

STATEMENT FOR THE RECORD

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW¹

HEARING ON THE RIGHT SIDE OF HISTORY: PROTECTING VOTING RIGHTS IN AMERICA

BEFORE THE SENATE JUDICIARY COMMITTEE

March 12, 2024

The Brennan Center appreciates the opportunity to submit a statement 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”). Together with the Freedom to Vote Act, this Act would go a long way toward addressing the most significant challenges facing voting rights and elections in America today.

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 in a series of decisions during the last 11 years. In doing so, it made clear that Congress has the power to restore and bolster the law, which the John Lewis Voting Rights Act would do.³

When this Committee considered the Act in the last Congress, it heard and compiled a vast array of evidence that race discrimination in voting is ongoing and pervasive. The record before this Committee and others presented a convincing case that the John Lewis Voting Rights Act was constitutional and necessary to continue our nation’s progress towards the equal and inclusive democracy envisioned by the Fourteenth and Fifteenth Amendments. Unfortunately, despite majority support for the Act in both houses of Congress and in the White House, it did not become law.

As more time passes without the full protections of the VRA, we now have even more evidence of race discrimination in voting and injury to voters. In *Shelby County*, the Court wrote that because the gap between white and Black turnout rates had narrowed significantly in the covered states, the preclearance requirements in Section 5 of the VRA may no longer be justified. Taking its cue from this analysis, a recent Brennan Center study shows that the racial turnout gap is growing across the country – and growing fastest in the formerly covered states.

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. This statement does not purport to convey the views, if any, of the New York University School of Law.

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

³ *Shelby County v. Holder*, 570 U.S. at 557 (2013) (“Congress may draft another formula based on current conditions.”); see also generally *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (premiering its holding on an interpretation of the current text of Section 2).

This study is far from the only new evidence since the fall of 2021. States have continued to pass laws that make it harder to vote (especially for voters of color) in astonishing numbers, map makers have fiercely defended post-2020 racial gerrymanders (sometimes despite court orders), and federal courts have scarcely protected voting rights even in the face of clear discrimination.

I. The Brennan Center’s Previous Submissions Demonstrated That the Act Is Both Constitutional and Necessary.

During the last Congress, the Brennan Center supplied significant evidence illustrating the problem of race discrimination in voting to this committee and others. Rather than reiterating that previously offered evidence here, we offer only a brief summary and attach our previous written submissions in Appendix A.

- On September 10, 2019, then-Director of the Brennan Center’s Voting Rights and Elections program Myrna Pérez testified before the House Committee on the Judiciary’s Subcommittee on the Constitution, Civil Rights and Civil Liberties. Her testimony provided evidence of how voting discrimination had evolved since *Shelby County*, explaining that formerly covered jurisdictions had passed numerous restrictive voting laws and engaged in improper voter purges.
- On May 27, 2021, Brennan Center Vice President for Democracy Wendy Weiser submitted testimony to the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the House Committee on the Judiciary that set out in detail three trends in voting since *Shelby County* that reveal ongoing discrimination: (1) an accelerated rate of voter purges in jurisdictions previously covered by preclearance; (2) longer waiting times for voters of color as compared to white voters; and (3) the decade-long trend of restrictive voting legislation in state legislatures that reached unprecedented heights in 2021.
- On June 11, 2021, Brennan Center Researcher Kevin Morris testified before the Committee on House Administration’s Subcommittee on Elections about how polling place issues disproportionately affect people of color. Morris focused on three primary issues: (1) voters of color face much longer lines than white voters across the country; (2) polling place closures are especially harmful to the turnout of nonwhite voters; (3) these problems were likely compounded by changes in voter purge practices attributable to *Shelby County*.
- On June 24, 2021, Brennan Center President Michael Waldman testified before the Subcommittee on Elections of the Committee on House Administration. He explained the relationship between the new spike in discriminatory voter suppression and the lies told about the 2020 election.
- On July 16, 2021, the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the House Committee on the Judiciary held a hearing on the implications of the Supreme Court’s decision in *Brnovich v. Democratic National Committee* earlier that month. The Director of our Voting Rights and Elections Program, Sean Morales-Doyle, described how that decision undermined Congress’s intent in Section 2 of the VRA, adding to the damage done by the *Shelby County* decision. He laid out how the John Lewis Voting Rights Act could

revitalize Section 2 to make it responsive to the modern-day approaches to vote suppression.

- On August 16, 2021, Wendy Weiser returned to the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights and Civil Liberties to present our early research on the persistence of the racial turnout gap and its growth in jurisdictions previously covered by Section 5, along with a compilation of the discriminatory barriers that voters faced during the 2020 election. She also offered a detailed analysis of the constitutionality of the approach that the John Lewis Voting Rights Act offers to remedy these problems.
- On October 6, 2021, Wendy Weiser appeared before this Committee to elaborate on the constitutionality of the geographic preclearance coverage formula in the Act. Her testimony demonstrated that while race discrimination in voting is still widespread, it is especially persistent and intractable in certain jurisdictions. She further explained how the formula in the Act was fine-tuned to address this reality.
- On April 8, 2022, Wendy Weiser submitted testimony to the House Select Committee to Investigate the January 6th Attack on the United States Capitol, describing Brennan Center research that revealed how the same false claims that fueled the insurrection also drove the vote suppression efforts that make the John Lewis Voting Rights Act necessary.

II. New Evidence Shows That the Racial Turnout Gap Is Growing Nationwide.

Groundbreaking new Brennan Center research reveals that the gap in voting turnout rates between white voters and voters of color – known as the racial turnout gap – has grown substantially and continuously since 2012. Additionally, the gap grew far more significantly in the states previously covered by Section 5 of the Voting Rights Act. In fact, the racial turnout gap grew almost twice as fast in the previously covered states. This study uses many techniques to establish robustness. In doing so, it demonstrates that the rising turnout gap is explained by racial discrimination and not by other factors such as region, income, or education alone.

a. Whether Or Not There Is a Racial Turnout Gap Is a Sign of Whether Voting Discrimination Is Occurring.

The racial turnout gap is one reflection of discrimination in voting because it shows the cumulative effect of how all the policies and practices within a jurisdiction affect voters of different racial groups. While analyses of specific types of policies may demonstrate discrete effects, the racial turnout gap accounts for the *overall* impact of a jurisdiction’s voting policies on voters of color, including informal changes at the local level like moving precinct locations. This analysis is important because most voting restrictions are not single, massive policy changes. Rather, modern restrictions are more likely to impose “inconveniences, especially a collection of them, differentially affecting members of one race.”⁴

⁴ *Brnovich*, 141 S. Ct. at 2362 (Kagan, J., dissenting).

While it is true that discriminatory policies are not the sole driver of the racial turnout gap, they are certainly one of the factors. A turnout gap that remains high over time indicates that voters of color are facing sustained barriers to the ballot box, whereas some other factors affecting turnout – such as the weather on election day – often vary from election to election. A comprehensive analysis of the racial turnout gap thus serves as a valuable tool in understanding how state and local laws and policies impact voters of color.

b. The Supreme Court Has Looked to Racial Turnout Gaps to Assess Whether Voting Discrimination Is Happening.

The Supreme Court has long viewed the turnout gap as a key marker of racial discrimination in voting. In the first major case challenging the constitutionality of the VRA, the Court upheld Congress’s creation of preclearance in part because it relied on low turnout: “a low voting rate is pertinent [evidence of voting discrimination] for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters.”⁵ Decades later, and just four years before *Shelby County*, the Court looked again to voter turnout rates.⁶ This time, the Court noted that preclearance may not be justified for much longer as the turnout gap had closed since 1965.⁷

This finding of a shrinking turnout gap played a major role in *Shelby County*. A significant portion of Chief Justice Roberts’ majority opinion focused on how the turnout gap had shrunk from 1965 to 2012.⁸ The Court observed that it had historically upheld Congress’s authority to use geographic preclearance in only certain states to remedy voting discrimination because turnout was so low in those states. By 2013, the Court looked at the evidence available to it to determine that voter turnout “approach[ed] parity” and therefore current conditions did not justify the use of Congress’s power to subject some states to preclearance.⁹

In stating that a small turnout gap evidenced a lack of racial discrimination, Chief Justice Roberts implied that the converse is true, as well: a large turnout gap is evidence of the existence of discrimination in voting.¹⁰ Whatever one’s view is of the relationship between discrimination and the racial turnout gap, the purported justification for ending preclearance enforcement turned out to be wrong. The elections of President Obama in 2008 and 2012 temporarily narrowed the turnout gap between white and Black voters, but that gap has since surged. And notably, the racial turnout gap never shrank so significantly for Asian and Latino voters and has remained high since *Shelby County*.

