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BRENNAN
CENTER
FOR JUSTICE

VOTING LAW CHANGES: ELECTION UPDATE

Wendy Weiser and Diana Kasdan

Brennan Center for Justice *at New York University School of Law*

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The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. Our work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protection in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group — the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

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She is also the co-author of *Voting Law Changes in 2012,* a comprehensive roundup of all state legislative action in 2011 on voting rights, focusing on new laws as well as state legislation that has not yet passed or that failed. She has appeared on *CNN*, *Fox News*, *Democracy Now!*, and *NPR's Morning Edition*, *All Things Considered*, and *Diane Rehm Show*, among other outlets; her political commentary has been published in the *New York Times*, *Roll Call*, *the Hill*, *Foreign Affairs*, *Huffington Post*, and elsewhere; and she is frequently quoted by the *New York Times*, the *Washington Post*, the *National Journal*, *Politico*, and other news outlets across the country. Previously, she directed the center's Fair Courts Project, which seeks to preserve a fair and impartial judiciary. She also served as an Adjunct Professor at NYU School of Law, where she taught the Brennan Center Public Policy Advocacy Clinic.

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Ms. Kasdan graduated *magna cum laude* from New York University School of Law where she was inducted into The Order of the Coif, was an Arthur Garfield Hay Civil Liberties Fellow, a recipient of the George P. Foulk Memorial Award for Distinguished Scholarship and the Ann Petluck Poses Award for Outstanding Contribution to the Immigrant Rights Clinic, and served as a notes editor for the *NYU Law Review*. Following law school, Ms. Kasdan clerked for the Honorable Nicholas G. Garaufis of the United States District Court for the Eastern District of New York.

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INTRODUCTION

Our nation was founded on the principle that "all men are created equal." To fulfill this promise, our voting system should be free, fair, and accessible to all eligible citizens.

A year ago, the Brennan Center issued a study documenting the recent and abrupt reversal of America's long tradition of expanding voting access. Without national notice, legislators pressed scores of new bills that would make it harder for eligible Americans to vote. This report helped spur much-needed public scrutiny of these laws and their possible impact on our elections.

We estimated that these new laws — which included onerous voter ID laws, cutbacks to early voting, and community-based registration drives — "could make it significantly harder for more than 5 million eligible voters to cast ballots in 2012." That number reflected the sheer quantity and scope of restrictive legislation already then enacted in 14 states.[1]

The drive to curb voting continued beyond October. All told, since January 2011, at least 180 bills were introduced in 41 states. Ultimately, 25 new laws and two executive actions were adopted in 19 states. These states represented 231 electoral votes, or 85 percent of the total needed to win the presidency.[2] This amounted to the biggest threat to voting rights in decades.

Today, the reality is very different, and far better for voters. The dramatic national effort to restrict Americans' voting rights was met with an equally dramatic pushback by courts, citizens, the Department of Justice, and farsighted public officials.

What does a survey of the landscape one week before Election Day 2012 now show? Strikingly, nearly all the worst new laws to cut back on voting have been blocked, blunted, repealed, or postponed. Laws in 14 states were reversed or weakened. As a result, new restrictions will affect far fewer than the 5 million citizens we predicted last year. For the overwhelming majority of those whose rights were most at risk, the ability to vote will not be at issue on November 6th.

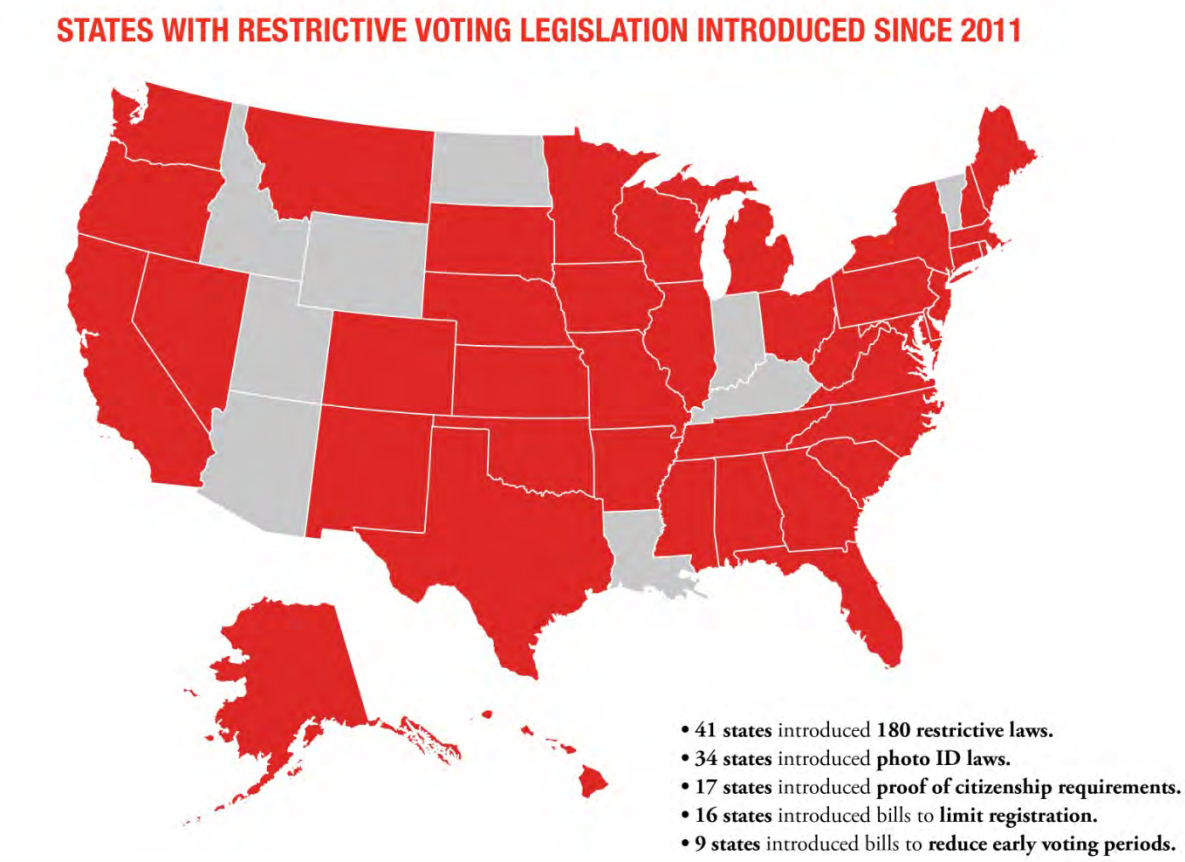
At the same time, the fight will continue well past November. Courts will examine laws in Wisconsin, Pennsylvania, and elsewhere. Politicians will introduce more bills to limit voting rights. Most significantly, the U.S. Supreme Court will likely hear two major cases that could substantially cut back on legal protections for voters. It has already agreed to hear a challenge, brought by Arizona, that could curb federal power to protect voting rights. The Court likely will also hear a challenge to Section 5 of the Voting Rights Act, which has proven to be a key protection against discriminatory laws, including many of the ones passed in 2011-12.

This upcoming legal battle unfolds against the backdrop of the recent struggle over voting rights — and in the wake of a clear demonstration of the vital need for strong laws to protect democracy.

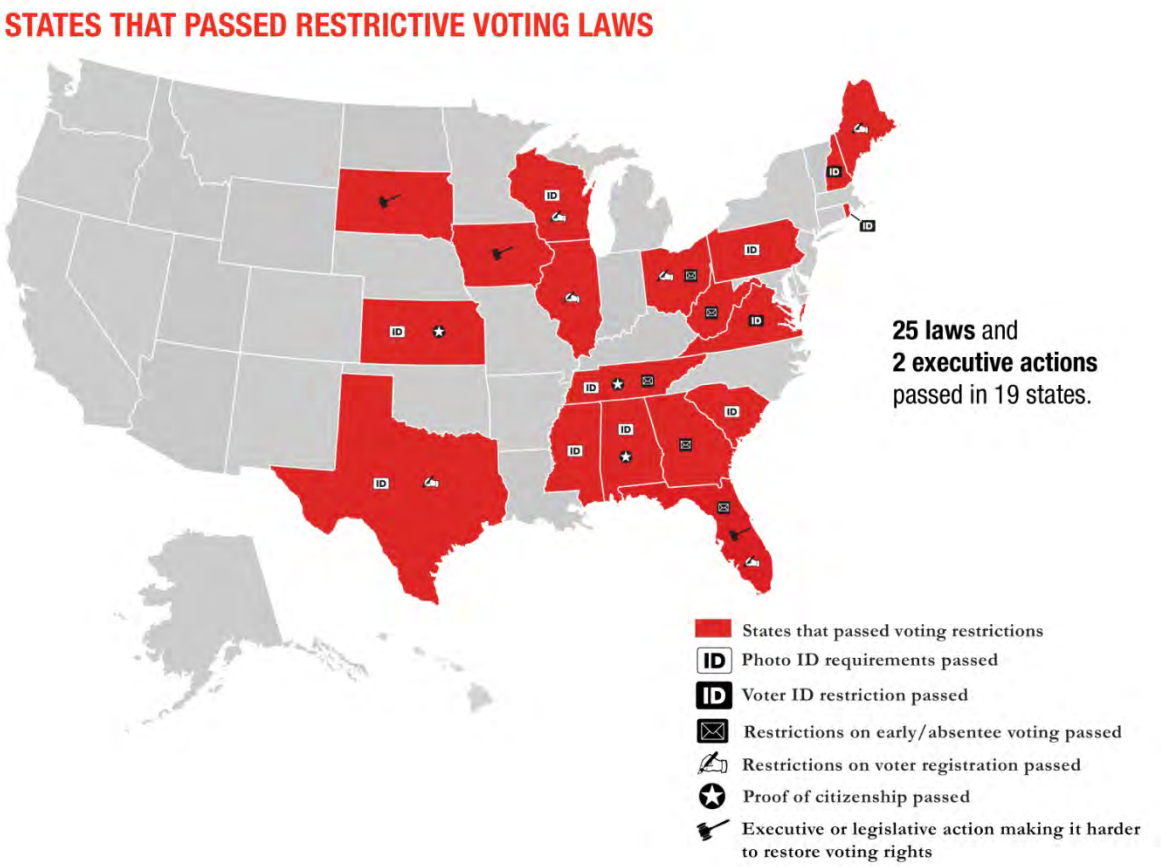
I. SUMMARY OF THE ASSAULT ON VOTING RIGHTS

A. Changes in State Law

What did these new restrictions look like?



Voter ID Laws: The most common new voting law — passed in nine states — was to require voters to show certain government-issued photo IDs to vote.[3] Every state already had some form of voter ID requirement in place, at least for new voters and often for all, but these laws were far more stringent. These highly inflexible and restrictive laws allow only select forms of ID, like driver's licenses and non-driver's IDs, which 11 percent of voting-age Americans — or 21 million citizens — do not have.[4] Studies also make clear that those without photo IDs are disproportionately seniors, African-Americans, the poor, students, or people with disabilities. Among older voters, 18 percent do not have the kind of photo IDs required by these laws; for African-Americans, 25 percent; and for low-income voters, 15 percent.[5] Three additional states passed new voter ID requirements, albeit ones that are less rigid.

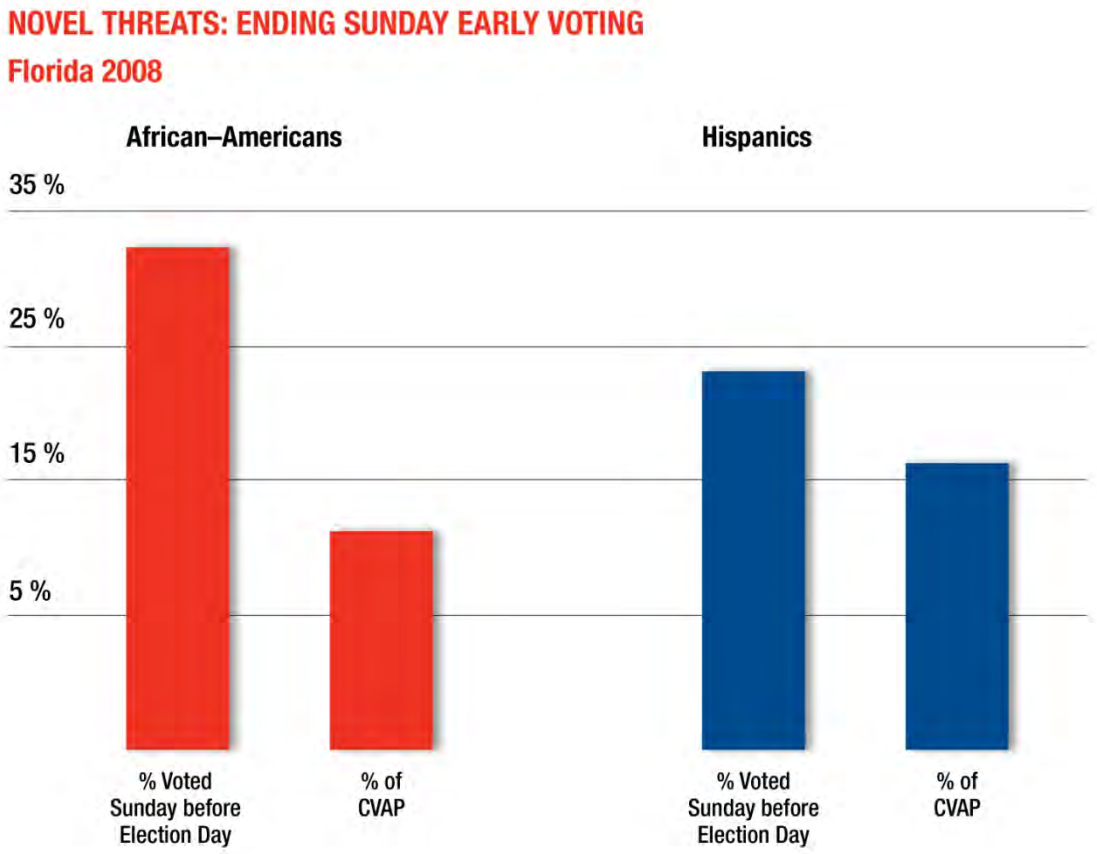


Documentary Proof of Citizenship Laws: Three states passed laws to require documentary proof of citizenship to register or to vote.[6] These requirements — which at least 7 percent of voting-age Americans do not have[7] — fall particularly hard on women and low-income citizens. A full one-third of women do not have citizenship documents with their current names and 12 percent of low-income individuals do not have such papers available.[8]

Laws Making Voter Registration Harder: Six states passed various laws making it harder for citizens to register to vote,[9] but the most common were restrictions on voter registration drives.[10] For example, in Florida, for a full year, onerous new restrictions on drives shut down groups like the League of Women Voters and Rock the Vote. These drives have historically played an extremely important role in getting people registered so they can vote. In both 2004 and 2008, hundreds of thousands of Florida voters registered through drives.[11] Once the new law passed, many of those drives ground to a halt and many Floridians lost a key opportunity to sign up. African-American and Latino citizens were especially hurt. Nationally, they register through drives at twice the rate as whites.[12] Elsewhere, new laws eliminated highly-popular Election Day registration,[13] and made it harder for people who have moved to stay registered to vote.[14]

Laws Reducing Early Voting Opportunities: After decades of states expanding early voting, for the first time there were efforts across the country to reduce this method for enhancing voting opportunities.[15] Five states cut back on early voting, and some in ways that were most likely to make it harder for minorities to get to the polls. For example, Ohio and Florida both eliminated early voting on the Sunday before the election — a day on which African-American and Latino churches organized very successful pews to polls drives in 2008.

A full one-third of citizens who voted early on the eliminated Sunday in Florida in 2008 were African-American, even though African-Americans make up only 13 percent of the state's citizen voting-age population.[16]



Laws Making it Harder to Restore Voting Rights: Three states also made it harder to restore voting rights for persons with past criminal convictions. The governors of Florida and Iowa both issued executive orders reversing prior policies that increased opportunities to restore rights.[17] And South Dakota passed a law to disenfranchise persons who are on probation.

B. Purges and Challenges

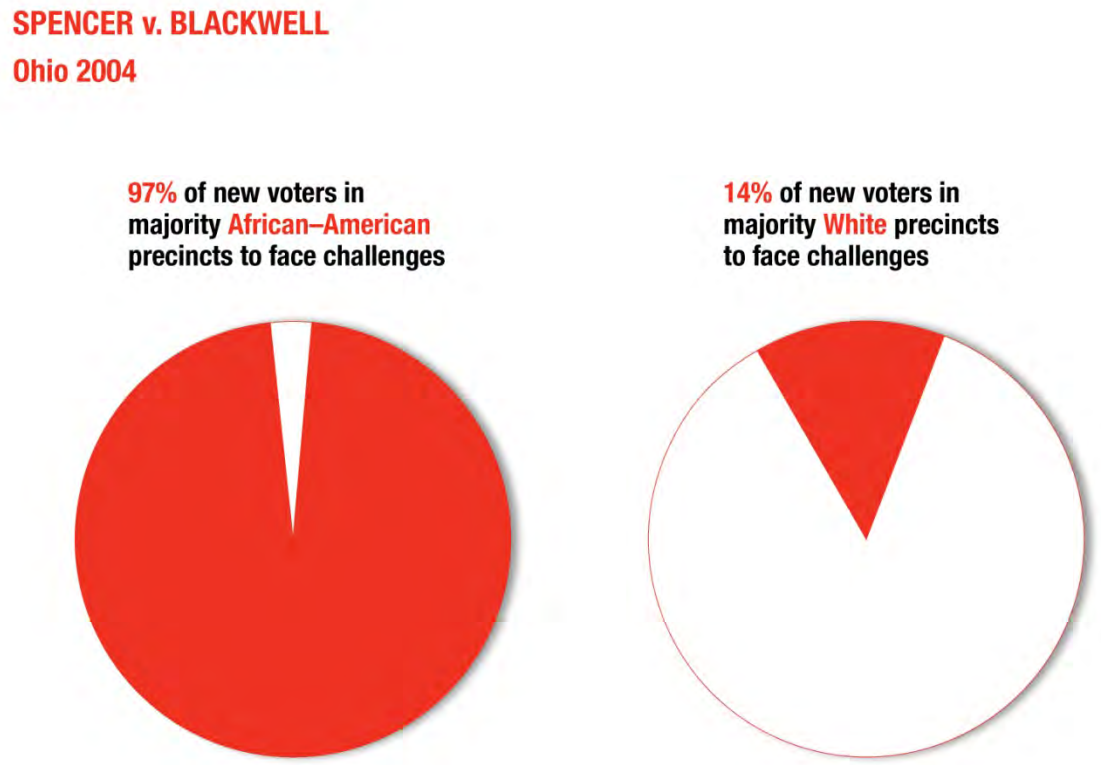
The onslaught of new laws was only the start. As legislative sessions wound down, efforts picked up to systematically purge voters from the rolls and challenge the eligibility of registered voters. These efforts continued in the final months leading up to the November election, creating additional — often last-minute and unforeseen — barriers to eligible, registered citizens.

Although regular list maintenance is an important tool for maintaining accurate voter registration lists, far too frequently, after secretive and inaccurate purge programs, eligible voters show up to the polls and discover their names have been removed from the voting lists.[18] Federal law, to some extent, constrains states' list maintenance activities, including by prohibiting systematic efforts to purge the voter rolls within 90 days of a federal election.

Colorado, Florida, and Texas, among other states, began to implement large-scale programs to remove registered voters in the latter part of 2012.[19] These attempts were wildly inaccurate and threatened to throw thousands of eligible citizens off the rolls.

In Texas, in September 2012, a court blocked a last-minute massive purge of nearly 80,000 voters identified as deceased shortly after hundreds of eligible living voters received removal notices.[20] In Florida, Secretary of State Ken Detzner announced he had a list of more than 180,000 potential non-citizens on the rolls, necessitating a purge before the election. Under greater scrutiny, though, that list quickly dwindled to just fewer than 3,000 voters targeted for removal. Within weeks of notices going out to those individuals, at least 500 confirmed their citizenship, including Bill Internicola, a 91-year-old World War II veteran who was born in Brooklyn. By the time Florida was done refining its purge program, including the use of a federal data system, it reported only about 200 potential non-citizens on the rolls. These names are still being checked.[21] This pattern repeated in Colorado. Secretary of State Scott Gessler initially announced there were potentially 11,000 non-citizens on the rolls. That number dropped to just under 4,000, and then down to a list of only 141 people.[22] With less than two weeks to the election, Gessler abruptly announced he found an additional 300 potential non-citizens.[23] At the same time, private organizations including True the Vote, Judicial Watch, and local citizen-led groups have threatened or filed lawsuits demanding purging of the voter rolls.[24]

In addition to purges, there has been an increase in mobilization of political groups to challenge voters at the polls. In nearly every state, antiquated laws known as "challenger laws" allow private individuals to contest the eligibility of a voter either before or on Election Day. The growing use of challenger laws in recent years has exposed abuse that suppresses and intimidates eligible voters.[25] This year, True the Vote and other groups have announced large-scale plans to blanket the polls with challengers and poll watchers.[26] It is not yet known whether the current challenger plans will materialize on Election Day. Past efforts have targeted communities of color, students, and voters with disabilities. Shortly before the 2004 presidential election in Ohio, for instance, a local political party planned to station 3,500 challengers in select voting precincts. A court found that under this scheme, 97 percent of first-time voters in majority-black precincts would have encountered challengers at the polls compared to just 14 percent of first-time voters in majority-white precincts (see chart on next page).[27] Under scrutiny, the controversial plan was abandoned on Election Day.



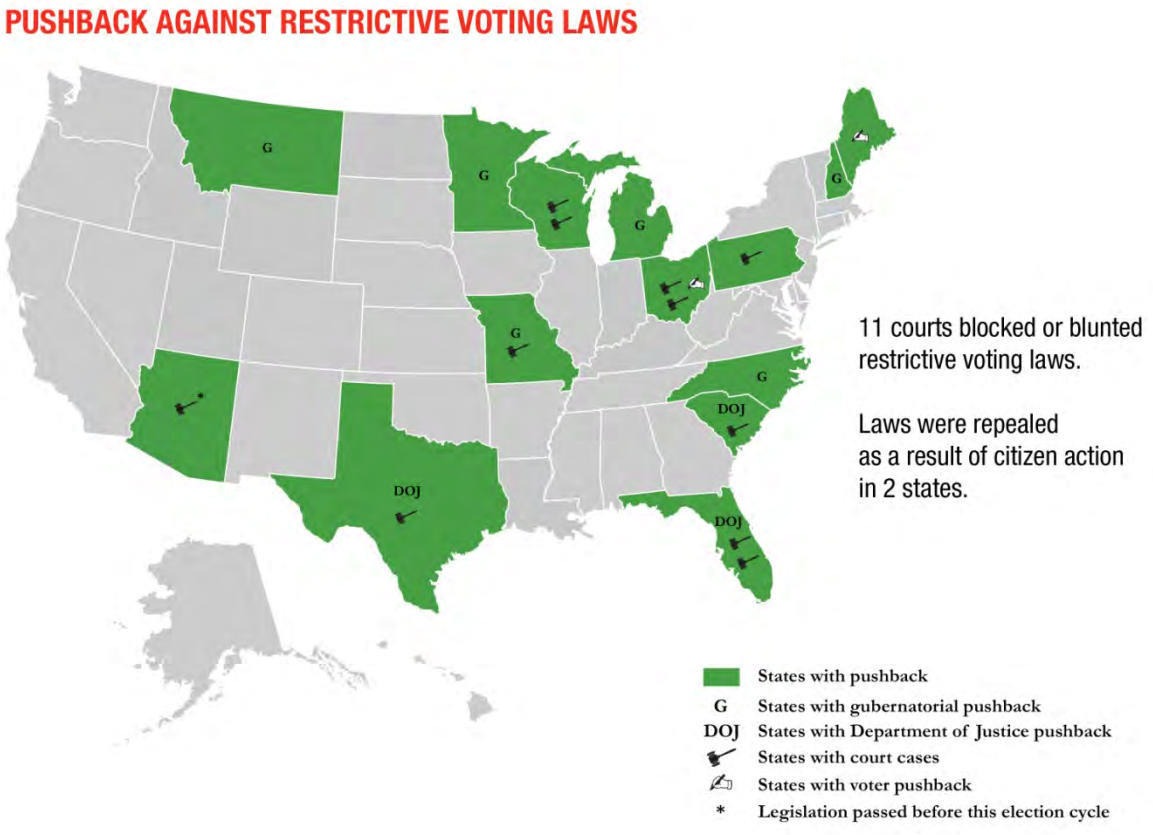
That's the bad news. The good news is that, starting in 2012, this overwhelming series of attacks on voting finally came to a halt.

II. THE PUSHBACK

The dramatic national effort to restrict Americans' voting rights was met with an equally dramatic pushback by citizens, voting rights groups (including the Brennan Center), courts, the Department of Justice, and farsighted public officials. This pushback was largely successful: As of the date of this report, restrictive voting measures have been blocked or blunted in 14 states. Specifically, for the 2012 elections:

- Restrictive photo ID requirements have been blocked in Pennsylvania, South Carolina, Texas, and Wisconsin, and vetoed in Minnesota, Missouri, Montana, New Hampshire, and North Carolina;
- Punitive regulations of voter registration drives have been permanently blocked in Florida and vetoed in Michigan;
- Cutbacks to early voting have been blocked in Ohio and mitigated in Florida;
- A law that required documentary proof of citizenship to register to vote has been blocked in Arizona; and
- Laws that would have cut back on voter registration opportunities have been repealed in Maine and Ohio, and vetoed in Montana.[28]

In the end, the bulk of the most onerous laws that would have made it harder for Americans to vote will *not* be in place for the 2012 elections. Of particular note, most of the voting restrictions adopted in swing states will not be in effect in 2012. By and large, voters have won the battle over voting rights in 2012.



How did this happen? The pushback has taken a variety of forms — from citizen-led repeal efforts, to gubernatorial vetoes, to objections from the Department of Justice, to court cases. The most significant blow to the movement to restrict voting this year has been the dramatic string of legal victories by citizens and voter advocates, mostly in the past few months.

A. Citizen-Led Repeal Efforts

In two states, citizens rallied around referendums to repeal new voting restrictions.

In **Maine**, citizens mobilized against a law passed in June 2011 to eliminate the state's highly popular practice of Election Day registration, which had been in place for nearly four decades. Political scientists credit Election Day registration with increasing voter turnout by 3 to 6 percent.[29] Immediately after the law passed, a broad-based coalition of groups launched a campaign to "repeal" it via ballot initiative. In September 2011, they submitted close to 70,000 signatures (well above the 57,277 needed) to the secretary of state's office to qualify the measure for a "People's Veto," a referendum process that placed a repeal of the newly passed law on the November 2011 ballot.[30] On November 8, 2011, citizens in Maine voted 60 percent to 40 percent to restore Election Day registration in the state.[31]

In **Ohio**, citizens similarly organized to oppose an omnibus voting bill that Gov. John Kasich had signed into law in July 2011. The law cut the early voting period, eliminated the state's *de facto* same day registration week during the early voting period, and barred county boards of election from mailing out return-paid absentee ballots or applications, among other things.[32]

Just after the law's passage, Fair Elections Ohio, a coalition of lawmakers, labor unions, church groups, voting rights advocates, and concerned citizens, led by former Democratic Secretary of State Jennifer Brunner, organized a petition drive to oppose the new law. In Ohio, if a referendum to repeal a law is certified for the ballot, that freezes the law's provisions until after the election. Ultimately, foes submitted more than 307,000 signatures; after the state board of elections found some of the signatures deficient, they submitted even more.[33] In mid-December 2011, Secretary of State Jon Husted certified the referendum for the November 2012 ballot.[34]

Reportedly because of the massive mobilization around the issue, on May 8, 2012, Ohio lawmakers voted along party lines to repeal the new election law.[35] (Of note, Republicans voted to repeal their own statute, while Democrats wanted the referendum to proceed.) The referendum effort did not cover, and the legislature did not repeal, another newly enacted law that would have cut the state's early voting period and eliminated early voting the weekend before the election. That was addressed by the courts, as discussed below.

B. Gubernatorial Vetoes and Resistance

In six states, governors vetoed restrictive voting laws that had been passed by state legislatures, and in one more, gubernatorial resistance caused the legislature to soften a new law. Given the consistent partisan divide

over laws making it harder to vote we documented in *Voting Law Changes in 2012*, it is not surprising that all of the vetoes in 2011 were done at the hands of Democratic governors. By 2012, however, perhaps as a result of public pressure, opposition to restrictive voting laws had spread beyond Democrats. In mid-2012, two Republican governors pushed back on new voting restrictions, handing voters additional victories.

1. Voter ID

In rapid succession in May and June of 2011, Democratic governors in Minnesota, Missouri, Montana, New Hampshire, and North Carolina vetoed restrictive laws passed by Republican legislatures that would have required government-issued photo IDs to vote:

- The **Montana** legislature passed H.B. 152 on April 25, 2011, and Gov. Brian Schweitzer vetoed it on May 5, 2011.[36]
- The **Minnesota** legislature passed S.F. 509 on May 21, 2011, and Gov. Mark Dayton vetoed it on May 26, 2011.[37]
- The **Missouri** legislature passed S.B. 3 on May 26, 2011, and Gov. Jay Nixon vetoed it on June 17, 2011.[38]
- The **North Carolina** legislature passed H.B. 351 on June 16, 2011, and Gov. Beverly Perdue vetoed it on June 23, 2011.[39]
- The **New Hampshire** legislature passed S.B. 129 on June 8, 2011,[40] and Gov. John Lynch vetoed it on June 27, 2011.[41]

In New Hampshire, a second voter ID bill eventually became law. It is far less rigid than the one originally proposed. The original bill (S.B. 129) would have required voters to present a photo ID issued by the U.S. government or the state of New Hampshire, or a driver's license from another state. Voters without acceptable ID would not have had their votes counted unless they returned to a town clerk's office within two and a half days of the election with an acceptable photo ID, a waiver from the secretary of state, or an affidavit of religious exemption. Lynch vetoed this bill, as well as a less restrictive voter ID bill (S.B. 289) introduced in the following session.[42] On June 27, 2012, however, the state legislature voted with two-thirds majorities to override the veto of the second bill.[43]

Under the new law, New Hampshire citizens seeking to vote in person in the 2012 general election will now have to show one of a variety of forms of photo ID — including a driver's license, non-driver's ID card, a U.S. armed services ID card, and a student ID card — or else submit an affidavit of identity at the polls. Beginning in September 2013, some of those forms of ID will no longer be accepted, though voters without acceptable IDs will still be able to vote a ballot that will count after executing an affidavit of identity.

In **Virginia**, Republican Gov. Bob McDonnell surprised observers by similarly pushing back on restrictive voter ID bills. In March 2012, Virginia lawmakers passed S.B. 1[44] and H.B. 9,[45] which would have required voters to present limited forms of photo IDs at the polls. These bills gave voters without those IDs on Election Day one day to present them to election officials. Rather than signing the bills into law, on April 9, 2012, McDonnell introduced several amendments to soften the bills' requirements and reduce their burdens on voters without IDs. To explain his action, the governor cited a desire "to preserve [the] goal of preventing

illegal voting while promoting voter participation, and making sure we do not stand in the way of legitimate voting" and "to ensure that this legislation complies with the requirements of the Voting Rights Act of 1965."[46] The legislature rejected one of the governor's proposed amendments — to require election officials to count the provisional ballots cast by voters without accepted IDs if their signatures matched those on file with the state — but adopted the remaining amendments.[47] McDonnell signed the bills into law on May 18, 2012.[48]

Under the new law, Virginians will have to present IDs before voting at the polls, though acceptable IDs include not only photo IDs but also a range of non-photo IDs, including a Virginia voter registration card that is mailed to all registered voters. In his signing statement, McDonnell pledged to "ensure that no voter is overly burdened by the provisions included in this legislation," and to send "every voter in Virginia a free voter card . . . to ensure they have at least one form of ID to bring with them to the polls."[49]

2. Voter Registration and Other Restrictions

In two states, governors vetoed bills that would have made it more difficult to register to vote, among other restrictions.

In **Montana**, as in Maine, the new Republican legislature passed a bill on April 5, 2011 that would have eliminated Election Day registration in the state. Democratic Gov. Brian Schweitzer vetoed that bill on April 13, 2011, leaving Election Day registration in place.[50]

In **Michigan**, on July 3, 2012, Republican Gov. Rick Snyder vetoed several controversial bills that would have made it harder to vote.[51] S.B. 754 sought to impose unnecessary administrative burdens on voter registration drives that would have hampered groups seeking to help register voters.[52] S.B. 803 would have required voters to affirmatively state they were citizens before receiving their ballots at the polling place, even though they already affirmed citizenship when registering to vote.[53] Voters who did not affirm their citizenship a second time would be automatically challenged by election officials.[54] Also vetoed, H.B. 5061 would have required a registered voter to check a repeat citizen affirmation box when applying for an absentee ballot. Failure to do so would have resulted in the voter's absentee ballot not being counted unless she could specifically affirm her citizenship on Election Day.[55]

C. Pushback in Legislatures

The political pushback against laws making it harder to vote did not only come from governors. In many states where restrictive voting bills were expected to pass, community efforts helped prevent the legislature from passing them in the first place. Overall, in 2011-12, 41 states introduced 180 bills restricting voting. Only 25 of those bills in 19 states eventually passed (and many of those have been blocked since).

Nebraska was one state with a successful legislative pushback. There, legislators introduced a bill (L.B. 239)[56] to require voters to present government-issued photo IDs to vote, as well as an amended bill that would have let voters also present a voter registration card.[57] A coalition of approximately two dozen organizations, including Nebraskans for Civic Reform and the Nebraska Association of County Officials, held protests and

rallies to voice their opposition to the bill,[58] raised public arguments about the negative impact the bill would have on voters and on the state's treasury,[59] and otherwise lobbied state legislators. The bill's backers could not defeat a filibuster, falling three votes short on March 28, 2012.[60]

D. Department of Justice Resistance

Throughout 2011, the Department of Justice was silent on the wave of restrictive voting laws in the states. The Department's voting rights law enforcement record during that period was also very sparse.[61] But on December 13, 2011, at a speech at the LBJ Library in Austin, Texas, Attorney General Eric Holder for the first time expressed public concerns over the "state-level voting law changes" that Rep. John Lewis (D-Ga.) had condemned as part of "a deliberate and systematic attempt to prevent millions of elderly voters, young voters, students, [and] minority and low-income voters from exercising their constitutional right to engage in the democratic process."[62] The attorney general said: "It is time to ask: what kind of nation — and what kind of people — do we want to be? Are we willing to allow this era — our era — to be remembered as the age when our nation's proud tradition of expanding the franchise ended?"[63]

Ten days later, the Justice Department issued a letter objecting to South Carolina's new photo ID law under Section 5 of the federal Voting Rights Act.[64] Since then, the Department also has objected to restrictive laws in Texas and Florida. It has delayed and may challenge Mississippi's new law, as well. In some cases, it refused to "preclear" changes; in others, it sought to block restrictions in court. In sum, the Department forcefully stepped forward to protect voters' rights.

Under the Voting Rights Act, certain states with a history of discrimination in voting must get approval — or "preclearance" — from the Department of Justice or a federal court in Washington, D.C. before implementing any changes to their voting laws or practices. The Department, in turn, is required to review all state law changes submitted to it for approval, and to object to those changes unless the state can prove they neither have the purpose nor the effect of worsening minorities' position with respect to the franchise.

Based on the information submitted by **South Carolina**, the Department rejected its voter ID law, finding that non-white voters were far more likely than white voters to lack accepted IDs.[65] This objection prevented South Carolina's law from going into effect — unless and until a court found otherwise. Soon after, the Palmetto State announced it would go to court to fight the Department's determination — and to challenge the constitutionality of a key provision of the landmark Voting Rights Act.[66] At the Republican presidential primary debate on Martin Luther King Day the next month, Texas Gov. Rick Perry praised South Carolina for being "at war with this federal government" over the Voting Rights Act and the state's voter ID law.[67] On February 7, 2012, South Carolina filed a lawsuit seeking judicial preclearance of its voter ID law, but omitted its threatened challenge to Section 5 of the Voting Rights Act.[68] (That provision was nonetheless challenged by a number of other states and jurisdictions.)

While South Carolina's lawsuit was pending, the Department objected to new voting laws from two other states — Texas and Florida — both of which had also filed lawsuits seeking to preclear their laws under the Voting Rights Act. On March 12, 2012, the Department objected to **Texas**'s strict photo ID law on the ground that it disproportionately harmed the state's minority voters.[69] The Department found that, based on

the data supplied by the state, between 604,000 and 795,000 registered Texans lacked IDs that would have been accepted for voting under the new law, and that Latinos were between 46 percent and 120 percent less likely than non-Hispanic voters to have state-issued photo IDs.[70]

In **Florida**'s case, the state withdrew its preclearance request before filing its lawsuit in federal court. Nonetheless, as part of the litigation, the Department was required to take a position on whether the voting law changes at issue — new restrictions on voter registration drives, cutbacks to early voting, and new procedures for voters who move to new counties — comported with the Voting Rights Act. On March 20, 2012, the Department said the voter registration and early voting changes did not pass muster because they disproportionately harmed minority voters.[71]

In each of these cases, the Department of Justice's determination under Section 5 of the Voting Rights Act was not the final word because all three states brought suit in federal court in Washington, D.C. The Department's role thus switched from decision-maker to litigant. In this capacity, too, the Department played a critical part in blocking these new laws.

While the Department resisted some of the most onerous new voting laws, it did preclear the new voter ID law in New Hampshire, which had been softened after the governor vetoed a more restrictive bill.[72] (The new law is described in Section III below.) The Department has not yet made a determination with respect to a new voter ID law in **Mississippi**, but as a result of its review and request for additional information, the law will not to be in effect for the 2012 elections.

E. Court Victories

By far the most striking pushback against new voting restrictions has come through the courts. Virtually every court to consider a law or policy restricting voting this past year found in favor of the voters. Overall, **11 court decisions in 8 states** blocked or blunted new laws that would have made it harder for eligible Americans to vote.

- **Wisconsin**: In March of this year, two separate state courts blocked Wisconsin's strict new photo ID law on the ground that it violated the state's constitution. One court found the new law unfairly burdened citizens' right to vote under the state constitution,[73] and the other found the law was both beyond the legislature's powers and inconsistent with a state constitutional provision setting out the exclusive qualifications for voting.[74]

  Although those decisions are still being appealed, the law will not be in effect for the 2012 election. The impact is significant: According to one court's findings, approximately 221,975 eligible voters in Wisconsin do not have IDs that would have been accepted under the new law.[75] Other estimates are even higher.[76]

- **Missouri**: Also in March 2012, a state court in Missouri blocked an initiative to place a voter ID constitutional amendment on the November 2012 ballot, ruling the language of the ballot initiative was misleading.[77] Because the Missouri Supreme Court struck down the state's prior photo ID law as

unconstitutional, voters will not have to show photo ID at the polls unless and until the state constitution is amended to require such ID.

- **Arizona**: On April 17, 2012, an expanded panel of the U.S. Court of Appeals for the Ninth Circuit sitting en banc blocked an Arizona law, enacted several years earlier, requiring voters to provide documentary proof of citizenship to register to vote. In a 7-2 decision written by a judge appointed by President George W. Bush, the court found that Arizona's law was inconsistent with the federal Motor Voter law, which requires states to "accept and use" a uniform federal voter registration form, delegates authority to a federal agency over that form, and seeks to streamline the registration process nationally.[78]

  As a result of this decision, Arizona's proof of citizenship requirement is currently blocked. While the law was in effect, tens of thousands of voters were denied registration because they did not provide adequate proof of citizenship.[79] On August 15, 2012, the U.S. Supreme Court agreed to review this decision during the next term.

- **Florida (voter registration drives)**: On May 31, 2012, a federal court in Tallahassee preliminarily blocked enforcement of the most onerous provisions of Florida's new law restricting community-based voter registration drives.[80] The court found the law likely violated the First Amendment and the federal Motor Voter law and noted that "allowing responsible organizations to conduct voter registration drives — thus making it easier for citizens to register and vote — promotes democracy."[81] After the parties reached a settlement agreement, on August 30, 2012, the court issued a final order permanently removing restrictions on community-based voter registration drives.[82]

  While the law was in effect, civic groups across the state — including plaintiffs the League of Women Voters of Florida and Rock the Vote — had completely shut down their voter registration drives. As soon as the law was blocked, drives resumed, registering thousands of Florida voters.[83] Registration numbers, which had fallen statewide in the wake of the law, jumped up after the law was enjoined in late May 2012, and August and September were the two months with the highest number of new voter registrations in 2012.[84]

- **Florida (early voting)**: In a decision issued on August 16, 2012, a three-judge court in the District of Columbia refused to preclear Florida's new law cutting back on early voting days and hours under the federal Voting Rights Act.[85] The court found the state had not met its burden of showing that the changes to early voting would not have a racially discriminatory effect on voters in Florida's five counties covered by the Act.[86]

  As a result of this decision, Florida submitted an early voting plan for the five covered counties to offer the same number of early voting hours as required by the prior law, which was equivalent to the maximum permitted under the new law.[87] Most of Florida's largest counties, including Miami-Dade, Broward, Orange, and Palm Beach, also followed suit.[88] Most Florida voters, therefore, will face the same number of early voting hours as in past elections, but those hours will be spread over fewer days.

- **Texas**: On August 30, 2012, shortly after the Florida decision, another three-judge court in Washington, D.C. rejected Texas's strict photo ID law under the federal Voting Rights Act.[89] The court found the state had not met its burden of showing that the law would not have a discriminatory effect against minorities. To the contrary, the court found the evidence showed that the costs of obtaining qualifying ID "will fall most heavily on the poor and that a disproportionately high percentage of African Americans and Hispanics in Texas live in poverty."[90]

  This decision means Texas's voter ID law will not be in effect for the upcoming election or future elections, although the lawsuit continues. (The court is now considering Texas's argument that the federal law at issue — Section 5 of the Voting Rights Act — is itself unconstitutional.) The impact of this on Texas voters will be substantial, although the number of affected voters is difficult to quantify.[91] According to the original data provided by Texas, more than 604,000 registered voters lack qualifying IDs.[92]

- **Pennsylvania**: Pennsylvania's highly restrictive new photo ID law was also blocked in large part by a state court on October 2, 2012.[93] The court had originally refused to enjoin the law under the state constitution, crediting the state's promises that it would be able to get conforming IDs into the hands of all affected voters in time for the election. On September 18, 2012, however, the state Supreme Court, in a 4-2 decision joined by the court's three Republican members, vacated that decision, finding that the trial court had relied too much on supposition, and that the state's implementation of a new photo ID law in the short term would violate the state constitution unless "there will be no voter disenfranchisement" as a result of that implementation.[94] The Court sent the case back to the trial court, which, in turn, issued a temporary order prohibiting the state from disenfranchising voters who do not have photo IDs in 2012.

  Under this ruling, the state may still ask voters to present state-issued photo IDs at the polls in November, but it must allow all voters, including those who do not have qualifying IDs, to vote by regular ballot. After November, the injunction will be reconsidered. Although the number of affected voters is disputed, as many as 758,000 registered Pennsylvanians may lack acceptable IDs, according to the Pennsylvania Department of Transportation.[95] The state itself conceded that at least tens of thousands would be affected.

- **Ohio (early voting).** On October 5, 2012, a federal appellate court — agreeing with the federal district court below — blocked Ohio's new law that significantly reduced opportunities for in-person early voting.[96] The suit had been brought by the Obama presidential campaign. Among other things, the new rules prohibited early in-person voting for all citizens except for military service members during the three days before Election Day. The court found the policy violated the U.S. Constitution's Equal Protection Clause. It held that the state could not justify its refusal to offer all voters the same early-voting opportunity it already provided to military voters. The U.S. Supreme Court rejected Ohio's request for emergency relief.[97]

As a result Ohio will offer early voting in the last three days before the election. This will significantly benefit Ohio voters, especially African-Americans, who heavily take advantage of early voting. In Ohio's largest county, Cuyahoga, African-American voters accounted for 28.6 percent of the overall vote but cast 77.9 percent of early in-person ballots. Overall, African-Americans were 26 times more likely to vote early than white voters.[98]

- **Ohio (provisional ballots).** Another appellate court decision, issued on October 11, 2012, prohibited Ohio from refusing to count provisional ballots cast in the right polling place but wrong precinct because of poll-worker error.[99] The Sixth Circuit panel found that it was "fundamentally unfair" to disqualify wrong-precinct ballots caused by poll-worker error, and blocked this policy under both the Due Process and Equal Protection Clauses of the U.S. Constitution.[100] After the case was sent down to the federal district court, the ruling was expanded to cover all wrong-precinct ballots that are the result of poll-worker error, even those cast at the wrong polling place.[101]

  The potential impact of this decision is significant. In 2008, more than 14,000 wrong-precinct provisional ballots were cast in Ohio.[102] A closely disputed judicial race in 2010 turned on the disposition of wrong-precinct provisional ballots.[103]

- **South Carolina**: On October 10, 2012, another three-judge federal court in Washington, D.C. ruled there was not enough time left to implement the state's voter ID law for the 2012 general election without significant disenfranchisement.[104] The court did preclear the requirement for future elections, but it clarified aspects of the law so that it "does not require a photo ID to vote."[105] Instead, South Carolinians can continue to use their non-photo voter registration card after 2012, so long as the voter signs an affidavit stating the reason for not having obtained a photo ID.[106] The preclearance going forward does not undermine the victory for voters. As Circuit Judge John Bates noted in his concurring opinion, "Act R54 as now pre-cleared is not the R54 enacted in May 2011."[107] Instead, the law was substantially mitigated both by the state's expansive interpretation of an exception to the photo ID requirement and by the state's efforts to expand access to photo ID.

  As a result of this decision, SC voters will not be required to provide photo ID in this year's elections, and going forward, they will have the ability to vote a valid ballot even if they do not have approved photo IDs. This means that the 130,000 registered voters who were found to lack acceptable photo IDs[108] will be able to vote and to have their votes counted.

Taken together, these decisions dismantle the bulk of the most restrictive new voting laws that would have been in place for the 2012 elections. The states that saw restrictive laws blocked or blunted by courts produce half the electoral votes needed to win the presidency. Without the courts, millions of citizens would have found it far harder to vote. This dramatically underscores the importance of the courts in protecting Americans' fundamental right to vote.

These decisions are noteworthy not only for their overall effect on voters but also for the sheer consistency of their results. As noted, almost every court to have considered a law or policy making it harder to vote blocked or mitigated it. There are exceptions. Most notably, a federal appeals court allowed severe restrictions

on voter registration drives in Texas to stand; a state appeals court upheld Tennessee's voter ID law in October 2012. But voters have won the vast majority of cases, at least for now. This is true despite the fact that the cases involved a variety of different legal claims and theories in different courts across the country.[109] This is true regardless of the political backgrounds of the judges deciding the cases. This overwhelmingly positive outcome stands in contrast to past election cycles, where litigation results have been more mixed.

What accounts for the remarkable string of litigation victories? In part, judges likely were struck by the scope of potential disenfranchisement. Each of the court cases considered — and often sought to quantify — the extent to which the laws at issue could prevent eligible citizens from voting. Where new laws were found to have a disenfranchising effect, they were typically blocked or mitigated to prevent that effect. Courts have also been sensitive to the fact that the wave of new voting restrictions generally runs counter to core principles of American law, which tend to promote democracy and seek to fulfill the promise of political equality espoused in the Declaration of Independence.

The decisions also suggest that courts are uncomfortable with what appears to be a push by some politicians to manipulate rules so certain voters would find it particularly hard to participate. Although no decision found improper motives behind new laws, courts did raise questions about legislators' purposes. For example, Judge Robert Hinkle in Florida questioned the state's reason for requiring groups conducting voter registration drives to submit completed forms to state officials within 48 hours of their being signed:

> [T]he state has little if any legitimate interest in setting the deadline at 48 hours. The short deadline, coupled with substantial penalties for noncompliance, make voter-registration drives a risky business. If the goal is to discourage voter-registration drives and thus also to make it harder for new voters to register, the 48–hour deadline may succeed. But if the goal is to further the state's legitimate interests without unduly burdening the rights of voters and voter-registration organizations, 48 hours is a bad choice.[110]

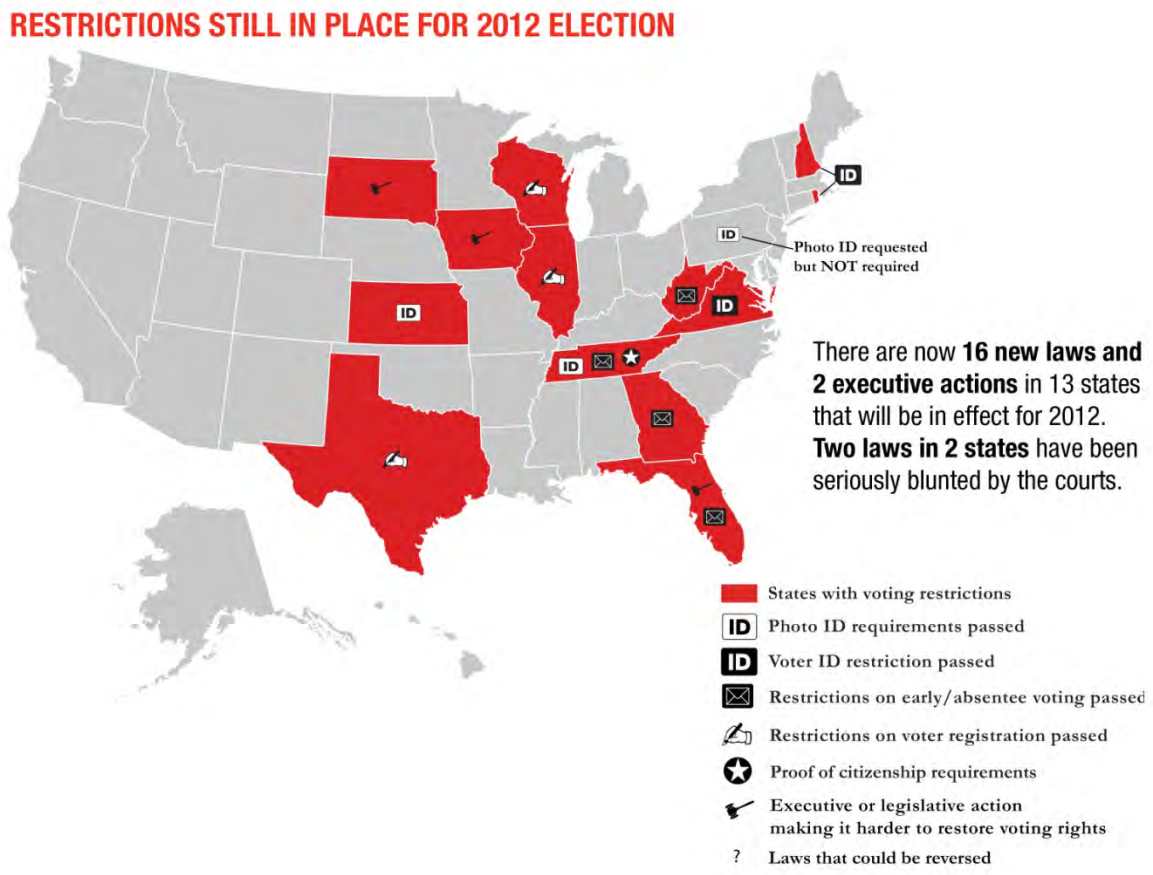
In Pennsylvania, the state Supreme Court raised serious questions during oral argument as to why the state insisted on trying to rush through a last-minute implementation of a new photo ID law before a working apparatus for issuing acceptable IDs was in place.[111] That concern was reflected in the court's decision, which referenced the state's "ambitious effort" to "bring the new identification procedure into effect within a relatively short timeframe."[112]

Regardless of the reasons, the results are unmistakable: Voters have largely won the litigation battles of 2012. And, as discussed above, they have successfully fought back new voting restrictions in a variety of other ways as well. The big story of this election cycle, therefore, is not just the massive legislative effort to cut back on voting rights across the country — it is also the massive and surprisingly successful effort by voters to protect their rights. But the job is not yet done.

III. THE DAMAGE DONE

A. New Voting Restrictions In Effect For 2012

Despite these victories, voters are somewhat worse off than they were in 2010. Going into the 2012 election, voters have been saddled with **18 new laws and executive actions in 13 states** that make it harder for eligible citizens to register and to vote.[113] These states account for 165 electoral votes, or 61 percent of the total needed to win the presidency.[114] Also, as discussed below, the legal flux surrounding the laws that passed but were blocked or blunted has contributed to increased confusion and uncertainty about election procedures this year. This has the potential to further impact the 2012 election.



In short — despite the tremendous victories in public squares, statehouses, and courthouses — not all damage has been averted. Following are the remaining voting restrictions that newly apply to millions of eligible citizens.

1. Laws Making It Harder to Register to Vote

Leading up to this election, new rules in four states make registering to vote harder, most notably by tightening the rules for voter registration drives.

- In **Florida**, for most of this election cycle, a new regulatory scheme imposed insurmountable obstacles on community-based groups and large national nonprofits that have registered hundreds of thousands of new voters in Florida for decades. Under the federal court order that blocked the law, drives now have 10 days, instead of just 48 hours, to return forms, and the most onerous of the previously-imposed registration and reporting requirements are no longer in force.[115]

  Unfortunately, by the time the court acted, groups were left with only four months to register new voters before the close of registration. Many of Florida's largest and most well-established nonpartisan voter registration drives were shut down, or severely handicapped, for an entire year.[116] During that 12-month period, there were **nearly 100,000 fewer new voter registrations in Florida** than there had been during the same period before the 2008 presidential election, according to our analysis.[117] This is a 14 percent decrease in the rate of new registrations from 2008 to 2012. A recent scholarly study of the impact of Florida's restrictions on voter registration found a similar rate of decline in new registrations, noting an even greater drop in new registrations among voters aged 21 and younger.[118]

- In **Texas**, the new rules cracking down on voter registration drives were particularly harsh. Although Texas already regulated drives more severely than perhaps any other state, it enacted new changes to make its laws even more restrictive. In particular, only residents of Texas who are eligible to vote can participate in voter registration drives.[119] This requirement effectively excluded major national voter registration groups from conducting drives in Texas.[120]

- Although **Illinois** also tightened its regulation of voter registration drives, its new rule is not nearly as hurtful as those in Florida and Texas. Voter registration drives participating in the official volunteer system now have less time to return collected applications to election officials.[121] But this reduction in time does not apply to groups only using the national mail-in voter registration form. Nonetheless, participation in the official volunteer system is still common in Illinois because it is mandatory for any drives collecting the state registration forms.[122]

- **Wisconsin** also made registering to vote harder for new residents of the state. It changed its voter eligibility requirements, by extending the minimum period of residency from 10 to 28 days.[123]

2. Voter ID

Of the five states enforcing new voter ID laws this November, only two impose strict photo ID requirements. Others afford more flexibility, such as accepting a broader range of IDs or allowing an affidavit of identity.

- In **Kansas and Tennessee**, where the laws are particularly rigid, registered voters will be required to show government-issued photo identification at the voting booth. Of the two, Kansas accepts a considerably broader range of photo IDs than does Tennessee. For example, in addition to a driver's license from *any state*, U.S. passport, or government employee ID, a state student ID card or state public assistance ID card are acceptable.[124] Voters without acceptable ID may vote a provisional ballot, and in most cases they have six days to present acceptable ID to election officials to ensure their votes are counted.[125] Tennessee, on the other hand, expressly refuses to accept student IDs from institutions of higher education.[126] While certain individuals may qualify for the option of executing an affidavit of identity at the polls,[127] most voters without ID will have to cast a provisional ballot and will have only two business days to provide acceptable ID.[128] Thus, for the first time in Kansas and Tennessee, eligible citizens who do not have the kind of ID required by these new laws will bear the burden and costs of obtaining it, or else find themselves unable to cast a regular ballot on Election Day.[129] Others may simply be dissuaded from even registering or going to the polls because they do not have, or cannot readily obtain, the necessary photo ID.

- In contrast, **New Hampshire, Rhode Island,** and **Virginia** all give voters without photo IDs a variety of options for having their votes counted. New Hampshire and Rhode Island both allow non-photo IDs for 2012 elections and will start having photo ID requirements next year or later. New Hampshire's law will allow election officials to verify voters' identity without strictly requiring one of the forms of ID on the statutory list, and voters without ID may vote after executing an affidavit attesting to their identity.[130] In Rhode Island, voters who are unable to provide approved photo ID will be allowed to vote a provisional ballot, which will be counted if the signatures on the ballot and the voter's registration match.[131] And in Virginia, the list of acceptable IDs includes documents without a photo that show the voter's name and address, such as a utility bill, bank statement, government check, or paycheck.[132]

3. Making it Harder to Restore Voting Rights

In three states, hundreds of thousands of citizens with past felony convictions will be left out of this election and will find it difficult or impossible to restore their voting rights in the future.[133]

- **Florida** and **Iowa** both reversed prior executive actions that made it easier for citizens with past criminal convictions to restore their voting rights. In 2007, Florida Gov. Charlie Crist streamlined the restoration process, and since then the voting rights of at least 150,000 Floridians were restored.[134] But since Gov. Rick Scott turned back the rules last year, no voting rights have been restored in Florida.[135] Similarly in Iowa, although an executive order by then Gov. Tom Vilsack had restored the voting rights of 80,000 persons with past convictions, in 2011, Gov. Terry Branstad revoked that order. Now Iowa permanently disenfranchises all citizens after a criminal conviction.[136]

- In 2012, **South Dakota** passed legislation to deny voting rights to persons with criminal convictions who are on probation. This change compounded existing requirements that already required a person to complete any term of incarceration or parole before the state would restore voting rights.[137]

4. Reduced Early Voting Opportunities

This November there will be fewer opportunities to cast a vote early in Florida, Georgia, Tennessee, and West Virginia.[138] The scope of the reduction differs significantly among these four states, and the outcome of the preclearance case in Florida has helped ameliorate the significant loss of heavily-used early voting days in that state.

In Florida and West Virginia, cuts to early voting were fairly substantial. In **Florida**, in addition to eliminating the first five days of early voting, counties lost the option of opening their polls on the last Sunday before the election. In total, Florida went from an early voting period that could extend up to 14 days, to one that is only eight days long.[139] The preclearance decision mitigated this somewhat — by ensuring maximum hours were offered in the five jurisdictions covered by the Voting Rights Act.[140] And most large counties have established hours close to the maximum for this election.[141] **West Virginia** likewise dropped its early voting period to less than two full weeks, reducing the 17 days previously available to 10 days.[142] The reductions in **Georgia** and **Tennessee** were less severe.[143]

Overall, how well voters will adjust to the loss of early voting days is an open question, but it is undisputed that millions will need to do so. In Florida — which made one of the most dramatic cuts — nearly 1 million voters in 2008 cast their ballots during the days that have been eliminated, which included the last Sunday before Election Day.[144] This will create difficulties and burdens for all Florida voters, but it is black voters who will bear the brunt of constricted access to the polls. In 2008, black voters in Florida used the now-eliminated first week of early voting at nearly twice the rate of white voters, and they relied on the last Sunday at more than three times the rate of white voters.[145]

The popularity of early in-person voting among black voters is not unique to Florida. According to the Census Bureau, early in-person voting by African-Americans in southern states nearly tripled from the 2004 to 2008, and was much higher than the rate among white voters in 2008.[146] Scholars expect this trend to continue.[147] Notably, the new state laws reducing early in-person voting are all concentrated in southern states.[148]

B. The Collateral Damage: Confusion and Misinformation

In a typical year, confusion and misinformation often mar American elections. This year saw dozens of new rules proposed, enacted, challenged, blocked, repealed, appealed, and postponed — all within months of a major election. Ordinary problems could compound.

Most at risk for confusion: States where voter ID laws were blocked.

In Pennsylvania, for example, under the terms of the court's injunction, voters may only be *asked* to show photo ID at the polls during the November election, but voters without ID can still vote a regular ballot. However, reports — including a legal petition for relief — document that voters were still receiving incorrect information about ID requirements from state and local election officials just weeks before the election. The state's television advertisements telling voters to bring photo ID ran before and after the court's ruling.[149] As

of mid-October, the state Department of Aging was sending mailings to thousands of seniors incorrectly stating, "Voters are required to show photo ID on Election Day."[150] The Brennan Center discovered similar misinformation on the official websites for two of the state's largest counties.[151] And a state newspaper recently published an article misinforming voters that photo ID was still required.[152] In Texas, election officials sent every voter a card saying photo ID would be required "upon federal approval"[153] — but never sent a follow up note saying that approval had been denied.

Indeed, even absent inaccurate information directly from the state, it is well documented that voters are frequently asked to show photo identification at the polls when state law does not require it. A leading national study found that at least half of voters were asked for photo ID by poll workers, even in states without ID requirements.[154] Not all voters are asked to show ID. Poll workers ask far more minority voters to show ID than their white counterparts.[155]

Voters may also be confused about when they can vote in states that trimmed early voting. In Ohio, whether polls would remain open to all voters on the last three days of the early voting period was the subject of litigation and remained an open question until as late as October 16.[156] As lawsuits unfolded in Florida, it was unclear until September how early voting changes would apply.[157] Moreover, the terms under which Florida's early voting changes were ultimately precleared require the five counties covered by Section 5 of the Voting Rights Acts to offer the maximum allowed hours each day, for a total of 96 hours of early voting.[158] Other counties, however, are not subject to this requirement. Those counties now have substantial discretion to decide the specific hours they will be open each day.[159] Fortunately, it appears most of the largest counties will offer hours close to the maximum, thus cushioning the blow of lost days.[160] But confusion may persist.

Finally, the eligibility of persons with prior criminal convictions is frequently a point of confusion for voters and election officials alike. Too often, these citizens are not properly informed of their rights, even when they remain eligible to vote (or have regained rights).[161] And persons with past convictions who are in fact properly registered to vote have been wrongly purged from the voter lists or challenged at the polls.[162] These problems are of particular concern this year in Florida, Iowa, and South Dakota where, for the first time in 15 years, states have taken actions to roll back rather than restore voting rights.[163]

IV. THE BATTLES TO COME

The national fight over voting rights will continue beyond November. We may be at a high water mark for voter access today. Going forward, we not only have to defend the victories already won, but we also have to stave off additional efforts to cut back on voting rights. The fight will play out in three main arenas: In the courts, in the U.S. Supreme Court, and in statehouses across the country.

A. In the Courts

First and foremost, many of the court victories won before this year's elections are temporary. The final decisions are those blocking Florida's voter registration drive law, mitigating South Carolina's voter ID law, preventing Missouri's photo ID ballot initiative from going onto the ballot, and preventing five Florida counties from implementing reduced early voting hours. All of the other decisions are subject to further review either on appeal or in the same courts. That means the outcomes could change.

These are the cases to watch:

- Both **Wisconsin** state court decisions striking down the state's strict photo ID law are subject to further review by the state appellate courts. The state Supreme Court refused to hear the case on an expedited basis before the election.[164] But both cases are currently before the state Court of Appeals and arguments are expected after the election.[165] (Because the cases are based on claims that the law violates the state constitution, they will not be subject to additional review in the U.S. Supreme Court.)

- Both federal appeals court decisions relating to **Ohio** — covering provisional ballots and early voting — are subject to review by the U.S. Supreme Court. With the support of attorneys general from 15 other states, Ohio asked the Supreme Court for, and was denied, emergency relief from the early voting decision.[166] But Ohio may still file petitions for review in both cases that would be considered on a regular timeline.

- Litigation continues in the federal court case that permanently blocked **Texas**'s photo ID law. Although the court already found that Texas cannot justify its new law under Section 5 the federal Voting Rights Act, the Lone Star State has argued that the provision itself is unconstitutional. The court is therefore now considering the constitutionality of that landmark federal law. Both the court's initial ruling on the preclearance and its upcoming ruling on the Voting Rights Act can be appealed to the U.S. Supreme Court.

- Litigation is also ongoing in the state court case that blocked **Pennsylvania**'s photo ID law for the 2012 elections. The law is blocked only for the 2012 elections;[167] it will be in effect in future years unless the court decides to permanently block it. Even if the court upholds the law, Pennsylvania's voters will be better off as a result of the litigation. Beforehand, the process to obtain state-issued photo ID in Pennsylvania was, according to the state Supreme Court, "a rigorous one" that was not consistent with principles of "liberal access."[168] Recognizing that, during the course of the litigation,

Pennsylvania created a new form of free state-issued photo ID that is much easier to obtain and will be accepted for voting.[169] That ID was created only at the end of August, so it remains to be seen whether it will significantly mitigate the disenfranchising effect of Pennsylvania's voter ID law.[170]

B. In the U.S. Supreme Court

The high court will hear two major cases next term that could substantially undermine legal protections for voters. The outcome of these cases may affect whether or not voters have any recourse in the courts to challenge discriminatory laws that make it harder for eligible Americans to vote.

The first case, *Gonzalez v. Arizona*, addresses Arizona's law that required individuals to produce documentary proof of their citizenship in order to vote. The Ninth Circuit Court of Appeals found that the state law was inconsistent with the National Voter Registration Act of 1993, a federal statute commonly referred to as "Motor Voter." It applied a special "preemption" analysis applicable to laws, like Motor Voter, enacted under Congress's authority under the U.S. Constitution's Elections Clause. The Supreme Court will consider both how the Motor Voter law works, and when a federal election law preempts a state law. If the Court overreaches, it could threaten Congress' core power to enact uniform federal election laws.

Although no case is docketed yet, the Supreme Court will likely rule on the constitutionality of Section 5 of the Voting Rights Act next term. This landmark civil rights law is widely acknowledged as being responsible for dismantling Jim Crow. It ensures that every American enjoys an equal opportunity to vote, regardless of race. It is among the few tools citizens have to fight back against discriminatory voting laws. It is also the main reason that voter ID laws in Texas and South Carolina, as well as early voting restrictions in five Florida counties, will not be in effect this election.

Six years ago, Congress voted by overwhelming bipartisan majorities to renew Section 5, saying the law was still needed to prevent discrimination in the voting system. The vote was unanimous in the Senate and 290-33 in the House. President George W. Bush signed it into law. Over the past two years, however, as states were passing laws making it harder to vote, seven states and localities asked courts to invalidate Section 5.[171] Of the suits that are still pending, the ones brought by Shelby County in Alabama, Kinston in North Carolina, and the state of Texas are the most likely to reach the Supreme Court. A three-judge federal court in Washington, D.C. upheld the constitutionality of Section 5 in a strong and thorough opinion in the Shelby County case, and the Court is reportedly considering before the election whether to take up that case. Three years ago, in a case brought by a public utility in Northwest Austin, several Justices questioned the continuing constitutional validity of Section 5.[172] That case predated new developments that strengthen the case for the law's constitutionality, but it nonetheless raises serious concerns.

At stake: One of the most effective legal tools for ensuring equality in the voting process and the most significant bulwark against discriminatory new voting laws. As Judge Bates found in the case blocking South Carolina's voter ID law, Section 5 plays a vital role in staving off discriminatory voting changes. He explained, "[w]ithout the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive."[173]

C. In the Statehouses

The past two years saw a sharp spike in harsh new bills to curb voting. This baleful trend was already well underway before 2011, and will likely continue.[174] Indeed, while 25 bills restricting voting passed into law over the past two years, 180 were introduced; and many are expected to come back in the next legislative session. Of particular concern are the nine bills that passed but were vetoed in six states. The battle over voting rights will thus resume in statehouses across the country next year.

CONCLUSION

In the wake of a massive wave of new laws that could have made it harder for millions of Americans to vote this year, voters have largely stood their ground. They have managed successfully to push back against the bulk of the most restrictive new laws, ensuring that far fewer voting restrictions will be in place for the 2012 elections. The most significant assault on voting rights in decades has thus been seriously blunted.

Although the election will soon be over, the fights over voting rights will, unfortunately, continue. Many of the battles won in 2012 will be refought in 2013. Court cases in Pennsylvania, Wisconsin, Texas, and Ohio are ongoing. The U.S. Supreme Court is taking up voting issues. And state legislators across the country are gearing up to introduce new restrictive voting laws. Americans cannot yet rest easy.

But Americans can learn from the battles over voting rights in 2012. We can learn the importance of strong national laws protecting voting rights, like the federal Voting Rights Act and the Motor Voter law, both of which made a big difference this year. We can learn the importance of strong courts to enforce those rights. And we can learn that enough is enough.

It is simply not acceptable to be fighting over vote suppression in 2012. It is not acceptable for politicians to try to fix the rules of the game in a way that makes it harder for some groups of Americans to have their say. Americans deserve a voting system that is free, fair, and accessible, but partisan voting wars threaten that ideal. To move past those wars, we need to focus on reforms that improve the system, not ones that game it. We need to better use technology to achieve that goal. And we particularly need to modernize our voter registration system to enhance both access and integrity.

ENDNOTES

[1] WENDY R. WEISER & LAWRENCE NORDEN, VOTING LAW CHANGES IN 2012 1 & 37 n.1 (2011), *available at* http://brennan.3cdn.net/92635ddafbc09e8d88_i3m6bjdeh.pdf.

[2] The Electoral College consists of 538 electors. A majority of 270 electoral votes is required to elect the president. The nineteen states that passed restrictive voting laws and executive actions since the beginning of 2011 account for 231 electoral votes: Alabama (9), Florida (29), Georgia (16), Illinois (20), Iowa (6), Kansas (6), Maine (4), Mississippi (6), New Hampshire (4), Ohio (18), Pennsylvania (20), Rhode Island (4), South Carolina (9), South Dakota (3), Tennessee (11), Texas (38), Virginia (13), West Virginia (5), and Wisconsin (10). For more information, *see* BRENNAN CENTER FOR JUSTICE, 2012 VOTING LAW CHANGES: PASSED AND PENDING LEGISLATION THAT HAS THE POTENTIAL TO SUPPRESS THE VOTE (2012), *available at* http://brennan.3cdn.net/b66811a6693907abbf_4cm6bneyp.pdf.

[3] Photo ID bills were signed into law in eight states — Alabama, Kansas, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin — and passed by referendum in Mississippi. They were introduced in at least 34 states. *See* WEISER & NORDEN, *supra* note 1, at 5; *see also* 2012 VOTING LAW CHANGES, *supra* note 2.

[4] WEISER & NORDEN, *supra* note 1, at 2; BRENNAN CENTER FOR JUSTICE, CITIZENS WITHOUT PROOF 3 (2006), *available at* http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

[5] CITIZENS WITHOUT PROOF, *supra* note 4, at 3.

[6] Proof of citizenship bills passed in Alabama, Kansas, and Tennessee. *See* WEISER & NORDEN, *supra* note 1, at 17.

