



**Written Testimony of Professor Gilda R. Daniels**

**Litigation Director, Advancement Project National Office  
Professor, University of Baltimore School of Law**

**Committee on House Administration, Elections Subcommittee Hearing**

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

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## Introduction

Thank you to Chairperson Lofgren and to the Committee on House Administration, Subcommittee on Elections for holding today's important hearing discussing *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*. My name is Gilda Daniels. I serve as the Director of Litigation at Advancement Project National Office, which is a multi-racial civil rights organization that uses a three pronged approach to achieve a just democracy. Advancement Project uses campaigns, communications, and litigation to support and empower its partners on the ground to gain power in their communities. We have four program areas: Power & Democracy (voting rights), Opportunity to Learn (education), Justice (policing and criminalization) and Immigrant Justice (immigration). During the twenty plus years of its existence, Advancement Project has been on the front lines of the fight for voting rights working with organizations and communities in Arizona, Florida, Georgia, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Pennsylvania, and Virginia.

I am also a Full Professor at the University of Baltimore School of Law where I teach Election Law, Civil Procedure, Appellate Advocacy, and Critical Legal Theory, which includes Jurisprudence, Feminist Legal Theory, Critical Race Theory, Socio-Economics and Access to Justice. My scholarly writings and research focus on the intersections of race, law, and democracy. I have extensive writings on voting rights, election law, and democracy and am well-published in law reviews across the country, including *California Law Review*, *George Washington Law Review*, *Kentucky Law Journal* and others.<sup>1</sup> In January 2020, I published *Uncounted: The Crisis of Voter Suppression in America* with NYU Press that chronicles the cycles of voter suppression and suggests ways to achieve access to the ballot in a free, fair, and nondiscriminatory manner.<sup>2</sup> Importantly, I served as a Deputy Chief in the United States Department of Justice, Civil Rights Division, Voting Section during the Clinton and Bush administrations. Consequently, I have more than two decades of expertise in the voting rights area. I have dedicated my career to ensuring free and fair access to the right to vote. It is appropriate to have this discussion today.

In the midst of a pandemic, jurisdictions reformed the election process to make access to the ballot easier. During the 2020 election process, states, counties, and locales expanded the opportunity to vote when they loosened the restrictions on vote by mail and extended early voting. These modifications were consistent with the Center for Disease Control's suggestions and helped eligible citizens to forego the false equivalencies of "casting a ballot or catching a virus." The expansion of early voting, mail in ballots and other measures lead to an increase in voter turnout. The expansions proved that if you make it easier to vote, remove unnecessary restrictions, inevitably making it easier to vote, not harder, then the people will vote. The hope after the record turnout in 2020 was that these expansive measures would continue, particularly

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<sup>1</sup> See, e.g., *Democracy's Destiny*, forthcoming *California Law Review* (2021); *Voting Realism*, 104 Ky. L.J. 583 (2016); *Unfinished Business: The Continuing Need for the Voting Rights Act*, 81 Geo. Wash. L. Rev. 6 (2013); *Senator Edward Kennedy: A Lion for Voting Rights*, 14 N.Y.U. J. Legis. & Pub. Policy 415 (2011); *Racial Redistricting in a Post-Racial World*, 32 Cardozo L. Rev. 947 (2011).

<sup>2</sup> Gilda R. Daniels, *Uncounted: The Crisis of Voter Suppression in America*, (NYU Press, 2020).

since after multiple audits in several states and the touting that the 2020 Presidential election was the most successful and safest ever. After several inquiries and audits and despite more than 60 lawsuits, no fraud was found. The election was certified and the people had spoken. This was democracy. People experienced expanded access to the ballot.<sup>3</sup>

Moreover, Advancement Project was in Florida, Pennsylvania, Virginia, Michigan, and Georgia on election day assisting voters with accurate voter information and coordinating with local officials to address numerous issues. Despite the high turnout and the extraordinary efforts of grass roots organizations to protect voters, the aftermath of the election has been stunning and disheartening. The more than 60 lawsuits were overwhelmingly found to lack merit. These cases and claims, however, have been used to fuel a tsunami of anti-voting legislation meant to rollback not only the gains made in the 2020 election but those made in the last few decades. Nonetheless, these disenfranchising efforts are not new, but they are incredibly dangerous to our democracy. Our country is experiencing an assault on its democratic principles that challenge the ability for eligible persons to access the right to vote. It is essential to put our current circumstances in an historical context and acknowledge the need for a federal response to pursue and protect the democratic process. Accordingly, my testimony will discuss historical and contemporaneous challenges to the right to vote, the disproportionate impact on voters of color and the need for federal legislation that protects the right to vote.

## **I. Historical and Contemporaneous Challenges to the Right to Vote**

In the beginning, this country excluded most of its occupants from the benefits of citizenship. It engaged in what I call a paradoxical democracy. On the one hand, it declared that “all men are created equal” and on the other denied basic human and civil rights to a large portion of its inhabitants. The right to vote was reserved for white, male, property owners.<sup>4</sup> This exclusion persisted until the passage of the Civil War Amendments. These amendments—the Thirteenth ended slavery,<sup>5</sup> the Fourteenth<sup>6</sup> provided equal protection under the law, and the Fifteenth<sup>7</sup> prohibited discrimination in voting—were the first step in including all people in “we the people.” For more than a century “we the people” only included Whites and excluded Indigenous and people of color.<sup>8</sup> The Civil War Amendments provided formerly enslaved persons the right to

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<sup>3</sup> It is important to note that issues did exist during the 2020 election, e.g., the plethora of rules, confusion over ID requirements, threats of voter intimidation.

Advancement Project is a founding member of Election Protection which received tens of thousands of calls with concerns on election day.

4. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 22-23 (2d ed. 2003); *see also* CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860, at 19 (1960) (free, White, twenty-one, native-born Protestant males who were the owners of real property were the early participants in the franchise).

5. U.S. Const. amend. XIII

6. U.S. Const. amend. XIV

7. U.S. Const. amend. XV

<sup>8</sup> *See, e.g.,* Elk v. Wilkins, 112 U.S. 94 (1884)(US Supreme Court ruling that Indians were “not . . . citizen[s] of the United States under the Fourteenth Amendment.”); Ozawa v. United States, 260 U.S. 178, 198 (1922)(upholding laws that prohibited Asians from voting or owning land); Smith v. Allwright, 321 U.S. 649 (1944)(banned all-white primaries). Lynch by Lynch v. Alabama, No. CV 08-S-450-NE, 2011 WL 13186739, at \*47-48 (N.D. Ala. 2011), *aff’d in part, vacated in part, remanded sub nom.* I.L. v. Alabama, 739 F.3d 1273 (11th Cir. 2014)( “Jim Crow

participate in the democratic process. Once the shackles of enslavement were removed, Black men registered and voted and changed their communities, making them more reflective of society. According to some historians, it was the first time that any country experienced a multiracial democracy. Indeed, the passage of the Civil War Amendments allowed Black men to experience the power and an abbreviated relationship with the right to vote.

During the period of Reconstruction that followed the passage of the Civil War Amendments, Black men participated as full citizens and enjoyed electoral success. During Reconstruction, Black men were able to elect persons to local, state, and federal offices.<sup>9</sup> For example, in South Carolina, “where in 1870 [B]lack leaders, as the result of a concerted campaign for greater power, received half the eight executive offices, elected three Congressmen, and placed Jonathan J. Wright on the state supreme court, the only [B]lack in any state to hold this position during Reconstruction.”<sup>10</sup>

This display of Black voter power was met with violence and economic terror. The Ku Klux Klan, the Knights of the White Camellia, Red Shirts, and other like-minded organizations sought to dismantle the pursuit of the ideal that all men were created equal.<sup>11</sup> Historian Eric Foner noted, “It is a measure of how far change had progressed that the reaction against Reconstruction proved so extreme.”<sup>12</sup> In addition to violence, the reaction included a resurgence of White segregationist laws that would eliminate Black people from elected office and political participation. South Carolina Senator “Pitchfork” Ben Tillman divulged the Southern Strategy, “We organized the Democratic Party with one plank, and only one plank, namely, that ‘this is a [W]hite man’s country and [W]hite men must govern it.’”<sup>13</sup> Southern legislators passed laws—such as poll taxes, grandfather clauses, literacy tests, and felon disenfranchisement—which had as their explicit intent to remove the “Negro” from the voter rolls. In Louisiana, in 1896, 135,000 Black men were registered, but due to the state’s implementation of various disenfranchising devices, this number was reduced to less than 1,000 men by 1907.<sup>14</sup>

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laws’ were state laws and local ordinances enacted from the end of Reconstruction through the first six decades of the twentieth century for the purpose of mandating *de jure* racial segregation of all public transportation conveyances, restaurants, restrooms, water fountains, schools, hotels, libraries, and virtually every other form of public accommodations and facilities.”); See also, Smithsonian Nat. Museum of Am. History, *White Only: Jim Crow in America*, SEPARATE IS NOT EQUAL: BROWN V. BOARD OF EDUCATION, <https://americanhistory.si.edu/brown/history/1-segregated/jim-crow.html>

Regents of University of California v. Bakke, 438 U.S. 265 (U.S. Cal., 1978).