⁵ *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966).

⁶ *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 302 (2009).

⁷ *Id.*

⁸ *Shelby County v. Holder*, 570 U.S. 529, 546-49 (2013).

⁹ *Id.* at 547 (quoting *Northwest Austin*, 557 U.S. at 202). Our report also explains why the Court was wrong to conclude that the turnout gap had disappeared in 2013. *Shelby County* focuses on the 2008 and 2012 elections, where a Black presidential candidate was on the ballot, which drove up Black turnout. Thus, the Court’s analysis was extremely narrow; for instance, the 2010 midterms saw a much larger turnout gap. For further explanation, see Kevin Morris and Coryn Grange, *Growing Racial Disparities in Voter Turnout, 2008–2022*, Brennan Center for Justice, March 2, 2024, 8, <https://www.brennancenter.org/our-work/research-reports/growing-racial-disparities-voter-turnout-2008-2022>.

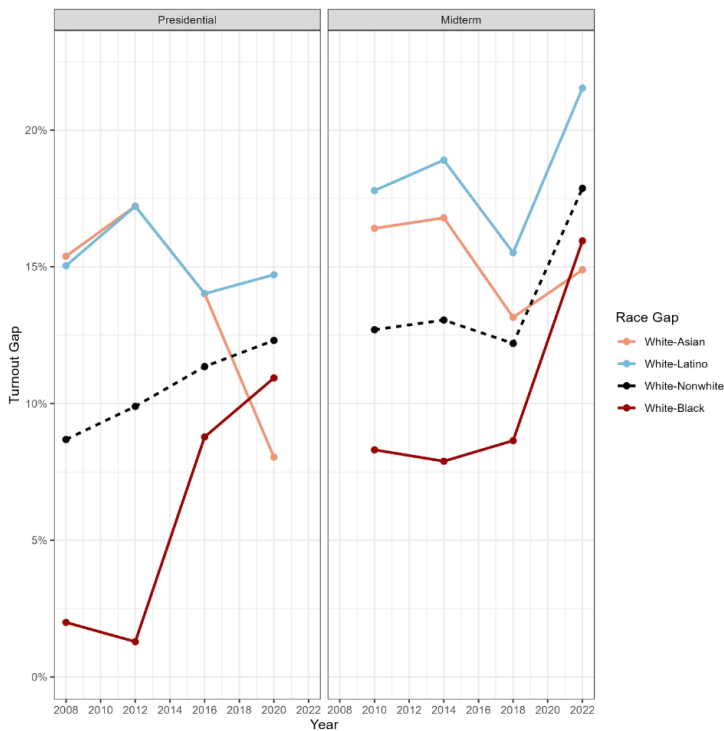
¹⁰ *Shelby County*, 570 U.S. at 546-47 (quoting *Katzenbach*, 383 U.S. at 308-13).

c. There Has Been a Steady Increase in the Racial Turnout Gap Over the Last Decade.

The Brennan Center has compiled the voter file data for every state in the country for every federal election going back to the 2008 election, which is a database of unprecedented size. To our researchers’ knowledge, this is the first time researchers have compiled such a comprehensive dataset. The team analyzed almost one billion voter records.¹¹ While our researchers have previously demonstrated that the racial turnout gap has grown in several states for specific elections, they can now quantify how widespread the problem is and what some of its root causes are.

The research demonstrates that the turnout gap is growing in virtually every state in the country.¹² Between 2010 and 2022, the gap between white Americans’ voting rates and voting rates for Americans of color grew by five percentage points. While the magnitude of the harm varies in each state, there is no question that this is a nationwide problem.¹³

Figure 1: Racial Turnout Gap, 2008–2022 (Figure 1 in Growing Disparities in Voter Turnout, 2008-2022)¹⁴



¹¹ Morris and Grange, *Growing Racial Disparities in Voter Turnout*, 3, 5.

¹² *Id.* at 3, 9-10.

¹³ Geographic preclearance is an essential tool to prevent further harm in the places where discrimination is the worst, but the nationwide scope of the problem shows that a complete package is necessary to give voters the tools to fight discrimination wherever it happens.

¹⁴ Morris and Grange, *Growing Racial Disparities in Voter Turnout*, 7.

Overall, in the period from 2008 to 2022, the white to voter of color gap was at its lowest in 2008 but was still nine percentage points.¹⁵ In the most recent presidential election, it rose to 12 points.¹⁶ As for midterm elections, the same gap has grown from 13 points to 18 points from 2010 to 2022.¹⁷

Drilling down, we see that voters across several racial groups are voting less relative to white voters. The white-Black turnout gap has increased by eight percentage points from 2010 to 2022. The white-Latino turnout gap rose by four percentage points in those 12 years. And the racial turnout gap is increasing even though overall turnout has gone up in recent years.¹⁸ This is because white turnout is growing at a faster clip than nonwhite turnout.

Other researchers, too, are discovering a growing nationwide turnout gap. The Washington Post found that the turnout gap between white and Black voters reached 11 percentage points in 2022, the largest in any federal election since at least 2000.¹⁹ Many scholars have recently found that restrictive voting laws generally limit the turnout of voters of color the most.²⁰

d. The Increase in the Racial Turnout Gap Is Not Being Fully Driven by Region, Income, or Education.

The study shows the turnout gap is not explained by other well-established factors such as regional differences, education, or income.²¹

When the researchers divide voters up by region – midwest, northeast, south, and west – the result remains the same: higher turnout from white voters than for other racial groups.²² This conclusion holds true in both presidential and midterm elections in all four regions.²³

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 8.

¹⁹ Scott Clement and Lenny Bronner, “Black Turnout Dropped Sharply In 2022 Midterms, Census Survey Finds,” *Washington Post*, May 2, 2023, <https://www.washingtonpost.com/politics/2023/05/02/black-voter-turnout-election-2022/>.

²⁰ Anna Baringer, Michael C. Herron, and Daniel A. Smith, “Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus,” *Election Law Journal: Rules, Politics, and Policy* 19, no. 3 (2020): 289–320, <https://doi.org/10.1089/elj.2020.0658>; Bernard L. Fraga and Michael G. Miller, “Who Do Voter ID Laws Keep from Voting?,” *Journal of Politics* 84, no. 2 (2022): 1091–1105, <https://doi.org/10.1086/716282>; John Kuk, Zoltan Hajnal, and Nazita Lajevardi, “A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout,” *Politics, Groups, and Identities* 10, no. 1 (2022): 126–34, <https://doi.org/10.1080/21565503.2020.1773280>; and Enrijeta Shino, Mara Suttman-Lea, and Daniel A. Smith, “Determinants of Rejected Mail Ballots in Georgia’s 2018 General Election,” *Political Research Quarterly* 75, no. 1 (2022): 231–43, <https://doi.org/10.1177/1065912921993537>.

²¹ The difference in growth rate in the formerly covered counties cannot be explained by any difference between these counties and the rest of the country in terms of age, education, racial composition, or other sociodemographic characteristics.

²² Morris and Grange, *Growing Racial Disparities in Voter Turnout*, 8-10.

²³ *Id.* The only exceptions across the 2008 to 2022 elections are the 2008 and 2012 elections in the South, where Black turnout slightly exceeded white turnout. The presence of a Black presidential candidate on the ballot likely explains in part, if not mostly, why these exceptions exist. *See id.* at 8.

Additionally, income only explains part of the turnout gap. There are turnout gaps between racial groups living in similar neighborhoods; for example, the white-nonwhite turnout gap exceeded 15 percentage points in the 2022 midterms even in the highest-income neighborhoods.²⁴ This disparity suggests that income alone does not explain the turnout gap.

Education, too, is only a partial explanation. White voters participate at higher rates than nonwhite voters even when the racial groups are split into quartiles based on the percent of adults who have at least a bachelor's degree in a neighborhood.²⁵ In other words, even when white and nonwhite Americans live in neighborhoods with similar education levels, white people vote more.

III. Our Study Reveals That the Racial Turnout Gap Is Growing Faster in States and Counties that Were Subject to Preclearance Before *Shelby County*.