[7] WEISER & NORDEN, *supra* note 1, at 18; CITIZENS WITHOUT PROOF, *supra* note 4, at 2.

[8] CITIZENS WITHOUT PROOF, *supra* note 4, at 2.

[9] Florida, Illinois, Maine, Ohio, Texas, and Wisconsin all passed registration restrictions. *See* WEISER & NORDEN, *supra* note 1, at 2-3.

[10] Florida, Illinois, and Texas passed restrictions on voter registration drives. *See id.*

[11] BRENNAN CENTER FOR JUSTICE, CAST OUT 8 (2006), *available at* http://brennan.3cdn.net/1d92eeaf94232a9031_zdm6b6okf.pdf; *see also* WEISER & NORDEN, *supra* note 1, at 19-20; DIANA KASDAN, STATE RESTRICTIONS ON VOTER REGISTRATION DRIVES 3 (2012), *available at* http://brennan.3cdn.net/2665c26afbdd9a4bce_inm6blqw1.pdf.

[12] WEISER & NORDEN, *supra* note 1, at 20 & 48 n.163; KASDAN, *supra* note 11, at 3 & 9 n.21.

[13] Maine and Ohio both passed laws to end Election Day registration. *See* WEISER & NORDEN, *supra* note 1, at 25-28. However, in both states these efforts were undone: in Maine citizens organized to repeal the law and in Ohio the legislature reversed itself after citizens organized a referendum to repeal the law. *See infra* Part II; 2012 VOTING LAW CHANGES, *supra* note 2, at 10, 18.

[14] Wisconsin increased its residency requirements to 25 days from 10 days before someone can register to vote, while Florida passed a law barring voters who move between counties from updating their address at the polls. *See* 2012 VOTING LAW CHANGES, *supra* note 2, at 4, 34.

[15] At least nine states introduced bills to reduce early voting and four tried to reduce absentee voting opportunities. These included Florida, Georgia, Maryland, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Tennessee, West Virginia, and Wisconsin. *See* WEISER & NORDEN, *supra* note 1, at 29.

[16] *Id.* at 33 & 54 n.273.

[17] *Id.* at 34-35.

[18] *See generally* MYRNA PÉREZ, VOTER PURGES (2008), *available at* http://brennan.3cdn.net/5de1bb5cbe2c40cb0c_s0m6bqskv.pdf.

[19] Diana Kasdan, *State Legislatures Wind Down, Purge Programs Pick Up*, BRENNAN CENTER FOR JUSTICE (Aug. 27, 2012), *available at* http://www.brennancenter.org/blog/archives/state_legislatures_wind_down_purge_programs_pick_up/; *see also* Greg Allen, *World War II Vet Caught Up in Florida's Voter Purge Controversy*, NPR (May 31, 2012), *available at* http://www.npr.org/blogs/itsallpolitics/2012/05/31/154020289/world-war-ii-vet-caught-up-in-floridas-voter-purge-controversy; Sara Burnett, *Suthers Backs Gessler, Asks Homeland Security to Screen Voters*, DENV. POST (July 7, 2012), *available at* http://www.denverpost.com/breakingnews/ci_21044134/suthers-backs-gessler-asks-homeland-security-screen-voters#ixzz24KJvcs9P; Chris Tomlinson, *Agreement Ends Texas Voter Purge Before Election*, HOUS. CHRON. (Oct. 3, 2012), *available at* http://www.chron.com/news/article/Agreement-ends-Texas-voter-purge-before-election-3916744.php.

[20] Cindy George, *Dispute Over 'Dead' Voters in Harris County is Finally Resolved*, HOUS. CHRON. (Sep. 19, 2012), *available at* http://www.chron.com/news/houston-texas/article/Dispute-resolved-over-dead-voter-issue-3879081.php; Chuck Lindell, *State Settles Lawsuit on 'Dead' Voter Purge*, AUSTIN AMERICAN-STATESMAN (Oct. 3, 2012), *available at* http://www.statesman.com/news/news/state-regional-govt-politics/state-settles-lawsuit-on-dead-voter-purge/nSSdg/.

[21] Marc Caputo, Patricia Mazzei & Anna Edgerton, *Florida Sends Election Departments List of 198 Potential Noncitizens; Some May Have Illegally Voted*, MIAMI HERALD (Sep. 26, 2012), *available at* http://www.miamiherald.com/2012/09/26/v-fullstory/3022387/florida-sends-election-departments.html.

[22] Diana Kasdan, *The Nearly Non-Citizen Purges*, BRENNAN CENTER FOR JUSTICE (Sep. 14, 2012), *available at* http://www.brennancenter.org/blog/archives/the_nearly_non-citizen_purges/; *see also* Mary Winter, *Covering the Search for Noncitizen Voters*, COLUM. JOURNALISM REV. (Oct. 22, 2012), *available at* http://www.cjr.org/swing_states_project/covering_the_search_for_noncitizen_voters.php?page=all; Ivan Moreno, *CO Elections Chief Moving Fast on Citizens Check*, S.F. CHRON. (July 17, 2012), *available at* http://www.sfgate.com/news/article/CO-elections-chief-moving-fast-on-citizens-check-3714047.php#ixzz29qyqzsww; Ivan Moreno, *Colo. Won't Reveal Suspected Ineligible Voters*, S.F. CHRON. (Aug. 21, 2012), *available at* http://www.sfgate.com/news/article/Colo-won-t-reveal-suspected-ineligible-voters-3805284.php; Ivan Moreno, *300 More Suspected Noncitizens on Colorado Voter Rolls in 2nd Round of Checks*, WASH. POST (Oct. 23, 2012), *available at* http://www.washingtonpost.com/national/apnewsbreak-300-more-suspected-noncitizens-on-colorado-voter-rolls-in-2nd-round-of-checks/2012/10/23/1e06cba0-1d73-11e2-8817-41b9a7aaabc7_story.html.

[23] Moreno, *300 More Suspected Noncitizens on Colorado Voter Rolls in 2nd Round of Checks*, *supra* note 2.

[24] Complaint, *Judicial Watch, Inc. v. Husted*, No. 2:12-cv-792 (S.D. Ohio Aug. 30, 2012); Complaint, *Judicial Watch, Inc. v. King*, No. 1:12-cv-800 (S.D. Ind. June 11, 2012); Press Release, Brennan Center for Justice, Michigan Secretary of State Must Ensure Transparency, Fairness and Protect Voters' Rights (Oct. 10, 2012), *available at* http://www.brennancenter.org/content/resource/michigan_secretary_of_state_must_ensure_transparency_fairness_and_protect_v/

[25] Based on a new analysis of the voter challenger laws in all fifty states, the recent Brennan Center report, VOTER CHALLENGERS, makes the following key findings: challenger laws are susceptible to abuse, historically they have been used to suppress newly franchised groups, and in recent years they have been used to target voters of color, students, and voters with disabilities. NICOLAS RILEY, VOTER CHALLENGERS (2012), *available at* http://brennan.3cdn.net/9edfc63808b7bf0c09_y5m6iyf3a.pdf. These findings are consistent with an earlier Brennan Center report assessing voter challenges as one component of a broader spectrum of "ballot security" operations carried out by political operatives and private groups and that have the effect of suppressing eligible voters. WENDY WEISER & VISHAL AGRAHARKAR, BALLOT SECURITY AND VOTER SUPPRESSION: WHAT IT IS AND WHAT THE LAW SAYS (2012), *available at* http://brennan.3cdn.net/49ec3e9f92cd004786_iqm6baoz3.pdf.

[26] Nicolas Riley, *Challengers Can Cause Headaches at the Polls*, BRENNAN CENTER FOR JUSTICE (Aug. 31, 2012), *available at* http://www.brennancenter.org/blog/archives/challengers_can_cause_headaches_at_the_polls/; DEMOS & COMMON CAUSE, BULLIES AT THE BALLOT BOX: PROTECTING THE FREEDOM TO VOTE AGAINST WRONGFUL CHALLENGES AND INTIMIDATION (2012), *available at* http://www.demos.org/sites/default/files/publications/BulliesAtTheBallotBox-Final.pdf.

[27] RILEY, *supra* note 25 at 39 n.159; Order Granting Plaintiffs' Motion for Temporary Restraining Order at 3, Spencer v. Blackwell, No. C-1-04-738 (S.D. Ohio Nov. 1, 2004).
[28] Detailed information about each of these laws, including descriptions and dates of passage, can be found in the Brennan Center's report, 2012 VOTING LAW CHANGES, *supra* note 2.

[29] R. MICHAEL ALVAREZ & JONATHAN NAGLER, ELECTION DAY VOTER REGISTRATION IN CALIFORNIA 2 (2011), *available at* http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/CA%20EDR%20Report%20-%20FINAL%20APR%202011.pdf. The research suggests that the positive turnout effects are even higher for some demographic groups, including younger voters, those who have moved, and newly naturalized citizens. *Id.* at 4.

[30] Jordan Howard, *Maine People's Veto of Voter Registration Law to Be on Ballot*, HUFFINGTON POST (Sep. 9, 2011), *available at* http://www.huffingtonpost.com/2011/09/09/maine-peoples-veto-voter-registration-ballot-measure_n_955576.html; Eric Russell, *Mainers Vote to Continue Election Day Registration*, BANGOR DAILY NEWS (Nov. 9, 2011), *available at* http://bangordailynews.com/2011/11/08/politics/early-results-indicate-election-day-voter-registration-restored/.

[31] Glenn Adams, *Maine Voters Restore Election Day Registration*, BOS. GLOBE (Nov. 8, 2011), *available at* http://www.boston.com/news/local/maine/articles/2011/11/08/maine_voters_decide_on_election_day_registration/; Steve Mistler, *"We Spoke with One Voice:" Mainers Vote to Keep Election Day Registration*, MAINE SUN JOURNAL (Nov. 8, 2011), *available at* http://www.sunjournal.com/news/state/2011/11/09/we-spoke-one-voice-mainers-vote-keep-election-day-registration/1112913.

[32] Ann Sanner, *Ohio Election Law Foes OK to Resume Repeal*, REAL CLEAR POLITICS (Aug. 18, 2011), *available at* http://www.realclearpolitics.com/news/ap/politics/2011/Aug/18/ohio_election_law_foes_ok_to_resume_repeal_effort.html.

[33] Joe Guillen, *Another Voter Referendum: Ohio Secretary of State Certifies Signatures to Put Elections Law on Next Year's Ballot*, CLEVELAND.COM (Dec. 9, 2011), *available at* http://www.cleveland.com/open/index.ssf/2011/12/another_voter_referendum_ohio.html; Dave Harding, *Fair Elections Ohio Delivers 166,148 Additional Petition Signatures for HB194 Referendum*, PROGRESS OHIO (Nov. 22, 2011), *available at* http://www.progressohio.org/blog/2011/11/fair-elections-ohio-delivers-166148-additional-petition-signatures-for-hb194-referendum.html.

[34] Guillen, *supra* note 33.

[35] Joe Guillen, *Ohio House Votes to Repeal Controversial Election Law*, CLEVELAND.COM (May 8, 2012), *available at* http://www.cleveland.com/open/index.ssf/2012/05/ohio_house_votes_to_repeal_con.html.

[36] *Detailed Bill Information for H.B. 152*, MONT. LEGISLATURE, http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=152&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ= (last visited Oct. 25, 2012).

[37] *SF509 Status in Senate for Legislative Session 87*, MINN. LEGISLATURE, https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF509&ssn=0&y=2011 (last visited Oct. 25, 2012).

[38] *Actions for S.B. 3*, MO. LEGISLATURE, http://www.senate.mo.gov/11info/BTS_Web/Actions.aspx?SessionType=R&BillID=4065294 (last visited Oct. 25, 2012).

[39] *House Bill 351 Information/History*, N.C. GEN. ASSEMBLY, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?BillID=H351&Session=2011 (last visited Oct. 25, 2012).

[40] *Docket of SB129*, N.H. GEN. COURT, http://gencourt.state.nh.us/bill_status/bill_docket.aspx?lsr=420&sy=2011&sortoption=&txtsessionyear=2011&txtbillnumber=sb129&q=1 (last visited Oct. 25, 2012).

[41] Press Release, N.H. Gov. John Lynch, Governor Lynch's Veto Message Regarding SB 129 (June 27, 2011), *available at* http://www.governor.nh.gov/media/news/2011/062711-sb129.htm.

[42] Press Release, N.H. Gov. John Lynch, Governor's Veto Message Regarding SB 289 (June 27, 2011), *available at* http://www.governor.nh.gov/media/news/2012/062112-veto-sb289.htm.

[43] *Docket of SB289*, N.H. GEN. COURT, http://www.gencourt.state.nh.us/bill_status/bill_docket.aspx?lsr=2853&sy=2012&sortoption=&txtsessionyear=2012&txtbillnumber=SB289 (last visited Oct. 25, 2012).

[44] *Bill Tracking for SB1*, VA. GEN. ASSEMBLY, http://lis.virginia.gov/cgi-bin/legp604.exe?121+sum+SB1 (last visited Oct. 25, 2012).

[45] *Bill Tracking for HB9*, VA. GEN. ASSEMBLY, http://lis.virginia.gov/cgi-bin/legp604.exe?121+sum+HB9 (last visited Oct. 25, 2012).

[46] Press Release, Va. Gov. Bob McDonnell, Governor McDonnell Takes Action on 2012 General Assembly Legislation (Apr. 10, 2012), *available at* http://www.governor.virginia.gov/news/viewRelease.cfm?id=1197.

[47] Press Release, Va. Gov. Bob McDonnell, Governor McDonnell Signs SB 1 and HB 9 and Issues Executive Order (May 18, 2012), *available at* https://www.governor.virginia.gov/news/viewRelease.cfm?id=1263&printpage=Yes.

[48] *Id.*

[49] *Id.*

[50] *Detailed Bill Information for H.B. 180*, MONT. LEGISLATURE, http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=180&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ= (last visited Oct. 26, 2012).

[51] Letter from Gov. Rick Snyder to the Michigan Senate (July 3, 2012), *available at* http://www.michigan.gov/documents/snyder/SBs_754_and_803_letter_391314_7.pdf; Letter from Gov. Rick Snyder to the Michigan Senate (July 3, 2012), *available at* http://www.michigan.gov/documents/snyder/HB_5061_letter_391313_7.pdf.

[52] S.B. 754 (Mich. 2011), *available at* http://www.legislature.mi.gov/documents/2011-2012/billenrolled/Senate/pdf/2011-SNB-0754.pdf.

[53] S.B. 803 (Mich. 2011), *available at* http://www.legislature.mi.gov/documents/2011-2012/billenrolled/Senate/pdf/2011-SNB-0803.pdf.

[54] Following the veto of S.B. 803, Michigan Secretary of State Ruth Johnson nevertheless ordered local election officials to put a citizenship check-box on ballot applications. The secretary's directive was applied inconsistently across the state. Because of this, a federal court found that continuing to use the checkbox in the upcoming election would likely violate voters' rights to equal protection and thus prohibited use of the check-box for 2012. Order Granting Plaintiffs' Motion for a Preliminary Injunction, *Brayton v. Johnson,* No. 12-14114 (E.D. Mich. Sept. 7, 2012), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/OrderGrantingPreliminaryInjunction.pdf.

[55] H.B. 5061 (Mich. 2011), *available at* http://www.legislature.mi.gov/documents/2011-2012/billenrolled/House/pdf/2011-HNB-5061.pdf.

[56] *Legislative Document LB239,* NEB. LEGISLATURE, http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=12209 (last visited Oct. 26, 2012).

[57] Martha Stoddard, *Bill Would Require Photo ID to Cast Vote*, OMAHA WORLD-HERALD (Jan. 8, 2012), *available at* http://www.omaha.com/article/20120108/NEWS01/701089899#.

[58] Brent Martin, *Voter Photo ID Criticized as Costly, Unneeded During Capitol Rally*, NEB. RADIO NETWORK (Jan. 11, 2012), *available at* http://nebraskaradionetwork.com/2012/02/21/voter-photo-id-criticized-as-costly-unneeded-during-capitol-rally-audio.

[59] Kevin O'Hanlon, *Opponents Assail Voter ID Bill*, LINCOLN JOURNAL STAR (Lincoln, Neb.) (Feb. 21, 2012), *available at* http://journalstar.com/news/unicameral/opponents-assail-voter-id-bill/article_572ffe10-36b3-5289-9d18-cd2be7ad5b5.html.

[60] *Filibuster Kills Nebraska Voter ID Measure*, KEARNEY HUB (Kearney, Neb.) (Mar. 29, 2012), *available at* http://www.kearneyhub.com/news/local/article_99d5f964-79ad-11e1-b6f0-0019bb2963f4.html.

[61] *See generally Civil Rights Division Voting Case List*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/litigation/caselist.php (last visited Oct. 26, 2012) (listing all of the Department of Justice's cases brought under federal voting laws for over a decade).

[62] U.S. Attorney General Eric Holder, Speech at the Lyndon Baines Johnson Library and Museum (Dec. 13, 2011), *available at* http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-111213.html.

[63] *Id.*

[64] Letter from Thomas E. Perez, U.S. Assistant Attorney General, to C. Havird Jones, Jr., Tex. Assistant Deputy Attorney General (Dec. 23, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_122311.php.

[65] Specifically, the Department found that, according to the data submitted by South Carolina, non-white voters were nearly 20 percent more likely than white voters to lack acceptable IDs, and that approximately 82,000 already-registered non-white voters lacked IDs. *Id.*

[66] Harriet McLeod, *South Carolina to Sue Obama Administration Over Voter ID Law*, REUTERS (Jan. 10, 2012), *available at* http://www.reuters.com/article/2012/01/11/us-southcarolina-voterid-idUSTRE80A02520120111; Richard L. Hasen, *Holder's Voting Rights Gamble*, SLATE (Dec. 30, 2011), *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/the_obama_administration_s_risky_voter_id_move_threatens_the_voting_rights_act.html.

[67] *See Perry: South Carolina is at War with this Federal Government*, FOX NEWS (Jan. 16, 2012), *available at* http://nation.foxnews.com/gop-debate-south-carolina/2012/01/16/perry-south-carolina-war-federal-government (transcript of relevant portion of debate).

[68] Complaint, *South Carolina v. United States*, No. 1:12-cv-203 (D.D.C. Feb. 7, 2012).

[69] Letter from Thomas E. Perez, U.S. Assistant Attorney General, to Keith Ingram, Tex. Director of Elections (Mar. 12, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_031212.php.

[70] *Id.*

[71] Joint Status Report, *Florida v. United States*, No. 1:11-cv-01428 (D.D.C. Mar. 20, 2012).

[72] Letter from T. Christian Herren, Jr., Chief, Voting Section of the Civil Rights Division of U.S. Department of Justice, to J. Gerald Hebert and Stephen B. Pershing (Sept. 4, 2012).

[73] *Milwaukee Branch of the NAACP v. Walker*, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6, 2012).

[74] *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669 (Wis. Cir. Ct. Mar. 12, 2012), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Niessruling.pdf.

[75] *Milwaukee Branch of the NAACP v. Walker*, No. 2012AP557, 2012 WL 1020254, at *3 (Wis. Ct. App. Mar. 28, 2012).

[76] JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN (2005), *available at* http://www.brennancenter.org/page/-/d/download_file_50902.pdf.

[77] *Aziz v. Mayer*, No. 11AC-CC00449 (Mo. Cole Co., Div. IV, Mar. 27, 2012).

[78] *Gonzalez v. Arizona*, 677 F.3d 383, 398-403 (9th Cir. 2012) (en banc).

[79] According to the district court, "[b]etween January 2005 and September 2007, the number of applicants in 14 of Arizona's 15 counties unable (initially) to register to vote because of Proposition 200 was 31,550." Order; Findings of Fact and Conclusions of Law, Gonzales v. Arizona, No. CV-06-1268, at 13 (D. Ariz. Aug. 20, 2008).

[80] *League of Women Voters of Florida v. Browning*, ___F.Supp.2d ___, No. 4:11-cv-628, 2012 WL 1957793 (N.D. Fla. May 31, 2012).

[81] *Id.* at *11.

[82] Permanent Injunction and Order for Entry of Judgment, *League of Women Voters of Florida v. Browning*, No. 4:11-cv-628 (N.D. Fla. Aug. 30, 2012), *available at* http://www.brennancenter.org/page/-/Democracy/VRE/LWVF_v_Browning_Final_Order.pdf.

[83] *See, e.g.,* Press Release, League of Women Voters of Florida, League of Women Voters and Rock the Vote Announce Resumption of Voter Registration in Florida (June 6, 2012), *available at* http://thefloridavoter.org/files/download/355.

[84] *See Voter Registration Report Archives*, FL. DIVISION OF ELECTIONS, http://election.dos.state.fl.us/voter-registration/archives/index.shtml (last visited Oct. 26, 2012); *see also infra* note 117.

[85] *Florida v. United States,* ___ F.Supp.2d ___, No. 11-1428, 2012 WL 3538298 (D.D.C. Aug. 16, 2012).

[86] *Id.* at *23.

[87] *See* Response by the United States to Florida's Mot. for Judgment, *Florida v. United States,* No. 11-1428 (D.D.C. Sept. 9, 2012).

[88] Notice of County Early Voting Plans, *Brown v. Detzner,* No. 3:12-cv-00852, (M.D. Fla. Sept 14, 2012).

[89] *Texas v. Holder*, ___ F.Supp.2d ___, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012).

[90] *Id.* at *32.

[91] The federal court found methodological problems with both the plaintiffs' and the defendants' numerical estimates. *Id.* at *17-*26.

[92] Letter from Thomas E. Perez, U.S. Assistant Attorney General, to Keith Ingram, Tex. Director of Elections (Mar. 12, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_031212.php.

[93] *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

[94] *Applewhite v. Pennsylvania*, ___ A.3d ___, No. 71 MAP 2012, 2012 WL 4075899 (Pa. Sept. 18, 2012).

[95] Bob Warner, *Voter ID law may affect more Pennsylvanians than previously estimated*, PHILA. INQUIRER, July 5, 2012, *available at* http://articles.philly.com/2012-07-05/news/32537732_1_voter-id-new-voter-id-cards.

[96] *Obama for America v. Husted,* No. 12-4055, 2012 WL 4497211 (6th Cir. Oct. 5, 2012), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Opinion_006.pdf.

[97] Order in Pending Case, *Obama for America v. Husted,* Order List 568 U.S., (U.S. Oct. 16, 2012), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/staydenied.pdf.

[98] RUSSELL WEAVER & SONIA GILL, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, EARLY VOTING PATTERNS BY RACE IN CUYAHOGA COUNTY, OHIO, 1, 10 (2012), *available at* http://www.866ourvote.org/newsroom/publications/document/EarlyVoting_Cuyahoga_Report.pdf.

[99] *Northeast Ohio Coalition for Homeless v. Husted*, ___ F.3d ___, Nos. 12-3916, 12-4069, 2012 WL 4829033 (6th Cir. Oct. 11, 2012).

[100] *Id.* at *13, *20.

[101] Associated Press, *Ohio Judge Extends Provisional Ballot Counting*, REVIEW (East Liverpool, Ohio) (Oct. 25, 2012), *available at* http://www.reviewonline.com/page/content.detail/id/260611/Ohio-judge-extends-provisional-ballot-counting-.html?isap=1&nav=5038.

[102] *See Northeast Ohio Coalition for Homeless,* 2012 WL 4829033.

[103] *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 222 (6th Cir. 2011).

[104] *South Carolina v. United States*, ___ F.Supp.2d ___, No. 12-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012).

[105] *Id.* at *1.

[106] *Id.*

[107] *Id.* at *21 (Bates, J., concurring).

[108] *See id.* at *20 (Kollar-Kotelly, J., concurring).

[109] The winning arguments included several different claims under state constitutions in Wisconsin and Pennsylvania; claims under Section 5 of the federal Voting Rights Act in Texas, South Carolina, and Florida; claims under the First Amendment's right to free speech and association in Florida; claims under the federal Motor Voter law in Arizona; and claims under the U.S. Constitution's Equal Protection and Due Process Clauses in Ohio.

[110] *League of Women Voters of Florida v. Browning*, ___ F. Supp. 2d ___, No. 4:11cv628, 2012 WL 1957793 at *4 (N.D. Fla. May 31, 2012).

[111] *See* Jan Murphy, Observers Expect a 3-3 Split Decision from Pa. Supreme Court on Voter ID Law Challenge**,** PENNLIVE.COM (Sep. 13, 2012), *available at* http://www.pennlive.com/midstate/index.ssf/2012/09/observers_expect_a_3-3_split_d.html..

[112] *Applewhite v. Pennsylvania*, ___ A.3d ___, No. 71 MAP 2012, 2012 WL 4075899, at *3 (Pa. Sept. 18, 2012).

[113] Florida, Georgia, Illinois, Iowa, Kansas, New Hampshire, Rhode Island, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. 2012 VOTING LAW CHANGES, *supra* note 2.

[114] The thirteen states that have passed restrictive voting laws and executive actions with the potential to impact the 2012 election account for 165 electoral votes: Florida (29), Georgia (16), Illinois (20), Iowa (6), Kansas (6), New Hampshire (4), Rhode Island (4), South Dakota (3), Tennessee (11), Texas (38), Virginia (13), West Virginia (5), and Wisconsin (10).

[115] *See supra* note 82.

[116] The new rules for voter registration drives became effective on May 20, 2011. Florida Division of Elections, May 20, 2011 Emergency Regulations for Third-Party Voter Registration Organizations and Memorandum from Kurt S. Browning to Supervisors of Elections (May 19-20, 2011), *available at* http://brennan.3cdn.net/bf429fcd66bddff833_ivm6bbswt.pdf. On May 31, 2012, Judge Hinkle issued his order preliminarily blocking the most onerous rules. That order remained in effect while the parties negotiated a settlement and until a final permanent order was entered on August 30, 2012. During this yearlong period, plaintiffs League of Women Voters of Florida, Rock the Vote, and Florida PIRG Education Fund conducted no voter registration drives. And many other nonpartisan groups severely curtailed or delayed their voter registration drive activities. KASDAN, *supra* note 11, at 2 & n.9.

[117] An analysis of the Florida Division of Elections monthly reports of new voter registration applications received reveals that from June 1, 2011 through May 31, 2012, there were 597,576 new voter registration applications received. From June 1, 2007 through May 31, 2008, there were 695,589 new voter registrations received. This is a difference of 98,013 registration applications within the same 12 month cycle. Thus, there is a 14 percent decrease in new registrations when comparing the period when HB 1355 was in effect, before the 2012 presidential election, to the same months, when no similar restriction was in place, before the last presidential election. The monthly reports of new registrations, from which these numbers were calculated, are available at http://election.dos.state.fl.us/voter-registration/archives/index.shtml.

[118] Michael C. Herron and Daniel A. Smith, *House Bill 1355 and Voter Registration in Florida*, Presentation for the 2012 Annual Meeting of the American Political Science Association 20 (Sept. 12, 2012), *available at* http://www.dartmouth.edu/~herron/FloridaVoterRegistrationsHB1355.pdf.

[119] TEX. ELEC. CODE ANN. §§ 13.031(d)(3), 11.002(a)(5).

[120] Complaint, *Voting for America, Inc. v. Andrade*, No. 3:12-cv-44 (S.D. Tex. Feb. 13, 2012).

[121] Illinois lawmakers passed S.B. 1586 on July 5, 2011, which requires deputy registrars to return completed registration materials by first-class mail within two business days or by personal delivery within seven days. 10 ILL. COMP. STAT. 5/4-6.2(c), 5/5-16.2(c), 5/6-50.2(c). Previously, deputy registrars were required to return completed registration materials within seven days of receipt, regardless of the mode of delivery.

[122] KASDAN, *supra* note 11, at 5, 24 & n.96.

[123] WIS. STAT. ANN. §§ 6.02, 6.10(4).

[124] KAN. STAT. ANN. § 25-2908(h)(1). There are also exemptions for certain disabled persons, active duty service members, and those with a religious objection. *Id.* at § 25-2908(h)(1), (i).

[125] KAN. STAT. ANN.§§ 25-2908(d), 25-3104.

[126] TENN. CODE ANN. § 2-7-112(c)(2)(B). There are exceptions for certain individuals who are hospitalized or in nursing homes. *Id.* at § 2-7-112(a)(1).

[127] Those with a religious objection to being photographed and indigent voters who are unable to pay to obtain ID may execute an affidavit instead. TENN. CODE ANN. § 2-7-112(f).

[128] TENN. CODE ANN. § 2-7-112(e)(5).

[129] WEISER & NORDEN, *supra* note 1, at 4 & n.4; *see also* KEESHA GASKINS & SUNDEEP IYER, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION (2012) available at http://brennan.3cdn.net/f5f28dd844a143d303_i36m6lyhy.pdf; *Applewhite v. Pennsylvania*, No. 330 M.D. 2012 (Pa. Commw. Ct. Oct. 2, 2012); *Milwaukee Branch of the NAACP v. Walker*, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6, 2012).

[130] N.H. REV. STAT. ANN. § 659:13(I), (II)(g) - (h). The affidavit allows the secretary of state to conduct an investigation after the election concerning such voters' identities. *Id.* at § 659:13(IV).

[131] R.I. GEN. LAWS §§ 17-19-24.2(d), -24.3(b).

[132] VA. CODE ANN. § 24.2-643(B).

[133] WEISER & NORDEN, *supra* note 1, 34-35 (describing executive orders by governors of Florida and Iowa that "returned their state policies to *de facto* permanent disenfranchisement for all citizens convicted of felonies.");
2012 VOTING LAW CHANGES, *supra* note 2, at 23 (describing South Dakota law passed in July 2012 denying voting rights to persons with criminal convictions who are on probation).

[134] *See* Gary Fineout, *Study: Fewer Ex-Felons Back in Prison After Rights Restored*, HERALD TRIBUNE (July 21, 2011), *available at* http://politics.heraldtribune.com/2011/07/21/study-fewer-ex-felons-back-in-prison-after-rights-restored/.

[135] WEISER & NORDEN, *supra* note 1, at 34-35.

[136] *Id.*; Iowa Exec. Order No. 42 (July 4, 2005), *available at* http://brennan.3cdn.net/563fe831695be5a1fa_nwm6bvbik.pdf.

[137] S.D. CODIFIED LAWS § 12-4-18.

[138] 2012 VOTING LAW CHANGES, *supra* note 2, at 29 (describing Florida, Georgia, Tennessee, and West Virginia laws cutting back on early voting periods).

[139] *Florida v. United States,* ___ F. Supp. 2d ___, No. 11-1428, 2012 WL 3538298 (D.D.C. Aug. 16, 2012) at *15-16.

[140] *See* Response by the United States to Florida's Mot. for Judgment at 2, *Florida v. United States,* No. 11-1428 (D.D.C. Sept. 5, 2012); *see also* United States Notice to the Court, *Florida v. United States,* No. 11-1428 (D.D.C. Sept. 12, 2012).

[141] Notice of County Early Voting Plans, *Brown v. Detzner,* No. 3:12-cv-00852, (M.D. Fla. Sept 14, 2012).

[142] W. VA. CODE § 3-3-3(a).

[143] In Georgia, the legislature enacted an "advance voting" period during which voters can cast early ballots, which begins on the fourth Monday prior to each primary or general election and lasts until the Friday immediately prior to the election. Previously, early ballots could be cast at any time after the early ballots had been printed, which had to occur at least 45 days prior to the election. 2012 VOTING LAW CHANGES, *supra* note 2, at 5-6. In Tennessee the early voting period was shortened by two days to thirteen days in presidential primary elections, but no changes were made to the fifteen-day early voting period for general elections. *Id.* at 25-26.

[144] According to data from Florida's statewide voter registration and voter history file, which was analyzed by Professor Paul Gronke, a leading expert on early voting, 836,224 voters used the first five days of the 14 day-long early voting period and another 78,380 used the last Sunday. Amended Rule 26(a)(2)(B) Expert Report and Declaration of Paul Gronke PhD, Exhibits 9 & 10, *Florida v. United States*, No. 1:11-cv-1428 (D.D.C. May 14, 2012); *see also Florida v. United States*, ___ F. Supp. 2d ___, No. 11-1428, 2012 WL 3538298 (D.D.C. Aug. 16, 2012) at *18-19.

[145] In 2008, 15.5 percent of all black voters in Florida used the first five days of early voting, as compared to 9.3 percent of all white voters. And on the last Sunday, 4.21 percent of all black voters voted, as compared to 1.35 percent of white voters. Amended Rule 26(a)(2)(B) Expert Report and Declaration of Paul Gronke PhD, Exhibits 9 & 10, *Florida v. United States*, No. 1:11-cv-1428 (D.D.C. May 14, 2012); *see also Florida v. United States,* ___ F. Supp. 2d ___,
No. 11-1428, 2012 WL 3538298 (D.D.C. Aug. 16, 2012) at *18 ("African-American voters used the repealed days of early voting at rates nearly *double* those of white voters in 2008.") (emphasis in original).

[146] *See* Gronke Report at 10-11, Ex. 4, *supra* note 145.

[147] *See Florida v. United States,* 2012 WL 3538298, at *18; *see also* Gronke Report, *supra* note 145. The heightened use of early in-person voting among black voters is a pattern identified in Ohio as well. *See supra* note 98 and accompanying text.

[148] Georgia, Florida, Tennessee, and West Virginia.

[149] Nicole Flatow, *Pennsylvania Ads Still Suggest ID Required to Vote*, THINK PROGRESS (Oct. 15, 2012), *available at* http://thinkprogress.org/justice/2012/10/15/1010051/pennsylvania-ads-still-suggest-id-required-to-vote/.

[150] Press Release, ACLU, Judge Asked to Order Commonwealth of Pennsylvania to Stop Misleading Voters About the Need for ID on Election Day (Oct. 19, 2012), *available at* http://www.aclu.org/voting-rights/judge-asked-order-commonwealth-pennsylvania-stop-misleading-voters-about-need-id; Petition for Supp. Inj. to Enforce Court's October 2, 2012, Order, *Applewhite v. Pennsylvania*, No. 330 M.D. 2012 (Pa. Commw. Ct. Oct. 2, 2012), *available at* http://www.aclupa.org/downloads/Petition101912.pdf.

[151] In a review of election websites for large counties, inaccurate information about the status of the photo ID law was found on the websites for both Delaware County and the City of Philadelphia. Before the Brennan Center contacted election officials in mid October to correct the erroneous information, Delaware County's website include a newsletter instructing voters that "a new state Voter ID law requires all voters to show a valid photo ID to be eligible to vote at the polling place on Nov. 6." (Documentation on file with authors.)

[152] Ian Millhiser, *Pennsylvania Newspaper Owned by Top Right-Wing Funder Falsely Claims ID Is Required to Vote*, THINKPROGRESS, (Oct. 22, 2012), *available at* http://thinkprogress.org/justice/2012/10/22/1056351/pennsylvania-newspaper-owned-by-top-right-wing-funder-falsely-claims-id-is-required-to-vote/.

[153] *See* Laura Conaway, *You Do Not Need I.D. To Vote In Texas*, THE MADDOW BLOG, Oct. 26, 2012, at http://maddowblog.msnbc.com/_news/2012/10/26/14700827-you-do-not-need-id-to-vote-in-texas (reproducing copy of Texas mailing).

[154] Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, PS: POLITICAL SCIENCE, Jan. 2009, at 128 (reporting results from analysis of individual-level data based on nationwide surveys of voters in the 2006 general midterm election and 2008 presidential primary election). Specifically, Ansolabehere finds: "In the 2006 sample, 49% of respondents reported that the poll workers asked them to show photo ID when they voted. In the 2008 sample that figure had risen to 56%. This rate is strikingly high. In 2006 only two states actually required photo identifications; the other Voter ID states allowed poll workers to request ID. In other words, poll workers are using their discretion and asking voters to show photo ID." *Id.*

[155] "In the 2006 general election, 47% of white voters reported being asked to show photo identification at the polls, compared with 54% of Hispanics and 55% of African Americans. In the 2008 Super Tuesday primary states, 53% of whites were asked to show photo ID, compared with 58% of Hispanics and a staggering 73% of African Americans." *Id.*

[156] Ohio Secretary of State, Directive 2012-50 (Oct. 16, 2012) (setting early voting hours), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2012/Dir2012-50.pdf; *see generally supra* notes 96-98.

[157] *See supra* note 88.

[158] Section 5 of the Voting Rights Act of 1965 requires certain states and local governments with a history of racially discriminatory voting practices to "preclear" any proposed changes to their voting or election laws with the Department of Justice or a three-judge federal court. The purpose of the preclearance process is to ensure that the changes in election practices do not have a detrimental effect on minority electoral participation and representation.

[159] *Florida v. United States*, ___ F. Supp. 2d ___, No. 11-1428, 2012 WL 3538298, at *5 (D.D.C. Aug. 16, 2012) (citing FLA. STAT. § 101.657(d)).

[160] *See supra* note 88.

[161] *See* ERIKA WOOD AND RACHEL BLOOM, DE FACTO DISENFRANCHISEMENT 1 (2008), *available at* http://brennan.3cdn.net/578d11c906d81d548f_1tm6iiqab.pdf.

[162] PÉREZ, *supra* note 18, at 21; WEISER & AGRAHARKAR, *supra* note 25, at 5.

[163] WEISER & NORDEN, *supra* note 1, at 34; 2012 VOTING LAW CHANGES, *supra* note 2, at 23.

[164] Wisconsin Top Court Won't Hear State Voter-ID Case Quicky, http://www.businessweek.com/news/2012-09-27/wisconsin-top-court-won-t-hear-state-voter-id-case-quicky

[165] *Id.*

[166] *Husted v. Obama for America*, No. 12A338, 568 U.S. __ (Oct. 16, 2012) (order denying application for a stay), *available at* http://www.supremecourt.gov/orders/courtorders/101612zr_pm02.pdf; Brief of Amici Curiae, Michigan et al., *Husted v. Obama for America*, No. 12A338 (Oct. 12, 2012), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/AmicusMIetal.pdf.

[167] *Applewhite v. Pennsylvania*, No. 330 M.D.2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2102).

[168] *Applewhite v. Pennsylvania*, ___ A.3d ___, No. 71 MAP 2012, 2012 WL 4075899, at *1-*2 (Pa. Sept. 18, 2012).

[169] *Id.*

[170] *Applewhite*, 2012 WL 4497211, at *2 (noting that fewer IDs than expected had been issued at the five-week mark prior to the election).

[171] Those states and localities are: Alaska, Arizona, Georgia, Florida, Texas, Shelby County, Alabama; and Kinston, North Carolina. South Carolina also claimed that Section 5 of the Voting Rights Act was unconstitutional, but it did not directly challenge the law.

[172] *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009).

[173] *South Carolina v. United States*, ___ F. Supp. 2d ___, No. 12-203, 2012 WL 4814094, at *21.

[174] *See* WENDY WEISER, THE BATTLE OVER THE VOTE IN 2012, Lecture Delivered at Pitzer College (May 1, 2012), *available at* http://www.brennancenter.org/content/resource/the_battle_over_the_vote_in_2012/.

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VOTING LAW CHANGES IN 2012

Wendy R. Weiser and Lawrence Norden

Brennan Center for Justice *at New York University School of Law*

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. Our work ranges from voting rights to campaign finance reform, from racial justice in criminal law to presidential power in the fight against terrorism. A singular institution—part think tank, part public interest law firm, part advocacy group—the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

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EXECUTIVE SUMMARY

Over the past century, our nation expanded the franchise and knocked down myriad barriers to full electoral participation. In 2011, however, that momentum abruptly shifted.

State governments across the country enacted an array of new laws making it harder to register or to vote. Some states require voters to show government-issued photo identification, often of a type that as many as one in ten voters do not have. Other states have cut back on early voting, a hugely popular innovation used by millions of Americans. Two states reversed earlier reforms and once again disenfranchised millions who have past criminal convictions but who are now taxpaying members of the community. Still others made it much more difficult for citizens to register to vote, a prerequisite for voting.

These new restrictions fall most heavily on young, minority, and low-income voters, as well as on voters with disabilities. This wave of changes may sharply tilt the political terrain for the 2012 election. Based on the Brennan Center's analysis of the 19 laws and two executive actions that passed in 14 states, it is clear that:

- These new laws could make it significantly harder for more than five million eligible voters to cast ballots in 2012.[1]

- The states that have already cut back on voting rights will provide 171 electoral votes in 2012–63 percent of the 270 needed to win the presidency.

- Of the 12 likely battleground states, as assessed by an August *Los Angeles Times* analysis of Gallup polling, five have already cut back on voting rights (and may pass additional restrictive legislation), and two more are currently considering new restrictions.[2]

States have changed their laws so rapidly that no single analysis has assessed the overall impact of such moves. Although it is too early to quantify how the changes will impact voter turnout, they will be a hindrance to many voters at a time when the United States continues to turn out less than two thirds of its eligible citizens in presidential elections and less than half in midterm elections.

This study is the first comprehensive roundup of all state legislative action thus far in 2011 on voting rights, focusing on new laws as well as state legislation that has not yet passed or that failed. This snapshot may soon be incomplete: the second halves of some state legislative sessions have begun.

INTRODUCTION

Legislators introduced and passed a record number of bills restricting access to voting this year. New laws ranged from those requiring government-issued photo identification or documentary proof of citizenship to vote, to those reducing access to early and absentee voting, to those making it more difficult to register to vote. In total, at least nineteen laws and two executive actions making it more difficult to vote passed across the country, at least forty-two bills are still pending, and at least sixty-eight more were introduced but failed.

As detailed in this report, the extent to which states have made voting more difficult is unprecedented in the last several decades, and comes after a dramatic shift in political power following the 2010 election. The battles over these laws were—and, in states where they are not yet over, continue to be—extremely partisan and among the most contentious in this year's legislative session. Proponents of the laws have offered several reasons for their passage: to prevent fraud, to ease administrative burden, to save money. Opponents have focused on the fact that the new laws will make it much more difficult for eligible citizens to vote and to ensure that their votes are counted. In particular, they have pointed out that many of these laws will disproportionately impact low-income and minority citizens, renters, and students—eligible voters who already face the biggest hurdles to voting.

This report provides the first comprehensive overview of the state legislative action on voting rights so far in 2011. It summarizes the legislation introduced and passed this legislative session, provides political and legal context, and details the contentious political battles surrounding these bills.

Overall, legislators introduced and passed the following measures:

- **Photo ID laws.** At least thirty-four states introduced legislation that would require voters to show photo identification in order to vote. Photo ID bills were signed into law in seven states: Alabama, Kansas, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin. By contrast, before the 2011 legislative session, only two states had ever imposed strict photo ID requirements. The number of states with laws requiring voters to show government-issued photo identification has quadrupled in 2011. To put this into context, 11% of American citizens do not possess a government-issued photo ID; that is over 21 million citizens.

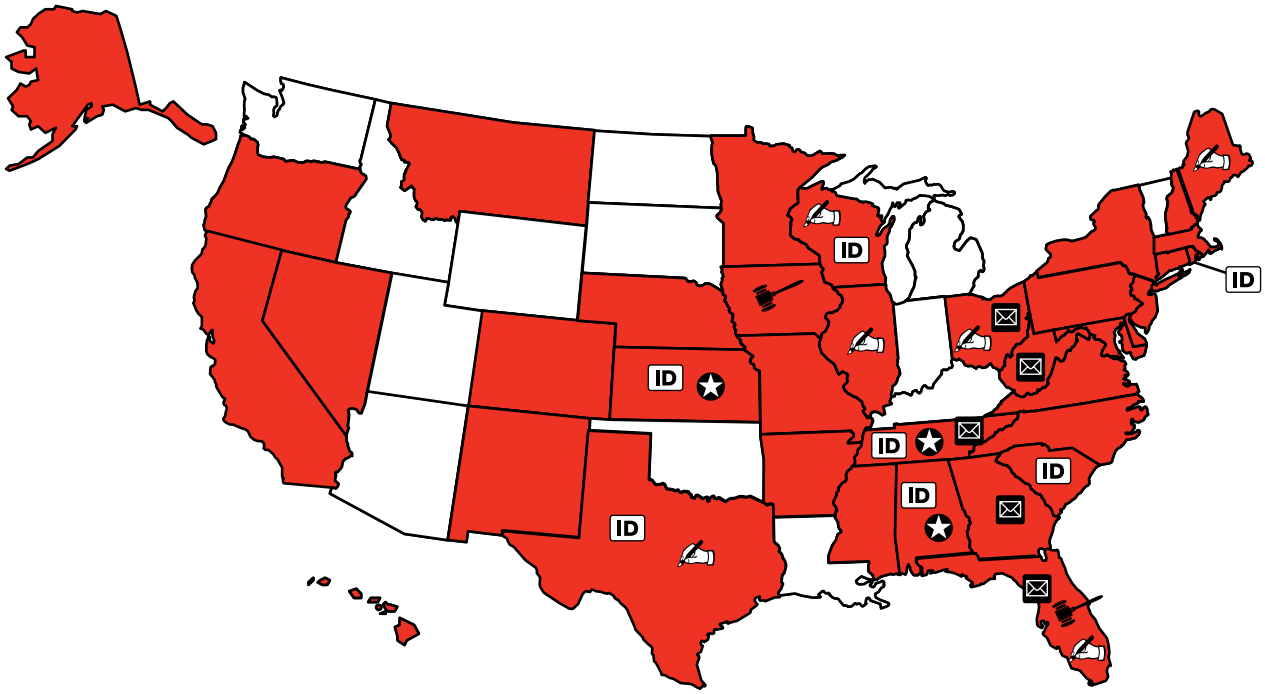
- **Proof of citizenship laws.** At least twelve states introduced legislation that would require proof of citizenship, such as a birth certificate, to register or vote. Proof of citizenship laws passed in Alabama, Kansas, and Tennessee. Previously, only two states had passed proof of citizenship laws, and only one had put such a requirement in effect. The number of states with such a requirement has more than doubled.

- **Making voter registration harder.** At least thirteen states introduced bills to end highly popular Election Day and same-day voter registration, limit voter registration mobilization efforts, and reduce other registration opportunities. Maine passed a law eliminating Election Day registration, and Ohio ended its weeklong period of same-day voter registration. Florida,

Illinois, and Texas passed laws restricting voter registration drives, and Florida and Wisconsin passed laws making it more difficult for people who move to stay registered and vote.

- **Reducing early and absentee days.** At least nine states introduced bills to reduce their early voting periods, and four tried to reduce absentee voting opportunities. Florida, Georgia, Ohio, Tennessee, and West Virginia succeeded in enacting bills reducing early voting.

- **Making it harder to restore voting rights.** Two states—Florida and Iowa—reversed prior executive actions that made it easier for citizens with past felony convictions to restore their voting rights, affecting hundreds of thousands of voters. In effect, both states now permanently disenfranchise most citizens with past felony convictions.



Legislation introduced

ID **Photo ID requirements passed**

Proof of citizenship passed

Restrictions on voter registration passed

Restrictions on early/absentee voting passed

Executive action making it harder to restore voting rights

I. VOTER IDENTIFICATION

A. Background

By far the most widespread legislative development this session involved bills to impose stricter documentary identification requirements on voters. Voter ID laws—especially those that require voters to show one of a small number of government-issued photo IDs to vote—have been the subject of intense debate over the past few election cycles, and the debate heated up this year.

Proponents of strict voter ID laws maintain that they are reasonable measures to prevent fraud by persons improperly casting ballots in the names of other registered citizens, real or imagined. They dispute that such laws will discourage voting by any group, claiming that photo IDs are needed for many aspects of modern life, including boarding an airplane or entering certain government buildings.[3] Opponents maintain that photo ID laws exclude large swaths of the electorate, since 11% of citizens—and an even greater percentage of low-income, minority, young, and older citizens—do not have state-issued photo IDs.[4] They argue that photo ID requirements are similar to a poll tax, whether or not the IDs are offered for free, because to obtain the necessary IDs citizens must produce documents that cost money, like passports and birth certificates.[5] Opponents also claim that impersonation voter fraud—the only type of fraud prevented by voter ID laws—almost never happens since our laws adequately protect against and punish such fraud.[6] Although the best available study found that strict voter ID laws reduce turnout, neither side can definitively demonstrate the extent of the effect on voter turnout, since such laws have not been in effect long enough to permit accurate study.[7] Each side also questions the other's motives.

Voter ID is nothing new—indeed, federal law requires every new voter who registers by mail to show ID before voting,[8] and a variety of states have additional common-sense ID requirements.[9] What is new, however, is the degree to which the voter ID bills that were proposed and passed this session were restrictive, excluding many common forms of photo and non-photo IDs, such as student IDs and Social Security cards, and offering no alternative mechanisms for eligible citizens without the selected IDs to cast ballots that will count. What also is new is the extent to which such restrictive bills passed this session.

Prior to the 2006 elections, *no* state required its voters to show government-issued photo ID at the polls (or elsewhere) in order to vote. In 2006, Indiana became the first state in the nation to do so. Although Georgia and Missouri passed photo ID laws at around the same time, both states' laws were blocked by courts on the ground that they interfered with the right of eligible citizens to vote—under the U.S. Constitution in Georgia's case and the Missouri State Constitution in Missouri's case.[10] In 2008, the U.S. Supreme Court upheld Indiana's voter ID law against a constitutional attack.[11] After lengthy litigation in response to which Georgia amended its voter ID law several times, Georgia's law was eventually upheld as well.[12] That law first went into effect in late 2007, making Georgia the second state in the nation to require its citizens to show photo ID at the polls.

Thus, as of the start of this legislative session, only two states had ever imposed strict photo ID requirements on voters, and only for a short period of time. Several other states—Florida, Hawaii, Idaho, Louisiana, Michigan, and South Dakota—also requested, and still request, photo ID from their voters at the polls, but if a voter in those states does not have photo ID, she can still cast a ballot that

will count after an alternative verification procedure, like a signature match or a sworn affidavit. The remainder of the states had more flexible voting identification requirements.[13]

B. Roundup of Legislative Developments

This year, at least thirty-four states introduced a record number of bills to require photo ID to vote.[14] As Jenny Bowser, senior fellow at the National Conference of State Legislatures, observed, "It's remarkable … I very rarely see one single issue come up in so many state legislatures in a single session."[15]

Photo ID bills passed and were signed into law in seven states to date: Alabama, Kansas, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin.[16] (The Alabama, South Carolina, and Texas laws cannot go into effect unless and until they are pre-cleared by either the U.S. Department of Justice or a federal court under the Voting Rights Act.) Bills also passed but were vetoed in five additional states: Minnesota, Missouri, Montana, New Hampshire, and North Carolina.[17] A number of additional states—including Pennsylvania[18]—still have active photo ID bills pending in ongoing legislative sessions. In New Hampshire, legislators failed to override the Governor's veto,[19] and in North Carolina, legislators could attempt to push a new voter ID bill despite the Governor's veto.[20]

In addition, Missouri legislators passed a ballot measure to amend the state constitution to allow the state to impose photo ID requirements on voters; the measure will appear on the state ballot in November 2012.[21] (If the measure passes, legislators will have to enact further legislation before a photo ID requirement could be imposed.) Supporters of strict voter ID in Mississippi similarly introduced a ballot initiative that will appear on the November 2011 ballot.[22]

C. What the Bills Say

In general, the photo ID bills that were introduced this session are more restrictive than those in prior sessions, including fewer forms of acceptable IDs, fewer exemptions, or fewer alternative mechanisms for eligible voters without the specified IDs to vote.

Those laws that have passed this session vary in several respects, including: (1) the types of photo ID that voters are permitted to show for voting; (2) whether the requirement to provide ID applies only to in-person voters or to those who vote by mail as well; (3) whether there are any exemptions from the requirement to provide ID; and, most importantly, (4) whether there is an alternative way for a voter who does not have an accepted form of photo ID to cast a ballot that counts. Detailed descriptions of each bill are included in the appendix to this report.

The types of ID permitted. With the exception of Rhode Island, each of the states that passed voter ID bills require voters to show government-issued photo IDs, though the list of acceptable IDs differs from state to state. All seven states accept an unexpired driver's license, non-driver's ID issued by a motor vehicle department, U.S. passport, or U.S. military photo ID. All states except for Kansas and South Carolina also accept U.S. naturalization documents bearing a photo. Alabama, Rhode Island, and Tennessee broadly accept any photo ID issued by state and federal governments, though Tennessee expressly excludes student IDs from consideration. Only Alabama, Kansas, and Rhode Island accept

student photo IDs issued by state institutions of higher education. Wisconsin purports to accept certain state-issued student IDs, but the state's new law imposes criteria for such IDs that few if any state schools' IDs meet. Kansas and Texas expressly allow concealed handgun licenses, and Alabama, Rhode Island and Tennessee accept such IDs as well. Only Alabama and Wisconsin accept a tribal ID card with a photo. Rhode Island is the only state that accepts non-governmental photo IDs for voting; indeed, any current ID with a voter's name and photograph suffices.

Who must show photo ID. All seven states require individuals appearing to vote in person at a polling place to show photo ID. Only Alabama and Kansas require all persons who vote absentee to submit a copy of their photo IDs with their mail-in ballots. Those states are now the first two states in the nation ever to require photo ID with absentee ballots. Wisconsin requires permanent absentee voters to submit a copy of their photo IDs, but only the first time they vote absentee. As a practical matter, all absentee voters in Wisconsin will have to provide a copy of their photo IDs when the law first goes into full effect in 2012.

Exemptions. Several states exclude certain categories of voters from the requirement to show photo ID for voting. Alabama exempts individuals who are entitled to vote absentee under federal laws protecting certain military and overseas voters and certain elderly and disabled voters. Wisconsin also exempts military and overseas voters, as well as voters designated as "confidential," such as police officers or domestic violence victims. It does not exempt elderly or disabled voters other than those indefinitely confined to certain care facilities. Tennessee exempts voters who are either hospitalized or in nursing homes. Texas exempts certain voters with disabilities who can produce a statement that they have been determined to be disabled by specified government agencies and do not have the required ID. And Kansas exempts only permanently disabled and absent military voters from its law, but allows persons over sixty-five to show expired photo IDs.

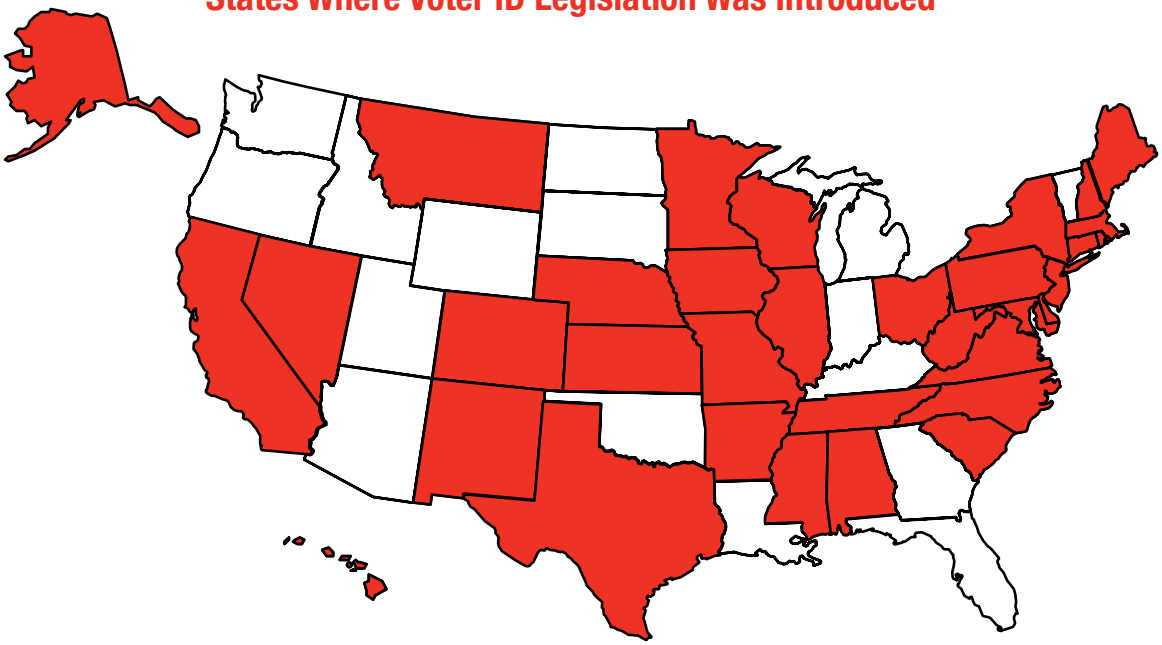
Alternative voting procedure. Three states—Rhode Island, South Carolina, and Tennessee—offer an alternative way for all or many voters who are unable to produce photo ID to vote and have their votes count. In Rhode Island, citizens who do not have photo ID must vote by provisional ballot, and election officials are directed to count all such ballots so long as the signature on the provisional ballot envelope matches the signature on the voter's registration. In South Carolina, persons who have a "reasonable impediment" to obtaining a photo ID or a religious objection to being photographed may cast a provisional ballot along with an affidavit explaining why they do not have ID. Election officials are directed to count those ballots unless there are grounds to believe the affidavit is false. In Tennessee, persons who cannot afford a photo ID or who have a religious objection to being photographed can swear an affidavit of identity and vote a regular ballot. These alternative means of demonstrating one's identity and voting without a photo ID separate these states' laws from the much stricter laws of Alabama, Kansas, Texas, and Wisconsin.[23]

Free IDs. The U.S. Supreme Court has made it clear that states that require their voters to present government-issued photo IDs for voting must make such IDs available to voters free of charge.[24] And indeed, each of the seven state laws provides a mechanism for free IDs for persons who need them for voting. Kansas and Tennessee specify that free IDs will be available only to those who swear an affidavit saying they need the ID for voting purposes and do not have other qualifying photo ID. It is not clear

whether those states or the others will sufficiently advertise their free ID offers so that eligible but indigent voters can obtain such IDs. For example, it appears that Wisconsin officials have taken the position that prospective voters must expressly request free IDs before one is offered; according to a key transportation official, "the statutory language specifically puts the onus on the customer for getting the ID for free for voting."[25] DMV officials reportedly turned away a Madison, Wisconsin voter when she did not have enough money to renew her photo ID because she did not specifically request a free ID for voting.[26] And a former state employee claimed that he was fired because he sent an e-mail to coworkers urging them to inform people that the free IDs had to be specifically requested.[27] It is unclear under the case law whether and under what circumstances states may be required to defray the costs of the documents voters need in order to obtain photo IDs—most notably birth certificates, which typically cost between $15 and $25.[28] Currently, only Kansas's law allows voters born in the state to obtain a birth certificate free of charge if needed to obtain ID for voting.

Effective Dates. The ID provisions for all of the new ID laws have effective dates on or before 2012, with two exceptions. The photo ID requirements in Alabama will not go into effect until 2014, if they are pre-cleared under the Voting Rights Act. The Rhode Island law goes into effect in 2012, but only partially; it allows either photo or non-photo ID (including, but not limited to, social security cards and government-issued medical cards) prior to 2014. Beginning in 2014, Rhode Island will allow only photo IDs at the polls.

States Where Voter ID Legislation Was Introduced



Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

Making it Harder for Students to Vote

A fair amount of attention has been paid this year to the impact of voter ID laws on students. Three of the seven photo ID bills to have passed—South Carolina's, Texas's, and Tennessee's—expressly do not allow students to use photo IDs issued by state educational institutions to vote, and Wisconsin's bill effectively excludes most student IDs as well.

When **Wisconsin**'s photo ID bill was first introduced, it too excluded all student IDs.[29] After substantial public debate and controversy,[30] the bill was amended to permit student IDs that meet certain criteria. The problem is that the student IDs currently issued by the University of Wisconsin system and various other schools do not meet those criteria. The University of Wisconsin would have to spend an estimated $1.1 million to issue new ID cards to students for its photo IDs to be accepted for voting purposes.[31]

Many question the fairness of voter ID laws that exclude government-issued photo IDs held by such a large segment of the population. This is especially the case with laws like Texas's, which does not allow voters to use student IDs but does allow them to use concealed weapon licenses for voting.[32] Some read into the fact that these bills exclude student IDs as a partisan motive to exclude certain groups of voters more likely to Democratic.[33]

The legislative targeting of students this session was not limited to voter ID laws. In **New Hampshire**, for example, Republican lawmakers introduced highly controversial legislation that would have prevented students and members of the military who previously lived elsewhere from acquiring voting residency in the state.[34] No other state singles out students or any other group for special voting residency requirements—and for good reason; as the Brennan Center pointed out, such a discriminatory rule clearly violates the U.S. Constitution.[35] The Speaker of the State House was notoriously caught on tape telling a Tea Party group that he supported the bill because students tend to vote Democratic. He said, "the kids [are] coming out of the school and basically doing what I did when I was a kid. Voting as a liberal. You know, that's what kids do. They don't have life experience and they just vote their feelings."[36] After strong public pressure, including opposition from both College Democrats and College Republicans, the bill failed on the House floor.[37]

The targeting of student voters has also gone beyond legislation. The newly-elected Secretary of State of **Maine** recently announced he was forwarding a list of 206 students who were registered to vote in the state but paid out-of-state tuition to law enforcement for voter fraud investigations.[38] But under Maine law, like in other states, the rules for tuition are very different from those for voting; many students meet the legal voting residency requirements while still being ineligible for in-state tuition.[39]

D. Legislative Battles

The voter ID battles this session differed from the past not only because the proposed laws were more restrictive but also because those pushing the bills prioritized them far more than their predecessors and commanded far greater legislative support. Another new feature of the legislative landscape was the reported involvement of the American Legislative Exchange Council (ALEC), a conservative group made up of state legislators and business and other interests. As in past sessions, voter ID bills were hotly contested along partisan lines, with Republicans largely supporting and Democrats largely opposing stricter ID requirements.

1. A High Priority After Years Without Success

State legislators across the country have been pushing strict photo ID requirements for almost a decade now, with little success before this year. In recent legislative sessions, a majority of states—though fewer than this year—saw the introduction of stricter voter ID bills.[40]

Although most voter ID bills did not advance very far in those years, there was a strong push in some states, especially where ID laws passed this year. Wisconsin's new voter ID law passed a decade after then-legislator and now-Governor Scott Walker first authored a photo ID bill; former Governor Jim Doyle vetoed the bill three times between 2002 and 2005.[41] In Kansas, legislators were successful in passing a voter ID bill in 2008, but it was vetoed by then-Governor Kathleen Sebelius. In Texas, strict voter ID bills came close to passage in both 2007 and 2009, but were blocked under a state procedure akin to the filibuster.[42] In 2009, legislators in the South Carolina House passed a photo ID bill over angry resistance from their Democratic colleagues,[43] inciting them to storm out of the session in protest.[44] In Tennessee in 2009, a voter ID bill passed the Senate, but died in the House.[45] In Mississippi in 2009, legislators fought so hard for a restrictive voter ID bill that they killed a compromise proposal to require photo ID because it was not strict enough—and the bill would have also permitted early voting.[46] In Alabama, a photo ID bill was part of the Republican Party's legislative agenda for more than a decade, with recent bills introduced in 2007, 2009, and 2010.[47] Following a failed bill in 2007,[48] Rhode Island's House passed a voter ID bill in 2009, but a Senate version stalled.[49]

In most states, however, strict voter ID bills did not advance very far before this year. Indeed, previously only two states (Indiana and Georgia) had ever implemented a photo ID requirement for voters. Between 2006 and 2011, no state passed a photo ID law. This year, in contrast, strict voter ID bills met with far greater success, passing twelve state legislatures—though ultimately vetoed in five—and passing one legislative chamber in at least six more.[50]

a. Change in Partisan Control

There are at least two major reasons for this change. The first is the stark shift in the partisan makeup of state legislatures after 2010. As noted, there is typically a sharp partisan divide over the issue of strict voter ID requirements, with Republicans generally pushing more restrictive measures and Democrats generally opposing them. This year, in every case but one, strict voter ID bills were introduced by Republican legislators. Newly elected legislators introduced about a quarter of these bills.[51]

As a result of Republican electoral success in state houses across the country in 2010, proponents of strict voter ID bills were able to garner much greater legislative support than in the past. In the 2010

elections, Republicans picked up at least 675 state legislative seats across the country.[52] Republicans therefore controlled both legislative chambers in twenty-six states, up from fourteen earlier in 2010.[53] In Wisconsin, for example, both houses switched to Republican control for the first time since 1998; Republicans gained fourteen seats in the Assembly and four in the Senate.[54] Similarly, in Alabama, Republicans won overwhelming majorities in both legislative chambers in 2010, and they made voter ID a priority.[55] With the exception of Rhode Island, every state that enacted stricter voter ID requirements this session had both houses and the governor's office controlled by Republicans.

Focus: Rhode Island and Ohio—Exceptions That Prove the Rule. As noted above, support and opposition to voter ID laws in state legislatures in 2011 fell almost entirely along partisan lines, with Republicans largely supporting and Democrats largely opposing stricter ID requirements. There were two notable exceptions.

In Rhode Island the photo ID bill that eventually became law was introduced by a Democratic legislator, passed two legislative chambers controlled by Democrats, and was signed by an independent governor. Senate sponsor Harold Metts said, "[I]n this day and age, very few adults lack one of the forms of identification that will be accepted, and the rare person who does can get a free voter ID card from the Secretary of State. While I'm sensitive to the concerns raised, at this point I am more interested in doing the right thing and stopping voter fraud."[56] But Rhode Island's bill is significantly less restrictive and differs substantially from the others that passed this session, in two major respects. First, unlike the other states that provide a narrow list of acceptable photo IDs, Rhode Island broadly accepts any ID with a voter's name and photograph.[57] Second, although Rhode Island now requires that all voters present photo ID before receiving a ballot in person, a voter without photo ID may sign an affidavit that she does not have a photo ID and cast a provisional ballot that will count if the signature on the ballot matches the voter's registration signature. In other words, a voter without photo ID can still cast a ballot that will count.

In Ohio the usual pattern was broken in a different way: a very restrictive photo ID bill was introduced by a Republican state legislator and uniformly opposed by Democrats, but it was ultimately defeated because of opposition from several prominent Republicans, including the Secretary of State.[58] In rejecting a proposal from the Ohio House that would only have allowed voters to present one of four types of government issued ID, Secretary Husted stated:

> I want to be perfectly clear, when I began working with the General Assembly to improve Ohio's elections system it was never my intent to reject valid votes. I would rather have no bill than one with a rigid photo identification provision that does little to protect against fraud and excludes legally registered voters' ballots from counting.[59]

The reaction of Husted and some of his fellow Republicans in the state senate may have something to do with the fact that Ohio is several years ahead of most of the country when it comes to acrimonious partisan fighting over election administration. In particular, the passage of a voter ID bill in 2005 by a Republican-controlled legislature, in a partisan battle typical of this year's fights, led to years of costly litigation and negative publicity about the new law.[60] That battle ultimately ended in a court-ordered settlement in 2009.[61] In the meantime, the new requirements received exceptionally harsh coverage from commentators and editorial boards across the state,[62] while election officials of both major parties complained that the

law was far too complicated and difficult to administer.[63] Given this history, it is perhaps not surprising that there were elected officials of both political parties who preferred to stay away from a proposal that would have imposed an even more restrictive set of ID requirements on Ohio voters.

b. Heightened Priority

The second reason for the greater success of photo ID bills this year is that legislators made them more of a priority than they had been in the past. Many of the Republican legislators and election administrators swept into office in 2010 made voter ID a significant campaign issue as well as a major legislative priority. Previously, it was rare for voter ID to become a campaign issue; in 2010, in contrast, newly elected Secretaries of State Matt Schultz of Iowa, Kris Kobach of Kansas, Scott Gessler of Colorado, and Dianna Duran of New Mexico all made voter ID a prominent part of their campaign platforms.[64] Newly-elected Wisconsin Governor Scott Walker similarly made voter ID a campaign issue in 2010.[65] Even before the legislative sessions began, state lawmakers had already pre-filed voter ID bills in a number of states.[66]

Focus: Texas. The Texas example is illustrative. After Republicans gained twenty-six seats in the State House, Texas State Representative Debbie Riddle camped out overnight in the State Legislature to be the first to pre-file voter ID legislation.[67] (As it turns out, her proposed bill was not the legislation that eventually passed.) Eager lawmakers introduced so many voter ID bills—at least fourteen—that a new "House Select Committee on Voter ID and Voter Fraud" was established to review the legislation. To ensure that more stringent voter ID rules would pass quickly, Texas Governor Rick Perry used emergency powers to alter the usual legislative process, declaring voter ID an "emergency item," allowing legislators to begin deliberation on voter ID bills immediately instead of waiting until after the first sixty days of the session, as is customary.