9. See, e.g., Eric Foner, *Reconstruction: America’s unfinished revolution, 1863–1877* 354–55 (NY: Harper & Row, 1988) (approximately 650 Black people were elected from 1860–1877, an incredible achievement a few years after the end of slavery.)

10. See Eric Foner, *A Short History of Reconstruction, 1863–1877* (1990), pp., 151.

11 Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty- First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 Wash. U. J.L. & Policy 71, 83 (2006).

12. Foner, *A Short History of Reconstruction*, at 184.

13. John Hope Franklin & Alfred A. Moss Jr., *From Slavery to Freedom: A History of African Americans* 285 (8<sup>th</sup> ed. 2000)

14. *Major v. Treen*, 574 F.Supp. 325, 340 (E.D. La. 1983) (noting that, while Black suffrage increased from 1867 to 1898, the imposition of a grandfather clause and educational and property qualifications for registration reduced Black voter registration).

Twentieth Century Suppression. White segregationists maintained this level of disenfranchisement in Black and Brown communities throughout the South and Southwest for much of the twentieth century. Accordingly, the “we” in “we the people” did not include people of color. In *Elk v. Wilkins*, the United States Supreme Court found that Native Americans were “not . . . citizen[s] of the United States under the Fourteenth Amendment.”<sup>15</sup> Latinx Americans have dealt with violence and laws that prevented the right to vote similar to those exercised over African American and Indigenous people.<sup>16</sup> Likewise, Asian American, Native Hawaiian, and Pacific Islanders (AANHPI) were denied the ability to vote for most of the country’s existence, as Asian immigrants were barred from becoming citizens via federal policy until 1943 and subject to racial criteria for naturalization until 1952. In fact, many legislative efforts prevented Asian immigrants from even entering the country and becoming citizens.<sup>17</sup> Asian immigrants were also prohibited from voting and owning land, as they were legally identified as aliens “ineligible for citizenship.”<sup>18</sup> Indeed, despite passage of the Nineteenth Amendment in 1920 that prohibited discrimination based on gender, Black and Brown women in the South and Southwest did not realize the right to vote until passage of the Voting Rights Act of 1965.<sup>19</sup>

Dr. Martin Luther King, Jr. prescribed that “all types of conniving methods “ were used to keep the Black voter from registration. These methods were common. In my book, *Uncounted*, I include firsthand accounts of voter suppression. For example, I recount the story of Ms. Myrtle Pless Jones, the mother of my University of Baltimore colleague, Cassandra Jones Havard.

Mrs. Myrtle Pless Jones moved to Montgomery, Alabama in 1955, after marrying an Alabama native, Robert F. Jones. Before relocating to Alabama, Mrs. Jones earned a bachelor’s degree from South Carolina State College and a Master’s degree from

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15. 112 U.S. 94, 109 (1884).

<sup>16</sup> See, Gilda Daniels, Tyson King-Meadows, Loren Henderson, *We Vote, We Count: the Need for Congressional Action to Secure the Right to Vote for All Citizens* (2019) [<https://perma.cc/2XXZ-3N54>] (citing Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 713, 713 (2008); “Around the same period, following the Mexican-American War in 1848, the U.S. had annexed over half of Mexico—what is now the states of Arizona, Colorado, California, New Mexico, Nevada, Utah, and portions of Kansas, Oklahoma, and Wyoming, plus Texas, annexed in 1845. Mexicans who resided in those territories and stayed were allowed to choose U.S. citizenship. Nonetheless, remaining meant they faced violence, and laws and practices similar to those experienced by African American and Native Peoples, . . .”)

17. See, e.g., Philippines Independence Act of 1934, ch. 84, 48 Stat. 456, 462 (amended 1946) (imposing annual quota of fifty Filipino immigrants); Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952) (denying entry to virtually all Asians); Scott Act of 1888, ch. 1064, 25 Stat. 504 (rendering 20,000 Chinese re-entry certificates null and void); Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795) (providing one of the first laws to limit naturalization to aliens who were “free white persons” and thus, in effect, excluding African Americans, and later, Asian Americans).

18. Gilda Daniels, Tyson King-Meadows, Loren Henderson, *We Vote, We Count: the Need for Congressional Action to Secure the Right to Vote for All Citizens* (2019) [<https://perma.cc/2XXZ-3N54>] (citing Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 713, 713 (2008); See Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (repealed 1943) (prohibiting immigration of Chinese laborers); Immigration Act of 1917, ch. 29, 39 Stat. 874, 874-98; Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952) (banning immigration from almost all countries in the Asia-Pacific region); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 415 (2005).

19. See, e.g., Martha S. Jones, *Vanguard: How Black Women Broke Barriers, Won the Vote, and Insisted on Equality for All*. (Basic Books, 2020).

Michigan State University. As a new resident of Alabama, Myrtle Jones felt it was her civic duty to register to vote. She and her husband were members of the Dexter Avenue Baptist Church. Pastored by Dr. Martin Luther King Jr., Dexter's congregants were civically and socially engaged and supported Dr. King's efforts to galvanize blacks to assert their democratic rights and privileges.

Mrs. Jones described her initial voting registration experience as one of intimidation. Alabama imposed a so-called literacy test, which election officials ostensibly designed to ensure that voters were able to read and write. Aware of the stereotypes about African Americans, she dressed professionally to go to the voter registration office. As a stay-at-home mother of two preschool-age daughters, Mrs. Jones did not have to take off work or risk being fired. At that time, Alabama required potential voters to read a passage of the Alabama Constitution out loud. After she read without error, the voting official then verbally asked, "How many bubbles are in a bar of soap?" Her answer, "over 100," resulted in failing the Alabama voter literacy test that day. The second time she took the literacy test, no oral question was asked, and Myrtle Pless Jones became a registered voter.<sup>20</sup>

Literacy tests were also administered outside of Southern states and targeted Mexican-Americans, Chicanos in the Southwest, and Puerto Ricans in the Northeast. Maria Luisa Jimenez, who migrated to the United States from Puerto Rico in 1951, had to take a literacy test in 1966, which was administered by the State University of New York. The certificate read: *Be it Known that the person whose name and address are entered herein, having met the requirements prescribed in Section 168 of the Election Law, and rules and regulations of the Regents of the State of New York, and having made the signature appearing herein in the presence of the examiner, is herewith granted a CERTIFICATE OF LITERACY.*<sup>21</sup>

Literacy tests, grandfather clauses, poll taxes, felon disenfranchisement, and all-white primaries were all prevalent "conniving methods" that prevented Blacks from registering and accessing the right to vote. It was state laws throughout the South and other parts of the country that barred people of color from the voting booth.

Federal Legislation. The Voting Rights Act of 1965 and its later iterations allowed people of color to register and vote in jurisdictions where they had previously been forbidden from exercising that right.<sup>22</sup> Although the Civil Rights Act of 1957<sup>23</sup> created the U.S. Commission on Civil Rights, a Civil Rights Section with an Assistant Attorney General, and the ability to bring

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<sup>20</sup> Daniels, *Uncounted*, p. 21-22. (Recounted by Mrs. Jones's daughter, Cassandra Jones Havard, October 7, 2018.)

<sup>21</sup> Id. at 172-173. (Interview with Losmin Jimenez, June 2018. (Certificate issued by the University of the State of New York, The State Education Department is in Attorney Jimenez's possession.)

22. See, e.g., Brian K. Landsberg, *Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act*, 187, University Press of Kansas, 2007 ("...the eight years from 1957 to 1965 seemed interminable. The failures of enforcement were maddening. Two presidential elections had come and gone in which hundreds of thousands of [B]lack citizens had been barred from voting. The 1957, 1960, and 1967 Acts could have led to a break from the pattern of racial discrimination in registration, but the state and local politics of the day combined with the natural preference for the status quo to produce resistance to compliance.")