The Brennan Center turnout gap study establishes not just that the turnout gap is growing nationwide but that it is growing far more significantly in the states and counties that were subject to preclearance before *Shelby County*.²⁶ The racial turnout gap in those areas grew on average almost twice as fast as in similar parts of the country that were not covered. Within the universe of once covered counties, those with histories of discrimination in voting are experiencing the fastest rise. In fact, the study argues that *Shelby County* is a significant cause of the racial turnout gap growing faster in those states and counties.²⁷

a. The *Shelby County* Decision Is One of the Most Significant Drivers of the Rising Racial Turnout Gap.

To make this determination, our researchers calculated the white-nonwhite and white-Black turnout gap for every county in the country for each federal election between 2008 and 2022. To be sure, turnout is the product of many factors, not all of which are measurable. But this research shows that the *Shelby County* decision has amplified the growing turnout gap trend.

The key finding driving this conclusion is that before 2013, the turnout gap between white and Black voters moved in lockstep in covered and noncovered jurisdictions alike. In other words, there was a roughly stable difference in the turnout gap between the places subject to coverage and areas not covered of around three or four percentage points.²⁸ Post-2013, however, the turnout gap in formerly covered areas has grown much faster than in non-covered ones. Non-covered counties saw their white-nonwhite and white-Black turnout gaps grow by five and six percentage points, respectively, over the last decade whereas formerly covered counties saw them rise to nine and 11 percentage points.²⁹ The research accounts for socioeconomic and

²⁴ *Id.*

²⁵ *Id.* at 12-13.

²⁶ *Id.* at 3.

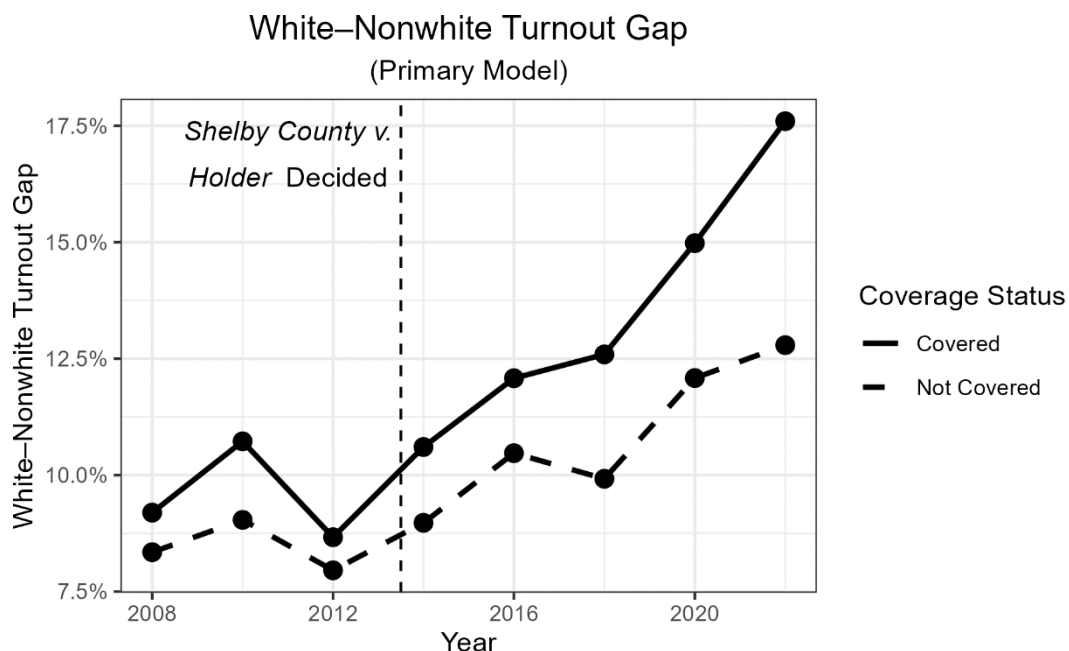
²⁷ *Id.* at 17-19.

²⁸ *Id.*

²⁹ *Id.* at 18.

political differences between the formerly covered counties and the rest of the country and the effects are statically significant at the 95% confidence level.³⁰

Figure 2: White–Nonwhite Turnout Gap Time Series (Figure A(3)(a) in the Technical Appendix to Growing Disparities in Voter Turnout, 2008-2022)³¹



Uncovered counties adjusted to control for the following characteristics: population, share white, share Black, median income, median age, share with bachelor’s degree or higher, 2012 Obama vote share.

The candidates on the ballot do not explain why the racial turnout gap is growing more in formerly covered places. The research team looked for an “Obama effect” and a “Trump effect” and found that neither explains the disparity. There were not bigger increases in the turnout gap in the formerly covered jurisdictions in 2016 and 2020 when Trump was on the ballot as compared to years he was not (2014, 2018, 2022). And there is no reason to think that the Trump campaign was more effective at mobilizing voters in formerly covered Alabama than it was in not formerly covered Arkansas. This portion of the study used techniques to compare once covered and never covered counties that are similar across numerous factors such as age, education, racial composition, and support for Obama.

b. States and Counties That Were Covered by Preclearance Before *Shelby County* Now Have Among the Highest Turnout Gaps When Adjusted for Population.

In addition to analyzing the raw racial turnout gap, our researchers looked at a **weighted racial turnout gap** to analyze impacts on statewide turnout rates. The weighted turnout gap is a

³⁰ Kevin Morris and Coryn Grange, *Technical Appendix to Growing Racial Disparities in Voter Turnout, 2008-2022*, Brennan Center for Justice, March 2, 2024, 11, <https://www.brennancenter.org/our-work/research-reports/growing-racial-disparities-voter-turnout-2008-2022>.

³¹ *Id.* at 12.

simple metric that multiplies the raw turnout gap times the percentage of the citizen voting age population that is people of color. For example, if a state is 25% people of color and had a 10% turnout gap in an election, the weighted turnout gap between white voters and voters of color would be $25\% * 10\% = 2.5\%$.

The weighted turnout gap shows the *impact* of the turnout gap on topline turnout numbers in a jurisdiction. The result is how much higher overall turnout would have been if nonwhite voters participated at the same rate as white voters. In the above example, overall turnout would have increased by two and a half percentage points – and those two and a half points would have comprised all voters of color. The weighted racial turnout gap allows for a standardized comparison across states because it shows the numerical effect of the turnout gap regardless of the size of the state’s population of color. It allows all states, regardless of their demographics, to be analyzed on equal footing. Two states with equal *weighted* turnout gaps are experiencing the same skew in statewide turnout attributable to lower nonwhite turnout.³²

The turnout gap study concludes that weighted racial turnout gap is growing significantly faster in counties that were covered before *Shelby County*. Since no jurisdictions have been covered since 2013, our researchers can compare turnout gaps in formerly covered and never covered jurisdictions before and after that date to assess the *Shelby County* effect.

A decade after *Shelby County*, the turnout gap is skyrocketing in the counties that have histories of discriminatory voting practices. The effects of preclearance (and its absence) at the county level are a reminder that local informal policies, such as moving or closing polling places, can effectuate discrimination.³³ It is not only statewide laws that can discriminate. And while the effects of such policy decisions are difficult to measure in isolation, the turnout gap shows their cumulative effects on voting behavior. Preclearance may well have prevented many of the harmful changes from being enacted at the local level over the last decade in formerly covered counties.