This rush came after at least six years of contentious and partisan debate in Texas on voter ID.[68] Democrats successfully blocked voter ID bills in the last three legislative sessions, under dramatic circumstances. In 2007, a Democratic senator on sick leave left his bed and rushed to the State Capitol to block a vote on proposed voter ID legislation. After casting the deciding vote to prevent debate, he went to the lounge and vomited.[69] That same session, another state senator rallied to block proposed legislation, despite the fact that he was suffering complications from a recent liver transplant and needed a hospital bed to be kept about one hundred feet from the Senate floor.[70] Two years later, in 2009, sparring[71] over a new voter ID proposal drove marathon hearings running for twenty-three hours straight.[72]

c. Support by Conservative ALEC

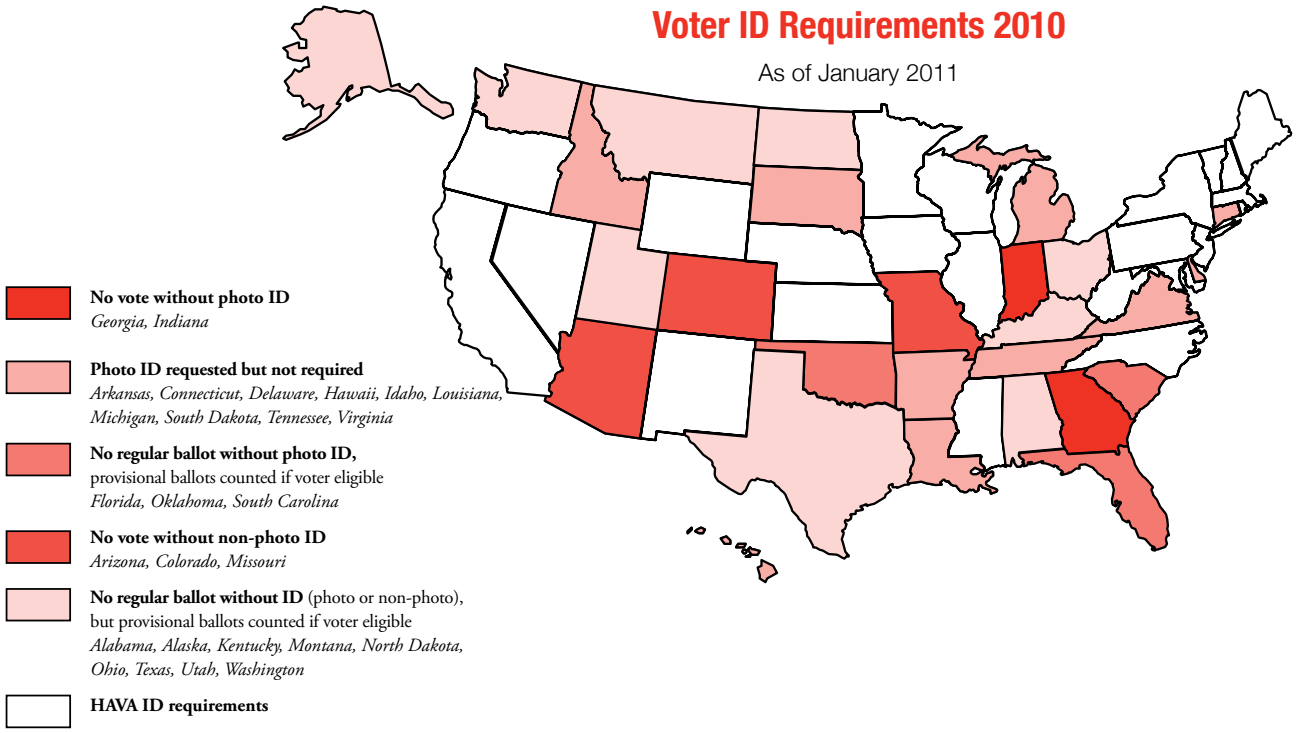
A third possible reason for the success of voter ID bills this year is the reported involvement of the American Legislative Exchange Council (ALEC), a powerful conservative group that brings together state legislators and private interests to develop and support state legislation and policy. According to the *New York Times*, "[m]any of [this session's voter ID] bills were inspired by the American Legislative Exchange Council, a business-backed conservative group, which has circulated voter ID proposals in scores of state legislatures."[73] In 2009, according to other media reports, not long after ALEC featured a cover story called "Preventing Election Fraud" in its member magazine, the organization adopted

model voter ID legislation and circulated it to its members across the country.[74] The voter ID bills that were eventually introduced and passed in the states this session all bear some resemblance to ALEC's model legislation. Although the extent of ALEC's involvement in voter ID legislation is unknown, the organization boasts that each year more than 1,000 bills based on its models are introduced in state legislatures, and that approximately 17% of those bills become law.[75] In addition to developing model bills, ALEC typically provides a range of support services to help advance the policies it supports, including trainings and seminars, studies, talking points, strategic plans, and action alerts.[76]

2. The Debate

As in previous legislative sessions, with the exception of Rhode Island, the debates over photo ID bills were highly charged and divided along partisan lines.

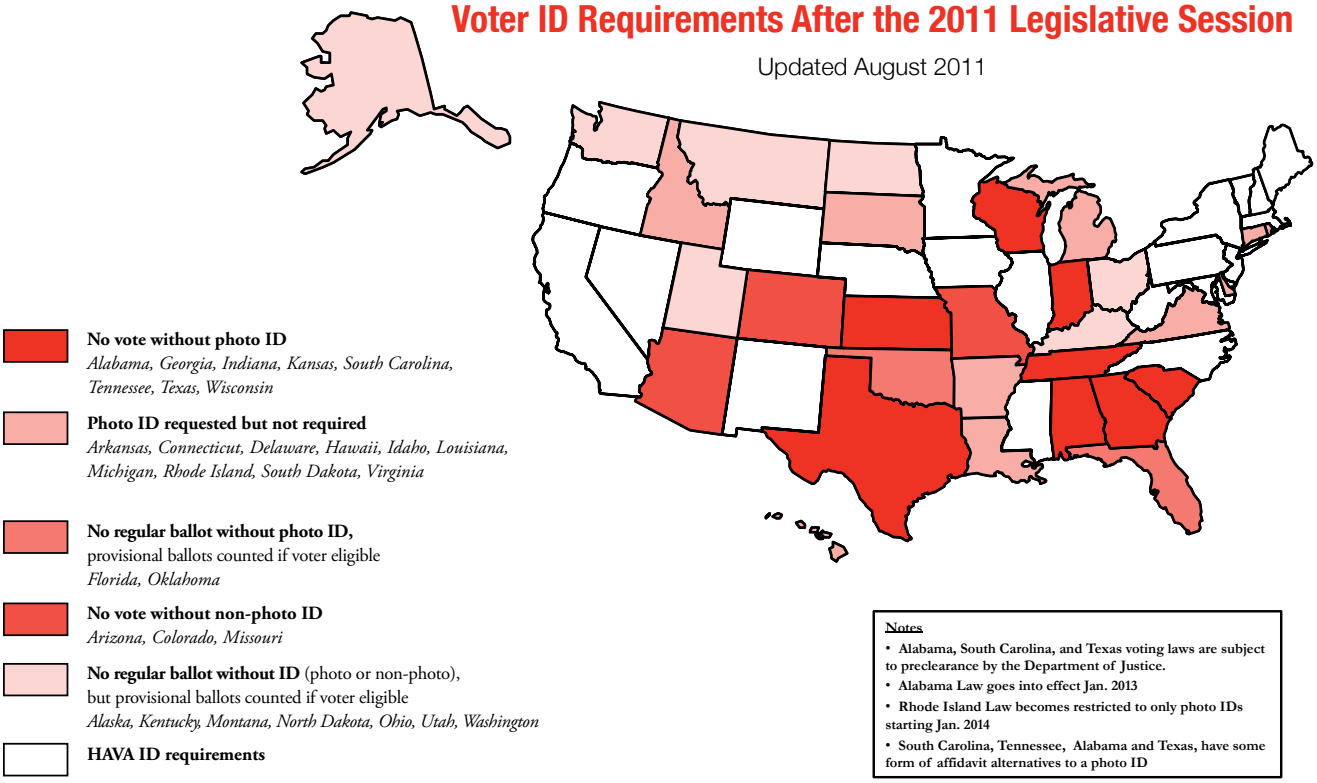
Nowhere was the debate more heated than in **Wisconsin**. There, Republican legislators considered passing the hotly contested photo ID bill while the Democrats were absent, boycotting the legislature to block the bill that eliminated collective bargaining rights for public employees.[77] Because the photo ID bill entailed significant costs for the state, state legislative rules prevented Republicans from proceeding unilaterally without a quorum. But the drama did not stop there. Once the Democrats returned, the State Senate passed the voter ID bill in a hasty and boisterous vote, denying opponents the opportunity to debate or speak out against the bill. Senate President Mike Ellis cut off the most senior member of the chamber, State Senator Fred Risser, to call a vote. Democratic members sought to stop the roll call, but President Ellis declared the bill passed once it had received enough votes. Some Democratic senators did not vote out of protest or confusion, and reportedly could not add their votes after the commotion was over.[78] Similarly, in **Alabama**, Senate leadership limited debate on the voter ID bill to twenty minutes.[79]



The debates were also characterized by a high level of mistrust between both sides. Opponents of voter ID accused proponents of attempting to shrink the electorate for partisan gain. Former President Bill Clinton, for example, asserted that voter ID laws are intended to specifically hurt Democratic voters, and that proponents "are trying to make the 2012 electorate look more like the 2010 electorate than the 2008 electorate."[80] Columnist E.J. Dionne wrote that "[s]ometimes the partisan motivation" behind these efforts "is so clear."[81] Proponents, on the other hand, accused proponents of trying to ignore or even foster voter fraud. According to one columnist, the Democrats' "rhetoric is over the top, probably because voter ID does get at the problem of voter fraud which—for some Democrats—is not so much a theory as a turn out model, a key to winning close elections."[82]

The content of the debate on voter ID bills was noteworthy for its consistency across the country. Proponents of photo ID bills consistently cited allegedly rampant voter fraud in their states and the need for greater ballot security to justify legislation. For example, in support of voter ID legislation, Kansas Secretary of State Kris Kobach relied upon 221 reported instances of voter fraud in Kansas between 1997 and 2010.[83] Similar claims were made by proponents of voter ID in other states.[84] Many also argued that voting is a "privilege" for which it is reasonable to require voters to expend effort.[85]

Opponents, on the other hand, argued that photo ID requirements will disenfranchise thousands of eligible Americans—especially low-income citizens, minorities, students, and older Americans.[86] They also pointed out that the kind of fraud addressed by ID requirements hardly ever occurs in American elections.[87] For opponents, voting is a fundamental right rather than a privilege. Thus, in explaining his veto of a photo ID bill, New Hampshire Governor John Lynch said, "[t]he right to vote is a



fundamental right … [The voter ID bill] creates a real risk that New Hampshire voters will be denied their right to vote."[88] And, as discussed below, opponents focused on the high costs of voter ID laws.

As voter ID laws were being considered across the country, members of Congress began weighing in on the issue, with a strong partisan divide. Upon achieving their new majority, House Republicans announced concerns about election administration and called for additional measures to "better protect the electoral process."[89] Congressional Democrats, on the other hand, decried the new push toward restrictive voter ID requirements. Representative John Lewis (D-GA) said, "this year's Republican-backed wave of voting restrictions has demonstrated that the fundamental right to vote is still subject to partisan manipulation."[90] Some congressional Democrats took to the house floor to denounce the new legislative efforts on voter ID, raising questions about the motives underlying those efforts. Congresswoman Marcia Fudge (D-OH), a leading opposition voice, charged that "these efforts have an all-too familiar stench of the Jim Crow era."[91] Representative G.K. Butterfield (D-NC) charged that the voter ID push "is a cynical and malicious Republican attempt to suppress minority and elderly voters who turned out in historical numbers for the '08 elections."[92] One hundred and fifteen Democratic House members signed a letter to Attorney General Eric Holder asking him to oppose the new voter ID provisions.[93] Voter ID was a prominent topic in a September 8, 2011 hearing before a Senate Subcommittee chaired by Senator Dick Durbin examining the rash of new state voting laws that threaten to suppress voter turnout across the country.[94]

3. When All Else Fails: Ballot Measures

Lawmakers who were unsuccessful in passing strict voter ID laws or whose laws were blocked by the courts have begun trying a new route: passing ballot measures to amend their state constitutions, as **Oklahoma** did in 2010. Oklahomans passed voter ID as a ballot measure in 2010, after a voter ID bill was vetoed by then-Governor Brad Henry. The new law—which is not nearly as restrictive as other measures introduced this year[108]—was implemented on July 1, 2011.

Though **Missouri** Governor Jay Nixon vetoed a photo ID bill this year, the Legislature passed a voter ID ballot measure, which cannot be vetoed, and which will be on the Missouri ballot in November 2012. The ballot measure would amend the State Constitution to allow the Legislature to impose stricter photo ID requirements on voters. This constitutional amendment effort comes five years after the Missouri State Supreme Court ruled a highly controversial voter ID law unconstitutional, noting that it would burden voters.[109] No state photo ID requirement can be imposed on Missouri voters unless the State Constitution is amended to overturn that decision. And even if the ballot measure passes, voters will not be required to show photo ID unless the Legislature passes and the Governor signs additional legislation.

Supporters of stricter voter ID have been pushing ballot measures in other states as well. A ballot measure requiring photo ID to vote will appear on the **Mississippi** ballot in November 2011.[110] In **Minnesota**, legislators in the House introduced a ballot measure to amend the State Constitution to require voter ID to counter this year's veto; the measure has not yet been introduced in the Senate.[111]

The Costs of Voter ID

The high cost of implementing voter ID laws was a big issue this session, when states were facing serious fiscal crises. States that pass voter ID laws must, according to court decisions, incur a range of costs, including the costs of providing free photo IDs to voters who do not have them, ensuring that IDs are reasonably accessible to all voters, and educating the public and election officials.[95] Although there was widespread agreement that voter ID laws entail necessary costs, there were disputes over what those costs would be, with bill opponents accusing proponents of dramatically understating the costs.[96]

The high cost of voter ID requirements caused local and county election officials in some states—including Iowa, Pennsylvania, and Wisconsin—to oppose new voter ID laws.[97] They also deterred legislators in Nebraska and Iowa, two states that considered, but did not pass, voter ID legislation this year.

Nebraska. The fiscal note attached to Nebraska's photo ID bill (L.B. 239), estimated negligible costs associated with its implementation, assuming that only voters who could prove they were indigent would be provided with free IDs.[98] Opponents argued that forcing voters to prove indigence before they could be provided with a photo ID could subject the bill to constitutional challenge, and argued that all IDs should be free.[99] The original sponsor of the bill, Senator Charlie Janssen, proposed an amendment the bill that would have added non-photo ID and voter registration confirmation cards to the list of acceptable forms of voting identification.[100] This drew a rebuke from Larry Dix, director of the Nebraska Association of County Officials, who said the amendment would increase costs for the counties without providing any extra security. "I don't see that the [proposed amendment] solves the problem at all," he said, "there's no security in that."[101] Ultimately, the bill failed to leave committee and therefore died when the legislative session ended.[102]

Iowa. The Iowa State Association of County Auditors (ISACA)—a bipartisan organization representing county auditors, who are responsible for administering elections at the county level—opposed the voter ID bill proposed in their state.[103] ISACA conducted an independent study of the impact of voter ID measures in Indiana, and found that the proposed Iowa bill would impose too high a cost and burden on local election jurisdictions to justify its adoption.[104] As one county auditor put it, the legislation would be an "unfunded mandate" on counties, who would have to bear the brunt of meeting the obligation of "educating the public and the voter [about the bill's requirements]."[105] As a result, the Association voted to officially oppose H.F. 95.[106] Both Democratic and Republican representatives in ISACA opposed the measure, with not one person voting to support it and with 16 of 60 county representatives choosing to remain neutral. According to Mike Gronstal, the Senate majority leader, the opposition from ISACA was one of the main reasons the bill ultimately failed.[107]

II. DOCUMENTARY PROOF OF CITIZENSHIP TO REGISTER OR VOTE

A. Background

In general, except for certain local elections, a person must be a U.S. citizen over eighteen years old to be eligible to participate in American elections. A voter typically establishes her eligibility by swearing an affidavit, under penalty of perjury, that she is a U.S. citizen of voting age and meets all the other eligibility requirements of her state (such as residency and lack of disqualifying criminal convictions).[112] A non-citizen or other ineligible person who falsely claims eligibility and either registers to vote or votes is subject to serious criminal penalties—including five years in prison and $10,000 in fines under federal law[113]—and also deportation.

Until recently, no state has ever required any voter to produce documentary proof of citizenship—or age or any other component of eligibility—to participate in elections. In 2004, however, as part of a broad-ranging ballot initiative, called Proposition 200, regulating the treatment of immigrants, Arizona for the first time passed a law requiring prospective voters to present documentary proof of citizenship in order to register to vote.[114] The Arizona law, which went into effect before the 2006 elections, specifically directs election officials to reject voter registration applications that are not accompanied by one of several specified citizenship documents,[115] thus denying those individuals the ability to vote. Until this year, this Arizona law was an outlier, unique in the country.

As of the start of this legislative session, only two states had ever sought to require documentary proof of citizenship for voter registration or voting.

Arizona's proof of citizenship law sparked significant controversy from the outset. In March 2006, the U.S. Election Assistance Commission, a bipartisan federal agency charged with regulating certain election administration matters, voted to reject Arizona's request to amend the federal voter registration application form to reflect the state's new rules.[116] Shortly afterward, the law was challenged in federal court;[117] it has been wrapped up in litigation ever since. In the most recent ruling in that case, a panel of the U.S. Court of Appeals for the Ninth Circuit held that the proof of citizenship requirement conflicts with federal law—specifically, the National Voter Registration Act of 1993.[118] The Ninth Circuit agreed to rehear that case *en banc*, and oral argument was held before a larger panel on June 21, 2011. The court has not yet issued its decision.

Georgia became the second state to pass a proof of citizenship law in 2009, requiring prospective voters to provide documentary proof of citizenship in order to register to vote.[119] This came after the Department of Justice blocked implementation of an earlier Georgia policy for checking the citizenship of registered voters as unreliable and discriminatory.[120] The Department of Justice ultimately approved of Georgia's proof of citizenship law in April 2011,[121] but the state has not yet put the law into effect.

Thus, as of the start of this legislative session, only two states had ever sought to require documentary proof of citizenship for voter registration or voting, only one had implemented such a requirement, and the legality of the requirement had not yet been resolved (and still is not resolved) in the courts.

The push for proof of citizenship requirements should also be considered in the context of the bills targeting immigrants that swept the states this year. Alabama, Arizona, Georgia, Indiana, South Carolina, and Utah are among the states that passed laws supposedly designed to restrict benefits for, and crack down on, undocumented immigrants.[122] As with Proposition 200, Arizona was the national leader in this effort, with its highly controversial H.B. 1070.

B. Roundup of Legislative Developments

This session, at least twelve states introduced legislation that would require documentary proof of citizenship to register or vote: Alabama,[123] Colorado,[124] Connecticut,[125] Kansas,[126] Maine,[127] Massachusetts,[128] New Hampshire,[129] Nevada,[130] Oregon,[131] South Carolina,[132] Tennessee,[133] and Texas.[134] Washington State introduced a resolution to request that any federal voting mandates make funding contingent upon the adoption of photo ID and proof of citizenship requirements.[135] Three proof of citizenship bills passed: in Alabama, Kansas, and Tennessee.[136] The new Kansas and Tennessee laws go into effect immediately; the Alabama law must await approval by the U.S. Department of Justice or a federal court under the Voting Rights Act.[137] To date, Alabama has not yet submitted the law for preclearance.[138]

C. What the Bills Say

The new Alabama and Kansas proof of citizenship laws are virtually identical. Like the 2004 Arizona law, both laws require prospective voters to provide documentary evidence of U.S. citizenship with their voter registration applicants, and election officials to deny registration to any applicant who does not provide satisfactory documentation.[139] Acceptable documents include: any driver's or non-driver's ID that includes a notation that the person submitted proof of U.S. citizenship, a U.S. birth certificate, a U.S. passport or U.S. naturalization documents, certain tribal IDs, and other rare documents.[140] The Alabama and Kansas laws apply only to new registrants; they specifically exempt all people already registered in the state, even those who move and must update their voter registration records.[141] Neither law includes any exceptions for prospective voters who were not previously registered. Both laws specify that applicants whose registrations are denied because they failed to include satisfactory proof of citizenship may challenge election officials' determination in court.[142] The bills that did not pass this session similarly would have required documentary proof of citizenship to register to vote.

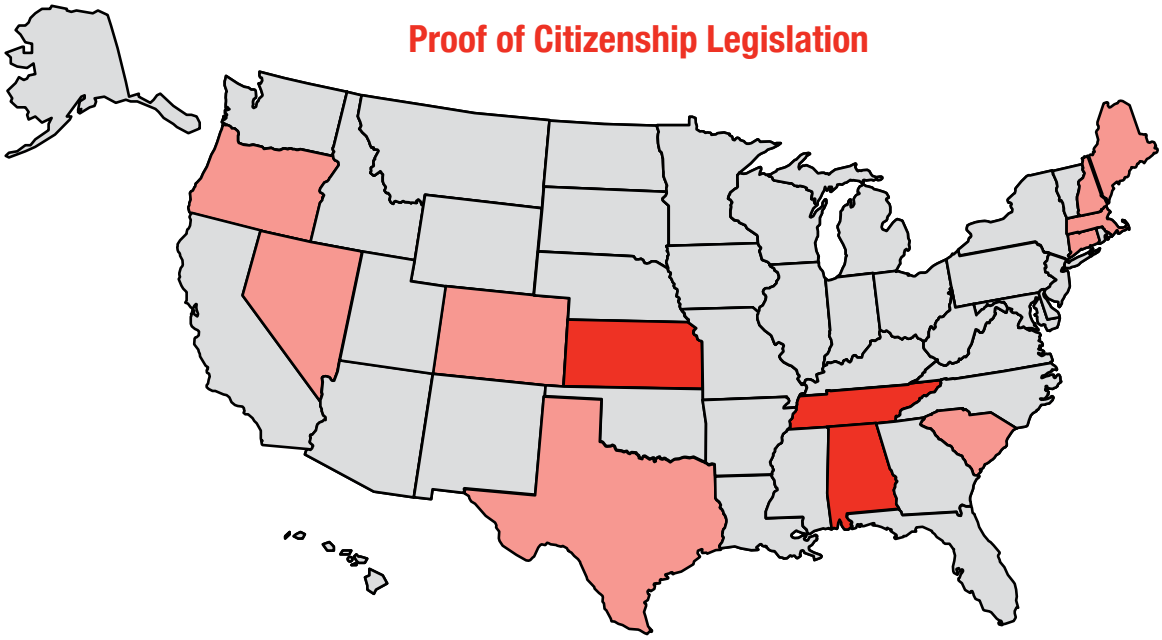
Unlike the Alabama and Kansas laws, the Tennessee law applies only to individuals flagged by state officials as potential non-citizens based on a database check. The Tennessee law therefore applies to a smaller number of prospective voters.

D. Legislative Battles

Legislative debate over proof of citizenship bills was at times rancorous. For example, in Colorado, Democratic legislators and others pressed Republican Secretary of State Scott Gessler on his claims of widespread voter fraud by non-citizens. One Colorado Democratic representative demanded that Mr.

Gessler turn over evidence of actual instances of non-citizens voting.[143] Another representative insisted that Mr. Gessler prosecute actual instances of voter fraud of which he was aware, suggesting that Mr. Gessler did not actually have any cases that could be prosecuted.[144] County clerks also demanded that Gessler turn over evidence of voter fraud, insisting that they were not aware of any such instances.[145]
The legislative debates over proof of citizenship mirrored those over voter ID. Proponents claimed that proof of citizenship requirements are needed to prevent non-citizens from illegally voting in elections. In several states, proponents claimed to have uncovered evidence of such illegal voting. Colorado Secretary of State Scott Gessler, for example, claimed that up to 11,805 non-citizens were registered to vote in Colorado,[146] while Kansas Secretary of State Kris Kobach claimed to have found 67 non-citizens illegally registered to vote in Kansas.[147] These claims were hotly disputed, and they have since been debunked.[148] Nonetheless, Representative Gregg Harper (R-MS) called the finding "shocking," and at a hearing he chaired on the topic, said, "[w]e simply cannot have an electoral system that allows thousands of non-citizens to violate the law and vote in our elections … [w]e must do more to protect the integrity of our electoral processes."[149]

Opponents, on the other hand, claimed that proof of citizenship requirements exclude large numbers of eligible voters, pointing out that millions of eligible Americans—at least 7% according to a leading study by the Brennan Center[150]— do not have ready access to the documents needed to prove citizenship. As Tennessee State Senator Thelma Harper said, "[i]t hampers people who want to be a part of the system."[151] Opponents further disputed the claim that there is a problem of non-citizen voting in American elections, pointing out that only a miniscule number of non-citizens have been found to have voted illegally, and that it is already easy to catch non-citizen voters since they leave a clear paper trail.[152]



Introduced (Colorado, Connecticut, Maine, Massachusetts, New Hampshire, Nevada, Oregon, South Carolina, and Texas.)

Passed (Alabama, Kansas, and Tennessee.)

III. MAKING VOTER REGISTRATION HARDER

In every state but one, citizens must be registered in order to vote. Voter registration facilitates election administration by enabling election officials to more easily plan for elections, process voters, and prevent fraud. But registration requirements can also function as a barrier to many eligible voters, preventing them from participating because of technical hurdles or missed deadlines.[153]

Experts have long pointed out that the nation's outdated registration system is among the most significant barriers to voting, resulting in the disenfranchisement of millions of Americans during every federal election.[154] In 2001, the Carter-Ford National Task Force on Election Reform found that "[t]he registration laws in force throughout the United States are among the world's most demanding … [and are] one reason why voter turnout in the United States is near the bottom of the developed world."[155] This impact has not abated: around 3 million Americans tried to vote in the 2008 Presidential election but could not, due to voter registration problems.[156]

The general thrust of the law over the past few decades has been to ease registration requirements to make it easier for eligible citizens to get on the voter rolls. The most significant advance was the National Voter Registration Act of 1993, also known as the "Motor Voter" law, which made voter registration opportunities widely available across the country.[157] More recently, states have taken the lead in modernizing their voter registration systems so that more voters are getting on the rolls and the rolls are getting more accurate.[158]

This year, the tide reversed. Instead of efforts to increase voter registration, this year new registration requirements have been instated that will make it more challenging for eligible citizens to ensure that they are registered to vote on Election Day. Voter registration regulations range from restrictions on individuals and groups who help register voters, to efforts to scale back Election Day and same-day registration, to new rules making it harder for voters to stay registered after they move.

Part 1: Voter Registration Drive Regulations

A. Background

Voter registration rates in the United States are routinely lower than they are in other democracies around the world: more than a quarter of voting-age Americans are not registered and thus cannot vote.[159] This is in part because, unlike in other democracies, U.S. state governments do not assume the responsibility of getting voters onto the rolls; instead, we rely on individual voters to ensure that they are registered. Community-based voter registration drives play an important role in encouraging and assisting other citizens to register to vote. Restrictions on voter registration drive activity have a direct impact on who has access to voter registration and who gets registered to vote.

Although community-based voter registration drives have been around in some form for decades, Congress helped expand such voter registration activity by passing the National Voter Registration Act of 1993 (NVRA).[160] Among other things, the NVRA greatly simplified voter registration application

forms, required states to follow uniform rules for accepting those forms, and required them to make blank forms generally available "with particular emphasis on making them available for organized voter registration programs."[161] As a result, civic groups were easily able to obtain and circulate voter registration forms to potential voters who might not otherwise register or become engaged in the electoral process.

Voter registration drives have become an increasingly important registration method in the past decade, especially for low-income citizens, students, members of racial and ethnic minority groups, and people with disabilities. For example, in the 2004 general election, large-scale voter registration drives report assisting almost 10 million citizens to register to vote, contributing to a surge in new registrations and increased turnout in that election. In one county in Florida alone, voter registration organizations were responsible for registering 62.7% of all newly registered voters.[162] Nationally, Census data show that Hispanic and African-American voters are approximately twice as likely to register to vote through a voter registration drive as white voters.[163]

Voting rights advocates point to increased voter registration rates, especially among minority, low-income, and younger citizens, as a positive effect of voter registration drives and a reason to expand them. They also cite recent falling voter registration rates as a reason to encourage voter registration drives. The 2010 election saw a plunge in new voter registrations, as new voter registrations in 2010 were down almost 17% from the 2006 cycle.[164] This was accompanied by a dramatic decrease in voter registration drive activity, for the first time in years. But voter registration drives have unfortunately become an increasingly controversial political topic.

Over the past few years, there has been a growing effort to push back against voter registration drives. Opponents have argued that voter registration drives are susceptible to fraud, citing allegations of fraud related to ACORN, a defunct organization that focused on registering low-income voters.[165] Presidential candidate John McCain cited allegedly fraudulent registration cards submitted by ACORN as "one of the greatest frauds in voter history in this country, maybe destroying the fabric of democracy."[166] Other opponents have argued that voter registration should be made more difficult to reflect the importance of the right to vote.[167] At the extreme end of the spectrum, some have argued that by specifically empowering low-income voters to register, voter registration drives are "antisocial and un-American."[168]

Recently, a number of state legislatures have pushed legislation to regulate and restrict community-based voter registration drives. This extensive regulation of voter registration drive activity is a unique government regulation of private political activity. These regulations have serious consequences for citizens' ability to organize and conduct voter registration drives; for example, the recent Florida law imposing a set of new restrictions on third-party voter registration activity (discussed at length below) has resulted in the volunteer-based League of Women Voters placing a moratorium on all voter registration work because the law imposes too great a burden on voter registration. The type and extent of laws governing voter registration have a direct impact on who gets to participate in the process, and who is permitted to assist them in doing so.

B. Roundup of Legislative Developments

Bills placing new restrictions on voter registration groups have been proposed in at least seven states—California (passed in both houses; awaiting governor's action), Florida, Illinois (pending), Mississippi (failed), Nevada (restrictions removed by amendment), New Mexico (failed), North Carolina (pending), and Texas.

These bills have been signed into law in Florida and Texas. Florida and Texas stand out as two states that have long histories of restricting voter registration drives, and the new laws passed in this session will make both states further outliers in limiting this activity. Neither state had reported cases of registration fraud linked to voter registration drives in the past election cycle, nor any other apparent precipitating cause for the further regulations imposed by these bills.

C. What the Bills Say

Although the bills seeking to regulate voter registration drives vary in their content, there are several recurring elements. Almost universally, these bills would require citizen registration groups to register with the state before undertaking a voter registration drive.[169] They may also require special training for volunteers; the use of special forms, disclosure, and reporting systems; or short deadlines for the submission of voter registration forms. Violation of these rules, or registering voters outside the mandated system, usually carries criminal or civil penalties. The legislation that succeeded this year is described below.

Florida. Florida's House Bill 1355, a mammoth 158-page omnibus bill, was signed by Governor Rick Scott on May 19th.[170] The new law requires voter registration groups to pre-register with the state before engaging in any voter registration activity, requires every volunteer or employee to sign a sworn affidavit under penalty of perjury listing all criminal penalties for false registration, and mandates that every registration form collected by a voter registration group be physically received by county officials within 48 hours of signature or face strict civil penalties and fines. In order to comply with this tight turnaround time, groups must write the precise date and time when an individual completes a voter registration form on each registration form. The law also requires voter registration groups to place their government-issued organizational code on each form they obtain from elections officials or receive from a voter, to track the precise numbers of both state and federal voter registration forms that each group obtains or collects, and to submit those figures in monthly electronic reports to the state.

Texas. Texas introduced a series of bills that would limit the ability of persons to register others to vote, two of which were signed into law (H.B. 1570 and H.B. 2194).[171] H.B. 1570 requires that anyone who registers voters first be deputized and attend a mandatory training; the law delegates the development of the training to the Secretary of State, and explicitly permits an "exam" at the end of the training.[172] H.B. 2194 requires anyone registering others to be a Texas resident and qualified voter, and prohibits performance-based compensation for anyone who is paid to register voters.[173]

D. Legislative Battles

The two bills signed into law in 2011 that restrict voter registration drive activity were uniformly supported by Republican legislators. In Florida, the law passed along straight party lines in the House of Representatives, with all Democrats opposing. Democrats were joined by two Republicans voting against the bill in the State Senate.[174] In Texas, which passed two companion bills restricting third-party voter registration, one bill passed unanimously,[175] while its companion bill passed only the Senate unanimously,[176] with seven House members, all Democrats of color, voting against the bill.[177]

Florida History

Florida has a history of implementing restrictive rules for voter registration drives—rules that have been successfully challenged before. (The Brennan Center for Justice has litigated twice in the past on behalf of Florida civic groups to challenge these restrictions.[178])

The first major imposition of restrictions on voter registration drives occurred in 2005, a year after ACORN's community organizing work resulted in enough signatures to place a citizen initiative on the ballot to increase Florida's minimum wage. The law required third-party voter registration groups to meet a new ten-day deadline to submit registration forms to election officials, no matter how far away the registration deadline, and imposed hefty and potentially unlimited fines for each form submitted after that time under a strict liability scheme. The law specifically excluded political parties from its new restrictions.

On May 18, 2006, the League of Women Voters of Florida and other voter registration groups and filed a lawsuit in federal court challenging as unconstitutional the 2005 Florida law regulating voter registration drives.[179] On August 28, 2006, a federal court in Miami blocked enforcement of the Florida law.[180]

After the state appealed that ruling, the Florida state legislature went back and reenacted a similar law with some changes in 2007, which the League and others also challenged.[181] During the lawsuit, the Secretary of State agreed not to implement the law before an administrative rulemaking process was completed. Civic groups were therefore able to resume their regular registration activities leading up to the 2008 election. In early 2009, the Florida Division of Elections proposed a final rule implementing the challenged statute in a way that reduced the negative impact on voter registration groups. The parties agreed to settle the lawsuit, and on June 17, 2009, the case was dismissed. The 2007 law has since been in effect.

2011 Debate in Florida

Between 2009 and 2011, there was no controversy in Florida involving voter registration and indeed nothing to suggest why the state legislature again took up the subject of restricting voter registration drives. Proponents of H.B. 1355, the omnibus voting bill that included new restrictions on voter

registration drives, merely claimed that they sought to reduce fraud. They also made it very clear that they wanted to make voting harder. The bill's sponsor, Florida State Senator Mike Bennett (R-Bradenton), was quoted as saying "But I have to tell you, I don't have a problem making it harder. I want people in Florida to want to vote as bad as that person in Africa who walks 200 miles across the desert. This should not be easy. This should be something you should do with a passion."[182] Florida State Senator Ellen Bogdanoff agreed: "Democracy should not be a convenience," she said.[183]

The new Florida law garnered broad opposition from civic and minority rights groups and prompted tens of thousands of emails to Governor Rick Scott urging him to veto the bill. Nonetheless, the law quickly passed on straight party lines and was signed into law, over strong opposition and condemnation by the Democratic Party. Shortly after its enactment, the all-volunteer Florida League of Women Voters and a variety of other voter registration groups announced they would discontinue their voter registration activities in the state. The League explained that the new law "imposes an undue burden on groups such as ours that work to register voters," [184] and that "we cannot and will not place thousands of volunteers at risk, subjecting them to a process in which one late form could result in their facing financial and civil penalties."[185]

The Florida law is currently being considered by a federal court for "preclearance," federal approval required for jurisdictions covered under Section 5 of the Voting Rights Act because of a history of discrimination. Section 5 requires covered jurisdictions to supply evidence that changes to a state's election laws will not harm minority voters before those changes may go into effect. Five of Florida's sixty-seven counties are covered jurisdictions, where H.B. 1355 remains on hold awaiting preclearance; Secretary of State Browning has ordered election supervisors in the sixty-two non-covered counties to implement the law. Voting rights advocates have submitted evidence to both the Department of Justice and the federal court arguing that the new restrictions on voter registration drives, as well as the bill's other provisions reducing early voting days and eliminating cross-county address changes at the polls, will disproportionately impact Florida's minority voters.

Impact of New Voting Laws on Minority Voters

Opponents of the bills and laws detailed in this report frequently point to their negative impact on the ability of African American and Latino citizens to vote, and with good reason: there is substantial evidence that these laws will make it far more difficult for minorities than whites to vote.

For instance, **Florida's** new law—which places so many new burdens on voter registration drive activity that most groups have discontinued their voter registration activities in the state—will almost certainly hit African American and Hispanic voters hardest. In Florida, U.S. Census Bureau data from the 2004 and 2008 election cycles show that both African-Americans and Hispanics rely more heavily than white voters on community-based voter registration drives; in fact, African-American and Hispanic citizens in Florida are more than twice as likely to register to vote through such drives as white voters.[186]

Similarly, the most restrictive voter ID laws, which only allow a small number of specified government issued photo IDs to vote, seem certain to create more burdens for minority citizens. According to one study, as many as 25% of African-American voters do not possess a current and valid form of government issued photo ID, compared to 11% of voters of all races.[187] And the kinds of government issued IDs that are permitted in the various state laws often put minorities at an even greater disadvantage. For instance, as noted above, the new **Texas** voter ID law, permits voters to use a concealed handgun license as proof of identity, but precludes voters from using a student ID, even if the student ID was issued by a state university. As the Texas Department of Public Safety recently noted, African Americans are significantly underrepresented among the state's handgun license holders. Of the more than 100,000 concealed handgun licenses issued in Texas last year, only 7.69% were issued to African Americans, even though African Americans constitute 12.1% of the state's voting age population. In contrast, African Americans are more likely to attend a public university in Texas than whites. According to the 2009 American Community Survey, 8.0% of voting-age African Americans in Texas attended a public university compared with only 5.8% of voting age whites.[188]

New restrictions on early voting will also have their biggest impact on people of color. Opponents of these restrictions have been particularly angered by the efforts to eliminate Sunday early voting, which they see as explicitly targeting African-American voters. **Florida** eliminated early voting on the last Sunday before Election Day, and **Ohio** has eliminated early voting on Sundays entirely. There is substantial statistical and anecdotal evidence that African Americans (and to a lesser extent Hispanics) vote on Sundays in proportionately far greater numbers than whites.[189] For instance, in the 2008 general election in Florida, 33.2% of those who voted early on the last Sunday before Election Day were African American and 23.6% were Hispanic, whereas African Americans constituted just 22.7% of all early voters for all early voting days, and Hispanics just 11.6%.[190]

Part 2: Eliminating Same-Day Registration

A. Background

Prior to 2011, eight states—Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, Wyoming—allowed for Election Day registration ("EDR"), meaning that citizens could register and vote at their local polling place on Election Day.[191] Maine was the first state to adopt EDR, in 1973; Iowa was the most recent, in 2008.[192] In 2007, North Carolina adopted same day registration for the early voting period, but not on Election Day.[193] Beginning in 2008, Ohio allowed same day registration for the first week of early voting.[194] (Other states provide for EDR in certain circumstances; for instance, in Connecticut and Rhode Island, voters who register on Election Day may vote for presidential candidates only.)

Voting rights advocates have long praised EDR.[195] Because it has existed in some states for nearly forty years, there is a substantial record of its benefits. States with EDR have consistently had higher turnout than states without, and the top five states for voter turnout in 2008 were all EDR states.[196] There is also evidence that EDR specifically increases turnout among young voters.[197]

Proponents of EDR point out that it greatly reduces the use of provisional ballots[198] (under federal law, provisional ballots are provided to voters when there is a question about the voter's eligibility, very often related to whether they are properly registered). Most voting rights advocates prefer the use of regular ballots to provisional ballots where possible, because a significant percentage of provisional ballots go uncounted in every election.[199]

The most common objection to EDR is that it "invites" voter fraud.[200] This has been the main public explanation provided by supporters of bills to end same day registration, though some have also argued that same day registration imposes administrative burdens on those running the polls on Election Day.[201]

Bills to eliminate same day registration in 2011 were uniformly sponsored by Republicans. The bills that passed the Montana and Ohio legislatures were unanimously opposed by Democratic legislators in the legislative chambers that voted on them.[202]

The partisan split over Election Day Registration has not always existed. When Maine became the first state to adopt EDR in 1973, the Republicans controlled both houses of the Legislature, and the proposal passed unanimously.[203]

B. Roundup of Legislative Developments

Bills to eliminate EDR or same day registration were introduced in five states: Maine, Montana, New Hampshire, North Carolina and Ohio. The bills in Maine and Ohio have been enacted, though both bills may be overturned in the coming months by ballot initiative processes currently underway in each state. The bill in Montana passed the legislature, but was vetoed by Governor Brian Schweitzer on March 4, 2011.[204] The bill in North Carolina is still pending.

C. What the Bills Say

Maine. On June 21, Governor Paul LePage signed a bill to repeal Maine's 38-year old law allowing same-day voter registration.[205] It was the oldest EDR law in the country. The Montana bill that was vetoed similarly would have eliminated EDR in that state.

Ohio. Beginning in 2008, the state of Ohio adopted what effectively became same day registration during the first week of early voting.[206] In both 2008 and 2010, the first week of early voting overlapped with the final week before the registration deadline, and meant that citizens were able to register and vote on the same day.[207] An omnibus election reform bill, signed by Governor John Kasich on July 1, substantially reduced the early voting period, thereby eliminating "Golden Week," and Ohio's *de facto* same day registration period.

North Carolina. Current law in North Carolina allows eligible voters to register to vote or update their registration information during the early voting period. A bill currently under consideration in the North Carolina Senate would eliminate same day registration (it would also reduce the early voting period, as discussed below) and the ability of voters to update their registration information during early voting.[208]

The Special Case of Ohio's Referendum

Ohio is no stranger to partisan fights over election law. With Republicans in control of both the Legislature and the executive branch this year, it is not particularly surprising that the state passed a new omnibus election law dramatically altering the state's election code. It was signed by Governor Kasich on July 1 and passed along party lines—without a single Democratic vote.[209] The bill, supported by the current Republican secretary of state of Ohio, impacted many areas of election administration.[210] Among the most significant changes relevant to this report, it cut the in-person early voting period by two thirds, eliminated early voting on Sundays, eliminated the state's *de facto* "same day registration" week during the early voting period, and forbade county boards of election from mailing out return-paid absentee ballot applications or absentee ballots.[211] Democrats argued that the bill would suppress votes, particularly votes of groups that traditionally favor Democrats, like African-Americans.[212]

Unlike minority parties in most other states, Democrats had a weapon that allowed them to fight changes to the election code even after they were passed into law: the Ohio referendum. Under the unique rules of that state, if opponents of the bill get enough signatures, all of the new provisions will be stayed until the referendum vote in November 2012.[213] Former Democratic Secretary of State Jennifer Brunner has led a petition drive to do just that.[214] If organizers gather enough signatures by September 29 to qualify for the referendum in November 2012, none of the bill's provisions will go into effect before the referendum.[215] That would mean, among other things, that Ohio would continue to operate under its old rules for early and absentee voting in 2012.

D. Legislative Battles

Efforts to repeal same day registration fell almost entirely along partisan lines. In states where repeal proposals received votes, most or all Republican legislators supported the repeal, and all Democratic legislators opposed it.[216]

A primary argument of those seeking repeal was that same day registration increased the possibility of fraud. "When you're able to register and vote on the same day, there's simply not the time to go and make sure that the registration is proper," argued Ohio State Senator Mark Wagoner.[217] Legislators seeking repeal also frequently emphasized the responsibility of the voter to ensure she could vote on Election Day. Maine Senate Republican Nichi Farnham stated "If it is something that's so important, our right to vote, then why would it be a problem to plan ahead to register?"[218]

In contrast to other states, proponents of the EDR repeal in Maine often placed more emphasis on the administrative burden of EDR than fraud, perhaps because of EDR's long history there, and the absence of evidence of voter fraud during that time.[219] Republican Secretary of State Charles E. Summers, Jr. wrote in an op-ed that "I have never argued that this is a measure necessary to prevent voter fraud … In fact, I have stressed repeatedly that this bill has been designed to relieve some of the stress on the system."[220] Proponents of EDR in Maine have responded to this argument by pointing out that elimination of EDR means the state must adopt a system for provisional ballots,[221] which comes with its own additional costs and administrative burdens.[222]

"The notion that same day voter registration leads to voter fraud is a myth . . . This is a solution in search of a problem."

—Maine Rep. Mark Dion

Not surprisingly, opponents of repeal were unanimous in disputing claims that same day registration invited fraud. Montana Representative Bryce Bennett pointed to the fact that the current Secretary of State and two of her predecessors all argued that EDR had not led to any fraud.[223] Maine Representative Mark Dion made similar comments about EDR in his state. "The notion that same day voter registration leads to voter fraud is a myth . . . This is a solution in search of a problem."[224]

Opponents of repeal also pointed to the benefits of EDR, including increased registration among the young and those who moved shortly before Election Day, greater voter turnout, and greater convenience for voters. Montana Secretary of State Linda McColloch argued that since its passage in 2006, 19,000 people registered to vote on Election Day in Montana, and that the repeal attempt ran "counter to the core freedoms of our democracy … [i]f you support freedom, and you support democracy, you cannot support a bill that will turn your neighbors away at the polls."[225]

Focus: Maine and the People's Veto

Because Maine has a referendum process known as "the People's Veto," which allows Maine citizens to reverse a legislative decision, it is not clear that the repeal of EDR will be in effect on Election Day. On

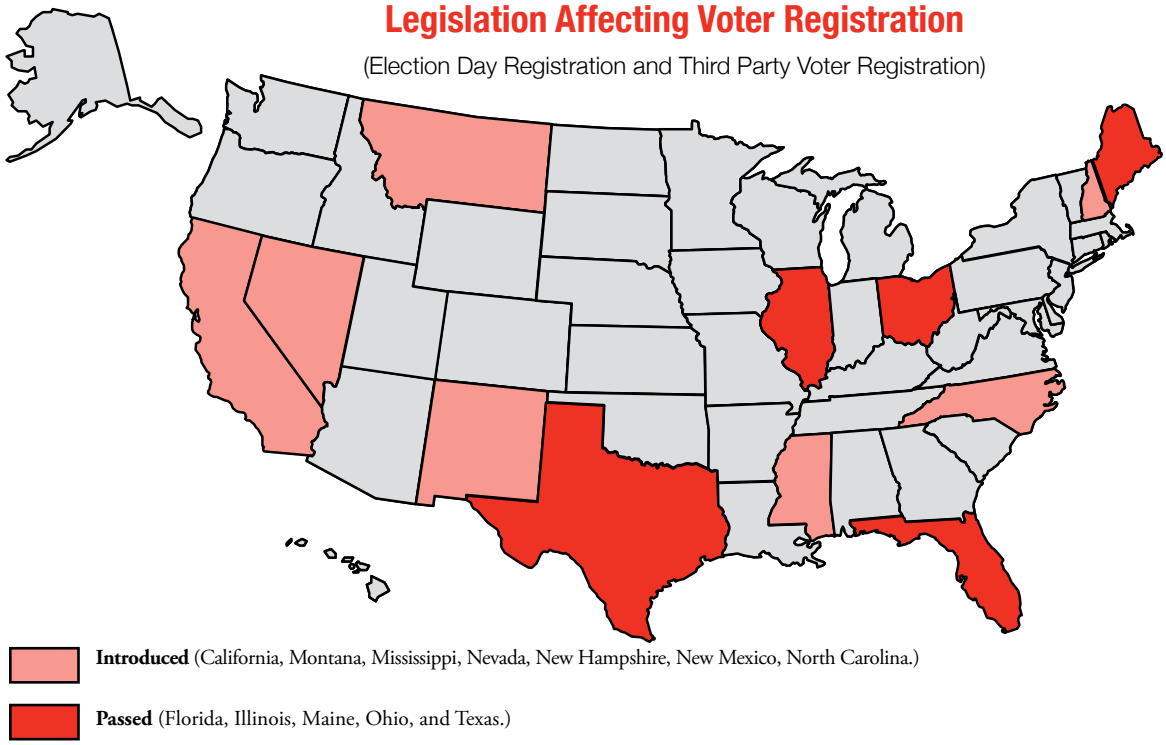
June 21, the same day that Governor Paul LePage signed the bill to repeal EDR, a coalition led by the League of Women Voters of Maine filed papers to launch a People's Veto campaign. They have gathered enough signatures to get the question on the November 2011 ballot.[226] It will appear as question number one on the ballot.[227]

Part 3: Other Restrictions on Voter Registration

While attempts to limit voter registration drives and same day registration were the most widespread efforts to restrict voter registration this year, there have been additional, state-specific efforts that will make it more difficult for voters to ensure that they are registered and able to vote at their current addresses on Election Day. We provide two examples of these new limitations below.

Florida. Though Florida does not have Election Day registration, it does have a longstanding policy permitting voters who changed their address before an election to update their new address at the polls on Election Day, where the voters' existing registrations were cross-checked in a state database before the voters were given a ballot. The Florida omnibus bill eliminated that right. This has the potential to disenfranchise a significant number of voters in Florida, especially those who move and are unaware of the change in law or who move within the state after the registration deadline.

Wisconsin. Wisconsin also worked to limit voter registration possibilities. Though commonly known for its voter ID provisions, there are other voter registration restrictions in the new Wisconsin election law, including extending the length of residency period before an eligible person may register to vote from ten to twenty-eight days.



IV. MAKING VOTING HARDER: RESTRICTING EARLY IN-PERSON AND MAIL-IN ABSENTEE VOTING

A. Background

For years, the growth of early voting—through in-person early voting sites and no-fault absentee voting by mail—has been dramatic, and seemed unstoppable. 2011 marks the first year that inexorable progress may have stalled. Early in-person and absentee voting have come under attack by legislatures around the country; these attacks have been particularly successful against early in-person voting.

The numbers tell the story of early voting's growth in just the last decade. In 2000, an overwhelming majority of Americans still voted at their local polling places on Election Day; less than 4% voted at early voting sites, and only 10% voted by mail. By 2008, more than a third of American voters voted early. The percentage of Americans voting at early voting sites had increased nearly five-fold, to 18%, and the percentage voting by mail nearly doubled to 19%.[228]

The primary benefit of early voting is convenience. Voters are provided more options and days during which they can vote.[229] While there is little evidence that early and absentee voting increase turnout,[230] there is strong anecdotal evidence that it makes election administration easier, reducing the crush of voters at the polling place on a single day.[231] In the past, that Election Day crush has led to hours-long lines, and resulted in the *de facto* disenfranchisement of tens of thousands of voters.[232]

Through much of its growth, early voting has had strong support from both Democrats and Republicans.[233] In 2011, most, though not all, of the new restrictions on early voting have been proposed by Republicans and adopted by Republican-controlled legislatures.

As discussed below, the reasons most often provided for restricting early voting were cost and administrative burden, though they sometimes also included arguments that the restrictions would reduce fraud.[234] Opponents of the new restrictions frequently disputed the alleged savings,[235] and many argued that the changes were really a response to the success in 2008 of Barack Obama's campaign to get the candidate's supporters—and in particular black voters—to vote before Election Day.[236]

B. Roundup of Legislative Developments

At least nine states—Florida, Georgia, Maryland, Nevada, New Mexico, North Carolina, Ohio, Tennessee, West Virginia—all considered bills to reduce their respective early voting periods this year.[237] At least four states—Georgia, New Jersey, Ohio, and Wisconsin—saw the introduction of bills to change or add new restrictions on absentee voting.[238]

Texas introduced a law that would omit early voting locations from official notices of a general or special election, but the measure did not pass.[239] In Wisconsin, a provision to eliminate no-excuse absentee voting was later removed from the state's voter ID bill.[240]

Ultimately, laws reducing early voting were passed and signed into law in five states: Florida, Georgia, Ohio, Tennessee, and West Virginia. Pending bills remain in North Carolina, Georgia, and New Jersey.

C. What the Bills Say

Ohio. As already discussed, Governor Kasich of Ohio signed into law an omnibus election reform bill on July 1. Among other things, this new law also substantially reduced early in-person voting and access to vote by mail. Under the new law, the in-person voting period was cut by more than two thirds, from thirty-five days to eleven.[241] Early voting on Saturday afternoon and Sunday was eliminated entirely.[242]

Controversially, the new law also prohibited county boards from mailing absentee ballot applications to all voters, or prepaying postage on absent voter's ballot applications.[243] Both practices were employed by Franklin (Columbus) and Cuyahoga (Cleveland) counties in past elections, and were credited by some voting rights advocates and election officials with reducing congestion at the polls on Election Day, and eliminating equity issues associated with requiring voters to pay to mail in their ballots.[244] Proponents of this ban, including Secretary of State Jon Husted, supported it on the grounds that all counties should adopt the same practices with regards to absentee ballots, and some counties could not afford to mail absentee ballot applications to all voters or prepay postage on those applications.[245] The impact of this law may have been largely thwarted by the Cuyahoga County Council, which voted to have its public works department oversee mailings of absentee ballot applications to all voters (the ban only applied to elections boards). As a result, Secretary Husted—arguing that uniformity in county practices was of paramount concern—decided that the State will mail absentee ballot request forms to voters in *all* counties ahead of the 2012 presidential election.[246]

Florida. The same Florida law that led the League of Women Voters to discontinue its voter registration operations also reduces the early voting period from two weeks to one. Florida also eliminated the Sunday before Election Day as an early voting day.[247]

Other states with new laws. In **Georgia**, on May 13, Governor Nathan Deal signed H.B. 92 into law, which reduces the early voting period from forty-five to twenty-one days.[248] In **Tennessee**, in June, Governor Bill Haslam signed S.B. 923[249] which shortens the early voting period by two days. In **West Virginia**, on March 18, Governor Earl Ray Tomblin signed S.B. 581, which reduces early voting by five days, but allows early voting on Saturdays for the first time.[250]

Pending bills. In **Georgia**, H.B. 138 would limit when in-person absentee ballots may be cast by requiring that when an absentee ballot is requested in person during the early voting period, the absentee ballot must be cast within the registrar's office at that same time.[251] In **New Jersey**, S.B.1596 would end no-excuse absentee voting.[252] In **North Carolina**, S.B. 657 would cut down the early voting period by one week and eliminate Sunday voting.[253] Another election law bill, S.B. 47, also originally contained a provision that would eliminate Sunday early voting. That provision, however, has since been removed from the bill. [254]

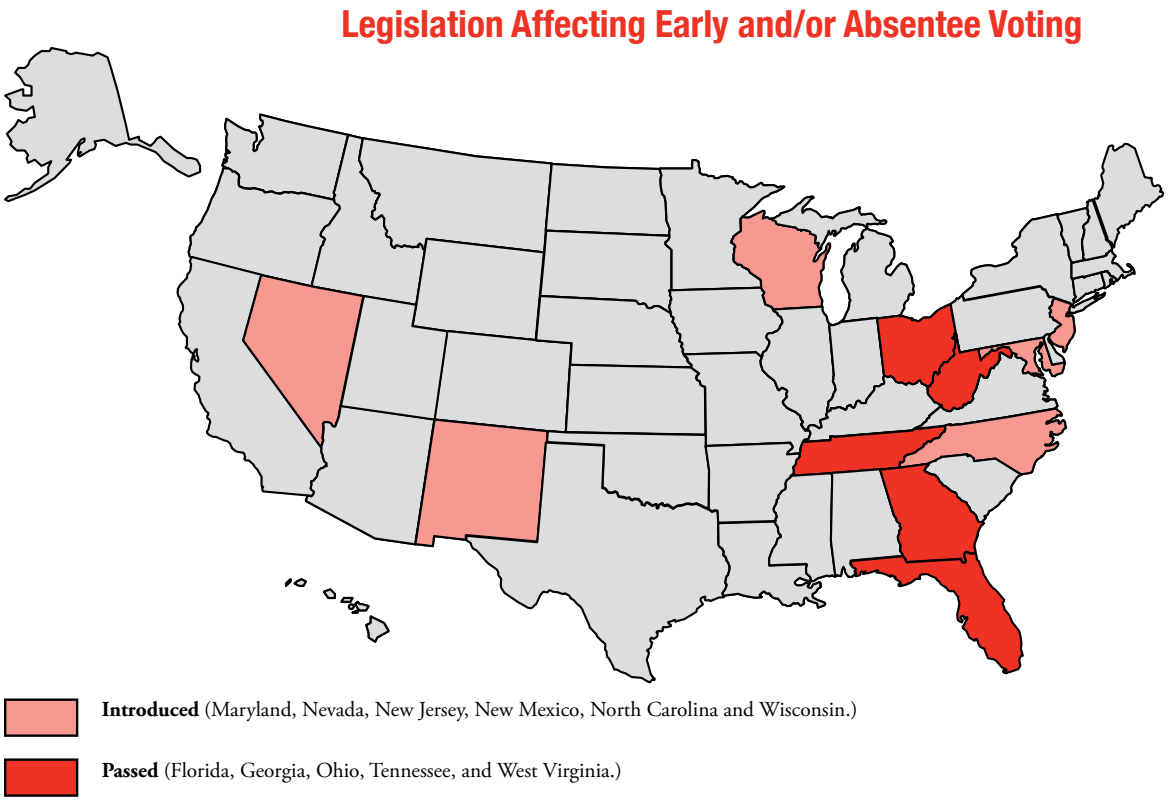
D. Legislative Battles

This year saw a substantial push in several states to reduce or, in some cases, eliminate these programs, and substantial resistance to those efforts. Of the five states that reduced early voting, four—Florida, Georgia, Ohio and Tennessee—saw sharp partisan divisions over those reductions. In all four cases, Republicans had uniform control over the legislative and executive branches, and passed the reductions over frequently vociferous objection by Democrats.[255] In the fifth state, West Virginia, the law reducing the early voting period also added early voting on Saturdays for the first time. It received bipartisan support.[256]

Until this year, the expansion of early voting seemed unstoppable. In 1972, just two states allowed no-fault absentee voting and five allowed early in-person voting. By 2010, thirty-two states and the District of Columbia allowed no-fault absentee voting, while thirty states and the District of Columbia allowed in-person early voting.[257]

The Debate

While some of the bills that reduced in-person early voting also put new restrictions on absentee voting by mail, it was the reduction of in-person early voting that received the most attention, and was the source



of the most bitter disagreements between the political parties. Proponents of such reductions usually praised the convenience of early voting, while arguing that it needed to be limited to reduce costs and administrative burdens on election officials. In Georgia, Republican Representative Bill Hembree stated that "We need to maintain early voting, which is very popular, [but] we also need to keep in mind that cities and counties are having economic problems. This bill still allows people to vote early, but saves money."[258] Supporters of a bill to reduce early voting in North Carolina made similar points. The *Herald Sun* editorialized "this is not a black and white issue, as some who want to inject race into everything are trying to say. This is a green and white issue ... as in saving the taxpayers a few greenbacks."[259]

Democrats and others who opposed these measures were less sure of the motives behind the bills and disputed the cost savings. In Georgia, Democratic State Senator Donzella James said, "We must provide every way possible for people to vote. It's not costing that much. The staff is already there and the facilities are available."[260] In North Carolina, George Gilbert, Director of Elections for Guilford County, argued that a reduction of early voting would not bring any savings. "If early voting begins later, a crush of voters will require more early voting sites to accommodate the crowds. There won't be any cost savings."

Some Democrats and editorial boards argued that the real motivation for reducing early voting was the success of the Obama campaign in using early voting in 2008. Morgan Jackson, a Democratic consultant stated, "This is pure partisanship … they see the numbers that Obama rolled up in early voting (and) they want to eliminate it."[261] A *New York Times* editorial made a similar argument. "Early voting skyrocketed to a third of the vote in 2008, rising particularly in the South and among black voters supporting Barack Obama," the *Times* wrote, adding "and that, of course, is why Republican lawmakers in the South are trying desperately to cut it back."[262] The suspicion that partisanship, rather than cost savings, was the main motivation for new early voting restrictions was particularly strong for proposals that eliminated or significantly reduced early voting on Sundays, thought to be a day of high turnout for black voters.[263]

Early Voting on Sunday and the Black Vote

Among the most controversial early voting reductions has been the partial or full eliminations of early voting on Sunday. Ohio has eliminated in-person early voting on Sundays entirely,[264] Florida has eliminated it on the last Sunday before Election Day,[265] and a North Carolina bill, proposes to eliminate all in-person early voting on Sundays.[266] Critics have cried foul, arguing that these measures are "aimed squarely at reducing African-American turnout."[267] In particular, these critics charge, it is common for Black voters to go to the polls in large groups on Sundays, after church,[268] and for some African-American churches to organize "Souls to the Polls" voting drives.[269] In Florida, a local Democratic club leader noted that "Churches had either hired buses, or used their buses to take people to the polls, or even suspending [sic] the service on the Sunday before."[270] The Palm Beach Post stated that "[m]ore than half of the black voters in the [November 2008] election voted before Election Day and many of them went on [the] final Sunday."[271] In Ohio, WilliAnn Moore, coordinator of the northwest Ohio district of the NAACP, labeled Ohio's new legislation "voter-suppression legislation," taking specific aim at the part of the law that eliminated Sunday early voting, noting that it had become a regular practice in the black community for voters to "pile into vans after church to cast their ballots."[272]

Where available, the evidence supports the contention that black (and to a lesser extent Hispanic) voters used Sunday early voting in numbers proportionally greater than other groups. For instance, in the 2008 general election in Florida, 33.2% of those who voted early on the last Sunday before election day were black and 23.6% were Hispanic, whereas blacks constituted 22.7% of all early voters statewide (for all early voting days) and Hispanics constituted 11.6%.[273]

Among those who supported these laws, which reduced early voting in additional ways, there was little public explanation of why Sunday was specifically targeted, other than the general argument that the elimination was needed to reduce costs and administrative burden. In North Carolina, Senator Jim Davis, the sponsor of his state's bill, opined that "We were just trying to minimize the time early voting polls were open ... so the expense is not so great for local election boards ... [e]verybody who wants to vote still can vote." One of his colleagues, Senate Leader Phil Berger, got closer to the issue of eliminating Sunday voting stating, "It's my understanding that there are some folks who feel that Sundays should not be mixed politics and religion, that it's probably better to have a day that folks take a day off from politics. That's one of the comments that I've heard."[274]

V. MAKING IT HARDER TO RESTORE VOTING RIGHTS

A. Background

Disenfranchisement after criminal conviction remains the single most significant barrier to voting rights in the United States. Nationally, 5.3 million American citizens are not allowed to vote because of a criminal conviction; of those, 4 million have completed their sentences and live, work, and raise families in their communities.[275] This disenfranchisement disproportionally impacts African-American men. Nationwide, 13% of African-American men have lost the right to vote, a rate that is seven times the national average.[276] Given current rates of incarceration, three in ten of the next generation of African-American men across the country can expect to lose the right to vote at some point in their lifetime.[277]

These voting bans are exceptional among democratic nations. The United States is one of only two countries that disenfranchise large numbers of persons for lengthy or indefinite periods after they have completed their time in prison.[278]

While the history of felon disenfranchisement laws in the United States dates to the nation's earliest days,[279] its greatest growth came in the decades after the Civil War. By 1900, thirty-eight states had some type of criminal voting restriction, most of which disenfranchised convicted individuals until they received a pardon.[280]

The last decade and a half saw a striking reversal of these restrictions. Since 1997, twenty-three states either restored voting rights or eased the restoration process; nine of these states repealed or amended lifetime disenfranchisement laws.[281] These changes occurred under both Republican and Democratic governors.[282]

Iowa and Florida saw the most recent dramatic restoration of voting rights. In Iowa, in 2005, Democratic Governor Tom Vilsack issued an executive Order ending the state's permanent disenfranchisement policy (at the time, Iowa was one of only three states with such a broad restriction on voting) and restoring voting rights to 80,000 Iowans.[283]

Like Iowa, Florida also had a notoriously severe law modified by executive action. Prior to 2007, nearly one million Floridians were permanently disenfranchised in the state; almost a quarter of them were African-American. In 2007, Republican Governor Charlie Crist amended the State's clemency rules in an attempt to streamline the restoration process for some individuals with non-violent convictions. Since restoration rules were streamlined, the voting rights of at least 150,000 Floridians were restored.[284]

B. Roundup of Legislation and Executive Actions

Last year marked the end of fifteen years of progress restoring the right to vote to formerly incarcerated persons. Specifically, the dramatic changes in Iowa and Florida were reversed. By executive action, the Governors Terry Branstad of Iowa and Rick Scott of Florida, both Republicans, returned their state

policies to *de facto* permanent disenfranchisement for all citizens convicted of felonies. In Florida, this has meant that 87,000 persons who were in the "backlog" of cases waiting for restoration under Governor Crist's new rules will not get their voting rights restored.

Also in 2011, Nevada Governor Brian Sandoval, also a Republican, vetoed a bill that would have automatically restored voting rights to anyone who honorably completed a felony sentence of imprisonment, probation, or parole. The bill had received bipartisan support in the Legislature.

Five states saw bills further restricting the ability of people with criminal convictions to participate in the political process: Alabama, Maryland, South Carolina, Washington, and West Virginia. None of these bills have passed.[285]

C. Content of Executive Actions

Florida. Governor Scott changed Florida's clemency rules, and the change denies the right to vote to hundreds of thousands, maybe as many as a million, Florida citizens. These changes make Florida the most punitive state in the country when it comes to disenfranchising people with criminal convictions in their past.

The Florida Constitution denies the right to vote for life to anyone with a felony conviction, unless he is granted clemency by the governor. It essentially gives the governor, an elected official, the power to decide who will (or will not) be allowed to vote in the next election.

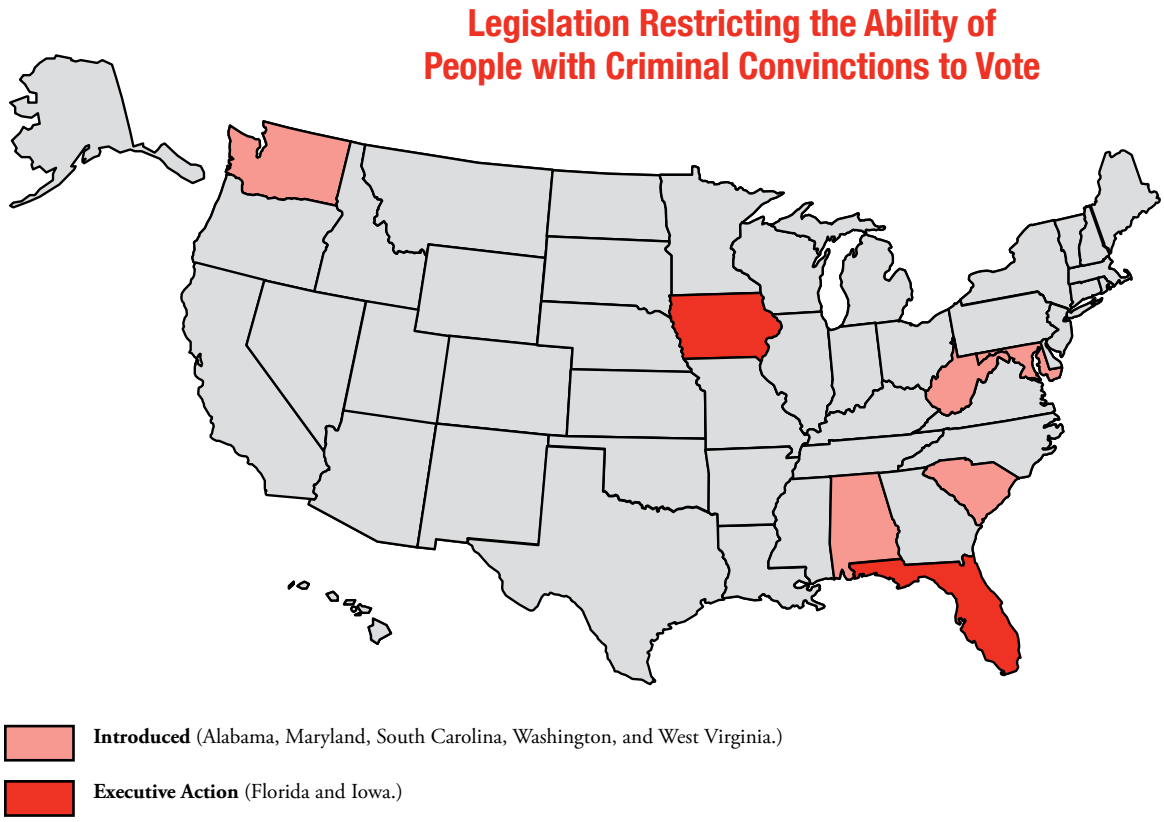
The new clemency rules[286] not only roll back reforms[287] passed by former Governor Charlie Crist, but they are far more restrictive than those in place under former Governor Jeb Bush. Under the new rules, people with even nonviolent convictions must wait five years after they complete all terms of their sentence before even being allowed to apply for restoration of civil rights. The clock resets if an individual is arrested for even a misdemeanor during that five-year period, even if no charges are ever filed. Some people must wait seven years before being able to apply, and must appear for a hearing before the clemency board. A provision allowing people to apply for a waiver of the rules, in place under Governors Bush and Crist, is eliminated. Everyone applying for clemency must provide various documents with their application—Bush and Crist had made an exception for those applying for restoration of civil rights. Florida's law is now the most restrictive in the country.[288]

Iowa. Governor Branstad, almost immediately after taking office, revoked Executive Order 42, a policy signed in 2005 by former Governor Tom Vilsack, which automatically restored voting rights to individuals with criminal convictions once they had completed their sentences.[289] Under the new policy, Iowa has become one of just four states that permanently disenfranchise all citizens after a criminal conviction. Prior to Executive Order 42, Iowa disenfranchised adults at a rate twice the national average, and had the nation's highest rate of African-American disenfranchisement.[290]

Nevada. Governor Sandoval vetoed Assembly Bill 301, a bill passed with bipartisan support in the State Legislature. The bill would have streamlined and simplified Nevada's complicated laws governing the restoration of voting rights after a criminal sentence, and would have automatically restored voting rights to anyone who honorably completed a felony sentence of imprisonment, probation, or parole.

D. The Debate

Governor Scott's and Governor Branstad's actions actions to reverse recent voting rights gains for persons with felony convictions were the subject of considerable publicity and debate in their states. The debate in Florida and Iowa mirrored the debate nationally about restoring the voting rights of formerly incarcerated persons. Those favoring further restrictions argued that persons convicted of felonies needed to "earn" the right to vote again,[291] while those opposed to harsher restrictions argued that preventing these citizens from voting was counter-productive and anti-democratic,[292] further penalizing those who had already completed their prison sentence,[293] and undermining the state's interest in re-integrating such citizens into society and reducing recidivism.[294]



ENDNOTES

1. This estimate is derived as follows: (1) New photo ID laws for voting will be in effect for the 2012 election in five states (Kansas, South Carolina, Tennessee, Texas, Wisconsin), which have a combined citizen voting age population of just under 29 million. 3.2 million (10.3%) of those potential voters do not have state-issued photo ID. Although Rhode Island's law will be in effect in 2012, the requirements are less onerous than those in the other states and so it was excluded. (2) New proof of citizenship laws will be in effect in three states (Alabama, Kansas, Tennessee), two of which will also have new photo ID laws. Assuming conservatively that those without proof of citizenship overlap substantially with those without state-issued photo ID, we excluded those two states. The citizen voting age population in the remaining state (Alabama) is 3.43 million. Of those potential voters, 240,000 (7%) do not have documentary proof of citizenship. (3) Two states (Florida and Texas) passed laws restricting voter registration drives, causing all or most of those drives to stop. In 2008, 2.13 million voters registered in Florida and, very conservatively, at least 8.24% or 176,000 of them did so through drives. At least 501,000 voters registered in Texas, and at least 5.13% or 26,000 of them did so via drives. (4) Maine abolished Election Day registration. In 2008, 60,000 Maine citizens registered and voted on Election Day. (5) The early voting period was cut by half or more in three states (Florida, Georgia and Ohio). In 2008, nearly 8 million Americans voted early in these states. An estimated 1 to 2 million voted on days eliminated by these new laws. (6) Two states (Florida and Iowa) made it substantially more difficult or impossible for people with past felony convictions to get their voting rights restored. Up to one million people in Florida could have benefited from the prior practice; based on the rates of restoration in Florida under the prior policy, 100,000 citizens likely would have gotten their rights restored by 2012. Other voting restrictions passed this year that are not included in this estimate.

2. The 12 states identified as "swing states" are Arizona, Colorado, Florida, Georgia, Iowa, Nevada, North Carolina, New Mexico, Ohio, Oregon, Pennsylvania and Virginia. David Lauter, *Obama's Gallup Numbers Show 12 States in Play in 2012,* L.A. Times, Aug. 15, 2011, http://articles.latimes.com/2011/aug/15/news/la-pn-inside-gallup-20110815. The five of those states that cut back on voting rights are Florida, Georgia, Iowa, Nevada, and Ohio. The four of those states with pending legislation are Georgia, Iowa, North Carolina, and Pennsylvania.

3. Kris W. Kobach, Op-Ed. *The Case for Voter ID,* Wall St. J., May 23, 2011, http://online.wsj.com/article/SB10001424052748704816604576333650886790480.html; *New State Voting Laws,* The Diane Rehm Show (NPR radio broadcast, June 21, 2011), *available at* http://thedianerehmshow.org/shows/2011-06-21/new-state-voting-laws/transcript.

