attacks included the widely reported efforts by former President Trump and his supporters to overturn the election outcome in key swing states. Most notably, the former President attempted to pressure Georgia Secretary of State Brad Raffensperger, a Republican, to “find 11,780 votes” and illegitimately declare him the state’s winner.¹⁰³ In Michigan, he publicly pressured local and state officials to revoke their votes to certify the election for President Biden.¹⁰⁴ These initial efforts to pressure election officials and sow distrust in the electoral system stem from the same false allegations of a stolen election that drove the insurrection.¹⁰⁵

Even after the 2020 election result was definitively resolved, political meddling persisted in the form of unsubstantiated audits and recounts. In Maricopa County, Arizona Republican Party leaders organized a sham “audit” of the County’s election results in an effort to discredit them.¹⁰⁶ To this day, Republican leaders in Arizona continue to claim—without evidence—that election administrators mishandled thousands of ballots.¹⁰⁷ The Arizona audit sparked copycat movements across the country, as the Wisconsin and Pennsylvania state legislatures ordered similar reviews of the 2020 vote.¹⁰⁸ As recently as September 2021, the Texas secretary of

¹⁰¹ Mark Scott and Rebecca Kern, “The Online World Still Can’t Quit the ‘Big Lie,’” *POLITICO*, January 6, 2022, <https://www.politico.com/news/2022/01/06/social-media-donald-trump-jan-6-526562>.

¹⁰² “Summary of Terrorism Threat to the U.S. Homeland,” Department of Homeland Security, last modified February 7, 2022, accessed April 8, 2022, <https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-february-07-2022>.

¹⁰³ Amy Gardner and Paulina Firozi, “Here’s the Full Transcript and Audio of the Call Between Trump and Raffensperger,” *Washington Post*, January 5, 2021, https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html.

¹⁰⁴ Maggie Haberman et al., “Trump Targets Michigan in His Ploy to Subvert the Election,” *New York Times*, November 19, 2020, <https://www.nytimes.com/2020/11/19/us/politics/trump-michigan-election.html>.

¹⁰⁵ See Brennan Center and Bipartisan Policy Center, *Election Officials Under Attack*, 16–17; and Ann Gerhart, “Election Results Under Attack: Here Are the Facts,” *Washington Post*, March 11, 2021, <https://www.washingtonpost.com/elections/interactive/2020/election-integrity/>.

¹⁰⁶ Elizabeth Howard and Gowri Ramachandran, “Partisan Arizona Election ‘Audit’ Was Flawed From the Start,” Brennan Center for Justice, September 27, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/partisan-arizona-election-audit-was-flawed-start>.

¹⁰⁷ Howard Fischer Capitol Media Services, “Another Senate Subpoena Issued for Arizona 2020 Election Documents,” *Arizona Daily Star*, March 21, 2022, https://tucson.com/news/state-and-regional/govt-and-politics/another-senate-subpoena-issued-for-arizona-2020-election-documents/article_dcc76aaa-a96d-11ec-a17a-b7f87b1c1504.html.

¹⁰⁸ Michael Wines, “Arizona’s Criticized Election Review Nears End, but Copycats Are Just Getting Started,” *New York Times*, September 23, 2021, <https://www.nytimes.com/2021/09/23/us/arizona-election-review.html>; Laurel White, “Wisconsin’s GOP-Backed Election Investigation Expanded over the Holidays,” Wisconsin Public Radio, January 3, 2022, <https://www.wpr.org/wisconsins-gop-backed-election-investigation-expanded-over-holidays>; and Sam Dunklau, “Pa. Senate Election ‘Audit’ Contract Doesn’t Say If the Public Will See the Results,” *WITF*,

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state’s office announced a “comprehensive forensic audit” of the 2020 results in four major counties.¹⁰⁹ And in Nevada, the state’s Republican Party compelled Republican Secretary of State Barbara Cegavske to review nearly 123,000 ballots based upon unfounded allegations of voter fraud.¹¹⁰ Secretary Cegavske’s review, which consumed 125 hours of her staff’s time, found no evidence of fraud.¹¹¹

More disturbingly, election officials increasingly face threats in the form of criminal prosecution. Just recently, election officials in Wisconsin were threatened with jail time as part of a months-long, spurious review of the 2020 presidential election.¹¹² Michael Gableman, a former state Supreme Court justice leading the review for Republican legislators, issued the threat after the chairwoman of the state Elections Commission and several other officials refused to sit for secret, closed-door interviews with him and instead requested to sit for the interviews before a legislative committee.¹¹³ As discussed in Part I above, other states such as Texas and Arizona are passing laws that would impose criminal penalties on election officials for routine activities and unintentional mistakes.¹¹⁴