Shifting this analysis to the state level, the study also finds that the formerly covered states have much higher weighted turnout gaps. Figure 3 shows that the formerly covered states tended to have among the largest weighted racial turnout gaps in 2020 and 2022.³⁴ Many of those states towards the top of the list would have been covered by the version of the Act introduced in 2021 as H.R. 4, according to testimony from Professor Peyton McCrary, including South Carolina, North Carolina, Florida, Louisiana, Georgia, Alabama, and Texas.³⁵

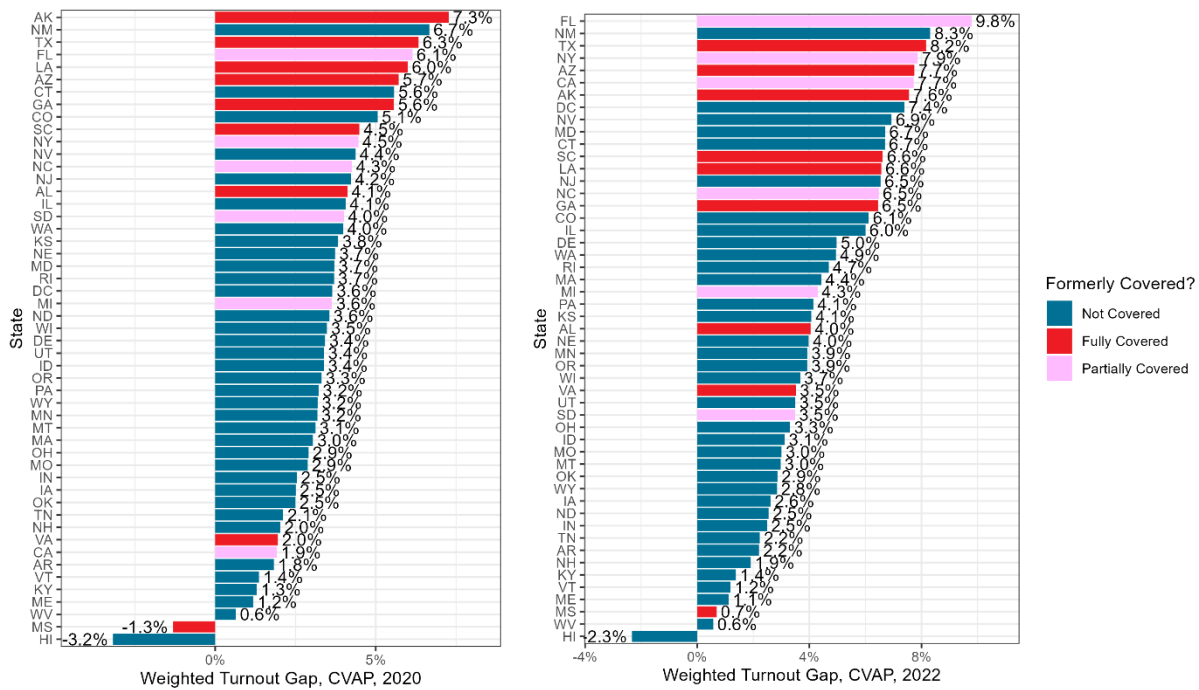
³² To be clear, this analysis should not be read to suggest that turnout gaps among small populations of color are unimportant. Native American voters, for example, tend to turn out at lower rates than voters of other races but because their populations are usually not large at a statewide level, the discrimination they face is not clear from the weighted racial turnout gap. Our researchers continue to investigate measures to capture the implications of large turnout gaps on small populations.

³³ Morris and Grange, *Growing Racial Disparities in Voter Turnout*, at 3, 17.

³⁴ *Id.* at 14.

³⁵ *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), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-McCraryJ-20210816.pdf>.

Figure 3: Weighted Turnout Gap, 2020–2022 (Figure 6 in Growing Disparities in Voter Turnout, 2008-2022)³⁶



c. Counties That Have Histories of Voting Discrimination Are Experiencing Faster Turnout Gap Increases Than Those Without Such Histories.

We also now know that of all the formerly covered counties, those with identifiable histories of voting discrimination are experiencing faster turnout gap growth. To measure this, our researchers compared the increase in the turnout gap in formerly covered counties that received an objection letter between 1965 and 2013 against the formerly covered counties that never received a letter. When preclearance was enforced, covered states and counties would send proposed policies to the Department of Justice (“DOJ”) for approval.³⁷ DOJ approved the vast majority for implementation, but denied a small number because they were retrogressive (*i.e.*, made it harder for voters of color to vote or diluted their voting power). When DOJ denied implementation of a policy, it issued an objection letter to the jurisdiction describing its findings. Accordingly, these letters are evidence of places that attempted to continue discriminating while subject to preclearance.

The study reveals that the racial turnout gap is growing fastest in the counties that received an objection letter.³⁸ In these counties, the gap between white voters and voters of color has grown by 1.6 percentage points more than in previously covered counties that did not receive

³⁶ Morris and Grange, *Growing Racial Disparities in Voter Turnout*, 14.

³⁷ Covered states and counties could also file a lawsuit in federal court in Washington, D.C. to fulfill preclearance obligations, but a very high percent of proposed changes were submitted to the Department of Justice.

³⁸ Morris and Grange, *Growing Racial Disparities in Voter Turnout*, 18-20.

an objection letter.³⁹ The turnout gap between white and Black voters has grown by an additional 1.8 percentage points more in the once covered counties that received letters than those that did not.⁴⁰ In comparison to formerly covered counties that never received an objection letter, formerly covered counties that received at least one are seeing their white-nonwhite and white-Black turnout gaps grow almost twice as fast since *Shelby County*.

d. Restrictive Voting Policies and Practices Are an Explanation for the Faster Growing Turnout Gap in Formerly Covered Jurisdictions.

After the research team accounted for many factors that could affect turnout (including region, education, income, and candidate preference), the study provides strong evidence that restrictive voting changes at the state and local level hurt turnout among voters of color. The *Shelby County* decision allowed changes harmful to voters of color to go into effect in jurisdictions with histories of discrimination and now those jurisdictions are seeing their turnout gaps grow significantly faster than the rest of the country. The differential impact in formerly covered jurisdictions strongly suggests that laws and policies that would have been blocked by preclearance are driving higher turnout gaps.⁴¹

The Brennan Center’s findings on the growing turnout gap are alarming. The study utilizes an unprecedented data set to demonstrate that we have lost, and continue to lose, so much of the progress that prior generations won for people of color at the ballot box. This is both a national problem and a particularly acute issue in some parts of the country. The trendlines suggest the problem will only grow further in those parts of the country absent intervention. Preclearance worked, and the loss of preclearance has resulted in fewer people of color casting ballots.⁴² Plainly, race discrimination continues to be real, continues to affect our democracy, and continues to need strong laws to protect the vote.

IV. Many States Continue to Pass Laws That Make It Harder for People of Color to Vote, Particularly in States That Were Previously Subject to Preclearance.

In the decade since the U.S. Supreme Court eroded the full protections of the VRA, state legislatures have passed a barrage of new voting restrictions that disproportionately harm voters of color. This wave has continued since the Brennan Center’s testimony in October 2021.

³⁹ *Id.* at 19.

⁴⁰ *Id.*

⁴¹ Correspondingly, restrictive laws and policies passed in never-covered jurisdictions account in part for the slower-but-still-growing turnout gaps in those places.

⁴² The end of preclearance also provides one possible explanation for why the turnout gap is growing everywhere. Until 2013, if a covered jurisdiction’s effort to enact a policy was blocked, noncovered jurisdictions would have warning that they may not want to pursue something similar. With no preclearance, this informal nationwide check is gone. Never-covered jurisdictions may also be implementing more policies that hurt voters of color than before *Shelby County*.

a. Without the Protections of Geographic Preclearance, States Have Recently Passed Scores of Laws that Make Voting Harder.

The Brennan Center has extensively documented the torrent of restrictive laws passed by states since *Shelby County* in 2013. By the ten-year anniversary of the decision, at least 29 states had passed 94 laws that curtail voting access.⁴³ At least 30 of these laws were passed in 11 states that had been covered by preclearance, in whole or in part, at the time the decision was issued.⁴⁴ Notably, however, not all laws have equal impact – some, like those passed in Florida, Georgia, Iowa and Texas in 2021, as well as North Carolina in 2023, are omnibus laws that have sliced away at voting access in multiple significant ways.

The wave of restrictive laws unleashed by *Shelby County* reached a fever pitch after the 2020 election and shows no signs of abating. Overall, since the 2020 election, 27 states have passed 60 laws that make it more difficult to vote. In 2021, at least 17 states enacted 32 restrictive laws.⁴⁵ In 2022, eight states passed 11 laws that make it harder to vote.⁴⁶ In 2023, 14 states enacted 17 restrictive voting laws. 2021 had the most restrictive voting laws in any year in the last decade and 2023 had the second most.⁴⁷ Many these laws restrict access to mail voting, a continuation of the backlash that erupted after 2020.⁴⁸ Voters of color used mail voting in 2020 at far higher percentages relative to white voters than they had in prior elections.⁴⁹

Lawmakers have set the stage for more of the same in 2024. As of the Brennan Center’s December 31, 2023, count, 2024 began with 140 restrictive voting bills already pending in 25 states.⁵⁰ Among them are an Arizona bill that would ban the use of vote centers and on-site early voting locations (it has passed one legislative chamber) and a Wisconsin bill that would create

⁴³ Jasleen Singh and Sara Carter, “States Have Added Nearly 100 Restrictive Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago,” Brennan Center for Justice, June 23, 2023, <https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights>. We also know that more restrictive laws have passed since last June: as of the end of 2023, at least 30 states have passed 96 laws curtailing voting access. See Brennan Center for Justice, *Voting Laws Roundup: 2023 in Review*, January 18, 2024, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review>.

