TESTIMONY OF

DEBO P. ADEGBILE, ESQ.

ON

VOTING IN AMERICA: ENSURING FREE AND FAIR ACCESS TO THE BALLOT

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION, SUBCOMMITTEE ON ELECTIONS

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I. INTRODUCTION

My name is Debo P. Adegbile. I am here in my personal capacity as a citizen and as a voting rights litigator for several decades, not in any other capacity. Thank you for inviting me to testify today about ensuring access to the foundational right in our democracy.

For more than twelve years, I was a litigator at the NAACP Legal Defense Fund, Inc. (LDF). I served in various positions there, including several years as the Director of Litigation. While at LDF, I presented oral argument twice before the Supreme Court to defend the Voting Rights Act's preclearance provisions against constitutional attack, first in 2008 in the *Northwest Austin Municipal Utility District v. Holder* case, and then in 2013 in the *Shelby County v. Holder* case. Since my time with LDF, I have continued to work on voting rights related issues in both private practice and as a member of the United States Commission on Civil Rights.

I had the honor to testify before subcommittees of the House and Senate Committees on the Judiciary in 2006, the last time the Voting Rights Act (VRA) was reauthorized. That year an overwhelming bipartisan majority of this House voted 390-33 to reauthorize the VRA, including the Sections 4 and 5 preclearance process that I will focus on in part today. After a unanimous Senate supported the bill, President George W. Bush signed it into law. I also testified in front of the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties in 2019 as Congress considered the Voting Rights Advancement Act which would have restored voting rights protections lost when the Supreme Court struck down the preclearance provisions of the Voting Rights Act in *Shelby County*.

I would like to focus my testimony today on three things. First, I want to speak to the importance of the ongoing work to build an enduring democracy that prioritizes participation and equal access to the vote, including the inclusion and protection of minority voters, and describe

the consequential threats to that project. Second, I want to briefly recount the role that Congress has historically played, primarily through the Voting Rights Act, to protect that system and then explore the impact of the Supreme Court's erosion of those protections in *Shelby County*. Finally, I will explain why Congress retains this constitutionally granted power and should act now to pass legislation that renews our collective commitment to the minority inclusion principle that the VRA embodies, and how Congress should do so.

II. THE CURRENT THREAT TO ENDURING DEMOCRACY

In his final essay, Congressman and civil-rights leader John Lewis wrote, "Democracy is not a state. It is an act, and each generation must do its part to help build what we call the Beloved Community."[1] Implicit in this statement is a recognition that democracies are fragile and require constant care. As the events of January 6th reminded us, our democracy can endure only as long as Americans remain committed to participating in the electoral process as the core means of mediating political disagreements.

To understand the imperative to defend our democracy, we must remember that it is, at bottom, a means of settling disputes peacefully. Where political conflict was once resolved by factions taking up arms, democracy provides another approach: Our society has committed to engage instead in political debate, expressing our preferences by taking issues to the ballot box at regular intervals, engaging in an ongoing process of political renewal. In that system, our ideas do not always win. But because we believe its outcomes are just and reflect the will of the People, we accept them—or better yet, we channel our disagreement into further political engagement, seeking a better result at the next election. The system is effective but also

[1] John Lewis, Opinion, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html.

precarious. Its vitality depends on its embrace and entrenchment and our shared understanding. And, particularly in light of American history, democracy's legitimacy, in substantial measure, depends upon its inclusion of minority voters.

I have written before that democracy presents candidates for elected office with two paths, both with deep historical roots. Candidates can choose the path of mobilization, doing the hard work of building support through active engagement and advancement of popular policies, while working to enhance voter access and participation. In other words, they can take American democracy's high road and what I, and hopefully an overwhelming number of Americans, regard as the right one. Conversely, politicians can choose the too well-trodden low road. Candidates and political parties can seek to win election not through inspiration, but by erecting barriers to voter participation and, sometimes without evidence, challenging unfavorable election results. Both of these roads have the potential to yield short term electoral gains, but only one strengthens and expands our democracy.[2]

We currently stand at an inflection point, but it is not unprecedented. The Fifteenth Amendment's expansion of the right to vote was met with the creation of poll taxes and literacy tests. The rise of minority voting power after the Voting Rights Act was met with the expansion of at-large elections. The National Voter Registration Act (i.e., the Motor Voter Law) and the narrow margin of the 2000 presidential election were answered by a wave of spurious voter ID laws. Now, record voter turnout, despite a pandemic, is almost predictably sparking renewed efforts to make it even harder to vote. The right to vote has its greatest power when it is exercised—some welcome it while others fear and try to thwart it.

[2] Debo Adegbile, *Attacks on Voting Rights: Is that Really How They Want to Win?*, ROLL CALL (Nov. 5, 2018), https://www.rollcall.com/2018/11/05/attacks-on-voting-rights-is-that-really-how-they-want-to-win/.