4. Opponents of strict voter ID laws argue that the impersonation of registered voters at the polls—the only type of voter fraud that voter ID bills have the potential to address—rarely occurs. They note that while there is no credible evidence that impersonation fraud occurs, reliable evidence proves that photo ID and proof of citizenship bills erect hurdles that prevent real citizens from voting. The citizens affected are predominantly elderly and indigent voters, and citizens from minority communities. Brennan Center for Justice, Citizens Without Proof (2006), *available at* http://www.brennancenter.org/content/resource/citizens _without_proof_a_survey_of_americans_possession_of_documentary_proo.

5. John Lewis, Op-Ed, *A Poll Tax by Another Name,* N.Y. Times, Aug. 26, 2011, *available at* http://www.nytimes.com/2011/08/27/opinion/a-poll-tax-by-another-name.html.

6. Justin Levitt, The Truth About Voter Fraud, Brennan Center for Justice (2007), *available at* http://www.brennancenter.org/content/resource/truthaboutvoterfraud/.

7. The most rigorous study on voter ID and turnout to date, recently published in the leading political science methodology journal, found that stricter voter ID requirements depress turnout, particularly among less educated and lower income populations. See R. Michael Alvarez et al., An Empirical Bayes Approach to Estimating Ordinal Treatment Effects 26-30 (2010), *available at* http://brennan.3cdn.net/a5782740e4185414a8_snm6bhfwg.pdf. Some studies suggest that voter ID laws have only a small or no effect on turnout. See Jason Mycoff et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?,* 42 PS: Pol. Sci. and Pol. 121 (2009), *available at* http://journals.cambridge.org/action/displayFulltext?type=1&fid=3260872&jid=PSC&volumeId=42&issueId=01&aid=3260864&bodyId=&membershipNumber=&societyETOCSession=#. But unlike the Alvarez study, these studies use aggregate data, which cannot provide any meaningful insight into how specific inputs–like voter ID–affect the behavior of individuals within a large group. For a comprehensive list of studies on voter ID, see *Research and Publications on Voter ID,* Brennan Center for Justice, http://www.brennancenter.org/content/resource/research_on_voter_id/ (last visited July 15, 2011).

[8] *See* 42 U.S.C. § 15483(b) (2010).

[9] *See generally* Voter Identification Requirements, Nat'l Conference of State Legislatures (NCSL), http://www.ncsl.org/default.aspx?tabid=16602 (last updated July 13, 2011).

[10] Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1369-70 (N.D. Ga. 2005); Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. 2006).

[11] The Court upheld Indiana's law on the ground that the "evidence in the record [was] not sufficient" to justify striking down the whole statute. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 200-203 (2008). The Court expressly left open the possibility of future constitutional challenges to Indiana's law and other voter ID laws.

[12] Common Cause/Ga. v. Billups, 544 F.3d 1340 (11th Cir. 2009); Democratic Party of Ga. v. Perdue, 707 S.E.2d 67 (Ga. 2011) (upholding Georgia's voter ID law against a challenge under the state constitution) Georgia's initial voter ID law was previously blocked by a federal court in October 2005. Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). The court blocked an amended version of that law in July 2006 and again in September 2006. *See* Common Cause/Ga. v. Billups, 544 F.3d 1340, 1347-48 (11th Cir. 2009) (discussing injunctions in 2006). A state trial court had also blocked enforcement of the 2006 version of Georgia's voter ID law; this decision was later overturned by the Georgia Supreme Court due to the plaintiff's lack of standing. Perdue v. Lake, 647 S.E.2d 6 (Ga. 2007).

[13] *See* Brennan Center for Justice, ID Requirements Discourage Voters (Jan. 1, 2011) (map of state voter ID laws prior to the 2011 legislative session), *available at* http://www.brennancenter.org/page/-/Democracy/Voter%20ID%20 2010%20States.pdf; *Voter Identification Requirements,* NCSL, http://www.ncsl.org/default.aspx?tabid=16602 (last updated July 13, 2011) (information on previous and existing voter ID statutes).

[14] These states are: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. *See generally* Nhu-Y Ngo & Keesha Gaskins, Brennan Center for Justice, Voter ID Legislation in the States, http://www.brennancenter.org/content/resource/voter_id_legislation_in_the_states/, (last updated July 6, 2011).

[15] Fredreka Schouten, *More States Require ID to Vote,* USA Today (June 20, 2011), http://www.usatoday.com/news/nation/2011-06-19-states-require-voter-ID_n.htm.

[16] H.B. 19, 2011 Gen. Assemb., Reg. Sess., Act No. 2011-673 (Ala. 2011), *available at* http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles//HB19-enr.pdf.; H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011), *available at* http://kslegislature.org/li/b2011_12/year1/measures/documents/hb2067_enrolled.pdf; S.B. 400 Sub. A, 2011 Leg., Jan. Sess. (R.I. 2011), *available at* http://www.rilin.state.ri.us//BillText11/SenateText11/S0400A.pdf; H. 3003, 119th Gen. Assemb., Reg. Sess. (S.C. 2011), *available at* http://www.scstatehouse.gov/sess119_2011-2012/prever/3003_20110511.htm; S.B. 16, 107th Gen. Assemb., 2011 Reg. Sess. (Tenn. 2011), *available at* http://www.capitol.tn.gov/Bills/107/Bill/SB0016.pdf; S.B 14, 82d Leg., Reg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00014F.pdf#navpanes=0; Assemb. B. 7, 2011 Leg., Reg. Sess. (Wis. 2011), *available at* http://legis.wisconsin.gov/2011/data/acts/11Act23.pdf.

[17] S.F. 509, 87th Leg., Reg. Sess. (Minn. 2011), *available at* https://www.revisor.mn.gov/bin/bldbill.php?bill=S0509.6.html&session=ls87; S.B. 3, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011), *available at* http://www.senate.mo.gov/11info/pdf-bill/tat/SB3.pdf; H.B. 152, 62d Leg., Reg. Sess. (Mont. 2011), *available at* http://data.opi.mt.gov/bills/2011/billpdf/HB0152.pdf; S.B. 129, 2011 Gen. Ct., 2011 Reg. Sess. (N.H. 2011), *available at* http://www.gencourt.state.nh.us/legislation/2011/SB0129.html; H.B. 351, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011), *available at* http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H351v6.pdf.

[18] H.B. 934, Reg. Sess. 2011-12 (Pa. 2011), *available at* http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2011&sind=0&body=H&type=B&BN=0934. Other states with pending bills that are less likely to succeed include Illinois, Massachusetts, New Jersey, New York, and Ohio. S.B. 2035, 97th Gen. Assemb. (Ill. 2011), *available at* http://www.ilga.gov/legislation/billstatus.asp?DocNum=2035&GAID=11&GA=97&DocTypeID=SB&LegID=58180&SessionID=84; H.B. 3058, 97th Gen. Assemb. (Ill. 2011), *available at* http://www.ilga.gov/legislation/billstatus.asp?DocNum=3058

&GAID=11&GA=97&DocTypeID=HB&LegID=60409&SessionID=84; H.B. 1113, 187th Gen. Ct. (Mass. 2011), *available at* http://www.malegislature.gov/Bills/187/House/H01113; H.B. 1115, 187th Gen. Ct. (Mass. 2011), *available at* http://www.malegislature.gov/Bills/187/House/H01115; H.B. 2731, 187th Gen. Ct. (Mass. 2011), *available at* http://www.malegislature.gov/Bills/187/House/H02731; S.B. 316, 187th Gen. Ct. (Mass. 2011), *available at* http://www.malegislature.gov/Bills/187/Senate/S00316; S.B. 318, 187th Gen. Ct. (Mass. 2011), *available at* http://www.malegislature.gov/Bills/187/Senate/S00318; S. 2996, 214th Leg. (N.J. 2011), *available at* http://www.njleg.state.nj.us/2010/Bills/S3000/2996_I1.PDF; A.B. 3373, 2011-12 Reg. Sess. (N.Y. 2011), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A03373&term=&Summary=Y&Actions=Y&Votes=Y&Text=Y; H.B. 159, 129th Gen. Assemb. (Ohio 2011), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_159.

19. State Senate Kills Voter ID Bill, WMUR N.H. (Sept. 7, 2011), http://www.wmur.com/r/29108560/detail.html; Kevin Landrigan, *Senate Veto Vote on Tap This Week,* Nashua Telegraph, Sept. 4, 2011, http://www.nashuatelegraph.com/news-statenewengland/931511-227/senate-veto-vote-on-tap-this-week.html. New Hampshire's bill is still pending for the next legislative session.

20. Mike Raley & David Horn, *Voter ID Bill Still Has Life,* N.C. News Network, Sept. 6, 2011, http://www.ncnn.com/edit-news/7232-voter-id-bill-still-has-life.

21. S.J.R. 2, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011), http://www.senate.mo.gov/11info/pdf-bill/tat/SJR2.pdf.

22. *Initiative Measure No. 27,* Mo. Sec'y of State, http://www.sos.ms.gov/page.aspx?s=7&s1=1&s2=51 (last visited July 15, 2011).

23. Alabama allows voters without photo ID to vote if identified by two election officials at a polling place, Ala. Code § 17-9-30(e) (2011), but it is unlikely that many voters will be able to take advantage of that procedure. Texas also has a very limited exception for voters who either have religious objections to being photographed or who lost their IDs in a federal or state-declared natural emergency within forty-five days of an election, allowing them to execute an affidavit and cast a provisional ballot in order to have their vote counted. *Bill Information for SB 14,* Tex. Leg. Online, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB14 (last visited Sept. 7, 2011).

24. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198 (2008).

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[53] Fredreka Schouten, *More States Require ID to Vote,* USA Today, June 20, 2011, http://www.usatoday.com/news/nation/2011-06-19-states-require-voter-ID_n.htm. Notably, Republicans gained control of the Minnesota Senate and House for the first time since the legislature switched back to partisan elections in 1974. *See* Tim Storey, *Updated – GOP Gains in Legislature are Historic,* Thicket (Nov. 4, 2010, 1:21 PM), http://ncsl.typepad.com/the_thicket/2010/11/by-tim-storey-updated-at-thursday-nov-4-1115am-mdt-republicans-have-added-over-675-seats-to-their-ranks-in-this-elec.html. Republicans also won control in Alabama, which had not been in GOP control since Reconstruction, and the North Carolina Senate, which had not been Republican since 1870. *See Pre-Election Party Control of State Legislatures,* NCSL, http://www.ncsl.org/?tabid=21314 (last visited July 19, 2011).

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[85.] For example, Minnesota House Speaker Kurt Zellers said in a radio interview, "I think [voting is] a privilege, it's not a right. Everybody doesn't get it because if you go to jail or if you commit some heinous crime your rights are taken away. This is a privilege." *See* Eric Roper, *Zellers: Voting Is "Privilege, Not Right",* Minneapolis Star Trib.: Hot Dish Politics (Apr. 21, 2011, 5:50 PM), http://www.startribune.com/politics/blogs/120393764.html.

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[87.] Letter from Mark Dayton, Governor, State of Minn., to Hon. Michelle L. Fischbach, President of the Senate, State of Minn., (May 26, 2011), *available at* http://www.scribd.com/doc/56415356/Ch-69-SF509; Lynch, *supra* note 86.

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Texas: "The fiscal note says it will cost about $2 million to implement, but Democrats say it could be much costlier, particularly for local governments." Brandi Grissom, *Senate Approves Voter ID Bill*, The Texas Tribune, Jan. 26, 2011, http://www.texastribune.org/texas-politics/voter-id/tribblog-senate-approves-voter-id-bill.

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99. *Id.*

100. Martha Stoddard, *Voter Bill Faces Changes*, Omaha World-Herald, Mar. 3, 2011, http://www.omaha.com/article/20110303/NEWS01/303039891.

[101] *Id.*

[102] L.B. 239, 102d Leg., 1st Sess. (Neb. 2011), *available at* http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=12209.

[103] Amy Erickson, *Auditors Oppose Current Voter ID Bill*, Le Mars Daily Sentinel, Feb. 17, 2011, http://www.lemarssentinel.com/story/1703969.html.

[104] ISACA Photo ID Exploratory Comm., A Report on Photo ID for Voting Purposes (2011), *available at* http://www.iowaauditors.org/index_files/ISACAVoterIDReport020211final.pdf.

[105] Jennifer Jacobs, *Iowa County Elections Officials Oppose Bill to Require a Photo ID to Vote*, Des Moines Reg.: Author Blog (Feb. 14, 2011, 5:55 PM), http://blogs.desmoinesregister.com/dmr/index.php/2011/02/14/iowas-county-elections-officials-oppose-bill-to-require-photo-id-to-vote/.

[106] Roxanna Moritz, *Iowa State Association of County Auditors Rejects Photo ID Bill*, Scott Cnty. Ia. Auditor's Blog (Feb. 15, 2011), http://scottcountyauditor.wordpress.com/2011/02/.

[107] Andrew J. Nelson, *Iowa Vote ID Plan Stymied*, Omaha World-Herald, Apr. 2, 2011, http://www.omaha.com/article/20110402/NEWS01/704029858/1009.

[108] Oklahoma's law requires voters to present photo identification in order to vote, but if a voter does not have photo ID, she may use a voter registration card issued by her county elections board. If she has neither a photo ID nor a voter registration card, or declines to present proof of identity, she may sign a sworn statement affirming her identity and vote by provisional ballot. Her provisional ballot will be counted if it is cast in the correct precinct and she is registered. Okla. Stat. tit. 26, § 7-116.1C (2011); Okla. Stat. tit. 26, § 7-114 (2011).

[109] Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006).

[110] Mississippi Voter Identification Petition, Ballotpedia, http://ballotpedia.org/wiki/index.php/Mississippi_Voter_Identification_Petition_%282011%29 (last visited July 19, 2011); Initiative Measure No. 27, Mo. Sec'y of State, http://www.sos.ms.gov/page.aspx?s=7&s1=1&s2=51 (last visited July 19, 2011).

[111] *HF 1597 Status in Senate for Legislative Session 87*, Minn. Leg. https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=House&f=HF1597&ssn=0&y=2011 (last visited September 7, 2011); *see generally* Tim Pugmire, *Push Begins to Get Voter ID on Ballot*, Minn. Pub. Radio News (June 7, 2011, 2:22 PM), http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2011/06/push_begins_to.shtml.

[112] *See* U.S. Election Assistance Comm'n, National Mail Registration Form (2006), *available at* http://www.eac.gov/assets/1/Documents/national%20mail%20voter%20registration%20form%20english%20February%2015%202011.pdf.

[113] *See* 18 U.S.C. § 1973i(c).

[114] Ariz. Rev. Stat. §§ 16-152(A)(23), 16-166 (2011).

[115] *Id.* § 16-166.

[116] Letter from Thomas R. Wilkey, Exec. Director, U.S. Election Assistance Comm'n, to Jan Brewer, Ariz. Sec'y of State (Mar. 6, 2006), *available at* http://www.eac.gov/assets/1/Page/EAC%20Letter%20to%20Arizona%20Secretary%20of%20State%20Jan%20Brewer%20March%206%202006.pdf.

[117] *See* Gonzalez v. Arizona, 435 F. Supp. 2d 997 (2006), *rev'd in part,* 624 F.3d 1162 (9th Cir. 2010), *reh'g en banc granted*, 2011 U.S. App. LEXIS 8573 (9th Cir. Apr. 27, 2011).

[118] Gonzalez v. Arizona, 624 F.3d 1162 (9th Cir. 2010), *reh'g en banc granted*, 2011 U.S. App. LEXIS 8573 (9th Cir. Apr. 27, 2011).

[119] 2009 Ga. Laws 712 (Ga. 2009) (codified at Ga. Code Ann. § 21-2-216(g) (2011)), *available at* http://www1.legis.ga.gov/legis/2009_10/fulltext/sb86.htm.

[120.] After extensive negotiations and modifications, the Department of Justice eventually approved Georgia's citizenship verification program. *See* Letter from T. Christian Herren, Chief, Voting Section, U.S. Dep't of Justice, to Ann W. Lewis, Esq. (Aug. 18, 2010); *see also* Joint Motion to Dismiss, Georgia v. Holder, 748 F. Supp. 2d 16 (D.D.C. 2010), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Georgia-Motion-8-20-10.pdf.

[121.] *See* Bill Rankin, *DOJ Approves Proof of Citizenship Requirement for Voter Registration*, Atlanta J.-Const., Apr. 4, 2011, http://www.ajc.com/news/georgia-politics-elections/doj-approves-proof-of-898132.html.

[122.] Nat'l Conference of State Legislatures, 2011 Immigration-Related Laws and Resolutions in the States (2011), *available at* http://www.ncsl.org/documents/statefed/IMMIG_REPORT_FINALAUG9.pdf.

[123.] S.B. 256, 2011 Gen. Assemb., Reg. Sess. (Ala. 2011), *available at* http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles/SB256-int.pdf.

[124.] S.B. 11-018, 68th Gen. Assemb., 1st Reg. Sess. (Colo. 2011), *available at* http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont3/BAED7B3078F4007E8725781500271318?open&file=018_01.pdf.

[125.] H.B. 5231, Sess. Year 2011 (Conn. 2011), *available at* http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB05231&which_year=2011.

[126.] H.B. 2067, 2011 Sess. (Kan. 2011), *available at* http://www.kslegislature.org/li/b2011_12/year1/measures/hb2067/.

[127.] S.P. 241, 125th Leg., 1st Reg. Sess. (Me. 2011), *available at* http://www.mainelegislature.org/legis/bills/display_ps.asp?snum=125&paper=SP0241&PID=1456.

[128.] H. 194, 187th Gen. Court (Mass. 2011), *available at* http://www.malegislature.gov/Bills/187/House/H00194.

[129.] H.B. 515-FN, 2011 Sess. (N.H. 2011), *available at* http://www.gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=326&sy=2011&sortoption=&txtsessionyear=2011&txtbillnumber=hb515&q=1,

[130.] S.B. 178, 76th Sess. (Nev. 2011), *available at* http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=428.

[131.] H.B. 2804, 76th Leg. Assemb. (Or. 2011), *available at* http://www.leg.state.or.us/11reg/measures/hb2800.dir/hb2804.intro.html.

[132.] S. 304, Sess. 119 (S.C. 2011), *available at* http://www.scstatehouse.gov/cgi-bin/web_bh10.exe?bill1=304&session=119&summary=T.

[133.] S.B. 352, 107th Gen. Assemb., 2011 Sess. (Tenn. 2011), *available at* http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0352.

[134.] H.B. 1338, 82d Leg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB1338.

[135.] S.J. Memorial 8001, 62d Leg., 2011 Sess. (Wash. 2011), *available at* http://apps.leg.wa.gov/billinfo/summary.aspx?bill=8001&year=2011.

[136.] S.B. 256, 2011 Gen. Assemb., Reg. Sess. (Ala. 2011), *available at* http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles/SB256-int.pdf ; H.B. 2067, 2011 Sess. (Kan. 2011), *available at* http://www.kslegislature.org/li/b2011_12/year1/measures/hb2067/.

S.P. 241, 125th Me. Leg., 1st Reg. Sess. (Me. 2011), *available at* http://www.mainelegislature.org/legis/bills/display_ps.asp?snum=125&paper=SP0241&PID=1456; S.B. 352, 107th Gen. Assemb., 2011 Sess. (Tenn. 2011), *available at* http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0352.

H.B. 1338, 82d Leg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB1338.

[137.] 42 U.S.C. § 1973c.

[138.] As of this drafting, the entire law has been temporarily enjoined by a federal court and cannot be implemented until the court lifts the injunction. Hispanic Interest Coal. of Ala. v. Bentley, No. 5:11-cv-02484 (N.D. Ala. Aug. 29, 2011) (order granting preliminary injunction) (consolidated with Parsley. v. Bentley, No. 5:11-cv-2736 (N.D. Ala.) and United States v. Alabama et al., No. 2:11-cv-2746 (N.D. Ala.)).

[139.] H.B. 56, § 29(c), 2011 Gen. Assemb., Reg. Sess. (Ala. 2011), *available at* http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles/HB56-enr.pdf; H.B. 2067, § 8(l), 2011 Sess. (Kan. 2011), *available at* http://www.kslegislature.org/li/b2011_12/year1/measures/hb2067/.

[140.] H.B. 56, § 29(k) (Ala. 2011); H.B. 2067, § 8(m) (Kan. 2011).

[141.] H.B. 56, §§ 29(d) and (f) (Ala. 2011); H.B. 2067, § 8(n) and (p) (Kan. 2011).

[142.] H.B. 56, § 29(m)(7) (Ala. 2011); H.B. 2067, § 8(m)(6) (Kan. 2011).

[143.] John Tomasic, *Sec of State Gessler Lands on Legislative Loser List for Voter ID Debacle,* Colo. Indep., May 12, 2011.

[144.] Joseph Boven, *Levy Call Gessler's Bluff: Says He Should Prosecute Those Who Vote Illegally,,* Colo. Indep., Apr. 8, 2011.

[145.] Nancy Lofholm, *County Clerks Want Illegal-Voting Proof,* Denver Post, Apr. 13, 2011.

[146.] Scott Gessler, Colo. Sec'y of State, Comparison of Colorado's Voter Rolls with Department of Revenue Non-Citizen Records (Mar. 8, 2011), *available at* http://cha.house.gov/images/stories/documents/co_non_citizen_report.pdf.

[147.] Kris W. Kobach*, supra* note 3. Mr. Kobach, however, was unable to identify a single instance of a non-citizen illegally casting a vote, or any successful prosecution for voter fraud in the state. Keesha Gaskins, *Debunking Misinformation on Voter ID*, Brennan Center for Justice (June 6, 2011), http://www.brennancenter.org/blog/archives/debunking_misinformation_on_photo_id/.

[148.] *See* Keesha Gaskins, *Smoke and Mirrors: Alleged Non-Citizen Voting in NM and CO*, Brennan Center for Justice (Apr. 1, 2011), http://www.brennancenter.org/blog/archives/smoke_and_mirrors_alleged_non-citizen_voting_in_new_mexico_and_colorado/. Congressman Charles Gonzalez (D-TX) questioned Mr. Gessler's claims, saying "No attorney would go before a judge with a report in which the main claims are preceded by such terms as 'inconclusive', 'incomplete', and 'impossible to provide a precise number' … Ensuring the integrity of our elections is far too important a matter to base decisions on a study that mischaracterizes empirical data, neglects even the most obvious analysis of that data, and hides these failings behind terms like 'tentative' and 'preliminary.'" Press Release, Kyle Anderson, Colorado Voter Registration Study Questioned during House Administration Hearing On a Look Back at What Went Right and Wrong with the 2010 Election (Apr. 1, 2011), *available at* http://democrats.cha.house.gov/press-release/colorado-voter-registration-study-questioned-during-house-administration-committee.

[149.] Press Release, House Comm. on House Admin., Harper: Report on Non-Citizen Voting is a Disturbing Wake-Up Call (March 31, 2011), *available at* http://cha.house.gov/index.php?option=com_content&task=view&id=375&Itemid=4.

[150.] Citizens Without Proof*, supra* note 4.

[151.] *Tennessee Debates Bill to Require Proof of Citizenship to Vote*, Huffington Post, May 12, 2010, http://www.huffingtonpost.com/2010/05/12/tennessee-debates-bill-to_n_573170.html.

[152.] *See, e.g.*, Keesha Gaskins, *Smoke and Mirrors, supra* note 148.

[153.] *See generally* Wendy Weiser et al., Brennan Center for Justice, Voter Registration Modernization, 3-5 (2009), available at http://brennan.3cdn.net/b75f13413388b2fccc_ynm6bn1l2.pdf.

[154.] *See id.* at 3; Caltech/MIT Voting Technology Project, Voting: What Is, What Could Be 3 (2001), *available at* http://www.vote.caltech.edu/drupal/files/report/voting_what_is_what_could_be.pdf; Stephen Ansolabehere, Testimony Before the Senate Rules Committee, Mar. 11, 2009, *available at* http://www.vote.caltech.edu/drupal/files/news/03112009Ansolabehere_Testimony.pdf.

155. John Mark Hansen & Michael A. Neblo, *Report of the Task Force on the Federal Election System: Voter Registration*, *in* Nat'l Comm. on Fed. Election Reform, To Assure Pride and Confidence in the Electoral Process 119, 131 (2002), *available at* http://tcf.org/publications/pdfs/pb246/99_full_report.pdfhttp://books.google.com/books?id=QLHhCtmIZCUC&pg=PA134&lpg=PA134&dq#v=onepage&q&f=false.

156. *See* Ansolabehere, *supra* note 154, at 19.

157. 42 U.S.C. §§ 1973gg to 1973gg-10.

158. *See generally* Christopher Ponoroff, Brennan Center for Justice, Voter Registration in a Digital Age, (Wendy Weiser, Ed., 2010), *available at* http://brennan.3cdn.net/806ab5ea23fde7c261_n1m6b1s4z.pdf.

159. *See* Jennifer Rosenberg & Margaret Chen, Expanding Democracy: Voter Registration Around the World, Brennan Center for Justice 3 (2009), *available at* http://www.brennancenter.org/content/resource/expanding_democracy_voter_registration_around_the_world/.

160. 42 U.S.C. §§ 1973gg to 1973gg-10.

161. 42 U.S.C. § 1973gg-4(b).

162. League of Women Voters v. Cobb, 447 F. Supp. 2d. 1314 (D. Fla. 2006).

163. In 2004, while 7.8% of non-Hispanic whites registered with private drives, 12.7% of blacks and 12.9% of Hispanics did the same. *Voting and Registration in the Election of November 2004 – Detailed Tables*, U.S. Census Bureau, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html (download Table 14) (last visited Aug. 2, 2011). In 2008, African Americans and Hispanics nationally remained almost twice as likely to register through a voter registration drive as whites. While 5.4% of non-Hispanic whites registered at private drives, 11.1% of African-Americans and 9.6% of Hispanics did the same. *Voting and Registration in the Election of November 2008 – Detailed Tables*, U.S. Census Bureau, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html (download Table 14) (last visited Aug. 2, 2011).

164. During the 2008-2010 voter registration cycle, 14.4 million applications nationwide were from new registrants who were not previously registered in a local jurisdiction or had not previously registered in any jurisdiction. This is a 16.8% drop from the last voter registration cycle that coincided with a national midterm election: during the 2004-2006 period, there were 17.3 million new registrants. U.S. Election Assistance Comm'n, The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-2010: A Report to the 112th Congress 1 (2011), *available at* http://www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf.

165. *See, e.g.*, Reince Priebus, *Anti Voter Fraud Reforms are Practical, not Partisan*, U.S. News & World Rep., June 6, 2011, http://www.usnews.com/opinion/articles/2011/06/06/anti-voter-fraud-reforms-are-practical-not-partisan.

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167. *See infra* notes 182-183 and accompanying text.

168. Ryan J. Reilly, *Columnist: Registering Poor to Vote "Like Handing Out Burglary Tools to Criminals",* TPM Muckraker, Sept. 2, 2011, http://tpmmuckraker.talkingpointsmemo.com/2011/09/columnist_registering_poor_to_vote_like_handing_out_burglary_tools_to_criminals.php.

169. The one exception is California's bill.

170. *CS/CS/HB 1355: Elections*, Fla. Senate, http://www.flsenate.gov/Session/Bill/2011/1355 (last visited Aug. 2, 2011).

171. *History: HB 1570,* Tex. Leg. Online, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB1570 (last visited Aug. 2, 2011); *History: HB 2194,* Tex. Leg. Online, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB2194 (last visited Aug. 2, 2011).

172. H.B. 1570, 82d Leg., Reg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB01570F.pdf#navpanes=0.

[173]. H.B. 2194, 82d Leg., Reg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB02194F.pdf#navpanes=0.

[174]. Florida H.B. 1355 passed on a party line vote of 25-13 in the Senate and 77-38 in the House. *CS/CS/HB 1355: Elections – House Floor Vote*, Fla. House of Reps. (May 15, 2011), http://www.myfloridahouse.gov/Sections/Bills/floorvote.aspx?VoteId=12484&BillId=46543&SessionIndex=-1&SessionId=66&BillText=&BillNumber=1355&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=H&BillSearchIndex=-1; *CS/CS/HB 1355: Elections – Senate Floor Vote*, Fla. House of Reps. (May 5, 2011), http://www.myfloridahouse.gov/Sections/Bills/floorvote.aspx?VoteId=12464&BillId=46543&SessionIndex=-1&SessionId=66&BillText=&BillNumber=1355&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=H&BillSearchIndex=-1.

[175]. H.B. 1570, 82d Leg., Reg. Sess. (Tx. 2011); H. Journal, 82d Leg., Reg. Sess., at 1583 (Tx. 2011), *available at* http://www.journals.house.state.tx.us/hjrnl/82r/pdf/82RDAY51FINAL.PDF#page=5; S. Journal, 82d Leg., Reg. Sess., at 2381 (Tx. 2011), *available at* http://www.journals.senate.state.tx.us/sjrnl/82r/pdf/82RSJ05-17-F.PDF#page=5.

[176]. H.B. 2194, 82d Leg., Reg. Sess. (Tx. 2011); S. Journal, 82d Leg., Reg. Sess., at 3537 (Tx. 2011), *available at* http://www.journals.senate.state.tx.us/sjrnl/82r/pdf/82RSJ05-25-F1.PDF#page=9.

[177]. H.B. 2194, 82d Leg., Reg. Sess. (Tx. 2011); H. Journal, 82d Leg., Reg. Sess., at 3550 (Tx. 2011), *available at* http://www.journals.house.state.tx.us/hjrnl/82r/pdf/82RDAY74FINAL.PDF#page=12.

[178]. *See Court Cases: League of Women Voters of Florida v. Cobb*, Brennan Center for Justice (Aug. 8 2008), *available at* http://www.brennancenter.org/content/resource/league_of_women_voters_of_florida_v_cobb/.

[179]. *Id.*

[180]. League of Women Voters v. Cobb, 447 F. Supp. 2d 1314 (D. Fla. 2006).

[181]. *Court Cases, supra* note 178.

[182]. Jerome R. Stockfisch, *Lawmakers Cut Time to File Hurricane-Related Claims*, Tampa Trib., May 6, 2011, http://www2.tbo.com/news/politics/2011/may/05/lawmakers-cut-time-to-file-hurricane-related-claim-ar-205183/; *Bill cutting early voting hours heads to governor,* Tampa Bay Online, May 5, 2011, *available at* http://www2.tbo.com/news/politics/2011/may/05/bill-cutting-early-voting-hours-heads-to-governor-ar-205181/.

[183]. Catherine Whittenburg & Lindsay Peterson, *Bill Would Cut Early Voting Period in Florida to 7 Days*, Tampa Trib., Apr. 28, 2011, http://www2.tbo.com/news/breaking-news/2011/apr/28/bill-would-cut-early-voting-period-in-florida-to-7-ar-203024/.

[184]. League of Women Voters of Collier County, *available at* http://www.lwvcolliercounty.org/ (last visited September 3, 2011).

[185]. *Id.*

[186]. Letter from Lee Rowland, Democracy Counsel, Brennan Center for Justice & Mark A. Posner, Senior Counsel, Lawyers' Comm. for Civil Rights Under the Law, to Chris Herren, Chief, Voting Section, U.S. Dep't. of Justice (July 15, 2011), *available at* http://brennan.3cdn.net/4713a8395c96f48085_p7m6iv6sh.pdf.

[187]. Citizens Without Proof, *supra* note 4.

[188]. Letter from Wendy Weiser, Brennan Center for Justice, et al., to T. Christian Herren, Chief, Voting Section, U.S. Dep't of Justice (Sept. 14, 2011), *available at* http://brennan.3cdn.net/772eab3b160f2da9f7_n4m6ivkrc.pdf.

[189]. *See* "Focus: Early Voting on Sunday and the Black Vote," *infra* at 33.

[190]. Rowland & Posner, *supra* note 186.

[191]. Wendy Weiser et al., Brennan Center for Justice, Modernizing Voter Registration: Momentum in the States 7-9 (2010), *available at* http://www.brennancenter.org/page/-/Democracy/VRM%20State%20Trends%20Final.pdf?nocdn=1.

[192] *Id.*

[193] Margaret Lillard, *Same-Day Voter Registration OK'd*, Star News Online (Aug. 22, 2007, 3:30 AM), http://www.starnewsonline.com/article/20070822/NEWS/708220479/-1/State.

[194] Mary Lu Carnevale, *Ohio Gets Green Light on Same-Day Registration and Voting*, Wall St. J.: Wash. Wire (Oct. 1, 2008, 3:28 PM), http://blogs.wsj.com/washwire/2008/10/01/ohio-gets-green-light-on-same-day-registration-and-voting/.

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[196] EDR states in the 2004 presidential election had on average a 12% higher turnout rate than non-EDR states, and 7% higher turnout in the 2008 presidential election. Demos, Voters Win With Election Day Registration (2009), *available at* http://www.demos.org/pubs/voterswin_09.pdf.

[197] Roger Larocca & John S. Klemanski, *U.S. State Election Reform and Turnout in Presidential Elections*, 11 St. Pols. & Pol'y Q. 76 (2011), http://spa.sagepub.com/content/11/1/76.full.pdf.

[198] *See Hearing on S.B. 641 Before the Cal. State Assemb. Comm. on Elections and Redistricting* (July 5, 2011) (statement of Steven Carbó, Senior Program Director, Demos), *available at* http://www.demos.org/pubs/Assembly_Elections_Comm.pdf (stating that in Iowa, the number of provisional votes dropped from 14,661 in 2004 to 4,725 in 2008 and in North Carolina, there were nearly 40,000 fewer provisional ballots cast in the 2008 presidential race than in the 2006 midterm election).

[199] In 2004, 35.5% of provisional ballots cast were not counted. Election Data Services, Inc., 2004 Election Day Survey Report (2005), *available at* http://www.eac.gov/assets/1/AssetManager/2004%20EAVS%20Chapter%206.pdf. In 2006, over 20% of provisional ballots cast in the 2006 midterm election were rejected. U.S. Election Assistance Commission, Casting and Counting Provisional Ballots (2007), *available at* http://archives.eac.gov/program-areas/research/doc/eds-2006/2006-eds-casting-and-counting-provisional-ballots.pdf/. In 2008, 28.2 percent of provisional ballots were rejected. U.S. Election Assistance Commission, 2008 Election Administration and Voting Survey (2009), *available at* http://www.eac.gov/assets/1/Documents/2008%20Election%20Administration%20and%20Voting%20Survey%20EAVS%20Report.pdf.

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EXPERT BRIEF

Voting Laws Roundup 2013

Election 2012 was marred by problems for voters nationwide. One year later, an encouraging number of states have taken steps to provide voters more access to the ballot box, but others have still tried to restrict access.

PUBLISHED: December 19, 2013



Ensure Every American Can Vote

Voting Reform

Also see our roundup of voting law changes in 2012 and 2014.

Election 2012 was marred by problems for voters nationwide. The northeast was beset by Superstorm Sandy, displacing hundreds of thousands of registered voters on Election Day. Across the country, millions of Americans stood in long lines at crowded polling stations to exercise their right to vote.

One year later, an encouraging number of states have taken steps to provide voters more access to the ballot box. At least 237 bills were introduced in 46 states to increase access. Unfortunately, others have restricted access — 33 states introduced 92 restrictive bills — and the Supreme Court has made it easier for some of them to do so by striking down a key provision of the Voting Rights Act. While 10 states passed 13 bills in 2013 to expand voting opportunities, eight states passed nine restrictive laws.

We will continue to monitor voting changes in the lead up to the 2014 legislative session. Already, four states have pre-filed election bills we will be watching with interest next year — including three measures to restrict voting, and six to expand it.

Numbers Overview

Since the beginning of 2013, and as of December 18, 2013, **restrictive voting bills** have been introduced in more than half the states:

At least **92 restrictive bills** were introduced in **33 states**.
Of those, **13 restrictive bills** are still pending in **5 states**.
Of those, **5 restrictive bills** are currently active in **2 states**, **[1]** in that there has been legislative activity beyond introduction and referral to committee (such as hearings, committee activity, or votes).
8 states have already passed **9 restrictive bills** this session.

At the same time, across the country, politicians from both sides of the aisle have introduced and supported bills that **expand access** to registration and voting.

At least **237 expansive bills** that would expand access to voting were introduced in **46 states**.
Of those, **73 expansive bills** are still pending in **7 states**.
Of those, **17 expansive bills** are currently active in **4 states**,**[2]** in that there has been legislative activity beyond introduction and referral to committee (such as hearings, committee activity, or votes).
10 states have passed **13 bills that expand opportunities** for eligible citizens to register and to vote.

Voting Restrictions



Note: In the cases where more than one piece of restrictive legislation has been introduced in a state, the map reflects the state's passed, active, or pending status based on its most active piece of legislation.

Restrictions Passed in 2013

Arkansas:

Photo ID required to vote (legislature overrode gubernatorial veto).

Indiana

Authorizes challengers to demand proof of identification.

Montana

Referendum to repeal Election Day Registration, placed on the ballot for 2014.

Nebraska

Reduces the early voting period.

North Carolina

Photo ID required to vote, eliminates same-day registration, eliminates pre-registration for 16- and 17-year-old citizens, reduces the early voting period.

North Dakota

Photo ID required to vote.

Tennessee

More restrictive Photo ID requirement.

Virginia:

Photo ID required to vote.
Restrictions on third party registration.

Summary of Introduced and Pending Restrictive Voting Legislation (see a **detailed summary** of passed and pending laws)

Identification laws

- **Photo ID laws.** At least 25 states introduced legislation either requiring voters to show photo ID at the polls or making existing photo ID laws more restrictive.**[3]**
- **Proof of citizenship laws.** At least eight states introduced legislation requiring proof of citizenship, such as a birth certificate, to register or vote.**[4]**

Making voter registration harder. At least eight states introduced bills to end Election Day or same-day voter registration, limit voter registration mobilization efforts, and reduce other registration opportunities.[5]

Reducing early voting opportunities. At least eight states introduced bills that limit existing opportunities to vote early in person.[6]

Making it harder to restore voting rights. At least two states introduced legislation that would further restrict the right to vote to persons with criminal convictions.[7]

Making it harder for students to vote. At least two states proposed legislation that would make it harder for students to register and vote.[8]

Enhancing Voter Access



Note: In the cases where more than one piece of expansive legislation has been introduced in a state, the map reflects the state's passed, active, or pending status based on its most active piece of legislation.

A new influx of bills to enhance voter access drew support on both sides of the aisle.

Expansive Voting Laws Passed in 2013

Colorado

Broad-based modernization of voter registration process, including, among other elements, Election Day registration and portable registration. More information is available **here.**

Preregistration of eligible 16- and 17-year-old citizens.

Delaware:

Constitutional amendment expanding opportunities for people with criminal convictions to regain their right to vote.

Florida

Expansion of early voting opportunities.

Illinois

Online voter registration.

Maryland:

Expansion of early voting, same-day registration during early voting, study methods to reduce long lines at the polls.

New Hampshire:

Existing photo ID law made less restrictive.[9]

New Mexico:

Automation of voter registration at the DMV office.

Oklahoma:

Existing photo ID law made less restrictive.

Virginia:

Online voter registration.

West Virginia:

Online voter registration.

Summary of Introduced and Pending Legislation to Expand Access to Voting

Identification Laws. At least 11 states[10] introduced bills that would relax existing voter ID or proof of citizenship laws.

Modernizing Voter Registration. At least 26 states[11] introduced bills that would modernize the voter registration system, in whole or in part, and make it easier for eligible citizens to register.

- **Broad-based modernization.** At least four states[12] introduced wide-ranging legislation to modernize the voter registration process using a combination of technology and fail-safe protections. Both houses of Congress introduced comprehensive bills to modernize voter registration.
- **Automation.** At least six states[13] introduced legislation that would introduce or expand automation of the voter registration process at government agencies.
- **Online registration.** At least 13 states[14] introduced bills that would establish or enhance the use of online registration systems.
- **Same day registration.** At least 19 states[15] introduced bills that would allow voters to register on the same day they vote. Same day registration (SDR) bills can vary in that some allow same day registration on Election Day only (EDR), some allow it during an early voting period only, and some may allow both options.
- **Portability.** At least four states[16] introduced bills that would allow a voter's registration to move with her when she moves to a new address in the state.

More early voting opportunities. At least 20 states[17] introduced bills that would newly introduce, or expand, opportunities for early in person voting. While New Jersey passed a bill to introduce early voting in the state, Governor Christie vetoed it on May 9, 2013.

Restoring voting rights. At least 14 states[18] introduced bills that would expand opportunities for those with criminal convictions to regain their right to vote. In Virginia, Governor Robert McDonnell issued an executive order automatically restoring the right to vote upon completion of sentence for those with past non-violent criminal convictions.

Pre-registering students to vote. At least 13 states[19] introduced bills that would allow students under the age of 18 to pre-register, so that upon turning 18 they are registered to vote.

Reducing long lines. At least four states[20] introduced bills that aim to reduce waiting times by requiring, or assessing, the implementation of minimum standards for efficient polling place administration.

Looking to 2014

States are already beginning to file bills in preparation for the 2014 legislative session. At least four states have introduced voting laws we will be watching. In Missouri, three bills have been pre-filed that would require voters to show photo ID at the polls. In Kentucky, three bills have been pre-filed that would restore voting rights to persons with past criminal convictions. A bill that would restore voting rights was also pre-filed in Virginia. In Florida, two bills have been introduced that would make it easier for eligible citizens to register to vote. Check back here for regular updates on what we can expect in the next session.

[1] Massachusetts, Ohio.

[2] Massachusetts, New York, Pennsylvania, South Carolina.

[3] Alaska, Arkansas, Connecticut, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Tennessee, Virginia, Washington, West Virginia, Wyoming.

[4] Massachusetts, Missouri, Nevada, Oklahoma, Oregon, South Carolina, Texas, Virginia.

[5] Alabama, Montana, Nebraska, New Mexico, North Carolina, Ohio, Texas, Virginia.

[6] Arizona, Indiana, Nebraska, North Carolina, Ohio, Tennessee, Texas, Wisconsin. As of December 18, 2013, a bill is still active in Ohio.

[7] Maine, North Carolina.

[8] North Carolina, Ohio.

[9] Although the New Hampshire bill is not expansive with respect to current law, it eases certain requirements that had not yet been implemented, but would have gone into effect September 2013 under a restrictive photo voter ID law passed by the legislature in 2011.

[10] Alabama, Indiana, Kansas, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Wisconsin.

[11] Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia. As of December 18, 2013, bills remain active in Massachusetts.

[12] Colorado, Massachusetts, Nevada, New York. As of December 18, 2013, a bill remains active in Massachusetts.

[13] Florida, Hawaii, New Mexico, Oregon, Texas, West Virginia.

[14] Florida, Illinois, Massachusetts, Michigan, Montana, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Virginia, West Virginia. As of December 18, 2013, bills are still active in Massachusetts and Pennsylvania.

[15] Alabama, Alaska, Arizona, Delaware, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Nevada, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia. As of December 18, 2013, a bill remains active in Massachusetts.

[16] Florida, Massachusetts, New York, Oregon. As of December 18, 2013, a bill remains active in Massachusetts.

[17] Connecticut, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia. As of December 18, 2013, bills remain active in Massachusetts, New York, and South Carolina.

[18] California, Delaware, Florida, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, New Jersey, New Mexico, New York, Tennessee, Virginia, Wyoming.

[19] California, Colorado, Connecticut, Hawaii, Iowa, Massachusetts, Michigan, Nebraska, New York, Ohio, Oregon, Texas, Washington. As of December 18, 2013, bills remain active in Massachusetts and New York.

[20] Arizona, Connecticut, Maryland, Virginia.

EXPERT BRIEF

Voting Laws Roundup 2014

Voting rights continues to be a highly contentious issue in America. This is the Brennan Center's regularly-updated, comprehensive roundup of introduced, pending, active, and passed voting bills.

PUBLISHED: December 18, 2014

Ensure Every American Can Vote

Voting Reform

Voting rights continues to be a highly contentious issue in America. Starting after the 2010 midterm elections, legislators in dozens of states introduced scores of laws to make it harder to vote. Voters and advocates pushed back at the ballot box and the courts. Some lawmakers started pushing laws that improve access to the ballot box.

Below you will find a regularly-updated, comprehensive roundup of introduced, pending, active, and passed voting bills.[1]

See our roundup of voting law changes since the 2010 election. Also see our roundup of voting law changes in 2012 and 2013.

Numbers Overview

Since the beginning of 2014, and as of November 11, 2014, legislators from both sides of the aisle have introduced and supported bills that **expand access** to registration and voting:

At least **340 expansive bills** that would increase access to voting were introduced in **42 states plus the District of Columbia** whose legislatures have had floor activity in 2014.

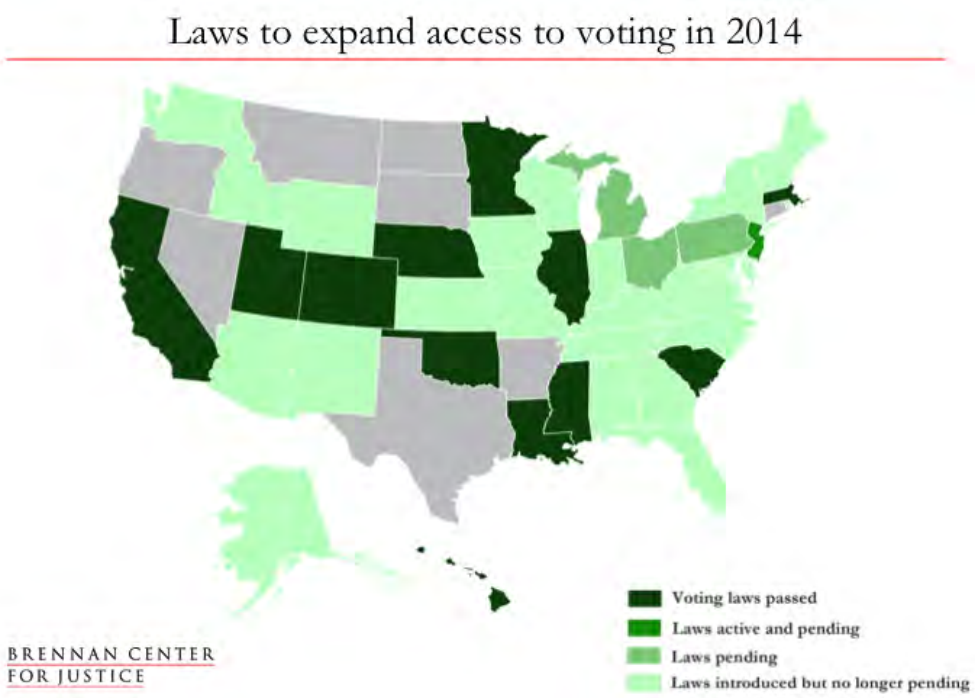
12 states plus the District of Columbia have passed **19 expansive bills** this session.[2]

Vigilance is still required, as numerous **restrictive voting bills** have been introduced in a number of states:

At least **83 restrictive bills** were introduced in **29 states** whose legislatures have had floor activity in 2014.

Two states have passed **4 restrictive bills** this session.

Enhancing Voter Access



Note: In the cases where more than one piece of expansive legislation has been introduced in a state, the map reflects the state's passed, active, or pending status based on the piece of legislation that has advanced farthest in the legislative process.

A new influx of bills to enhance voter access is drawing support on both sides of the aisle, many bearing much similarity to the recommendations offered by the president's bipartisan commission. Efforts to modernize our voter registration system are particularly prevalent.

Expansive Voting Laws Passed in 2014

California

A.B. 1589: Streamlines ballot requests for military voters.
S.B. 1063: Provides voter registration assistance to eligible applicants in juvenile detention facilities.
S.B. 113: Expands pre-registration to vote to 16-year-old citizens.

Colorado

S.B. 161: Expands language access for voters who speak a language other than English.

Hawaii

H.B. 452: Prohibits distribution of false information about the time, date, place, or means of voting with the purpose of interfering with the franchise.
H.B. 2590: Establishes same-day registration at absentee polling places starting in 2016, and Election-Day registration at polling places starting in 2018.

Illinois

H.J.R.C.A. 52 / **H.J.R. 102**: Places a ballot measure before voters to establish constitutional protections against discrimination in voting. Voters approved the measure in the November 2014 election.

H.B. 105: Establishes pilot program to expand early voting for 2014 general election; establishes pilot program for same-day registration for 2014 general election; expands opportunities for students to vote.

Louisiana

H.B. 501: Permits 16- and 17-year-old citizens to pre-register to vote when they apply for their driver's license.

Massachusetts

H.B. 4072: Establishes online registration; permits 16- and 17-year-old citizens to pre-register to vote; establishes early voting starting 11 business days before the election until the second business day before the election.

Minnesota

H.F. 2096: Establishes online registration.

Mississippi

H.B. 624: Expands access to absentee ballots for deployed emergency response providers.

Nebraska

L.B. 661: Establishes electronic registration at DMVs; establishes online registration.

Oklahoma

H.B. 2576: Expands access to absentee ballots for voters living on tribal lands.

South Carolina

S.B. 825: Expands absentee voting options for military voters and their families.

Utah

H.B. 156: Establishes pilot program for Election Day registration.

S.B. 117: Allows registered voters without a DMV signature to update their registration information online.

S.B. 135: Gives voters more time to register through certain methods.

Washington, D.C.

B. 20-0264: Establishes online registration.

Summary of Introduced and Pending Legislation to Expand Access to Voting

Modernizing voter registration. At least **29 states plus the District of Columbia** have introduced bills that would modernize their voter registration systems, in whole or in part, and make it easier for eligible citizens to register.[3] Bills to modernize voter registration have passed in 6 states plus the District of Columbia: Hawaii, Illinois, Massachusetts, Minnesota, Nebraska, and Utah.

- **Broad-based modernization**. At least **3 states** have introduced wide-ranging legislation to modernize the voter registration process using some combination of electronic transfer of voter registration information, online registration, portability, and fail-safe protections.[4]
- **Electronic registration**. At least **6 states** have introduced bills that would allow for electronic transfer of voter registration information at state agencies.[5]
- **Online registration**. At least **18 states plus the District of Columbia** have introduced bills that would establish or enhance the use of online registration systems.[6]
- **Same-day registration**. At least **19 states** have introduced bills that would allow voters to register on the same day they vote.[7] Same-day registration (SDR) bills can vary in that some allow same-day registration on Election Day only (EDR), some allow it during an early voting period only, and some may allow both options.
- **Portability. At least 6 states have intro**duced bills that would allow a voter's registration to move with her when she moves to a new address within the same county or state.[8]

More registration opportunities. At least **9 states** have introduced bills that would expand opportunities to register to vote.[9]

Pre-registering students to vote. At least **13 states** have introduced bills that would allow students under the age of 18 to pre-register, so that upon turning 18 they are registered to vote.[10]

More early voting opportunities. At least **23 states** have introduced bills that would newly introduce, or expand, opportunities for early in-person voting.[11]

Restoring voting rights. At least **12 states** have introduced bills that would expand opportunities for those with criminal convictions to regain their right to vote.**[12]**

Identification laws. At least **11 states** have introduced bills that would relax existing voter ID or proof of citizenship laws.**[13]**

Making it easier for students to vote. At least **2 states** have introduced bills that would make it easier for students to register and vote.**[14]**

Reducing long lines. At least **3 states** have introduced bills to reduce waiting times by requiring, or assessing, the implementation of minimum standards for efficient polling place administration.**[15]**

Improving disability access. At least **5 states** have introduced bills that would make it easier for voters with disabilities to cast a ballot.**[16]**

Improving language access. At least **2 states** have introduced bills that would expand language access for voters who speak a language other than English.**[17]**

Improving access for military voters. At least **7 states** have introduced bills aimed at expanding opportunities to vote for voters in the military.**[18]**

Expanding access to absentee ballots. At least **15 states** have introduced bills aimed at expanding opportunities to cast an absentee ballot.**[19]**

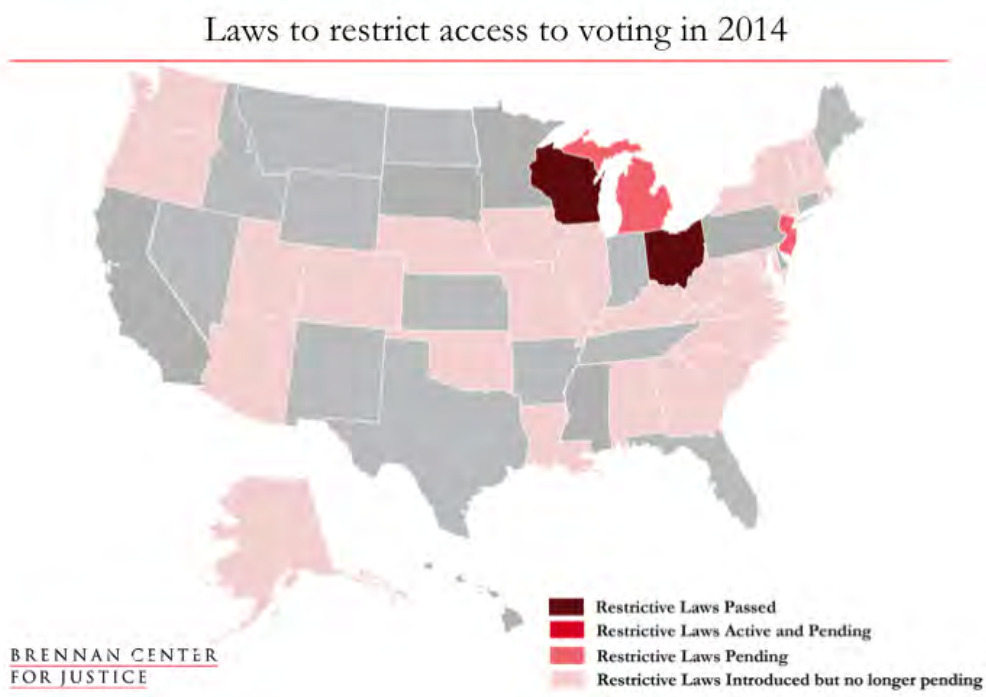
Guaranteeing the right to vote. At least **4 states** have introduced bills that would amend their constitutions to guarantee the right to vote.**[20]**

State preclearance. At least **3 states** have introduced bills that would require a preclearance procedure modeled after Section 5 of the Voting Rights Act.**[21]**

Improving list maintenance. At least **1 state** has introduced a bill to improve voter list maintenance to protect eligible individuals against wrongful removal.**[22]**

Preventing deceptive practices. At least **3 states** have introduced bills that would make it a crime to knowingly distribute false information about an election to mislead voters.**[23]**

Voting Restrictions



Note: In the cases where more than one piece of restrictive legislation has been introduced in a state, the map reflects the state's passed, active, or pending status based on the piece of legislation that has advanced farthest in the legislative process.

Restrictive Voting Laws Passed in 2014

Ohio

S.B. 205: Conditions any determination by the Secretary of State to mail unsolicited absentee ballot applications on legislative funding for that particular mailing.

S.B. 216: Prohibits individuals who lack identification or a Social Security number from voting even with a provisional ballot.

S.B. 238: Reduces early voting period and eliminates same day registration by eliminating the week during which voters could simultaneously register to vote and cast a ballot early and in person.

Wisconsin

S.B. 324: Reduces early voting period and hours.

Summary of Introduced and Pending Restrictive Voting Legislation

Identification laws

- **Photo ID laws**. At least **19 states** have introduced bills either requiring voters to show photo ID at the polls or making existing photo ID laws more restrictive.**[24]**

- **Proof of citizenship laws**. At least **4 states** have introduced bills requiring proof of citizenship, such as a birth certificate, to register or vote.[25]

Making voter registration harder. At least **13 states** have introduced bills to limit voter registration mobilization efforts and reduce other registration opportunities.[26]

Reducing early voting opportunities. At least **4 states** have introduced bills to limit existing opportunities to vote early in person.[27]

Making it harder for students to vote. At least **2 states** have introduced bills that would make it harder for students to register and vote.[28]

Reducing access to absentee ballots. At least **6 states** have introduced bills that would reduce access to absentee ballots.[29]

Making voter purges worse. At least **2 states** have introduced bills to limit protections for voter purges and increase the chance of wrongful removal of eligible voters.[30]

[1] This document tracks certain voting legislation making it easier or harder to register or vote. Note that the numbers in this document do not tally several types of election- and voting-related legislation, including: ballot design, voting machines, enfranchisement of people under 18 or non-citizens, public or individual notice requirements, or expanding authority to conduct elections primarily by mail ballot. The document also does not track other administrative changes that could indirectly expand or restrict access, such as counting provisional ballots, or minor departures from the status quo that are unlikely to have a substantial impact. The numbers in this document also do not reflect changes to rules for challenging voter eligibility. Additionally, bills that carry over to the 2014 session from a prior session are included in the counts of "introduced" bills.

[2] For purposes of this document, a bill has passed if it has advanced through all required stages in the legislative and executive branches, including signature by a governor if necessary. Thus, in most cases a bill that has advanced through both houses of the legislature is not counted as passed unless a governor has signed it. Certain types of legislation, such as resolutions, can advance fully through the legislative process without signature by a governor; these are counted as passed if they have cleared the legislative branch. Legislation that places a ballot measure before voters is counted as passed, even if voters have not yet approved the measure, as long as the legislation has advanced through all necessary stages of the legislative and executive process. If a ballot measure has been rejected by voters, it is no longer counted as passed. Accordingly, the **controversial** Missouri measure which would have allowed for six days of early voting, but would have set a constitutional limit on the legislature's ability to provide additional early voting days is not counted as passed at this time because it was rejected by voters on November 4, 2014.

[3] Alabama, Alaska, Arizona, California, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Washington, Washington D.C., Wisconsin.

[4] Massachusetts, Nebraska, New York.

[5] California, Florida, Georgia, Idaho, Missouri, New Jersey.

[6] Alabama, Florida, Georgia, Idaho, Iowa, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Washington D.C., Wisconsin.

[7] Alabama, Alaska, Arizona, Delaware, Georgia, Hawaii, Illinois, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Utah, Vermont, Washington.

[8] Georgia, Massachusetts, Mississippi, Nebraska, New Jersey, New York.

[9] California, Hawaii, Idaho, Michigan, New Jersey, New York, Utah, Washington, Wisconsin. Of these states, New Jersey and New York introduced bills to designate additional agencies as voter registration agencies under the National Voter Registration Act (NVRA). Additionally, Idaho, which is exempt from the NVRA's "motor voter" requirement, introduced a bill to provide for voter registration at state DMV offices.

[10] Arizona, California, Iowa, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New York, Ohio, Virginia, Washington.

[11] Arizona, California, Florida, Georgia, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia.

[12] Arizona, Florida, Iowa, Kentucky, Louisiana, Minnesota, New Jersey, New York, Tennessee, Virginia, Wisconsin, Wyoming.

[13] Arizona, Kansas, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Wisconsin.

[14] Illinois, New York.

[15] Arizona, Ohio, Washington.

[16] Minnesota, New Jersey, New York, Pennsylvania, South Carolina.

[17] Colorado, New York.

[18] California, Florida, Michigan, Missouri, New Jersey, New York, South Carolina.

[19] Indiana, Iowa, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia. While not counted here, legislation has been proposed in at least 8 states to expand authority to conduct elections primarily by mail ballots. Such bills have been introduced in Alaska, Arizona, California, Colorado, Iowa, Michigan, Nebraska, and Utah.

[20] Florida, Hawaii, Illinois, New York.

[21] California, Florida, New York.

[22] Virginia.

[23] Hawaii, New Jersey, Wisconsin.

[24] Alaska, Colorado, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island, Washington, West Virginia.

[25] Massachusetts, Oklahoma, South Carolina, Utah.

[26] Alabama, Arizona, Colorado, Kentucky, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Vermont, Wisconsin.

[27] Georgia, North Carolina, Ohio, Wisconsin.

[28] New Hampshire, North Carolina.

[29] Arizona, Iowa, Kentucky, Ohio, South Carolina, Washington.

[30] Nebraska, Virginia.

EXPERT BRIEF

Voting Laws Roundup 2015

As the early stages of the 2016 presidential race begin, state legislatures are already considering hundreds of laws that could determine voters' access to the ballot.

PUBLISHED: June 3, 2015



Ensure Every American Can Vote

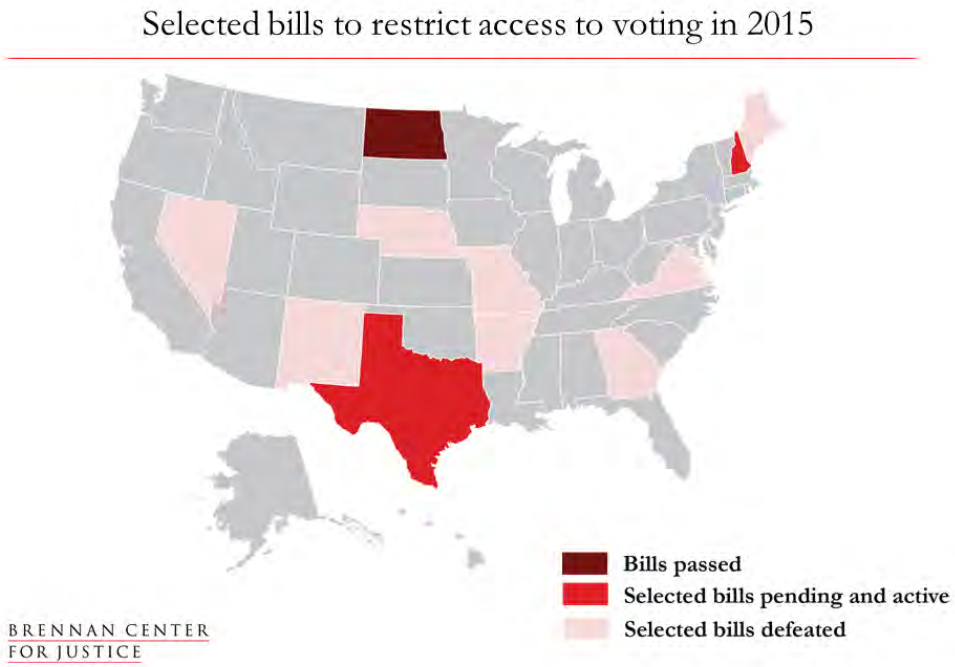
Voting Reform

As the early stages of the 2016 presidential race begin, state legislatures are already considering hundreds of laws that could determine voters' access to the ballot. Since the beginning of the 2015 legislative session, and as of May 13, 2015, at least **113 bills** that would **restrict access** to registration and voting have been introduced or carried over in **33 states**. Over the same time period, at least **464 bills** that would **enhance access** to voting were introduced or carried over in **48 states** plus the District of Columbia.

For the third year in a row, bills to expand voters' access to the ballot box outpace those to restrict voting, both in terms of introduction and enactment. This strong show of support for making the ballot accessible has not necessarily put voters ahead of where they have been in recent years, because some recent restrictive legislation continues to make it harder for citizens to participate.

Voting Restrictions

Of the **113** bills restricting access in this legislative session (including bills carried over from last session), **6** of them are active in **5 states**, in that there has been legislative activity beyond introduction and referral to a committee in 2015 (such as hearings, committee activity, or votes).



Note: If a state falls into more than one category, the map reflects the legislation that has advanced furthest in the legislative process.

Voter ID remains at the forefront of the voting wars, but enactment has slowed. Nearly half of the voting bills introduced so far this session that restrict access are aimed at establishing voter ID requirements or tightening pre-existing ones. Voter ID remains largely a partisan issue. Of the 52 restrictive ID bills introduced so far, most have Republican-only sponsorship. Only one state, North Dakota, passed a voter ID bill this legislative session — all others failed. Nevada, a Republican-led state without an existing strict photo ID law, had a rancorous fight. Arkansas and Missouri, where state courts struck down ID laws, had renewed efforts this session to put ID requirements before the voters as ballot questions. Voter ID bills also failed in Maine, Nebraska, and New Mexico.

Only one restrictive bill has been enacted thus far. This session, North Dakota passed a bill making its already-restrictive voter ID law even more onerous for voters. Thus far, this is the only restrictive law passed and signed, and it is noteworthy that it exacerbates existing restrictions rather than imposing a new one. This stands in contrast to recent prior years, which saw numerous burdensome voting bills at around this time of year. As amended, North Dakota's new law allows for only four forms of ID: a current North Dakota driver's license or non-driver ID card, a tribal ID, and a long-term care certificate. Persons stationed or living outside of the country can present a current military ID or passport. The ID requirement applies to absentee voters, with a narrow exception for voters with disabilities unable to travel to get an accepted ID. In those instances, a disabled voter may obtain an absentee ballot without ID, but only if another eligible North Dakota voter confirms in writing that the absentee voter is eligible to vote.

As court battles continue, state legislators are also waging wars against voting restrictions. There are ongoing lawsuits over new voting restrictions in Arizona, North Carolina, and Texas. In a few states, legislative battles happened alongside those court fights. The most interesting example comes from Texas, which has a high-profile court battle over photo ID. The Texas legislature enacted a bill that would provide a certified copy of a Texas birth certificate free of charge to a voter who states she is seeking it to obtain an election identification certificate,

BRENNAN CENTER FOR JUSTICE
APPENDIX A

a minor adjustment. More impactful ameliorative bills failed to pass. More alarming, a bill passed by the Texas legislature would exacerbate the restrictive ID law by eliminating non-expiring photo identification cards for the state's senior citizens. There are also bills pending in North Carolina — which has a trial beginning this July over new voting restrictions passed in an omnibus law in 2013 — to restore some early voting hours cut by the challenged law and to expand the list of IDs accepted to vote, but neither is active. In Arizona, where there is an ongoing suit over a requirement that voters present documentary proof of citizenship before registering, legislators introduced bills to repeal or mitigate the burdensome law, but the session expired with none of the bills progressing.

Restrictive Bills Passed in 2015

North Dakota	Voter ID (**HB 1333**) (passed and signed)

Selected Restrictive Bills Defeated in 2015

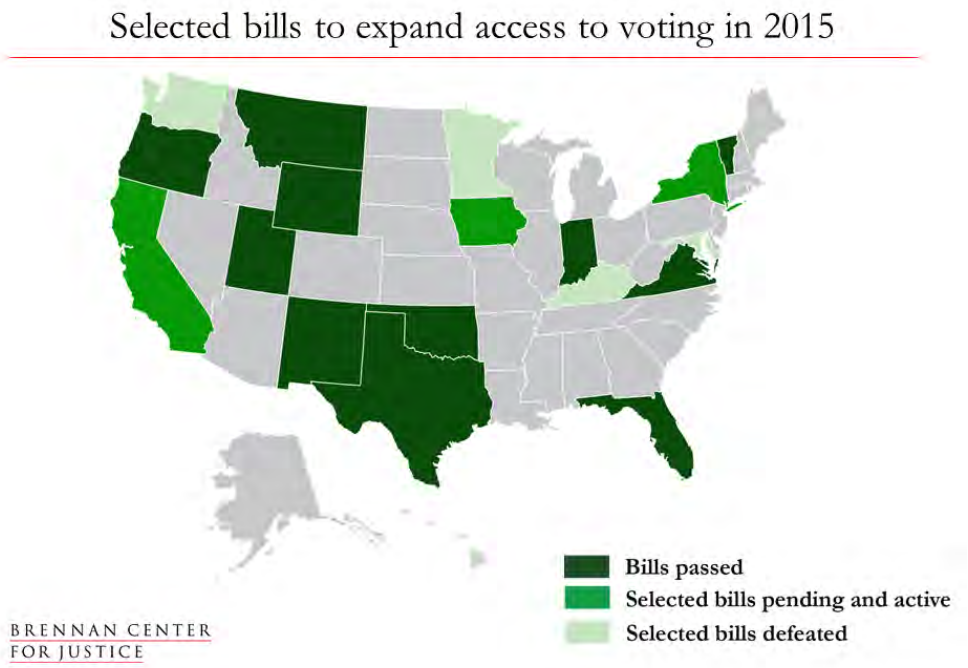
Arkansas	Voter ID (**HJR 1007**/**SJR 7**)
Maine	Voter ID (**LD 197**)
Georgia	Early Voting (**HB 194**)
Missouri	Voter ID (**HB 30**, **HB 339**)
Nebraska	Voter ID (**LB 111**)
Nevada	Voter ID (**SB 169**, **SJR 15**, **AB 253**, **AB 266**)
New Mexico	Voter ID (**HB 340**)
Texas	Purges (**HB 1096**)
Virginia	Voter ID (**HB 1318**) (vetoed)

Selected Restrictive Bills Pending and Active in 2015

New Hampshire	Voter Registration and Student Voting (**SB 179**) (passed Senate)
Texas	Voter ID (**SB 1934**) (passed, not yet signed)

Enhancing Voter Access

Legislators from both sides of the aisle introduced and supported numerous voting bills expanding access to the ballot box as well. Of the **464** bills enhancing access that have been introduced or carried over this legislative session, **33** are active in **16 states**.



Note: If a state falls into more than one category, the map reflects the legislation that has advanced furthest in the legislative process.

Oregon triggers a surge of automatic registration bills. In March, Oregon **passed** a breakthrough law to modernize voter registration by **automatically registering** eligible citizens who have driver's licenses (and do not ask to remain unregistered). Soon after Oregon's bill was introduced, 14 additional states — Alabama, Arizona, Arkansas, California, Georgia, Illinois, Louisiana, Minnesota, New Jersey, New York, Ohio, South Carolina, Texas, and Vermont — plus the District of Columbia introduced bills that would automatically register citizens who have, apply for, or update driver's licenses, and that information would be electronically sent over. In some states, such as Georgia, Illinois, and Ohio, the legislation would register citizens who have conducted business with other government agencies as well. The bills vary as to the specific mechanism by which individuals are registered, and other details — for instance, when and how an individual may opt out of registration. But all seek to reduce the burden on individual voters and instead require the government to ensure eligible citizens are registered.

Online registration continues to pass with bipartisan support. As in recent legislative sessions, several states — Florida, New Mexico, and Oklahoma — enacted online registration on a bipartisan basis.

Other reforms are gaining bipartisan support. In Vermont, a bill to establish Election Day registration was enacted on a bipartisan basis. Indiana enacted a bill, with bipartisan support, to allow state agencies that issue SNAP and TANF benefits to electronically transfer voter registration information to election officials (which is currently in place only at the DMV). A bill to restore voting rights to people with past criminal convictions **passed** the Maryland legislature in April by a substantial majority and with some bipartisan support, but was vetoed by the governor. The legislature will have the opportunity to override the veto when it is back in session; the bill passed the State Senate with **enough votes to override a veto** and the House only two short of the necessary amount. In Minnesota, a bill restoring voting rights with bipartisan co-sponsorship advanced before being defeated.