Like the upsurge in vigilante attacks, the wave of political attacks following the 2020 election finds its roots in the same election denial that drove the insurrection. Unfortunately, political attacks against election officials show no sign of abating.¹¹⁵ State legislators across the county continue to propose bills that allow for criminal penalties against, or the removal of, experienced election officials.¹¹⁶ In fact, when the Brennan Center asked local election officials to compare how worried they were about political interference in the 2020 election with how worried they are about political interference in future elections, nearly three times as many said they are very worried about the future.¹¹⁷ In other words, election officials themselves believe that the political attacks against them will get worse.

December 7, 2021, <https://www.witf.org/2021/12/07/pa-senate-election-probe-contract-doesnt-say-if-the-public-will-see-the-results-among-other-things/>.

¹⁰⁹ Reid J. Epstein, “Texas, Under Pressure From Trump, Announces a ‘Full Forensic Audit’ of the 2020 Election In Four Counties,” *New York Times*, September 23, 2021, <https://www.nytimes.com/2021/09/23/us/politics/texas-trump-election-audit.html>.

¹¹⁰ Jacob Solis, “2020 Election Fraud Conspiracy Theories Remain Central to Many Republican Campaigns,” *Nevada Independent*, October 17, 2021, <https://thenevadaindependent.com/article/2020-election-fraud-conspiracy-theories-remain-central-to-many-republican-campaigns>.

¹¹¹ Barbara K. Cegavske, Secretary of State, and Mark A. Wlaschin, Deputy Secretary for Elections, “Re: Elections Integrity Violation Reports,” (via email, Nevada Office of the Secretary of State: April 21, 2021), <https://www.nvsos.gov/sos/home/showpublisheddocument?id=9428>.

¹¹² Patrick Marley, “Wisconsin Republicans Seek to Jail More Officials as Part of Their Review of the 2020 Presidential Election,” *Milwaukee Journal Sentinel*, February 18, 2022, <https://www.jsonline.com/story/news/politics/2022/02/18/wisconsin-republicans-michael-gableman-seeks-jail-officials-2020-presidential-election-review/6853176001/>.

¹¹³ Marley, “Wisconsin Republicans Seek to Jail More Officials.”

¹¹⁴ S.B. 1, 87th Leg., 1st Spec. Sess. (Tex. 2021); and H.B. 2905, 55th Leg., Reg. Sess. (Ariz. 2021).

¹¹⁵ Grace Gordon, et al., *The Dangers of Partisan Incentives for Election Officials*, Bipartisan Policy Center and Election Reformers Network, 2022, <https://bipartisanpolicy.org/report/the-dangers-of-partisan-incentives-for-election-officials/>.

¹¹⁶ NH H.B. 1567, 2022 Leg., Reg. Sess. (N.H. 2022); and S.F. 413, 89th Gen. Assemb., Reg. Sess. (Iowa 2021).

¹¹⁷ Brennan Center, *Local Election Officials Survey*, 9.

iii. Growing Election Official Retention Crisis

These disinformation-driven attacks threaten to create a retention crisis among election officials. According to the Brennan Center’s survey, three in five local election officials are concerned that threats and harassment will make it more difficult to retain or recruit election workers going forward.¹¹⁸ Disinformation also exacerbates the already-heavy strain on election workers, who must spend significant time correcting misleading and false information.¹¹⁹ Due to these challenging circumstances, dozens of local election officials in Michigan, Pennsylvania, and Wisconsin already have left their positions.¹²⁰ In Nevada, by 2024 more than a third of the state’s 17 top county election officials will be new to the job.¹²¹ And nationwide, one in five elected officials surveyed plan to leave their position before 2024.¹²² These officials overwhelmingly cited stress and the belief that politicians are attacking “a system that they know is fair and honest” as their top reasons for leaving.¹²³

B. Disinformation about the 2020 Election and Voter Fraud Is Distorting Statewide Campaigns to Oversee Elections

The vast majority of the thousands of state and local election officials in America are elected. This year, elections from town clerk and supervisor to state secretary of state and governor will decide who will administer and certify the elections during the next presidential cycle in 2024.¹²⁴ Twenty-seven states will hold elections for secretary of state—the official who typically serves as a state’s chief election officer.¹²⁵ These races are being run in the context of a disinformation campaign intended to cast doubt on election results, and a significant number of election official candidates in these races are invoking claims that the 2020 election was invalid.¹²⁶

For example, many candidates embrace disinformation about the 2020 election and voter fraud in their pitch to voters and donors, including—at the highest level—secretaries of state and gubernatorial candidates. The States United Democracy Center found that 21 secretary of state

¹¹⁸ Brennan Center, *Local Election Officials Survey*, 19.