The 2020 election saw over 158 million ballots cast and the highest turnout as a percent of the voting eligible population in 120 years.[3] States across the country rose to the challenges posed by holding an election during a pandemic, and over 100 million votes were cast early or by mail.[4] Voter fraud, never a widespread problem in our elections, was essentially nonexistent in November.[5] Efforts to track such fraud, even from outlets that have previously promoted that narrative, found no more than a handful of cases last year.[6]

But the months since Election Day have vividly demonstrated how precarious the right to vote remains. As this body knows, losing candidates and state officials pushed unprecedented and unfounded claims of election interference, with some going so far as to seek to invalidate the electoral result. These unsupported attempts to invalidate a popular election employed a deliberate and unmistakable strategy of attacking votes in urban centers with high minority populations as somehow invalid.[7] If that weren't enough, it is unfortunately now clear that many state legislatures are choosing democracy's low road. Fueled by grievances, falsehoods, and thinly veiled discrimination, legislatures across the country are working on bills to restrict voting rights.[8] As of February 19th this year, more than 250 bills with provisions that restrict voting

[3] Drew Desilver, *Turnout soared in 2020 as nearly two-thirds of eligible U.S. voters cast ballots for president*, PEW RESEARCH CENTER (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/; Kevin Schaul et al., *2020 turnout is the highest in over a century*, WASH. POST (Nov. 5, 2020), https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/.

[4] Lazaro Gamio et al., *Record-Setting Turnout: Tracking Early Voting in the 2020 Election*, N.Y. TIMES (Nov. 12, 2020), https://www.nytimes.com/interactive/2020/us/elections/early-voting-results.html.

[5] Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Nov. 10, 2020), https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html.

[6] *See, e.g.,* THE HERITAGE FOUNDATION, Election Fraud Cases, https://www.heritage.org/voterfraud/search (last visited Mar. 28, 2021).

[7] *Trump Challenge to Election Results Hits Hardest at Black Voters*, BLOOMBERG, (Nov. 21, 2021), https://www.bloomberg.com/news/articles/2020-11-21/trump-challenge-to-election-results-hits-hardest-at-black-voters.

[8] BRENNAN CENTER FOR JUSTICE, Voting Laws Roundup: February 2021 (Feb. 8, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2021. (The news is not all bad, as legislatures in 37 states are working on legislation to expanding voting access.)

access have been considered in 43 states.[9] These proposed restrictions span the spectrum of options to reduce participation in our democracy. Broadly speaking, they fall into five categories: 1. Restrictions on Mail Voting, 2. Stricter Voter ID Requirements, 3. Reduced Voter Registration Opportunities, 4. Increased Voter Purges, and 5. Reduced In-Person Voting.[10] Almost without fail, these bills are solutions in search of problems following an historic, well-run, virtually fraud-free election.

I would like to focus briefly on bills in two states, both of which you are likely already familiar with. Georgia S.B. 202, signed into law last week, contains a wish-list for advocates of voter suppression. While much of the media attention has been focused on the gratuitous and mean-spirited prohibition on distribution of food and water to voters waiting in line, it is important to view this restriction against the reality that, as compared to white voters, minority voters are six times as likely to wait over an hour to vote.[11] Moreover, the bill encompasses several other changes that will lead to increases in those lines, including additional requirements for absentee ballots and restrictions on ballot drop boxes and mobile voting. Most concerning in light of efforts to interfere with Georgia's ballot count during the 2020 presidential election, the bill grants the state legislature power to overtake the authority of county election officials. President Biden accurately described this law as "Jim Crow in the 21st Century," and he has promised that the Justice Department is looking into it. It goes without saying that the Justice Department would have had more tools at its disposal before *Shelby County*.[12]

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[9] BRENNAN CENTER FOR JUSTICE, State Voting Bills Tracker 2021 (Feb. 24, 2021), https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021.
[10] BRENNAN CENTER, Voting Laws Roundup, *supra* note 8.
[11] Emily Badger, *Why Long Voting Lines Could Have Long-Term Consequences*, N.Y. TIMES (Nov. 8, 2016), https://www.nytimes.com/2016/11/09/upshot/why-long-voting-lines-today-could-have-long-term-consequences.html.
[12] *Biden Calls Georgia's Restrictive Voter Law 'an Atrocity'*, N.Y. Times (Mar. 26, 2021), https://www.nytimes.com/live/2021/03/26/us/biden-news-today#biden-gun-control.

While Georgia's bill is now law, the Arizona legislature is still devising changes to that state's elections. Bills pending in Arizona could dramatically reduce voting by mail, potentially removing voters from an automatic vote-by-mail list after they miss a single election.[13] Other provisions could reduce the window for voters to receive and return a mail ballot, particularly worrisome for residents of Indian reservations who may lack regular mail delivery.[14] In defense of these proposals, a state representative recently expressed his belief that "[q]uantity is important, but we have to look at the quality of votes, as well."[15]

An exchange during a recent argument before the Supreme Court is illuminating. In a currently pending case in which Arizona is seeking to greatly diminish the effectiveness of enforcement efforts under Section 2 of the Voting Rights Act, Justice Barrett asked the attorney for the state's Republican party what interest it had in keeping laws that restrict opportunities to vote on the books. In response, the lawyer, in effect, admitted that voter suppression was the aim.[16]

Only Congress can meaningfully turn the tide against these efforts to weaken our democracy. Historically, Congress has played a central, bipartisan role in preserving our democratic process by enacting strong protections that allow the Executive, the courts, and individuals to enforce the right to vote ensured by the Fourteenth and Fifteenth Amendments. Congress's watershed enactment of the Voting Rights Act of 1965 broke with the pattern of systemic exclusion of minority voters in wide swaths of the Nation. This had both profound

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[13] Jane C. Timm, *Arizona Republicans push new laws to limit mail voting*, NBC NEWS (Mar. 20, 2021), https://www.nbcnews.com/politics/elections/arizona-republicans-push-new-laws-limit-mail-voting-n1261328.
[14] U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES, (2018), at 182-83, 278, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf (last accessed Mar. 30, 2021) [hereinafter U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS].
[15] *Arizona Republicans push new laws to limit mail voting*, *supra* note 13.
[16] *Brnovich v. Democratic National Committee*, No. 19-1257, Oral Argument Transcript 37-38 (Mar. 2, 2021), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-1257_1b7d.pdf.

practical effects and an equally important signaling effect that has proved essential to Americans' continued belief in the democratic system.