23. Civil Rights Act of 1957, Pub. L. 85-315, 71 STAT. 634 (codified as amended at 42 U.S.C. Section 1995 (2006)).

discrimination cases in federal courts, the Attorney General of the United States found that the Civil Rights Act and the constitutional amendments were still not enough to prevent the widespread discrimination in the South. Attorney General Katzenbach had requested authority to abandon “case-by-case litigation against voting discrimination.”<sup>24</sup> In *South Carolina v. Katzenbach*, the Court found that “[v]oting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings.”<sup>25</sup> Election officials often ignored or subverted the existing civil rights laws, thus, highlighting the need for federal intervention.<sup>26</sup>

The VRA opened the gates for free and fair access to the polls. The Voting Rights Act of 1965 is considered one of the most important and effective pieces of congressional legislation in United States history.<sup>27</sup> It outlawed practices such as literacy tests, empowered federal registrars to register citizens to vote, and gave the Attorney General the power to bring extensive litigation instead of the piecemeal approach of the past. Congress gave the attorney general the authority to investigate and prosecute voting discrimination throughout the United States and its territories, conduct administrative review of changes in voting practices and procedures in certain jurisdictions, and monitor elections in various parts of the country. The act prohibits discrimination based on race, color, national origin, or language-minority status. Its impact was extensive, and the ability to provide federal registrars and observers in places like Louisiana, Mississippi, and Alabama helped to eliminate wide gaps between black and white voter registrations.

It was apparent that the disenfranchising methods that persisted from the constitutional conventions of the early twentieth century and continued throughout the South and Southwest needed congressional action to prevent their unrelenting threat to democracy.<sup>28</sup> The need for the VRA was clear. After enactment of the Voting Rights Act of 1965, much like after the passage of the Civil War Amendments, African American voter registration<sup>29</sup> and the number of African American elected officials began to rise.<sup>30</sup>

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24. See *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

<sup>25</sup> *Id.* *Katzenbach* at 314.

<sup>26</sup> See *id.* at 315 (“The litigation in Dallas County took more than 4 years to open the door to the exercise of constitutional rights conferred almost a century ago. The problem on a national scale is that the difficulties experienced in suits in Dallas County have been encountered over and over again under existing voting laws. Four years is too long. The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today.”).

<sup>27</sup> President Lyndon B. Johnson called the Voting Rights Act of 1965 “one of the most monumental laws in the entire history of American freedom.” DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 132 (1978).

<sup>28</sup> See, e.g., Gilda R. Daniels, *Uncounted: The Crisis of Voter Suppression in America 20-23* (NYU Press, 2020) (for firsthand accounts of these disenfranchising methods during the 1950s and 1960s).

<sup>29</sup> See, e.g., BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 23-24* (1992) (indicating that the gap between white and African American voters decreased significantly and in some instances disappeared in some southern states between 1965 and 1988).

<sup>30</sup> The number of African American elected officials stood at 1,469 in 1970. In 2000, 9,040 African Americans held elected office in the United States. See DAVID BOSITIS, *BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY*, 2000, at 5 (2002), [www.jointcenter.org](http://www.jointcenter.org).

The Voting Rights Act included two primary provisions: Section 2 and Section 5. Section 2 of the Act provides a nationwide prohibition against discrimination in voting.<sup>31</sup> It is primarily a litigation tool and reactive, meaning that the action begins after the passage of legislation or implementation. Section 5 of the VRA, originally a temporary provision requiring periodic Congressional reauthorization, required “covered jurisdictions” to submit all voting changes to either the U.S. Attorney General or the District of Columbia District Court.<sup>32</sup> In any given year, the Department of Justice would receive thousands of submissions that included tens of thousands of changes, and that number would increase substantially during a redistricting period.<sup>33</sup> President Ronald Reagan signed the reauthorization of the VRA in 1982 and remarked on its necessity stating:

“To so many of our people—our Americans of Mexican descent, our [B]lack Americans—this measure is as important symbolically as it is practically. It says to every individual, “Your vote is equal; your vote is meaningful; your vote is your constitutional right . . . the right to vote is the crown jewel of American liberties, and we will not see its luster diminished.”<sup>34</sup>

Indeed, the dismal voter registration rates pre-1965 served as evidence that the land of the free and home of the brave had fallen far short of its democratic ideals. In short order, the VRA began to dismantle the vestiges of voter suppression. Voter registration rates increased among voters of color, as did the number of elected officials of color.<sup>35</sup> The VRA, particularly Section 5, forced the country to live up to its democratic principles. Although the Act enjoyed wide bipartisan support through each of its reauthorizations, it continued to endure challenges to its constitutionality.<sup>36</sup>

In 2013, the United States Supreme Court decided *Shelby County v. Holder*,<sup>37</sup> and dismantled the VRA’s preemptive protection in Section 5. In *Shelby*, the U.S. Supreme Court decided that the triggering mechanism in Section 4 was outdated, and as such unconstitutional. Without a mechanism to determine which jurisdictions were covered, Section 5 ceased to exist. Accordingly, covered jurisdictions no longer must seek federal approval of voting changes. Consequently, since *Shelby County* and the elimination of preemptive federal protections under the Voting Rights Act, previously covered states have instituted suppressive measures impacting

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<sup>31</sup> 52 U.S.C. § 10301.

<sup>32</sup> 52 U.S.C. § 10304.

<sup>33</sup> *About Section 5 of the Voting Rights Act*, Department of Justice, <https://www.justice.gov/crt/statutes-enforced-voting-section#vra> [<https://perma.cc/N7MZ-KMCN>] (“Over the last decade, the Attorney General received between 4,500 and 5,500 Section 5 submissions, and reviewed between 14,000 and 20,000 voting changes, per year.”)

<sup>34</sup> President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982, June 29, 1982, found at: <https://www.presidency.ucsb.edu/documents/remarks-signing-the-voting-rights-act-amendments-1982> [<https://perma.cc/DNL3-8Y74>]

<sup>35</sup> See, Tables 5.1 and 5.2, Daniels, *Uncounted*, pp. 124 and 127.

<sup>36</sup> See, e.g., *South Carolina v. Katzenbach* (1966)(challenging the constitutionality of Section 5 and finding that the coverage formula “evolved to describe these areas [and] was relevant to the problem of voting discrimination.”); *NAMUDNO v. Holder* (2009)(challenging the constitutionality of Section 5, where the Supreme Court upheld the provision and expanded the bailout provision.); *Shelby County, AL v. Holder* (2013)(finding Section 4 of the Act unconstitutional.)

<sup>37</sup> 570 U.S. 529 (2013)



the right to vote.<sup>38</sup> This resurgence is similar to the regression in the post-reconstruction era, where forces were determined to “redeem” the country from the newly enfranchised voters and return it to a more restrictive voting regime that disenfranchised voters of color.

Clearly, the Court’s decision in *Shelby* eliminated a key weapon in the voting rights arsenal. Section 5 served as a safeguard for discriminatory voting changes.<sup>39</sup> It was an important prophylactic that prevented jurisdictions from implementing laws that harmed minority voters. It provided important oversight for voting changes and practices. It prevented jurisdictions from implementing laws without providing notice to minority communities. Without Section 5, jurisdictions are free to pass and put laws into place without considering the impact on its citizens. These laws go into practice and civil rights groups are burdened with the responsibility of learning of these changes that were once routinely submitted to the federal government. More importantly, these legal challenges happen after the changes have occurred not before as under Section 5. Importantly, without Section 5, the primary tool to combat voter suppression is Section 2. Although Section 2 is a nationwide prohibition against discrimination, it is litigation, which is expensive and time consuming. The average Section 2 case costs more than a \$1,000,000 and can last more than two years.

## II. Life After Shelby: Impact and Burden

The *Shelby County v. Holder* decision sounded the alarm for legislatures to once again pass laws that would make access to the right to vote harder and impede the ability of voters of color. Some states responded almost immediately to pass restrictive and suppressive legislation that adversely impacted voters of color. For example, in Texas, within hours of the *Shelby* decision, then Attorney General Abbot declared that the state would implement its restrictive voter ID law. Notwithstanding, that a federal court had ruled that the same Texas law could not receive Section 5 preclearance due to its retrogressive effects on voters of color. Courts have subsequently found the Texas voter ID law intentionally discriminatory. Citing its discriminatory impact on African American and Latinx voters – the court found that over 600,000 people lacked the ID needed to vote. Weeks after the *Shelby* ruling, North Carolina – where the Department of Justice had objected to more than 150 voting practices under the pre-*Shelby* provisions of the Voting Rights Act – passed the nation’s most wide-sweeping voter suppression law, eliminating positive measures responsible for expanding access to voters of color.<sup>40</sup> In a legal challenge to that law brought by Advancement Project and others, a federal appeals court also found North Carolina’s omnibus legislation intentionally discriminatory, and that North Carolina had acted “with almost surgical precision” to eliminate voters of color.<sup>41</sup> States respond to voters of color exercise of

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<sup>38</sup> Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, (Jan. 16, 2020), [www.brennancenter.org](http://www.brennancenter.org). [<https://perma.cc/L6C3-9SLP>]. “Over the past decade, half the states in the nation have placed new, direct burdens on people’s right to vote, abetted by a 2013 Supreme Court decision that struck down a key provision of the Voting Rights Act. And the racial cause and effect of these seemingly race-neutral laws are hard to escape.”