¹¹⁹ Brennan Center and Bipartisan Policy Center, *Election Officials Under Attack*, 10.

¹²⁰ Sean Golonka, “Election Official Departures Rising Amid Burnout, Angry Voters, New Requirements,” *Nevada Independent*, January 23, 2020, <https://thenevadaindependent.com/article/election-official-departures-rising-amid-burnout-angry-voters-new-requirements>.

¹²¹ Golonka, “Election Official Departures.”

¹²² Brennan Center, *Local Election Officials Survey*, 18.

¹²³ Brennan Center, *Local Election Officials Survey*, 18.

¹²⁴ Local officials, like county clerks, are typically responsible for designing ballots, running polling places, employing poll workers, and overseeing ballot counts. Secretaries of state are often a state’s chief election official, overseeing procedures for voter registration and voting, as well as certifying results. Governors can also be involved in election administration through appointments, emergency declaration powers, and sometimes certification of results. Ian Vandewalker and Lawrence Norden, *Financing of Races for Offices that Oversee Elections: January 2022*, Brennan Center for Justice, 2022, <https://www.brennancenter.org/our-work/research-reports/financing-races-offices-oversee-elections-january-2022>.

¹²⁵ Louis Jacobson, *Secretary of State Races: More Important Than Ever in 2022, and More Complicated, Too*, Sabato’s Crystal Ball – UVA Center for Politics, December 1, 2021, <https://centerforpolitics.org/crystalball/articles/secretary-of-state-races-more-important-than-ever-in-2022-and-more-complicated-too/>.

¹²⁶ Lawrence Norden and Derek Tisler, “Addressing Insider Threats in Elections,” Brennan Center for Justice, December 8, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/addressing-insider-threats-elections>.

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candidates disputed the results of the 2020 election, including at least one candidate in 18 of the 27 states holding secretary of state contests this year.¹²⁷ Similarly, 24 of the 36 gubernatorial contests this year have seen campaigns take part in this disinformation.¹²⁸

This disinformation has, in turn, increased the prominence of these races, illustrated by trends in the financing of contests for secretary of state in key battleground states. Compared to recent election cycles, campaigns are raising more money, from more donors, with greater reliance upon out-of-state donations.

Across the states with the closest margins in the 2020 presidential contest that are holding secretary of state elections this year (Arizona, Georgia, Michigan, Minnesota, Nevada, and Wisconsin), the amount of campaign contributions has climbed more than three times higher than at this point in the 2018 cycle and eight times higher than 2014, according to the Brennan Center's analysis.¹²⁹

Disinformation about the 2020 election and voter fraud is primarily responsible for this trend. Arizona, for example, has received national attention for claims about election irregularities, as is discussed above. One candidate, a leading fundraiser in the secretary of state race, has claimed that "Trump won" and called for "decertifying" the election.¹³⁰ Amidst this disinformation-driven dialogue, contributions to Arizona secretary of state candidates doubled since the last cycle and have reached levels more than eight times higher than at this point in the 2014 cycle.¹³¹ Further, the number of donors giving in this year's secretary of state election, 11,566, is higher than that of recent cycles by a factor of 10.¹³² By comparison, only 1,235 people gave to all the Arizona secretary of state candidates combined in 2018.¹³³

In Michigan, one leading candidate has claimed that Dominion voting machines used by the state changed votes and said that "Trump won Michigan."¹³⁴ Another has said the "big lie" is leading to "an effort to try again in 2024 what those democracy deniers attempted to do in

¹²⁷ "Secretary of State Races in 2022," States United Democracy Center, last modified January 27, 2022, accessed April 8, 2022, https://statesuniteddemocracy.org/wp-content/uploads/2022/02/sos_deniers.html.

¹²⁸ "Governor Races in 2022," States United Democracy Center, last modified January 27, 2022, accessed April 8, 2022, https://statesuniteddemocracy.org/wp-content/uploads/2022/02/gov_deniers.html.