⁴⁴ Singh and Carter, “States Have Added Nearly 100 Restrictive Laws.”

⁴⁵ Brennan Center for Justice, *Voting Laws Roundup: December 2021*, last updated January 12, 2022, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>. As of December 2021, the Brennan Center reported that 19 states had passed 34 restrictive voting laws that year. After obtaining additional information about the way in which two laws – Nevada’s S.B. 84 and Louisiana’s H.B. 167 – would operate, we removed those laws from the list of restrictive bills passed in 2021. See Brennan Center for Justice, *Voting Laws Roundup: May 2022*, May 26, 2022, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022>.

⁴⁶ Brennan Center for Justice, *Voting Laws Roundup: December 2022*, last updated February 1, 2023, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022>.

⁴⁷ Brennan Center for Justice, *Voting Laws Roundup: 2023 in Review*.

⁴⁸ See, e.g., Singh and Carter, “States Have Added Nearly 100 Restrictive Laws.”

⁴⁹ See, e.g., 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>.

⁵⁰ See Brennan Center for Justice, *Voting Laws Roundup: 2023 in Review*. Many states allow for bills to be “carried over” from one year to the next. Many states also allow for bills to “pre-filed” at the end of one calendar year for consideration in the following. This count considers both carryovers and pre-files.

several new grounds for not counting mail ballots (which passed both chambers but has not yet been signed).⁵¹

While courts blocked some of these laws, this wave of legislation nonetheless means that voters in 27 states will face barriers in the 2024 election that they have never before experienced in a presidential election.⁵² These new laws take aim at every stage of voting access, posing obstacles to registration, chipping away at access to mail voting, creating strict photo ID requirements, and increasing the likelihood of faulty voter roll purges. For many, their passage was fueled by baseless claims of widespread voter fraud in 2020 – the same falsehoods that have long served as pretext for race discrimination.⁵³ Despite their mythical underpinnings, these new laws will tangibly and adversely impact voters in 2024 and fall hardest on voters of color.

b. These New Laws Are Disproportionately Harming Voters of Color.

There is ample evidence that many of the new voting restrictions are racially discriminatory. In addition to growing turnout gaps, our research has discovered disproportionately high mail ballot rejection rates for voters of color in states that passed laws making mail voting harder.⁵⁴ Moreover, federal and state courts have struck down or blocked a number of recent laws on the basis of being racially discriminatory (though too many more have been permitted to stand).⁵⁵ Some laws were blocked only after years of litigation, during which time millions of voters faced discriminatory barriers. Dozens of others will target voters of color this election cycle.

States with histories of race discrimination have been at the forefront of this effort. Our analysis found that approximately one-third of restrictive voting laws enacted since *Shelby County* were passed in states that were formerly subject to preclearance, either in whole or in part.⁵⁶

Some recently-passed voting laws are likely to worsen existing racial disparities. A new Ohio law passed in 2023 imposes one of the strictest photo ID requirements in the country, limiting acceptable ID to an unexpired Ohio driver’s license, an Ohio-issued state ID card, a U.S. or state military ID, or a passport.⁵⁷ There is a large and growing body of evidence that strict ID laws disproportionately impact voters of color.⁵⁸ The same law makes it less likely that voters of color will have their mail votes counted by prohibiting prepaid postage, curtailing the use of drop

⁵¹ H.B. 2547, 56th Leg., 2nd Reg. Sess. (Ariz. 2024); A.B. 570, 2023 106th Sess. (Wisc. 2023).

⁵² Brennan Center for Justice, *Voting Laws Roundup: 2023 in Review*.

⁵³ Kevin Morris, *Patterns in the Introduction and Passage of Restrictive Voting Bills are Best Explained by Race*, Brennan Center for Justice, August, 3, 2022, <https://www.brennancenter.org/our-work/research-reports/patterns-introduction-and-passage-restrictive-voting-bills-are-best>.

⁵⁴ Brennan Center for Justice, *The Impact of Voter Suppression on Communities of Color*, January 10, 2022, <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color>.

⁵⁵ See, e.g., *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (reversing district court to strike down North Carolina’s 2013 voter ID law for race discrimination); *Montana Democratic Party v. Jacobsen*, 518 P.3d 58 (Mont. 2022) (upholding preliminary injunction that prohibited state from enforcing 2021 law ending same-day registration and 2021 law restricting ballot collection for race discrimination).

⁵⁶ Singh and Carter, “States Have Added Nearly 100 Restrictive Laws.”

⁵⁷ H.B. 458, 134th Gen. Assemb. (Ohio 2021) (signed into law on January 6th, 2023).

⁵⁸ See, e.g., Brennan Center, *Impact of Voter Suppression*.

boxes, and shortening deadlines. Several studies have found that mail ballots cast by voters of color are rejected at much higher rates than those cast by their white counterparts.⁵⁹

A 2023 omnibus law in North Carolina may have a similar impact on voters of color who use mail ballots.⁶⁰ Among its restrictive provisions, the law moves the deadline for receipt of mail ballots from three days after Election Day to 7:30 p.m. on Election Day. In North Carolina’s 2020 presidential election, more than 11,600 ballots sent by Election Day arrived in election offices in the three days following.⁶¹ This law also adds hurdles to same-day registration that increase the chances that voters of color will have their ballots rejected and their registrations cancelled.⁶²

The worst of these voting restrictions would be stopped by a revitalized VRA. First, preclearance would have stopped some of these recently enacted laws from ever taking effect. Second, a strengthened Section 2 would help block or blunt discriminatory laws passed nationwide. Although most rampant in certain locations, discriminatory voting laws are a nationwide problem. Third, the Act’s “known practices” preclearance coverage, which applies universally to voting practices that have historically been used to discriminate, would stop some of these laws. Among those subject to review include polling place consolidations, photo ID laws, and voter purges that target nonwhite citizens. In short, the Act is well-equipped to address the kinds of discriminatory voting laws we have seen passed over the last few years.

V. This Redistricting Cycle Has Included Many Maps That Dilute the Voting Power of Nonwhite Voters, Especially in the Formerly Covered States.

A key takeaway from our nation’s recent round of redistricting is that while people of color constituted virtually all of the nation’s growth, these communities continue to be minimized in the political process.

⁵⁹ See, e.g., Kevin Morris and Coryn Grange, *Records Show Massive Disenfranchisement and Racial Disparities in 2022 Texas Primary*, Brennan Center for Justice, October 20, 2022, <https://www.brennancenter.org/our-work/research-reports/records-show-massive-disenfranchisement-and-racial-disparities-2022-texas>.

⁶⁰ S.B. 747, 140th Leg., S.L. 2023 (N.C. 2023).

⁶¹ Hannah Schoenbaum, “N. Carolina GOP Pushes to Move Up Absentee Ballot Deadline,” *Associated Press*, April 4, 2023, <https://apnews.com/article/elections-absentee-ballot-north-carolina-b90b86f8057f77aee6aed91d73c63cb1>.

⁶² The law requires election officials to send an address verification notice to voters who register to vote the same day that they cast their ballots, even though the voters already presented photo ID and proof of residence. If the Postal Service returns the notice as “undeliverable” within ten days of the election, a voter’s registration must be cancelled and their ballot must be rejected. There is evidence that Black and Latino voters are more likely to rely on same-day registration. See, e.g., Laura Williamson and Jesse Rhodes, *Same Day Registration: How Registration Reform Can Boost Turnout Among Black and Latinx Voters*, Demos, June 23, 2021, https://www.demos.org/sites/default/files/2021-06/Demos_SDR_Report_DD_0.pdf. Asian, Black, and Latino voters are also more likely to live in multigenerational housing, which increases the chances that an address verification notice will be mistakenly returned as undeliverable. A court has temporarily enjoined this provision until the state implements a system to provide voters notice and an opportunity to contest the denial of their ballots and registrations. See *Latino v. Hirsch*, No. 1:23-CV-861 (M.D.N.C. Jan. 21, 2024).

a. Voters of Color Are Underrepresented in Government.