Bills to Enhance Voter Access Passed in 2015

District of Columbia	Online Registration (**LB 1035**) (passed in 2014, signed in 2015)
Florida	Online Registration (**SB 228**) (passed and signed)
Indiana	Optional Electronic Registration (at agencies administering TANF and SNAP benefits) (**SB 465**) (passed and signed)
Montana	Disability Access (**HB 209**) (passed and signed)
New Mexico	Online Registration (**SB 643**) (passed and signed)
Oklahoma	Online Registration and Optional Electronic Registration (**SB 313**) (passed and signed)
Oregon	Automatic Registration (**HB 2177**) (passed and signed)
Utah	Expansion of Same Day Registration Pilot Project (**HB 219**) (passed and signed) Pre-registration (**HB 340**) (passed and signed)
Texas	Voter ID (**SB 983**) (passed and signed)
Vermont	Election Day Registration (**S 29**) (passed and signed)
Virginia	Voter ID (**HB 1653**) (passed and signed) Polling Place Standards (**SB 1062**) (passed and signed)
Wyoming	Voting Rights Restoration (**HB 15**) (passed and signed)

Selected Bills to Enhance Voter Access Defeated in 2015

Hawaii	Electronic Registration (**HB 401**)
Kentucky	Online Registration (**HB 214**)
Virginia	Voting Rights Restoration (**SJR 238**)
Maryland	Voting Rights Restoration (**SB 340**/**HB 980**) (vetoed)
Minnesota	Voting Rights Restoration (**SF 878**) (provision removed from version of bill that passed) Voting Rights Restoration, Pre-registration, Automatic Registration, Early Voting (**SF 455**) (provisions removed from version of bill that passed)
Oklahoma	Voter ID (**SB 86**), (**HB 1511**)
Washington	Pre-registration (**HB 1294**)

Selected Bills to Enhance Voter Access Pending and Active in 2015

California	Automatic Registration (**AB 1461**) (passed)
Iowa	Online Registration (**SF 331**) (passed Senate)
New York	Ballot Design (**A 3389**) (passed Assembly)

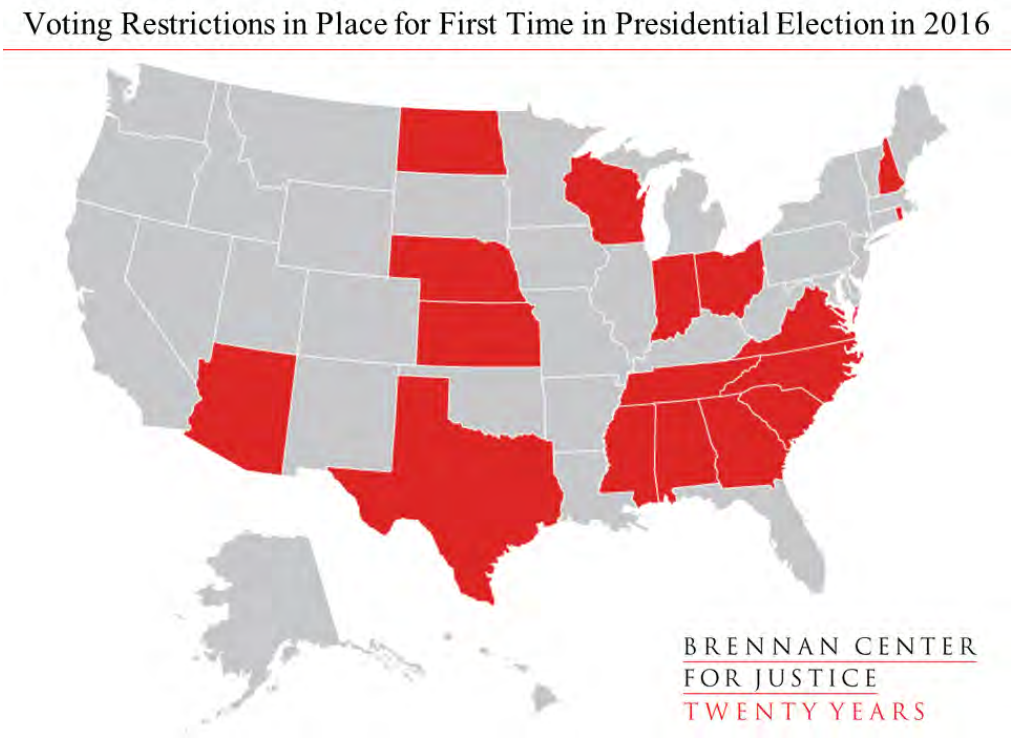
Also see our roundup of voting law changes in 2012, 2013, and 2014.

Voting Rights Context

These voting law changes come amid a high-pitched battle over voting rights.

Since the 2010 election, **22 states** have new laws making it harder to vote — ranging from photo ID requirements to early voting cutbacks to registration restrictions — and 17 states will have them in place for the first time in a presidential election in 2016. Those 17 states are: Alabama, Arizona, Georgia, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.*

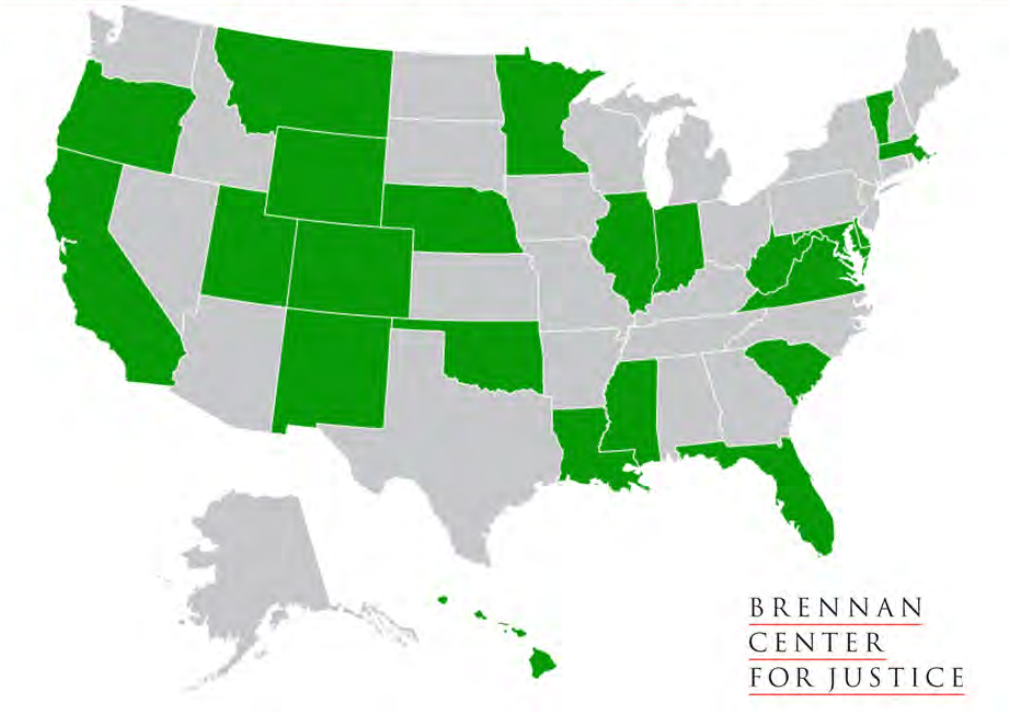
**Note: This list was updated to include Arizona in March 2016.*



Click for interactive version.

There has also been some positive momentum to improve voting. After long lines marred the 2012 election, **23 states** plus the District of Columbia passed new legislation to improve access to the polls.

States That Expanded Voting Since the 2012 Election



Click here for interactive version.

EXPERT BRIEF

Voting Laws Roundup 2016

For the fourth year in a row, bills that would expand voters' access to the ballot box have outpaced those that would restrict voting, in terms of both introduction and passage.

PUBLISHED: April 18, 2016



Ensure Every American Can Vote

Voting Reform

The 2016 election season is already in full swing. As voters in a number of states face new restrictions for the first time in a presidential election, we've already seen problems in primaries across the country. A new photo ID requirement led to long lines in Wisconsin. A reduction in polling places forced some to wait five hours to vote in Arizona. New rules created confusion in North Carolina. This could be an early glimpse of problems in November — as voters face the first presidential election in 50 years without the full protections of the Voting Rights Act, which was designed to prevent discrimination in voting.

Against this backdrop, legislators are considering a variety of changes to their states' voting laws. At the beginning of the 2016 legislative session, and as of March 25, 2016, at least **422 bills** to **enhance voting access** were introduced or carried over in **41 states** plus the District of Columbia. Meanwhile, at least **77 bills** to **restrict access** to registration and voting have been introduced or carried over from the prior session in **28 states**.

Thus far, two key trends have emerged in 2016:

1. **Automatic voter registration has taken off across the country**. Legislators in **West Virginia** and **Vermont** both passed groundbreaking bills with strong bipartisan support — West Virginia's has already been enacted, and Vermont's awaits the governor's signature. This progress comes as Oregon, which **passed** automatic voter registration in 2015, has reported substantial early **success** with its new system. After just a few months,

registration rates have increased nearly fourfold. California also passed a bill in late 2015, and supporters are looking forward to full implementation next year.

2. **States are passing fewer voting restrictions, but nonetheless, restrictions in 14 states will be on the books for the first time in a presidential election in 2016.** Overall, states are passing fewer laws to restrict voting rights — and voter ID bills are once again the most common type of restriction — but this may be due to states already having restrictive voting laws in place. In 2016, **14 states** will have restrictive voting laws in effect for the first time in a presidential election. Restrictions in most of these 14 were passed before this year. *(Note: This paragraph was updated September 23, 2016 to change the number of states with new restrictions, reflecting recent court victories.)*

For the fourth year in a row, bills that would expand voters' access to the ballot box have outpaced those that would restrict voting, in terms of both introduction and passage. These bills, a number of which have bipartisan support, included efforts to modernize voter registration systems and restore voting rights to eligible citizens with past criminal convictions.

Expansive Legislation

Automatic voter registration is picking up speed and bipartisan support. The 2016 session saw more automatic voter registration bills introduced than any other kind of voting legislation. Under automatic registration, the government automatically and securely registers every eligible citizen who interacts with designated government offices unless the person declines to register.

West Virginia passed an automatic voter registration bill, the first with significant bipartisan support, making it the third state after Oregon and California to adopt this reform.
In **Vermont**, the final version of the bill passed nearly unanimously, and observers expect the measure to be signed into law soon. It is the second state to pass automatic registration with strong bipartisan support.
Illinois may also still pass legislation in the current session. Illinois' bill is exciting because it provides for automatic registration not only at DMVs but also at other agencies, like social service and disability offices, expanding the breadth of this reform to reach a wider array of eligible citizens.
Although **Maryland** did not pass automatic voter registration, the state's legislature **passed** a broad voting reform bill, requiring all of the state's voter registration agencies to transfer voter information electronically to state election officials. Doing so would add a key building block for future automatic registration in the state. The governor is expected to sign the bill, which enjoyed strong bipartisan support, into law.

All in all, **28 states and the District of Columbia** have considered automatic registration this year (including legislation carried over from 2015 sessions). In addition, groups in several states, like **Alaska**, are pursuing ballot initiatives to adopt automatic registration.



Online voter registration continues to advance in the states. At least **15 states** considered online registration legislation. **Idaho, Rhode Island**, and **Wisconsin** (which also included restrictive elements discussed below) adopted the reform, and **Tennessee** is also poised to pass it this session. Most states now offer some form of **online voter registration**.

Rights restoration remains a popular reform. Restoration of voting rights to those with past criminal convictions was the second most popular type of reform this session after efforts to modernize registration, with **27 bills** introduced in **15 states**. **Maryland's** legislature overrode a gubernatorial veto to restore the rights of 40,000 Marylanders. And in **Kentucky**, a dispute continues over Gov. Matt Bevin's suspension of an executive order restoring voting rights to those convicted of certain crimes. Legislation that would amend Kentucky's constitution to automatically restore voting rights passed the state House by a wide margin and received substantial bipartisan support, but has stalled in the state Senate.

Restrictive Legislation

States are passing fewer laws that restrict voting rights overall, but voter ID bills are still the most common type of restriction being introduced. The pace of states' adoption of restrictive voting legislation continues to slow, perhaps because many states already have them on the books.

Although voter ID bills are the most common form of restrictive legislation that has been introduced, other types of restrictions have gained traction.

19 states saw **37 voter ID bills** introduced or carried over into the 2016 session. Legislators in **Missouri** introduced a photo ID requirement, though it will require voter approval through a state constitutional amendment. The bill passed the state House and awaits a vote in the Senate. **West Virginia** passed a less restrictive voter ID requirement, but as part of legislation that included automatic registration, described above.

On the brighter side, **Florida** made its law less restrictive, adding veterans' health IDs, concealed-carry licenses, and government employee IDs to its list of photo ID forms accepted for voting, as long as those IDs were unexpired and contained the voter's name and photograph.

Two states passed laws that may limit voter mobilization. **Arizona** made it a felony for anyone other than a family/household member or caregiver of the voter to collect and submit the voter's absentee ballot. In prior years, several states prescribed rules to limit third-party collection and delivery of absentee ballots. Arizona's would be among the strictest, and may create significant barriers for minority or elderly communities, who historically have relied on absentee ballots and assistance from civic groups to cast their votes. In **Wisconsin**, the state eliminated "special registration deputies" — volunteers who were previously permitted to verify voters' residency when they collected or submitted voter registration applications. The law **threatens** the ability to civic groups to conduct voter registration drives in the state.

New voting restrictions in place in 2016. Aside from new restrictions *considered* in 2016, there are **14 states** with voting restrictions *in place* for the first time in a presidential election this year. The new measures range from strict photo ID requirements to early voting cutbacks to registration restrictions.

Those 14 states are: Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. See the following map:



This is part of a broader movement to curtail voting rights, which began after the 2010 election, when state lawmakers nationwide started introducing hundreds of harsh measures making it harder to vote. Overall, 20 states have new restrictions in effect since the 2010 midterm election.

(Note: The restrictive laws section was updated September 23, 2016 to change the number of states with new restrictions, reflecting recent court victories.)

EXPERT BRIEF

Voting Laws Roundup 2017

In 2017, changes to voting laws are again poised to play a major role in state legislative agendas.

PUBLISHED: May 10, 2017



Ensure Every American Can Vote

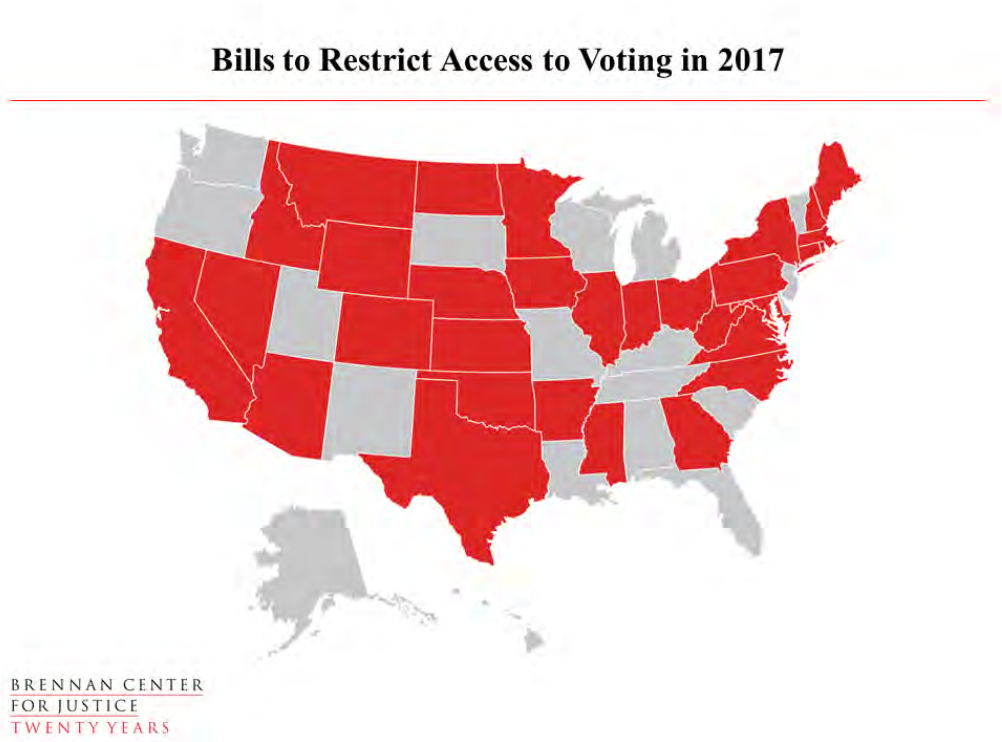
Voting Reform

(Note: This updates the Roundup previously published on March 27, 2017.)

At this point in the year, every state's legislature is either in session or has completed its 2017 calendar. As has been the case all decade, legislators across the country are trying to reshape state voting laws. In several places, this means it will soon be harder to vote: **Five states** have already enacted bills to cut back on voting access, and **one more** is on the verge of doing so. By comparison, three states enacted voting restrictions in **2015** and **2016** combined. Overall, however, more bills to expand access to voting were introduced this year than bills that would restrict voting access. Still, of the legislation making the most substantial impact on voting access, more legislation to limit participation is advancing toward passage. Moreover, governors in Nebraska and Nevada have vetoed the bills that would expand access to the franchise.

Overview of Legislation to Restrict Voting Access

Overall, at least **99 bills** to restrict access to registration and voting have been introduced in **31 states**. **Thirty-five** such bills saw significant legislative action (meaning they have at least been approved at the committee level or beyond) in **17 states**.



Several states will soon implement major new voting restrictions

Five states have already enacted laws making it harder to register or vote, one more is on the verge of doing so, and more states could act later this year:

Iowa's governor signed a broad-based law that will require voter ID, restrict voter registration efforts, and impose new burdens on Election Day registration and early and absentee voting. Although not as restrictive as a North Carolina law that passed in 2013 (and was **blocked** by a federal court), Iowa's law similarly restricts voting in a number of different ways.
Arkansas passed two bills to bring back voter ID to the state after a court struck down an earlier law.
North Dakota also enacted legislation to re-impose an identification requirement after a court blocked a strict ID law in 2016.
Indiana enacted a law that will implement a purge of registered voters from the rolls. The program will remove voters in a manner similar to purges in other states that have been criticized for being error-prone and inadequately protective of eligible voters.
Montana's house and senate passed a bill that will prevent civic groups and individuals from helping others vote absentee by collecting and delivering their voted ballots. The bill now goes to voters as a November 2018 ballot measure.
Georgia's legislature sent bill that would make voter registration more difficult to the Governor, and he signed it on May 9.

Voter ID bills are still the most common form of voting restriction moving in state legislatures

Since 2010, ten states have passed more **burdensome voter ID requirements**. As in previous years, voter ID is the most common type of legislation to restrict voting access this year. Overall, **39 bills** imposing harsher voter ID requirements were introduced in **22 states**. As noted above, **three states** — Arkansas, Iowa, and North Dakota have already enacted voter ID laws.

Legislation pending in other states poses risks to voting access. For example, **Oklahoma**'s Senate passed a bill that would add a voter ID requirement to the state constitution. The bill passed with a **wide margin** in the Senate, setting up a likely house vote. Meanwhile, **Texas's** senate has passed a voter ID bill, discussed in further detail below, that would put in place a voter ID provision less voter-friendly than the current, court-ordered provision.

Restrictions on voter registration are a close second

After voter ID, making the voter registration process more burdensome is the most popular subject of bills to cut back on voting access. Overall, **33** bills to make the voter registration process more burdensome have been introduced in **22** states. Bills have at least been considered and approved by a legislative committee in Connecticut, Iowa, Kansas, Maryland, New Hampshire, Rhode Island, Texas, Virginia. Of these, **New Hampshire**'s has the most momentum: a bill to make registration more difficult for students, supported by the Secretary of State, has **passed the Senate**.

The majority of states acting to restrict voting are legislating on topics where courts previously acted to protect voters

Most of the states that have already enacted or on the verge of enacting new voting restrictions are passing legislation of the same subject on which courts have recently acted to protect voters from past voting restrictions.

Arkansas has passed two harmful voter ID bills. One, which restores a statutory requirement that voters show one of a limited set of ID, has been enacted. The other, which would amend the state constitution to require voter ID, must be approved by the voters in the form of a ballot initiative before taking effect. A state court blocked a previous ID law in 2014.

Georgia enacted a law imposing a requirement that information on voter registration forms match exactly with other state records — a burdensome process known as "no match, no vote." Only months earlier, the secretary of state agreed in a court **settlement** to stop a similar procedure that had prevented tens of thousands from registering.

Iowa enacted an omnibus voting bill, described in further detail above, on May 5. The bill includes a requirement that suspected non-citizens be deleted from the voter rolls. Such removals programs, if conducted without safeguards to adequately ensure those being removed are actually ineligible, can sweep in thousands of eligible voters, as has happened in Colorado and Florida. In 2014, a state court **blocked** former Secretary of State Matt Schultz from purging suspected noncitizens because he lacked authority to carry out the program in the manner he intended.

North Dakota's Governor signed a bill on April 25 that would restore a strict voter ID requirement in the state. In 2016, a federal court partially blocked a previous ID law that accepted a narrow range of identification documents and did not provide any meaningful voting opportunities for voters without the accepted ID. The new bill slightly expands options to use for ID, but eliminates the process the court imposed, which allows voters without IDs to cast a ballot that counts on Election Day, and instead included a more burdensome process. One legislator argued that that the bill does **not pass constitutional muster**.

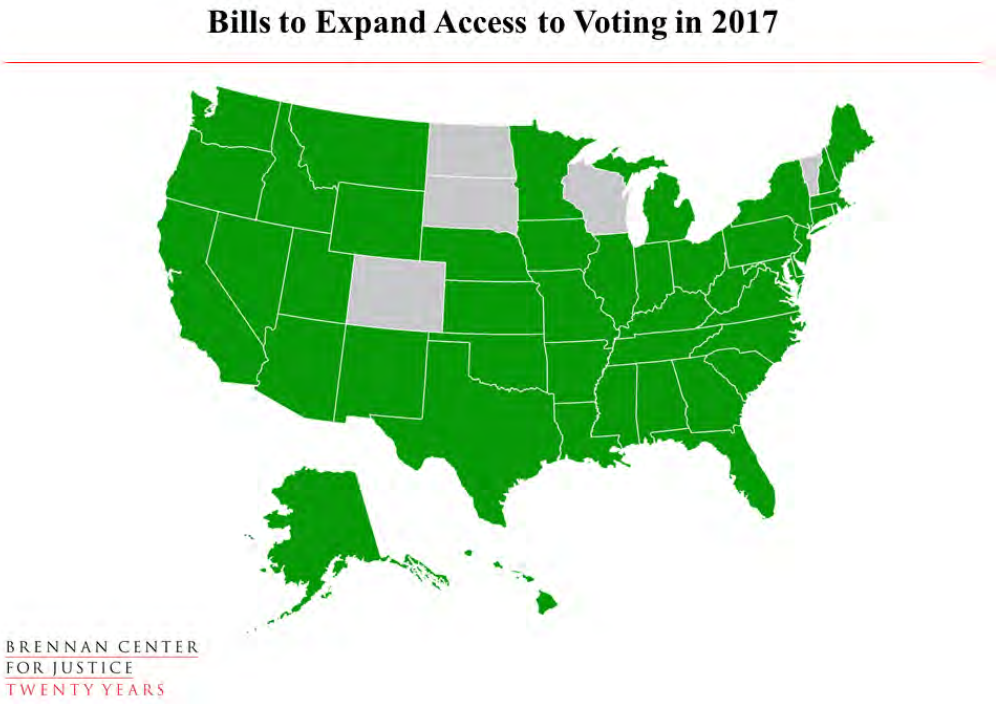
Texas's legislature is considering a voter ID bill that that is on the verge of being passed a house committee has already approved the legislation and it has already passed the senate. The state attorney general **has described** the bill as a response to a court's blocking of the state's previous strict voter ID law. Critics **observe** that the bill, if enacted, would put in place a voter id requirement that is more stringent than the existing court-ordered process.

Bills to restrict voter access approved by state legislatures in 2017

Arkansas	Voter ID (**HB 1047**) (passed and signed) Voter ID (**HJR 1016**) (passed house and senate; signed by governor; must be approved as ballot measure to become law)
Georgia	Voter registration (**HB 268**) (passed and signed)
Indiana	Voter purge (**SB 442**) (passed and signed)
Iowa	Voter ID, restrictions on voter registration drives, Election Day registration, absentee voting (**HF 516**) (passed house and senate). Also contains voter list maintenance provisions that, if implemented improperly, could lead to voter purges.
Montana	Absentee ballot collection (**SB 352**) (passed house and senate; must be approved as ballot measure to become law)
North Dakota	Voter ID (**HB 1369**) (passed and signed)

Overview of Legislation to Expand Voting Access

Overall, at least **531 bills** to enhance voting access have been introduced in **45 states**. **One hundred fifty-six** bills have at least been considered and approved by a legislative committee in **30** states.



Fifteen state legislatures have passed bills to expand access to voting, but Governors have vetoed the most impactful legislation

Eight states have enacted bills that will make voting and registration easier, seven states have not yet enacted legislation but have passed it through their state legislatures, and **more than a hundred bills** to improve voting access have at least advanced through a committee. The two bills that would make the biggest impact on voting access, however, have been vetoed.

Florida, Kansas, New Jersey, Tennessee, Utah, **Virginia** enacted legislation that would make it easier to vote without showing up to the polls on Election Day.

- **New Jersey** improved voting for military voters.
- **Utah** expanded early and absentee voting opportunities.
- The other states upgraded their absentee voting procedures.

Indiana improved its process for registering voters who visit the state drivers' license offices.
Wyoming eased the process for restoring the right to vote for people with criminal convictions.
Idaho made its voter ID law slightly less burdensome.
The most significant reforms to pass, however, have been vetoed by Republican governors.

- **Nevada**'s assembly and senate passed legislation to establish automatic voter registration, but Republican Governor Brian Sandoval vetoed it. The legislation, an initiative petition, now goes to the voters, who could approve it by directly voting on it in the November 2018 general election.
- **Nebraska** Governor Pete Ricketts, also a Republican, vetoed a bill that would have restored the right to vote to citizens with criminal convictions upon their release from incarceration. The veto came after Nebraska's unicameral legislature (which is technically nonpartisan, but controlled by legislators generally identified as politically conservative), passed the bill by a 27-13 margin. An attempted veto override failed, with the chamber **splitting 23-23** for override.

Automatic registration and other reforms to modernize voter rolls are common forms of legislation to expand voting access

Automatic voter registration (AVR) remains a popular pro-voter reform that is being introduced in legislatures across the country, building on momentum from the last two years. AVR is a new reform that leverages existing technology to help get voters registered. It also changes our system from one in which voters must affirmatively register to vote to one in which they are registered unless they "opt out." In 2015 and 2016, six states passed or implemented AVR.

This year, AVR became law in the **District of Columbia.**
A **bill** in **Illinois**, which nearly enacted the reform last year, just passed the Senate by a 48-0 vote. The bill is similar to legislation introduced and supported by both Democrats and Republicans in the last legislative session, and there is a strong possibility the bill will pass.
Nevada passed an automatic voter registration bill through both legislative chambers, but it was **vetoed** by the governor. It will be on the ballot in 2018 for the voters to decide.
Utah's House also passed an automatic voter registration bill, but it died in the Senate.
Colorado, Connecticut, and Georgia are moving forward to implement automatic voter registration administratively.
Overall, at least **86 bills** to implement or expand AVR have been introduced in at least **32 states**.
Legislation has at least been approved by a legislative committee in **Arkansas, Connecticut, Hawaii, Illinois, Maryland, Nebraska, Rhode Island, Virginia,** and **Washington**, and efforts to introduce and pass legislation have also received media attention in **Maine** and **Maryland**.



Legislation to expand early and absentee voting is popular

In addition to the six states that have already enacted legislation to make early, absentee, and military voting easier, **seven** states have at least moved early voting legislation through a committee, and **nineteen** states have

done the same with absentee voting legislation. Overall, **166 bills** to improve early voting or absentee voting access have been introduced in **35 states**.

Legislation restoring the right to vote to people with past convictions is also common

As described above**, Nebraska and Wyoming**'s legislatures approved bills to help restore the right to vote to people with past criminal convictions. Nebraska's bill was vetoed.

Nevada's Senate passed a bill that would improve the rights restoration process in the state, and a bill is also moving in the House. Nevada's Governor has opposed past efforts to restore the right to vote.
In **Virginia**, different versions of a bill that would improve voting access for certain persons with criminal convictions passed in the house and senate, but neither was enacted.
Overall, **55 bills** to help restore the right to vote to persons with past criminal convictions have been introduced in **18 states**, and bills have at least been approved by a committee in **17 states**.

Bills to enhance voter access approved by state legislatures 2017:

Florida	Absentee voting (**H 105**) (passed and signed)
Idaho	Voter ID (**HB 149**) (passed and signed)
Indiana	Electronic voter registration (**HB 1178**) (passed and signed)
Kansas	Absentee voting (**HB 2158**) (passed and signed)
Maryland	Voter registration (**HB 1626**) (passed house and senate)
Montana	Absentee voting (**HB 287**) (passed house and senate)
Nebraska	Voting rights restoration (**LB 75**) (passed unicameral legislature; vetoed by governor)
Nevada	Automatic voter registration (**IP 1**) (passed house and senate; vetoed by governor)
New Jersey	Military voting (**SB 92**) (passed and signed)
New Mexico	Disability access (**HB 98**) (passed house and senate)
Oklahoma	Early voting (**SB 347**) (passed house and senate)

Tennessee	Absentee (**SB 286**) (passed and signed)
Utah	Voter list maintenance (**HB 86**) (passed and signed) Early voting (**HB 105)** (passed and signed) Absentee voting (**HB 230**) (passed house and senate) Minimum standards for polling places (**SB 116**) (passed house and senate)
Virginia	Absentee voting (**HB 1912**) (passed house and senate)
Wyoming	Voting rights restoration (**HB 75**) (passed and signed)

BRENNAN CENTER FOR JUSTICE
at New York University School of Law

Voting Laws Roundup 2018

Legislative sessions have either commenced or concluded in every state that is meeting this year, except North Carolina, and the most notable takeaway of this session so far is the remarkable momentum around automatic voter registration, or AVR. What follows is the Brennan Center's analysis of state legislative activity as of April 2, 2018. [1]

In March, the New Jersey Senate passed an AVR bill out of committee with a bipartisan vote. In the same month, Washington's governor signed AVR into law and the Maryland Legislature passed an AVR bill and sent it to the state's governor. In addition, the Massachusetts House has passed an AVR bill out of committee. The Utah Senate passed an AVR bill this year, but it died in the House.

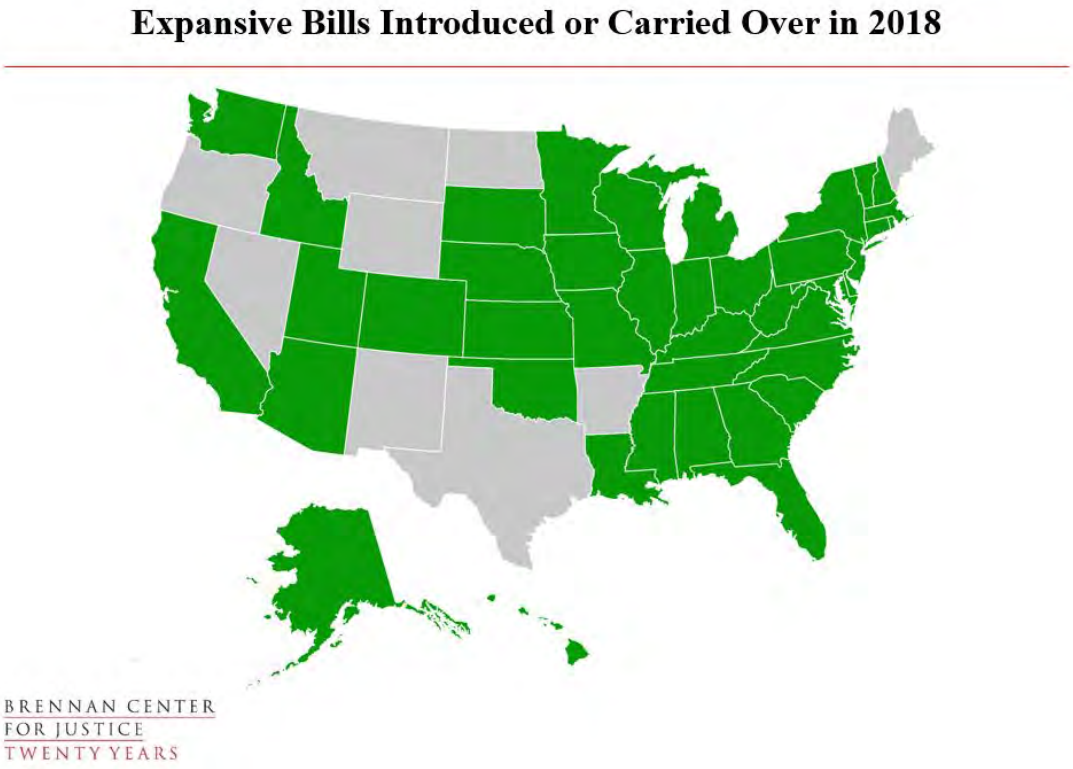
Broadly speaking, more pro-voter reforms are moving than anti-voter restrictions. Washington state has been a significant locus of pro-voter reform this year: in addition to AVR, the Legislature passed – and the governor signed – a package of reforms, including election day registration, pre-registration for 16- and 17-year-olds, and a state-level Voting Rights Act. California and Utah have also enacted laws improving voter access. In total, as of April 2 – when we at the Brennan Center completed our latest round of legislative bill tracking – at least **12 states** have advanced at least **20 bills expanding voting access** through at least **one state legislative chamber**. [2]

Nevertheless, efforts to restrict access to the franchise persist. At least **five states** have advanced at least **six bills restricting voting access** through at least **one chamber**.[3] Notably, the New Hampshire Legislature has passed a bill targeting student voting. In addition, the Georgia Senate passed a pair of bills cutting voting hours in Atlanta, one of which also would have restricted early voting options on weekends. But those bills were rejected by the state Assembly.

Finally, states have taken only tentative steps to address significant election security issues ahead of the 2018 elections. So far this year, at least **six states** have advanced at least **eight bills** related to **election security** through at least **one chamber**. [4] At the federal level, Congress recently appropriated $380 million to help states upgrade their voting systems. This is a necessary, but far from sufficient, step toward securing our voting systems.

Overview of Expansive Bills

As of April 2, at least **41 states and Washington D.C.** have **introduced or carried over** at least **514 bills** expanding voting access.



Pro-voter reforms that have moved thus far this year include:

- **Bills That Have Been Signed** ***(Three States).***
  - **Washington state** has enacted: (1) a law implementing **automatic voter registration**, (2) a law implementing **election day registration**, (3) a law implementing **pre-registration** for 16- and 17-year-olds, and (4) a state-level **Voting Rights Act** that grants citizens the right to challenge electoral systems that deny race, color, or language minority groups an equal opportunity to elect candidates of their choosing.
  - **California** has enacted a law implementing **pre-registration** through its AVR system.
  - **Utah** has enacted (1) a law that **extends registration deadlines** and (2) a law that may encourage certain counties to offer **early voting** opportunities.

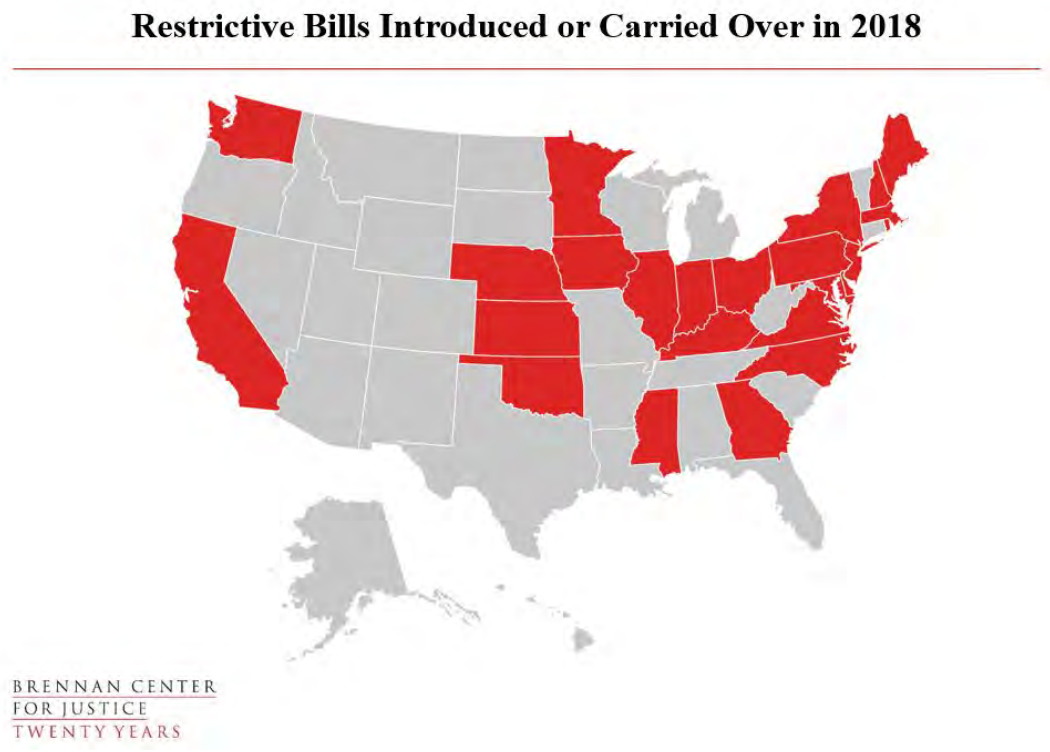
- **Bills Passed by the Legislature** ***(Three States).***
  - The **Maryland** Legislature has passed (1) a bill implementing **automatic voter registration** and (2) a constitutional amendment that would permit the Legislature to implement **election day registration**. If ultimately enacted, the amendment will go to the voters in a November referendum.
  - The **South Dakota** Legislature has passed a bill facilitating the **addition of registration locations**.
  - The **Wisconsin** Legislature has passed a bill permitting the use of **tribal identification to register to vote**.

- **Bills Passed by One Legislative Chamber** ***(Eight States).***
  - The **Indiana** Senate has passed a bill that would implement **no-excuse absentee voting**.
  - The **Kansas** Senate has passed a bill improving **access for voters with disabilities**.

- The **Maryland** House and Senate have each passed separate bills that would implement **no-excuse absentee voting in municipal elections**.
- The **Michigan** Senate has passed a bill that would permit applicants to **register to vote online** through the secretary of state's website.
- The **New York** Assembly has passed a bill extending the deadline for receipt of **absentee ballot** applications.
- The **Oklahoma** Senate has approved a bill facilitating opportunities for **early in-person voting**.
- The **Pennsylvania** Senate has passed a bill easing access to **absentee ballots for voters with disabilities**.
- The **Wisconsin** House has approved a bill **expanding access for military voters**.

Overview of Restrictive Bills

As of April 2, 2018, at least **24 states** have **introduced or carried over** at least **70 bills** restricting voting access.



No states have enacted restrictive laws yet this year, but restrictive legislation is still advancing.

- **Bills Passed by the Legislature** ***(Two States).***
  - The **Indiana** Legislature has approved a **list maintenance** bill that fails to fix the problems with its current list maintenance practices (though as we previously observed in footnote 3, this bill presents an unusual case).
  - The **New Hampshire** Legislature has passed a bill that appears to be directed at **deterring student voting**.

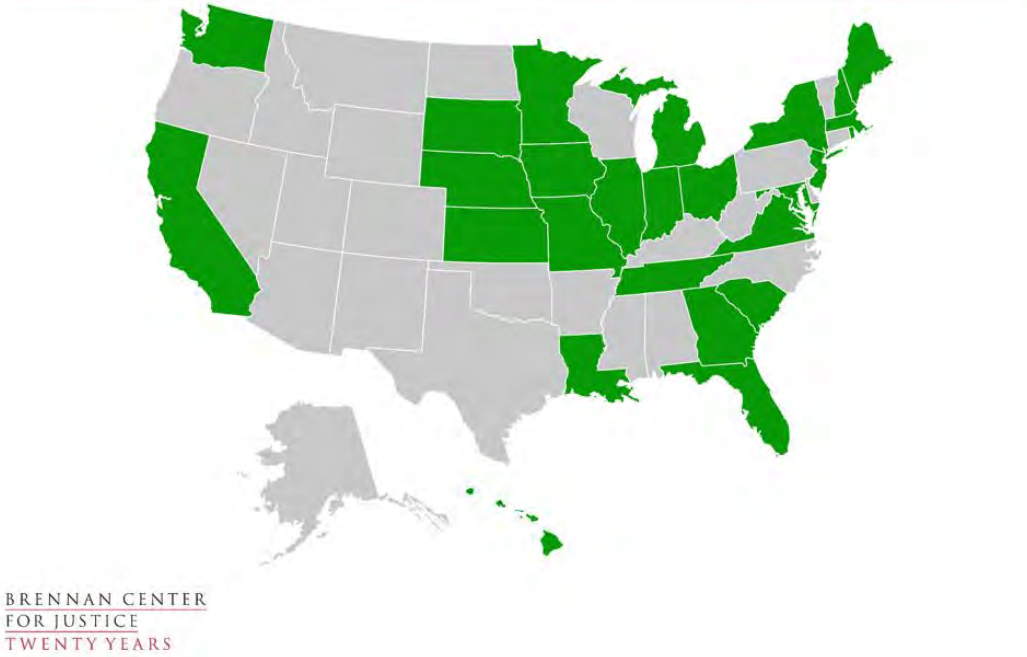
- **Bills Passed by One Legislative Chamber** ***(Four States).***
  - The **Kentucky** House has passed a bill restricting access to **absentee voting**.

- The **New Hampshire** House has passed a bill that appears to be directed at **deterring student voting**.
- The **Ohio** Senate has passed a bill **reducing the minimum required number of precinct officials** in certain circumstances.
- The **Oklahoma** House has passed a bill authorizing the state Election Board to compare the state voter registration database to other state and federal databases and requiring the Board to **refer** any individuals on the voter rolls identified as **potential non-citizens** to the **district attorney**.

Overview of Election Security Bills

As of April 2, 2018, at least **26 states** have **introduced or carried over** at least **79 bills** related to election security. Note that this count does not include appropriations bills or administrative action, nor is the Brennan Center opining on the impact or potential efficacy of these bills in this document.

Election Security Bills Introduced or Carried Over in 2018



Election security bills that have moved thus far this year include:

- **Bills That Have Been Signed *(Three States)*.**
  - **Indiana** has enacted (1) a law containing a variety of provisions related to **maintaining voting equipment**; updating the **permissible error rate** for voting systems to reflect current federal standards; and requiring county election boards to **notify** the Secretary of State within 48 hours of **certain security violations**, and (2) a law regarding **post-election reconciliation of vote counts.**
  - **South Dakota** has enacted a law prohibiting voting equipment from being connected to the Internet and prohibiting ballot marking devices from saving or tabulating votes.
  - **Washington** has enacted a law expanding the types **of post-election audits** election officials may run on direct recording electronic or in-person ballot marking systems to include random checks of ballot counting equipment, risk-limiting audits, and electronic audits of ballot counting equipment.

- **Bills Passed by One Legislative Chamber** ***(Three States).***
  - The **Maryland** House has passed (1) a bill requiring **post-election, manual audits** of voter-verifiable paper records for general elections (and authorizing such audits for primary elections) and (2) a bill requiring the state election administrator to **notify the governor and other elected officials** and agencies, within seven days, **of security violations** involving state elections systems.
  - The **Michigan** House has passed a bill requiring that electronic voting systems use **paper ballots for tabulating purposes**.
  - The **Missouri** House has passed a bill that beginning January 1, 2019 bans future purchase of **direct recording electronic voting machines** and requires that all newly purchased electronic voting systems read paper ballots that voters have marked by hand or, in the case of disabled voters who need assistance, from paper ballots that have been marked by paper-ballot marking devices designed to assist disabled voters.

Appendices listing the bills referenced in this analysis can be found here.

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[1] This document tracks certain voting legislation making it easier or harder to register or vote, as well as certain legislation related to election security. Note that there are several types of election- and voting-related legislation that we do not track, including: redistricting, ballot design, enfranchisement of people under 18 or non-citizens, or public or individual notice requirements. The document also does not track administrative changes that could expand or restrict access.

[2] California, Indiana, Kansas, Maryland, Michigan, New York, Oklahoma, Pennsylvania, South Dakota, Utah, Washington, Wisconsin. This count – and the counts of restrictive and election security bills passed through one chamber – does not include bills that passed through one chamber last year and carried over, or bills that passed through one chamber and subsequently failed.

[3] Indiana, Kentucky, New Hampshire, Ohio, Oklahoma. Indiana's current law violates the National Voter Registration Act of 1993. This Indiana bill introduces some protections against improper purges, but it does not address Indiana's unlawful failure to give notice to voters prior to purging them.

[4] Indiana, Maryland, Michigan, Missouri, South Dakota, Washington.

EXPERT BRIEF

Voting Laws Roundup 2019



With most legislatures closed, major positive reforms were enacted, but a handful of states made it more difficult to vote.

Brennan Center for Justice

LAST UPDATED: July 10, 2019
PUBLISHED: July 10, 2019

Ensure Every American Can Vote

Voting Reform

At this point in the year, 42 state legislatures have concluded their last regular legislative session in the leadup to a presidential election year. Looking back at this session, three new, Democratic trifectas – New York, Nevada, and Colorado – were responsible for an outsize portion of the most impactful expansive voting laws enacted so far this year.[1]

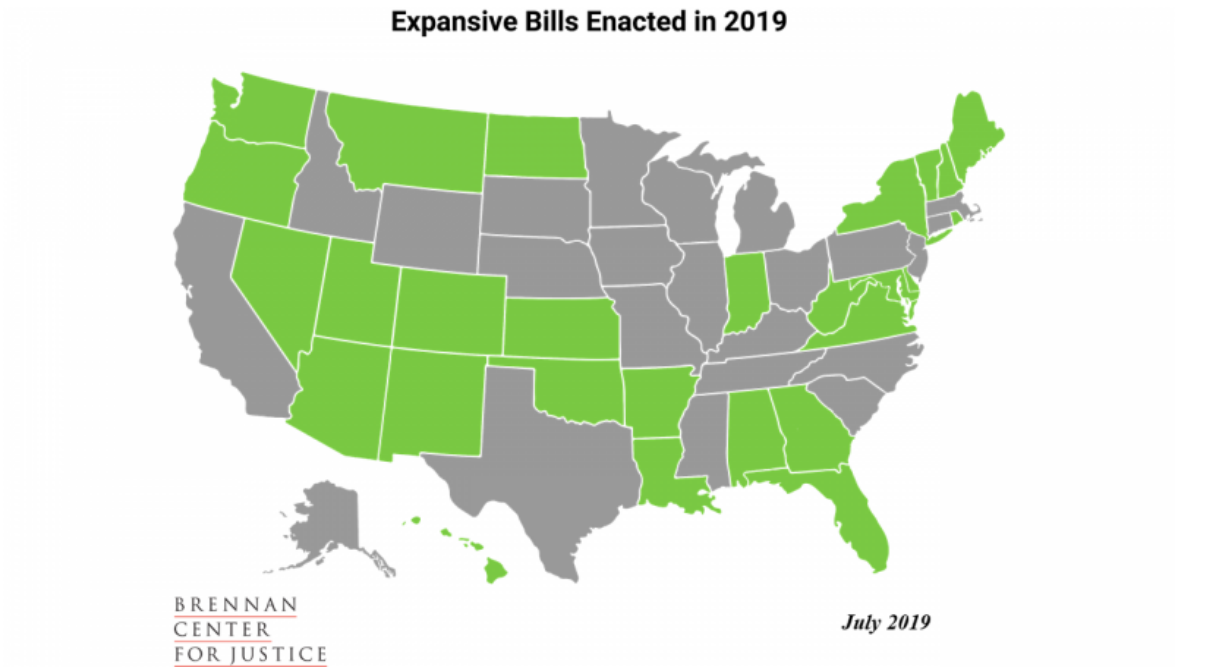
At the same time, a late-session surge in legislation cutting back voting access was successful in creating new restrictions in five states. Most significantly, in Florida, a new restriction cuts back on the gains made by Amendment 4. This new restriction could dramatically curtail the number of people who get their voting rights back under Amendment 4 and it flies in the face of the voters' decision last November to expand voting access. In addition, in Tennessee, lawmakers added new burdens on voter registration drives. And in Texas, lawmakers pushed through a new restriction on early voting, but it could have been even worse, if a powerful coalition had not come together to stop an even more restrictive bill that was moving toward passage.

Overall, since the start of the session, 46 states have introduced or carried over 688 bills expanding access compared to 29 states have introduced or carried over at least 87 bills restricting voting access. In addition, 33 states have introduced or carried over at least 108 bills related to election security.

Expansive Voting Bills

The massive burst of pro-voter bills introduced this session – 688 bills in 46 states – translated into significant reform across the country. As a group, states with new, Democratic trifectas led the way in terms of expansive laws this year – and, within that group, New York, Colorado, and Nevada enacted multiple, high-impact reforms. In addition, Delaware and Virginia enacted early in person voting. And a number of other states – under Democratic, GOP, and mixed control – enacted reforms that are either more incremental or alleviate past voter suppression.

(Click **here** for a list of expansive bills that have passed at least one house and are still alive – as we are now deep into the legislative calendar, bills that have seen significant movement are generally the ones to watch for passage.)



A couple of other trends emerged as well. States enacted a number of bills providing notice and cure opportunities for absentee ballots and voter registrations. In addition, despite Florida's decision to cut back on Amendment 4, rights restoration continues to gain momentum. See below for more details:

New Democratic Trifectas. Following the 2018 election, Democrats **newly obtained** trifecta control of state government in six states. At the start of 2019, U.S. House Democrats made democracy reform a central part of the party's agenda, by introducing (and then passing) a democracy reform bill as H.R.1 – the first bill in the new House. Each of the six states with new Democratic trifectas states has enacted (or is shortly expected to enact) major pro-voter reforms.

- **New York** passed the most significant reforms this year, enacting into law a package of voting reforms at the start of the legislative session, including: **early voting** (SB 1102), **pre-registration** for 16- and 17-year-olds (AB 774), and **portability** of registration records (AB 775), as well as a law that consolidated the dates for state and federal primaries and required ballots to be distributed to military voters farther in advance of elections (AB 779). The legislature also passed constitutional amendments to permit **same-day registration** (SB 1048) and **no-excuse absentee voting** (SB 1049), which will need to be passed again and then ratified by the voters.

- **Colorado** enacted a law **restoring voting rights** to individuals on release from incarceration (HB 19-1266) and a law expanding **AVR** and writing that reform into the statute books (it had previously been put in place as an administrative measure by election and DMV officials) (HB 19-235). In addition, the state enacted a law improving voting access for voters with disabilities (SB 19-202) and a law with several additional reforms, including new standards for vote centers and improvements to the registration process for voters living on Indian reservations (HB 19-1278).
- The **Illinois** legislature sent Governor Pritzker a bill that would enhance voting access for eligible voters confined in jails (SB 2090).
- **Maine** enacted **AVR** (HB 1463).
- **Nevada** enacted a law providing immediate **rights restoration** to people on release from incarceration (AB 431) and a law that authorizes **same day registration,** improves the provisional ballot process and extends early or absentee voting deadlines, among other reforms (AB 345).
- **New Mexico** enacted same day voter registration (SB 672).

Additional Notable Reforms. Several states passed additional expansive reforms through their legislative process. Both red and blue states took steps to expand access this year – continuing a trend we have seen throughout the decade. While GOP-controlled states passed a wide variety of pro-voter measures, the most common were reforms to enhance absentee voting and access for voters with disabilities. Reforms include:

- **Delaware** enacted **early in-person voting** (HB 38).
- **Georgia** enacted into law reforms addressing a variety of problems with its voting systems (and the lawsuits that challenged them), including improvements to its "no match, no vote" policy, voter purges, absentee voting, provisional voting, voting for people with disabilities (HB 316).
- **Virginia** enacted **no-excuse early in-person voting** (SB 1026/HB 2790).
- **Washington** enacted a Native American voting rights act (SB 5079).

Notice/Cure Process. States' processes for determining the validity of voting materials like absentee ballots or registration applications are critically important but can result in improper disenfranchisement. For example, some states require elections officials to compare the voter's signature on an absentee ballot with the signature they have on file and to reject the ballot if the signatures do not match. In some cases, though, states offer inadequate guidance to officials to make the comparison and inadequate recourse to voters whose ballots have been rejected.

This year, several states enacted laws that require election officials to notify and/or permit voters to cure deficiencies in absentee ballots, absentee ballot applications, or voter registration applications (or improve their existing processes), including: Arizona (SB 1054), Florida (SB 7066), Georgia (HB 316), Kansas (SB 130), and Virginia (HB 1042).

Rights Restoration Momentum Continues. Last year, Florida voters enacted the paradigm-shifting Amendment 4, and New York and Louisiana also made major improvements to their rights restoration laws. This year, while Florida lawmakers cut back on Amendment 4, lawmakers in other states pushed forward.

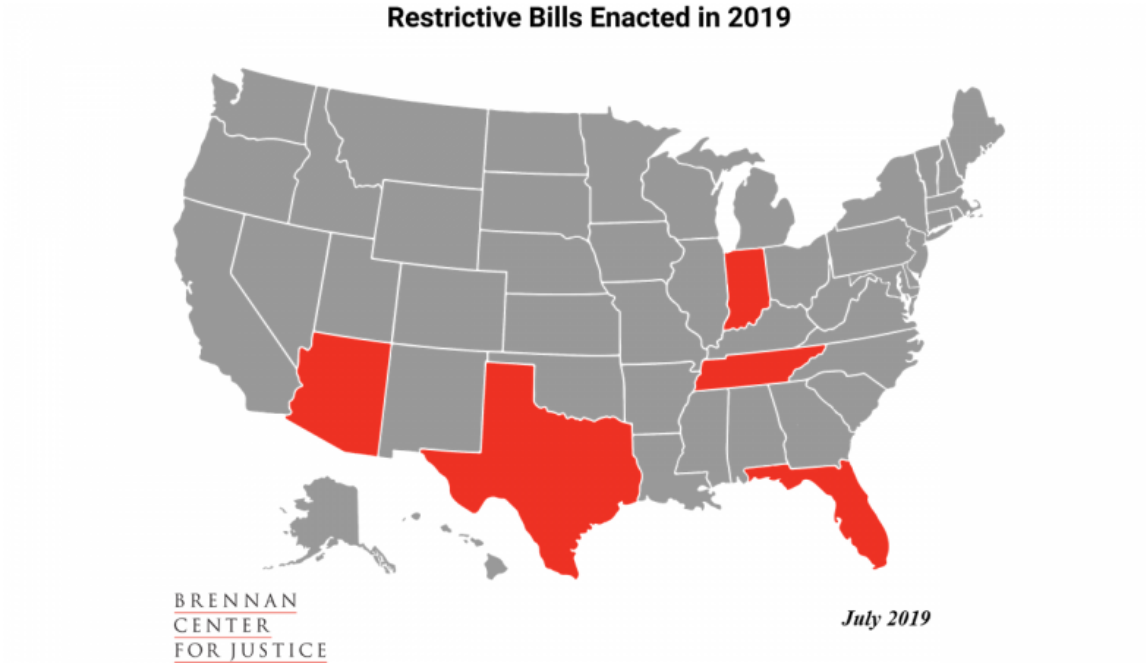
- As noted above, **Colorado** and **Nevada** enacted rights restoration laws. In addition, **Arizona** enacted a law that would eliminate the obligation for people with only one felony conviction to pay certain types of legal financial obligations before having their voting rights restored (HB 2080). People are still required, however, to pay any outstanding restitution.
- **California** (AB 646) and **New Jersey** (SB 2100) continue to consider rights restoration legislation.

- Moreover, even though efforts in Iowa (HJR 14) and Tennessee came up short this year, the seriousness of those efforts, in states with extremely restrictive rights restoration regimes, is a further indication of the momentum behind this critical reform.

Restrictive Voting Bills

While some states are expanding voting access, others are cutting it back. At least seven restrictive bills in five states have been signed into law. All of the five states with new restrictions are under Republican trifecta control, and all of them had already passed restrictions making it more difficult to vote previously since we started systematically tracking anti-voter legislation in 2011.

(Click **here** for a list of restrictive bills that have passed at least one house in states with open sessions.)



The most noteworthy restrictions that passed this year are in Florida, where lawmakers cut back on Amendment 4, and Tennessee, which enacted new restrictions on voter registration drives. Arizona, Indiana, and Texas also signed new restrictions into law. Opponents, however, were able to stop a major additional piece of legislation in Texas.

Florida enacted a law that **cuts back** on the **historic changes to the state's felony disenfranchisement laws** that voters passed overwhelmingly in November 2018 (SB 7066). Voting rights advocates, including the Brennan Center, have filed a lawsuit challenging the law.

Tennessee enacted into law wide-ranging **new restrictions on third-party voter registration** (HB 1079 and SB 971). The initial version of the bill imposed new registration and training requirements on third-party registration groups, as well as civil and criminal penalties for, among other things, submitting too many "deficient" voter registration forms. The amended version improves on this by carving out volunteers and organizations that only use volunteers from the new requirements. Voting rights groups have filed lawsuits challenging these new restrictions.

Arizona enacted laws that **extend voter ID requirements to early voting** (SB 1072) and **restrict access to emergency early/absentee voting** (SB 1090). These bills appear to be a GOP **reaction** to the use of emergency vote centers in Maricopa County during the 2018 Senate election.

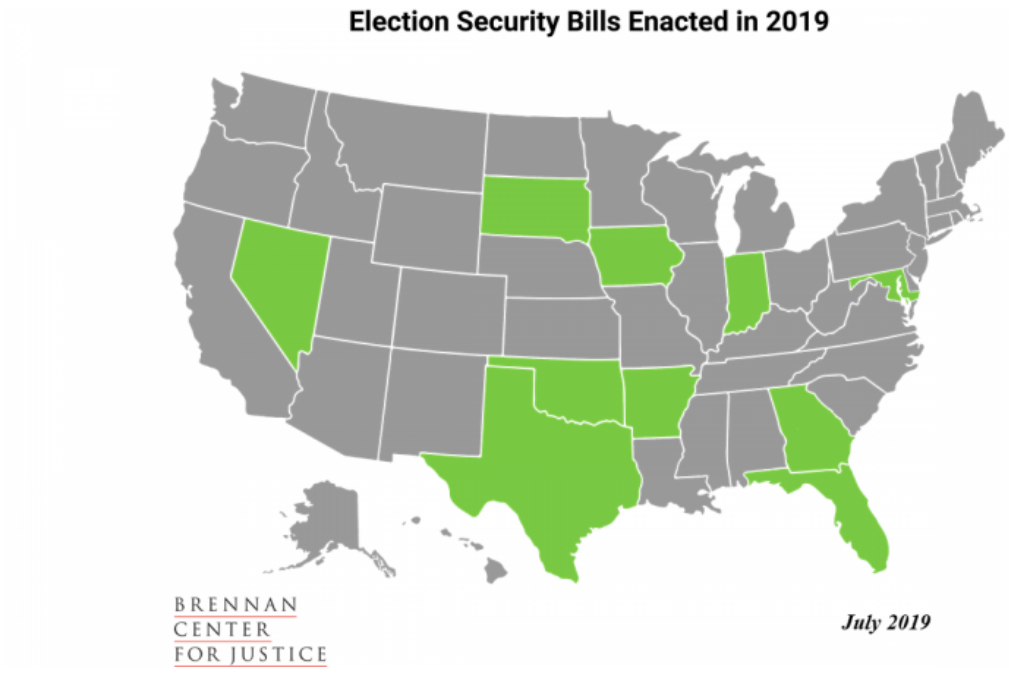
Indiana enacted a law **cutting the deadline** for submitting an **absentee ballot application** for most voters from eight days to 12 days prior to the election (HB 1311) and a law **restricting state court lawsuits to extend polling place hours** (SB 560).

Texas enacted a law **restricting mobile early voting** sites (HB 1888). Voters and voting rights advocates joined in a powerful coalition, however, to halt another highly restrictive bill that was moving towards passage. SB 9 would have significantly increased penalties and risk of prosecution for election code violations by voters; permitted poll watchers to inspect voter ID; and imposed new restrictions on people assisting voters with physical limitations or who cannot read the ballot, among other measures.

Election Security Bills

In advance of the 2020 elections, state legislatures showed renewed interest in shoring up election infrastructure and implementing election integrity measures. Ten states have signed into law 14 election security bills thus far this year, and another three states have passed bills through their legislature.

(Click **here** for a list of election security bills that have passed at least one house in states with open sessions.)



Several states have recognized the critical importance of post-election audits to verify vote totals. The urgency of adopting these audits has only increased in light of the foreign interference in the 2016 election – and the likelihood that foreign powers will attempt to interfere in next year's election. Still, more work remains in order for states to be ready for 2020.

The following bills have been enacted into law or passed through the legislature:

Arkansas enacted a law that requires post-election audits (SB 524).

The **California** legislature passed a bill authorizing the Secretary of State to require data security training as a condition of receiving voter registration information.

The **Delaware** legislature passed a bill that makes the paper ballot is the legal ballot of record, enhances pre-election voting machine inspection requirements, and requires post-election audits (SB 121).

Florida enacted a law requiring the Secretary of State to promulgate security standards addressing chain of custody of ballots, transport of ballots, and ballot security (SB 7066). (Note that this bill also cuts back on Amendment 4, as explained above.)

Georgia enacted a law that requires voting machines to produce a paper record and authorizes a risk-limiting audit pilot program (HB 316),[2] as well as a law that requires the Secretary of State to establish security protocols to protect voter registration information (HB 392).

Indiana enacted a law requiring two-factor authentication to access the computerized voter registration list as well as requiring election vendors to disclose foreign ownership (SB 558); a law authorizing a risk-limiting audit pilot program (SB 405); a law prohibiting the acquisition and, eventually, the use of direct recording electronic voting machines ("DREs"), and imposing new security measures for e-pollbooks, among other measures (SB 570); and a law mandating annual cybersecurity training for county elections officials (SB 560).

Iowa enacted a law directing state and local election officials to adopt new election cybersecurity measures (HF 692).

Maryland enacted a law requiring vendors to disclose foreign ownership (SB 743).

Nevada enacted a law that would mandate risk-limiting audits starting in 2022 (and a pilot risk-limiting audit program for the 2020 election) and establish a cybersecurity training requirements for local elections officials (SB 123).

Oklahoma enacted a law: authorizing the State Board of Elections to order post-election audits, requiring county election officials to undertake new cyber-security measures. and authorizing the State Board to declare an election emergency in response to security threats or interference (SB 261).

The **Oregon** legislature has passed a bill authorizing risk-limiting audits (SB 944).

South Dakota enacted a law that requires vote centers and counties that use e-pollbooks to have printed paper copes of the registration list.

Texas enacted a law that would direct the Secretary of State to establish new cybersecurity rules for protecting elections data, among other reforms (HB 1421).

Endnotes

1. This document tracks certain voting legislation making it easier or harder to register or vote, as well as certain legislation related to election security. Evaluating which laws to include requires exercising judgment and is not susceptible to precise quantification. Note that there are several types of election- and voting-related legislation that we do not track, including: redistricting, ballot design, enfranchisement of people under 18 or non-citizens, or public or individual notice requirements. The document also does not track administrative changes that could expand or restrict access.

2. The bill, however, is highly controversial: It does not require the use of hand-marked paper ballots and critics are concerned that it would result in the state purchasing voting systems that only use ballot-marking devices.

RESOURCE

Voting Laws Roundup 2020

The Brennan Center's latest voting laws roundup catalogs new bills relating to the voting process in 2020.

LAST UPDATED: February 4, 2020
PUBLISHED: February 4, 2020



Ensure Every American Can Vote
Voting Reform

The start of 2020 state legislative sessions has been marked by a flurry of activity around pro-voter reforms, particularly in states with Democratic control over both chambers of the legislature and the governor's office (i.e., where there is a Democratic trifecta).

New Jersey, for example, **enacted** three bills in January to establish online voter registration, end prison-based gerrymandering, and create more transparency around district boundaries.

Virginia legislators seek to enact a broad-based, pro-voter **agenda**, and the commonwealth accounts for nearly a quarter of the expansive bills introduced in 2020. Virginia Democrats hold full control over state government for the first time in more than two decades.

Legislators in two other Democratic trifectas—New York and Washington—expect to pass automatic voter registration (which has already passed the New York Senate) and rights restoration (which has moved out of a Washington Senate committee).

Of the 40 states that have opened their regular legislative sessions, **29 states** have introduced at least **188 bills to expand access** to the franchise, **primarily by making registration easier and reducing restrictions on absentee voting**. [1] We estimate that most of the 188 new expansive bills, if enacted, would go into effect by or

before Election Day, November 3. When combined with bills carried over from last year, the new bills bring the total of expansive bills currently before state legislatures to **471**. [2]

Still, there are parallel efforts to restrict voting access. Legislators have introduced at least **35 bills** that would **restrict access** in **15 states**. [3] Thus, when combined with bills carried over from last year, there are currently 57 restrictive bills before state legislatures. [4]

We estimate that most of the 35 new restrictive bills, if enacted, would go into effect by or before Election Day in November. **Unsurprisingly, a substantial portion of these bills seek to impose stricter voter ID requirements**. And, building off a resurgence of efforts to limit voter assistance (which coincides with the **growing** use of absentee and mail-in ballots), legislators in three states—Florida, Oklahoma, and Hawaii—have introduced bills that would **limit who may assist voters in applying for and delivering absentee and mail ballots**. In addition, legislators in two states, Florida and New Jersey, have introduced bills that would require election administrators to affirmatively undertake steps to purge supposed noncitizens from the rolls, and they would use flawed data regarding citizenship to do so.

Of course, these bill counts do not capture all efforts to restrict or expand access to the vote – there is significant action occurring outside of state legislatures. For example, voting rights are being threatened by non-legislative actions, like voter roll **purges**. In December, **Georgia** purged over 300,000 voters from its rolls on the basis of their inactivity, and **Wisconsin** may purge more than 200,000. At the local level, activists have sent a **series of letters** to dozens of local election officials threatening them with legal action if they do not undertake more aggressive purges (ripping a page out of the **2017** voter suppression playbook).

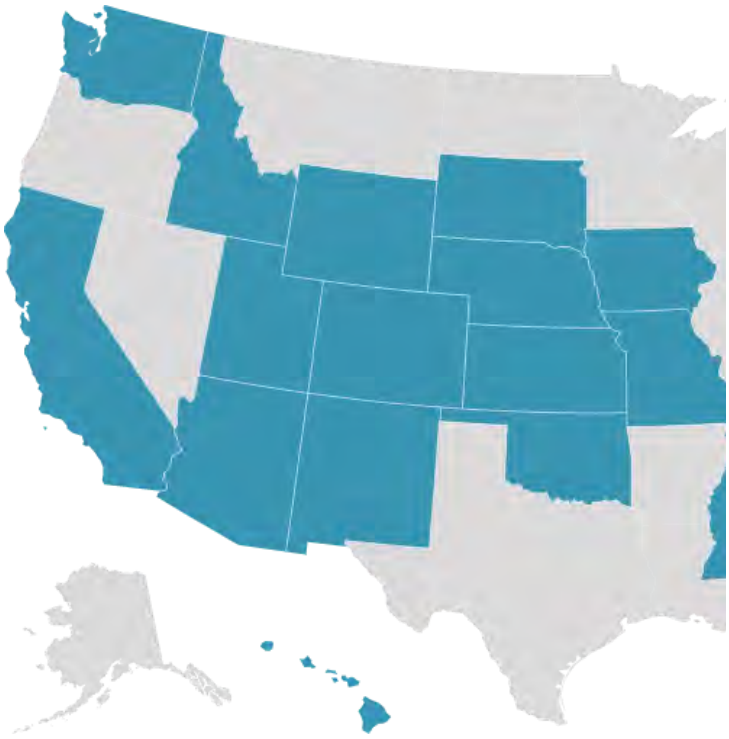
Finally, following the **election security concerns** that surfaced in the 2016 election, we continue to see legislative activity around this issue, though few of these policies are likely to have an impact before the 2020 election. Thus, as of February 3, **15 states** [5] have introduced bills related to **election security**, and **11 states** [6] are still considering **46 carry-over bills** related to election security. Note, however, that this count does not include appropriations bills or administrative action – two important tools for improving election security.

Overview of Expansive Bills

As of February 3, 2020, legislators had introduced at least 188 bills expanding access to the franchise in 29 states.

Expansive Bills Prefiled or Introduced in 2020

February 2020



The bulk of pro-voter bills introduced this year aim to reform registration.

Registration Reforms

- **AVR *(Ten states).*** New York is poised to pass automatic voter registration ("AVR"). Indeed, on its first day in session this year, the New York Senate passed an AVR **bill** carried over from 2019. AVR is a transformative reform that registers eligible voters unless they "opt out" of registration and leverages existing technology to more efficiently update the voter rolls. Ten other states—Hawaii, Idaho, Iowa, Kentucky, Mississippi, Missouri, New Jersey, Oklahoma, Virginia, and Washington—have introduced **20** bills this year that would implement or strengthen AVR. Like New York, Arizona is also advancing an AVR bill carried over from last year. Sixteen states and the District of Columbia have already approved automatic voter registration.
- **Same Day Registration *(Seven states).*** Florida, Hawaii, Indiana, Kentucky, Missouri, New Jersey, and West Virginia have introduced bills that would allow voters to register on Election Day.
- **Pre-Registration *(Five states).*** Hawaii, Indiana, Kentucky, Virginia, and Washington have introduced bills permitting minors to pre-register to vote prior to their eighteenth birthdays. Virginia's pre-registration **bill** is expected to pass, but—because the provision seeks to amend the state's constitution—the bill would need approval from both chambers again next year, before going to the voters.
- **Portability *(Three states).*** California has introduced a **bill** that would allow voters to update their registration or change party affiliation from the fourteenth day before election to the close of polls on Election Day. West Virginia has introduced a **bill** that would permit voters to update their address when voting early in-person and vote without challenge. Hawaii has introduced companion **bills** that permit

voters to change their registration information seven days before an election (instead of 14) and still receive mail ballots.

Absentee Voting *(Thirteen states)*. Alabama, Indiana, Iowa, Kentucky, Maine, Mississippi, Missouri, New Jersey, Oklahoma, Tennessee, Virginia, West Virginia, and Wyoming have proposed 45 bills collectively that would ease restrictions on absentee voting, with most bills aimed at removing the requirement that voters establish an excuse before they can vote absentee. **One** of the bills out of Virginia would permit voters who are confined while awaiting trial or for a misdemeanor conviction to vote absentee as an exception to the requirement that first-time voters who registered by mail must vote in person.

