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U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND REFORM
HEARING ON VOTER SUPPRESSION IN MINORITY COMMUNITITIES:
LEARNING FROM THE PAST TO PROTECT OUR FUTURE

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Introduction

Chairwoman Maloney, Ranking Member Jordan and members of the Committee on Oversight and Reform, I welcome the opportunity to provide testimony regarding Voter Suppression in Minority Communities. My name is Marcia Johnson-Blanco and I co-direct the Voting Rights Project of the Lawyers' Committee of Civil Rights Under Law ("Lawyers' Committee"), where I oversee the Project's programmatic and advocacy portfolio. Today, I will discuss how we are in danger of undermining the positive trajectory the country has been on to ensure that all eligible voters have access to the ballot, free from discrimination.

For the past 16 years, a major part of my work at the Lawyers' Committee has been researching and documenting the record of discrimination in voting across the country. The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to mobilize the private bar to address issues of racial discrimination. From its beginning, the major work of our organization has been combating racial discrimination. During my time at the Lawyers' Committee, I have organized and overseen the work of both the National Commission on the Voting Rights Act, which researched and documented the record of discrimination in voting from 1982 to 2005 and the National Commission on Voting Rights, which researched and documented both racial discrimination in voting and the challenges in election administration from 1995 to 2014. Additionally, I oversee the work of the non-partisan Election Protection Coalition. Convened by the Lawyers' Committee through a suite of hotlines and a dedicated team of trained legal and grassroots volunteers, the Election Protection Coalition helps all American voters--including those that are traditionally disenfranchised--gain access to the polls and overcome obstacles to voting.

When Congress passed the Voting Rights Act ("the VRA") in 1965[1] by a large bi-partisan majority, our nation finally made strides to achieve the goal of the Fifteenth Amendment of the U.S. Constitution that the right of citizens to vote shall not be denied or abridged because of their race.[2] The goals of the VRA are to guarantee access to the ballot by addressing the barriers (both explicit and subtle) that kept minority voters from voting, and to ensure that after gaining access to the ballot minority voters would not be impeded from electing their candidate of choice.[3]

In order to further ensure access to the ballot, Congress enacted the National Voter Registration Act of 1993 ("the NVRA"), which improves access to voter registration by requiring states to provide opportunities for voter registration at Departments of Motor Vehicles and public assistance agencies, as well as allowing community organizations to conduct voter registration drives.[4] Together, these two laws did much to ensure access to the ballot. However, today a major provision of the Voting Rights Act is no longer operational, jurisdictions are aggressively removing voters from the rolls, and the Department of Justice is not actively enforcing the Nation's voting rights laws.

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[1] Pub. L. 89-110, Aug. 6, 1965, 79 Stat. 437; see *South Carolina v. Katzenbach*, 383 U.S. 310, 309 (1966).

[2] U.S. Const. amend. XV.

[3] The National Commission on the Voting Rights Act, Protecting Minority Voters, The Voting Rights Act at Work, 1982 – 2005, 5 (2006).

[4] *Id.* at 15.

In ruling on the first challenge to the Voting Rights Act in 1965, the United States Supreme Court noted that Congress deemed case-by-case protection an inefficient method, because "[v]oting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours combing through registration records in preparation for trial."[5] Even when drawn-out litigation ends in a favorable outcome for plaintiffs, the Court noted, "some of the States affected have merely switched to discriminatory devices not covered by the federal decrees."[6] Forty-seven years later, even while nullifying a major provision of the Voting Rights Act by finding the formula that determined coverage under Section 5 of the Act to be outdated, the U.S. Supreme Court conceded that "voting discrimination still exists; no one doubts that."[7] The Court expressed a willingness to consider a revised formula based on current conditions,[8] which as this testimony demonstrates, provides ample justification for such a renewal of the VRA coverage formula.

Voting Discrimination Today

Before the passage of the VRA, the burden for enforcing anti-discrimination laws was on the victims of discrimination, and this enforcement was done on a case-by-case basis. In order to address this onerous challenge, the provisions of the VRA sought to address various barriers to the vote, including:

- Discriminatory administration of voting qualifications;
- Barriers to voter registration;
- Onerous and laborious litigation where practices found to be discriminatory were changed to another discriminatory practice.[9]

Two significant provisions of the Voting Rights Act are Sections 2 and 5. Section 2 prohibits voting discrimination nationwide, while Section 5 provides requirements that jurisdictions with a history of discrimination in voting (identified in Section 4 of the VRA) must adhere to in order to enact changes in their voting laws. These two provisions were designed to work together to address voting discrimination, with Section 2 used to assess whether existing voting laws are discriminatory and Section 5 to assess whether a change in the voting law was enacted to make it harder for minority voters to vote. When the Supreme Court held that Congress did not respond to "current needs," without accounting for the robust record that Congress amassed for the formula in the 2006 reauthorization, it opened the door for jurisdictions that had consistently passed laws that were stopped by Section 5 of the Voting Rights Act to pass laws that required years of litigation and enormous expense to stop.