III. HOW WE GOT HERE: VOTING RIGHTS BEFORE *SHELBY COUNTY*

The Fifteenth Amendment gives Congress broad powers to protect the right to vote, while the Elections Clause permits Congress to administer federal elections and address the decisions of state legislatures in this sphere. The Supreme Court has stated that voting is considered "preservative of all rights,"[17] and has repeatedly "forbid[den] the abridgment of the right to vote."[18] Despite this expansive field for Congress to act, "the first century of congressional enforcement of the [Fifteenth] Amendment, however, [was] a failure."[19] After the Compromise of 1877 and the removal of federal troops from the South, southern states began lashing out to fetter black political power.[20] Jim Crow laws, including poll taxes, grandfather clauses, and literacy tests, in addition to violence and intimidation at the polls, suppressed Black voting rights from the end of Reconstruction in 1877 to the 1950s.[21] Only with the Voting Rights Act of 1965 did Congress finally fulfill its constitutional duty to enforce the Fifteenth Amendment.

The VRA has been called the "single most effective piece of civil rights legislation ever passed."[22] That efficacy, however, was hard won. The struggle to pass the VRA is well-known. Congress had previously passed the Civil Rights Act of 1957, 1960, and 1964 to, in part, address voting discrimination. The Voting Rights Act of 1957 did not provide the Attorney General with

[17] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
[18] *Smith v. Allwright*, 321 U.S. 649, 661 (1944) (collecting cases).
[19] *Shelby County v. Holder*, 570 U.S. 529, 536 (2013) (internal quotation omitted).
[20] U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS at 16.
[21] *See, e.g.*, USC Gould School of Law, A Brief History of Civil Rights in the United States: Jim Crow Era, https://onlinellm.usc.edu/a-brief-history-of-jim-crow-laws/ (last accessed Mar. 28, 2021).
[22] *See* U.S. Department of Justice, "The Effect of the Voting Rights Act," last modified June 19, 2009, https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0.

specific authority to enforce its provisions.[23] Though the Civil Rights Acts of 1960 and 1964 aimed to tackle the limitations of the 1957 Act, they too proved to be ineffective in addressing voting discrimination. The U.S. Commission on Civil Rights, founded by the Civil Rights Act of 1957, issued a report demonstrating that Black voters continued to face poll taxes, literacy tests, physical violence, and economic retaliation.[24] By the mid-1950s, 75% of Black people were not registered to vote.[25] Congressional hearings showed that the Department of Justice's efforts to eliminate discriminatory election practices by litigation on a case-by-case basis had been unsuccessful in addressing these discrepancies.[26] As the Department of Justice put it, "[a]s soon as one discriminatory practice or procedure was proven to be unconstitutional and enjoined, a new one would be substituted in its place and litigation would have to commence anew."[27] None of these initial laws adequately met the challenge of the seemingly unwavering commitment to racial discrimination in voting.

On March 7, 1965, peaceful protestors led by John Lewis marched in Selma, Alabama against unequal access to the ballot box. Many were violently beaten by state troopers. Coverage of the march shocked the Nation, and spurred a public outcry to protect voting and civil rights. A little over a week later, President Johnson introduced the legislation to ensure federal enforcement of the right to vote. In addressing the Nation, he said: "At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. . . . So it was last week in Selma, Alabama. . . . We cannot, we must not, refuse to

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[23] *United States v. Raines*, 362 U.S. 17, 26-27 (1960); see also *United States v. State of Ala.*, 362 U.S. 602, 604 (1960) (recognizing federal authority under Civil Rights Act of 1960 to bring voting rights action against Alabama).
[24] U.S. COMM'N ON CIVIL RIGHTS, 1961 U.S. COMM'N ON CIVIL RIGHTS REPORT BOOK 1: Voting, (1961) XVI, at 23, http://www2.law.umaryland.edu/marshall/usccr/documents/cr11961bk1.pdf.
[25] Charles S. Bullock III, Ronald Keith Gaddie, and Justin L. Wert, The Rise and Fall of the Voting Rights Act 25 (2016) (Norman: University of Oklahoma Press).
[26] *See* U.S. Department of Justice, "History of Federal Voting Rights Laws," last modified July 28, 2017, https://www.justice.gov/crt/history-federal-voting-rights-laws.
[27] *Id.*

protect the right of every American to vote in every election that he may desire to participate in."[28] Congress answered that call, passing the Voting Rights Act of 1965. The Act aimed to serve "the broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.'"[29] It did so through several mechanisms. Section 2 of the Act, which closely followed the language of the Fifteenth Amendment, applied a nationwide prohibition on discrimination in voting, a nationwide prohibition of poll taxes, literacy tests, and other "tests and devices" that limit access to the ballot for minority voters, and protections against voter intimidation. It permitted enforcement through an individual cause of action and by the Department of Justice. Today, cases related to redistricting, voter identification, discriminatory treatment at polls, and at-large voting systems are litigated under Section 2.