Re-enfranchising persons with past convictions *(Eleven states)*. Washington (**SB 6228**), Florida, Iowa, Kentucky, Mississippi, Missouri, Nebraska, New York, Oklahoma, Tennessee, and Virginia have introduced bills to grant greater access to the ballot for individuals with criminal convictions. These bills come on the heels of rights restoration laws enacted in 2019 in Nevada, Colorado, and **New Jersey**. The 2020 bills in Kentucky, Virginia, and Nebraska aim to amend the state constitutions, though **Kentucky** and Virginia already restore voting rights by executive action. Florida legislators have introduced a **bill** that would eliminate the requirement that returning citizens pay off all court costs, fees, and fines before their rights are restored (though the prerequisite of paying off restitution obligations would remain). The Brennan Center and allies have **challenged** in federal court the current Florida statute that makes voting contingent on the payment of legal financial obligations limitations.

Early Voting *(Twelve states)*. Alabama, Arizona, Kentucky, Maryland, Mississippi, Missouri, New Jersey, New York, Oklahoma, Tennessee, Virginia, and West Virginia have introduced bills expanding opportunities for early in-person voting.

Easing Voter ID Restrictions *(Eight states)*. Virginia, Indiana, Iowa, Missouri, New Mexico, South Dakota, Tennessee, and Wyoming have introduced bills easing the burden of existing voter ID laws, such as making it acceptable to use other forms of identification (e.g., university or tribal IDs), removing the requirement that an ID contain a photograph. Virginia has introduced seven different bills that would eliminate entirely or ease its photo ID requirements.

Access for People with Disabilities *(Three states)*. Kentucky, Maryland, and Missouri have introduced bills to improve access for voters with disabilities.

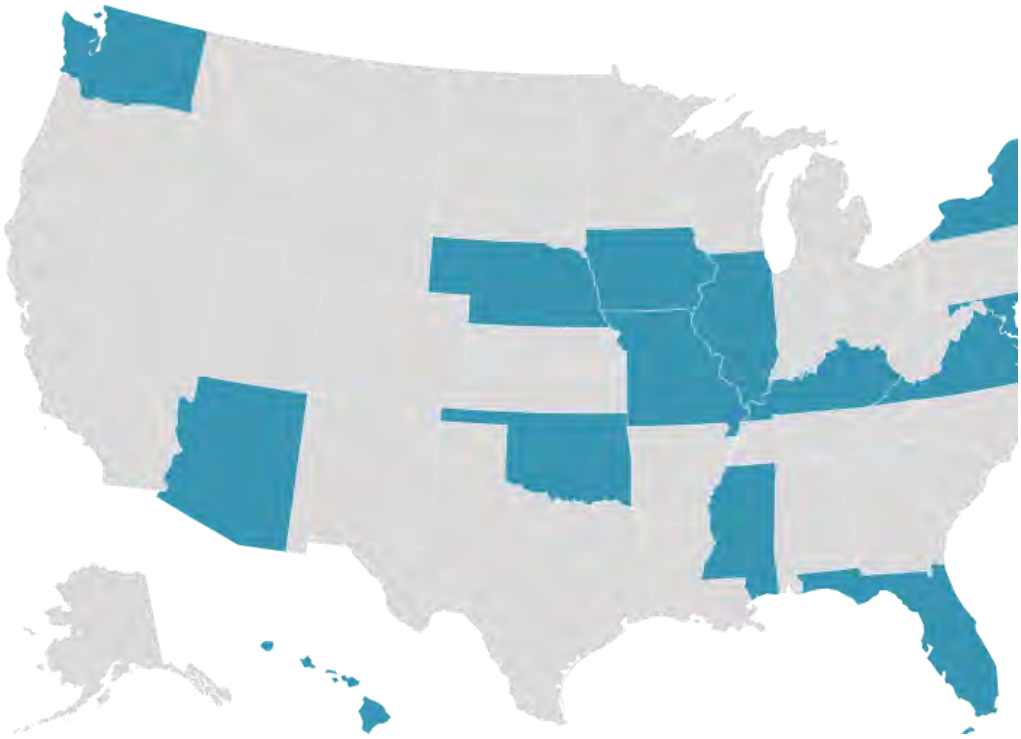
List Maintenance *(Two states)*. Missouri has introduced a bill that would extend the time during which a voter must be inactive before the voter's registration can be cancelled. Mississippi has introduced a **bill** that would prohibit the state from purging voters within 120 days of an election.

Overview of Restrictive Bills

As of February 3, 2020, legislators had introduced at least 35 bills restricting access in 15 states. The vast majority of these bills impose stricter voter ID or absentee voting requirements.

Restrictive Bills Prefiled or Introduced in 2020

February 2020



The restrictions introduced this year include:

More Restrictive Voter ID *(Nine states).* Arizona has introduced a **bill** that prohibits the use of school IDs for voter verification and eliminates the ability to use other identity verification documents; Kentucky, Illinois, Maryland, Nebraska, and New Jersey have introduced bills imposing photo ID requirements to vote (the MD, IL, and NJ requirements would be especially strict); New York has proposed a **bill** that would require proof -of - citizenship to register to vote; Oklahoma has proposed a **bill** that would require fingerprinting upon registration to vote; and Missouri has proposed a **bill** that would eliminate the possibility for those without ID to submit an attestation and then vote using a regular ballot.

More Burdens on Absentee Voting *(Five states).* Virginia has introduced three bills increasing burdens related to overseas absentee voting. Kentucky has introduced a **bill** that would require voter ID at the polls (as noted above) and that applications for an emergency absentee ballot be accompanied by proof of ID.

Limitations on the Assistance of Voters *(Three states).* Florida, Hawaii, Oklahoma have introduced bills limiting those who may assist with or deliver vote-by-mail or absentee ballots. A Florida **bill**, for example, would limit who may be designated to pick up and deliver a voter's mail-in ballot to the elector's caregiver, household member, immediate family member, or legal guardian. Currently, any person could assist in picking up a voter's ballot, so long as that person didn't pick up more than two vote-by-mail ballots.

Aggressive Prosecution *(Three states).* Florida and New Jersey have introduced bills that make it a felony to collect the ballot of another if the person collecting the bill is not the kind of person specifically authorized to do so. New York has introduced a **bill** that would make it a felony for a person to register or attempt to register to vote if the applicant is not a U.S. citizen, without a knowledge (or, mens rea) requirement.

Overview of Election Security Bills

Fifteen states have introduced bills related to election security thus far this year. Note that these bills do not include appropriations bills or administrative action, nor is the Brennan Center opining on the impact or potential efficacy of these bills in this document.

Election Security Bills Prefiled or Introduced in 2020

February 2020



Fourteen states seek to make some improvements to election security. For example, three states would create offices related to election security or grant existing bodies more authority over election security. (CA **SB 808**, NJ **AB 291**, and VA **HB 539**). Five states have introduced bills related to audits, addressing procedures, paper ballots, and technology acquisition. (IA **LD 5426**, KS **SB 310**, SC **HB 4725**, TN **HB 1863**, and WA **SB 6412**). Legislatures in Maryland (**HB 392**), Utah (**SB 42**), Arizona (**SB 1135**), and Indiana (**SB 179**) have introduced measures related to manufacturing voting equipment in the United States, protecting voters' signature on mail ballots, and guidelines for electronic vote adjudication and the use of batteries in voting systems.

But legislators in one state—Florida—have introduced a **bill** that would undermine security. Florida's HB 1005 / SB 1312 would result in an end-run around certification processes for voting systems in the state by permitting a single proprietary software to be used for recounts. Florida election security advocates oppose the bill because it risks exposing Florida recounts to interference.

For more information, please visit our **State Voting Laws** project.

Endnotes

1. Alabama, Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming.

2. The following states carried over expansive bills from last year's sessions: California, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, Washington, and Wisconsin.

3. Arizona, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New York, Oklahoma, Virginia, and Washington.

4. The following states carried over restrictive bills from last year's sessions: Alaska, California, Illinois, Iowa, Kansas, New York, North Carolina, Ohio, Pennsylvania, and Tennessee.

5. Arizona, California, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Maryland, New Jersey, South Carolina, Tennessee, Utah, Virginia, and Washington.

6. Georgia, Illinois, Iowa, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Washington.

BRENNAN CENTER FOR JUSTICE

at New York University School of Law

THE STATE OF VOTING IN 2014

By Wendy Weiser and Erik Opsal

Executive Summary

As we approach the 2014 election, America is still in the midst of a high-pitched and often highly partisan battle over voting rights. On one side are politicians passing laws and executive actions that would make it harder for many citizens to vote. This started after the 2010 midterm elections, when new state legislative majorities pushed a wave of laws cracking down on voting. On the other side are groups of voters and advocates pushing back — in the legislatures, at the ballot box, and especially in the courts.

Until recently, the Voting Rights Act was a critical tool in the fight, but the U.S. Supreme Court gutted the law's core protection last year. Since then, a number of states moved forward with controversial voting changes, including those previously blocked under the Voting Rights Act. As most state legislative sessions wind down, the focus shifts to activity in the courts, which are currently considering major challenges to new restrictions across the country.

In short, many Americans face an ever-shifting voting landscape before heading to the polls this November.

In advance of this crucial midterm election, this report details the new voting restrictions put in place over the past few years, the laws that are in place for the first time in 2014, and the major lawsuits that could affect this year's elections. Our key findings include:

- **Since the 2010 election, new voting restrictions are slated to be in place in 22 states.** Unless these restrictions are blocked — and there are court challenges to laws in six of those states — voters in nearly half the country could find it harder to cast a ballot in the 2014 midterm election than they did in 2010. The new laws range from photo ID requirements to early voting cutbacks to voter registration restrictions. Partisanship and race were key factors in this movement. Most restrictions passed through GOP-controlled legislatures and in states with increases in minority turnout.

- **In 15 states, 2014 will be the first major federal election with these new restrictions in place.** Ongoing court cases could affect laws in six of these states.

- **The courts will play a crucial role in 2014, with ongoing suits challenging laws in seven states.** Voting advocates have filed suits in both federal and state courts challenging new restrictions, and those suits are ongoing in seven states — Arizona, Arkansas, Kansas, North Carolina, Ohio, Texas, and Wisconsin. There is also an ongoing case in Iowa over administrative action that could restrict voting. More cases are possible as we get closer to the election.

There has also been some positive momentum. Laws to improve the election system and increase voting access passed in 16 states since 2012, and these laws will be in effect in 11 states this November. The most common improvements were online registration and other measures to modernize voter registration, and increased early voting.

Still, this national struggle over voting rights is the greatest in decades. Voters in nearly half the country could head to the polls in November worse off than they were four years ago. This needs to change.

New Laws Restricting the Vote

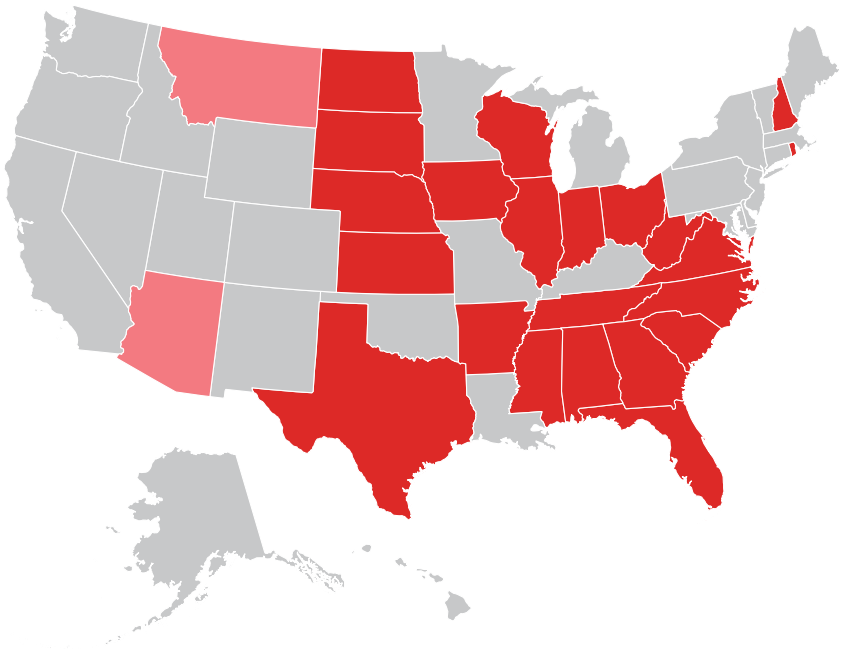
Election laws have long been prone to politicization, but for decades there were no major legislative movements to restrict voting. Indeed, the last major legislative push to cut back on voting rights was after Reconstruction. The first stirrings of a new movement to restrict voting came after the 2000 Florida election debacle. Indiana and Georgia passed restrictive photo ID laws in 2005 and 2006, respectively, and Arizona voters approved a ballot initiative in 2004 requiring registrants to provide documentary proof of citizenship when signing up.

But the 2010 election marked a major shift. From early 2011 until the 2012 election, state lawmakers across the country introduced at least 180 restrictive voting bills in 41 states. By the 2012 election, 19 states passed 27 restrictive voting measures, many of which were overturned or weakened by courts, citizen-led initiatives, and the Department of Justice before the election. States continued to pass voting restrictions in 2013 and 2014.

What is the cumulative effect of this legislative movement? As of now, a few months before the 2014 midterm elections, new voting restrictions are set to be in place in 22 states.[1] Ongoing court cases could affect laws in six of these states.[2] Unless these restrictions are blocked, citizens in nearly half the nation could find it harder to vote this year than in 2010.

Partisanship played a key role. Of the 22 states with new restrictions, 18 passed entirely through GOP-controlled bodies,[4] and Mississippi's photo ID law passed by a voter referendum. Two of the remaining three states — Illinois and Rhode Island — passed much less severe restrictions. According to a recent study from the University of Massachusetts Boston, restrictions were more likely to pass "as the proportion of Republicans in the legislature increased or when a Republican governor was elected."

STATES WITH NEW VOTING RESTRICTIONS SINCE 2010 ELECTION



Click on map for interactive version. Note: This map includes two states — Montana and Arizona — that do not technically fit the title and thus are reflected in light red. [3]

1. Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Mississippi, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. For a detailed description of each state's laws, see our interactive map or this list.
2. Arkansas, Kansas, North Carolina, Ohio, Texas, and Wisconsin. There is also a challenge to an Arizona law not reflected here because that law passed before 2010.
3. Montana lawmakers put a referendum on the November ballot to repeal Election Day registration, but that repeal will not actually be in effect this year. An Arizona law requiring documentary proof of citizenship when registering was passed in 2004, but blocked in 2012 for a voter using the federal registration form. In response, Arizona joined Kansas, which has a similar law, in a suit to force the U.S. Election Assistance Commission (EAC) to change the federal form to allow the two states to require such documents. In March 2014, a federal judge ruled the EAC must change the form, but the 10th Circuit Court of Appeals stayed that decision while it considers the appeal. Arizona is included here because until now, the federal form has never been amended to allow for documentary proof of citizenship in any state.
4. By GOP-controlled body, we mean: (1) Both chambers of the legislature were controlled by Republicans and a Republican governor signed the bill, (2) Republicans controlled both chambers and overrode a veto from a Democratic governor, or (3) a Republican governor took executive action without legislative involvement. States in the first category were Alabama, Florida, Georgia, Indiana, Kansas, Nebraska (unicameral legislature with GOP governor), North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Virginia (the GOP lieutenant governor broke a tie between an equally divided Senate), and Wisconsin. States in the second category were Arkansas and New Hampshire. Iowa and Florida fall into the third category.

Race was also a significant factor. Of the 11 states with the highest African-American turnout in 2008, 7 have new restrictions in place.[5] Of the 12 states with the largest Hispanic population growth between 2000 and 2010, 9 passed laws making it harder to vote.[6] And nearly two-thirds of states — or 9 out of 15 — previously covered in whole or in part by Section 5 of the Voting Rights Act because of a history of race discrimination in voting have new restrictions since the 2010 election.[7] Social science studies bear this out. According to the University of Massachusetts Boston study, states with higher minority turnout were more likely to pass restrictive voting laws. A University of California study suggests that legislative support for voter ID laws was motivated by racial bias.

What do these laws look like?

- **Voter ID:** A total of 13 states passed more restrictive voter ID laws between 2011 and 2014, 11 of which are slated to be in effect in 2014.[8] Nine states passed strict photo ID requirements,[9] meaning a citizen cannot cast a ballot that will count without a specific kind of government-issued photo ID. An additional four states passed less strict ID requirements.[10] Eleven percent of Americans do not have government-issued photo ID, according to a Brennan Center study, which has been confirmed by numerous independent studies. Research shows these laws disproportionately harm minorities, low-income individuals, seniors, students, and people with disabilities. In Texas, for example, early data from the state showed that between 600,000 and 800,000 registered voters did not have the kind of photo ID required by the state's law, and that Hispanics were 46 to 120 percent more likely to lack an ID than whites. In North Carolina, estimates show that 318,000 registered voters — one-third of whom are African American — lack a DMV-issued ID.[11]

- **Voter Registration:** A total of nine states passed laws making it harder for citizens to register to vote between 2011 and 2014.[12] These measures took a variety of forms. Four states[13] have new restrictions on voter registration drives. Nationally, African Americans and Hispanics register through drives at twice the rate as whites.[14] Three states[15] also passed laws requiring registrants to provide documentary proof of citizenship, which as many as 7 percent of Americans do not have readily available. North Carolina eliminated highly-popular same-day registration, and Wisconsin made it harder for people who have moved to stay registered.

- **Early Voting:** Eight states passed laws cutting back on early voting days and hours.[16] These restrictions could exacerbate lines on Election Day and are particularly likely to hurt minority voters. For example, in North Carolina, Department of Justice data show that 7 in 10 African Americans who cast ballots in 2008 voted during the early voting period, and 23 percent of them did so during the week that was cut. Many states eliminated weekend and evening hours, when minority voters are more likely to cast a ballot. According to a study in Ohio in 2008, 56 percent of weekend voters in Cuyahoga County, the state's most populous, were black.

- **Restoring Voting Rights to People with Past Convictions:** Three states also made it harder to restore voting rights for people with past criminal convictions.[17] These laws disproportionately impact African Americans. Nationwide, 7.7 percent of African Americans have lost the right to vote, compared to 1.8 percent of the rest of the population.

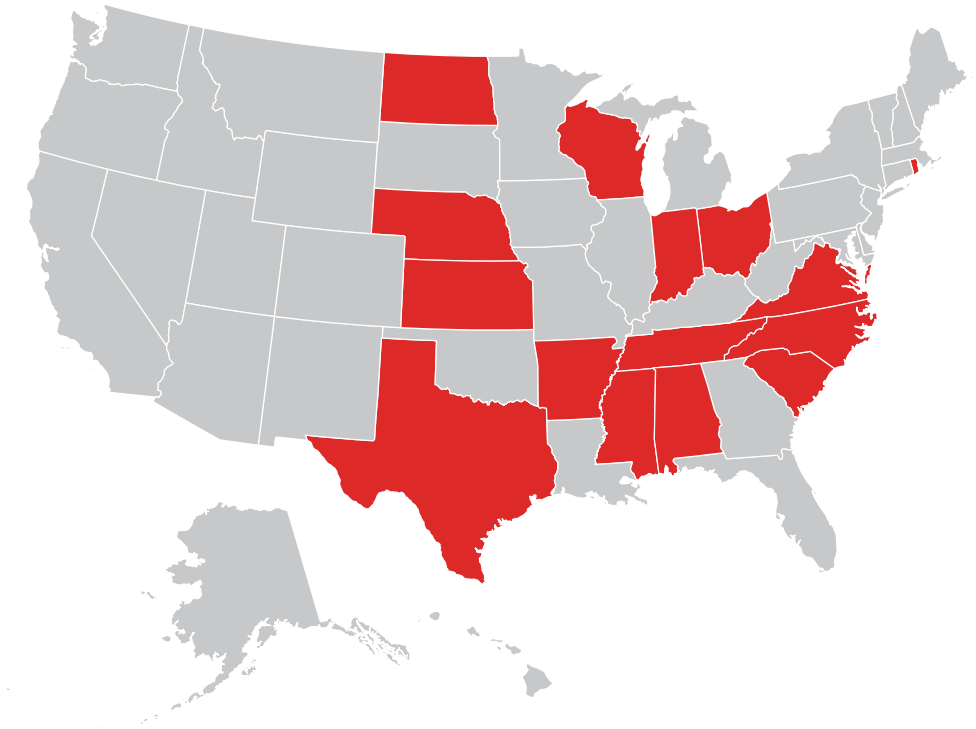
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5. Mississippi (73.1 percent), South Carolina (72.5), Wisconsin (70.5), Ohio (70.0), Georgia (68.1), North Carolina (68.1), and Virginia (68.1). *Source: U.S. Census Bureau, Voting and Registration in the Election of November 2008 - Detailed Tables, Table 4b (Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008)* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html.
6. South Carolina (148 percent growth), Alabama (145), Tennessee (134), Arkansas (114), North Carolina (111), Mississippi (106), South Dakota (103), Georgia (96), and Virginia (92). *Source: Pew Hispanic Center tabulations of U.S. Census Bureau Redistricting_Files-PL_94-171 for states* http://www.pewhispanic.org/files/reports/140.pdf.
7. Alabama, Florida (partially covered), Georgia, Mississippi, North Carolina (partially covered), South Carolina, South Dakota (partially covered), Texas, and Virginia.
8. Alabama, Arkansas, Kansas, Mississippi, New Hampshire, North Carolina, North Dakota, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. The North Carolina law will not be in effect for 2016, and the Wisconsin law was blocked by the courts in ongoing litigation. Some of these states passed more than one voting restriction and thus appear in other categories as well.
9. Alabama, Arkansas, Kansas, Mississippi, North Carolina, Tennessee, Texas, Virginia, and Wisconsin. The North Carolina law will not be in effect for 2016, and the Wisconsin law was blocked by the courts in ongoing litigation.
10. A photo ID is requested in New Hampshire, Rhode Island, and South Carolina, but there is an affidavit alternative. A non-photo ID is required in North Dakota.
11. A study from the North Carolina Board of Elections estimates 318,643 registered voters lack a DMV-issued photo ID. Approximately one-third of that total (107,681) are African American. Available here: http://moritzlaw.osu.edu/electionlaw/litigation/documents/League1591.pdf.
12. Alabama, Florida, Illinois, Kansas, North Carolina, Tennessee, Texas, Virginia, and Wisconsin. Due to an error, Nebraska was previously included in this list. It was updated and removed on October 9, 2014.
13. Florida, Illinois, Texas, and Virginia.
14. Voting Law Changes in 2012, at 20 & 48 (2011), *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf; State Restrictions on Voter Registration Drives, at 3 & 9 (2012), *available at* http://www.brennancenter.org/sites/default/files/legacy/publications/State%20Restrictions%20on%20Voter%20Registration%20Drives.pdf.
15. Alabama, Kansas, and Tennessee. The Kansas law is only in effect for the state registration form. Alabama and Tennessee election officials have yet to implement their state's laws.
16. Florida, Georgia, Nebraska, North Carolina, Ohio, Tennessee, West Virginia, and Wisconsin.
17. Florida, Iowa, and South Dakota.

What's New in 2014

In 15 states,[18] 2014 will be the first major federal election with new voting restrictions in place. Ongoing court cases could affect laws in six of these states.[19] The uncertainty over these laws could lead to problems on Election Day, as they did in 2012, when voting changes, even those not in effect, contributed to long lines.[20] We have already seen problems with new ID requirements in low-turnout primaries, such as in Arkansas this May, which could foreshadow more serious problems in November.

VOTING RESTRICTIONS IN PLACE FOR FIRST TIME IN FEDERAL ELECTION IN 2014



18. Alabama, Arkansas, Indiana, Kansas, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.
19. Arkansas, Kansas, North Carolina, Ohio, Texas, and Wisconsin. There is also a challenge to an Arizona law not reflected here because that law passed before 2010.
20. How to Fix Long Lines, at 4 (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/How_to_Fix_Long_Lines.pdf.

Lawsuits Over Voting Restrictions

Voter advocates are fighting many of these new restrictions, especially in court. Voting restrictions are currently being challenged in court in seven states — Arizona, Arkansas, Kansas, North Carolina, Ohio, Texas, and Wisconsin. A lawsuit over a voter purge is also ongoing in Iowa. Most of the cases we are watching this year will likely be decided, at least preliminarily, in the coming months and could thus impact the 2014 election.

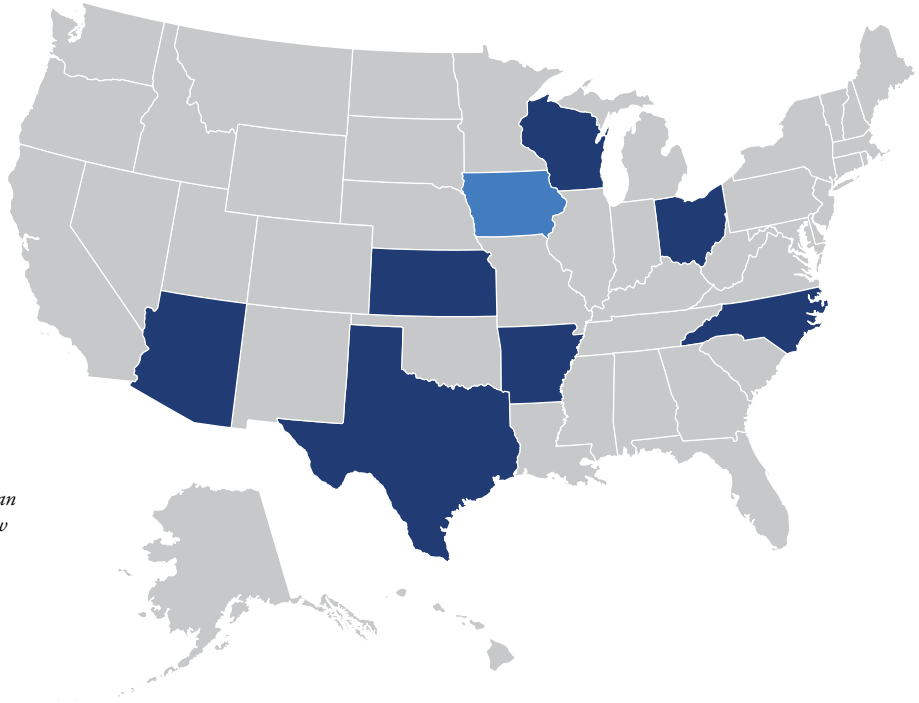
Challenges to restrictive voting laws have had a successful track record to date. Before the 2012 election, 10 courts blocked new restrictions in at least 7 states.[21] Some of those legal fights continued into this year — in Pennsylvania (where a case challenging a strict new photo ID requirement is now over after the governor chose not to appeal a ruling against the law), in Texas (where a court found the state's voter ID law discriminatory under Section 5 of the Voting Rights Act, but then the Supreme Court effectively invalidated Section 5, prompting a new lawsuit challenging the same voter ID law under a different legal provision), and in Arizona (where the Supreme Court ruled against the state's new documentary proof of citizenship requirement for voter registration but left room for the state to sue again to seek a different result).

Over the past few years voters have won decisively in Pennsylvania on voter ID; in Florida on voter registration restrictions, early voting cutbacks, and a voter purge; in Ohio on early voting cutbacks and provisional ballot counting; and in a few cases challenging ballot measure language.

Voters received favorable decisions in ongoing lawsuits in Wisconsin and Arkansas on voter ID and Iowa on voter purges. Voters also won a lawsuit challenging Texas's voter ID law that is now being re-litigated under a different provision of law after the Supreme Court gutted a key provision of the Voting Rights Act.

Voters have also experienced losses — in Tennessee on voter ID, in Texas on voter registration drive restrictions, and in South Carolina on voter ID (though during the course of the litigation, the state interpreted the law in a way that was much less restrictive). All of those laws are in place this year.

MAJOR VOTING LITIGATION THAT COULD IMPACT 2014



Click on map for interactive version. Note: An Iowa suit, reflected in light blue, involves an administrative action, not a law passed by the legislature.

21. Arizona, Florida, Missouri, Ohio, Pennsylvania, Texas, and Wisconsin.

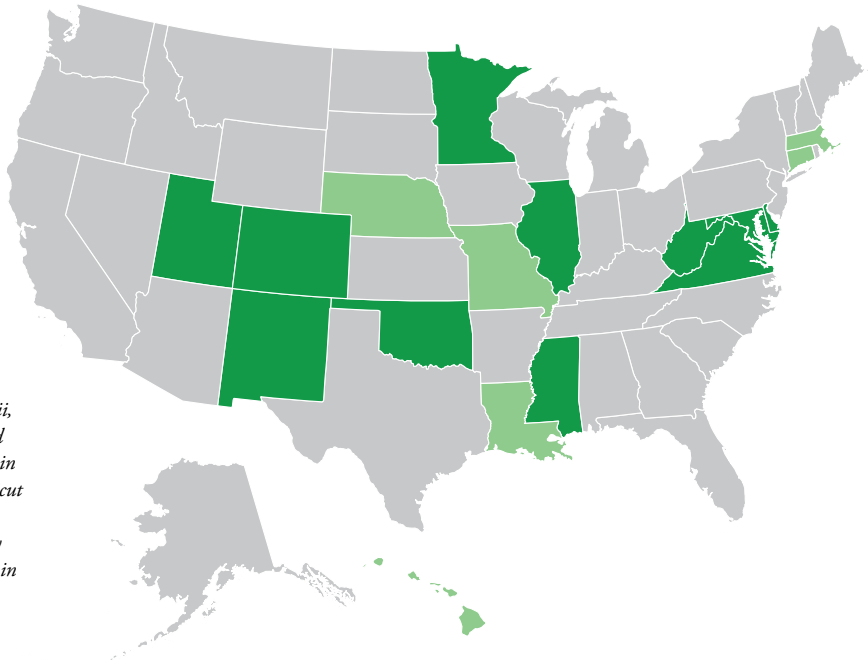
Improving Voting Access

There has also been some positive momentum to improve voting. After long lines marred the 2012 election, dozens of states introduced legislation in 2013 and 2014 to improve access to the polls. Overall, laws to improve the voting process passed in 16 states, and are set to be in effect in 11 states this November.[22] Five of these states also passed voting restrictions.[23]

What do these laws look like?

- **Voter Registration Modernization:** A total of 11 states passed laws to modernize the voter registration system and make it easier for eligible citizens to sign up.[24] (A number of states, like New York, implemented reforms administratively and are not reflected here.) Research shows these upgrades can increase registration rates, efficiency, and accuracy, save money, and curb the potential for fraud.
  - Seven states passed laws creating or upgrading online registration systems.[25]
  - Five states added same-day registration options.[26]
  - Two states passed laws requiring motor vehicle offices to transfer voter registrations electronically to local election offices.[27]
- **Early Voting:** Three states expanded or created early voting opportunities,[28] which can reduce stress on the voting system, lead to shorter lines on Election Day, and improve poll worker performance, among other benefits. Massachusetts's law will not be in effect until 2016. Missouri and Connecticut voters will also consider ballot measures to create early voting periods.
- **Pre-Registration:** Three states passed laws allowing 16- and 17-year-olds to pre-register to vote before turning 18.[29]
- **Restoring Voting Rights to People with Past Convictions:** Delaware passed a constitutional amendment expanding opportunities for people with criminal convictions to regain their right to vote.
- **Easing Voter ID Burdens:** Oklahoma passed a law making its existing photo ID law less restrictive.
- **Access to Ballots:** Colorado expanded access for voters who speak a language other than English. Mississippi and Oklahoma also expanded access to absentee ballots.

STATES THAT EXPANDED VOTING IN 2013 AND 2014



Click on map for interactive version. Note: Laws in Hawaii, Louisiana, Massachusetts, and Nebraska will not be in effect in 2014. Missouri and Connecticut voters will consider ballot measures this year to add early voting. These states are shown in light green.

22. Laws in Colorado, Delaware, Illinois, Maryland, Minnesota, Mississippi, New Mexico, Oklahoma, Utah, Virginia, and West Virginia are slated to be in effect in 2014. Measures in Hawaii, Louisiana, Massachusetts, and Nebraska will be in effect at a later date. Missouri voters will consider a ballot measure this November. Connecticut citizens will also vote on an early voting ballot measure this year, but that bill passed prior to 2013 and is not included in this count. For a detailed description of each state's laws, see our interactive map or this list.
23. Illinois, Nebraska, Mississippi, Virginia, and West Virginia.
24. Colorado, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico, Utah, Virginia, and West Virginia.
25. Illinois, Massachusetts, Minnesota, Nebraska, Utah, Virginia, and West Virginia.
26. Colorado, Hawaii, Illinois, Maryland, and Utah. Both Illinois and Utah are pilot programs.
27. Nebraska and New Mexico.
28. Illinois, Maryland, and Massachusetts. Illinois's bill is a pilot program for 2014 only.
29. Colorado, Louisiana, and Massachusetts.

There was also movement on the national level. The bipartisan Presidential Commission on Election Administration released a widely-praised set of recommendations to fix many of the problems persistently plaguing the voting system. These ideas included modernizing voter registration and increasing early voting opportunities. A few states — Hawaii, Illinois, Nebraska, Massachusetts, and Minnesota — adopted some of these reforms in 2014. And in Congress, Republicans and Democrats introduced a bill to strengthen the Voting Rights Act. Unfortunately, that measure appears stalled. Democrats in Congress also introduced a host of bills to modernize the voting system, reduce long lines, and increase access to the polls.

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PROTECT THE VOTE

The State of Voting 2018

by Wendy Weiser and Max Feldman

Introduction

This fall, voters will head to the polls for the first time since our presidential election was decided by a margin of just 80,000 votes across three states. Clearly, every vote counts.

Nevertheless, on November 6, voters will face serious challenges to making their voices heard at the ballot box. These obstacles include voter ID laws and curbs on early voting. Extremely gerrymandered electoral maps and unresolved concerns regarding foreign interference in our elections also undermine the free and fair vote that is essential to our democracy.

As in previous election years, the Brennan Center has been tracking not just the laws but the political forces that may impact this year's midterms.

In 2018, voters in at least eight states will face more stringent voting laws than they did in the last federal election. These restrictions are a continuation of a trend, beginning in 2011, of states passing laws making it harder to vote. Overall, voters in 23 states will face tougher restrictions than they did in 2010. Lawsuits and legal campaigns have in some cases mitigated a number of the most pernicious new laws, and future court decisions could still impact the voting landscape before November. Regardless, *more* voters in *more* states will face unnecessary hurdles to casting a ballot this fall.

Restrictive laws, however, are not the only challenges to the vote.

The electoral landscape is still highly skewed by gerrymandering. Earlier in the decade, partisan legislatures drew extremely gerrymandered legislative maps, using modern data and technology to manipulate electoral lines for political advantage. The resulting maps have tilted electoral outcomes, producing dramatic incongruities between what voters want and what they get out of their elections and making it difficult to hold representatives accountable. Despite recent legal victories against political and racial gerrymanders, most of those flawed maps will still be in place in November.

In addition, nearly three-quarters of Americans are **worried about foreign interference** in our elections — worries that could create a **crisis** of legitimacy. The story is by now well-known: Agents connected to the Russian government targeted election systems in 18 states in 2016, and the threat hasn't dissipated. State actors and even rogue hackers continue to have our election systems in their sights.

Still, there is reason for optimism. Voters and their allies have taken to the courts to throw out unfair laws. Lawsuits challenging skewed legislative maps have recently resulted in a wave of victories, and for the first time in decades, the Supreme Court is set to rule in a case that could put real limits on partisan gerrymandering. Lawmakers and government officials are waking up to the fact that our election systems are vulnerable and that they can and *must* be repaired.

The electoral pressure-cooker has spurred many Americans to action. This November, citizens will be able to vote on ballot measures to end partisan gerrymandering in Michigan, to end lifetime felony disenfranchisement in Florida, and to adopt automatic voter registration in Nevada. Even amid the highly partisan battle over the franchise, bills to expand voting have been moving through state legislatures with broad bipartisan support — far more than bills to restrict access. We are at an inflection point.

In this piece we take stock of the state of voting in 2018, plotting where we are in the fight over voting rights and fair maps and evaluating and offering context for key issues that will affect not only the November election but also our democracy going forward. The most significant takeaways are:

- This is the first election where there is widespread awareness of the risk of foreign hacking of our election systems. In 2016, Russian agents manipulated our electoral process and attempted to interfere with our voting systems. While there is no evidence that they succeeded in tampering with our systems, the threat is significant going into 2018. There is a race to spur states to upgrade the security of their systems, but millions of Americans will vote this November using vulnerable voting systems.

- Many voters' voices will be unfairly muted this November because numerous jurisdictions, several of which are critical to the control of Congress and statehouses, are extremely gerrymandered. The Supreme Court could soon find that these districts are not only unfair but also unconstitutional. A decision striking down extreme partisan gerrymandering would be a win for voters in the longer term, but it will change little for voters this November.

- The decade-long battle over restrictions to the franchise continues, with neither side yielding significant ground. But more than a dozen lawsuits challenging these restrictions are ongoing. This fight will likely remain at an impasse — with states implementing restrictions, courts blocking some of them in whole or in part, and states responding with new restrictions — until there is a more definitive consensus in the courts.

- There is new public energy for positive change in voting. This is the first election where many voters will benefit from automatic voter registration: Seven states and the District of Columbia will have AVR in place by November. (Only Oregonians were able to take advantage of AVR in a significant way prior to the 2016 election.) In addition, a broad swath of states will have significant voting referendums on the ballot this November, many put there by citizens themselves.

Election Security

In the lead-up to the 2016 election, Russia launched an unprecedented attack on our election infrastructure. According to the recent **report** issued by the Senate Select Committee on Intelligence, Russian agents targeted election systems in 18 states, conducted malicious access attempts on voting-related websites in at least six states, and gained access to voter registration databases in a small number of states. While there is no evidence that the attempt to tamper with our voting systems was successful (unlike the attempt to manipulate the election discourse), the incident laid bare the serious security vulnerabilities of our nation's voting machines and voter registration databases. Intelligence officials **unanimously conclude** that Russia and other hostile foreign powers will continue to try to interfere in American elections, using what they have learned to hone more sophisticated and effective techniques.

Since 2016, states and the federal government have taken some important steps to increase election system security. But unfortunately, very little progress has been made in two critical areas: (1) few states or localities have replaced the voting machines most vulnerable to hacking; and (2) few states have mandated manual post-election audits, which use the paper records of votes to check voting machine software totals, thereby enabling officials to discover and recover from cyberattacks. In addition, while we have not fully assessed how many states have upgraded their voter registration systems since last year, progress on that front appears insufficient as well. As a result, we are approaching the 2018 elections with many voting systems vulnerable to attack.

Here is the current overview of the largest threats related to voting machines:

- **Thirteen states** still use paperless Direct Recording Electronic (DRE) voting machines — which do not provide a record that can be reliably audited after an election — as their primary voting equipment in some or all polling places. (Those states are Arkansas, Delaware, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, New Jersey, Pennsylvania, South Carolina, Tennessee, and Texas.) Five of those states use paperless DREs statewide, while eight use them in at least some of their counties.

- Forty-three states will be using voting machines that are no longer manufactured. Officials in 33 states say they must replace their machines by 2020. In most cases, elections officials do not yet have adequate funds to do so.

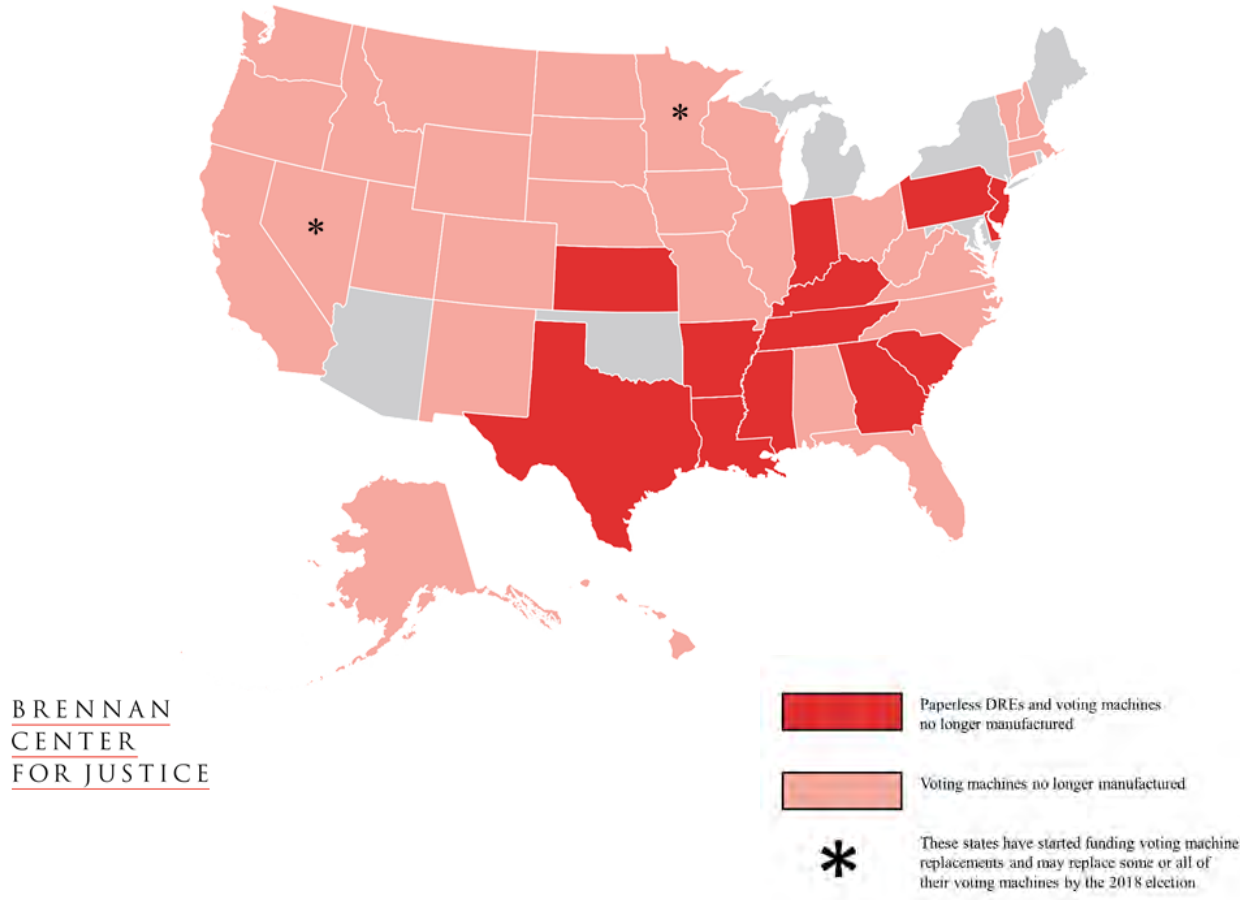
- Only one state — Colorado — will mandate "risk-limiting" audits, which are post-election audits designed to provide a high level of statistical confidence that a software hack or bug could not have produced the wrong outcome.

A number of states that are likely to have closely watched competitive midterm elections have vulnerable voting systems. Of the states that are likely to have a competitive **House**, **Senate** or **gubernatorial** election, according to Cook Political Report, or a contest for control of **the state legislature**, according to Ballotpedia:

- Six with House, Senate, or gubernatorial toss-up races or close races for state legislative control still use paperless DREs (Delaware, Indiana, New Jersey, Pennsylvania, Tennessee, Texas), as do three with somewhat less competitive races (Georgia, Kansas, Kentucky); and

- Three states with toss-up races have voter-verifiable paper trails but do not mandate *any* post-election audit, risk-limiting or otherwise (Maine, Michigan, and North Dakota), as do two states with somewhat less competitive races (Nebraska and New Hampshire).

States with Vulnerable Voting Systems



Voter registration systems are also still at risk:

- As of June 2017, 41 states were still using voter registration databases that were initially created a decade ago or longer. These outdated systems were not designed to withstand current cybersecurity threats. A number of those states have since taken steps to upgrade their registration systems. While we have not yet assessed the full extent of progress, Michigan and New Jersey expect to complete upgrades before November's election, Virginia is completing the first phase of a three-year upgrade plan, and North Carolina and Washington have at least started an upgrade process. Additional states may soon join this list, using new federal funds to bolster registration list security before November. In Minnesota, however, Gov. Mark Dayton **vetoed** the budget bill that was needed to authorize the secretary of state to use new federal funds for this purpose, even though the secretary said that it was the state election system's highest security need.

Unless significant steps are taken to bolster the security of our election infrastructure over the remaining months, there is a serious risk of additional successful attacks that will erode the public's confidence in the legitimacy of our elections. Attacks by cybercriminals or nation states could take down election websites with important information — including polling location information, voter registration status, and unofficial election results — or even potentially change the software-generated vote totals on individual voting machines. Worse, existing vulnerabilities leave open the possibility that control of our federal government could be determined by voting machines that are hackable and provide no auditable paper trail. While unlikely, this scenario is certainly possible. Virginia narrowly avoided this nightmare in 2017 when control of the state House was determined after a recount of paper ballots in a city that had decertified its paperless DREs right before the election.

Progress So Far

Although there has not been sufficient movement to upgrade our nation's voting equipment in advance of the 2018 elections, there has been some progress in addressing election security issues. Specifically:

- At the federal level, Congress recently appropriated **$380 million** to help states upgrade their voting systems — the first significant step at the federal level on election security and the most significant investment in election security since 2002. Unfortunately, this money came too late for states to be able to use the money to upgrade systems by the 2018 elections. In addition, two **major** pieces of bipartisan legislation were introduced in Congress to ensure vital election security reforms: the Senate's **Secure Elections Act** (S. 2261), co-sponsored by Sens. James Lankford (R-Okla.) and Amy Klobuchar (D-Minn.), and the House's bipartisan **PAPER Act** (H.R. 3751), co-sponsored by Reps. Mark Meadows (R-N.C.) and James Langevin (D-R.I.). While these bills are critically important, their passage at this point would not impact election security in 2018.

- The **U.S. Election Assistance Commission** (EAC) and the **Belfer Center** at Harvard University have provided cybersecurity training to hundreds of state and local election officials, while the Department of Homeland Security, the EAC, and state and local officials have established a coordinating council to allow them to share threat information and pool security resources.

- At the state level, since the 2016 election, **only** Virginia has stopped using its paperless DREs. In Pennsylvania — a critical battleground state — Gov. Thomas Wolf has ordered all counties to select new voting systems by the end of 2019, but this order obviously will not halt the use of paperless DREs in time for the 2018 elections. Only four states have enacted laws improving their post-election audit systems since 2016. No states have taken significant action to upgrade their outdated voter registration systems. Legislation to improve election security was **introduced** in at least 26 states, but most of those bills did not advance during this legislative cycle.

What Can Be Done Before November?

Although the 2018 elections will almost certainly move forward with aging, vulnerable voting equipment, it is not too late to significantly reduce election security risks. Here is what needs to happen between now and November to bolster election security:

- While unlikely, it is still possible for enterprising states to replace their antiquated voting machines with new, auditable voting systems before November. In 2017, Virginia decertified and replaced its DRE machines only two months before its statewide elections. There is a chance that this could happen in New Jersey, too: New Jersey lawmakers recently introduced a **bill** that would halt the use of DREs in certain counties this November. States that do not replace paperless DREs before November should still move expeditiously this year so that

they can upgrade their voting equipment before the 2020 elections.

- States that do not replace paperless DREs should take several basic steps to secure their voting machines for 2018, including adding strong passwords and two-factor password authentication, engaging in rigorous systems testing, ensuring that all PC and server operating systems and software have the latest security patches, and providing cybersecurity training. Similar defenses are needed for voter registration systems.

- Where possible, states should implement effective post-election audits. Legislatures can still mandate such audits, and in many states, elections administrators have the authority to audit vote tallies after an election even if they are not required to do so by state law. They should do so.

- State elections officials should engage in detailed contingency planning in case of a system breach or failure, including preparing backup paper ballots and paper voter registration lists.

At this point, there is reason for optimism that many states will, in fact, take at least some of these interim steps to secure their voting systems. At least 17 states have formally requested that the Department of Homeland Security (DHS) conduct risk assessments of their election systems. In each state, DHS should be able to identify cybersecurity risks and best practices for securing election systems ahead of this November's election. In the coming months, many more states plan to request this DHS review or will use private vendors to do so. These assessments will almost certainly result in the application of additional security patches and the revamping of contingency plans. In addition, election officials in several counties and states are working with outside experts to develop new post-election audit protocols.

Restrictive Voting Laws

Over the past decade, states **enacted** a **wave** of laws restricting access to voting. This fall, voters in at least eight states will face more stringent voting laws than they did in the last federal election cycle in 2016. Voters in 23 states will face tougher restrictions than they did in 2010. The most common restrictions involve voter ID laws, but they also include additional burdens on registration, cutbacks to early voting and absentee voting, and reduced voting access for people with past criminal convictions. If these laws remain in effect, they have the potential to make it harder for millions of Americans to vote. Even with an expected wave of enthusiasm this November, a growing body of research shows these laws reduce participation, particularly among communities of color, low-income voters, young people, older citizens, and people with disabilities.

These laws are part of a broader trend: Following the 2010 wave election, there were two shifts that continued to distort our electoral system. First, as discussed at length below, state legislatures drew extremely gerrymandered maps following the 2010 Census. Second, states started to enact a series of laws that made it markedly more difficult for some of their citizens to register and vote. Lawsuits and legal campaigns helped block or mitigate most of the harshest new restrictions prior to the 2012 election. But the Supreme Court's 2013 *Shelby County v. Holder* ruling, which neutered the strongest legal protection against voting discrimination, changed the landscape. A flood of new barriers to voting that would have otherwise been blocked were implemented at once, and newly unfettered legislatures were incentivized to press forward with additional restrictions. The new laws were again met with legal challenges, and voters experienced a seesaw effect as new voting rules were imposed, blocked by courts, and then reinstated in modified form, only to be challenged again. Throughout, thousands upon thousands of would-be voters were thwarted at the ballot box over the course of multiple elections.

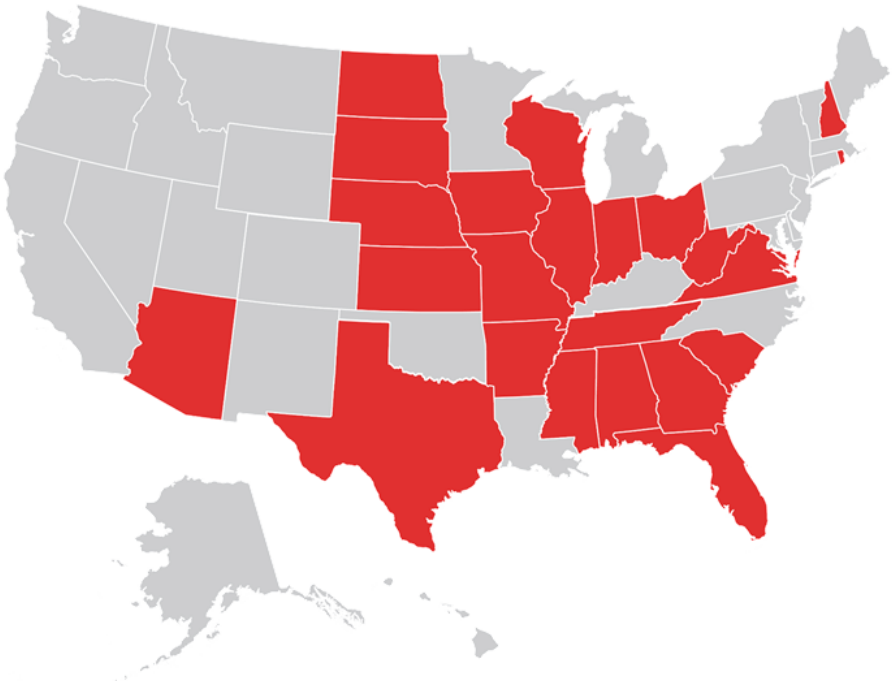
Here is where things stand now:

Changes in Voting Restrictions Since 2016

Since 2016, at least **eight** states have enacted new voting restrictions. Four of those states — Arkansas, Iowa, Missouri, and North Dakota — enacted new voter ID laws (but as noted below, a court has partially halted the North Dakota law for now). Texas also passed a new voter ID law, though its earlier strict voter ID law was partially in effect in 2016. Georgia, Indiana, Iowa, and New Hampshire imposed new burdens on voter registration. And Iowa cut back on early and absentee voting. In addition to these new laws, there have also been new lawsuits that may impact which restrictive voting laws are in effect in 2018. These are discussed in the next section, below.

Looking ahead, it is not clear whether state legislatures will continue their almost decade-long trend of passing restrictive voting laws, at least in the face of a steady stream of courtroom wins for voting rights. Indeed, **this year**, states have not enacted any significant new voting restrictions — at least not yet. That could change if legislators sense that courts are growing less vigilant in protecting voting rights.

Restrictive Voting Laws Since 2011



Overview of Restrictive Laws Since 2011

Going into the 2018 elections, voters in **23 states** — nearly half the country — will face additional restrictions on voting as compared to 2010, the year before state legislative efforts to cut back on voting access first mushroomed. These 23 states are in red on the map above.

Strict voter ID requirements are the most common type of new restriction. Overall, 13 states have harsher voter ID laws than they did in 2010, and 15 states have toughened their laws since 2006. Before 2006, **no state** had a strict photo ID requirement in effect.

List of New Voting Restrictions

Below is the complete list of new voting restrictions since 2010, taking into account changes as a result of successful lawsuits, ballot initiatives, and legislative efforts. An asterisk (*) denotes a voting requirement that will be in place for the first time in a federal election this November.

Potential Impact

If these laws remain in effect, they will make it harder for millions of Americans to vote. The cumulative effect of a decade of voting restrictions could be substantial, but their depressive effect may be masked this November by a spike in electoral enthusiasm and new candidates bringing voters to the polls. Still, the new laws will likely thwart many.

As stated above, a growing body of **research**, although still nascent, finds that voting restrictions reduce participation, especially among communities of color, low-income voters, youth, older voters, and voters with disabilities. In 2016, for instance, Wisconsin's voter ID law disenfranchised about 17,000 registered voters, according to one **study**. Overall, roughly 300,000 eligible Wisconsonites lacked IDs that could be used for voting that year, according to a federal **court's findings**. Another **analysis** found that local cutbacks to early voting in North Carolina depressed African-American turnout in 2016 even though a federal court had blocked statewide cutbacks as discriminatory. The U.S. Government Accountability Office

State	Voting Restrictions
Alabama	• Strict voter ID requirement (2011 law) • Documentary proof of citizenship (2011 law; not yet implemented)
Arizona	• Documentary proof of citizenship to register (2004 ballot initiative; currently blocked for registrations using federal form) • Polling place consolidation (2016 law) • Limitations on mail-in ballot collection (2016 law)
Arkansas	• Voter ID requirement (2017 law) *
Florida	• Reduced early voting period (2011 law, mitigated by 2012 court ruling and by subsequent 2013 statute restoring some early voting days) • Curbed voter registration drives (2011 law, mitigated by court decisions) • Reduced access to rights restoration for those with past criminal convictions (2011 gubernatorial action)
Georgia	• "No match, no vote" limit on access to voter registration (2017 law) * • Reduced early voting period (2010 law) • Documentary proof of citizenship to register (2009 law) • Strict voter ID requirement (2006 law)
Illinois	• Curbed voter registration drives (2011 law)
Indiana	• Aggressive voter purge requirements (2017 law) * • Documentary proof of citizenship for certain individuals (2013 law) • Strict voter ID requirement (2006 law)
Iowa	• Voter ID requirement (2017 law; will be partially implemented in 2018) * • Restrictions on voter registration drives (2017 law) * • Limited access to election-day registration (2017 law) * • Limited early and absentee voting (2017 law) * • Stricter voting rights restoration policy for the formerly incarcerated (2011 reversed executive action)
Kansas	• Strict voter ID requirement (2011 law) • Documentary proof of citizenship (2011 law; currently blocked for registrations at motor vehicle offices and those using federal voter registration forms)
Mississippi	• Strict voter ID requirement (2011 ballot initiative)
Missouri	• Voter ID requirement (2016 law and ballot initiative) *
Nebraska	• Reduced early voting period (2013 law)
New Hampshire	• Restricted student voting and registration (2017 law) * • Voter ID requested, but not required (2017 law)
North Dakota	• Voter ID requirement (2017 law, partially halted by court, and less restrictive than earlier law struck down by court) *
Ohio	• Reduced early voting period and abolished same-day registration period (2014 law) • Restricted absentee and provisional ballot rules (2014 law)
Rhode Island	• Voter ID requirement (2011 law)
South Carolina	• Voter ID requirement (2011 law, mitigated after lawsuit)
South Dakota	• Stricter voting rights restoration policy for the formerly incarcerated (2012 law)
Tennessee	• Strict voter ID requirement (2011 law) • Reduced early voting period (2011 law) • Proof of citizenship required for certain individuals (2011 law)
Texas	• Voter ID requirement (2017 law, which is less restrictive than 2011 law struck down by court but more restrictive than the temporary ID requirement in place in 2016) * • Curbed voter registration drives (2011 law)
Virginia	• Strict voter ID requirement (2012 law) • Restricted third-party voter registration (2012 law)
West Virginia	• Reduced early voting period (2011 law)
Wisconsin	• Voter ID requirement (2012 law, implemented for the first time in 2016) • Added longer residency requirement before a person could register to vote (2012)

found that new voter ID laws depressed turnout by about 2 to 3 percent in Kansas and Tennessee in 2012.

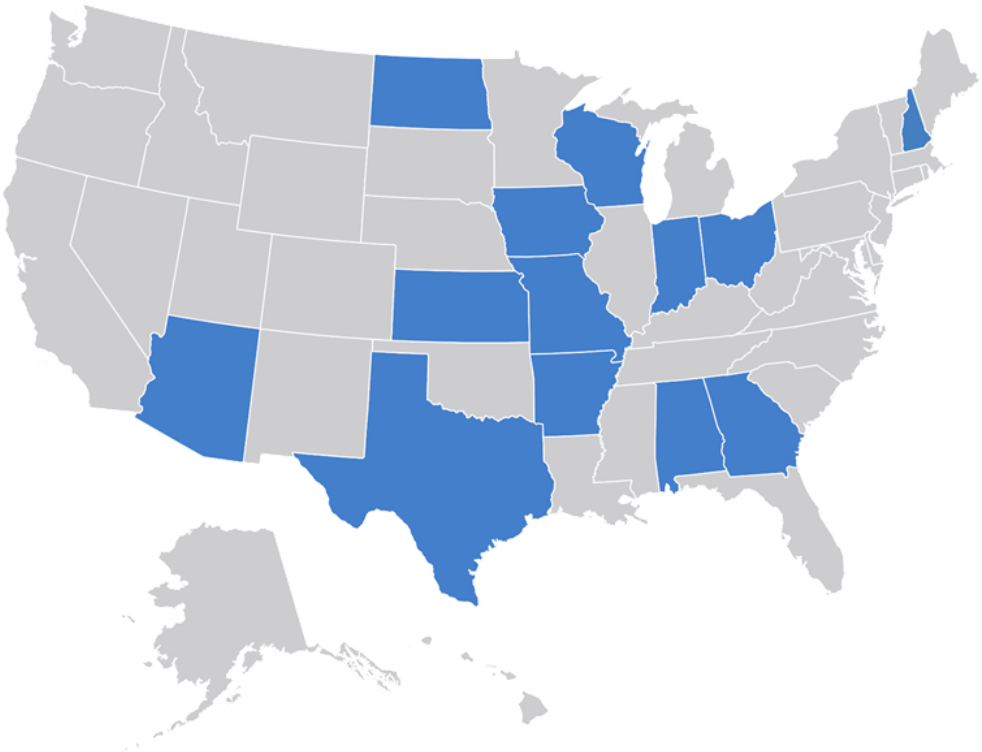
The impact of new laws will likely be especially pronounced in states with highly competitive elections. Missouri, for example, enacted a voter ID law last year and soon will hold a closely watched U.S. Senate election. A court rejected a challenge to the measure earlier this year, and absent a victory on appeal, the law will be in place this November. North Dakota will also hold a very competitive Senate election with a new voter ID law. A court has temporarily blocked part of that law, but its order has been appealed. Indiana will hold a very competitive Senate election, and unless a court strikes down the state's new aggressive voter purge law, many eligible voters could show up to the polls to vote only to find that they have been mistakenly removed from the rolls. And Iowa will administer a broad new set of voter restrictions in November, coinciding with a highly competitive election for U.S. Congress.

Voting problems will likely be compounded because many of the restrictions will be in place for the first time this November. Overall, voters in eight states will face more onerous voting hurdles for the first time this year. Major changes to voting rules often cause voter confusion and errors by poll workers and election officials when they are first implemented, exacerbating their negative effect.

What Can Be Done Before November?

The most effective way to prevent a restrictive voting law from marring an election is to obtain a judicial order stopping it from going into effect. As discussed in the next section, courts in a number of states could issue decisions in pending lawsuits that could impact voting in November. Additional cases may be filed. Where voting restrictions cannot be limited or eliminated by courts, voter education and mobilization are a necessary line of defense to ameliorate the disenfranchising effects of these laws. Voters must be made aware of new voting requirements, election officials must be trained to implement the restrictions fairly and lawfully, and state and non-state actors should assist eligible voters in overcoming the restrictions on or before election day.

Ongoing Litigation Against Voting Restrictions



Litigation That Could Impact Voting Access

Over the past few years, the voting rights landscape has been shaped by both victories and losses in cases challenging new voting barriers. Particularly since 2013, when the Supreme Court's *Shelby County v. Holder* decision effectively eliminated the U.S. Department of Justice's oversight of state voting regulations, the courts have been the primary venue for reversing or limiting the effects of burdensome and discriminatory voting laws. This year, the courts continue to play a critical role in shaping Americans' access to the franchise.

Ongoing Litigation Against Voting Restrictions

Major litigation against restrictive voting laws is currently ongoing in at least 13 states (pictured in blue on the map above), and other lawsuits against state election administration practices could impact voting as well. There are active cases challenging voter ID laws in Alabama, Arkansas, Iowa, Missouri, North Dakota, Texas, and Wisconsin; voter registration restrictions in Alabama, Arizona, Georgia, Kansas, and New Hampshire; early voting restrictions in Wisconsin; and voter purge practices in Indiana and Ohio. The most common claims are that new laws are discriminatory, in violation of the federal Voting Rights Act or the Constitution; that they impermissibly burden the right to vote in violation of the federal or state constitutions; and that they violate voter protections under the National Voter Registration Act. The fate of these laws could substantially affect the voting landscape and the composition of the electorate in 2018.

Here are some key cases to watch:

- **U.S. Supreme Court/Ohio:** A case challenging Ohio's voter list maintenance practices awaits decision by the U.S. Supreme Court. Specifically, Ohio is using a voter's failure to vote over a two-year period, by itself, as a basis to start a process of removing that voter from the rolls. The plaintiffs argue that this practice, which has resulted in thousands of eligible voters being removed from the rolls, violates the National Voter Registration Act of 1993. While the case's outcome could impact how states conduct voter purges and whether there are sufficient protections against improper purges, the legal issues involved are distinct and will not directly impact the vast majority of legal challenges to new voting laws.

- **Alabama:** The federal Court of Appeals for the Eleventh Circuit expedited an appeal from a decision rejecting a challenge to Alabama's voter ID law and has tentatively scheduled oral argument for the end of July. A decision may be issued before the election. Unless the appellate court reverses the district court's decision before the election, Alabamans will be required to show photo ID to vote again this November. In 2014, Alabama's Secretary of State estimated that roughly 280,000 Alabama voters lacked the requisite ID, according to the plaintiffs' complaint in this case.

- **Arizona:** Plaintiffs are challenging the state's "dual registration" system, which it put in place following a Supreme Court decision that prevented it from requiring documentary proof of citizenship in connection with the federal voter registration form. The system requires documentary proof of citizenship in order to vote in state elections.

- **Arkansas:** A state trial court issued an order halting enforcement of the state's voter ID law. But the state Supreme Court stopped the trial court's order from going into effect for the May 22 primary election, even though the high court had struck down a previous iteration of the voter ID law as inconsistent with the state Constitution. Unless the state Supreme Court upholds the trial court's order on appeal, Arkansas voters will face a photo ID requirement for the first time in a federal election this November. In addition, perhaps to hedge its bets, the Arkansas Legislature has put a ballot initiative amending the state Constitution to require voter ID on the November ballot.

- **Indiana:** A federal court will likely soon issue a decision on whether to freeze a new state purge program. Under a new Indiana law, election officials must purge voters from the rolls if their records are flagged by the controversial "Crosscheck" data repository. A recent study estimated that up to 99.5 percent of Crosscheck flags for double-voting in a sample of 800,000 were inaccurate. While the state has agreed to hold off on these purges before July 1, if the law is not blocked before then, a major purge of the voter rolls could occur prior to this year's election.

- **Iowa:** Voter groups filed a lawsuit on May 30 challenging the state's new restrictive voting law, including its voter ID, absentee ballot counting, and early voting provisions.

- **Kansas:** There are at least two court cases challenging the state's documentary proof of citizenship requirement for voting awaiting decision. A federal district court in Kansas held a trial in March on the state's requirement that individuals registering at the department of motor vehicles must present proof of citizenship. And a federal court in the District of

Columbia heard arguments before the 2016 election in a **case** challenging the decision by a federal agency to apply Kansas's documentary proof of citizenship requirement to applicants using the federal voter registration form. (This case also applies to **Alabama** and **Georgia** applicants.) In both cases, the courts have temporarily blocked the state's requirements as applied to relevant applicants. If either court reverses course before November, it could have a major impact: When the proof of citizenship requirement was in place from 2013 through 2015, it prevented more than **35,000 Kansans** from registering.

- In **Missouri**, a trial court dismissed a challenge to the state's new voter ID law, but that decision has been **appealed**, and a decision in the appeal is expected prior to the election.

- In **New Hampshire**, there is a **bench trial** on a restrictive voter registration law scheduled for August. If that schedule holds (and there is currently some jockeying over whether the judge in the case will recuse himself), then a decision could be issued before November. Critics claim that the law was designed to prevent students from voting in a state where the 2016 Senate election was decided by roughly **1,000** votes.

- In **North Dakota**, a federal district court has issued an order temporarily halting the state from enforcing parts of its voter ID law that could disenfranchise significant numbers of Native Americans. The state has appealed that decision and is seeking a stay of the district court's order, pending resolution of the appeal. If the order is reversed, thousands of Native Americans could be disenfranchised, according to the **court**.

- **Texas:** The Fifth Circuit Court of Appeals recently issued a decision permitting Texas's new **photo ID law** to go into effect. Texas has been applying that law since the beginning of the year, and even if there is a further appeal of the Fifth Circuit's decision, the law will likely govern this November's elections.

- **Wisconsin:** The Seventh Circuit Court of Appeals heard oral argument well over a year ago in **two challenges** to various aspects of Wisconsin's election law, including voter ID and early voting restrictions enacted earlier this decade. The court is likely to decide these appeals before November. (For context, the appeals were noticed nearly two years ago — the median time from the filing of a notice of appeal to a decision in the Seventh Circuit is about eight **months**.) Most of the restrictions have been temporarily halted by a court order, although the voter ID law is largely in place.

Groups have also challenged administrative decisions that disenfranchise voters. Earlier this year, a district court judge in Florida **struck down** the state's cumbersome process of restoring voting rights to individuals convicted of felonies, although that decision is on appeal. In May, a lawsuit was **filed** challenging Florida's decision to block state university campuses from hosting early voting sites.

With some notable exceptions, voters have fared reasonably well in lawsuits challenging the most onerous new voting laws over the past decade. A litigation scorecard, tracking the outcomes of the decade's major cases against voting restrictions, is included in the appendix.

Look Ahead: The U.S. Supreme Court

Looking ahead, the Supreme Court is poised to take up a major voting rights case. The Court's last effort to consider the legality of a state voting restriction — a decade ago in ***Crawford v. Marion County Election Board*** — left key questions unresolved. The issue of discrimination was raised in the case, and so the Court did not clarify the contours of laws protecting against voting discrimination. Nor did the Court definitively address the scope of constitutional protections for voting. When the Court does take up a new voting case, it will likely determine the strength of voting rights protections for years to come.

Over the past few years, the Court has sent strong signals that it is inclined to take up such a case. It took the unusual step of weighing in on orders from two separate **lower courts** (involving challenges to North Carolina's major voting restriction law and Wisconsin's voter ID law) — something the Court typically does only if there is a "**reasonable probability**" it will take the case. And while the Court ultimately refused to **hear both cases** (twice in the North Carolina case), Chief Justice Roberts took the unusual step of issuing a special statement explaining that the Court's refusal to hear the North Carolina case did not reflect an opinion on the merits of the case.

A number of major cases that appeared to be barreling toward the high court over the past two years did not or have not yet reached it. In Texas, a challenge to the state's voter ID law appeared to be first in line for Supreme Court review, but the state Legislature amended the law in 2017, changing the course of the litigation against the state's original law. (The Brennan Center represents a group of plaintiffs in the Texas case.) A widely watched challenge to a package of North Carolina voting restrictions also appeared to be teed up for Supreme Court review, but the Court denied review, after a newly elected governor tried to withdraw the state's petition seeking review. In addition, challenges to a set of restrictions

passed in Wisconsin were also expected to be in the mix for Supreme Court review, but the federal court of appeals has not yet issued a decision that the Court could review.

The only case the Court took up this year is the case challenging Ohio's voter list maintenance practices, discussed above. While the case could impact state practices for purging voter rolls, it will not address the main legal questions at issue in typical cases against new voting restrictions. We will likely know by the end of the year whether next year's docket will include a blockbuster voting case.