A review by the 2014 National Commission on Voting Rights found that from 1965 to 2013, the Department of Justice stopped over 3,000 voting changes using the Section 5 review process:

[5] *Katzenbach*, 383 U.S. at 314.
[6] *Id.*
[7] *Shelby County v. Holder*, 570 U.S. 529, 536 (2013)
[8] *Id.* at 556.
[9] *See Katzenbach*, 383 U.S. at 314.

> This included objections to over 500 redistricting plans and nearly 800 election method changes (such as the adoption of at-large election systems and the addition of majority-vote and numbered post requirements to existing at-large systems). Much of this activity occurred between 1982 (when Congress enacted the penultimate reauthorization of Section 5) and 2006 (when the last reauthorization occurred); in that time period approximately 700 separate objections were interposed involving over 2,000 voting changes, including objections to approximately 400 redistricting plans and another 400 election method changes.
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> Each objection, by itself, typically benefited thousands of minority voters, and many objections affected tens of thousands, hundreds of thousands, or even (for objections to statewide changes) millions of minority voters. It would have required an immense investment of public and private resources to have accomplished this through the filing of individual lawsuits.[10]

The passage and subsequent litigation against Texas' voter identification law illustrates what has been lost without a robust Section 5 of the VRA. In 2012, Texas passed SB 14, a restrictive voter ID law that was found to be discriminatory under a Section 5 review by both the Department of Justice[11] and the U.S. District Court of the District of Columbia.[12] The afternoon of the *Shelby County* decision, then–Texas Attorney General, now-Governor, Greg Abbott announced that the state would immediately enact the ID law that was previously found to be discriminatory.[13]

After several civil rights groups, including the Lawyers' Committee, filed suit against Texas under Section 2 of the Voting Rights Act, the District Court ruled that the ID law violated the VRA because it had a discriminatory result as Black and Hispanic voters were two to three times less likely to possess the identification needed to vote, and that it would be two to three times more burdensome for them to get the IDs than for white voters.[14] This decision was stayed pending appeal so that a law which was continuously found to be discriminatory remained in effect.[15] Subsequently, a three-judge panel and later an en banc panel of the Fifth Circuit Court of Appeals, affirmed the District Court's finding.[16] During the pendency of this litigation, elections took place under the discriminatory voter ID law from June 25, 2013 until the Fifth Circuit en banc opinion was issued on July 20, 2016. A law that was found to be discriminatory under Section 5 was also found to be discriminatory under Section 2, but only after enormous expense and effort; and after elections had taken place in which hundreds of thousands of eligible voters did not have the identification needed in order to vote.[17]

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[10] The National Commission on Voting Rights, *supra* note 4, at 56 (internal citations omitted).

[11] Letter from Thomas E. Perez, Assistant Att'y Gen., to Keith Ingram, Dir. of Elections, Tex., (Mar. 12, 2012), https://www.justice.gov/crt/voting-determination-letter-34.

[12] *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated and remanded*, 570 U.S. 928 (2013) ("in light of *Shelby County*").

[13] *See Veasey v. Abbott* (*Veasey II*), 830 F.3d 216, 227 & n.7 (5th Cir. 2016) (en banc).

[14] *Id.* at 227–28; *see also Veasey v. Perry* (*Veasey I*), 71 F. Supp. 3d 627, 695 (2014).

[15] *See Veasey II*, 830 F.3d. at 227–29, 250–251.

[16] *Id.* at 228, 264–65.

[17] *Id.* at 250 ("The district court found that 608,470 registered voters, or 4.5% of all registered voters in Texas, lack SB 14 ID.").

Similarly, in North Carolina following the 2013 *Shelby County* decision, the state passed an omnibus voting bill that cut the early voting period, created a photo identification requirement, eliminated same day voter registration, got rid of out-of-precinct voting and pre-registration.[18] In 2016, the Fourth Circuit found the law was enacted with discriminatory intent and noted:

> Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. Thus, the asserted justifications cannot and do not conceal the state's true motivation.[19]

Undeterred, the state passed another voter identification law that once again was found to have been enacted with discriminatory intent. In 2018, 55% of North Carolinians voted in favor of a voter ID constitutional amendment,[20] and the legislature passed an implementing bill which became law[21] over Governor Roy Cooper's veto. Subsequently both a federal[22] and state[23] court agreed with Governor Cooper's assessment that the cost of the bill of disenfranchising minority, poor and elderly voters was too high.[24]

Actions by election officials in Arizona provide another example of a formerly covered jurisdiction making a voting change that would likely have been stopped by a functioning Section 5 of the Voting Act. Shortly before the *Shelby County* decision, the Arizona legislature passed a law that applied only to the Maricopa County Community College District, adding two at-large members to what was previously a five-single district board. The legislature then submitted the change for Section 5 preclearance. The Department of Justice requested more information, noting concerns about the addition of two at-large members given that the racially polarized voting in Maricopa County would likely weaken the electoral power of minority voters on the board. After receiving the more information letter, Arizona officials did not seek to implement the change.