¹²⁹ Ian Vandewalker, *Financing of Races for Offices that Oversee Elections: February 2022*, Brennan Center for Justice, 2022, <https://www.brennancenter.org/our-work/research-reports/financing-races-offices-oversee-elections-february-2022>. We include the Wisconsin secretary of state race even though that office does not administer elections because election denial is an issue there. The Wisconsin Elections Commission, like elections administrators in many states, has been attacked over the 2020 elections. There has been a push, including by several declared candidates for secretary of state or governor, to give the secretary of state greater power over elections. See Laurel White, "GOP Lawmaker Amy Loudenbeck Launches Secretary of State Campaign, Calls for Office to Take Control of Elections," Wisconsin Public Radio, December 1, 2021, <https://www.wpr.org/gop-lawmaker-amy-loudenbeck-launches-secretary-state-campaign-calls-office-take-control-elections>.

¹³⁰ Vandewalker, *Financing of Races for Offices: February 2022*.

¹³¹ Vandewalker, *Financing of Races for Offices: February 2022*.

¹³² Vandewalker, *Financing of Races for Offices: February 2022*.

¹³³ Vandewalker, *Financing of Races for Offices: February 2022*.

¹³⁴ Jeremy Herb and Sara Murray, "Trump-Backed Michigan Secretary of State Candidate Spread False Election Claims and January 6 Conspiracy Theories," CNN, November 16, 2021, <https://www.cnn.com/2021/11/16/politics/kristina-karamo-michigan-secretary-of-state-candidate/index.html>.

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2020 but failed.”¹³⁵ Amid this rhetoric, contributions to Michigan secretary of state candidates are three times higher than at this point in the 2018 cycle.¹³⁶ Incumbent Jocelyn Benson (D), who administered the 2020 election in Michigan and opposes claims that the 2020 election was invalid, has raised \$1.5 million, from 4,890 donors.¹³⁷ Educator Kristina Karamo, Benson’s Republican opponent, has raised the second-largest amount: \$233,494 from 2,206 donors.¹³⁸ They each have more donors than those giving to all the secretary of state candidates combined in the last cycle, which was 1,478.¹³⁹

Beyond the sheer amounts of money flowing into secretary of state races, these contests for bureaucratic state positions are taking on a more national profile as candidates attract unprecedented numbers of donors and funding from outside their own state.

In Arizona, the amount that donors from other states have contributed has soared to almost 10 times more than in the 2018 cycle and over 30 times more than in either the 2014 or 2010 cycle.¹⁴⁰ Republican State Representative Mark Finchem has received contributions from 4,983 people who live outside Arizona—two-thirds of his donors.¹⁴¹ Another secretary of state candidate, Democratic State Representative Reginald Bolding, also counts a majority of his donors—54 percent of his 1,390 contributors—from other states.¹⁴² In the 2018 cycle, by comparison, only 117 out-of-state donors made contributions throughout the entire secretary of state contest.¹⁴³

Similarly, the Michigan secretary of state election also has seen a sudden increase in out-of-state funding. Donors living outside of Michigan have contributed \$474,977—three and a half times higher than the amount from the prior election, which also saw out-of-state funding levels higher than each of the two election cycles before.¹⁴⁴

In light of these numbers, it is important to recognize the dangerous interplay between election denial, threats against election officials, and the nationalization of races for election official positions. As detailed above, disinformation-driven attacks against election officials are pushing experienced officials from both parties out of their positions. At the same time, the individuals who may replace them will in many instances emerge from nationalized, politically charged races that heavily feature disinformation about the 2020 election and voter fraud. Our

¹³⁵ Vandewalker and Norden, *Financing of Races for Offices: January 2022*.

¹³⁶ Vandewalker, *Financing of Races for Offices: February 2022*.

¹³⁷ Vandewalker, *Financing of Races for Offices: February 2022*.

¹³⁸ Beth LeBlanc, “Benson Leads Karamo in Cash Haul for Michigan Secretary of State’s Race,” *Detroit News*, January 31, 2022, <https://www.detroitnews.com/story/news/politics/2022/01/31/jocelyn-benson-leads-kristina-karamo-cash-haul-michigan-secretary-state-race/9288506002/>; and Vandewalker, *Financing of Races for Offices: February 2022*.

¹³⁹ Vandewalker, *Financing of Races for Offices: February 2022*.

¹⁴⁰ Vandewalker, *Financing of Races for Offices: February 2022*.