Sections 4 and 5 of the Act took an even more proactive approach. To respond to the persistent and adaptive discrimination that the Department of Justice had identified, these provisions forged a "preclearance" process to target areas of the country where Congress believed the potential for discrimination was at its height.[30] Recognizing that, "just as the Fifteenth Amendment had been circumvented by devices such as literacy tests, the intent of the Voting Rights Act could readily be circumvented through other devices or alterations in the structure or mechanisms of elections," the legislation's drafters designed the preclearance provision "to prevent such circumventions."[31]

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[28] President Lyndon Johnson, President Johnson's Special Message to Congress: The American Promise, http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-thecongress-the-american-promise (last accessed Mar. 28, 2021).
[29] *Chisom v. Roemer*, 501 U.S. 380, 403 (1991).
[30] U.S. Department of Justice, "History of Federal Voting Rights Laws," last modified July 28, 2017, https://www.justice.gov/crt/history-federal-voting-rights-laws.
[31] Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 242, 247-48 (2006) (statement of Alexander Keyssar, Kenn. Sch. of Gov., Harv. U.),

Preclearance, set out in Section 5 of the Act, operated by requiring jurisdictions with a history of discrimination to submit any changes in voting procedures to the Department of Justice or a three-judge panel and prove that the new procedures did not have a discriminatory purpose or discriminatory effect. The Attorney General could also appoint federal examiners in counties covered by these special provisions to review the qualifications of persons who wanted to register to vote and observe activities in polling locations. Section 4 of the Act identified the geographic reach of the minority voter protections, which were directed at many of the places with the most entrenched discrimination. That provision determined which jurisdictions would be subject to additional scrutiny if state actors changed their voting procedures. Under the preclearance formula, which was updated in 1970, 1975, 1982, and 2006, Section 5's requirements applied statewide to several states in the South and certain towns and counties across the country.[32] In the states that were partially covered, only the local jurisdictions that were covered had to submit any changes to their local voting rules for preclearance, but any statewide changes that impacted those jurisdictions also had to be precleared.[33]

If a jurisdiction could show that it had not discriminated in voting for 10 years, it could "bail out" of Section 5 coverage.[34] A finding that the state or locality had violated the VRA under Section 2 or a decision rejecting a proposed change under Section 5 restarted the clock.

The effects of the Voting Rights Act were monumental. In just two years after enactment, over 50% of nonwhite voters were registered to vote in Southern states. In Mississippi, registration increased eight-fold. Federal examiners helped register over 150,000

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https://www.scribd.com/document/33361 8920/SENATE-HEARING-109TH-CONGRESS-RENEWING-THETEMPORARY-PROVISIONS-OF-THE-VOTING-RIGHTS-ACT-LEGISLATIVE-OPTIONS-AFTER-LULAC-VPERRY (last accessed Mar. 28, 2021).

[32] U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS at 28.

[33] *Id.*

[34] *Id.*

Black southerners to vote in 58 of the counties covered under Section 5.[35] Research also shows that preclearance specifically increased representation of minorities in Congress.[36]

IV. *SHELBY COUNTY* IN CONTEXT

The Supreme Court upheld the Voting Rights Act, and specifically preclearance, numerous times.[37] In 2006, President Bush became the fourth President to reauthorize the VRA and extended its life by 25 years. Recognizing that the VRA "helped bring a community on the margins into the life of American democracy,"[38] President Bush committed his administration to "vigorously enforce the provisions of this law" and to "defend it in court."[39]

Despite the unbroken line of reauthorizations and robust federal enforcement, violations of the VRA continued, and remained most concentrated in the covered jurisdictions. Also, during the 2006 reauthorization, Congress found that DOJ had blocked more proposed voting changes under Section 5 due to determinations that they would be discriminatory between 1982 and 2004 (626) than it had between 1965 and the 1982 reauthorization (490). Thus, while Section 5 of the VRA had prohibited "retrogression," going backwards by decreasing access to the polls for voters of color, such efforts continued in jurisdictions with a history of discrimination.

In 2013, the Supreme Court decided *Shelby County v. Holder*. The Court struck down the preclearance formula under Section 4 of the Voting Rights Act as reauthorized in 2006.

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[35] U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 12 (1968), https://www.law.umaryland.edu/marshall/usccr/documents/cr12p753.pdf.
[36] Desmond Ang, *Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight under the Voting Rights Act,* 11.3 American Economic Journal 1, 10 (2019), https://pubs.aeaweb.org/doi/pdfplus/10.1257/app.20170572.
[37] *Lopez v. Monterey Cty.*, 525 U.S. 266, 287 (1999); *City of Rome v. United States*, 446 U.S. 156, 158 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).
[38] Press Release, President George W. Bush, President Bush Signs Voting Rights Act Reauthorization and Amendments Act of 2006 (July 27, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727.html (last accessed Mar. 30, 2021).
[39] *Id.*

While Section 5 remained intact, no jurisdictions were covered without the Section 4 preclearance formula. As such, Section 5's preclearance mechanism will remain a dead letter absent congressional action.

Prior to *Shelby County*, the law provided that a state or subdivision (like a county) would be covered if the Attorney General determined that two criteria were met: first, that the state employed a discriminatory "test or device" in voting, like a literacy test, a "good character test," or some other method of exclusion used in the Jim Crow South; and second, that under 50% of the voting age population was registered to vote or turned out to vote in a presidential election. But those criteria had to be met on particular dates: November 1964, November 1968, or November 1972. If at any of those points the criteria were met for a particular state or county, then that state or county was covered.