It was only after the *Shelby County* decision that they moved forward. The Lawyers' Committee and partners filed litigation in state court alleging that the new law violated Arizona's constitutional prohibition against special laws because the board composition of less populous counties was not changed. Reversing the intermediate court of appeal, the Arizona Supreme Court held that the special laws provision of the state constitution was not violated.[25] Unsurprisingly, the Latino candidate who ran for the at-large seat in the first election lost and the two new at-large members are white.

Recent discriminatory voting changes are not limited to those passed by the legislature. The closure or consolidation of polling places can also create a barrier to the vote for poor and

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[18] *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).
[19] *Id.*
[20] *See* Gary D. Robertson, New Voter ID Law Immediately Challenged in N. Carolina Court, AP (Dec. 19, 2018), https://apnews.com/37988b09026041678894a8c876dc9063.
[21] 2018 N.C. Sess. Laws 144.
[22] *See N.C. State Conf. of the NAACP v. Cooper*, No. 1:18CV1034, 2019 U.S. Dist. LEXIS 222874, at *52–54 (M.D.N.C. Dec. 31, 2019).
[23] *See Holmes v. Moore*, No. COA19-762, 2020 N.C. App. LEXIS 138, at *44–46 (N.C. Ct. App. Feb. 18, 2020).
[24] S.B. 824 Veto Message from Governor Roy Cooper (Dec. 14, 2018), https://webservices.ncleg.gov/ViewBillDocument/2017/7703/0/S824-BD-NBC-2666.
[25] *Gallardo v. State*, 236 Ariz. 84, 336 P.3d 717 (2014).

minority voters. A common tactic–one that Section 5 was particularly designed to prevent[26]–is to change or close an individual's polling location. Since *Shelby County v. Holder*, polling location closures have been widespread.[27] In Louisiana, for example, 61% of parishes closed polling locations between 2012 and 2016.[28] Almost half of the counties in Texas closed polling places after *Shelby County*.[29]

Likewise, in Georgia–a state that had been subject to 151 objections by the Attorney General under Sections 5–jurisdictions have moved swiftly with attempted efforts to close, consolidate, or relocate polling places and voting precincts since 2013, including:

- Proposal to move 16 of 37 polling sites in Henry County, GA;
- Proposal to close all but two polling places in Randolph County, GA;
- Proposal to eliminate all but one of the City of Fairburn, GA polling places;
- Proposal to eliminate all but one of Elbert County, GA precincts and polling locations;
- Numerous polling place and precinct changes in Fulton County, GA;
- Proposal to close 2 of 7 precincts and polling places in Morgan County, GA after previously reducing the number from 11 to 7 in 2012;
- Proposal to reduce the number of precincts and polling locations from 36 to 19 in Fayette County, GA;
- Proposal by the majority-White board of elections to consolidate all polling locations in a single location at the county seat in majority-Black Hancock County, GA;
- Proposal to eliminate 20 of 40 precincts and polling locations in Macon-Bibb County, GA.
- More than 35 polling site changes were made in Cobb County, GA since 2018 - the majority of which involved moving polling stations out of public schools because of alleged concerns about school safety even though there have been few, if any, reported incidents of voting-related safety issues in Georgia schools hosting polling sites.
- In 2019, the City of Jonesboro, GA, a majority-Black city with a majority-White city council voted to move its single municipal election voting site from a museum to the Jonesboro Police Department over the objections of community members and advocates who fear the move will deter participation in the city's municipal elections by persons of color and voters who have experienced negative contacts with law enforcement.
- Due to Georgia's roll-out of new voting machine equipment in 2020, some counties are contemplating even more polling site changes because of the lack of sufficient power supplies, space and other logistical problems associated with the change over to the new voting system.

It is now up to citizens in these communities to monitor election official meetings in order to learn of these proposed changes, and then to mobilize and testify about the impact of the changes on their ability to vote.

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[26] From 2010 through 2013, polling place changes accounted for 7,514 of the Section 5 changes received by the Attorney General – more than any other type of Section 5 change. Section 5 Changes by Type and Year, U.S. DEP'T OF JUST. (last updated August 6, 2015), https://www.justice.gov/crt/section-5-changes-type-and-year-3.

[27] The Leadership Conference Education Fund, The Great Poll Closure 4 (2016), http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf.