The results of the 2020 Census underscored the country's rapid demographic transformation. According to Brookings Institution research, growth in communities of color accounted for all population gains.⁶³ The number of people who identify as Black, Asian, American Indian or Alaska Native, Hawaiian or Pacific Islander, or multiracial increased by more than 27.8 million, while those identifying as white fell by more than 5.1 million.⁶⁴ The same research found that since the 1980 Census, people of color have more than doubled their share of the United States population, growing from 20.6 percent of the total to 42.2 percent in 40 years.⁶⁵

District maps and electoral systems have not translated these demographic changes into corresponding opportunities for voters of color. According to Pew Research Center data, at the federal level, members of color make up only 25 percent of Congress, 17 points short of the nonwhite share of the general population.⁶⁶ This representation gap remains nearly identical to what existed in 1981 when members of color made up six percent of congress and roughly 21 percent of the population. The problem is not confined to the federal level. Multiple reports have found similar issues of systemic underrepresentation persist in state legislatures⁶⁷ and in local government.⁶⁸

A recent Brennan Center analysis found systemic underrepresentation of nonwhite communities at the county and school board levels in Georgia.⁶⁹ Black, Latino, and Asian people make up half of the state's population but hold only 27 percent of the seats on county commissions and 29 percent of the seats on school boards. These key local institutions set countless policies that affect their constituents' day-to-day lives, yet almost no checks are in place to prevent these unrepresentative majorities from gaming the system to cement their power. Even more troubling is the state legislature's direct involvement in denying Georgians of color an equal say in local governance: in several instances the legislature has engaged in unprecedented redrawing of local board lines – such that incumbents were drawn out of power – in localities where those boards had recently elected a majority of people of color.⁷⁰

⁶³ William H. Frey, "New 2020 census results show increased diversity countering decade-long declines in America's white and youth populations," Brookings Institution, August 13, 2021, <https://www.brookings.edu/articles/new-2020-census-results-show-increased-diversity-countering-decade-long-declines-in-americas-white-and-youth-populations/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Katherine Schaeffer, "U.S. Congress continues to grow in racial, ethnic diversity," Pew Research Center, January 9, 2023, <https://www.pewresearch.org/short-reads/2023/01/09/u-s-congress-continues-to-grow-in-racial-ethnic-diversity/>.

⁶⁷ Renuka Rayasm, et al., "Why State Legislatures Are Still Very White – and Very Male," *Politico*, February 22, 2021, <https://www.politico.com/interactives/2021/state-legislature-demographics/>.

⁶⁸ Federico Ricca and Francesco Trebbi, *Minority Underrepresentation in U.S. Cities*, National Bureau of Economic Research, 2022, <https://www.nber.org/papers/w29738>.

⁶⁹ Sonali Seth and Sara Loving, *Local Lockout in Georgia*, Brennan Center for Justice, November 28, 2023, <https://www.brennancenter.org/our-work/research-reports/local-lockout-georgia>. Georgia is a formerly covered state that according to Peyton McCrary's testimony would have been covered by H.R. 4 in 2021.

⁷⁰ Seth and Loving, *Local Lockout*.

Lawmakers in states like Texas and North Carolina telegraphed their intention to willfully disregard their obligations under the Voting Rights Act by purportedly drawing districts without the use of racial data.⁷¹ This “race-blind” tactic produced maps that left many Black legislators drawn out of their former districts across the South,⁷² including former Representative G.K. Butterfield, who served as the chairman of the Congressional Black Caucus.⁷³

Without the prophylactic protections of preclearance, voters of color across the country relied on post-adoption litigation to challenge discriminatory maps and electoral systems in a race against the clock as 2022 elections drew near. The issue remains in 2024.

b. Recent and Ongoing Litigation Shows the Great Lengths Those in Power Will Reach for to Create and Enforce Discriminatory Maps.

Recent efforts by Alabama and Louisiana demonstrate how pervasive discriminatory mapmaking can be. After a federal trial court in Alabama ruled in favor of Black voters who challenged the state’s congressional map under Section 2 of the Voting Rights Act, the Supreme Court issued a procedural order on the “shadow docket” to pause the redraw of the map.⁷⁴ This move forced Black Alabamians to use a discriminatory map in the 2022 election. Even though the Supreme Court ultimately upheld the lower court’s ruling, the use of the shadow docket means that the effects of using this dilutive map, on policy and on voters, cannot be undone by a subsequent order of the Court.⁷⁵

Stunningly, the State attempted to circumvent the Supreme Court’s ruling. Alabama refused to draw a second district where Black voters had an opportunity to elect a preferred candidate. The trial court forcefully rejected the state’s submission, writing that it was “not aware of any other case in which a state legislature – faced with a federal court order declaring that its electoral plan unlawfully dilutes the votes of people of color and requiring a plan that provides an additional opportunity district – responded with a plan that the state concedes does

⁷¹ Tierney Sneed, “‘They know where Black voters live’: Challengers say ‘race blind’ redistricting maps are anything but,” *CNN*, December 29, 2021, <https://www.cnn.com/2021/12/29/politics/redistricting-race-blind-maps-texas-north-carolina/index.html>.

⁷² Nick Corasaniti and Reid J. Epstein, “Map by Map, G.O.P. Chips Away at Black Democrats’ Power,” *New York Times*, December 18, 2021, <https://www.nytimes.com/2021/12/18/us/politics/gop-gerrymandering-black-democrats.html>.

⁷³ Julia Boland and Yuriy Rudensky, “North Carolina’s Racially Discriminatory Maps Show Why the Voting Rights Act Must Be Restored,” Brennan Center for Justice, January 18, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/north-carolinas-racially-discriminatory-maps-show-why-voting-rights-act>.

⁷⁴ *Merrill v. Milligan*, 142 S.Ct. 879, 879 (2022). The shadow, or emergency, docket refers to the Supreme Court’s rulings – issued without a written opinion – on issues that have not been argued or fully briefed. Historically, shadow docket rulings were rare and non-controversial, relating to procedural issues such as due dates for briefs. But in recent years the Court has increasingly used it as a vehicle to functionally decide key issues such as whether a lower court ruling should stand without public review of its rationale. For more on the shadow docket, see Harry Isaiiah Black and Alicia Bannon, *The Supreme Court ‘Shadow Docket,’* Brennan Center for Justice, July 19, 2022, <https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket>.

⁷⁵ *Allen v. Milligan*, 599 U.S. 1 (2023).

not provide that district.”⁷⁶ Given the state’s blatant noncompliance, the court adopted a plan drawn by court-retained experts.⁷⁷

Litigation over the congressional map in neighboring Louisiana followed a similar trajectory. A trial court found that the State violated Section 2 of the Voting Rights Act well in advance of the 2022 election, only for the Supreme Court to put a pause on proceedings pending *Allen v. Milligan*.⁷⁸ Following the favorable Alabama decision, the state repeatedly attempted to circumvent the trial court’s order in a series of appeals to the Fifth Circuit.⁷⁹ Ultimately, after those appeals failed, the Louisiana legislature relented and adopted a remedial map with a second Black opportunity district over 18 months after the remedy was first ordered by the trial court.⁸⁰

The sustained intractability of Alabama and Louisiana, harkening back to the overt resistance that made preclearance necessary in the first place, is strong evidence that not only is discriminatory mapmaking alive and well, but that some states feel empowered to pursue it in the open. These tactics – which are far too often accepted by federal courts, resulting in delayed decisions and elections held under illegal maps – belie the states’ intents to discriminate.

Additionally, there remain active lawsuits challenging congressional and/or state legislative districts for violating the Constitution or the Voting Rights Act in 11 other states, including Arkansas, Florida, Georgia, Michigan, Mississippi, North Carolina, North Dakota, South Carolina, Tennessee, Texas, and Washington.⁸¹ Counting Alabama and Louisiana, federal trial courts have ruled in favor of plaintiffs in seven of the 13 states. Considering the roadblocks the Supreme Court has created in voting rights litigation, this is an incredible rate of success.