Expansive Voting Laws

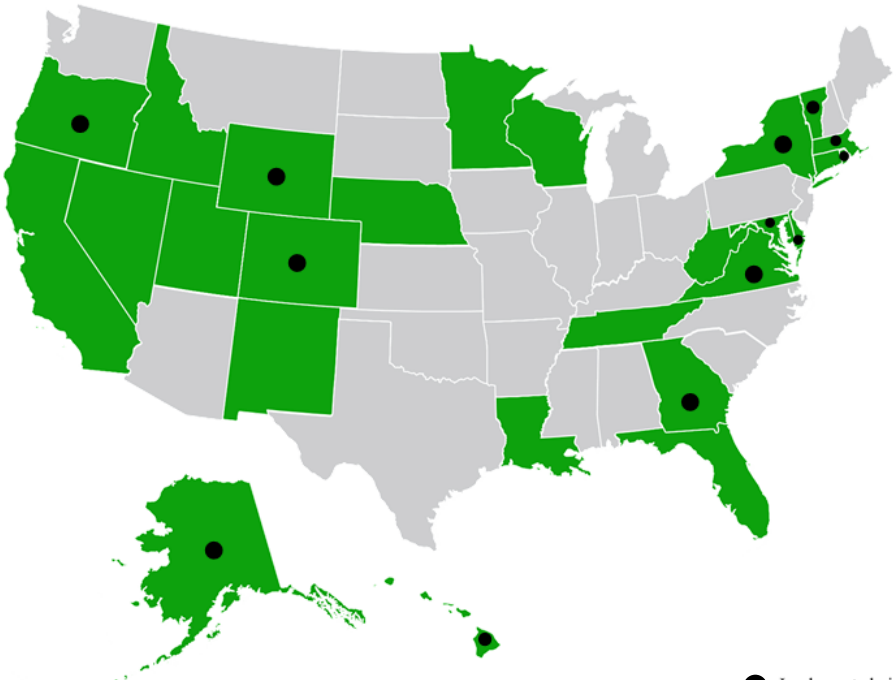
While many states have moved to restrict their citizens' access to the ballot in the past decade, others have expanded access to their voting process. These recent pro-voter victories form an important part of the overall voting landscape going into 2018. Most significantly, new automatic voter registration (AVR) systems will be in place in seven states and the District of Columbia this year, five of them for the first time.

New Laws in Place

- This year, five states — Alaska, California, Colorado, Rhode Island, and Vermont — and the District of Columbia will have **automatic voter registration** (AVR) in place for the first time in the lead-up to a federal election. In total, seven states and the District of Columbia will have up-and-running AVR systems prior to the 2018 elections, including Georgia and Oregon, which implemented AVR in advance of the 2016 elections. (Two additional states are scheduled to, but may not have, AVR in place by the 2018 elections, and three states will not implement the reform until after the election.) AVR is transformative, yet simple: When eligible citizens visit a government office, such as a state's department of motor vehicles, they are automatically registered to vote unless they decline.

    - So far this year, three more states have enacted AVR laws: Maryland, New Jersey, and Washington. That brings the total number of states that

Major Expansions to Voting Access Since 2013



BRENNAN CENTER FOR JUSTICE

● Implemented significant voting reforms, including AVR, election-day registration, early voting, or rights restoration

have adopted AVR to 12 plus the District of Columbia.

- AVR could significantly increase the number of people who register and vote in these states this November. In **Oregon**, which adopted AVR in 2016, the rate of new registrations at the department of motor vehicles quadrupled, and the overall registration rate jumped by nearly 10 percent after it was implemented. Many of these new registrants turned out to vote. While Oregon had no competitive statewide races, its voter turnout **increased** by 4 percent in 2016, which was 2.5 percentage points **higher** than the national average.

- AVR is a rare voting reform to have garnered broad bipartisan support. For example, West Virginia's largely Republican Legislature passed an AVR bill, and its Democratic governor signed it into law; conversely, Illinois's Democratic-majority Legislature passed AVR with unanimous support, and its Republican governor signed it into law. Alaskans passed AVR via ballot initiative with nearly 65 percent of the vote in 2016, the same year they gave Donald Trump a 15-point victory over Hillary Clinton.

- Also this year, thousands of New Yorkers who had previously lost their voting rights because of a criminal conviction could newly be eligible to vote as a result of an executive order that Gov. Andrew Cuomo issued in April, indicating he will restore voting rights to certain New Yorkers on parole. As of May 2018, approximately **24,000 New Yorkers** have had their voting rights restored, and there are plans to restore voting rights on a monthly basis going forward.

  - In Louisiana, Gov. John Bel Edwards recently signed a law restoring voting rights to individuals on probation and parole if they have been out of prison at least 5 years. According to state officials, this reform could enfranchise roughly 2,000 citizens of Louisiana, but it will not take effect until 2019.

  - Since the 2016 elections, three other states have also expanded the right to vote for the formerly incarcerated. In **Virginia**, right before the last election, voting rights were restored with great fanfare to more than 61,000 citizens, but not until after the voter registration deadline had passed for the 2016 election. This will be the first federal election in which those citizens can vote. In Alabama, the Legislature passed clarifying legislation that had the effect of reducing the number of crimes for which citizens can be disenfranchised. And in **Nevada**, the governor signed a law restoring voting rights to those who committed certain crimes and previously would have been permanently disenfranchised; that law will not go into effect until January 2019.

  - Florida is seriously considering a significant reform that could add to that total. Its citizens, as explained below, have collected enough signatures to qualify a referendum for the ballot that would end the state's lifetime ban on voting for individuals with criminal convictions. This reform will not affect the composition of the electorate in November.

- More broadly, compared to the 2016 election, at least 16 states will have implemented significant new laws that will make it easier to register or vote this year. This count includes states that passed laws before November 2016 but did not put them into effect for the 2016 election. (Since we started tracking legislation expanding voting access in 2013, 25 states and the District of Columbia have implemented significant reforms expanding access, and four states have eased their ID requirements for voting or registration.) In addition to the AVR and rights restoration laws discussed above, these reforms include same-day and election-day registration, online voter registration, and expanded early voting opportunities. Online registration is among the most common reforms implemented in the past two years — five states implemented online registration, bringing the total number of states with **online** registration to 37 plus the District of Columbia (Oklahoma has enacted online registration, but does not expect to implement it until **2020**.) This reform, which was a major innovation last decade and early into this one, is now the norm. Beyond the states that have implemented reforms, other states, like **Washington**, have enacted pro-voter reforms that will not be in effect this year.

Other Voting Issues to Watch

Voter Roll Purges

This year, there is a heightened **risk** that elections officials will mistakenly remove large numbers of eligible voters from the rolls. Properly done, efforts by election officials to clean up the voter rolls by removing names that should not be there promotes election integrity and efficiency. But when done hastily or incorrectly, the resulting

"purges" can sweep in and disenfranchise large numbers of eligible voters. An upcoming Brennan Center report finds that states are now purging many more people than they did a decade ago, without marked improvements in their techniques, and with fewer legal protections for voters. There are two main dangers to watch this year.

First, watch for whether local elections officials capitulate to a threat campaign launched by private groups promoting aggressive — and reckless — removals of voters from the rolls. This past September, a group called the Public Interest Legal Foundation threatened or filed lawsuits against 248 jurisdictions, claiming their list maintenance practices were inadequate. Other groups, including the American Civil Rights Union and Judicial Watch, have similar lawsuits pending in three states. (Voter advocacy groups, including the Brennan Center, have **pushed back** against this effort by providing guidance to jurisdictions about how to properly comply with their list maintenance obligations under federal law and by intervening in their lawsuits.)

Second, watch for whether the U.S. Department of Justice tries to force states to remove voters from the rolls. In June 2017, the Department of Justice took the unusual step of sending letters to 44 states demanding that they provide detailed information on their list maintenance practices. **Some** have understood this as a possible prelude to legal action and recalls **efforts** undertaken by the George W. Bush administration in the mid-2000s to pressure U.S. attorneys to sue states for failing to purge their voter rolls aggressively enough.

Ballot Security Operations

There is also a risk of improper ballot security and vote suppression efforts at the polls this November. "Ballot security" is a term used to describe a set of practices by private groups, candidates, or political parties with the stated goal of preventing voter fraud. These practices include efforts to identify improperly registered voters, often using unreliable methods; efforts to formally challenge the eligibility of individual or groups of voters; and efforts to discourage voters from committing fraud. In the heated environment of political campaigns, there is a high **risk** that these kinds of operations will lead to voter intimidation or deception.

There is reason to worry about an increase of these types of efforts this year. This election may be the first in more than 30 years that the Republican National Committee (RNC) is not bound by a **consent decree** requiring it to get approval from federal court before conducting any ballot security operations. Before the consent decree effectively stopped it, the RNC was the nation's premier organizer of these suppressive efforts. Smaller organizations have tried to mobilize ballot security efforts in recent years, but they lacked the RNC's reach and resources. If the RNC gets back into the ballot security game, we may see a revival of these vote suppression efforts at the polls. Indeed, the party's standard-bearer, President Trump, has personally championed ballot security measures. As a candidate in 2016, he encouraged vigilante monitoring of polling places, and since then he has continued to fan unfounded fears of widespread voter fraud. In addition, the Department of Justice, which is our nation's leading bulwark against voter intimidation, has signaled a broad retreat from enforcing voting rights. The consent decree is not dead yet, though — the Democratic National Committee has appealed the court's decision to dissolve it.

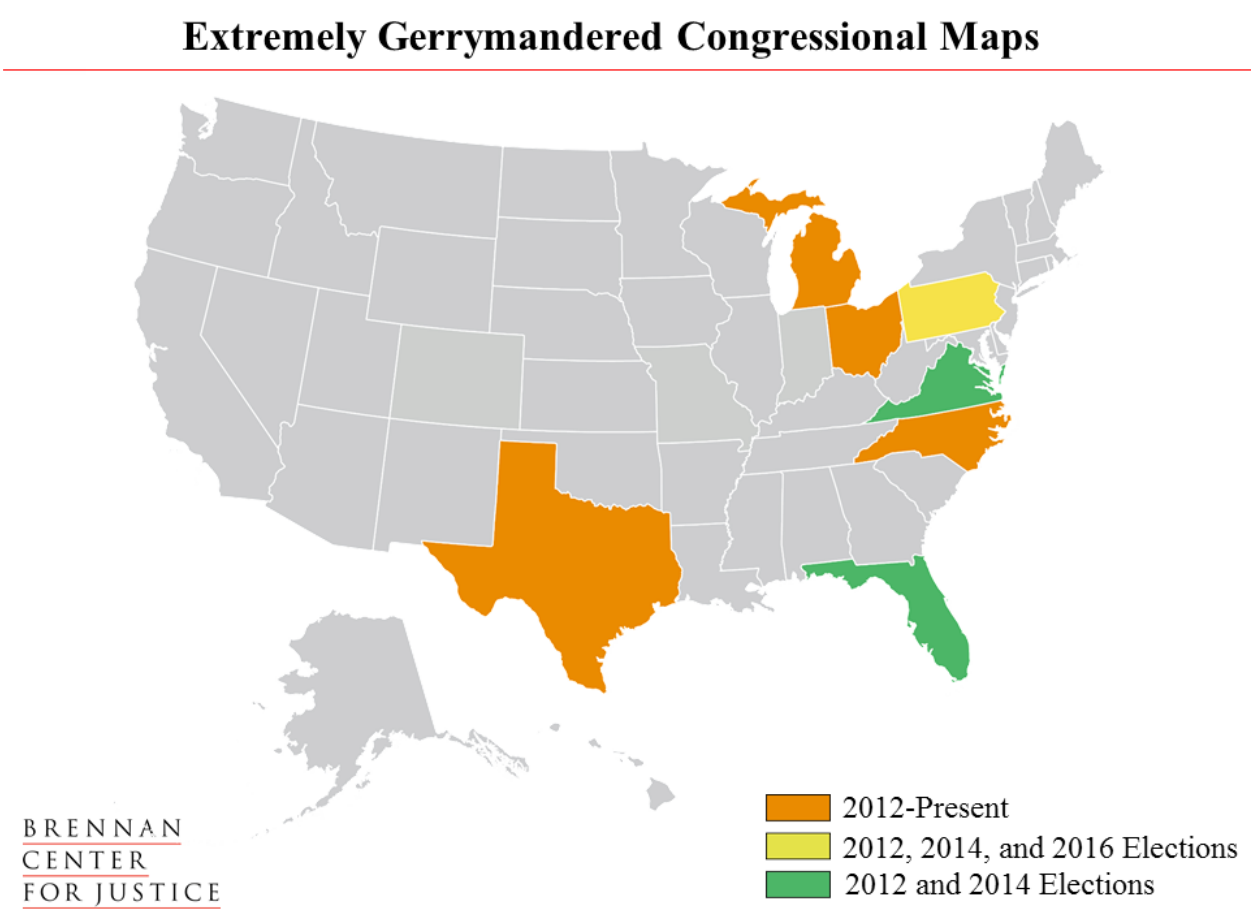
Redistricting and Gerrymandering

Historically, midterm elections have offered the chance for American voters to change course in the country's political path. But because of the pervasive gerrymandering that took place after the 2010 Census, the impact of the 2018 midterms could prove to be far more muted.

A Brennan Center **study** found that extreme partisan gerrymandering in half a dozen key states provides Republicans with an **advantage** of up to 16 or 17 seats in the current House of Representatives — a significant share of the 24-seat majority that Republicans held at the start of this Congress. That advantage will decrease somewhat after the 2018 midterm election because of a court-ordered redrawing of Pennsylvania's congressional map in February. But even with a new Pennsylvania map, Democrats face significant structural barriers to winning their first House majority since maps were redrawn in 2011.

According to the Brennan Center's estimates, Democrats would have to win the national popular vote by **10.6 percentage points**, or benefit from extraordinary shifts in partisan enthusiasm, in order to win a majority in the next House. While **some** have estimated Democrats' structural disadvantage to be somewhat smaller, the consensus is that even a historically large popular vote win will yield far fewer House seats than similarly sized, or even smaller, past popular vote wins. There is a real **risk** that Democrats will win the national popular vote but will not win a majority of House seats — something that also happened in 2012. In other words, biased maps could be determinative in the outcome of November's elections for control of the U.S. House of Representatives, as well as of **several** state legislatures.

The problem of gerrymandering is not new this year; indeed, many Americans will vote this November in the



fourth election in a row under severely gerrymandered maps. This is both because the gerrymanders of this decade have been much more extreme and durable than those of the past and because in most of the country there has been no judicial or other mechanism to rein them in. That could change this summer. While there will likely be few changes to any maps before November, there are some important stories to watch over the course of the summer and fall.

A New Map in Pennsylvania, but Not in North Carolina

- In Pennsylvania, voters will go to the polls this November using a new congressional map as the result of a **decision** of the Pennsylvania Supreme Court in January that found that the state's original map was a partisan gerrymander in violation of the Pennsylvania Constitution. That ruling resulted in the replacement of a map that locked in a 13-to-5 Republican advantage — in a state that is roughly evenly divided between Democrats and Republicans — with a new map drawn by a court-appointed special master. The new map is substantially more responsive to electoral shifts, making Pennsylvania a central 2018 battleground and potentially the key to control of the House. According to a Brennan Center estimate, Democrats and Republicans each have the opportunity to win between **7 and 11** seats, and the respected Cook Political Report currently includes eight Pennsylvania congressional districts on its **list** of competitive races (the second highest number of competitive races of any state after much larger California).

- By contrast, voters in North Carolina will go to the polls for the second election in a row using a map drawn in 2016 to replace an earlier map found by courts to be an unconstitutional racial gerrymander. Like the original map, the replacement map, which lawmakers described as a "**political gerrymander**," locks in a 10-to-3 Republican advantage in a state where there is robust competition between the parties at the statewide level. Although a three-judge panel **struck down** the replacement map in January as a partisan gerrymander, the Supreme Court put the

drawing of a new map on hold while it considers North Carolina lawmakers' appeal (likely to be heard in the fall of 2018 — see below).

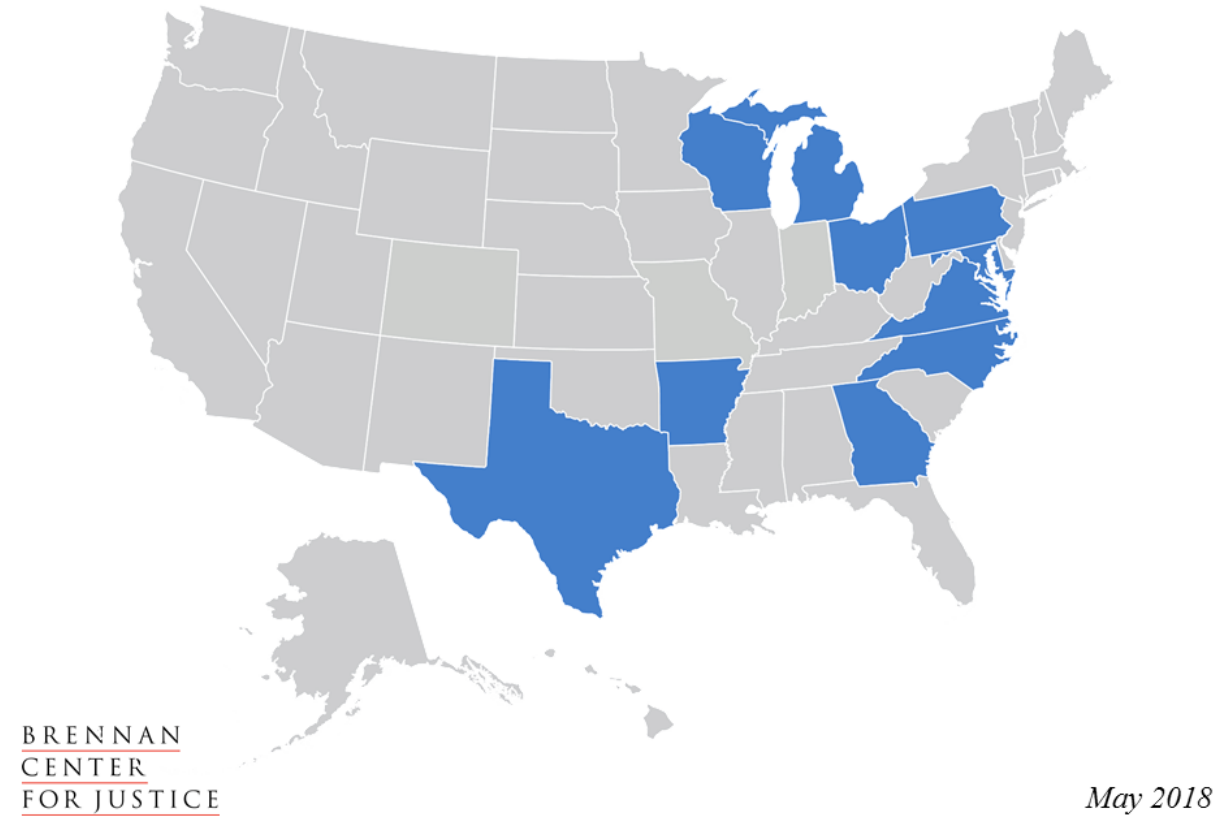
Redistricting Cases at the Supreme Court

- While decisions will likely come too late to affect the 2018 midterms, the U.S. Supreme Court could set the stage for further redrawing of the nation's electoral maps this summer when it is expected to rule in closely watched partisan gerrymandering cases from **Wisconsin** and **Maryland**. The former challenges a Republican gerrymander of Wisconsin's state assembly map and the latter a Democratic gerrymander of Maryland's 6th Congressional District. The two decisions will be the Supreme Court's first partisan gerrymandering opinions since it badly deadlocked on the question of the constitutionality of partisan gerrymandering in the mid-2000s in *Vieth v. Jubelirer* and *LULAC v. Perry*. Together, the Wisconsin and Maryland decisions will give the high court an opportunity to finally establish a standard for gauging when a map is unconstitutional.

  If the court does rule that there are constitutional limits to partisan gerrymandering, the impact would be significant both in the near and long term. Not only would the rulings result in changes to maps used in the 2020 elections, they, more importantly, would radically change the legal framework in place for the next round of redistricting in 2021.

- The Supreme Court also will rule this summer in a **Texas redistricting case** that could result in several congressional and state house districts being redrawn for the 2020 elections because of unconstitutional racial gerrymandering and/or violations of the Voting Rights Act. This case is significant because it also could set the stage for Texas to be placed back under preclearance coverage using the "bail in" provisions of section 3 of the Voting Rights Act. If this happens, Texas would once again be required to get certain election-related laws preapproved before putting them into effect — something it has not had to do since the Supreme Court's 2013 decision in *Shelby County v. Holder*.

Ongoing Redistricting Litigation



- The Supreme Court also is expected to decide before the end of June whether it will hear North Carolina's appeal of a lower-court decision striking down that state's 2016 congressional map as a partisan gerrymander. Most observers expect the high court to set the case for argument in the Supreme Court term that starts October 2. However, the court also could decide the case without oral argument (as requested by the plaintiffs) or send the case back to the trial court for consideration in light of the Supreme Court's decisions in the Wisconsin and Maryland cases.

Other Noteworthy Redistricting Cases

- In addition to the Wisconsin, Maryland, and North Carolina partisan gerrymandering cases at the Supreme Court, partisan gerrymandering challenges are in their early stages in federal district court in **Ohio**, challenging the state's congressional map, and in **Michigan**, challenging both congressional and legislative maps. Rulings could be possible this fall in either or both cases.

- In Virginia, a decision could come from a three-judge panel this spring or summer in a **racial gerrymandering challenge** to 11 of the state's house of delegates districts. The panel previously rejected the challenge, but the Supreme Court reversed, ruling that the panel had used the wrong standard in assessing the claims.

- Also in Virginia, on May 31, the state Supreme Court rejected a challenge to the state's legislative maps under the Virginia Constitution, terminating hopes that the maps would be redrawn in advance of the 2019 state elections.

Redistricting Reform Efforts

There also is significant momentum toward redistricting reform in the states. As discussed below, voters in four states have succeeded in putting initiatives on their state ballots to reform the redistricting process, either by creating an independent redistricting commission to draw political boundaries or by constraining map drawers. In May (during the primary election), Ohio voters, by a 3-to-1 margin, passed a referendum reforming the redistricting process for congressional seats. Starting in 2021, new congressional maps will require either support of a supermajority in the Ohio Legislature, as well as a minimum level of support from the minority party in each chamber, or compliance with strict new rules, including a prohibition on maps that unduly favor a political party.

November Ballot Measures That Could Impact Voting Access

November's election is also remarkable for the sheer number of ballot initiatives that address voting issues — far more such ballot initiatives than in any election in recent memory. Voters in nine states will have the opportunity this year to vote on ballot initiatives to change voting and redistricting processes. Initiatives in Arkansas and Montana would make it more difficult for citizens to vote. Initiatives in Florida, Maryland, and Nevada would substantially expand access to the franchise. And initiatives in Colorado, Michigan, Missouri, and Utah would improve the redistricting process. Voters' decisions on these ballot measures could have a major impact on voting for years to come. Here is an overview of those measures:

Initiatives restricting voting access

- In **Arkansas**, voters will decide whether to enshrine a strict voter ID requirement in their state constitution, on top of the voter ID law enacted by the state Legislature last year. The Arkansas Supreme Court struck down the state's previous strict voter ID law as unconstitutional in 2014.

- In **Montana**, voters will vote on a measure that prevents civic groups and individuals from helping others vote absentee by collecting and delivering their voted ballots. Opponents claim that the measure will create **unnecessary** barriers to voting and could impact **student** voters in particular.

Initiatives expanding voting access

- In **Florida**, voters will vote on a citizen-initiated ballot measure to automatically **restore** the voting rights of individuals who have been convicted of felonies (other than murder and sexual offenses) when they complete all terms of their sentences. If the referendum passes, it has the potential to transform Florida's electorate: 1.4 million Floridians would regain their eligibility to vote. Florida's law currently disenfranchises, by far, the **most people** in the country. It is also an outlier in terms of its punitiveness. Florida is currently one of only three states that disenfranchises all people with felony convictions for life. If the Florida law is amended, only Iowa and Kentucky will have lifetime voting bans.

- In **Maryland**, voters will cast their ballot on a proposed constitutional amendment authorizing the Legislature to permit election-day voter registration. Maryland already allows same-day registration during its early voting period. This would make Maryland

the 19th state (plus the District of Columbia) to enact election-day registration, according to the National Conference of State **Legislatures**. Experts believe that this reform increases turnout by 5 to 7 **percent**.

- In **Nevada**, voters will **weigh in** on whether to adopt automatic voter registration. This reform could be particularly transformative in a state that has a history of scandals over voter registration drives as well as one of the lowest voter registration **rates** in the nation. AVR was first put before the state Legislature by a citizen-initiated **petition** supported by tens of thousands of **Nevadans**. The bill was passed by the state Legislature with substantial bipartisan support. Nevertheless, Gov. Brian Sandoval vetoed it, setting up this year's ballot initiative. If enacted, AVR could help to get many of the more than 770,000 eligible citizens who are not registered onto the rolls.

- In **Michigan**, a coalition is collecting signatures to put a constitutional amendment on the ballot that would include a variety of pro-voter reforms, including AVR at the secretary of state's office, election-day registration, and no-excuse absentee voting, as well as requiring post-election audits. This suite of reforms could transform voting in Michigan, improving the way people register and vote and how their votes are counted.

Initiatives improving redistricting

- In **Colorado**, two amendments on the ballot this November would put a 12-member commission in charge of drawing the state's congressional and legislative districts. (Congressional districts are currently drawn by the state Legislature and legislative districts are drawn by a commission of political appointees.) The commission would have an equal number of Democrats, Republicans, and unaffiliated members. A majority of eight commission members, including at least two unaffiliated members, would be required to approve a map. The commission would be required to hold at least three public hearings in each congressional district before approving a redistricting map. The proposals also establish new substantially stronger criteria for map drawing, including provisions barring partisan gerrymandering and rules favoring competitive districts. If adopted, the amendments would guarantee unaffiliated voters a role in the redistricting process for the first time.

- In **Michigan**, a grassroots ballot initiative that began with a single Facebook post in November 2016 would create a 13-member citizens' redistricting commission, consisting of four Democrats, four Republicans, and five members not affiliated with a major party, to draw both the state's congressional and legislative boundaries. (Both congressional and legislative districts are currently drawn by the state Legislature.) A majority vote of the commission would be required to approve a plan, which must include at least two commissioners affiliated with each major political party, and two commissioners affiliated with neither party. Any map approved by the commission would be subject to new rules, including a requirement that the map not unduly favor a political party as determined by accepted measures of partisan fairness.

- In **Missouri**, a citizen-proposed constitutional amendment will be on the 2018 ballot that would give a nonpartisan state demographer primary responsibility for drawing state legislative lines for consideration by the state's existing legislative apportionment commissions (one for the state House and one for the state Senate). Although the legislative apportionment commissions can modify the demographer's maps, any changes will require a supermajority of the commission. If voters approve the measure, Missouri would be one of the first states in the nation to require that proposed maps be tested using a specific statistical measure of partisan fairness.

- In **Utah**, voters will weigh in this November on a citizen-led ballot initiative that would create a seven-member advisory redistricting commission to propose redistricting plans for consideration by Utah lawmakers, starting in 2021. (Congressional and legislative districts are currently drawn by the state Legislature.) The commissioners, who would be appointed by the governor and legislative leaders, would be required to follow ranked-order criteria to draw the state's congressional and legislative districts, which would include preserving local communities of interest and traditional neighborhoods. The proposal also would prohibit the commission and the Legislature from considering partisan political data unless necessary to comply with other redistricting criteria. To ensure that maps are not gerrymandered, the amendment requires map drawers to use best available scientific and statistical methods, including measures of partisan bias, to test maps. Uniquely among states that use advisory commissions, the Utah amendment would require the Legislature to issue a written report if it rejects a commission-drawn map. The report would have to explain both why the Legislature rejected the commission's proposed map and why the map adopted by the Legislature better satisfies the amendment's map-drawing criteria.

Appendix: Voting Litigation Scorecard

Here is a summary of the outcomes of major lawsuits challenging new voting restrictions over the past decade. They are mostly federal cases, except where otherwise indicated:

LITIGATION VICTORIES

State	Year of Key Ruling	Law Blocked/Mitigated	Outcome
Alabama, Georgia, Kansas	2016	Documentary proof of citizenship for registration	Blocked for use on federal voter registration form.
Georgia	2016	"No match, no vote" purge practice	State agreed to suspend the practice before a hearing was held. New "no match, no vote" bill subsequently enacted in 2017.
Kansas	2014, 2016	Documentary proof of citizenship for registration	Documentation requirement for the DMV voter registration form, the state voter registration form (challenged in state court), and the federal registration form all blocked.
North Carolina	2016	Single legislative package of restrictions: strict voter ID; cutbacks to early voting; elimination of same-day registration, preregistration, and out-of-precinct voting	Struck down
Texas	2012, 2016	Strict voter ID	Struck down, both before and after the *Shelby* ruling. Legislature subsequently passed an amended voter ID law in 2017.
Wisconsin	2016	Strict voter ID; early voting, residency, absentee ballot distribution, and student voting restrictions	Process for obtaining free voter ID modified and restrictions on use of certain types of ID struck down. Other challenged restrictions struck down.
Arizona	2013, 2014	Documentary proof of citizenship for registration	Blocked for state and federal voter registration form
Arkansas	2014	Voter ID	Struck down by state court. New voter ID law subsequently enacted in 2017.
Pennsylvania	2014	Strict voter ID	Struck down by state court
Florida	2006, 2007, 2008, 2012	Cutbacks to early voting; restrictions on voter registration drives; restrictions on processing voter registration forms	Cutbacks to early voting struck down in part. Restrictions on registration drives and form processing blocked.
South Carolina	2012	Voter ID	Blocked for 2012 election, and most harmful effects mitigated for future elections
Georgia	2005, 2006	Strict voter ID	Blocked for 2006 elections by state and federal courts, but an amended version of the law was subsequently upheld
Missouri	2006	Strict voter ID	Struck down by state court
Ohio	2006	Documentary proof of citizenship for naturalized citizens at the polls	Struck down

UNSUCCESSFUL LITIGATION

State	Year of Key Ruling	Law Challenged
Ohio	2016	Cutbacks to early voting
Ohio	2016	Hurdles to counting provisional and absentee ballots
Virginia	2016	Strict voter ID
Tennessee	2015	Strict voter ID
Wisconsin	2014	Strict voter ID (challenged in both state and federal court)
Texas	2012	Third-party voter registration restrictions
Indiana	2008, 2010	Strict voter ID (challenged in both state and federal court)

Voters have also been successful in challenging state administrative decisions. A pair of lawsuits brought in 2016 successfully challenged election officials' decision to reduce the number of polling sites in Maricopa County, Arizona. And in 2013, a state court in Colorado rejected the secretary of state's incorrect interpretation of the state's vote-by-mail statute, which would have obstructed thousands of Coloradans from voting.

APPENDIX B

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BRENNAN CENTER FOR JUSTICE

Testimony of Wendy R. Weiser
Brennan Center for Justice at NYU School of Law

Before the Senate Judiciary Committee
Hearing on "From Selma to *Shelby County*: Working Together to Restore the Protections of the Voting Rights Act"

July 17, 2013

On behalf of the Brennan Center for Justice, I thank the Senate Judiciary Committee for the opportunity to submit testimony in connection with this important hearing, "From Selma to *Shelby County*: Working Together to Restore the Protections of the Voting Rights Act." The Brennan Center is a nonpartisan law and policy institute that focuses on issues of democracy and justice; among other things, we work to ensure fair and accurate voting procedures and systems, and that every eligible American, and only eligible Americans, can participate in elections.[1]

Because of the centrality of voting to our system of democracy, and because of the persistence of racial discrimination in the voting process, we urge Congress to work quickly, and in a bipartisan manner, to restore the protections of the Voting Rights Act that were rendered inoperative by the Supreme Court's recent decision in *Shelby County v. Holder*. The purpose of my testimony is to bring to this Committee's attention recent research by the Brennan Center that underscores the urgency of congressional action now. Specifically, in *If Section 5 Falls: New Voting Implications*, attached to this testimony, Myrna Perez and Vishal Agraharkar catalog, quantify, and describe some of the substantial number of discriminatory voting changes that officials in covered jurisdictions have previously sought to put in place and may now attempt to put in place in the wake of the Supreme Court's decision in *Shelby County*.

I. The Supreme Court's Decision in *Shelby County*

The Supreme Court in *Shelby County* effectively eviscerated the core provision of the Voting Rights Act, leaving millions of voters without the protection of the most effective tool in American law to combat racial discrimination in voting. The Voting Rights Act is widely acknowledged as the most effective piece of civil rights legislation, a cornerstone of American

[1] The Brennan Center has done extensive work on a range of issues relating to voting rights, including work to modernize our voter registration system; remove unnecessary barriers to voter participation; make voting machines more secure and accessible; defend the federal Voting Rights Act; and expand access to the franchise. Our work on these topics has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, litigation to compel states to comply with their obligations under federal and state law. This testimony is submitted on behalf of a Center affiliated with New York University School of Law, but does not purport to represent the school's institutional views on this or any topic.

law guaranteeing political equality. As political leaders on both sides of the aisle recognized when Congress overwhelmingly reauthorized the law just seven years ago, Section 5 is a critical and necessary element of that Act.[2]

A robust Voting Rights Act—with a reinvigorated Section 5 at its core—continues to be necessary to secure the equal voting rights promised to all citizens by the Constitution. "[N]o one doubts," as Chief Justice Roberts declared, that the problem of "voting discrimination still exists" in America,[3] especially in places with a history of such discrimination. Congress made substantial findings on this point in 2006, and we expect the evidence before this Committee to further demonstrate the unfortunate persistence of racial discrimination in voting. Although the country has made substantial progress since 1965, the work of the Voting Rights Act is unfinished. Until last month, Section 5 was a critical engine for this progress and a critical deterrent for discriminatory voting practices. Existing laws are simply insufficient to fill the void left by the Supreme Court's decision.

In *Shelby County*, the Supreme Court expressly left the door open for Congress to restore or replace Section 5.[4] Although the real-world effect of the Court's decision was sweeping, the legal ruling was actually relatively narrow. The Court invalidated Section 4 of the Voting Rights, the coverage formula that determined which states were subject to the requirements of Section 5, on the basis of its finding that the formula was outdated and had not been tailored to "current conditions."[5] The Court thus rendered Section 5 inoperative in practice, but, for the second time since 2006, it expressly declined to strike down Section 5. The Court expressly acknowledged that the problem of race discrimination in voting has not been eradicated and that Congress may act to remedy that problem.[6] Indeed, the decision in no way undermined Congress's express powers, under both the Fourteenth and Fifteen Amendments to the U.S. Constitution, to combat racial discrimination in voting through appropriate legislation. Moreover, in another case this Term, the Court reaffirmed Congress's "broad" and "paramount" powers to regulate how federal elections are conducted.[7] Congress thus has an extremely strong basis to pursue much-needed legislative efforts to protect all Americans against the threat of discrimination in voting.

II. Implications of Loss of Section 5 Protections

We commend this Committee for taking up this important issue at this time. We urge Congress to act expeditiously to restore or replace Section 5. As outlined in *If Section 5 Falls: New Voting Implications*,[8] a Brennan Center report released shortly before the decision in Shelby

[2] *See* 152 CONG. REC. H5143-02 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner, R-Wis.) (calling the VRA "the most successful civil rights act that has ever been passed"); 152 CONG. REC. S7949-05 (daily ed. July 20, 2006) (statement of Sen. Feinstein, D-Cal.) (calling the VRA "the most important and successful civil rights law of the 20th century"). The 2006 reauthorization of the Voting Rights Act passed the U.S. House of Representatives by a vote of 390-33 and the U.S. Senate by a vote of 98-0.
[3] Shelby Cnty., Ala. v. Holder, No. 12-96, slip op. at 2 (2013).
[4] *Id.* at 24.
[5] *Id.* at 21.
[6] *Id.* at 2.
[7] Arizona v. Inter Tribal Council of Ariz., No. 12-71, slip. op. 5, 6 at (2013).
[8] MYRNA PÉREZ & VISHAL AGRAHARKAR, IF SECTION 5 FALLS: NEW VOTING IMPLICATIONS (2013), *available at* http://www.brennancenter.org/publication/if-section-5-falls-new-voting-implications (hereinafter IF SECTION 5 FALLS).

County, there is a serious risk that, without the protections of Section 5, jurisdictions could now attempt immediately to put in place discriminatory voting changes by: re-enacting discriminatory changes that were blocked by Section 5; pursuing policies previously deterred by Section 5; implementing changes that were potentially discriminatory but had not yet been reviewed by the Department of Justice; passing new restrictive voting changes; or enforcing previously blocked changes that remain on the books.

The report makes clear that the magnitude of the problem is substantial. The immediate impact of the decision has been to enable jurisdictions to move forward with voting changes—including those that are potentially discriminatory—without Department of Justice or court review. According to news reports, at the time of the Court's decision the Department of Justice had 276 submissions of voting changes awaiting its review under Section 5.[9] Those changes will now go forward without further review to determine if they are discriminatory.

Unless Congress acts, future discriminatory voting changes will also move forward without review. In the run-up to the 2012 elections, state legislatures passed scores of new laws that would have made it harder for eligible Americans to vote.[10] While most of the restrictive new voting laws were blocked, mitigated, or repealed before the elections, efforts to cut back on voting access continue.[11] In the most recent legislative session (as of April 29, 2013), 28 restrictive voting bills were introduced in states that were covered wholly or in part by Section 5, and 2 of those bills already passed.[12] To the extent that those bills are discriminatory, Section 5 can no longer function to deter their passage or prevent their implementation.

Another threat in the wake of *Shelby County* is that jurisdictions may seek to re-enact or implement voting changes that have previously been formally blocked by Section 5. Our report identified, among other things:

- thirty-one discriminatory election changes had been blocked by the Department of Justice since Congress reauthorized the Voting Rights Act in 2006;[13]
- three examples in the run up to the 2012 election where federal courts denied preclearance to proposed election changes;[14] and
- multiple cases where Section 5 blocked repeated attempts by a single jurisdiction to dilute minority voting strength.[15]

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[9] Bill Barrow, *States Promise Quick Action on Election Laws*, ASSOCIATED PRESS (June 26, 2013), http://bigstory.ap.org/article/states-promise-quick-action-after-voting-ruling.
[10] IF SECTION 5 FALLS, *supra* note 8, at 7.
[11] *See* WENDY R. WEISER & DIANA KASDAN, VOTING LAW CHANGES: ELECTION UPDATE (2012), *available at* http://www.brennancenter.org/publication/voting-law-changes-election-update.
[12] IF SECTION 5 FALLS, *supra* note 8, at 8.
[13] This is the number of submissions of voting changes since July 2006 to which DOJ has interposed an objection. In some cases, objections by DOJ were later withdrawn, or were superseded by a declaratory judgment action for court preclearance in the U.S. District Court for the District of Columbia. *See Section 5 Objection Determinations*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited July 12, 2013) (listing 31 objections since July 2006); *see also* IF SECTION 5 FALLS, *supra* note 6, at 3.
[14] *Id.* at 3.
[15] For example, within the span of a few months in 2012, Section 5 prevented two separate discriminatory changes to the method of electing trustees of the Beaumont Independent School District in Beaumont, Texas. *Id.*

The report further found that some previously blocked voting changes remain on the books, leading to the possibility jurisdictions could begin enforcing them.[16] For example, the report identifies two discriminatory state laws blocked by Section 5 which remain on the books.[17]

Perhaps the largest impact of the *Shelby County* decision will be the loss of the powerful deterrent effect of Section 5 on discriminatory voting practices. To give a sense of the magnitude of this problem, the report pointed out that:

- 153 voting changes were abandoned between 1999 and 2005 after the Department of Justice requested more information about a jurisdiction's Section 5 submission;[18] and
- In several cases in the run up to the 2012 election, Section 5 deterred restrictive voting changes, either through more information requests by the Department of Justice, or when officials were first contemplating changes to their election procedures.[19]

These examples only graze the surface of the kinds of voting changes that have been deterred or prevented by Section 5 and that may now move forward more easily. Unless Congress acts, there is a real risk that a significant number of discriminatory voting changes could be put in effect in jurisdictions previously covered by Section 5.

* * *

The Voting Rights Act was a remarkable accomplishment for the nation, ushering in the promise of real political equality after centuries of abuse. The Act has taken on an iconic role, reflecting the country's rejection of the brutality of Jim Crow and embrace of the core constitutional value of political equality. It has simultaneously played a hardworking role, protecting against ongoing discrimination in the voting process. The Supreme Court's decision in *Shelby County* gutted the core of the Voting Rights Act. In doing so, it left a gaping hole in American law and demands an immediate response. While Section 5 has been an enormously successful tool in the struggle to eradicate racial discrimination in voting, the struggle is not over. Strong legal protections are crucial to sustaining the core value of our democracy, reflected in the Declaration of Independence, that we all are created equal. We urge Congress to work together again to restore this critical law to ensure our elections remain free, fair, and accessible for all Americans.

[16] *Id.* at 9.
[17] *Id.*
[18] *Id.* at 5.
[19] *Id.*

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Testimony of

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Hearing on H.R. 1, The For the People Act
The Committee on House Administration, U.S. House of Representatives

February 14, 2019

Chairperson Lofgren, Ranking Member Davis, and members of the Committee:

Thank you for the opportunity to submit this statement in support of House Resolution 1, the *For the People Act* ("H.R. 1" or "the Act"), a sweeping set of much-needed reforms to revitalize and restore faith in American democracy.

The Brennan Center for Justice enthusiastically supports H.R. 1. It is historic legislation. We cherish our democracy, the world's oldest. But for far too long, public trust has declined, as longstanding problems with our system of self-government have worsened. In this past election, we saw the result: some of the most brazen and widespread voter suppression in the modern era; super PACs and dark money groups spending well over $1 billion, raised mostly from a tiny class of megadonors; the ongoing effects of extreme gerrymandering; large-scale purges of the voter rolls; and a foreign adversary exploiting at-risk election technology in an attempt to meddle with our elections.

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[1] The Brennan Center for Justice at NYU Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice. I direct the Center's Democracy Program, which focuses on voting rights and election administration, money in politics and ethics, redistricting, and fair courts. Over more than two decades, the Brennan Center has built up a large body of nationally-respected research and work on these issues. This work has been widely cited by legislators, government agencies, courts, academic journals, and the media. The Brennan Center's experts have testified dozens of times before Congress and state legislatures around the country. Public officials across the political spectrum have relied on the Brennan Center's research in crafting innovative policies. Indeed, a number of the Center's signature policy proposals have been incorporated into the Act. I thank the staff of the Center's Democracy Program, and especially Senior Counsel Daniel I. Weiner, for assistance with this testimony. Michael Waldman, Max Feldman, Sidni Frederick and Natalie Giotta also provided important assistance.

But in 2018, we also saw citizens awaken to the urgent need for action. This Congress was elected with the highest voter turnout since 1914. Many of you took office with a pledge to reform democracy. And in states across the country, voters approved ballot measures aimed at unrigging the political process, tackling redistricting, voting, and money in politics, often by large bipartisan majorities.[2] Voters sent a clear message: the best way to respond to attacks on democracy is to strengthen it.

The public hunger for change demands a strong response. This legislation includes the key reforms to revitalize American democracy—including automatic voter registration, small donor public financing, redistricting reform, and a commitment to restore the Voting Rights Act. It is fitting that this bill is designated as the very first introduced in this Congress. Democracy reform must be a central project for our politics now and going forward.

This testimony focuses on what we view as the most critical provisions of H.R.1. It is based on years of research and advocacy in states across the country. Every single major provision of this legislation draws on strong and successful models already in use. These carefully honed proposals meet a specific, urgent need. We commend the House for taking up the entire Act and look forward to working with members to ensure its passage.

I. Voting Rights

In the Federalist Papers, Alexander Hamilton and James Madison laid down a standard for our democracy: "Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States."[3] For over two centuries, we have worked, but not fully succeeded, to live up to that ideal. Many have struggled, and continue to struggle, for the franchise. The right to vote is at the heart of effective self-government.

A. Voter Registration Modernization (Title I, Subtitle A, Parts 1, 2, and 3 & Title 2, Subtitle F)

One of the most important parts of H.R. 1 is a package to modernize registration. The centerpiece of that proposal is a plan for automatic voter registration (AVR). This bold, paradigm-shifting approach would add tens of millions to the rolls, cost less, and bolster security and accuracy. It is now the law in fifteen states and the District of Columbia.[4] It should be the law of the land.

Outdated Voter Registration Systems. More than many realize, an outdated registration system poses an obstacle to free and fair elections. One in four eligible Americans is not

[2] *See, e.g.*, Lee Drutman, "One Big Winner Last Night: Political Reform," *Vox*, Nov.7, 2018, https://www.vox.com/polyarchy/2018/11/7/18072204/2018-midterms-political-reform-winner.
[3] The Avalon Project: Documents in Law, History and Diplomacy, "Federalist No. 57," accessed Feb. 11, 2019, http://avalon.law.yale.edu/18th_century/fed57.asp.
[4] Thirteen states and D.C. enacted AVR legislatively or via ballot initiative; two states (Colorado and Georgia) adopted it administratively. *See* Brennan Center for Justice, "History of AVR & Implementation Dates," last updated Nov. 7, 2018, https://www.brennancenter.org/analysis/history-avr-implementation-dates.

registered to vote.[5] This quiet disenfranchisement is partly due to an out-of-date, and in some places ramshackle, voter registration system. The United States is the only major democracy in the world that requires individual citizens to shoulder the onus of registering to vote (and re-registering when they move).[6] In much of the country, voter registration still largely relies on error-prone pen and paper. In 2012, the Pew Center on the States estimated that roughly one in eight registrations in America is invalid or significantly inaccurate.[7]

These problems contribute to low voter turnout.[8] Each Election Day, millions of Americans go to the polls only to have trouble voting because of registration flaws.[9] Some find their names wrongly deleted from the rolls.[10] Others fall out of the system when they move.[11] One-quarter of American voters wrongly believe their registration is updated when they change their address with the U.S. Postal Service.[12] Election Protection, the nonpartisan voter assistance hotline, reported that registration issues were the second most common problem voters faced in both the 2018 and 2016 elections.[13] Registration errors affect more than those voters who are not

[5] Pew Center on the States, *Inaccurate, Costly and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade*, 2012, 1; *see also* U.S. Census Bureau, *Voting and Registration in the Election of 2016*, 2017, Tbl. 1, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

[6] Jennifer S. Rosenberg, *Expanding Democracy: Voter Registration Around the World*, Brennan Center for Justice, 2009, 2-3, *available at* https://www.brennancenter.org/publication/expanding-democracy-voter-registration-around-world.

[7] Pew Center on the States, *Inaccurate, Costly and Inefficient*, 2012.

[8] According to a 2001 commission chaired by former Presidents Ford and Carter, "[t]he registration laws in the United States are among the most demanding in the democratic world … [and are] one reason why voter turnout in the United States is near the bottom of the developed world." *See* Carter and Ford: National Commission on Election Reform, *Reports of the Task Force on the Federal Election System*, 2001, 1-3. In too many parts of America this is still true.

[9] A Caltech/MIT study found that in 2008, approximately 3 million people tried to vote but could not because of registration problems, and millions more were thwarted by other issues. *See* R. Michael Alvarez, Stephen Ansolabehere, *et al.*, 2008 Survey of the Performance of American Elections, (2009), 59, https://elections.delaware.gov/pdfs/SPAE_2008.pdf; *see also* Stephen Ansolabehere, Testimony Before the U.S. Senate Rules Committee 19 (Mar. 11, 2009); Data from 2012 similarly demonstrates that millions of voters experienced registration problems at the polls. Charles Stewart III, *2012 Survey of the Performance of American Elections: Final Report*, 2013, 70, http://dvn.iq.harvard.edu/dvn/dv/measuringelections.

[10] Approximately 2.5 million voters experienced voter registration problems at the polls in the 2012 election. Charles Stewart III, *2012 Survey of the Performance of American Elections: Final Report*, Harvard Dataverse, 2013, ii, http://dvn.iq.harvard.edu/dvn/dv/measuringelections; U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey*, 2013, 8-10, https://www.eac.gov/assets/1/6/2012ElectionAdministrationandVoterSurvey.pdf. Stewart found 2.8% of 2012 voters experienced registration problems when they tried to vote. The Election Administration and Voting Survey found that 131,590,825 people voted in 2012 and that 65.5% percent voted in person on election day (56.5%) or early (9%). 65.5% of 131,590,825 voters. multiplied by the 2.8% figure from Stewart's study, yields 2,413,375.73 voters with registration problems at the polls in the 2012 election).

[11] Thomas Patterson, The Vanishing Voter: Public Involvement in an Age of Uncertainty (New York: Vintage Books, 2002), 178.

[12] Pew Center on the States, *Inaccurate, Costly and Inefficient*, 7.

[13] Laura Grace and Morgan Conley, *Election Protection 2018 Midterm Elections Preliminary Report*, Lawyers' Committee for Civil Rights Under Law, 2018, 4, https://lawyerscommittee.org/wp-content/uploads/2018/12/Election-Protection-Preliminary-Report-on-the-2018-Midterm-Elections.pdf; *see also* Wendy Weiser and Alicia Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, 6, *available at* https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_DEmocracy_FINALpdf.pdf; Walter Shapiro, Brennan Center for Justice, "Election Day Registration Could Cut Through many of the Arguments

on the rolls. As the bipartisan Presidential Commission on Election Administration found in 2014, registration problems cause delays at the polls and are a principal cause of long lines.[14]

Outdated registration systems also undermine election integrity. Incomplete and error-laden voter lists create opportunities for malefactors to defraud the system or disenfranchise eligible citizens. And they are far more expensive to maintain than more modern systems. Arizona's Maricopa County, for example, found that processing a paper registration cost 83 cents, compared to 3 cents for applications processed electronically.[15]

1. Automatic Voter Registration (Title I, Subtitle A, Part 2)

Automatic voter registration ("AVR") is a simple but transformative policy that could bring millions into the electoral process and energize our democracy. Under AVR, every eligible citizen who interacts with designated government agencies is automatically registered to vote, unless they decline registration. If adopted nationwide, it could add as many as 50 million new eligible voters to the rolls.[16]

AVR shifts registration from an "opt-in" to an "opt-out" approach. When eligible citizens give information to the government—for example, to get a driver's license, receive Social Security benefits, apply for public services, register for classes at a public university, or become naturalized citizens—they are automatically signed up to vote unless they decline. This reflects how the human brain works; behavioral scientists have shown that we are hard-wired to choose the default option presented to us.[17]

The policy also requires that voter registration information be electronically transferred to election officials, rejecting paper forms and snail mail. This significantly increases the accuracy of the rolls and drives down the costs of maintaining them.[18]

AVR Works. Oregon and California became the first states to adopt AVR in 2015.[19] Since then, thirteen more states and the District of Columbia followed—many with strong

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in the Voting Wars," last modified Oct. 16, 2018, https://www.brennancenter.org/blog/election-day-registration-could-cut-through-many-arguments-voting-wars.

[14] *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, 2014, http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.

[15] Christopher Ponoroff, *Voter Registration in a Digital Age*, Brennan Center for Justice, 2010, 12, *available at* https://www.brennancenter.org/publication/voter-registration-digital-age.

[16] Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf.

[17] *Id.* 6-7. Opt-out systems have led to increased program-participation rates across a variety of fields. *See, e.g.*, Alberto Abadie and Sebastian Gay, "The impact of presumed consent legislation on cadaveric organ donation: a cross-country study," *Journal of Health Economics* 25 (2006): 599–620, http://www.sciencedirect.com/science/article/pii/S016762960600004X (25-30% higher participation in organ donation programs); James J. Choi et al., "Defined Contribution Pensions: Plan Rules, Participant Decisions, and the Path of Least Resistance," *Tax Policy and the Economy* 16 (2002): 67-114, http://www.nber.org/papers/w8655.pdf (401(k) participation over 30 percentage points higher with automatic enrollment).

[18] Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, 11.

[19] Brennan Center for Justice, "History of AVR & Implementation Dates," last updated Nov. 7, 2018, https://www.brennancenter.org/analysis/history-avr-implementation-dates.

bipartisan support.[20] In Illinois, for example, the state legislature passed AVR unanimously, and a Republican Governor signed it into law.

The new system has proven extraordinarily successful. In nine states and the District of Columbia, AVR is already up and running. In Oregon, registration rates quadrupled at DMV offices.[21] In Vermont, registrations jumped 62 percent in the six months after AVR was put in place compared to the same period in the previous year.[22] One state, California, experienced minor glitches at first, because of a computer programming design flaw. But that error was quickly caught and contained, and according to the state's motor vehicle office has since been fixed.[23] California too has seen dramatic increases in voter registration. As the Brennan Center finds in a forthcoming report, AVR has dramatically increased registration rates in nearly every state.

There is strong reason to believe that the reform also boosts turnout.[24] Oregon saw the nation's largest turnout increase after it adopted AVR.[25] It had no competitive statewide races, and yet the state's turnout increased by 4 percent in 2016, which was 2.5 percentage points higher than the national average.[26] Other registration reforms have measurably improved turnout.[27] When voters are automatically registered, they not only are relieved of an obstacle to voting but also are exposed to direct outreach from election officials and others.[28] AVR sends a strong message that all eligible citizens are welcome and expected to participate in our democracy.

Election officials enthusiastically back AVR because it improves administration and saves money. Virtually every state to have transitioned to electronic transfer of registration information has reported substantial savings from reduced staff hours processing paper, and

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[20] Brennan Center for Justice, *Automatic Voter Registration*, last updated Nov. 7, 2018, https://www.brennancenter.org/analysis/automatic-voter-registration.
[21] Jonathan Brater, Brennan Center for Justice, "Update: Oregon Keeps Adding New Voters at Torrid Pace," last modified Aug. 19, 2016, https://www.brennancenter.org/analysis/update-oregon-keeps-adding-new-voters-torrid-pace.
[22] Christopher Famighetti, Brennan Center for Justice, "First Look Shows Automatic Voter Registration Was a Success in Vermont," last updated Aug. 17, 2017, https://www.brennancenter.org/blog/first-look-shows-automatic-voter-registration-was-success-vermont.
[23] Furthermore, this programming error was completely unrelated to the state's AVR policy. Rather, it resulted from the rollout of the state's new internal electronic interface. The state is engaging in ongoing audits of its system to make sure there are no further problems.
[24] Wendy Weiser, "Automatic Voter Registration Boosts Political Participation," *Stanford Social Innovation Review*, Jan. 28, 2016, https://ssir.org/articles/entry/automatic_voter_registration_boosts_political_participation#.
[25] Rob Griffin et al., *Who Votes with Automatic Voter Registration?*, Center for American Progress, 2017, https://www.americanprogress.org/issues/democracy/reports/2017/06/07/433677/votes-automatic-voter-registration/.
[26] United States Elections Project, "2016 November General Election Turnout Rates," last accessed Apr. 23, 2018, http://www.electproject.org/2016g; United States Election Project, "2012 November General Election Turnout Rates," last modified September 3, 2014, http://www.electproject.org/2012g.
[27] For example, one study found that simply making registration portable can boost turnout by more than 2 percent. Michael McDonald, "Portable Voter Registration," *Political Behavior* 30 (2008): 491-501, https://www.jstor.org/stable/40213330?seq=1#page_scan_tab_contents.
[28] Donald Green et al., "Field Experiments and the Study of Voter Turnout," Journal of Elections Public Opinion and Parties 23 (2013): 27-48, https://www.researchgate.net/publication/271937319_Field_Experiments_and_the_Study_of_Voter_Turnout.

lower printing and mailing expenses.[29] Eliminating paper forms improves accuracy, reduces voter complaints about registration problems, and reduces the need for the use of provisional ballots.[30]

Voters strongly support the reform. According to recent polling, 65 percent of Americans favor it.[31] Michigan and Nevada adopted AVR this past election by popular referendum, with overwhelming support from voters, including Democrats, Republicans, and Independents.[32] Alaska voters passed AVR in 2016 with nearly 64 percent of the vote—at the same time they voted to put Donald Trump in the White House.

AVR Should be the National Standard. H.R. 1 sensibly makes AVR a national standard, building on past federal reforms to the voter registration system.[33] Critically, the Act requires states to put AVR in place at a wide variety of government agencies beyond state motor vehicle agencies, including those that administer Social Security or provide social services, as well as higher education institutions. It also requires a one-time "look back" at agency records to register individuals who have previously interacted with government agencies. And it protects voters' sensitive information from public disclosure.

The Act includes multiple safeguards to ensure that ineligible voters are not registered. The government agencies designated for AVR regularly collect information about individuals' citizenship and age, and they must obtain an additional affirmation of U.S. citizenship during the registration transaction. Before anyone is registered, agencies must inform individuals of eligibility requirements and the penalties for illegal registration and offer them the opportunity to opt out. Election officials too are required to send individuals a follow up notice by mail. In light of these checks, there is no basis for critics' alarmist speculation that AVR would result in an increase in the registration of ineligible persons. Indeed, election officials report that AVR's elimination of paper forms *enhances* the accuracy of the rolls. As a precaution, H.R.1 also includes protections in the unlikely event that an ineligible person is inadvertently registered, to ensure that they are not harmed as a result. We strongly urge Congress to pass AVR.

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[29] Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, 11.
[30] *Id.* 10-11.
[31] Pew Research Center, "Elections in America: Concerns Over Security, Divisions Over Expanding Access to Voting," last modified Oct. 29, 2018, http://www.people-press.org/2018/10/29/elections-in-america-concerns-over-security-divisions-over-expanding-access-to-voting/
[32] New York Times, "Michigan Election Results," last modified Jan. 28, 2019, https://www.nytimes.com/interactive/2018/11/06/us/elections/results-michigan-elections.html; New York Times "Nevada Election Results," last modified Jan. 29, 2019, https://www.nytimes.com/interactive/2018/11/06/us/elections/results-nevada-elections.html; New York Times "Alaska Ballot Measure 1—Allow Qualified Individuals to Register to Vote When Applying for a Permanent Fund Dividend—Results: Approved," last modified Aug. 1, 2017, https://www.nytimes.com/elections/2016/results/alaska-ballot-measure-1-pfd-application-voter-reg.
[33] The National Voter Registration Act of 1993 required states to offer voter registration at their motor vehicle, public assistance, and disabilities agencies, among other things. 52. U.S.C. §§ 20504-20506. H.R.1's AVR provisions build on this by expanding the agencies that offer voter registration and by making the registration process paperless at those agencies. The Help America Vote Act of 2002 pushed states into the digital age, by requiring them to create a centralized, computerized voter registration list. 52 U.S.C. § 21083. H.R.1 extends the benefits of that legislation by seamlessly transmitting voter information between registration agencies and the election officials that control the computerized voter list.

2. Same-Day Registration (Title I, Subtitle A, Part 3)

Same-day registration (SDR) allows eligible citizens to register and vote on the same day. It is a strong complement to AVR, available to those eligible voters who have not interacted with government agencies or whose information has changed since they did. Because it provides eligible Americans an opportunity to vote even if their names are not on the voter rolls, SDR safeguards against improper purges, registration system errors, and cybersecurity attacks.

SDR has been used successfully in several states since the 1970s. Today, seventeen states and the District of Columbia offer some form of same day registration, either on election day, during early voting, or both.[34] Studies indicate that SDR boosts voter turnout by 5 to 7 percent.[35] And it is highly popular with voters. This past November, supermajorities of voters in Michigan and Maryland passed ballot measures that, respectively, implemented and expanded same day registration. According to recent polls, more than 60 percent of Americans support SDR.[36] As part of the full package of reforms, SDR's use would be limited, since AVR would capture the vast majority of voters well before Election Day. Taken together, AVR and SDR would ensure that no eligible voter is left out.

3. Online Registration (Title I, Subtitle A, Part 1)

H.R.1 also requires states to offer secure and accessible online registration. At a time when many Americans do everything from banking to reviewing medical records online, voters want this convenient method of registration. The online registration provisions in H.R. 1 would let all voters register, update registration information, and check registrations online. They also would ensure that these benefits are available to citizens who do not have driver's licenses.

In addition to offering voter convenience, online registration saves money and improves voter roll accuracy. Washington State reported savings of 25 cents with each online registration (for a total of about $176,000 in savings) in the first two years of the program, and its local officials save between 50 cents and two dollars per online transaction.[37] Election officials also

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[34] National Conference of State Legislatures, "Same Day Voter Registration," last modified Jan. 25, 2019, http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx.

[35] Michael McDonald, "Portable Voter Registration," *Political Behavior* 30 (2008): 499, 495-96, https://www.jstor.org/stable/40213330?seq=1#page_scan_tab_contents; *see also* Jacob R. Neisheisel and Barry C. Burden, "The Impact of Election Day Registration On Voter Turnout and Election Outcomes," *American Politics Research* 40 (2012): 636, 638-39 (citing studies finding that same-day registration increases turnout by 3 to 6 percent, and by as much as 14 percent). In the 2016 election, voter turnout was, on average, 7 percent higher in states with SDR than in those without. *See* George Pillsbury and Julian Johannesen, *America Goes to the Polls 2016: A Report on Voter Turnout in the 2016 Election*, Nonprofit Vote, 2016, *available at* https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf/; Mijin Cha and Liz Kennedy, *Millions to the Polls: Same Day Registration*, Demos, 2014.

[36] Pew Research Center, "Elections in America"; "PRRI/The Atlantic 2018 Voter Engagement Survey," *The Atlantic*, July 17, 2018, https://www.prri.org/wp-content/uploads/2018/07/PRRI-The-Atlantic-2018-Voter-Engagement-Survey-Topline.pdf?utm_source=Democracy+Collaborative+at+ReThink+Media&utm_campaign=774f203b91-EMAIL_CAMPAIGN_2019_02_01_09_27&utm_medium=email&utm_term=0_3e305aa083-774f203b91-391816881.

[37] *See* Holly Maluk et al., *Voter Registration in a Digital Age: 2015 Update*, Brennan Center for Justice, 2015, 6.

report that letting voters enter their own information significantly reduces the likelihood of incomplete applications and mistakes.[38]

It is not surprising, therefore, that online registration is incredibly popular and has spread rapidly. In 2010, only six states offered online voter registration. Now, thirty-eight states do.[39] It is time to bring the reform to the whole country.

4. Voter Purge Protections (Title I, Subtitle A; Title II, Subtitle F)

The Act curbs illegal efforts to purge eligible voters from the rolls, addressing one of the biggest problems we saw in the last election.

Voter purges—the large-scale deletion of voters' names from the rolls—are on the rise.[40] The Brennan Center has calculated that almost 4 million more names were purged from the rolls between 2014 and 2016 than between 2006 and 2008.[41] Purge activity has increased at a substantially greater rate in states that were subject to federal oversight under the Voting Rights Act prior to the Supreme Court's decision in *Shelby County v. Holder*.[42] Georgia, for example, purged 1.5 million voters between the 2012 and 2016 elections—double its rate between 2008 and 2012. Texas purged 363,000 more voters between 2012 and 2014 than it did between 2008 and 2010. We found that *2 million fewer voters* would have been purged between 2012 and 2016 if jurisdictions previously subject to pre-clearance had purged at the same rate as other jurisdictions.[43]

Purges that are implemented incorrectly disenfranchise legitimate voters and cause confusion and delay at the polls. Last month, for example, the Texas Secretary of State sent lists of approximately 95,000 alleged non-citizens to county officials for purging—but within days, the state was forced to retreat, once it became clear that the lists were rife with inaccuracies.[44] In 2016, New York election officials erroneously deleted hundreds of thousands from the voter rolls, with no public warning and little notice to those who had been purged.[45] The same year, thousands of Arkansas voters were purged because of supposed felony convictions—but the lists

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[38] *Id.* 8.
[39] Brennan Center for Justice, "VRM in the States: Online Registration," last modified Feb. 3, 2017, https://www.brennancenter.org/analysis/vrm-states-online-registration.
[40] Myrna Pérez, "How the Midterm Elections May Be Compromised," *New York Times*, July 19, 2018, https://www.nytimes.com/2018/07/19/opinion/midterms-voting-purges-elections-registration.html; *see also* Kevin Morris and Myrna Pérez, Brennan Center for Justice, "Florida, Georgia, North Carolina Still Purging Voters at High Rates," last modified Oct. 1, 2018, https://www.brennancenter.org/blog/florida-georgia-north-carolina-still-purging-voters-high-rates.
[41] Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice, 2018, 3, *available at* https://www.brennancenter.org/publication/purges-growing-threat-right-vote; *see also* Kevin Morris, Brennan Center for Justice, "How Purges Threaten to Disenfranchise Voters Under the Radar," last modified July 20, 2018, https://www.brennancenter.org/blog/how-purges-threaten-disenfranchise-voters-under-radar.
[42] Brater et al., *Purges,* 3-5.
[43] *Id.* 1.
[44] Sean Morales-Doyle and Rebecca Ayala, Brennan Center for Justice, "There's Good Reason to Question Texas' Voter Fraud Claims," last modified Jan. 29, 2019, https://www.brennancenter.org/blog/theres-good-reason-question-texas-voter-fraud-claims.
[45] Brater et al., *Purges,* 5-6.

that were used were highly inaccurate, and included many voters who had never committed a felony or had had their voting rights restored.[46]

Purge practices can be applied in a discriminatory manner that disproportionately affects minority voters.[47] In particular, matching voter lists with other government databases to ferret out ineligible voters can generate discriminatory results if the matching is done without adequate safeguards. African-American, Asian-American, and Latino voters are much more likely than Caucasians to have one of the most common 100 last names in the United States, resulting in a higher rate of false positives.[48]

The Act puts strong protections in place to prevent improper purges. First, it puts new guardrails on the use of inter-state databases that purport to identify voters that have re-registered in a new state, but that have been proven to produce deeply flawed data. Second, it prohibits election officials from relying on a citizen's failure to vote in an election as evidence of ineligibility to vote. The Brennan Center supports these protections and urges states to provide additional notice to voters prior to purging them so eligible voters can intervene before they are removed from the rolls.

B. Commitment to Restore the Voting Rights Act (Title II, Subtitle A)

As recent experience makes clear, Congress must restore the full protections of the Voting Rights Act of 1965 ("VRA"), which the U.S. Supreme Court hobbled in 2013 in *Shelby County*.[49] Thanks in part to *Shelby County*, the recent midterm elections were marred by some of the worst voter suppression of the modern era,[50] including large-scale voter purges;[51] polling place and early voting site closures, especially in minority neighborhoods; burdensome voter ID requirements that excluded IDs possessed by minority citizens;[52] unnecessarily strict registration rules like Georgia's "exact match" policy, under which 53,000 voter registrations—the overwhelming majority of which belonged to African-Americans, Latinos, and Asian-Americans—were put on hold;[53] and suspicious rejections of absentee ballots;[54] among other

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[46] *Id.* 5.
[47] Myrna Pérez, *Voter Purges*, Brennan Center for Justice, 2008, 31-32, *available at* https://www.brennancenter.org/publication/voter-purges.
[48] Brater et al., *Purges*,7.
[49] Shelby County v. Holder, 570 U.S. 529 (2013).
[50] Zachary Roth and Wendy Weiser, Brennan Center for Justice, "This Is the Worst Voter Suppression We've Seen in the Modern Era," last modified Nov. 2, 2018, http://www.brennancenter.org/blog/worst-voter-suppression-weve-seen-modern-era; *see also* Rebecca Ayala, Brennan Center for Justice "Voting Problems 2018," Brennan Center for Justice, last modified Nov. 5, 2018, https://www.brennancenter.org/blog/voting-problems-2018.
[51] Morris and Pérez, "Florida, Georgia, North Carolina Still Purging Voters at High Rates"; Brater et al., *Purges*, 3-5; Ayala, "Voting Problems 2018."
[52] Perhaps the most striking example was a North Dakota law that required voters to show IDs with a residential street address, despite the fact that the state's Native American communities often do not have such addresses. Although this requirement was briefly halted by a federal district court, the Eighth Circuit Court of Appeals ultimately upheld the requirement for the 2018 election. *See* Brakebill v. Jaeger, 905 F.3d 553, 558 (8th Cir. 2018).
[53] Jonathan Brater and Rebecca Ayala, Brennan Center for Justice, "What's the Matter with Georgia?," Oct. 12, 2018, https://www.brennancenter.org/blog/whats-matter-georgia.
[54] Christopher Ingraham, "Signature Mismatches, Missing Birthdays and Errant Spouses: Why Thousands of Absentee Ballots Were Tossed Out in Georgia," *Washington Post*, Nov. 16, 2018,

things.[55] We are therefore pleased that H.R. 1 affirms a strong commitment to restore the full protections of the Voting Rights Act.

The VRA is widely regarded as the single most effective piece of civil rights legislation in our nation's history.[56] As recently as 2006 it won reauthorization with overwhelming bipartisan support.[57] For nearly five decades, the linchpin of the VRA's success was the Section 5 pre-clearance provision, which required certain states with a history of discriminatory voting practices to obtain approval from the federal government for any voting rules changes before putting them into effect. Section 5 deterred and prevented discriminatory changes to voting rules right up until the time the Supreme Court halted its operation. Between 1998 and 2013, Section 5 blocked 86 discriminatory changes (13 in the final 18 months before the *Shelby County* ruling), caused hundreds more to be withdrawn after Justice Department inquiry, and prevented still more from being put forward because policymakers knew they would not pass muster.[58]

Shelby County eviscerated Section 5 by striking down the "coverage formula" that determined which states were subject to pre-clearance. That resulted in a predictable flood of discriminatory voting rules, contributing to a now decade-long trend in the states of restrictive voting laws, which the Brennan Center has documented extensively.[59] Within hours of the Court's decision, Texas announced that it would implement what was then the nation's strictest voter identification law—a law that had previously been denied preclearance because of its discriminatory impact. Shortly afterward, Alabama, Arizona, Florida, Mississippi, North Carolina, and Virginia also moved ahead with restrictive voting laws or practices that previously would have been subject to pre-clearance.[60] In the years since, federal courts have repeatedly found that new laws passed after *Shelby* made it harder for minorities to vote, some intentionally so.[61] Our research regarding last year's election confirmed the persistence of voter suppression

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https://www.washingtonpost.com/business/2018/11/16/signature-mismatches-missing-birthdays-errant-spouses-why-thousands-absentee-ballots-were-tossed-out-georgia/?utm_term=.e43b354ee61b.

[55] Ayala, "Voting Problems 2018"; *see also* Peter Dunphy, Brennan Center for Justice, "When It Comes to Voter Suppression, Don't Forget About Alabama," Nov. 5, 2018, https://www.brennancenter.org/blog/when-it-comes-voter-suppression-dont-forget-about-alabama.

[56] *See* U.S. Dep't of Justice, "The Effect of the Voting Rights Act," last updated June 19, 2009, https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0.

[57] The vote was unanimous in the Senate and 390-33 in the House. *See* U.S. Senate, "H.R.9 Vote Summary," July 20, 2006, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212; U.S. House of Representatives, "Final Vote Results for Roll Call 374," July 13, 2006, http://clerk.house.gov/evs/2006/roll374.xml. The reauthorization was signed into law by President George W. Bush. *See* The White House, Press Release, "Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006," July 27, 2006, https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html.

[58] Tomas Lopez, Shelby County*: One Year Later*, Brennan Center for Justice, 2014, https://www.brennancenter.org/analysis/shelby-county-one-year-later.

[59] Wendy Weiser and Max Feldman, *The State of Voting 2018*, Brennan Center for Justice, 2018; Brennan Center for Justice, "New Voting Restrictions in America," accessed Jan. 1, 2019, https://www.brennancenter.org/new-voting-restrictions-america; Brennan Center for Justice, "Voting Laws Roundup 2019," last modified Jan. 23, 2019, https://www.brennancenter.org/analysis/voting-laws-roundup-2019; Wendy Weiser and Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice, 2011, http://www.brennancenter.org/publication/voting-law-changes-2012.