<sup>39</sup> Daniels, Gilda, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century* (August 7, 2013). Available at SSRN: <https://ssrn.com/abstract=2405974> or <http://dx.doi.org/10.2139/ssrn.2405974>

<sup>40</sup> HB589 (NC 2013), <http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H589v8.pdf>. The law eliminated a week of early voting, a practice used by 70 percent of the state’s African American voters, imposed a photo ID requirement, and eliminated same day registration, out of precinct voting, straight ticket voting and even preregistration of 16 and 17-year olds.

<sup>41</sup> *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (2016)

the franchise with restrictive laws. Since *Shelby*, a weakened VRA allows states to engage in the process of voter suppression without consequence.

**a. The Disproportionate Impact on Voters of Color**

Advancement Project has chronicled the *Shelby*-effect on communities of color. In 2013, Advancement Project and the Lawyers’ Committee for Civil Rights Under Law published *Lining Up: Ensuring Equal Access to the Right to Vote* which comprehensively analyzed the experience of voters of color in the 2012 election and highlighted the extensive efforts of the two civil rights organizations and their labor to combat restrictive voter ID laws, challenges at the polls, deception and intimidation, “show-me-your-papers” proof-of-citizenship practices, unacceptably long lines, and the troubling use of provisional ballots. The joint report details the post-*Shelby* landscape of the right to vote, in which states with the worst records of voter discrimination no longer have to submit voting changes for federal review. Many of those states, previously covered by Section 5, acted swiftly to push new voting restrictions that disproportionately targeted people of color. Without the full protections of Section 5’s review process, those actions – including voter education campaigns, direct advocacy to election administration officials, poll monitor trainings, deploying staff and volunteers to the polls during early voting and on Election Day to resolve problems encountered by voters, and steadfast litigation – are a preview of the extraordinary work, and redoubled, in more states to combat the new flood of discriminatory voting changes and barriers to democratic participation.<sup>42</sup>

An excerpt from the *Long Lines* report:

- “In Florida, due to the cuts in early voting, Sonia Gibson and her children waited 19 hours to vote. Due to the long lines, Ms. Gibson, an African-American teacher in Palm Beach County, FL, who voted during early voting with her two young-adult children, was forced to come to the polls on two different days. She testified before the Presidential Commission on Election Administration in Miami on June 28, 2013, that she is not sure if her young-adult children would have been able to wait for 19 hours to vote if it were not for her convincing them. She believes that instead of having to wait many hours to vote, elections should be improved so that the citizens of Florida “can celebrate our constitution and our democracy.’ One study estimated that more than 200,000 voters in Florida did not vote in 2012 because of long lines.”<sup>43</sup>

These kinds of restrictions hinder the right to vote and increase the cost of voting in communities of color.

After conducting a series of People’s Hearings highlighting the impact of a post-*Shelby* world, Advancement Project and The Racial Equity Anchors Collaborative<sup>44</sup>, a coalition of nine leading national racial justice and civil rights organizations published a report *We Vote, We*

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<sup>42</sup> Gilda Daniels, *Lining Up: Ensuring Equal Access to the Right to Vote* (2013) available at <https://advancementproject.org/resources/lining-ensuring-equal-access-right-vote/>.

<sup>43</sup> *Id.*, at 24 (*internal citations omitted*).

<sup>44</sup> The members of the Racial Equity Anchors Collaborative are Advancement Project, Asian & Pacific Islander American Health Forum, Dēmos, Faith in Action, National Association for the Advancement of Colored People, National Congress of American Indians, National Urban League, Race Forward, and UnidosUS.

*Count: The Need for Congressional Action to Secure the Right to Vote for All* that centers around the voices of people of color and describes accounts of voter interference which disproportionately affects communities of color. The 2019 report includes testimonies demonstrating how voter suppression manifests across the country. Voters testified to onerous and confusing limitations to access the ballot, limitations that disproportionately impact voters of color, including: an increase in the number of voting rights violations since the *Shelby* decision; an increase in the costs and burdens to access the right to vote; an increase in the costs of litigating violations of the voting rights act; evidence of discrimination in voting.<sup>45</sup>

In the post-*Shelby* era, voters of color face renewed barriers to casting a ballot. The following are highlights from testimonials gathered since the *Shelby* decision in various reports published by the Advancement Project in collaboration with other organizations fighting for free, fair, and nondiscriminatory access to the right to vote.

#### Access Issues: Voter ID laws

- North Carolina. During testimony at the North Carolina People’s Hearing (2019), people spoke about North Carolina’s voter identification law enacted in 2013. Witnesses described this law as “the strictest discriminatory photo voter ID law in the nation”<sup>46</sup> and the “monster voter suppression law”<sup>47</sup> (*We Vote, We Count*, 24-25)
  - Witnesses further testified that in addition its controversial voter ID law, North Carolina simultaneously eliminated same day registration, safeguards to protect out-of-precinct voting, and a week of early voting.
- Alabama. During the Alabama People’s Hearing, commissioner Sheila Tyson testified “Alabama passed a strict ID requirement, hurting over 300,000 voters. Did not care that a fourth of those 300,000 people did not have cars. They knew exactly what they were doing when they did it...When they closed down the 31 ID spots, it wasn’t just an ID or voter’s ID, it was a driver’s license. You have to drive four hours to get a driver’s license but you can’t vote without a driver’s license or some type of state ID. But then you turn around and close [the voter ID offices].”<sup>48</sup>
  - Other field hearing testimony pointed out that Alabama’s closure of “thirty-one DMV offices” could not be separated from issues of race and class because many of the closed facilities were in primarily Black and primarily poor counties and that “confusion among poll workers over what constituted proper identification” added other burdens to voters seeking to comply with the strict voter ID law.<sup>49</sup>
- North Dakota. In North Dakota, a burdensome voter ID law was enacted that required voters to show photo identification that includes their name, birth date, and residential street address. This law disproportionately impacts Native voters living on reservations where they do not have residential street addresses. Additionally, Native voters are on average less likely to have electricity, phone lines, or bank accounts needed for the requisite documentation. Native voters also report being unduly burdened by the cost of

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<sup>45</sup> Gilda Daniels, Tyson King-Meadows, Loren Henderson, *We Vote, We Count: the Need for Congressional Action to Secure the Right to Vote for All Citizens* (2019) available at <https://advancementproject.org/resources/wevotewecount/>

<sup>46</sup> Caitlin Swain, Co-Director, Forward Justice, Testimony at the North Carolina People’s Hearing (2019).

<sup>47</sup> Dr. Rev. Barber, Testimony at the North Carolina People’s Hearing (2019).

<sup>48</sup> Sheila Tyson, Jefferson Cty. Comm’r., Dist. 2, Testimony at the Alabama People’s Hearing (2019).

<sup>49</sup> Witness Testimony, Testimony at the Alabama People’s Hearing (2019).

traveling long distances, particularly given the high poverty rates on many reservations to obtain state identification.<sup>50</sup>

- Witnesses at the field hearings reported that poll workers were rejecting “lifelong” Native voters that they had known “their entire lives,” and whom they were previously permitted to vouch for if questions arose about the identity of the voter. Witnesses characterized the North Dakota voter ID law as carrying an “anti-Indian undertone,” objecting to certain forms of identifications in a manner that was “incorrect as a matter of law.” Witnesses reported, for example, that poll workers had rejected federal passports and military identifications as inadequate photo-based proof of a voter’s identity.<sup>51</sup>

### Method of Election.

These accounts include voter suppression tactics, such as vote dilution, racial gerrymandering, and states’ failure to comply with federal voting law.