Chief Justice Roberts, writing for a divided Court, posited that "[t]hings have changed in the South."[40] The Chief explained that covered jurisdictions now enjoy close to equal voter registration rates among Black and White populations, and that the jurisdictions no longer used the mechanisms, including literacy tests and poll taxes that had served as early attempts to keep minority voters from accessing the ballot, which had long since been federally prohibited. The Court recognized that Congress had developed an ample record of ongoing discrimination when reenacting the VRA, but it determined, contrary to the congressional judgment, that the coverage mechanism didn't bear a sufficient relationship—and indeed, was not based on—that record. The Court rejected the preclearance coverage mechanism embodied in Section 4a as simply a

[40] *Shelby County*, 570 U.S. 529, 540 (2013) (quoting *Northwest Austin Municipal Utilities District One*, 557 U.S. 193, 202 (2009)).

"renact[ment] [of] a formula based on 40-year-old facts having no logical relation to the present day."[41]

Given the record assembled by Congress, this conclusion is subject to substantial questions; nevertheless, it frames the canvas on which Congress must now paint.

The consequence of the Court's *Shelby County* decision was devastating. It "effectively halt[ed] heightened federal scrutiny in advance of voting changes in jurisdictions where the criteria applied."[42] Though Section 2 remained in effect, preclearance had been the most powerful tool to eradicate discrimination in voting. Without it, the federal government lacks the ability to nullify discriminatory changes to state and local voting laws before they can go into and remain in effect. Removing the astringent of light that preclearance had shone on state efforts to discriminate reintroduced an incentive to pass such laws in the first place. And by removing the possibility that good behavior could lead to a jurisdiction bailing out of coverage, it eliminated the opposite incentive to avoid passing laws that fail under Section 5 review.

In sum, the decision took away certain, efficient, and less burdensome prophylactic protections for minority voters. It also curtailed the Department of Justice's ability to send federal examiners to monitor polls and voting in the previously covered jurisdictions, eliminating its ability to have eyes and ears on the ground.[43] The result of all this is that more discriminatory laws can be enacted and remain on the books, carrying out their intended suppressive effects, sometimes for years, as enforcement litigation unfolds.[44] This litigation is complex and

[41] *Id.* at 554.
[42] *See* U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS, at 53.
[43] *Id.*
[44] U.S. Dep't of Justice, Fact Sheet on Justice Department's Enforcement Efforts Following *Shelby County* Decision, https://www.justice.gov/crt/file/876246/download (last accessed Mar. 30, 2021).

expensive, and the constant battle that minorities have to fight in order to attack these laws and defend their right to vote is itself a burden that degrades our democratic system.

Litigants and the congressional record warned the Court of the harmful effect that retreat from preclearance would have. Those predictions relied on the ample evidence that efforts to discriminate against minorities in voting had continued, particularly in the covered jurisdictions, and had been held in check, in substantial measure, by the VRA's preclearance mechanism. Indeed, 90% of discriminatory incidents at polls occurred in covered jurisdictions—a trend that has continued in the years since *Shelby* was decided.[45] The gains that the Court noted in minority participation in the democratic process had come because of, and depended on, continued enforcement of preclearance. That premise is now clear and beyond cavil: Without the VRA's strong deterrent, the Fourteenth and Fifteenth Amendments' promise of equality in voting cannot be realized.

In her prescient dissenting opinion in *Shelby County*, the late Justice Ginsburg recognized as much. She explained that "throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[46]

While many viewed the Court's decision as a tragedy, others saw an opportunity. Within two hours of the Supreme Court's decision, the Texas state Attorney General tweeted that the state would immediately reinstitute its strict photo-identification law, which had previously been struck down by a federal court under the VRA's preclearance procedures. A month after the decision, North Carolina passed a sweeping voter-suppression law that was later struck down by

[45] J. Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in* Shelby County*?*, TRANSATLANTICA (Jan. 9, 2016), http://journals.openedition.org/transatlantica/7462.
[46] *Shelby County*, 570 U.S. at 590 (Ginsburg, J. dissenting).

the Court of Appeals for the Fourth Circuit for targeting African-American voters "with almost surgical precision."[47] These laws became no exception. Between 2010 and 2020, 28 states passed new laws or policies restricting access to the ballot. Specifically, 16 states enacted strict voter-identification laws, 12 states enacted laws or adopted policies that make it more difficult to register and to stay registered to vote, 12 states enacted laws or adopted policies that that make it more difficult to vote early or absentee, and three states created new barriers for restoring the right to vote for people with past criminal convictions.[48] An even larger number of voting restrictions have been considered in state legislatures in the last decade. In 2011 and 2012, 180 restrictive bills were considered in 41 states.[49] In 2013, 92 restrictive bills were introduced in 33 states.[50] That trend continued unabated in the years since.[51]

Of course, these actions have consequences: These jurisdictions experienced unprecedent purging of voter rolls and closing of polling sites after *Shelby County*. From 2014 to 2016, 16 million voters were removed from voter rolls.[52] Nearly four million more names were purged from the rolls between 2014 and 2016 than between 2006 and 2008.[53] In Texas alone, over 360,000 voters were erased from rolls in the first election cycle after Shelby County.[54] Georgia purged twice as many voters—1.5 million—between the 2012 and 2016 elections as it did