[28] These closures accounted for over 212 polling locations. *Id.*

[29] *Id.*

At other times, citizens have to resort to petitions in order to stop a polling place change that could have a potentially discriminatory effect. In 2016, the Macon-Bibb County, Georgia Board of Elections voted to temporarily relocate a voting precinct location in an African American community to the Macon-Bibb Sheriff's Office over the objections of the community. Because of valid fears that this decision would reduce turnout among African American voters, the Lawyers' Committee worked with its local partners, the Georgia State Conference of NAACP, Macon-Bibb County Branch of the NAACP, the Georgia Coalition for the People's Agenda, and New Georgia Project, to organize a successful petition drive that required the Board of Elections to reverse the relocation decision under Georgia law.

Similarly, in February 2016, Maricopa County, Arizona slashed the total number of polls from 211 in 2012 to only 60 in 2016 during the presidential primary. The result was extremely long lines, hours-long wait-times and a host of election administration problems. With this reduction, there was approximately one polling place for every 21,000 voters in Maricopa County as compared to one polling place for every 1,500 voters in the rest of the state. Maricopa County is Arizona's most populous county, and was a covered jurisdiction under Section 5 of the VRA with approximately 60 percent of the state's minority voters residing in the county. The Lawyers' Committee and partners challenged the closures which resulted in a settlement agreement that required Maricopa County to create a comprehensive wait-time reduction plan and a mechanism to address wait times at the polls that exceed 30 minutes.[30]

Previously under Section 5, these changes would have been submitted to the Department of Justice for review. The Department of Justice would then reach out to affected communities to ascertain the impact of the change on their right to vote. Today, citizens have to do the job of the Department of Justice without the resources or reach of the agency. As a result, there are likely polling place closures and consolidations that are being made that community members are unaware of until Election Day.

It is very striking that today's Department of Justice has been largely absent in enforcing the nation's voting rights laws. When the VRA was first enacted, it was with the expectation that the U.S. Attorney General would play an active role in enforcing the nation's voting rights laws.[31] Since *Shelby County*, the Department of Justice has filed three suits against jurisdictions over voting changes that would have required preclearance under Section 5.[32] Significantly, since January 20, 2017, the Department has not filed a <u>single</u> suit under Section 2 of the VRA.[33]

While the Department's inactivity is troubling, recent reversals are even more so. Since January 20, 2017, the Department of Justice has reversed prior positions in two significant voting rights matters. In both instances, the Department moved to positions at odds with its historic concern for

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[30] *Huerena v. Reagan*, Superior Court of Arizona, Maricopa County, CV2016-07890 (D. Aziz. July 7, 2016)

[31] *See South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1966).

[32] *Veasey v. Abbott (Veasey III)*, 249 F. Supp. 3d 868 , (S.D. Tex. 2017) (Texas Photo ID); *Perez v. Texas*, No. 5:11-cv-00360, 2011 U.S. Dist. LEXIS 155222 (W.D. Tex. 2011) (Legislative redistricting); *United States v. North Carolina*, Case No. 13-cv-861 (M.D. N.C. 2013)(state omnibus voting law).

[33] The last Voting Rights Act complaint filed by the United States was a vote dilution claim filed on January 10, 2017. Complaint, *United States v. City of Eastpointe*, 378 F. Supp. 3d 589 (E.D. Mich. 2019), https://www.justice.gov/opa/file/924276/download .

the protection of the rights of minority voters.[34] In the Texas photo ID case discussed above, the United States had filed its own complaint, similar to that filed by several civil rights organizations, including the Lawyers' Committee, alleging both discriminatory intent and results. The District Court found discrimination on both counts.

On appeal, although it affirmed the results finding, the Fifth Circuit, en banc, remanded the intent claim to the District Court for reconsideration.[35] At that time, the DOJ continued to challenge the law as late as December 2016, vigorously advocating re-affirmance of the finding of discriminatory intent.[36] On the same day as the installation of the new administration on January 20, 2017, the Department of Justice inquired whether the Lawyers' Committee would agree to an adjournment of the hearing.[37] The day before the rescheduled hearing in the case, the Department of Justice informed counsel for the civil rights organizations that it intended to withdraw its discriminatory intent claim.[38] During the argument, the Department of Justice joined with the state of Texas to argue that a newly enacted photo ID law provided enough of a basis for the Department of Justice to forego the larger remedy that would come with a finding of intentional discrimination.[39]

The Government's reversal of position in a matter as significant as a finding of intentional discrimination is a signal both to state lawmakers and to this country's minority populations that there is a degree of tolerance for discriminatory and/or illegal actions. This is particularly troubling given this nation's tortured history of discrimination in voting. It runs the risk of being perceived as an invitation to those who would push the limit of discriminatory tactics, and a cold shoulder to those vulnerable populations who have counted on the federal government to have their backs.