- Texas. Mimi Marziani, Chairwoman of the Texas Advisory Committee to the U.S. Commission on Civil Rights, testified that “Texas has been refusing . . . to comply with federal voter registration law, namely the Motor Voter Act” which requires state governments to allow mail-in voter registration and to provide eligible people with voter registration opportunities at drivers’ license agencies, public assistance agencies, and disability agencies. Marziani stated this failure to comply resulted in 1.5 million Texans a year unable to update their license online and thus miss their opportunity to register to vote. This especially impacts frequent movers, who tend to be poorer and younger and thus more likely to be people of color, because it means that as they move, they are no longer registered at their current address.<sup>52</sup>
- North Dakota. In North Dakota, District 27 Representative Ruth Buffalo testified about Native Peoples’ experience with vote dilution stating, “Tribal citizens make up 31.8% of the district despite there being a sizeable Native American population. 5, 632 members currently live on the Fort Berthold Reservation, with another 3,655 living in close proximity, yet there are no majority Native American districts... If maps were drawn another way, Native Americans could easily support their own district. In fact, the dilution of the Native vote is even more outrageous if you look at the counties. There are six counties that intersect the Fort Berthold Reservation, ensuring no Native American representation among county seats.”<sup>53</sup>
- North Carolina. In North Carolina, Patricia Timmons-Goodson, Vice Chair of the United States Commission on Civil Rights, testified that that the community member recollected that the General Assembly “split” a majority black voting precinct “down the middle.” The precinct was located in North Carolina Agricultural and Technical State University, a historically black college with a deep history of civil rights activism. “One part of the

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<sup>50</sup> *We Vote, We Count: The Need for Congressional Action to Secure the Right to Vote for All Citizens* (2019) at 26.

<sup>51</sup> Witness Testimony, Testimony at the North Dakota People’s Hearing (2019).

<sup>52</sup> Mimi Marziani, Chairwoman, Texas Advisory Comm. to the U.S. Comm’n on Civil Rights, Testimony at the Texas People’s Hearing (2019).

<sup>53</sup> Ruth Buffalo, N.D. State Representative, 27th District, Testimony at the North Dakota People’s Hearing (2019).

campus was in one district and the other part in another part of the district,” recalled the community member.<sup>54</sup>

### **b. Disproportionate Burden to Access the Right to Vote**

Voters of color encounter a plethora of problems in their attempt to exercise their right to vote. When polling places close or other barriers are erected to access the right to vote, the burden and cost of voting increases tremendously in communities of color. Since the *Shelby* decision, voters of color have been increasingly harmed by polling site closures, language access barriers, states’ failure to comply with the ADA, financial barriers to voting, and lack of transparency on voting law changes among many other voter suppression tactics. These tactics force voters to travel long distances to register or to cast a ballot, exacerbate financial burdens on voters of color, and leave low-income voters and voters of color unduly burdened with changing polling locations because they are more likely to move than their counterparts. These tactics also exacerbate the disenfranchisement of incarcerated and formerly incarcerated people. All of this leads to confusion, frustration, and the reduced likelihood of voting because of the difficulty in locating one’s polling location.

- Ohio. Daniel Ortiz, Outreach Director for Policy Matters Ohio, testified that since 2012, Ohio closed more than 300 polling locations across the state, a disproportionate number in urban areas, noting that “Cuyahoga County Board of Elections [reports] show in that time period there were closures that eliminated 78 polling locations in Ohio’s second largest county.”<sup>55</sup>
  - Mike Brickner, Ohio State Director for All Voting is Local, testified that between 2016 and 2018, Cuyahoga County “eliminated 41 polling locations and nearly 16 percent of all precincts changed location,” harming a majority of Black communities.<sup>56</sup> Brickner went on to note the effects on Cleveland, wherein eight of the 17 wards are majority Black and comprise between 72 and 98 percent of the population: “Of the city’s 45 precincts with polling place changes, the majority, 29, were in black majority wards, while only 16 were in black minority wards.”<sup>57</sup>
  - In Ohio, Angela Woodson, Political Action Chair for the Cleveland Branch of the NAACP, for example, testified: “It seems like every election cycle, at least two to three voting precincts move. We’re noticing this is very consistent in the governor’s race as well as the presidential election,” noting these moves occurred in “low-income African American wards.”<sup>58</sup>
- Alabama. A Black woman who testified anonymously during the Alabama People’s Hearings described feeling confused about where her polling location was located after

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<sup>54</sup> Patricia Timmons-Goodson, Vice Chair, United States Comm’n on Civil Rights, Testimony at the North Carolina People’s Hearing (2019).

<sup>55</sup> Daniel Ortiz, Outreach Dir., Policy Matters Ohio, Testimony at the Ohio People’s Hearing (2019).

<sup>56</sup> Mike Brickner, Ohio State Dir., All Voting is Local, Testimony at the Ohio People’s Hearing (2019).

<sup>57</sup> Mike Brickner, Ohio State Dir., All Voting is Local, Testimony at the Ohio People’s Hearing (2019).

<sup>58</sup> Angela Woodson, Political Action Chair, Cleveland Branch of the NAACP, Testimony at the Ohio People’s Hearing (2019).

having moved. She remarked, “Now the problem that I’m having is where to go vote, where to go register. That’s the problem that I’m having.”<sup>59</sup>

### Early Voting & Mail-in Ballot Restrictions

- Georgia State Rep. Barry Fleming (R), chair of a newly created Special Committee on Election Integrity, introduced a bill February 2021 that aimed to eliminate all early voting on Sundays — thus eliminating “souls to the polls,” a get-out-the-vote initiative popular with the state’s predominantly Black churches.<sup>60</sup>
  - In the November 2020 general election, Black voters in Georgia used early voting on weekends at a higher rate than whites in 43 of 50 of the state’s largest counties. Black voters make up roughly 30% of Georgia’s electorate, but comprised 36.7% of Sunday voters in 2020 and 36.4% of voters on early voting days.<sup>61</sup>
  - *Early Weekend voting statistics compiled by the Center for New Data in Georgia:*<sup>62</sup>
    - 264,511 Georgians voted on weekends, accounting for 10% of all GA voters.
    - In 100 of Georgia’s 159 counties, Hispanic Americans voted on weekends at higher rates (relative to early vote weekday votes) than white voters in the same county.
    - 107 counties showed African Americans voting on weekends at higher rates than voters identifying as white in the same county
    - Individuals identifying as white were the least likely to cast their vote on weekends (8.6%), compared to those identifying as Asian (13.1%), African-American (11.8%), and Hispanic (11.4%) (see county-level measures on A.6.).
    - Weekend closures would likely disproportionately burden Georgians with less flexibility around work schedules or other weekday commitments.
- Wisconsin. “Souls to the Polls was created to build a voting bloc of African American people living in Milwaukee’s low income community. This mission was grounded in the churches that help sustain inner city neighborhoods.”<sup>63</sup> Organizers with Souls to the Polls (SttP) Milwaukee faced serious challenges with carrying out their voter campaigns in 2020 after COVID changed everything and forced churches to close.<sup>64</sup> Not only this, but

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<sup>59</sup> Witness Testimony, Testimony at the Alabama People’s Hearing (2019).

<sup>60</sup> Eugene Scott, New Georgia legislation would curb ‘souls to the polls,’ (Washington Post, February 24, 2021).

<sup>61</sup> Ari Berman, *Georgia Republicans Are Doubling Down on Racist Voter Suppression*, <https://www.motherjones.com/politics/2021/02/georgia-republicans-voter-suppression-bill/>

<sup>62</sup> The Center for New Data, *Access to the Polls in Georgia: Assessment of Early Vote Wait Times in the General Election and Potential Effects of Voting Restrictions in the Runoff* (December 2020) 6, available at [https://docs.google.com/document/d/1ttCb9zRiyU5s\\_icUEUGe7vq1TVsygcamAKap7YG42ks/edit#heading=h.cxk8rwei9a2b](https://docs.google.com/document/d/1ttCb9zRiyU5s_icUEUGe7vq1TVsygcamAKap7YG42ks/edit#heading=h.cxk8rwei9a2b) or <https://www.newdata.org/ga-analysis>

<sup>63</sup> Souls to the Polls Milwaukee, *Annual Report* at <https://soulstothepollsmke.org/annual-report/>.