Across the country, nonwhite voters also continue to face pervasive discrimination in local district maps and election systems. Plaintiffs have secured favorable trial court outcomes in at least seven suits, most notably in Galveston County, Texas and Thurston County, Nebraska. The facts from these two suits provide particularly notable examples of the ways in which local governments have gamed the legal system to flout federal protections and repeatedly discriminate against communities of color.

Prior to *Shelby County*, Galveston County was subject to preclearance under Section 5 of the Voting Rights Act. In 1992 and 2012, the Department of Justice objected to Galveston’s

⁷⁶ *Singleton v. Allen*, No. 2:21-cv-1291-AMM, No. 2:21-cv-1530-AMM, 2023 WL 6567895, at *2 (N.D. Ala. Oct. 5, 2023).

⁷⁷ *Id.* at *19.

⁷⁸ *Ardoin v. Robinson*, 142 S.Ct. 2892 (2022).

⁷⁹ See *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023); *In re Landry*, 83 F.4th 300 (5th Cir. 2023).

⁸⁰ Emily Cochrane, “Louisiana Lawmakers Approve Map That Empowers More Black Voters,” *New York Times*, January 19, 2024, <https://www.nytimes.com/2024/01/19/us/politics/louisiana-voting-map.html>.

⁸¹ See Yurij Rudensky and Chris Leaverton, *Ongoing Voting Rights Act Redistricting Litigation After SCOTUS Ruling in Allen v. Milligan*, Brennan Center for Justice, July 5, 2023, <https://www.brennancenter.org/our-work/research-reports/ongoing-voting-rights-act-redistricting-litigation-after-scotus-ruling>. See also Common Cause Florida, “Case Summary: Common Cause FL et al v. Byrd,” last modified February 7, 2023, <https://www.commoncause.org/florida/common-cause-florida-et-al-v-lee/>; and Amy Howe, “Justices question finding that S.C. district was unconstitutional racial gerrymander,” SCOTUSblog, October 11, 2023, <https://www.scotusblog.com/2023/10/justices-question-finding-that-s-c-district-was-unconstitutional-racial-gerrymander/>.

proposed county commission maps because they diminished the ability of Black and Latino voters to elect preferred candidates.⁸² No longer subject to preclearance requirements, Galveston promptly dismantled the opportunity district, and Black and Latino voters filed suit.⁸³ A federal trial court ruled in favor of plaintiffs, finding that the new plan amounted to “stark and jarring” discrimination against Black and Latino voters.⁸⁴ But, the county appealed, asking the Fifth Circuit to misinterpret the Voting Rights Act and foreclose the ability of Black and Latino voters to jointly challenge discriminatory districts.⁸⁵ The Fifth Circuit has paused the redrawing of the map pending appeal, meaning even if successful, Latino and Black voters in Galveston County will have their votes diluted by a discriminatory map in the 2024 election.⁸⁶

Like Galveston County, voters of color in Thurston County, Nebraska have faced persistent discrimination over decades.⁸⁷ In both the 1970s and 1990s, it took Section 2 litigation for the County to draw sufficient opportunity districts for American Indian voters.⁸⁸ After the 2020 Census, tribal leaders and community members again turned to Section 2 for relief from discriminatory redistricting.⁸⁹ Fortunately, the case settled in an agreement that requires the county to add another opportunity district for Native voters.⁹⁰

Discriminatory redistricting practices and electoral systems that serve to dilute the ability of voters of color to elect preferred candidates require more robust federal safeguards. The loss of Section 5 and the erosion of Section 2 of the Voting Rights Act have resulted in rampant abuses and disregard for the limited protections that remain. Congress must address these dubious claims of “race blind” redistricting, efforts to dismantle opportunity districts, refusals to adjust maps to demographic change, and meritorious litigation bogged down by adverse procedural rulings and open defiance. It can do so by strengthening anti-vote dilution protections and restoring preclearance so that repeated bad actors in jurisdictions with a recent history of discrimination cannot deny constitutionally guaranteed rights to voters of color.

⁸² *Petteway v. Galveston County*, No. 3:22-cv-57, 2023 WL 6786025 at *22-23 (S.D. Tex. 2023).

⁸³ Alexa Ura, “A GOP power grab shatters 30 years of political progress for Black voters in Galveston County,” *Texas Tribune*, May 20, 2022, <https://www.texastribune.org/2022/05/20/galveston-redistricting-black-voters/>.

⁸⁴ Ed Pilkington, “Texas voting map discriminates against Black and Latino residents, judge rules,” *Guardian*, October 13, 2023, <https://www.theguardian.com/us-news/2023/oct/13/texas-galveston-county-discrimination-electoral-map-ruling>.

⁸⁵ Defendants’ Notice of Appeal, *Petteway*, No. 3:22-cv-57 (S.D. Tex. Oct. 14, 2023), ECF No. 253.

⁸⁶ Rachel Selzer, “5th Circuit Pauses Ruling Requiring Galveston, County Texas To Implement Fair Districts for 2024,” *Democracy Docket*, December 7, 2023, <https://www.democracydocket.com/news-alerts/5th-circuit-pauses-ruling-requiring-galveston-county-texas-to-implement-fair-districts-for-2024/>.

⁸⁷ *See, e.g.*, Complaint for Declaratory and Injunctive Relief, *Winnebago Tribe of Nebraska v. Thurston County*, No. 8:23-cv-20 (D. Neb. Jan. 19, 2023), ECF No. 1; *Stabler v. County of Thurston*, 129 F.3d 1015 (8th Cir. 1997); *United States v. Thurston County*, No. 78-0-380 (D. Neb. May 9, 1979) (consent decree).

⁸⁸ *See, e.g.*, *Thurston County*, No. 78-0-380; *Stabler*, 129 F.3d at 1015; *Winnebago Tribe*, 8:23-cv-20, ECF No. 1.

⁸⁹ Native American Rights Fund, “Tribes and Voters Sue Nebraska County to Secure Equal Representation,” January 19, 2023, <https://narf.org/thurston-nebraska-redistricting/>.

⁹⁰ Order, Consent Decree, and Judgment, *Winnebago Tribe*, No. 8:23-cv-20, (D. Neb. Jan. 16, 2024), ECF No. 49.

VI. Federal Courts Are Undermining Congress’s Purposes in Enacting the VRA By Failing to Protect Voters of Color Even in the Face of Clear Discrimination.

Judicial developments in the last couple years have made it increasingly evident that voters – particularly voters of color – cannot rely on federal courts to protect their voting rights. Below we lay out only a few of the troubling cases we have seen.

a. Federal Appellate Courts Have Followed the Supreme Court’s Lead in Undermining the Purpose of the VRA.

The movement of federal courts away from protecting voting rights follows from the Supreme Court’s 2021 decision in *Brnovich v. DNC*, in which the Court effectively rewrote Section 2 to require plaintiffs to prove more to win.

In Florida, for example, the Eleventh Circuit largely gutted a district court’s thorough decision finding violations of Section 2. The order went far beyond the appropriate standard of review (for clear legal error) and instead rejected the lower court’s findings of fact that struck down several provisions of the state’s omnibus restrictive voter law, S.B. 90.⁹¹ The lower court’s 288-page post-trial ruling considered hours of testimony and hundreds of pages of exhibits to conclude that several of the law’s restrictive provisions *intentionally* targeted Black voters in violation of Section 2 and the Fourteenth and Fifteenth Amendments.⁹² The appellate panel’s sweeping rejection clearly contravenes Congress’s objective in enacting Section 2: if almost 300 pages of carefully reasoned and supported findings are not enough to establish a finding of discrimination, what is?

Just months later, the Eleventh Circuit dealt a similar blow to Section 2 in a Georgia vote dilution case. In an August 2022 decision, a federal district court found that Georgia’s at-large elections for its Public Service Commission dilute the voting power of Black voters in violation of Section 2.⁹³ The Eleventh Circuit, however, summarily overturned the district court’s ruling, relying on unprecedented federalism grounds in holding that it could not replace the legislature’s chosen electoral method.⁹⁴ History underscores the extent to which the ruling undermines the purpose of the VRA: in the Commission’s 143-year existence, only one Black candidate has ever been elected to its membership (and that person was an incumbent who had previously been appointed before running for re-election).⁹⁵ The end result of the court’s decision leaves voters with one less vehicle to challenge discriminatory electoral methods, and Congress with one less vehicle to support its goal of dismantling discrimination in voting.