While the DOJ has not been actively enforcing the nation's voting rights laws, civil rights organizations and ordinary citizens have had to step into the breach. Since 2013, the Lawyers' Committee has participated in 45 cases. Of the fourteen cases involving voting changes,[40] eleven

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[34] *See* Charlie Savage & Eric Lichtblau, *Civil Rights Group Rebukes Trump Justice Department Over Case Delays*, N.Y. Times (Jan. 24, 2017), https://www.nytimes.com/2017/01/24/us/politics/civil-rights-trump-administration-sessions.html.

[35] *Veasey II*, 830 F.3d 216, 241 (5th Cir. 2016).

[36] *See* United States' Response Brief Concerning Discriminatory Impact, *Veasey III*, 249 F. Supp. 3d 868. (No. 2:13-cv-00193), ECF No. 977.

[37] *See* United States' Motion for Continuance of January 24 Hearing, *Veasey III*, 249 F. Supp. 868 (No. 2:13-cv-00193), ECF No. 984.

[38] *See* United States' Motion for Voluntary Dismissal of Discriminatory Purpose Claim Without Prejudice, *Veasey III*, 249 F. Supp. 868 (No. 2:13-cv-00193), ECF No. 1001.

[39] *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

[40] T*exas State Conference of NAACP Branches v. Steen* No. 2:13-cv-291 (S.D. Tx. 2013) , consolidated under *Veasey v. Abbott*, No. 2:13-cv-00193 (NGR) (S.D. Tex. 2013)Texas Photo ID law); *Gallardo v. State*, 236 Ariz. 84, 336 P.3d 717 (2014); *Third Sector Development, et al. v. Kemp, et al.* Fulton County, Superior Court, Case No. 2014CV252546, 2014 WL 5113630 (October 10, 2014)(challenge to delays in the processing of voter registration applications resulting from Georgia's exact match voter registration process); *Georgia State Conference of NAACP v. Hancock Cty. Bd. of Elections & Registration*, No. 5:15-CV-00414 (CAR), 2018 WL 1583160, at *1 (M.D. Ga. 2018) (voter purge); *Kobach v. U.S. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2015)(proof of citizenship); *Navajo Nation Human Rights Comm'n v. San Juan Cty*., No. 2:16-CV-00154 JNP, 2016 WL 3079740, at *1 (D. Utah May 31, 2016), *vacated* (June 16, 2016)(access to in-person absentee voting and language assistance); *Huerena v. Reagan*, Superior Court of Arizona, Maricopa County, CV2016-07890 (D. Ariz. July 7,

were in jurisdictions formerly-covered by Section 5 of the VRA. These changes would have been blocked under that provision, because they made it more difficult for minority voters to access the ballot.

Without the notice provision that was a part of Section 5 coverage, it is difficult for civil rights groups like the Lawyers' Committee to be aware of all the voting changes that are potentially discriminatory. Between 2000 to 2010, the U.S. Attorney General received between 4,500 and 5,500 submissions under Section 5 of the VRA, and reviewed between 14,000 and 20,000 voting changes per year. It is impossible for civil rights groups to replace the DOJ in this important function, nor should they have to. The DOJ has always played a significant role in the enforcement of this nation's voting rights laws and its recent absence is striking.

Election Administration Barriers

Voters are increasingly facing laws and practices that keep them from being able to cast a ballot that counts. The Election Protection program, mentioned above, provides a window into the challenges voters encounter. Throughout the 19 years of the program, Election Protection helped voters to address a range of barriers to the vote including: long lines and late openings due to understaffing and poor training of poll workers, ballot shortages and machine malfunctions; problems with voter registration; problems with absentee ballots; overuse of provisional ballots; lack of voter assistance, intimidation and deceptive practices. Some significant problems, but not an exhaustive list, are discussed below.

Voter Purges

A significant challenge to accessing the ballot today is the aggressive purges of voter registration rolls. A recent study by the Brennan Center for Justice found that approximately 17 million voters have been purged from the voter rolls between 2016 to 2018, with higher purge rates in jurisdictions formerly-covered by Section 5 of the Voting Rights Act. While the NVRA does require list maintenance of voter registration rolls, it is troubling when jurisdictions remove voters from the rolls without full compliance with this law. Recently, the Lawyers' Committee was successful in litigation against New York State when it obtained a judgment that the state's policy of not listing "inactive voters" on the poll books maintained at the polling places violated the right to vote.[41]

The impact of the U.S. Supreme Court's decision in *Husted v. A. Philip Randolph Institute*[42] remains to be seen. In this case, the Court agreed with Ohio--and a late change in position by the Department of Justice--that Ohio's "supplemental process" of removing voters from the rolls