¹⁴¹ Vandewalker, *Financing of Races for Offices: February 2022*.

¹⁴² Vandewalker, *Financing of Races for Offices: February 2022*.

¹⁴³ Vandewalker, *Financing of Races for Offices: February 2022*.

¹⁴⁴ Vandewalker, *Financing of Races for Offices: February 2022*.

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research shows that local election officials themselves are worried about this very problem and the impact on their profession: over half of local election officials surveyed by the Brennan Center worry that their incoming colleagues might believe that “widespread voter fraud” contaminated the 2020 elections.¹⁴⁵

Regardless of the outcome of these elections, relentless voter fraud lies and conspiracy theories have damaged voter confidence in election results, which is necessary for a functioning democracy. A majority of Americans believe U.S. democracy is “in crisis and at risk of failing.”¹⁴⁶ One candidate put it starkly: “If American democracy is to survive, political figures of both parties need to abandon stolen-election claims.”¹⁴⁷

* * *

My testimony has shown that the same allegations that fueled the insurrection are continuing to wreak havoc on our democracy. The attacks on our democracy, in turn, expose the uncomfortable truth that our country does not have sufficient guardrails in place to protect our elections from efforts to restrict voting, sabotage our electoral processes, and undermine impartial election administration. To ensure free and fair elections, we must bolster and strengthen those guardrails. Most critically, we need baseline national standards for voting access and election administration, protections against voting discrimination, protections for impartial election administrators, and other defenses against election sabotage.

Congress has broad authority under the Constitution to enact the necessary legislation, and it came close to doing so earlier this year. The Freedom to Vote: John R. Lewis Act, which narrowly failed to overcome a filibuster in March, would address many of these problems. Most importantly, it would establish national standards for the casting *and the counting* of ballots in federal elections and protect against harmful rollbacks of voting rights, partisan efforts to discard or otherwise manipulate election results, and attacks on election officials who are simply following well-recognized best practices. It also would directly insulate election officials from politicized efforts to remove them, increase safeguards against vigilante threats and harassment, curb the fraudulent “audits” that have been conducted in Arizona and elsewhere, and give voters a statutory right to sue if their voting rights are infringed, including by a failure to certify lawful election results. And it contains direct curbs on disinformation—including a clear prohibition on the dissemination of false information about elections designed to suppress the vote—as well as increased transparency for paid political communications over the Internet. Finally, it would revitalize the landmark Voting Rights Act’s protections against racial discrimination in voting that the Supreme Court has hobbled, among many other much-needed provisions.¹⁴⁸

¹⁴⁵ Brennan Center, *Local Election Officials Survey*, 14.

¹⁴⁶ Mallory Newall, Chris Jackson, and James Diamond, “Seven in Ten Americans Say the Country Is in Crisis, at Risk of Failing,” Ipsos, January 3, 2022, <https://www.ipsos.com/en-us/seven-ten-americans-say-country-crisis-risk-failing>.

¹⁴⁷ Vandewalker and Norden, *Financing of Races for Offices: January 2022*.

¹⁴⁸ See Wilder, Tisler, and Weiser, *The Election Sabotage Scheme*; Brennan Center for Justice, *The Freedom to Vote Act*, 2022, <https://www.brennancenter.org/our-work/research-reports/freedom-vote-act>; *Hearing on Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act, before the S. Comm. On Judiciary*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://www.brennancenter.org/our-work/research-reports/testimony-protecting-precious-almost-sacred->

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The only way to neutralize the disinformation-driven threats to our democracy and to protect against potentially catastrophic results is through such federal legislation. We strongly urge Congress to revisit this critical bill and pass it into law.

[right-john-r-lewis-voting](#); *Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms, before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://docshouse.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-WeiserW-20210816.pdf>;
Hearing on the Oversight of the Voting Rights Act: A Continuing Record of Discrimination, before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>;
Hearing on Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot, 117th Cong. (2021) (testimony of Kevin Morris, Researcher, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/Morris%20-%20Written%20Testimony.pdf>;
Hearing on Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, before the H. Comm. on House Administration, Subcomm. on Elections, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/2021-06-22%20Waldman%20-%20Testimony.pdf>; and *Hearing on the Implication of Brnovich v. Democratic National Committee and Potential Legislative Responses, before the H. Comm. On Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Sean Morales-Doyle, Acting Director, Voting Rights and Elections Program, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210716/113905/HHRG-117-JU10-Wstate-Morales-DoyleS-20210716.pdf>.