[47] *North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).
[48] New Voting Restrictions in America, Brennan Center for Justice (Nov. 18, 2019), https://bit.ly/383e0U8; Voting Laws Roundup 2020, Brennan Center for Justice (Dec. 8, 2020), https://bit.ly/3rI1rVM.
[49] Election 2012: Voting Laws Roundup, Brennan Center for Justice (Oct. 11, 2012), https://bit.ly/34ZIG6D.
[50] Voting Laws Roundup 2013, Brennan Center for Justice (Dec. 19, 2013), https://bit.ly/3aYXh5V.
[51] Voting Laws Roundup 2014, Brennan Center for Justice (Dec. 18, 2014), https://bit.ly/3pDHsWt; Voting Laws Roundup 2015, Brennan Center for Justice (June 3, 2015), https://bit.ly/3aYby2X; Voting Laws Roundup 2016, Brennan Center for Justice (Apr. 18, 2016), https://bit.ly/383BVCU; Voting Laws Roundup 2017, Brennan Center for Justice (May 10, 2017), https://bit.ly/387P2mB; Voting Laws Roundup 2018, Brennan Center for Justice (Apr. 2, 2018), https://bit.ly/38QSXmH; Voting Laws Roundup 2019, Brennan Center for Justice (July 10, 2019), https://bit.ly/3o6t9JH.
[52] Kevin Morris, et al., *Purges: A Growing Threat to the Right to Vote* (July 20, 2018), at 1, https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf (last accessed Mar. 30, 2021).
[53] *Id.*
[54] *Id.*

between 2008 and 2012.[55] Additionally, jurisdictions once subject to preclearance closed, on average, almost 20% more polling stations per capita than jurisdictions in the rest of the country after the decision.[56] In other words, for every ten polling sites closed in the rest of the country, 13 were closed in jurisdictions once subject to preclearance. In total, nearly 1,600 polling places have closed since the decision, 1,200 of which are in the South.[57]

All this pales in comparison to the assault on voting rights that is spreading across our Nation as we speak today. As I mentioned previously, legislators have introduced at least 253 bills with provisions that restrict voting access in 43 states since the beginning of this year.[58] What is most striking is neither the nature of the restrictions, many of which have long precedent, nor the virtually nonexistent efforts to disguise their discriminatory purpose. Instead, it is the speed and urgency with which elected officials are moving to introduce obstacles to participation in our democracy. To put it in Justice Ginsburg's terms, the country is now drenched.

IV. THE LESSONS OF *LULAC* AND KILMICHAEL, MISSISSIPPI

While the aftermath of *Shelby County* is profoundly disappointing, it is not surprising. History teaches that the threat of discrimination against minorities in voting is at its greatest in

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[55] *Id.*

[56] Rob Arthur & Allison McCann, *How The Gutting Of The Voting Rights Act Led To Hundreds Of Closed Polls*, VOX, Oct. 16 2018, https://news.vice.com/en_us/article/kz58qx/how-the-gutting-of-the-voting-rights-act-led-to-closed-polls.

[57] Matt Cohen, *Report: More than 1600 Polling Places Have Closed Since the Supreme Court Gutten the Voting Rights* Act, MOTHER JONES, https://www.motherjones.com/politics/2019/09/report-more-than-1600-polling-places-have-closed-since-the-supreme-court-gutted-the-voting-rights-act/; Andy Sullivan, *Southern U.S. states have closed 1,200 polling places in recent years: rights group*, REUTERS, Sept. 10, 2019, https://www.reuters.com/article/us-usa-election-locations/southern-u-s-states-have-closed-1200-polling-places-in-recent-years-rights-group-idUSKCN1VV09J.

moments when the country's minority population comes together to lift up its voice and to exercise its political power.

Kilmichael, Mississippi presents a stark example. In 2001, the 2000 Census had just determined that the City's Black population had become a majority, and that community was on the verge of electing a candidate of choice for the first time. The City's white mayor and all-white Board of Aldermen took an extraordinary step to halt this momentum. They moved to cancel the 2001 elections, with only a Section 5 preclearance objection preventing them from successfully doing so. Stated plainly, in the face of Black voters standing ready to benefit in electoral outcomes from a mobilized electorate, local official sought to suspend democracy itself. Only Section 5 preclearance interceded, and we now recognize this response to minority voter mobilization in the more recent and perhaps even more brazen attempts to choose suppression over democracy.

Not long after, in 2003, Texas engaged in a mid-decade congressional redistricting. Just as Latinos in one congressional district "were poised to elect their candidate of choice," Texas sought to redraw the boundaries to dilute their political power. As Justice Kennedy put it his opinion for the Court in *LULAC v. Perry*, presenting a challenge to that action: the Texas legislature "took away the Latinos' opportunity because Latinos were about to exercise it."[59] Again, mobilization and democracy's high road met with the low road response of discrimination.

More recent examples of the phenomenon are not hard to find. The state of Florida's experience battling the restoration of voting rights for up to 1.4 million disproportionately minority Floridians is instructive. In 2018, almost 65% of voters in that state approved a

[59] 548 U.S. at 438, 440 (2006).

referendum that would have automatically restored voting rights to most felons who had completed their sentence.[60] Almost immediately, pundits began predicting a change in fortunes for political parties in the state when the newly re-enfranchised citizens exercised their right. The Florida legislature began drafting legislation to reduce the amendment's impact, culminating in a new law that again disenfranchised over half of those who had just had their rights restored, particularly impacting Black residents. A district court ruling in late 2019 found that the new law was unconstitutional, but the Court of Appeals for the Eleventh Circuit reversed that decision shortly before the 2020 election.[61] Lawyers for the plaintiffs have decried the ruling as endorsing a modern poll-tax, and they have promised an appeal to the Supreme Court. Meanwhile, the right to vote remains out of reach for thousands of minority Floridians.