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2016); *Georgia State Conference of the NAACP v. Kemp for Georgia*, No. 1:17-CV-1397- TCB, 2018 WL 2271244, at *1 (N.D. Ga. 2018) (challenge to exact match process for voter registration); *Georgia State Conference of NAACP v. State*, 269 F. Supp. 3d 1266 (N.D. Ga. 2017) (racial gerrymander); *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (challenge to new statute reinstituting exact match for voters registration); *League of United Latin Am. Citizens Arizona v. Reagan*, No. CV17-4102 PHX DGX, 2018 WL 5983009 (D. Ariz. Nov. 14 2018); *MOVE Texas Civic Fund v. Whitley*, No. 3:19-cv-00041 (S.D. Tex. Feb. 4, 2019) (voter purge); *Tennessee State Conference of the N.A.A.C.P. v. Hargett*, Case. No. 3:19-cv-00365 (M.D. Tenn. 2019)(onerous criminal and civil penalties targeting voter registration drives by individuals and private entities); *New Va. Majority Educ. Fund v. Fairfax Cty. Bd. of Elections*, No. 1:19-cv-1379-RDA-MSN (E.D. Va. filed 2019)(rejection of student registrations).

[41] *Common Cause/New York v. Brehm*, No. 17-cv-6770 (AJN) 2020 U.S. LEXIS 4911 (S.D.N.Y. Jan. 10, 2020).

[42] 138 S. Ct. 1833 (2018).

triggered when voters did not engage in "voter activity" for two years did not violate the NVRA.[43] The Lawyers' Committee, along with other civil rights organizations, will be monitoring Ohio and any other jurisdiction that adopts this process, to determine whether the practice is being implemented in such a way that disproportionately impacts minority voters who are historically more likely to have periods of voting inactivity than white voters.[44]

Citizenship Verification Processes and Laws

In addition to aggressively purging voters, some states are delaying or denying voter registration to naturalized United States citizens based upon outdated or erroneous citizenship data. In Georgia, for example, voter registration application information is compared against Georgia driver's license record data which are not updated to reflect current citizenship status. So if an applicant obtained a limited term Georgia driver's license before obtaining U.S. citizenship, the voter registration application is put into a pending status and the applicant must produce documentary proof of citizenship before they will be able to vote because the data used by the state is stale and doesn't reflect the applicant's updated citizenship status. In litigation filed by the Lawyers' Committee, the District Court in November 2018, right before the general election, partially granted Plaintiffs' motion for preliminary relief, ordering that Georgians inaccurately flagged as non-citizens could vote a regular ballot if they provided proof of citizenship to a poll manager, rather than a deputy registrar, when voting at the polls for the first time. The Georgia legislature subsequently amended other aspects of the "exact match" law in 2019 to permit applicants who fail the "exact match" process for reasons unrelated to citizenship to become active voters, but the Legislature chose not to enact any remedial legislation to reform the defective citizenship match process. Litigation on this failure to fully address the impact of the citizenship match process is pending.

Other states have attempted to pass legislation aimed at targeting registered voters for removal from the voter registration rolls based upon alleged non-citizenship which suffer from the same infirmities as Georgia's deficient citizenship matching program. For example, Virginia Governor, Ralph S. Northam vetoed Bill 1038 on March 22, 2019, which would have required the purging of registered voters for alleged non-citizenship without adequate safeguards to prevent the erroneous removal of eligible citizens.[45] In Florida, House Bill 131 and Senate Bill 230, which would have also targeted registered voters for removal from the registration list for alleged non-citizenship without adequate safeguards, died in committee at the end of the 2019 legislative session. We fully expect efforts to pass similar legislation will continue in the absence of the protections of Section 5 of the VRA.

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[43] *Husted*, 138 S. Ct. 1842–43.

[44] Nationwide census data confirms that turnout differentials persist between whites and non-whites. *See generally* U.S. Census Bureau, Voting and Registration Tables, available at https://census.gov/topics/public-sector/voting.html (last visited September 21, 2017). *See generally* Brief of the Lawyers' Committee for Civil Rights Under Law, Rock the Vote, The Nuns on the Bus of Ohio, The Texas Civil Rights Project, and the Center for Media and Democracy as Amici Curiae in Support of Respondents, *Husted*, 138 S. Ct. 1833 (No. 16-980).

[45] *See* Virginia Governor, Ralph S. Northam, Press Release and Veto Memo Re: Bill 1038, March 22, 2019, accessible at: https://www.governor.virginia.gov/newsroom/all-releases/2019/march/headline-839670-en.html; Florida Senate, Bill History for SB 230 (2019 session), accessible at: https://www.flsenate.gov/Session/Bill/2019/00230/?Tab=BillHistory; Florida Senate, Bill History for House Bill 131 (2019 session), accessible at: https://www.flsenate.gov/Session/Bill/2019/131.