<sup>64</sup> Souls to the Polls Milwaukee, *Annual Report* at <https://soulstothepollsmke.org/annual-report/> (“Established in 2012, Souls to the Polls built a massive support base in 2020. In spite of COVID 19 restrictions, SttP went to over 30,000 homes, contacted 32,000 individuals and reached over 2 million people via multiple media forms to build voter understanding and participation in the 2020 elections. SttP organized ministers and congregations to fight voter suppression, partner with Black Lives Matter, work to protect the community from COVID and Light Up

organizers were also up against Wisconsin’s Republican-led legislature which planned to purge over 200,000 names from voter rolls and stopped the Governor from implementing an all-mail election using absentee ballots due to COVID. Although SttP and its partners sued, the court sided with Wisconsin’s conservative legislators, forcing voters to wait hours in long lines, in the rain and unprotected from COVID. SttP was, however, able to delay the deadline for absentee ballots, which allowed for over 113,000 of these votes to be counted.<sup>65</sup>

- “Tennessee has some of the strictest laws when it comes to absentee voting. Under Tennessee law, unless a registered voter falls into one of 14 narrowly defined categories they may not vote by mail. (T.C.A. § 2-6-201) None of those 14 categories appears to encompass individuals who are (1) under the age of 60, and (2) wish to vote by mail because of a fear that voting in person, whether early or on election day, might expose them or someone they live with, to COVID-19. For such voters, the only options are to either risk their health and vote in person, or to not vote at all. Tennessee also criminalizes aiding voters in obtaining an absentee ballot application, making it a Class E felony if you do so.”<sup>66</sup> One of the most alarming aspects of Tennessee’s law is that mail ballots are rejected at a rate nearly twice as high as ballots cast in person. One way to reduce the rejection rate is to make sure ballots are not rejected for inadvertent mistakes on the absentee ballot envelope. Tennessee law provides no opportunity to correct mistakes on mail ballot envelopes. Given that only 2% of the voting population utilized absentee voting in a previous election, the surge in absentee ballots due to the pandemic is likely to result in a high rate of mistakes due to inexperience.
  
- Texas. Mimi Marziani, Chairwoman of the Texas Advisory Committee to the U.S. Commission on Civil Rights, testified that “Texas has been refusing . . . to comply with federal voter registration law, namely the Motor Voter Act” which requires state governments to allow mail-in voter registration and to provide eligible people with voter registration opportunities at drivers’ license agencies, public assistance agencies, and disability agencies. Marziani stated this failure to comply resulted in 1.5 million Texans a year unable to update their license online and thus miss their opportunity to register to vote. This especially impacts frequent movers, who tend to be poorer and younger and thus more likely to be people of color, because it means that as they move, they are no longer registered at their current address.<sup>67</sup>
  - In 2021, Texas Republicans pushed for legislation they argued would reassure voters elections were “secure.”<sup>68</sup> Although they deny the bill is aimed at disenfranchising voters of color, the bill sought to outlaw measures that increased voters of color turnout. For instance, it sought to outlaw two kinds of early voting

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Milwaukee in a successful mobilization for November 3rd. The result was a success — 80% of eligible Milwaukee adults made their voices heard and early voting increased by 50%.)

<sup>65</sup> Souls to the Polls Milwaukee, *Annual Report* at <https://soulstothepollsmke.org/annual-report/>.

<sup>66</sup> The Equity Alliance, *Voting During the Covid-19 Pandemic*, available at <https://theequityalliance.org/covid19vote/>

<sup>67</sup> Mimi Marziani, Chairwoman, Texas Advisory Comm. to the U.S. Comm’n on Civil Rights, *Testimony at the Texas People’s Hearing* (2019).

<sup>68</sup> Amy Gardner, *How The Texas Voting Bill Would Have Created Hurdles For Voters Of Color*, (The Washington Post, May 31, 2021), available at <https://www.washingtonpost.com/politics/2021/05/30/texas-voting-law/>.

methods established last year in Harris County, home of Houston, to give voters more opportunities to vote safely and crowd-free during the pandemic: drive-up voting and 24-hour voting. 130,000 voters took advantage of drive-through voting and an additional 10,000 ballots were cast during the 24-hour voting marathon. Chris Hollins, who oversaw these programs last year, states that data on the Harris County vote showed voters of color made up more than half of those who used drive-through early voting and the 24-hour early-voting window. “That was a higher share than in early voting overall, when Black and Latino voters accounted for just 38 percent of all voters,” he said.<sup>69</sup>

Disabilities and Accessing the Right to Vote. The following are from testimonials regarding the intersecting barriers voters of color with disabilities face.

- Alabama. Polling site closures and the consolidation of precincts exacerbate burdens to vote for disabled voters, many of whom are denied ballot access. At the Alabama People’s Hearing, Scott Douglas, Executive Director of Greater Birmingham Ministries, highlighted the story of habitual voter Elizabeth Ware, a Black woman on Social Security disability benefits who lost her non-driving photo ID and had limited transportation and financial options available to obtain a photo ID in compliance with Alabama’s strict voter ID law. Ware’s disability made it painful for her to walk five blocks to the nearest bus stop, and she did not have reliable car transportation. Douglas commented, “the nearest license commission where she could have gone to get an ID was not in walking distance, and a ride costs 20 bucks, a significant amount for somebody on her income. She was finally able to get a ride to the Board of Registrars where she attempted to get a free voter ID card. However, she was wrongly denied the ID by a staff member who had been improperly trained and told her that she had an ID in the past.”<sup>70</sup> *Ware was also a plaintiff in litigation challenging Alabama’s photo ID law.*
- Wisconsin. “In Wisconsin, Mary McClintock, a wheelchair-bound voter had to take three trips via para-transit vans to the downtown DMV offices to obtain her photo ID to vote. In Missouri, Emmanuel Aziz, who has multiple sclerosis and is confined to a wheelchair, challenged the state’s proposed photo ID ballot initiative. While he has an expired Missouri driver’s license and an expired passport, he has no means to renew them, nor any need to. He resides in a skilled nursing facility and does not have ready access to transportation. The cost of obtaining the underlying documents necessary to procure a new state identification would pose a significant hardship on him in getting to the offices necessary to get a certified copy of his birth certificate, obtaining a new identification and the costs for the documents.”<sup>71</sup>

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<sup>69</sup> Amy Gardner, *How The Texas Voting Bill Would Have Created Hurdles For Voters Of Color*, (The Washington Post, May 31, 2021), available at <https://www.washingtonpost.com/politics/2021/05/30/texas-voting-law/>.

<sup>70</sup> Scott Douglas, Executive Dir., Greater Birmingham Ministries, Testimony at the Alabama People’s Hearing (2019).

<sup>71</sup> Advancement Project and the Lawyers’ Committee for Civil Rights Under Law, *Lining Up: Ensuring Equal Access to the Right to Vote* (2013) available at <https://advancementproject.org/resources/lining-ensuring-equal-access-right-vote/> at 16 (*internal citations omitted*).



## Felon Disenfranchisement

Felon Disenfranchisement remains as one of the vestiges of post-Reconstruction, Jim Crow disenfranchisement mechanisms. Across the country, more than 5.2 million people are unable to participate in the electoral process due to a previous felony conviction. Advancement Project has championed rights of restoration efforts in many states, including, Florida, Virginia, Louisiana, Mississippi, Wisconsin, Tennessee, and others. In 2021, we released a report entitled, *Our Voices, Our Votes: Felony Disenfranchisement and Re-entry in Mississippi* with our state partners, One Voice and Mississippi Votes.<sup>72</sup> The report analyzes how Mississippi silences those with prior felony convictions and creates reentry barriers for returning citizens. Indeed, Mississippi has one of the most difficult systems to navigate the restoration process, requiring a vote from both houses of the state legislature. Using statistics, national data, and personal stories from directly impacted Mississippians, the report illuminates what people with felony convictions must endure. The report details how the state's Jim Crow legacy not only fails to assist returning citizens, but permanently disenfranchises them.

For many returning citizens, the lack of notice cripples the restoration process. The following quotes from formerly incarcerated people speaking on the lack of notice they received about their voting rights, giving a glimpse to some of the ways incarcerated people are made more vulnerable by changes in voting laws. These can also be found in *Our Voices, Our Votes: Felony Disenfranchisement and Re-entry in Mississippi*.<sup>73</sup>

- “I am currently registered to vote. I was not an active voter before I was incarcerated; I was 16 years of age at that time. I knew that at the age of 18 I could vote, but once I was released from prison there was nothing shared with me about my voting rights.” - Michael Vardaman
- “Before I was incarcerated, I was a voter. When I was convicted, I did not know about my voting rights. I only found out about my voting rights when I was released. I feel that voting is the best thing because you can make a change.” - Kartrell Terry
- The following is an excerpt from the story of Denise “Nissi” Coleman, a Black woman who was incarcerated for 38 years on two life sentences. “Reentry is hard because it’s a different ball game on the other side of that fence, and they don’t prepare you for any of it. They don’t give you any resources... I had a very hard time with reentry. My daughter passed away while I was in prison, and I didn’t have any family, siblings, or friends left to help me. They didn’t prepare me at all for release—no official ID, no social security card, no birth certificate. All you get is a Department of Corrections ID and \$20—and you can’t do anything with \$20. You can’t stay at a shelter—you need those documents the prison doesn’t give you. You don’t even get transportation away from the prison. How are you supposed to find a roof to put over your head? How are you supposed to survive and stay free?”<sup>74</sup>

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<sup>72</sup> *Our Voices, Our Votes: Felony Disenfranchisement and Re-entry in Mississippi* (2021) at 17. <https://advancementproject.org/resources/our-voices-our-votes/>

<sup>73</sup> *Our Voices, Our Votes: Felony Disenfranchisement and Re-entry in Mississippi* (2021) at 17.