Going one step further, the Eighth Circuit’s decision in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment* threatens to upend Section 2’s enforcement mechanism altogether.⁹⁶ In November 2023, the court held that private parties cannot sue to

⁹¹ *League of Women Voters of Florida, Inc. v. Lee*, 595 F. Supp. 3d 1042 (N.D. Fla. 2022).

⁹² *Id.*

⁹³ *Rose v. Raffensperger*, 619 F. Supp. 3d 1241 (N.D. Ga. 2022).

⁹⁴ *Rose v. Secretary, State of Georgia*, 87 F.4th 469 (11th Cir. 2023).

⁹⁵ *Rose*, 619 F. Supp. 3d at 1253.

⁹⁶ 86 F.4th 1204 (8th Cir. 2023).

protect their voting rights under Section 2.⁹⁷ The decision flies in the face of congressional intent, longstanding precedent, and common sense. In the four decades since Congress expanded the scope of Section 2 in 1982, federal courts have exercised jurisdiction over hundreds of lawsuits brought by private plaintiffs to enforce it.⁹⁸ Indeed, the Supreme Court ruled in private plaintiffs' favor in a Section 2 case mere months before the Eighth Circuit's decision.⁹⁹

Private litigants are critical components of the Section 2 enforcement mechanism that Congress created. Section 2 cases are too time-consuming for the government to bring all of them; the United States, unlike private plaintiffs, cannot recover attorneys' fees under the VRA; and after *Shelby County* eliminated DOJ's oversight function under preclearance, investigating Section 2 claims has become even more daunting for already-limited government resources.¹⁰⁰ The Eighth Circuit's decision targets the heart of Congress's intent when it enacted the VRA.

b. Courts Are Attempting to Circumvent the VRA By Imposing Procedural Hurdles That Severely Disadvantage Plaintiffs.

First, several courts have become increasingly receptive to state legislator defendants who invoke legislative privilege, which prevents plaintiffs from reviewing legislators' communications about challenged voting laws.¹⁰¹ The privilege allows defendants to circumvent the VRA in two ways. For one, it makes it near-impossible for plaintiffs to establish that legislators enacted a law with discriminatory intent. If legislators deny that discrimination motivated a law and do not have to reveal any private conversations about that legislation, plaintiffs are left with few tools to prove their case unless a lawmaker openly announces such intent on the floor of the legislature. In other words, courts that accept broad legislative privilege claims add yet another hurdle to stopping voting discrimination. Additionally, claims of legislative privilege – even if unsuccessful – create harmful litigation delays that allow otherwise unlawful provisions to stay on the books.¹⁰² It can take months to hear arguments and appeals about privilege issues, during which the parties make no progress in resolving the merits of the case.

Second, the *Purcell* principle is running amok. The doctrine, which stems from a 2006 ruling on the Supreme Court's shadow docket, says that courts should avoid granting relief that

⁹⁷ *Id.*

⁹⁸ Ellen D. Katz et al, "To Participate and Elect: Section 2 of the Voting Rights Act at 40," University of Michigan Law School Voting Rights Initiative, 2022. <https://voting.law.umich.edu>.

⁹⁹ *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

¹⁰⁰ See, e.g., Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143, 2157 (2015) ("What is clear is that section 2's uncertain substantive norm, coupled with its express call for a totality of circumstances inquiry, has made litigating section 2 cases expensive and unpredictable."); 52 U.S.C. § 10310(e) (no attorney's fees for the United States); 570 U.S. 529, 557 (2013) (explaining that Section 2 enforcement remains viable in the wake of striking down Section 5).

¹⁰¹ See, e.g., *La Union del Pueblo Entero v. Abbott*, 2024 WL 655988 (5th Cir. Feb. 16, 2024) (holding that legislative privilege applied to bar communications with state legislators and members of the state executive branch in a federal challenge to restrictive voter legislation).

¹⁰² See, e.g., *Smith v. Iowa District Court for Polk County*, 2024 WL 737318 (Iowa Feb. 24, 2024) (holding, after a March 2022 trial date was indefinitely delayed for almost two years, that the Iowa Constitution protects legislator defendants from turning over documents in a suit challenging restrictive voter legislation under the state constitution).

changes voting laws too close to an election so as to avoid confusing voters.¹⁰³ Critically, however, the Court has not offered any guidance as to when it is too close to an election to alter voting rules, nor has it explained how courts should weigh voter confusion against other factors, such as the risk of voter disenfranchisement. This ambiguity has created a bevy of inconsistent decisions that have applied *Purcell* to leave otherwise discriminatory maps and laws in place on Election Day.¹⁰⁴ Procedural loopholes that stymie efficient Section 2 litigation and allow unlawful laws to remain in effect for years contradict the purpose of the VRA.¹⁰⁵

A restored VRA would resolve many of these judicially-created problems. Preclearance would obviate the need for much of this litigation, as discriminatory policies would never go into effect in covered jurisdictions. A bolstered Section 2 (and VRA as a whole) would again give affected voters the ability to restore their rights in court by restoring the reasonable standards that existed before *Brnovich* and cutting back on the abuse of procedural rules.

VII. A Restored Voting Rights Act Is Necessary To Combat This Pervasive Voting Discrimination.

The record is clear that race discrimination in voting persists across the country and is particularly acute in certain states and jurisdictions. In the last several years, federal courts have whittled away at the protections afforded by the Voting Rights Act. We have seen state legislatures act with alarming intensity to restrict voting access, enacting almost 100 laws that make it harder to vote and particularly burden voters of color. States have worked to diminish the political power of voters of color, passing discriminatory maps and dragging their feet to fix those maps, despite court orders. And on top of all this evidence, amassed over the nearly eleven years since *Shelby County*, groundbreaking research now shows a growing racial turnout gap, particularly in jurisdictions that were previously subject to preclearance.

There is no uncertainty about the problem and no question as to the solution. We need the John R. Lewis Voting Rights Advancement Act to protect voters of color from the discrimination that they continue to face. And as we confront the next generation of race discrimination in voting, we urge Congress to consider how new evidence and changed jurisprudence in recent

¹⁰³ *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

¹⁰⁴ See, e.g., *Merrill v. Milligan*, 142 S. Ct. 879, 879-882 (2022) (J. Kavanaugh, concurring) (citing *Purcell* to justify a stay order that allowed Alabama's new congressional map to remain in effect for the midterm elections, even though a federal district court – and later, the Court itself – found it likely to be racially gerrymandered); *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022) (blocking a Louisiana district court order that found the state's map constituted a racial gerrymander and would have required the state legislature to draw new congressional maps for the midterm elections, including a second majority-Black district); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222 (N.D. Ga. 2022) (citing *Purcell* to decline to impose new maps in a gerrymandering suit until after the midterm elections, even though it found that the state had engaged in racial gerrymandering in creating the original maps); *League of Women Voters of Florida, Inc. v. Florida Secretary of State*, 32 F.4th 1363 (11th Cir. 2022) (staying the district court's permanent injunction against S.B. 90 after trial on *Purcell* grounds and allowing law to remain in effect for the midterm elections).

¹⁰⁵ To be sure, the last several years did see at least one significant, pro-voter ruling. In *Allen v. Milligan*, the U.S. Supreme Court affirmed a lower court's decision that struck down Alabama's congressional map under Section 2, thereby leaving Section 2 intact. 599 U.S. 1 (2023). But *Milligan* did just that; far from buttressing the section's guardrails, it merely froze the status quo. In the face of relentless and procedural attacks, courts have proven time and time again that they will continue to chip away at Congress's Section 2 design if left unchecked.

years might point toward adjustments and finetuning that could further strengthen the Act to respond to pervasive and well-documented voting discrimination.

The John Lewis Voting Rights Act tackles only some of our democracy's problems, and therefore works in tandem with the Freedom to Vote Act (FTVA) and the Native American Voting Rights Act (NAVRA). The FTVA would set baseline national standards for fair, secure, and accessible elections, including universal access to early and mail voting, automatic and same day voter registration, a ban on partisan gerrymandering, and protections against election denial campaigns. NAVRA would protect the right of Native Americans to vote in the face of distinct barriers experienced by voters living on tribal lands. Together, these bills will ensure that the next generation can access free and fair elections.

We strongly urge Congress to enact the John Lewis Voting Rights Act, as well as the Freedom to Vote Act and the Native American Voting Rights Act, into law.