Natural Emergencies

Not all obstacles to voter registration start with a law or administrative procedure. Sometimes, the problem is caused by Mother Nature or results from technical difficulties. However, how election officials choose to respond to these barriers can have an impact on whether voters can cast a ballot. In 2016, Chatham County, Georgia, was hard hit by Hurricane Matthew, just days before the close of voter registration. Chatham County has over 200,000 voting age citizens, of whom more than 40 percent are African American. Almost half of its residents lost electrical power during the storm, and the county had been subject to a mandatory evacuation order. Yet Governor Nathan Deal and then Secretary of State Brian Kemp refused to extend the voter registration deadline. We sought and obtained emergency relief extending the deadline to register, allowing over 1400 predominately African American and Latino citizens to register to vote. That same year, we sought and obtained similar relief, extending the voter registration deadline in Virginia, after its online voter registration system crashed. Over 28,000 voters were able to register as a result of the court order.

Flawed List Maintenance Procedures.

More recently, in January 2019, David Whitley, then-Secretary of State of Texas, sent Texas counties a list containing 95,000 registered voters and directing the counties to investigate their voting eligibility. The list was based on DMV data that the state knew was flawed and would necessarily sweep in thousands of citizens who completed the naturalization process after lawfully applying for a Texas drivers' license. Voting rights advocates, including the Lawyers' Committee, filed lawsuits challenging the purge and obtained a preliminary injunction, enjoining the removal of voters from the rolls based upon this flawed process. The case settled immediately thereafter, with Texas abandoning the process.[46]

Aggressive Rejection of Absentee Ballots

In 2018, the Lawyers' Committee joined lawsuits challenging Georgia's practices of 1) rejecting absentee ballots based upon election officials' untrained conclusion that the voter's signature on the absentee ballot envelope did not match the voter's signature on file with the registrar's office, and 2) rejecting absentee ballots for immaterial errors or omissions on the ballot envelope. Georgia had an extraordinarily high rate of absentee ballot rejections generally, but the rejection rate in Gwinnett County was almost 3 times that of the state and absentee ballots cast by voters of color were rejected by Gwinnett County at a rate between 2 and 4 times the rejection rate of absentee ballots cast by white voters. Plaintiffs were granted preliminary relief before the November 2018 mid-term election. Subsequently, Georgia enacted remedial legislation that addressed this practice and the lawsuits were voluntarily dismissed

Barriers for Minority Language Voters

Despite protections offered by Sections 4(e) and 203 of the VRA requiring language assistance at the polls for limited English proficient voters, these voters nevertheless do encounter ineffective language assistance at the polls. These provisions require that jurisdictions provide affirmative

[46] *Texas League of United Latino American Citizens v. Whitley*, No. 5:19-cv-00074 2019 WL 7938511 (W.D. Tex. Feb. 27, 2019).

assistance in many forms, including "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots… in the language of the applicable minority group as well as in the English language."[47] Additionally, Section 208 of the VRA requires that "any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." Examples in which jurisdictions violate these provisions include:

- In San Juan County, Utah, the County failed to provide adequate assistance for its Navajo language speakers. In a settlement following litigation by the Lawyers' Committee and partners, the County is required to provide in-person language assistance on the Navajo reservation for the 28 days prior to each election through the 2020 general election, and to take additional action to ensure quality interpretation of election information and materials in the Navajo language.[48]
- In September 2018, a District Court ordered the Secretary of State of Florida to issue instructions to 32 counties, requiring them to provide Spanish-language sample ballots at polling places, on county websites, and by mail to guide voters in marking their ballots, and to publicize the availability of these sample ballots and instructions on how to use them after those counties refused to provide language assistance to Puerto Rican residents.[49]
- In 2016, a federal court blocked Texas's law that limited access to interpreters for limited English proficient voters.[50]

Barriers for Returning Citizens/Implementation of Amendment 4 in Florida

On November 6, 2018, almost 65 percent of Florida voters approved Amendment 4, a constitutional amendment that restored the voting rights of Floridians who had been disenfranchised for life as a result felony convictions.[51] As a result of the approval of Amendment 4, it has been estimated that as many as 1.4 million voters would have their voting rights restored in what has been viewed as an historic expansion of the franchise.[52]

In response to the passage of Amendment 4, the Florida legislature passed Senate Bill 7066 in the 2019 legislative session.[53] SB 7066 mandated the payment of all fines and fees by Florida's formerly convicted, newly enfranchised voters before they would be allowed to register to vote and cast ballots. Notably, as the Brennan Center for Justice found in its May 2019 brief,

[47] Pub. L. No. 109-246, 120 Stat. 577 (2006) (codified at 52 U.S.C. § 10301 et seq.).

[48] Navajo Nation Human Rights Comm'n v. San Juan County, 2:16-cv-00154 JNP, 2017 WL 3976564, at *1 (D. Utah Sept. 7, 2017).

[49] Madera v. Detzner, 325 F. Supp. 3d 1269 (N.D. Fla. 2018).

[50] OCA-Greater Houston v. Texas, No. 1:15-CV-00679-RP, 2016 WL 9651777 (W.D. Tex. 2016).