Advocates in the *Shelby County* litigation described to the Court how these examples fit into a historical trend. The NAACP LDF explained that these examples of "concerted effort[s] to abridge the voting rights of the Black majority" at various points in American history "illustrate[] that voting discrimination is often particularly intense as minority voters are poised to make inroads in elected bodies."[62] Accordingly, any student of history could have predicted the reality that we are now facing: After a historic 2020 election cycle, in which record minority participation led to unprecedented outcomes in favor of minority-preferred issues and candidates, a retrenchment is approaching. States and localities are scrambling to do something—anything—to stop these gains from holding.

[60] Tim Mak, *Over 1 Million Florida Felons Win Right To Vote With Amendment 4*, NPR (Nov. 7, 2018), https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4.
[61] *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020).
[62] Brief for Respondent-Intervenors Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, and William Walker, at 22, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

Against this history, the effects of the Supreme Court's decision in *Shelby County* are drawn into sharper focus. In addition to eliminating the VRA's blocking and deterrent mechanisms, the decision had an important signaling effect. The Court's elimination of the preclearance mechanism made clear that the federal government was in retreat from the minority inclusion principle that had been won and so vigorously defended over the prior half-century. As these past examples show, our national experience has been that, without clear authority and resolve from the federal government to stand against invidious discrimination, efforts to block access to the polls, often directed at minority voters, proliferate. The protections of the Voting Rights Act are thus in part a measure of the country's commitment to its promise of equal protection and the right to vote, and its determination to combat these unwelcome discriminatory tendencies. Yet, the Court's decision, and Congress's failure to respond since, has signaled acceptance of that reality.

Consistent with historical example, it is once again up to Congress to intervene. Congress must meet the urgency of this moment to restore vital voting rights protections.

V. CONGRESS'S AUTHORITY AND RESPONSIBILITY TO ACT

Congress has both the power and the duty to respond to our democracy's current crisis. The Constitution specifically promises equal access to the franchise and assigns to Congress the task of acting when state legislation may envision something less. The post-Civil War amendments empower Congress to enforce the Constitution's prohibition on discrimination, specifically providing that "Congress shall have power to enforce this article by appropriate legislation."[63] Together, the Fourteenth and Fifteenth Amendment thus grant this body affirmative authority to act to ensure and defend equal voting rights.

[63] U.S. Const., amend. XV, §2.

For over half a century, the Supreme Court has consistently recognized that Congress's legislative power encompasses the ability to impose prophylactic measures to combat discriminatory state and local election laws and practices before they take effect. That power includes the authority to enact measures, like the VRA's preclearance mechanism, tailored to target jurisdictions and practices where discrimination is most prevalent. And while *Shelby County* invalidated the Voting Rights Act's preclearance formula, it did not upset that long line of authority.[64]

As previously described, the *Shelby County* decision rested on the Court's determination that the preclearance formula was not appropriately calculated to effectuate the constitutional equal enfranchisement principle. Because, in the Court's view, the formula was not aligned with current conditions, it fell outside of Congress's constitutional enforcement authority. But the Court did not question—and indeed reaffirmed—that Congress may appropriately enforce those provisions, including through the uniquely effective mechanism of preclearance.

In *Shelby County*, the Court found that the VRA's coverage formula was unconstitutional because it was based on factual criteria at fixed points in the past that the Court perceived as outdated. In the Court's view, preclearance required heightened justification because it placed limits on state action beyond those normally imposed by federal law. This incursion had, as the Court's saw it, "substantial federalism costs." The Court also warned that preclearance interfered with the "fundamental principle of equal sovereignty" among the states by singling out some states but not others and subjecting those states to different standards. It acknowledged

[64] *See Katzenbach*, 383 U.S. at 315.

costs of this different treatment. It did not foreclose differing treatment but called for a closer nexus between that legislative choice and the established record.[65]

From those principles, the Court articulated two interrelated rules for evaluating the VRA's preclearance system: The formula and its resulting coverage "must be justified by current needs" and, to the extent that it provides "disparate geographic coverage," the disparity must be "sufficiently related to the problem that it targets." Because the Court concluded those rules were not satisfied in the context of the VRA, it invalidated the geographic coverage provision. But the Court specifically rested its decision to invalidate the preclearance coverage mechanism on Congress's "failure to update" the Act's geographic trigger. And it stated that Congress "could have" and still "may draft another formula based on current conditions."[66]

This presents Congress with an opportunity to reinvigorate the Voting Rights Act and to attack efforts to discriminate in voting, using a geographic focus and with recent experience in view. A central question for this body to resolve in enacting new voting rights protections is accordingly how to design this new preclearance coverage formula. For this action to be both effective and constitutional, the preclearance mechanism should be designed to do several things:

1. Any geographic coverage provision must be based on the current conditions throughout the Nation. Congress must update and continue to develop the record of ongoing and recent discrimination in voting laws and practices, including by studying the effects of the *Shelby County* decision, and it must tailor its legislative response to those up-to-date facts. There is much evidence that Congress may and should rely on evidence in establishing a geographic coverage provision that roots out and targets discriminatory voting laws and practices. This

[65] *See Shelby County*, 570 U.S. at 549-50.
[66] *Id.* at 550-557.

includes the recent and pending legislation I previously described, as well as the efforts made by elected officials and candidates at every level of government over the last several years to both restrict the vote and then, most recently, to undermine it.

Looking at patterns over time, including historical patterns that endure, is also relevant. A word of caution is warranted, however: While a geographic coverage provision should, consistent with the *Shelby County* Court's instruction, take into account advances made in minority-voter inclusion in a given geographic area, it must not allow such gains to conceal evidence of ongoing discrimination. Advances for minority participation in the political process in this country have time and again spurred immediate backlash. Thus, even if jurisdictions now see registration, voting, and electoral outcomes that reflect progress, discrimination that is unsuccessful can and must be treated as equally odious to discrimination that has its intended effect. After all, that Black Americans and others have overcome attempts to discriminate does not render those discriminatory efforts constitutional.