<sup>74</sup> *Our Voices, Our Votes: Felony Disenfranchisement and Re-entry in Mississippi* (2021) at 19.

With this report and our extensive work in communities of color assisting returning citizens to gain power, we hope to bring awareness to the difficulties in rights of restoration and empower local organizations and impacted persons. The crazy quilt of laws across the country are in dire need of federal intervention to provide uniformity and restoration to eligible persons.

### III. Litigating Access to the Right to Vote

In general, 2020 and 2021 saw significant increases in voting rights litigation, due in part to various elections taking place in 2020, and the impact of COVID-19. In 2021, “at least 21 voting cases have been filed in ten states, and Georgia leads the way with eight new lawsuits in 2021.”<sup>75</sup> According to the Brennan Center’s 2020 Voting Rights Litigation Tracker, there were 82 major post-election cases.<sup>76</sup> And across 45 states, there were an additional 439 significant voting rights litigation cases prior to the election related to “voters’ ability to cast their ballots in 2020 — whether through vote-by-mail, early in-person voting, or election day voting at the polls.” *Id.* This number “does not include cases pertaining to candidacy issues, ballot initiatives, or redistricting.” *Id.*

Georgia. In May 2021, Advancement Project filed a lawsuit on behalf of religious and Latinx organizations challenging Georgia’s voting legislation, SB 202, which in part requires voters to provide “identification or sensitive personal information when requesting and casting an absentee ballot.”<sup>77</sup> *The Concerned Black Clergy v. Raffensperger* alleges violations of Section 2 of the Voting Rights Act, the American Disabilities Act, and the 1<sup>st</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments. In this case, several religious and nonprofit organizations brought suit on behalf of the communities they work with, primarily Black Americans and Muslim Americans. These organizations were specifically challenging the difficulties brought by the SB 202 vote-by-mail ID requirement, ballot request & receipt period, drop box availability, out-of-precinct policy, food & drink ban, mobile polling place ban, early voting days & hours, and the runoff voting period.

Additionally, another Georgia case, *New Georgia Project v. Raffensperger*, challenged SB 202 for its new voter identification requirements among other components of the law. The plaintiffs’ complaint alleges “violations of Section 2 of the Voting Rights Act and the 1st and 14th Amendments to the U.S. Constitution, in that the law has the effect of discriminating against voters on account of race or color and unduly burdens the fundamental right to vote.” *Id.* Plaintiffs in this case include the New Georgia Project, Black Voters Matter Fund, and Rise Inc., all civic organizations that support voters of color broadly in voting, as well as other underrepresented or vulnerable groups.<sup>78</sup>

Florida. Furthermore, Advancement Project along with other civil rights organizations and on behalf of organizations in Florida filed *Florida Rising Together v. Lee* plaintiffs bring claims under Section 2 of the Voting Rights Act, 1<sup>st</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments to the U.S.

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<sup>75</sup>*Voting Rights Litigation Tracker 2021*, BRENNAN CENTER FOR JUSTICE (updated May 28, 2021).

<sup>76</sup>*Voting Rights Litigation Tracker 2020*, BRENNAN CENTER FOR JUSTICE (updated May 28, 2021).

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<sup>78</sup> Amended Complaint, *New Georgia Project v. Raffensperger*, No. 1:21-cv-1229 (N.D. Ga.), [https://storage.courtlistener.com/recap/gov.uscourts.gand.288457/gov.uscourts.gand.288457.1.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.gand.288457/gov.uscourts.gand.288457.1.0_1.pdf)

Constitution.<sup>79</sup> Specifically, this case challenges Florida’s Senate Bill 90 which “imposes additional identification requirements for requesting an absentee ballot, requires voters to submit new absentee ballot applications every general election cycle, restricts the use of ballot drop boxes, and criminally prohibits churches and other organizations from “influencing” voters waiting in line at the polling place, thus effectively banning organizations and individuals from handing out water and snacks to voters waiting in line.” Another Florida case, *Florida State Conference of the NAACP v. Lee*, also challenges Florida’s SB 90 under Section 2 of the Voting Rights Act, the 1<sup>st</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments. Plaintiffs here are also various civic groups bringing suit on behalf of the individuals and communities they serve. *Id.* Plaintiffs in this case are various civic organizations that help individual communities vote, but plaintiff accounts attest to the impact this law would have on minority populations.<sup>80</sup>

Multilingual Voting Materials. In addition, changes in providing multilingual voting materials were also challenged in 2020 and 2021. In *Asian Americans Advancing Justice-Atlanta (AAAJ-Atlanta) v. Raffensperger*, AAJ-Atlanta brought claims alleging violations of Section 2 of the Voting Rights Act (intentional racial discrimination and discriminatory results), 14<sup>th</sup> and 15<sup>th</sup> Amendment Violations (intentional racial discrimination), 1<sup>st</sup> and 14<sup>th</sup> Amendment (undue burden on right to vote). Overall, this case is challenging SB 202 in Georgia which “dramatically reduces the time during which voters may request and return absentee-by-mail ballots, eliminates drop-off locations, bars local and state officials from proactively mailing absentee ballot applications, imposes new, burdensome voter identification requirements, and criminalizes certain handling and return of completed absentee ballot applications.”<sup>81</sup> Because of efforts by organizations like AAJ– Atlanta, AAPI voters were able to turn out in record numbers during the past election. The AAPI community often has lower voter turnout than other minority groups due to “linguistic isolation and limited English proficiency.”<sup>82</sup> AAPI voters also rely disproportionately on absentee ballots in Georgia, and requested absentee ballots over the average amount in the 10 days before the General Election Day. Plaintiff accounts demonstrate the importance of absentee ballots, and other voting supports, in assisting limited English proficient individuals and households during the voting process. For example, in this case, Steven Paik is a 69-year-old Korean American, and registered in Gwinnett County. His first-time voting was the General Election in 2020.<sup>83</sup>

Challenging Voting Location Reductions, Consolidations and Relocations. Various states have implemented changes that reduce, consolidate, or relocate voting locations and thus constitute a burden on many voters in regard to casting their vote.

Arizona. In Maricopa County, Arizona, there were reduced voting locations for the March 22, 2016, presidential preference election (PPE) and thousands of voters were forced to wait in

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<sup>79</sup> *Florida Rising Together v. Lee*, No. 4:21-cv-201 (N.D. Fla. 2021), <https://storage.courtlistener.com/recap/gov.uscourts.flnd.369472/gov.uscourts.flnd.369472.1.0.pdf>.

<sup>80</sup> *Florida State Conference of the NAACP v. Lee*, No. 4:21-cv-187 (N.D. Fla.), <https://storage.courtlistener.com/recap/gov.uscourts.gand.288705/gov.uscourts.gand.288705.27.0.pdf>

<sup>81</sup> Amended Complaint at 6, *Asian Americans Advancing Justice-Atlanta v. Raffensperger*, No. 1:21-cv-1333 (N.D. Ga.), <https://storage.courtlistener.com/recap/gov.uscourts.gand.288705/gov.uscourts.gand.288705.27.0.pdf>

<sup>82</sup> *Id.* at 21.