[51] Florida Division of Elections, Voting Restoration Amendment 14-01 Text and History, accessible at: https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64388&seqnum=1

[52] Jones v. Governor of Florida, Docket No. 19-14551, 2020 WL 829347, *1 (11th Cir. 2020).

[53] Florida Senate, Bill History for Senate Bill 7066 (2019 session), accessible at: https://www.flsenate.gov/Session/Bill/2019/07066.

"Thwarting Amendment 4," Black and low income returning citizens are more likely to be represented in the pool of individuals whose voting rights are restored by Amendment 4.[54]

SB 7066 put unreasonable, if not impossible, hurdles in the way of these largely Black and low income returning citizens. In particular, the law would prevent indigent individuals with no ability to pay these fines and fees from regaining the ability to register and vote, making the restoration of their voting rights under Amendment 4 entirely illusory.

After the passage of SB 7066, seventeen formerly convicted indigent Floridians with the inability to pay the fines and fees as a condition of their ability to register to vote and vote, filed suit challenging the constitutionality of the law. The United States District Court for the Northern District of Florida granted a preliminary injunction requiring the State to allow the named plaintiffs to register and vote if they are able to show that they are genuinely unable to pay their fines and fees and are otherwise eligible to vote under Amendment 4.[55]

The state appealed the order on the preliminary injunction to the Eleventh Circuit Court of Appeals. Governor Ron DeSantis also requested an advisory opinion from the Florida Supreme Court on whether the phrase, "all terms of sentence" as used in Amendment 4 required returning citizens to satisfy all fines and fees in addition to completing terms of probation or parole in order to be eligible to register and vote. On January 16, 2020, the Florida Supreme Court concluded that the phrase, "all terms of sentence," included fines and fees in response to the Governor's request for the advisory opinion.[56] However, on February 19, 2020, a three judge panel of the Eleventh Circuit issued a per curiam decision upholding the District Court's order granting the plaintiffs' motion for a preliminary injunction, concluding that the law's fines and fees requirement punished those formerly convicted individuals who could not pay more harshly than those who could pay by denying them access to the ballot box in violation of the Equal Protection Clause of the Fourteenth Amendment. The same day the Eleventh Circuit panel issued its opinion, Governor DeSantis' office tweeted that his Administration disagreed with the Court's opinion and planned to seek an en banc review.[57]

The refusal of the Governor and Legislature to accept the will of the people by conditioning the full restoration of voting rights on the relative poverty or wealth of these returning citizens, speaks volumes to the need for Congress to take action to ensure that prospective voters are not subjected to structural barriers to the ballot box that make their access to the ballot dependent upon their race, wealth or other discriminatory factors.

Redistricting and Voting Discrimination

The 2020 Census enumeration period has already begun and will be in full swing in the coming months. The redistricting process will immediately follow and unless Congress acts, it will be the first in decades without the full protections of the Voting Rights Act. It cannot be overstated how significant the Voting Rights Act has been in combatting discrimination during redistricting.

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[54] Kevin Morris, Thwarting Amendment 4, Brennan Center for Justice (May 9, 2019), accessible at: https://www.brennancenter.org/our-work/research-reports/thwarting-amendment-4

[55] *See Jones v. DeSantis*, 410 F. Supp. 3d 1284 (N.D. Fla., 2019).

[56] Supreme Court of Florida, Docket No. SC19-1341, Advisory Opinion to the Governor Re: Implementation of Amendment 4, The Voting Restoration Amendment, January 16, 2020, accessible at: https://www.floridasupremecourt.org/content/download/567884/6414200/file/sc19-1341.pdf.

[57] See https://twitter.com/helenaguirrefer/status/1230148392216645636?s=20

During the Section 5 review, organizations had the opportunity to present redistricting plans with demographic and statistical detail, and individual voters submitted their views on the proposed plans to the Department of Justice. This avenue of participation, particularly for minority voters and the organizations representing their interests, is lost without the Section 5 process. As noted above, between 1965 – 2013, the Department of Justice issued objections to over 500 redistricting plans. During the 2020 Census, several thousand formerly covered jurisdictions will redistrict without Section 5 available to protect minority voters for the first time in over 50 years.

Conclusion

Efforts to block access to the ballot are ongoing. Findings of discrimination in voting following the *Shelby County* decision illustrate that "current conditions" do call for the full protections of the Voting Rights Act. Furthermore, as the U.S. Commission on Civil Rights has noted in its 2018 report, the Department of Justice's Voting Rights Act Enforcement has substantially declined following the *Shelby County* decision. Organizations such, as the Lawyers' Committee, have been carrying the load without the resources available to the United States government. Additionally, we have lost the notice of potentially discriminatory voting changes that a fully operational Section 5 allows. It is important that Congress act to ensure that there is no backsliding after a many decade-long trajectory of passing laws to ensure that all eligible citizens have access to the ballot.