2. The coverage formula must also respect the equal sovereignty principle that was central to the Shelby County *Court's analysis.* Congress can alleviate any unwarranted indignity upon states that fall under the coverage mechanism by crafting a formula that is fair and dynamic. This means that, although preclearance coverage may submit some states and counties to a process that does not apply to others, it should do so on an equitable basis. There are many sources that help illuminate current conditions, and recent reports from the U.S. Commission on Civil Rights, the Brennan Center, the Leadership Conference for Civil and Human Rights, and

the NAACP LDF are all relevant.[67] Every state should have the same potential, based on its actions, to come under coverage, and likewise have equal and meaningful opportunity to escape coverage. A more fluid formula that permits geographic coverage to adjust based on current and future actions will give states incentives to promote voter access. That will both serve this body's aim of preventing discrimination and comply with the test of *Shelby County*.

In addition to fairness and fluidity, the coverage formula can respect equal sovereignty and ensure efficacy by employing triggers untethered to geography. This should include targeting specific practices—such as closing poll locations, restricting voter opportunities and hours, purging voter rolls, and imposing onerous identification and other requirements—that history shows are often designed solely to impose barriers and unsuited to target any legitimate governmental concern.

3. The requirements imposed under the formula must be effective, but they must not by overly burdensome. Congress must ensure that the preclearance process is streamlined and efficient. It should be tailored to avoid interference in states' legislative decisions to the maximum extent possible, while still preventing the enactment of laws that, while neutral on their face, result in discriminatory effects in practice.

VI. CONCLUSION

One cannot deny that our Nation has made great progress since Congress first conceived and enacted the preclearance process in 1965. We owe much of that progress to Congress and its

[67] *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS; BRENNAN CENTER, Voting Laws Roundup, *supra* note 8; BRENNAN CENTER FOR JUSTICE, State Voting Bills Tracker, *supra note* 9; THE LEADERSHIP CONFERENCE, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE, (Sept. 2019), http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf; NAACP LDF, DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-*SHELBY COUNTY, ALABAMA V. HOLDER*, (June 27, 2018), https://naacpldf.org/wp-content/uploadfs/Democracy-Diminished-State-and-Local_Threats-to-Voting_Post-Shelby-County,Alabama-v.Holder__Political_Participation__.pdf.

determined commitment to protecting the minority-inclusion principle in its vigorous enforcement of equal voting rights.

But so too is it impossible to deny the grave and manifest threats facing our democracy. Efforts to undermine equal access. Attempts to utilize race-based discrimination as an end in itself and as a means of obtaining political advantage. These actions are not just occurring, they are occurring with greater frequency, fervor, and in a more brazen manner than we have seen since the Supreme Court first found the Voting Rights Act's "extraordinary" approach to be justified.[68]

These two things can simultaneously be true.

As the pre-eminent historian of voting and democracy, Professor Alexander Keyssar, has explained, "the history of voting rights since the founding, and despite our most heroic images of our country, has not been one of continuous expansion and enlargement"; rather, it has been "up and down" with significant periods of contraction. And "the conflicts and patterns of exclusion have always been along the lines of race, class, and for a long time gender." In short, this country's "history of democratic rights is a history of conflict" because as some would now readily admit: "not everybody wants everybody to participate."[69]

We know that the only solution is vigilance. As Professor Keyssar so aptly put it, "if you want to preserve voting rights, you have to protect them."[70] I urge this committee and this Congress to recognize the threat facing our Nation's democracy, and to treat its defeat as among the most important of its duties. Congress can fix the problems that the Court identified in *Shelby County* and it can address the problems that have manifested as a result of that decision.

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[68] *See* U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS at 275.
[69] Keyssar, U.S. Commission on Civil Rights Meeting, Part 2, C-SPAN (Aug. 18, 2017), https://bit.ly/3nF4laG
[70] *Id.*

Congress should reprise its role as protector of our multi-racial democratic process and enact legislation to combat the persistent and adaptive problem of discrimination in voting. Restoring the preclearance process as part of that effort will constitute a meaningful step in preserving our democracy for all Americans.

John Lewis said, "The vote is the most powerful nonviolent change agent you have in a democratic society. You must use it because it is not guaranteed. You can lose it."[71] We have an opportunity now to revitalize one of the most important achievements of the Civil Rights Era and ensure that millions do not lose their right to vote. If we do not take that opportunity, we cannot be sure that it will come again.

So, today I ask Congress to fulfill its highest service to our country, by acting as a guardian of democracy itself. I am reminded of the words of the late Reverend C.T. Vivian, another person who put his body on the line to defend and improve democracy. The Reverend said, "You are made by the struggles you choose."[72] His legacy, that of Congressman John Lewis, and that of the original Voting Rights Act remind us of the importance of protecting minority voices and votes. I ask Congress to take up that struggle and not to shrink from it. To defend and embrace, in the battle for democracy, the minority inclusion principle for which so many have fought very hard, and in doing, transformed our Nation.

I look forward to your questions.

[71] Lewis, *supra* note 1.
[72] U.S. CIVIL RIGHTS COMMISSION, REVEREND C.T. VIVIAN, IN MEMORIAM (Aug. 21, 2021), https://www.usccr.gov/files/2020-08-21-FMRTCT-Vivian-Statement.pdf.