<sup>83</sup> *Id.* at 12.

lines for many hours to cast their votes.<sup>84</sup> This was a result of the election officials’ decision to focus on cutting costs of PPE by reducing polling locations rather than making sure there were enough locations per eligible voter, and that they were accessible to minority communities. Reduction of voting locations were “particularly burdensome on Maricopa County’s Hispanic and African-American communities, many of which had fewer polling locations than Anglo communities and, in some instances, no voting locations at all.”<sup>85</sup>

Louisiana. Additionally, in *Harding v. Edwards*, plaintiffs “sued the Louisiana governor and secretary of state, challenging state laws that restrict absentee voting to those who qualify for a limited number of excuses, require that absentee ballots be signed by a witness, and limit the duration of early voting to seven days.”<sup>86</sup> Alleging violations of the 1st and 14th Amendments to the U.S. Constitution, Section 2 of the Voting Rights Act, and Title 2 of the Americans with Disabilities Act, plaintiffs noted that the law enforcement during COVID-19 unduly burdened Black Americans and individuals with disabilities.<sup>87</sup> In a plaintiff account, Jennifer Harding noted significant family responsibilities and health concerns that led to concern over not being able to sufficiently social distance, and exposing elderly parents and other family members to COVID-19 if required to vote in person.<sup>88</sup> In addition, plaintiff Jasmine Pogue is a 33 year old black woman who was diagnosed with asthma – voting in person due to the challenged provisions remaining in place would have put her health at risk, especially due to the disproportionate effect of COVID-19 on Black Louisianans.<sup>89</sup>

#### IV. The Need for Federal Legislation

The Constitution gives Congress the authority to enact “appropriate legislation” to enforce the fundamental right to vote.<sup>90</sup> Congress has authority under the Fourteenth and Fifteenth Amendments to address discrimination in voting and has utilized its powers to address election issues and expand the ability for eligible persons to vote.<sup>91</sup> While approximately two-thirds of eligible Americans cast a ballot in the 2020 election,<sup>92</sup> the United States consistently has abysmal voter turnout. According to Pew Research, the United States voter participation rate ranks thirtieth

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<sup>84</sup> Amended Complaint at 7, *Feldman v. Arizona Secretary of State*, No. 2:16-cv-1065 (Ariz. D. 2016), <https://storage.courtlistener.com/recap/gov.uscourts.azd.976323.12.0.pdf>.

<sup>85</sup> *Id.* at 4.

<sup>86</sup> *Harding v. Edwards*, No. 3:20-cv-495 (M.D. La.), No. 20-30632 (5th Cir.), [https://storage.courtlistener.com/recap/gov.uscourts.lamd.57839/gov.uscourts.lamd.57839.22.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.lamd.57839/gov.uscourts.lamd.57839.22.0_1.pdf).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 10.

<sup>89</sup> *Id.* at 11.

90. *Shelby County v. Holder*, 570 U.S. at 567 n.2. (Ginsburg, J., dissenting) (“[The Constitution uses the words ‘right to vote’ in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact ‘appropriate legislation’ to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections”).

<sup>91</sup> See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 52 U.S.C. § 10301)

<sup>92</sup> Olivia B. Waxman, *The 2020 Election Set a Record for Voter Turnout. But Why Is It Normal for So Many Americans to Sit Out Elections?*, TIME (Nov. 5, 2020, 9:24 AM), <https://time.com/5907062/record-turnout-history/> [https://perma.cc/S7ZM-Z8FS].

of thirty-five advanced democracies.<sup>93</sup> The federal government can take several immediate and impactful steps to make voting easier. Congress must pass legislation that addresses the disproportionate impact and burden on voters of color accessing the right to vote,<sup>94</sup> which requires states with a proven history of voter suppression and discrimination, to prove that any changes to their election laws will not disenfranchise voters.

Despite the achievements and expansion of the right to vote in 2020, the country has witnessed an onslaught of anti-democratic measures that seek to limit the number of persons who can cast a ballot. During the 2020 election season, Advancement Project became aware of a number of common problems that voters faced. For example, in Georgia, polling place changes and precinct reassignments (or voter confusion) are one of the more common problems that voters encountered. This is problematic in this state due to the new legislation (SB 202) that invalidates provisional ballots cast in the wrong precinct. Moreover, limitations on when polling places can close or move, or when precincts merge, and more robust notice requirements for when that happens, are key. Notice ideally includes advance outreach to affected voters by local election officials as well as signage and personnel stationed at the old polling place to help redirect people. Without these key components, voters will find that under the new legislation, ballots cast outside of a voter's assigned precinct will not get counted; thus, disenfranchising voters for a lack of information.

It has been proven that expanding early voting, vote by mail ballots, and drop box return options decrease the cost of voting. Evidence exists that under a "cost of voting" analysis, i.e., early voting options, underlying documents, cost of voter identification, etc. that reducing the cost of voting by making these options widely available can help with turnout and smooth election administration. In Virginia, early voting and a vote by mail option increased turnout 575,000 in 2016 to 2.8 million in 2020.<sup>95</sup> This increase is a direct correlation to the expansion of voting opportunities. Congress must address the lack of uniformity in the myriad of ways to cast a ballot and ensure that uniform methods are set and enforced.

Polling place technology can also impact voters' ability to access the right to vote. Indeed, wait times vary for many different reasons, but can sometimes hinge on the functionality of polling place technology. For example, both Georgia and Virginia use electronic pollbooks. Often when the electronic books malfunction, poll workers and voters are left without options. In November 2020, in Georgia, a county-wide electronic pollbook failure resulted in hours-long lines and an extension to polling place hours in Spalding County.<sup>96</sup> Training and resourcing poll

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<sup>93</sup> See Drew DeSilver, *In past elections, U.S. trailed most developed countries in voter turnout*, PEW RESEARCH CTR. (Nov. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout/> [https://perma.cc/Y5E2-ZSS2].

<sup>94</sup> See, e.g., John Lewis Voting Rights Advancement Act, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/4263> [https://perma.cc/K27K-NANM].

<sup>95</sup> Here are two websites which make comparisons in Georgia and Virginia for before-and-after various early voting, vote by mail, drop box expansions became available in 2020: Georgia Votes: <https://www.georgiavotes.com/2020-general/>; VPAP early voting dashboard: <https://www.vpap.org/elections/early-voting/year-2020/>

<sup>96</sup> See, e.g., <https://www.13wmaz.com/article/news/politics/elections/tech-issue-causes-voting-machines-in-spalding-county-to-go-down/85-1aa7d660-a2e3-441a-ab56-1ffeebc5adcf>; <https://www.wsbtv.com/news/local/spalding-county-experiencing-county-wide-glitch-bringing-down-voting-machines/EPCV6RSBRFBLTJUVQXJZAIFO2U/>.

workers and local election offices in a smart way can help problems like this—including making sure that resourcing is equitable from one community to the next. Some states have banned local election board’s ability to seek third party funds to purchase the equipment needed to address these types of access issues; thus, leaving eligible citizens in the dark without a ballot.

Additionally, voter registration continues to serve as a barrier for so many eligible persons. Improvements in this area will make it easier to register and update one’s registration and prevent wrong-precinct situations and eliminating eligible persons before they can register. Advancement Project filed suits in Florida and Virginia to address failures in the online voter registration system. In Virginia, during the 48-hour time period for which our consent decree extended the voter registration deadline, over 24,000 more Virginians registered to vote in the November 2020 election.<sup>97</sup>

Finally, Congress must adopt an explicit right to vote in the Constitution. Without an affirmative right to vote, states will continue to pass legislation that disenfranchises communities of color. We have experienced this level of opposition to enfranchisement and the utilization of state laws to disenfranchise eligible citizens at the turn of the twentieth century. The impact of those laws remains in areas, such as felon disenfranchisement. Judith Brown-Dianis, Advancement Project’s Executive Director has stated, “[T]he right to vote must be an affirmative, explicit, bedrock, individual constitutional right protected by the highest level of judicial scrutiny: strict scrutiny. Under strict scrutiny, states would have to prove – with evidence – that a restrictive law like voter ID is justified by a compelling purpose and is the least restrictive means to achieve that purpose. Hollow claims of “voter fraud” would no longer be acceptable. States would have to prove that “voter fraud” is a real problem that can be addressed only through denying or restricting the right to vote, which is something they cannot do.”<sup>98</sup>

In a democracy, the vote, and the ability of eligible persons to exercise the right to vote is central and elections must be conducted fairly, freely, and without discrimination. Only after we achieve these goals will we have a true democracy and experience a more perfect union.

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<sup>97</sup> (Source: lines 79-80 in the attached SBE minutes)

<sup>98</sup> Testimony in favor of a #RightToVote Amendment before the 2016 DNC Platform Committee, by Judith Browne Dianis, Executive Director, Advancement Project National Office, June 16, 2016. Found at [https://advancementproject.org/wp-content/uploads/2020/08/JBD\\_DNC\\_Testimony.pdf](https://advancementproject.org/wp-content/uploads/2020/08/JBD_DNC_Testimony.pdf)