[60] Lopez, Shelby County.

[61] Danielle Lang and J. Gerald Hebert, "A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation," *Yale Law Journal Forum* 127 (2017 – 2018): 780 n.4. For example, the Fourth Circuit Court of Appeals

and the willingness of too many state officials to continue developing new tactics to keep people from voting.[62]

Section 2 of the VRA—which prohibits discriminatory voting practices nationwide and permits private parties and the Justice Department to challenge those practices in court—remains an important bulwark against discrimination. But Section 2 lawsuits are not a substitute for pre-clearance. They are far more lengthy and expensive, and often do not yield remedies for impacted voters until after an election (or several) is over.[63] Our case against Texas's 2011 voter ID law illustrates this point.[64] The law initially did not go into effect because a three-judge federal court refused to preclear it under Section 5. But that decision was vacated after *Shelby County*, spurring multi-year litigation under Section 2. Despite the fact that every court that has considered the law found it discriminatory (and a federal district court found it intentionally so), the law remained in effect until a temporary remedy was ordered for the November 2016 election. In the interim, Texans voted in 3 federal and 4 statewide elections and numerous local elections under discriminatory rules.

Congress has the power to address these problems, by updating the VRA's coverage formula, examining its coverage, and restoring the VRA to its full power. As this Committee recognizes, any new coverage formula must be supported by a thorough legislative record. We commend the commitment to restoring the VRA reflected in H.R.1, and we urge Congress to make development of this record and passage of a renewed VRA a top priority.

C. Nationwide Early Voting (Title I, Subtitle H)

H.R.1 also provides all voters with the flexibility to vote early during the two weeks before Election Day, which will boost turnout and make it easier for hard-working Americans to vote.

Holding elections on a single workday in mid-November is a relic of the nineteenth century; it was done for the convenience of farmers who had to ride a horse and buggy to the county seat in order to cast a ballot.[65] This no longer works for many Americans, who must find time to cast a ballot between jobs, childcare, and the everyday obligations of modern life.

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found that a 2013 voting law passed by North Carolina targeted African-American voters with "surgical precision." N. Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

[62] Roth and Weiser, "This Is the Worst Voter Suppression We've Seen in the Modern Era"; Ayala, "Voting Problems 2018"; Makeda Yohannes, Brennan Center for Justice, "New Hampshire's New Voting Law Threatens Student Voters," last modified July 18, 2018, https://www.brennancenter.org/blog/new-hampshires-new-voting-law-threatens-student-voters; Brater and Ayala, "What's the Matter with Georgia?".

[63] Lopez, Shelby County.

[64] The Brennan Center represented the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives, along with the Lawyers' Committee for Civil Rights Under Law and other co-counsel. The case was consolidated with several others. For more information, see https://www.brennancenter.org/legal-work/naacp-v-steen.

[65] Weiser and Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, 7.

Early voting works well. Thirty-nine states offer some opportunity to vote in person before Election Day.[66] And more than a dozen of those states offer early voting for a period comparable to or greater than the two-week period leading to Election Day required by H.R. 1.[67]

Despite the popularity of early voting, the absence of a national standard means that some states have few or inconsistent early voting hours, and others have been able to engage in politicized cutbacks to early voting.[68] Over the past decade, multiple states have reduced early voting days or sites used disproportionately by African-American voters (such as the elimination of early voting on the Sunday before Election Day), and federal courts have struck down early voting cutbacks in North Carolina and Wisconsin because they were intentionally discriminatory.[69]

H.R.1 will make voting more manageable by requiring that states provide two weeks of early voting and equitable geographic distribution of early voting sites. A guaranteed early voting period will reduce long lines at the polls and ease the pressure on election officials and poll workers on Election Day, by spreading out the days on which people cast their ballots. For this reason, it was one of the principal recommendations of the bipartisan Presidential Commission of Election Administration for reducing long lines.[70] It will also make it easier for election officials to spot and solve problems like registration errors or voting machine glitches before they impact most voters.[71] For these reasons, election officials report high satisfaction with early voting. The Brennan Center's research indicates that two weeks is an effective minimum time period for generating the benefits of early voting.[72]

Early voting is popular with voters too, with study after study showing a significant positive effective on voter satisfaction.[73] It is a critical element of a convenient and modern voting system.

D. Voting Rights Restoration (Title I, Subtitle E)

The Democracy Restoration Act in Title I, Subtitle E of H.R. 1 would restore federal voting rights to citizens with past criminal convictions living in our communities, strengthening those communities, offering a second chance to those who have paid their debts to society, and removing the stain of a policy born out of Jim Crow.

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[66] National Conference of State Legislatures, "Early and Absentee Voting," last modified Jan. 25, 2019, http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx
[67] National Conference of State Legislatures, "State Laws Governing Early Voting," last modified Jan. 25, 2019, http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx.
[68] Brennan Center for Justice, "New Voting Restrictions in America."
[69] NC State Conference of NAACP v. McCrory, 831 F.3d 204, 219; One Wisconsin Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016).
[70] *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, 2014, http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.
[71] Diana Kasdan, *Early Voting: What Works*, Brennan Center for Justice, 2013, 5-6, *available at* https://www.brennancenter.org/publication/early-voting-what-works.
[72] *Id.* 12
[73] *Id.* 7-8.

Harms of Current Disenfranchisement Laws. A confusing patchwork of discriminatory disenfranchisement laws cause profound harm across the country. Nationally, state laws deny more than 4.7 million citizens the right to vote because of a criminal conviction.[74] 3.3 million of these citizens are no longer incarcerated; they live in our communities, work, pay taxes, and raise families.[75]

Disenfranchisement laws vary dramatically from state to state. They range from permanent disenfranchisement for everyone convicted of a felony in Iowa and Kentucky, to no disenfranchisement at all in Vermont and Maine. In between these extremes there are states that distinguish between different types of felonies, states that treat repeat offenders differently, and varying rules on what parts of a sentence must be completed before rights are restored.[76] Navigating this patchwork of state laws causes confusion for everyone—including election officials and prospective voters—about who is eligible to vote. The result is large-scale *de facto* disenfranchisement of voters who are eligible but do not know it.[77]

Regardless of these particulars, disenfranchisement laws are discriminatory and especially impact African Americans. In 2016, one in 13 voting-age Black citizens could not vote, a disenfranchisement rate more than 4 times that of all other Americans.[78] In three states the ratio was one in five.[79] This unequal impact is no accident—many states' criminal disenfranchisement laws are rooted in nineteenth-century attempts to evade the Fifteenth Amendment's mandate that Black men be given the right to vote.[80]

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[74] Scholars previously estimated that about 6.1 million citizens were disenfranchised nationwide. *See* Christopher Uggen et al., *6 Million Lost Voters: State-level Estimates of Felony Disenfranchisement*, The Sentencing Project, 2016, 4. Florida accounted for approximately 1.5 million of these because its constitution permanently disenfranchised everyone convicted of a felony. *See id*. Since then, in November 2018, Florida voters approved the Voting Restoration Amendment, which restores voting rights to anyone who has completed all terms of their sentence. *See* Fl. Const. Art. VI, § 4 (2019). Unless otherwise noted, all of the numbers cited in this testimony adjust for the estimated 1.4 million voters whose rights were or should be restored by that change. *See* Lori Rozsa, "'A Joyous Day' Ahead as 1.4 Million Florida Ex-Felons Have Voting Rights Restored," *Washington Post*, Jan. 5, 2019, https://www.washingtonpost.com/national/a-joyous-day-ahead-as-14-million-florida-ex-felons-have-voting-rights-restored/2019/01/05/58650ee2-106f-11e9-8938-5898adc28fa2_story.html?noredirect=on&utm_term=.b1dbaea9c4a0.

[75] Brennan Center for Justice, "Restoring Voting Rights," https://www.brennancenter.org/issues/restoring-voting-rights.

[76] "Criminal Disenfranchisement Laws Across the United States," Brennan Center for Justice, last modified December 7, 2018, accessed February 8, 2019, https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states.

[77] Erika Wood and Rachel Bloom, *De Facto Disenfranchisement*, American Civil Liberties Union and Brennan Center for Justice, 2008, http://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf. The ACLU found that many elections officials misunderstand their state's felony disenfranchisement laws, meaning that "untold hundreds of thousands of eligible, would-be voters throughout the country" may be getting turned away by misinformation.

[78] Uggen et al., *6 Million Lost Voters*, 3. This number has not been adjusted for the passage of the Voting Restoration Amendment in Florida.

[79] *Id.* These states are Kentucky, Tennessee, and Virginia. The ratio in Florida was one in five as well but has likely improved as a result of the passage of the Voting Restoration Amendment.

[80] Erin Kelley, *Racism and Felony Disenfranchisement*, Brennan Center for Justice, 2017, 2, *available at* https://www.brennancenter.org/publication/racism-felony-disenfranchisement-intertwined-history.

This disproportionate impact on people of color means that all too often entire communities are shut out of our democracy. Disenfranchisement laws have a negative ripple effect beyond those people within their direct reach. Research suggest that these laws may affect turnout in neighborhoods with high incarceration rates, even among citizens who are eligible to vote.[81] This is not surprising. Children learn civic engagement habits from their parents. Neighbors encourage each other's political participation. And when a significant portion of a community is disenfranchised, it sends a damaging message to others about the legitimacy of democracy and the respect given to their voices.

The Promise of Voting Rights Restoration. H.R. 1 adopts a simple and fair rule: if you are out of prison and living in the community, you get to vote in federal elections. It also requires states to provide written notice to individuals with criminal convictions when their voting rights are restored.

These changes would have a profoundly positive impact on affected citizens and society. We all benefit from the successful reentry of formerly incarcerated citizens into our communities. Restoring their voting rights sends the message that they are truly welcome to participate and are entitled to the respect, dignity and responsibility of full citizenship. That message pays concrete dividends. One study found "consistent differences between voters and non-voters in rates of subsequent arrests, incarceration, and self-reported criminal behavior."[82] For this reason, criminal justice professionals support automatic restoration of voting rights upon release from prison.[83]

Voting rights restoration also benefits the electoral process, by reducing confusion and easing the burdens on elections officials to determine who is eligible to vote. If every citizen living in the community can vote, officials have a bright line rule to apply. This clear rule also eliminates one of the principal bases for erroneous purges of eligible citizens from the voting rolls.

For these reasons, rights restoration is immensely popular among Americans of all political stripes. This past November, 65 percent of Florida voters passed a ballot initiative restoring voting rights to 1.4 million of their fellow residents, with a massive groundswell of bipartisan support.[84] Governor Kim Reynolds, Republican of Iowa, recently endorsed a similar

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[81] Erika Wood, *Restoring the Right to Vote*, Brennan Center for Justice, 2009, 12, *available at* https://www.brennancenter.org/publication/restoring-right-vote.
[82] Christopher Uggen & Jeff Manza, "Voting and Subsequent Crime and Arrest: Evidence from a Community Sample," *Columbia Human Rights Law Review* 36 (2004): 193.
[83] *See, e.g.*, *Resolution Supporting Restoration of Voting Rights Released*, American Probation and Parole Association, 2007, https://appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IE_NewsRelease&wps_key=a587deaf-9cbf-4efd-bd8d-025c14143f65; *Resolution on Restoring Voting Rights*, Association of Paroling Authorities International, 2008, http://www.apaintl.org/about/resolutions.html.
[84] *See, e.g.*, "Voting Rights Restoration Efforts in Florida," Brennan Center for Justice, last modified November 7, 2018, accessed February 8, 2019, https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida; Kevin Morris, "A Transformative Step for Democracy in Florida," Brennan Center for Justice, last modified November 6, 2018, accessed February 8, 2019, https://www.brennancenter.org/blog/transformative-step-democracy-florida; Myrna P*érez*, "What Victory in Florida Means to Me," Brennan Center for Justice, last modified November 7, 2018, accessed February 8, 2019, https://www.brennancenter.org/blog/what-victory-florida-means-me; "Florida

constitutional amendment in her state.[85] And over the past two decades, fourteen states have restored voting rights to segments of the population.[86]

Congress has the authority to act. The Supreme Court has previously upheld congressional expansion of the pool of voters qualified for federal elections when Congress lowered the voting age to 18.[87] Here, there are three sources of congressional power: the Elections Clause of Article I, section 4, the Fourteenth Amendment, and the Fifteenth Amendment. As detailed below, Congress has very broad powers to regulate federal elections under the Elections Clause.[88] Because many state criminal disenfranchisement laws were enacted with a racially discriminatory intent and have a racially discriminatory impact, Congress can also act under its powers to enforce the Fourteenth and Fifteenth Amendments, which guarantee equal protection of the laws and prohibit denial of the right to vote on the basis of race, respectively. The Supreme Court has described this enforcement power as "a broad power indeed," one that gives Congress a "wide berth" to devise appropriate remedial and preventative measures for discriminatory actions.[89]

E. Prohibiting Deceptive Practices (Title I, Subtitle D)

The Act increases protections against, and remedies for, efforts to use deception or intimidation to prevent people from voting or registering to vote. Unfortunately, attempts to suppress votes through deception and intimidation remain all too widespread. Every election cycle, journalists and non-partisan Election Protection volunteers document attempts at voter deception and intimidation.[90] This is not a new problem, but now social media platforms make the mass dissemination of misleading information easy and allow for perpetrators to target particular audiences with precision. In a recent analysis for the Brennan Center, for example, University of Wisconsin Professor Young Mie Kim documented hundreds of messages on Facebook and Twitter designed to discourage or prevent people from voting in the 2018 election.[91]

Amendment 4, Voting Rights Restoration for Felon Initiative (2018)," Ballotpedia, accessed February 8, 2019, https://ballotpedia.org/Florida_Amendment_4,_Voting_Rights_Restoration_for_Felons_Initiative_(2018).

[85] "Reynolds Releases Bill to Restore Felon Voting Rights," *Associated Press*, January 22, 2019, https://www.apnews.com/c2e817c35d6e48a1b7d678c6f5c69843.

[86] Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, The Sentencing Project, 2018, 3.

[87] Oregon v. Mitchell, 400 U.S. 112 (1970).

[88] *See* Part VI.

[89] Tennessee v. Lane, 541 U.S. 509, 518, 520 (2004).

[90] *See e.g*\Ayala, "Voting Problems 2018"; Sean Morales-Doyle and Sidni Frederick, "Intentionally Deceiving Voters Should Be a Crime," *The Hill*, Aug. 8, 2018, https://thehill.com/opinion/civil-rights/400941-intentionally-deceiving-voters-should-be-a-crime; Wendy Weiser and Adam Gitlin, *Dangers of "Ballot Security" Operations: Preventing Intimidation, Discrimination, and Disruption*, Brennan Center for Justice, 2016, *available at* https://www.brennancenter.org/analysis/dangers-ballot-security-operations-preventing-intimidation-discrimination-and-disruption. Wendy Weiser and Vishal Agraharkar, *Ballot Security and Voter Suppression: What It Is And What the Law Says*, Brennan Center for Justice, 2012, *available at* https://www.brennancenter.org/publication/ballot-security-and-voter-suppression.

[91] Young Mie Kim, Brennan Center for Justice, "Voter Suppression Has Gone Digital," last modified Nov. 20, 2018, https://www.brennancenter.org/blog/voter-suppression-has-gone-digital.

While federal law already prohibits voter intimidation, fraud, and intentional efforts to deprive others of their right to vote,[92] existing laws have not been strong enough to deter misconduct. Moreover, no law specifically targets deceptive practices, nor is there any authority charged with investigating such practices and providing voters with corrected information.

H.R.1 protects voters from deception and intimidation in three ways. First, it increases criminal penalties for false and misleading statements and intimidation aimed at impeding or preventing a person from voting or registering to vote. Second, it empowers citizens to go to court to stop voter deception. Third, it blunts the effect of deceptive information by requiring designated government officials to disseminate accurate, corrective information to voters. These provisions will give federal law enforcement agencies and private citizens the opportunity to stop bad actors from undermining our elections. We encourage Congress to enact them.

II. Campaign Finance

A. Small Donor Public Financing (Title V, Subtitles B and C)

H.R.1 also dramatically overhauls federal campaign finance law. The centerpiece of these reforms is small-donor public financing, which has the potential to fundamentally transform political campaigns and counteract the worst effects of the Supreme Court's now-infamous decision in *Citizens United*.[93]

Big Money Undermines American Democracy. Thanks to *Citizens United* and related cases, a small class of wealthy donors has achieved unprecedented clout in American politics.[94] Super PACs, political committees that can raise and spend unlimited funds, poured more than $3 billion into federal elections last year; of that total, roughly a third can come from a mere 11 donors.[95] Another $1 billion has come from dark money groups that keep their donors secret, but which we know are funded by many of the same donors who back super PACs.[96] While all of these groups are supposed to operate independently of candidates and parties, many actually

[92] Weiser and Gitlin, *Dangers of "Ballot Security Operations*.
[93] *See* Adam Skaggs and Fred Wertheimer, *Empowering Small Donors in Federal Elections*, Brennan Center for Justice, 2012, *available at* https://www.brennancenter.org/publication/empowering-small-donors-federal-elections.
[94] Ian Vandewalker and Lawrence Norden, "Small Donors Still Aren't as Important as Wealthy Ones," *The Atlantic*, Oct. 18, 2016, https://www.theatlantic.com/politics/archive/2016/10/campaign-finance-fundraising-citizens-united/504425/ (showing the portion of contributions from donors of $100,000 or more increasing in presidential cycles since 2010); Daniel I. Weiner, Citizens United *Five Years Later*, Brennan Center for Justice, 2015, 3 (explaining how *Citizens United* changed the legal landscape for campaign finance), *available at* https://www.brennancenter.org/sites/default/files/analysis/Citzens_United_%20Five_Years_Later.pdf.
[95] Michelle Ye Hee Lee, "Eleven donors have plowed $1 billion into super PACs since they were created," *Washington Post*, Oct. 26, 2018, https://www.washingtonpost.com/politics/eleven-donors-plowed-1-billion-into-super-pacs-since-2010/2018/10/26/31a07510-d70a-11e8-aeb7-ddcad4a0a54e_story.html.
[96] Center for Responsive Politics, "Dark Money Basics," https://www.opensecrets.org/dark-money/basics; Ashley Balcerzak, "How Democrats Use Dark Money – and Win Elections," *NBC*, Feb. 20, 2018, https://www.nbcnews.com/politics/congress/how-democrats-use-dark-money-win-elections-n849391; Maggie Haberman, "Ad by Pro-Trump Group Attacks the Club for Growth," *New York Times*, Apr. 18, 2017, https://www.nytimes.com/2017/04/18/us/politics/attack-ad-sheldon-adelson-club-for-growth.html.

have close ties to elected officials, to the point where they basically function as a campaign arm.[97] This creates an unacceptable risk of corruption and its appearance.

Recent election cycles have also seen a surge in giving by small donors (donors who give $200 or less),[98] but they still account for less than a fifth of the total raised and spent on campaigns.[99] In the two most recent midterm election cycles, the top 100 super PAC donors gave almost as much as all the millions of small donors combined.[100] In 2018, the top five individuals or couples who gave to super PACs alone contributed almost $350 million.[101]

The dominance of wealthy elites and special interests has a direct impact on policy. Studies have repeatedly shown that campaign donors have far more clout than voters,[102] which they often use to pursue objectives most Americans do not share.[103] The last Congress, for

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[97] See generally Ian Vandewalker, Brennan Center for Justice, "The Rise of Shadow Parties," Oct. 22, 2018, https://www.brennancenter.org/blog/rise-shadow-parties; Ian Vandewalker, Eric Petry, *Shadow Campaigns: The Shift in Presidential Campaign Funding to Outside Groups*, Brennan Center for Justice, 2015, *available at* https://www.brennancenter.org/publication/shadow-campaigns-shift-presidential-campaign-funding-outside-groups; Daniel P. Tokaji and Renata E.B. Strause, *The New Soft Money: Outside Spending in Congressional Elections*, Election Law @ Moritz, 2014, 76-79 (quoting members of Congress and staff about the influence of outside spending on elected officials), *available at* https://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf.

[98] See Peter Overby, "Democrats Built a Small-Donor Money Machine. Now, Republicans Want Their Own," *NPR*, Nov. 23, 2018, https://www.npr.org/2018/11/23/670084581/democrats-built-a-small-donor-money-machine-now-republicans-want-their-own; Max Greenwood, "Small-dollar Donations Explode in the Trump Era," *The Hill*, Oct. 19, 2018, https://thehill.com/homenews/campaign/412231-small-dollar-donations-explode-in-the-trump-era; Kenneth P. Vogel and Rachel Shorey, "Eyeing 2020, Trump Fund-Raisers Return to a Familiar Well: Small Donors," *New York Times*, Apr. 15, 2018, https://www.nytimes.com/2018/04/15/us/politics/trump-campaign-fec-financial-reports.html.

[99] The total price tag for the 2018 midterms was roughly $5.7 billion. Roughly $1.1 billion of that total came from small donors. Center for Responsive Politics, "Most Expensive Midterm Ever: Cost of 2018 Election Surpasses $5.7 Billion," Feb. 6, 2019, https://www.opensecrets.org/news/2019/02/cost-of-2018-election-5pnt7bil/. That was a substantial increase relative to the 2014 midterm, but comparable to other types of donations. *Id*.

[100] Center for Responsive Politics, "2018 Super PACs: How Many Donors Give," last updated Feb. 1, 2019, https://www.opensecrets.org/outside-spending/donor-stats?cycle=2018&type=B; Center for Responsive Politics, "2014 Super PACs: How Many Donors Give," last updated Mar. 9, 2015, https://www.opensecrets.org/outside-spending/donor-stats?cycle=2014&type=B. The 2018 midterms were also notable for how many wealthy self-funders won office. "Most expensive midterm ever: Cost of 2018 election surpasses $5.7 billion," Center for Responsive Politics, "Most Expensive Midterm Ever."

[101] Center for Responsive Politics, "2018 Top Donors to Outside Spending Groups," last updated Feb. 1, 2019, https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&disp=D&type=V&superonly=S.

[102] Chris Tausanovitch, "Income, Ideology and Representation," *Russell Sage Foundation Journal of the Social Sciences* 2 (2016): 33, 49; Martin Gilens and Benjamin I. Page, "Testing Theories of American Politics: Elites, Interest Groups, and American Citizens," *Perspectives on Politics* 12 (2014): 564, 575; Christopher Ellis, "Social Context and Economic Biases in Representation," *Journal of Politics* 75 (2013): 773, 779; Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton: Princeton University Press, 2012), 84; Larry Bartels, *Unequal Democracy: The Political Economic of the New Gilded Age* (Princeton: Princeton University Press, 2010), 285.

[103] As Connecticut Senator Chris Murphy said of the daily calls he has had to make to wealthy donors: "I talked a lot more about carried interest inside of that call room than I did at the supermarket." Wealthy donors "have fundamentally different problems than other people…And so you're hearing a lot about problems that bankers have and not a lot of problems that people who work in the mill in Thomaston, Conn., have." Paul Blumenthal, "Chris Murphy: 'Soul-Crushing' Fundraising Is Bad for Congress," *Huffington Post*, May 7, 2013, https://www.huffingtonpost.com/2013/05/07/chris-murphy-fundraising_n_3232143.html.

example, was dominated by the push for Obamacare repeal and a $1.5 trillion tax overhaul, avowedly donor-driven initiatives that were consistently unpopular with the general public.[104] The disconnect between elite priorities and those of everyday Americans has profoundly undermined faith in our democracy. Overwhelming majorities across the political spectrum feel their voices are not being heard because of our dysfunctional campaign finance system. [105]

Big money politics especially harms people of color. The donor class has long been overwhelmingly white.[106] Major corporate and individual donors have helped to drive policies that disproportionately hurt poor and minority communities, from mass incarceration to the failure to rein in subprime lending.[107] Barriers related to fundraising also disproportionately keep people of color from running, especially women, who still face persistent discrimination and are less likely to have wealthy networks they can tap for support.[108]

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[104] See Daniel I. Weiner, Brennan Center for Justice, "The Tax Overhaul is Proof that Money in Politics Affects All of Us," Dec. 4, 2017, https://www.brennancenter.org/blog/tax-overhaul-proof-money-politics-affects-all-us; Carl Hulse, "Behind New Obamacare Repeal Vote: 'Furious' G.O.P. Donors," *New York Times*, Sept. 22, 2017, https://www.nytimes.com/2017/09/22/us/politics/republican-donors-obamacare-repeal.html; Alex Isanstadt and Gabriel Debenedetti, "Angry GOP Donors Close Their Wallets," *Politico*, Oct. 5, 2017, https://www.politico.com/story/2017/10/05/republican-donors-trump-mcconnell-anger-243449;

[105] Bradley Jones, "Most Americans want to limit campaign spending, say big donors have greater political influence," *Pew Research Center*, May 8, 2018, http://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/; Michael W. Traugott, "Americans: Major Donors Sway Congress More Than Constituents," *Gallup*, Jul. 6, 2016, https://news.gallup.com/poll/193484/americans-major-donors-sway-congress-constituents.aspx; "Voters Say Money, Media Have Too Much Political Clout," *Rasmussen Reports*, Feb. 16, 2016, http://www.rasmussenreports.com/public_content/politics/general_politics/february_2016/voters_say_money_media_have_too_much_political_clout.

[106] Among elite donors giving more $5,000, 93 percent were white in 2012 and 94 percent were white in 2014. Sean McElwee, Brian Schaffner, Jesse Rhodes, *Whose Voice, Whose Choice?* Demos, 2016, 2, *available at* https://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf. Since 2009, only one Black American donor has appeared in the top 100 political spenders list. Lateshia Beachum, "There are Many Rich Minorities. So Why Are There No Black Koch Brothers?" *Center for Public Integrity*, Jul. 23, 2018, https://www.pri.org/stories/2018-07-18/there-are-many-rich-minorities-so-why-are-there-no-black-koch-brothers.

[107] Adam Lioz, *Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and our Economy*, Demos, 2013, 43, 51, *available at* https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf.

[108] Women of color are approximately 20 percent of the U.S. population but despite historic gains still make up less than ten percent of the voting membership of the House of Representatives and only four percent of the Senate. "Women of Color in Elective Office 2019," Center for American Women and Politics, last accessed Feb. 12, 2019, http://cawp.rutgers.edu/women-color-elective-office-2019. According to one scholar, "[t]he support infrastructure available to women of color has historically not been as strong, particularly when it comes to things like campaign trainings, recruitments, and financial support." Linda Kramer Jenning, "Women of Color Face Significant Barriers When Running for Office. But They're Finding Support," *Yes! Magazine*, Jul. 31, 2018, https://www.yesmagazine.org/people-power/women-of-color-face-significant-barriers-when-running-for-office-but-theyre-finding-support-20180731. The founder of Collective PAC, which raises money for candidates of color, notes that "especially for black women, raising money is oftentimes a major deterrent to why they don't get into politics or run for election." Kate Ackley, "Women – and the Power of the Purse – Will Be Key in 2018," *Roll Call*, Oct. 26, 2017, https://www.rollcall.com/news/politics/99810-2. See also Asha DuMonthier, Chandra Childers, Jessica Milli, *The Status of Black Women in the United States*, Institute for Women's Policy Research, 2017, 4-5, *available at* https://www.domesticworkers.org/sites/default/files/SOBW_report2017_compressed.pdf (finding that fundraising pressure is disproportionately discouraging to potential candidates who are female, African American, or represent less-affluent districts).

1. Small-Donor Matching for Congressional Races (Title V, Subtitle B, Part 2)

The Government by the People Act of 2019 in Title V, Subtitle B, Part 2 of H.R.1 establishes a small donor matching system for congressional races. Small donor matching is a transformative solution to the problem of big money. While its potential may be profound, the basics of this system are simple. Candidates opt into the system by raising enough small start-up donations to qualify and accepting certain conditions such as lower contribution limits. Donors who give to participating candidates in small amounts will then see their contributions matched by public money.[109] The Act matches donations of $1-$200 to participating congressional candidates at a six-to-one ratio, the same ratio used until recently in New York City's highly successful program.[110]

Small Donor Matching is a Tried and True Solution. Small donor matching has a long and successful history in American elections. It was first proposed more than a century ago by President Theodore Roosevelt.[111] Congress incorporated a one-to-one small donor match for primaries into the presidential public financing system enacted in 1971. The vast majority of major party presidential candidates from 1976 to 2008 used matching funds in their primary campaigns.[112] Thanks to the presidential public financing system, Ronald Reagan was reelected by a landslide in 1984 without holding a single fundraiser.[113] Two years later, the bipartisan Commission on National Elections concluded that: "Public financing of presidential elections has clearly proved its worth in opening up the process, reducing the influence of individuals and groups, and virtually ending corruption in presidential election finance."[114]

Small donor matching has also found success at the state level, where it has been adopted in a wide variety of jurisdictions.[115] The system that has been studied the most is New York

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[109] Brent Ferguson, *State Options for Reform*, Brennan Center for Justice, 2015, 1, *available at* https://www.brennancenter.org/sites/default/files/publications/State_Options_for_Reform_FINAL.pdf.
[110] Last year the city voted overwhelmingly to raise the match to an 8-to-1 ratio.
[111] Skaggs and Wertheimer, *Empowering Small Donors*, 8.
[112] *Id.* 10.
[113] *Id.* 11.
[114] *Id.* 10 (quoting Fred Wertheimer, *Testimony to DNC Commission on Presidential Nomination Riming and Scheduling*, Sept. 30, 2005).
[115] A number of states, including Florida, Michigan, and New Jersey, provide matching funds in governor races. See Juhem Navarro-Rivera, Emmanuel Caicedo, *Public Funding for Electoral Campaigns: How 27 States, Countries, and Municipalities Empower Small Donors and Curb the Power of Big Money in Politics*, Demos, 2017, *available at* https://www.demos.org/sites/default/files/publications/Public_Financing_Factsheet_FA[5].pdf. New York State is poised to pass small donor matching for all state races this year. Andrea Sears, "2019 Could Be the Year for NY Election Reform," *Public News Service*, Jan. 14, 2019, https://www.publicnewsservice.org/2019-01-14/civic-engagement/2019-could-be-the-year-for-ny-election-reform/a65199-1. Comprehensive matching already exists in many other large, diverse municipalities besides New York City, including Los Angeles, Tucson, Washington, D.C., Montgomery County, Maryland, Prince George's County, Maryland, and others. See Navarro-Rivera and Caicedo, *Public Funding for Electoral Campaigns*; Martin Austermuhle, "Bowser Signs Bill Creating Public Financing Program For Political Campaigns – And Will Fund It," *WAMU*, Mar. 13, 2018, https://wamu.org/story/18/03/13/bowser-signs-bill-creating-public-financing-program-political-campaigns-will-fund/#.XFzEYmfsZaQ; Rachel Chason, "Prince George's Approves Matching Funds for Local Candidates – Starting in 2026," *Washington Post*, Oct. 24, 2018, https://www.washingtonpost.com/local/md-politics/prince-georges-approves-public-finance-system-for-local-candidates/2018/10/24/47f7b75a-d738-11e8-a10f-b51546b10756_story.html.

City's, which has existed since the 1980s and currently matches donations of up to $175.[116] The vast majority of city candidates participate.[117] Studies of the 2009 and 2013 city elections found that participating candidates took in more than 60 percent of their funds from small donors and the public match.[118]

The central role small donors play in funding New York City campaigns has many benefits. Most notably, the system has increased the diversity of viewpoints influencing officeholders. Small donors are far more representative of the real makeup of New York than big donors in terms of race, income, education level, and where they live, and officeholders who court these campaign contributions spend more time talking to everyday New Yorkers.[119] The comparison to state races that do not have small donor matching is remarkable. One study the Brennan Center conducted found that participating city candidates raised money from 90 percent of the city's census blocs, as compared to roughly 30 percent for state assembly candidates (who do not receive public matching dollars) running in the same areas.[120] The city's system has also helped more diverse candidates run, including the city's first African-American mayor and New York State's first female and first African-American elected attorney general, who began her career on the city council.[121]

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[116] "How It Works," New York City Campaign Finance Board, last accessed Feb. 11, 2019, https://www.nyccfb.info/program/how-it-works/; Angela Migally, Susan M. Liss, Frederick A.O. Schwartz, Jr., *Small Donor Matching Funds: The NYC Election Experience*, Brennan Center for Justice, 2010, *available at* https://www.brennancenter.org/publication/small-donor-matching-funds-nyc-election-experience.

[117] In 2017, 84 percent of candidates in New York City primaries opted to accept public funds; in 2013 it was 91 percent. *Keeping Democracy Strong: New York City's Campaign Finance Program in the 2017 Citywide Elections*, New York City Campaign Finance Board, 2018, 45-46, *available at* https://www.nyccfb.info/pdf/2017_Post-Election_Report_2.pdf.

[118] Michael Malbin, *Testimony before the New York City Campaign Finance Board*, Campaign Finance Institute, Feb. 13, 2013, http://www.cfinst.org/Press/PReleases/14-02-13/Testimony_before_the_New_York_City_Campaign_Finance_Board_Says_Small_Donor_Matching_Funds_a_Success_but_the_City_Should_Look_at_Changes_Moving_Forward.aspx. Candidates who did not participate in the public financing system raised most of their money from donors of $1,000 or more. Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *What Is and What Could Be: The Potential Impact of Small-Donor Matching Funds in New York State Elections*, Campaign Finance Institute, 2013, 3, *available at* http://www.cfinst.org/pdf/state/NY/CFI_Impact-Matching-on-NYS.pdf.

[119] As New York State Senator (and former City Council Member) Jose Serrano explained: "Imagine if you could spend a little less time [making fundraising calls], and a little more time in someone's living room, listening to conversations that they have, hearing the ideas that they may have. You can become a much more engaged and responsive candidate and hopefully elected official." DeNora Getachew and Ava Mehta, eds., *Breaking Down Barriers: The Faces of Small Donor Public Financing*, Brennan Center for Justice, 2016, 29, https://www.brennancenter.org/sites/default/files/publications/Faces_of_Public_Financing.pdf. Councilmember Eric Ulrich, a Queens Republican, makes a similar point: "[t]he matching funds program has allowed for the voice of small donors and regular people to have a greater say in outcomes . . .. That has helped us transform how we serve our constituents. I have no choice but to listen to and engage the [constituents] in an overall discussion about what direction the city should go." *Id.* at 34.

[120] Elisabeth Genn, Michael J. Malbin, Sundeep Iyer, Brendan Glavin, *Donor Diversity Through Public Matching Funds*, Brennan Center for Justice and Campaign Finance Institute, 2012, 4, *available at* www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

[121] As New York State Attorney General Letitia James put it after being elected New York City Public Advocate: "The public financing system in New York City gave me the opportunity to compete and succeed, allowing me to represent individuals whose voices are historically ignored." Getachew and Mehta, *Breaking Down Barriers*, 7.

Conserving Taxpayer Funds. Small donor matching for congressional races would transform how they are funded in a cost-effective manner. While critics claim this reform will squeeze taxpayers,[122] the actual price tag is modest. A reasonable estimate for congressional races comes out to less than $1 per citizen per year over a ten year period.[123] There are many ways to come up with this sum that do not necessitate an increased burden on taxpayers.[124] There are also numerous safeguards in the Act against waste or other misuse of taxpayer funds, including detailed reporting obligations, a requirement that candidates spend available privately-raised funds at the same rate as they spend public funds, and a requirement that candidates remit unused public funds to the program.[125]

Ultimately, *someone* pays for candidates to run for office. Whether those sponsors are a handful of wealthy special-interest donors or everyday Americans boosted by public dollars is up to Congress.[126] Small donor matching stands on firm constitutional ground.[127] No reform has the potential to be more transformative. The time to pass this system is now.

2. My Voice Vouchers (Title V, Subtitle B, Part 1)

H.R.1 also creates a pilot program to provide eligible donors with $25 in "my voice vouchers" to give to congressional candidates of their choice in increments of $5. While less common, vouchers are another promising type of small donor public financing, one that is

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[122] Mitch McConnell, "Behold the Democrat Politician Protection Act," *Washington Post*, Jan. 17, 2019, https://www.washingtonpost.com/opinions/call-hr-1-what-it-is-the-democrat-politician-protection-act/2019/01/17/dcc957be-19cb-11e9-9ebf-c5fed1b7a081_story.html.

[123] Lee Drutman, "Democrats' Small-Donor Campaign Finance Proposal Is a Great Deal for Taxpayers," *Vox*, Jan. 14, 2019, https://www.vox.com/polyarchy/2019/1/14/18182579/democrats-hr1-donor-campaign-finance-proposal-taxpayers.

[124] See Skaggs and Wertheimer, *Empowering Small Donors*, 23; *see generally Public Financing of Elections: Where to Get the Money?* Center for Governmental Studies, 2003, *available at* www.policyarchive.org/handle/10207/bitstreams/232.pdf.

[125] One witness before a hearing conducted last week by the Committee on Oversight and Reform suggested that public financing programs "have a history of corrupt actors exploiting the system for personal gain" at taxpayers' expense. Bradley A. Smith, *Testimony of Bradley A. Smith Before the U.S. House Oversight and Reform Committee: H.R. 1: Strengthening Ethics Rules of the Executive Branch*, Institute for Free Speech, Feb. 6, 2019, 11, *available at* https://www.ifs.org/expert-analysis/testimony-of-bradley-a-smith-before-the-u-s-house-oversight-and-reform-committee/ ("*Smith Testimony*"). This is simply false. In New York City, for example, most instances of "corruption" that critics have tried to link to the small donor matching system involved no misuse of public matching funds or an attempted violation that was caught. Lawrence Norden, Brennan Center for Justice, "New York Senate Committee Denies Testimony from Campaign Finance Experts," May 7, 2013, https://www.brennancenter.org/analysis/ny-senate-committee-denies-testimony-campaign-finance-experts. Ultimately, bad actors exist in every system. The key question is whether a public financing program is well-run, with good enforcement mechanisms that will find and stop misuse of public funds. The Act contains extensive provisions to do exactly that.

[126] As one political scientist recently put it: "There are no free lunches. If the public doesn't foot the cost of political campaigns, wealthy donors and lobbyists will. And they will get something in return. And it will be far more than what they paid in. That's how the system works. If we enact public financing through a small-donor matching system, the public will also get something in return. And it will be far more than what they paid in. That's how the system works." Drutman, "Democrats' Small-Donor Campaign Finance Proposal Is a Great Deal for Taxpayers."

[127] As the Supreme Court observed in upholding the presidential system: "Public financing is an effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [it] furthers, not abridges, pertinent constitutional values." Buckley v. Valeo, 424 U.S. 1, 92-93 (1976).

especially beneficial for less wealthy Americans who cannot afford to make even small donations. Voters in the city of Seattle overwhelmingly passed a voucher program in 2015. In the first election where they were used, 18,000 Seattle residents contributed nearly 70,000 vouchers—more than double the total number of contributors in the 2013 election. Most of these donors had not contributed to any candidate in the two previous election cycles.[128] Voucher donors were much more representative of the city's population, including women, people of color, younger residents, and less affluent residents.[129] The Brennan Center strongly supports piloting vouchers for federal elections.

3. Presidential Public Financing (Title V, Subtitle C)

Finally, H.R.1 revamps the presidential public financing system, which provides matching funds to primary candidates and block grants to general election nominees. Despite its success, that system ultimately failed because it did not afford candidates sufficient funds to compete in light of the dramatic growth in campaign costs.[130] The Act addresses this problem by increasing the primary match to a six-to-one ratio, increasing the block grant for nominees in the general election, and repealing burdensome limits on how much participating candidates can spend. The Brennan Center supports all of these changes.

B. Improving Federal Disclosure Law (Title IV, Subtitles B and C)

H.R. 1 also updates federal campaign disclosure rules, including by closing the main loopholes in federal disclosure law that have given rise to dark money and extending basic transparency requirements to online political ads.

The Rise of Dark Money. Over the last decade, the prevalence of secret money has become one of the biggest challenges for our campaign finance system. As recently as 2006, almost all federal campaign spending was transparent. But *Citizens United* made it possible for new types of entities to spend limitless funds on electoral advocacy—including 501(c)(4) and (c)(6) nonprofit corporations that are not required to make their sources of funding public.[131] These dark money groups have spent almost $1 billion on federal elections since 2010.[132] And they have given millions more to super PACs, in a manner that allows those entities (which in theory do have to disclose their donors) to keep major underlying funders anonymous.[133] All of this secret spending tends to be concentrated in the closest races. One Brennan Center study of

[128] *First Look: Seattle's Democracy Voucher Program*, Win Win Network and Every Voice Center, 2017, 2, *available at* https://everyvoice.org/wp-content/uploads/2018/08/2017-11-15-Seattle-Post-Election-Report-FINAL.pdf.
[129] *Id.* 3-5.
[130] Skaggs and Wertheimer, *Empowering Small Donors*, 11.
[131] Weiner, Citizens United *Five Years Later*, 7.
[132] Center for Responsive Politics, "Political Nonprofits (Dark Money)," last visited Jan. 24, 2019, https://www.opensecrets.org/outsidespending/nonprof_summ.php.
[133] Chisun Lee and Douglas Keith, "How Semi-Secret Spending Took Over Politics," *The Atlantic*, Jun. 28, 2016, https://www.theatlantic.com/politics/archive/2016/06/the-rise-of-gray-money-in-politics/489002/.

the 2014 midterms, for instance, showed that more than 90 percent of dark money spending in Senate contests was concentrated in the eleven most competitive contests.[134]

Dark money deprives voters of critical information needed to make informed decisions.[135] Voters are entitled to know who is trying influence them, and what those spenders want from the government. It is donor disclosure, as the *Citizens United* court itself pointed out, that allows voters to determine whether elected leaders "are in the pocket of so-called 'moneyed interests.'"[136] Dark money also harms shareholders in many publicly-traded companies, which frequently use dark money groups as conduits for political spending.[137] Researchers have shown that the corporate managers who drive this giving sometimes do so for their own reasons, and not to maximize shareholder value.[138] Shareholders need transparency so they can monitor how their money is being spent.[139]

The New Threat of Foreign Interference. More recently, it has come to light that lack of transparency is also providing multiple avenues for foreign governments and nationals to meddle in the American political system. In 2016, for example, the Russian government donated millions to the National Rifle Association, a 501(c)(4) nonprofit that does not disclose its donors. This money was allegedly intended to influence the presidential race.[140]

Russia's efforts to inject money into the 2016 election did not stop with dark money. Russian operatives also took advantage of weak disclosure rules for paid Internet ads. Overall, political advertisers spent $1.4 billion online in the 2016 election, almost eight times what they spent in 2012.[141] Online ads are cheap to produce and disseminate instantly to vast potential audiences across great distances without regard for political boundaries.[142] Moreover, sophisticated micro-targeting tools have given rise to the "dark ad," which is seen only by a narrowly targeted audience, threatening to remove much of the political debate around elections from public view.[143] Russian operatives exploited these capabilities to purchase millions of

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[134] Ian Vandewalker, *Election Spending 2014: Outside Spending in Senate Races Since* Citizens United, Brennan Center for Justice, 2015, 4, *available at* https://www.brennancenter.org/sites/default/files/analysis/Outside%20Spending%20Since%20Citizens%20United.pdf.

[135] *Buckley*, 424 U.S. at 66-67 (explaining voters' interest in knowing the sources of political money "to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.").

[136] 558 U.S. at 370.

[137] Weiner, Citizens United *Five Years Later*, 10.

[138] John C. Coates IV, "Corporate Politics, Governance, and Value Before and After Citizens United," *Journal of Empirical Legal Studies* 9 (2012): 657.

[139] David Earley and Ian Vandewalker, *Transparency for Corporate Political Spending: A Federal Solution*, Brennan Center for Justice, 2012, 5-6, *available at* https://www.brennancenter.org/publication/transparency-corporate-political-spending-federal-solution.

[140] Peter Stone and Greg Gordon, "FBI Investigating Whether Russian Money Went to NRA to Help Trump," *McClatchy*, Jan. 18, 2018, https://www.mcclatchydc.com/news/nation-world/national/article195231139.html.

[141] Sean J. Miller, "Digital Ad Spending Tops Estimates," *Campaigns & Elections*, Jan. 4, 2017, https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates.

[142] Nathaniel Persily, "Can Democracy Survive the Internet?" *Journal of Democracy* 28 (2017): 72.

[143] Christopher S. Elmendorf, Ann Ravel and Abby Wood, "Open up the black box of political advertising," *San Francisco Chronicle*, Sept. 22, 2017, http://www.sfchronicle.com/opinion/openforum/article/Open-up-the-black-box-of-political-advertising-12221372.php.

targeted ads in an attempt to influence and foment discord around the 2016 election.[144] And Moscow's efforts in 2016 may serve as a blueprint for other malefactors. As former Homeland Security Secretary Jeh Johnson put it, "the Russians will be back, and possibly other state actors, and possibly other bad cyber actors."[145]

Common Sense Reforms. H.R. 1 takes several key steps to deal with these problems. The DISCLOSE Act in Title IV, Subtitle B closes legal loopholes that have allowed dark money groups to refrain from disclosing their donors.[146] The Honest Ads Act in Title IV, Subtitle C expands disclosure and disclaimer requirements for "electioneering communications"[147]—campaign ads that mention a candidate during the time leading up to an election—to include paid Internet or digital communications. And it requires the largest online platforms, with over 50 million unique visitors per month, to establish a public file of requests to purchase political ads akin to the file broadcasters have long been required to maintain.[148]

These changes will make U.S. campaigns significantly more transparent. But critics have charged they will require large numbers of Americans to disclose their political activities to the government.[149] That is not true. The Act places no additional requirements on individual contributors. Moreover, research has shown that dark money campaign spending is funded almost entirely by wealthy corporations and individuals; there is no evidence that large numbers of small donors will be impacted.[150]

The Act does require relatively modest purchases of paid Internet ads to be included in platforms' public files, which is necessary because such ads can have a wide impact at relatively low cost. Russia's 2016 ads reached tens of millions of people, at a cost of roughly $400,000.[151] But these provisions are limited to those who purchase paid ads; the Act does not (as critics have wrongly implied)[152] cover unpaid postings to an individual's personal website, social media account, or email.

Disclosure continues to stand on firm constitutional ground, with the Supreme Court repeatedly affirming that robust transparency is a permissible—and often preferred—means to

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[144] For a more complete discussion of Russia's use of Internet ads in 2016, see Ian Vandewalker, *Oversight of Federal Political Advertisement Laws and Regulations: Statement before the Committee on House Oversight and Government Reform, Subcommittee on Information Technology*, Brennan Center for Justice, Oct. 24, 2017, *available at* https://www.brennancenter.org/analysis/oversight-federal-political-advertisement-laws-and-regulations.
[145] Andrew Rafferty, "Former DHS Chief Warns Russians Will Continue to Target U.S. Elections," *NBC News*, June 21, 2017, https://www.nbcnews.com/politics/politics-news/former-dhs-chief-warns-russians-will-continue-target-u-s-n775116.
[146] The Act amends statutory text that had been interpreted to require dark money groups to disclose only those donors who earmark their contributions to pay for a specific ad, which virtually never happens. It also prevents donors from funneling contributions through front groups to hide their true origin.
[147] 52 U.S.C. § 30104(f)(3).
[148] 47 C.F.R. 73.3526(e)(6), 73.3527(e)(5).
[149] *Smith Testimony*, 8; McConnell, "Behold the Democrat Politician Protection Plan."
[150] Derek Willis, "Shedding Some Light on Dark Money Political Donors," *ProPublica*, Sept. 12, 2018, https://www.propublica.org/nerds/shedding-some-light-on-dark-money-political-donors.
[151] Ian Vandewalker and Lawrence Norden, *Getting Foreign Funds Out of America's Elections*, Brennan Center for Justice, 2018, 7, https://www.brennancenter.org/publication/getting-foreign-funds-out-americas-elections.
[152] *Smith Testimony*, 8.

prevent "abuse of the campaign finance system."[153] And while transparency has become a subject of heated debate inside the Beltway, it remains overwhelmingly popular with the general public.[154] These are valuable reforms that, like small donor public financing, will help blunt the worst effects of *Citizens United*. Congress should pass these reforms without delay.

C. FEC Overhaul (Title VI, Subtitle A)

H.R.1 also overhauls the dysfunctional Federal Election Commission, which has failed to meaningfully enforce existing rules and would almost certainly struggle to implement the other campaign finance reforms in the Act.

A Deadlocked and Dysfunctional Commission. The FEC's mission is to interpret and enforce federal campaign finance laws.[155] No more than three of its six members can be affiliated with any one party, and at least four votes are required to enact regulations, issue guidance, or even investigate alleged violations of the law.[156] By longstanding tradition, each of the two major parties takes half the FEC's seats.[157] This has resulted in pervasive gridlock. The Commission routinely deadlocks on whether to pursue significant campaign finance violations—often after sitting on allegations for years without even investigating them.[158] Its process for issuing new regulations has virtually ground to a halt.[159] Increasingly, commissioners cannot

[153] McCutcheon v. FEC, 134 S.Ct. 1434, 1459 (2014) (plurality opinion)
[154] "A New York Times/CBS News Poll on Money in Politics," *New York Times*, Jun. 2, 2015, https://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html.
[155] 52 U.S.C. § 30106(b)(1).
[156] 52 U.S.C. §§ 30106(c), 30106(f), 30107.
[157] Thomas E. Mann, "The FEC: Administering and Enforcing Campaign Finance Law," in Anthony Corrado, et al., eds., *The New Campaign Finance Sourcebook*, Brookings Institute, 2005, 233, *available at* https://www.brookings.edu/book/the-new-campaign-finance-sourcebook/.
[158] *See Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, Office of FEC Commissioner Ann M. Ravel, 2017, 2, 4, *available at* https://classic.fec.gov/members/ravel/ravelreport_feb2017.pdf. In one notorious case, in which a donor admitted that he had formed an LLC solely for the purpose of hiding a $1 million contribution to a super PAC, the Commission delayed more than four years before deadlocking on whether to proceed, notwithstanding that all six commissioners appear to have agreed that the donor broke the law. *See* Certification (Feb. 23, 2016), MUR 6485 (W Spann LLC *et al.*), *available at* https://www.fec.gov/files/legal/murs/6485/16044390516.pdf; Statement of Reasons, Comm'rs. Walther, Ravel & Weintraub, MUR 6485 (W Spann LLC, *et al.*), *available at* https://www.fec.gov/files/legal/murs/6485/16044391123.pdf; Statement of Reasons, Comm'rs. Petersen, Hunter & Lee, MUR 6485 (W Spann LLC, *et al.*), *available at* http://eqs.fec.gov/eqsdocsMUR/16044393039.pdf.
[159] Among other things, the Commission has repeatedly deadlocked on proposals for a comprehensive rulemaking to address the effects of *Citizens United*. Minutes of an Open Meeting of the Federal Election Commission, Wednesday Jun. 15, 2011 (approved Jun. 30, 2011 as Agenda Document No. 11-39), *available at* https://www.fec.gov/resources/updates/agendas/2011/approved2011_39.pdf; Minutes of an Open Meeting of the Federal Election Commission, Thursday Dec. 15, 2011 (approved Jan. 12, 2012 as Agenda Document No. 12-02), *available at* https://www.fec.gov/resources/updates/agendas/2012/approved2012_02.pdf; Minutes of an Open Meeting of the Federal Election Commission, Thursday Mar. 7, 2013 (approved Apr. 11, 2013, as Agenda Document No. 13-11), *available at* https://www.fec.gov/resources/updates/agendas/2013/approved_1311.pdf. See *also* Statement of Commissioner Ellen L. Weintraub on the 2014 *Citizens United Rulemaking*, Oct. 9, 2014, *available at* http://www.fec.gov/members/weintraub/statements/2014-10-09_Statement_of_Commissioner_Weintraub_on_2014_CU_Rulemaking.pdf.

even agree on how to answer requests for interim guidance they receive through the Commission's advisory opinion process.[160]

The Commission is also beset with management problems. It has not had a permanent general counsel (its chief legal officer and one of the two most important staff members) in more than five years.[161] Morale among its rank-and-file staff consistently ranks nears the bottom of the federal government.[162]

FEC dysfunction has exacerbated many problems with our campaign finance system, including dark money,[163] rampant coordination between candidates and outside groups,[164] and vulnerability to foreign interference in our campaigns.[165] As a bipartisan group of lawmakers wrote President Trump last year, a dysfunctional FEC "hurts honest candidates who are trying to follow the letter of the law and robs the American people of an electoral process with integrity."[166] If not addressed, the Commission's problems could stymie implementation of the other ambitious reforms in the Act. Moreover, the agency's inability to enforce campaign finance laws contributes to a broader culture of impunity at a time of eroding respect for the rule of law and democratic values more generally.[167]

A Necessary Overhaul. The Act addresses the FEC's main flaws through several targeted changes. It curtails gridlock by reducing the number of commissioners from six to five, with no more than two affiliated with any party (effectively requiring one commissioner to be an independent). It creates clear lines of accountability for management issues by allowing the president to name a real chair[168] to serve as the FEC's chief administrative officer, with responsibility for the agency's day-to-day management. It helps ensure that commissioners will have the right temperament and qualifications by establishing a bipartisan blue ribbon advisory commission to publicly vet potential nominees. It ensures that the Commission will periodically

[160] See 52 U.S.C. §§ 30107(a)(7), 30108. Deadlocks on advisory opinion requests have increased exponentially, as detailed in a forthcoming Brennan Center white paper. See Daniel I. Weiner, *How to Fix the FEC*, Brennan Center for Justice, forthcoming 2019.
[161] Dave Levinthal and Suhauna Hussain, "Five Years Ago, the Federal Election Commission's Top Lawyer Resigned. No Permanent Replacement Has et been Named." *Center for Public Integrity*, Jul. 4, 2018, https://www.pri.org/stories/2018-07-04/five-years-ago-federal-election-commission-s-top-lawyer-resigned-no-permanent.
[162] Dave Levinthal, "Report: FEC Leaders, Managers Share Blame for Horrid Morale," *Center for Public Integrity*, Jul. 26, 2016 (updated Feb. 11, 2019), https://publicintegrity.org/federal-politics/report-fec-leaders-managers-share-blame-for-horrid-morale/.
[163] Lawrence Norden, Brent Ferguson, Douglas Keith, *Five to Four*, Brennan Center for Justice, 2016, 7, *available at* https://www.brennancenter.org/publication/five-four.
[164] *See* Weiner, Citizens United *Five Years Later*, 8.
[165] Jordan Muller, "FEC Rejects Proposal to Consider New Rules on Foreign Spending in U.S. Elections," *Opensecrets.org*, May 25, 2018, https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/.
[166] Kilmer, Buck Lead Bipartisan Call to President Trump: Fill Vacant Seats on Federal Election Commission Immediately, 2018, https://kilmer.house.gov/news/press-releases/kilmer-buck-lead-bipartisan-call-to-president-trump-fill-vacant-seats-on-federal-election-commission-immediately.
[167] Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law and Democracy, 2018, 16, https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf.
[168] Currently the office rotates annually and is largely symbolic *See* 52 U.S.C. § 30106(a)(5).

have fresh leadership by ending the practice of allowing commissioners to hold over in office indefinitely past the expiration of their terms.[169] And it helps streamline the enforcement process by giving the Commission's nonpartisan staff authority to investigate alleged campaign finance violations and dismiss frivolous complaints—subject to overrule by a majority vote of commissioners.[170]

These changes would bring the FEC's structure more in line with other independent agencies, but with significantly greater safeguards to prevent either party from weaponizing the agency against its opponents. Critics nevertheless charge that H.R.1 would effectuate a partisan takeover of the FEC.[171] They argue that, although the president could only nominate two of five commissioners from their own party, the FEC's new structure would allow presidents to install secret partisans in the third seat reserved for an independent.[172] But as a legal matter, the president already has constitutional authority to nominate whomever they want to serve on the FEC, provided no more than three of the nominees are affiliated with one party at the time they are nominated.[173] The tradition of deferring to party leaders has no force of law.[174] By providing for public bipartisan vetting of nominees, H.R.1 actually establishes stronger safeguards than currently exist. In a similar vein, critics suggest that a presidentially-appointed FEC chair would be tantamount to an "election czar," with vast power to persecute the president's opponents.[175] But the role of chair envisioned by the Act is identical to that which exists at many other independent agencies, except without a working majority of commissioners from the chair's own party.[176]

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[169] All four of the current commissioners (there are two vacancies) have been in office since the George W. Bush administration, notwithstanding that they are theoretically limited to one six-year term. "All Commissioners," Federal Election Commission, accessed Oct. 18, 2018, https://www.fec.gov/about/leadership-and-structure/commissioners/. Before 1997, commissioners could be re-appointed to new terms an unlimited number of times. Congress eliminated reappointment with the goal of ensuring that the agency would periodically have fresh leadership, and to reinforce commissioners' independence in the face of congressional attempts to use the reappointment process as leverage to deter enforcement. Exec. Office Appropriations Act of 1998, 105 Pub. L. No. 61, 111 Stat. 1272 (Oct. 10, 1997). But allowing indefinite holdovers has created the worst of both worlds. There is still very little turnover, and commissioners whose terms have expired are even more beholden to the president and Congress, who can replace them at any time. Weiner, *How to Fix the FEC*.

[170] Under the Commission's present structure, even those wrongfully accused of violations must sometimes wait years for their names to be cleared. See, *e.g.*, Notification with Factual and Legal Analysis, MUR 6896 (Margie Wakefield for Kansas), *available at* https://www.fec.gov/files/legal/murs/6896/15044385209.pdf; Notification with General Counsel's Report, MUR 6904 (Cat Ping for Congress), *available at* https://www.fec.gov/files/legal/murs/6904/16044396706.pdf.

[171] *Smith Testimony*, 2; McConnell, "Behold the Democrat Politician Protection Plan."

[172] *Smith Testimony*, 2.

[173] *Buckley*, 424 U.S. at 140.

[174] Daniel I. Weiner, "FEC's Status Quo is Hazardous—Proposed Legislation Would Help Fix It," *The Hill*, February 10, 2019, https://thehill.com/opinion/campaign/429294-fecs-status-quo-is-hazardous-proposed-legislature-would-help-fix-it.

[175] *Smith Testimony*, 3.

[176] That being said, any concerns about partisan domination of a restructured FEC can easily be addressed through minor changes to Act. For example, the Act could specify that any nominee who has been affiliated with a party at any time in the last five years (including registering as a member of the party or working for or representing the party or its candidates or officeholders) will be deemed affiliated with the party for purposes of determining partisan balance on the Commission. Model language can be found in legislation proposed in the last Congress. *See* H.R. 3953, 115th Congress (2017).

Ultimately, no government institution functions independently from background norms that restrain excessive partisanship and other abuses of power. To insist that any reforms eliminate such risks entirely is to set an impossible standard. The Act makes sensible changes to the FEC's structure that deserve immediate passage.

D. Reforming Coordination Rules (Title V, Subtitle B)

H.R.1 also tightens restrictions on coordination between candidates and outside groups like super PACs that can raise unlimited funds, another important reform.

The Supreme Court has long held that outside campaign expenditures coordinated with a candidate can be "treated as contributions," because "[t]he ultimate effect is the same as if the [spender] had contributed the dollar amount [of the expenditure] to the candidate."[177] *Citizens United* did nothing to change that. When the Supreme Court struck down limits on how much outside groups could spend in federal elections, it did so on the assumption that these groups would operate independently of candidates. The Court reasoned that the absence of "prearrangement and coordination" would "undermine[] the value of the expenditure to the candidate" and alleviate the danger of quid pro quo corruption or its appearance.[178]

Whether or not that was a correct assumption,[179] in reality the independence of much outside spending is illusory. In 2016, most presidential candidates had personal super PACs run by top aides or other close associates, whose only purpose was to get the candidate elected and for which the candidate often personally raised funds or even appeared in ads.[180] These entities are also becoming increasingly common in Senate and House races.[181] Other forms of collaboration are also on the rise, such as the practice of super PACs and other outside groups republishing flattering b-roll footage that campaigns make available online.[182] Even blatant instances of cooperation, like super PAC ads in which a candidate appears, have been excluded from the definition of "coordinated communication" and thus deemed not to count as contributions under federal rules.[183] These developments make it easy to circumvent contribution limits, especially for the class of billionaire mega-donors who have gained unprecedented influence in our elections.

H.R. 1 shores up federal coordination rules in important respects. It specifies that if a candidate and any outside group or individual collaborate on a communication that promotes,

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[177] *Buckley*, 424 U.S. at 36-37.
[178] *Citizens United*, 558 U.S. at 360.
[179] There is evidence to suggest it was not. See Lawrence Norden and Iris Zhang, Brennan Center for Justice, "Fact Check: What the Supreme Court Got Wrong in its Money in Politics Decisions," Jan. 30, 2017, https://www.brennancenter.org/analysis/scotus-fact-check.
[180] Brent Ferguson, *Candidates & Super PACs: The New Model in 2016*, Brennan Center for Justice, 2015, 3, *available at* https://www.brennancenter.org/publication/candidates-super-pacs-new-model-2016.
[181] Soo Rin Kim, Center for Responsive Politics, "Mine, All Mine: Single Candidate Super PACs, Creeping Down-Ballot," Nov. 10, 2016, https://www.opensecrets.org/news/2016/11/mine-all-mine-single-candidate-super-pacs-creeping-down-ballot/.
[182] Paul Blumenthal, "How Super PACs And Campaigns Are Coordinating In 2016," *Huffington Post*, Nov. 14, 2015, https://www.huffingtonpost.com/entry/super-pac-coordination_us_56463f85e4b045bf3def0273.
[183] Comment of Brennan Center for Justice at NYU School of Law (Nov. 15, 2011), AO 2011-23 (American Crossroads), *available at* https://www.fec.gov/data/legal/advisory-opinions/2011-23/.

attacks, supports, or opposes that candidate (the so-called PASO standard), the communication will be deemed a contribution. It also clarifies that any reproduction of campaign footage or materials also constitutes a contribution. And it creates a new category of "coordinated spenders," groups whose actual ties to a candidate are so close that it is simply not plausible to think that the group's spending in support of the candidate is truly independent.

Critics have attacked the constitutionality of these provisions on a number of grounds that do not withstanding scrutiny.[184] Far from being unconstitutional, the Act's strengthening of federal coordination rules is in line with regulatory trends in the states.[185] These changes are necessary to restore the integrity of campaign contribution limits and we strongly support their passage.

E. Helping Diverse Candidates Run (Title V, Subtitle D)

Finally, the Help America Run Act in Title V, Subtitle D of H.R.1 establishes an innovative reform to help middle- and working-class candidates run for office. Campaigning for federal office is a demanding job, one that can require successful candidates to take months or even years away from paid work or full-time care of loved ones. That is simply not an option for many middle- and working-class Americans.[186] FEC regulations allow non-incumbents to pay themselves a salary out of campaign funds, but doing so is relatively rare, and can open a candidate up to criticism.[187] The Act provides a new option for non-wealthy candidates who do

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[184] For, example, the Supreme Court has never held that strong coordination rules may only be applied to political committees. See *Smith Testimony*, 5. Doing so would create an enormous loophole given how active non-PAC dark money groups are in federal races. See Part II(B). Equally unfounded are criticisms of the PASO (promote support attack oppose) standard the Act uses to determine which communications can be coordinated. *See Smith Testimony*, 5. As the Supreme Court noted when it upheld the standard in McConnell v. FEC, "'[p]ublic communications' that promote or attack a candidate for federal office … undoubtably have a dramatic effect on federal elections." McConnell v. FEC, 540 U.S. 93, 169-70 (2003). The Court has repeatedly declined to revisit this aspect of McConnell, most recently in 2017. See Republican Party of Louisiana v. FEC, 137 S.Ct. 2178 (2017). In light of this benefit, when such communications are made in collaboration with a candidate it is entirely reasonable to treat them as contributions. Finally, designating certain groups as "coordinated spenders" does not impermissibly presume coordination based solely on a group's identity, as the Supreme Court has disallowed. *See Smith Testimony*, 5; Colorado Republic Federal Campaign Committee v. FEC, 518 U.S. 604 (1996). The case cited by opponents of the Act. rejected an absolute presumption of coordination for party communications based on the supposed nature of political parties. *Colorado Republican*, 518 U.S. at 621 (Breyer, J., lead op.). The Act, in contrast, provides that groups will be deemed "coordinated spenders" based on specific facts that make any assertion of independence implausible.

[185] *See, e.g.*, Conn. Gen. Stat. § 9-601c (2013), Cal. Code Regs. tit. 2, § 18225.7 (2015); Chisun Lee, et al., *After* Citizens United: *The Story in the States*, Brennan Center for Justice, 2014, *available at* https://www.brennancenter.org/publication/after-citizens-united-story-states.

[186] Geoff Williams, "Can You Afford to Be a Politician?," *U.S. News*, July 16, 2013, https://money.usnews.com/money/personal-finance/articles/2013/07/16/can-you-afford-to-be-a-politician

[187] *See* Ashley Balcerzak, "You're Young and Broke. Here's How to Still Win a Congressional Seat," *Center for Public Integrity*, Dec. 10, 2018, https://publicintegrity.org/federal-politics/young-broke-money-win-congress-election/ ("Most candidates [for federal office] don't take advantage of this provision [allowing them to draw a salary. At least 22 candidates running in the 2017-2018 election cycle that together paid themselves about $155,000 from campaign funds. None of the candidates the Center for Public Integrity identified this cycle appeared to collect a $174,000 salary."); Sam Janesch, "Jess King is the only Pennsylvania candidate for Congress drawing a salary from her campaign," *Lancaster Online*, Jul. 20, 2018, https://lancasteronline.com/news/politics/jess-king-is-the-only-pennsylvania-candidate-for-congress-drawing/article_86c5de3c-8b96-11e8-bc8f-3f9a023379f9.html; Michelle

not want to pay themselves a salary, allowing them to instead use campaign funds to cover specific expenses like child, elder, or other dependent care, health insurance premiums, and professional dues. Giving non-wealthy candidates more ways to make ends meet so they can run for office is another step towards truly representative government, one that we strongly support.

III. Redistricting Reform (Title II, Subtitle E)

The Redistricting Reform Act of 2019 in Title II, Subtitle E of H.R. 1 would end extreme partisan gerrymandering by requiring states to use independent citizen commissions for congressional redistricting, in a way that respects the Voting Rights Act and preserves communities of interest.

The need for reform is urgent. Extreme gerrymandering has reached levels unseen in the last 50 years. As Brennan Center research has shown, this decade's skewed maps have consistently given Republicans 15-17 extra congressional seats over the course of the whole decade.[188] Shifts in political winds have virtually no electoral impact in gerrymandered states. In 2018, for example, a political tsunami year for Democrats, no districts changed parties in Ohio and North Carolina, two states with extremely biased maps. Despite the fact that Democrats earned nearly half the vote in both states, they won only a quarter of the seats. The overwhelming majority of the seats that did change parties in 2018—72 percent—were drawn by commissions and courts.[189]

To be clear, Republicans are not alone in rigging districts to their advantage. A Democratic gerrymander in Maryland was proven to be just as unbreakable in the Republican wave of 2014.[190] Both parties are more than capable and willing to draw districts that primarily serve their partisan ends if given the opportunity, and both have done so this decade with devastating consequences for American democracy.

Many of this decade's redistricting abuses have come at the expense of communities of color. When Republican-drawn maps in Virginia, North Carolina, and Texas were successfully challenged on the grounds that they discriminated against minority voters, the states defended the maps by arguing that politics, rather than race, had been the driving force behind their maps.[191] Democrats in Maryland, likewise, rejected a congressional map that would have given African-Americans additional electoral opportunities because that would have created an additional

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Tsai, "Take the Money and Run?" *Slate*, Dec. 20, 2007, https://slate.com/news-and-politics/2007/12/do-presidential-candidates-receive-a-salary.html ("[I]t's almost considered bad form for someone seeking the presidency [to accept a salary]").

[188] Laura Royden and Michael Li, *Extreme Maps*, Brennan Center for Justice, 2017, 6-13, *available at* https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf.

[189] Annie Lo, "How Did Democrats Flip the House? Fairer Maps," *Brennan Center for Justice*, Dec. 7, 2018, https://www.brennancenter.org/blog/how-did-democrats-flip-house-fairer-maps.

[190] *Benisek v. Lamone*, __ F. Supp. 3d __ (2018).

[191] Guy-Uriel E. Charles & Luis Fuentes-Rohwer, "Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA," *William and Mary Law Review* 59, no. 5 (2018): 1559-1600.

Republican seat.[192] Without a rule that makes disadvantaging minority voters for partisan gain illegal, this type of discrimination will continue and grow.

Congressional action is necessary to stop partisan and racial gerrymandering. If not reined in, the problem will only get worse next cycle. Increasingly sophisticated technologies and voter data enable modern line-drawers to lock in a durable partisan advantage with shocking accuracy. And in light of the successful gerrymanders of this past decade, political operatives will have a strong incentive (and little disincentive) to manipulate these tools for their advantage.

The courts alone will not and cannot solve the problem. Even if the United States Supreme Court develops a manageable standard for partisan gerrymandering, judicial intervention would likely be limited to the most egregious cases. It will also require aggrieved voters to resort to expensive, time-consuming, and complicated litigation in order to obtain a remedy years later. Maps drawn in 2011 are still being challenged in nearly half a dozen states even though the next round of redistricting is only two years away. The burden that this places on communities that are the most affected by gerrymandering is unacceptable.

Congress has the authority to fix congressional redistricting.[193] As the Supreme Court has recognized, "the Framers provided a remedy" in the Constitution for redistricting abuses through the "power bestowed on Congress to regulate elections, and . . . to restrain the practice of political gerrymandering."[194] Over the years, Congress has repeatedly exercised its power under article I, section 4 to do just that.[195] In 1967, for example, Congress required all states to use single member congressional districts to end the drawing of racially discriminatory multimember districts, a practice adopted to defy the call of the Voting Rights Act.[196]

H.R. 1 Offers Bold Solutions for Congressional Redistricting. These abuses require strong solutions. The Redistricting Reform Act would be the boldest and most comprehensive exercise of this congressional authority. It would require states to use independent redistricting commissions to draw congressional maps and impose a uniform set of rules for how districts should be drawn, prioritizing criteria like keeping communities together, and expressly ban partisan gerrymandering. It would also open the process to public oversight and participation.

The experience of states like California and Arizona show that independent commissions work. California went from having a congressional map that was one of the least responsive to electoral changes in the nation to one of the most.[197] California's maps did not just improve

[192] Aaron C. Davis, "Redistricting in Md. has element of racial friction," *Washington Post*, July 24, 2011, https://www.washingtonpost.com/local/dc-politics/redistricting-in-md-has-element-of-racial-friction/2011/07/23/gIQAU86MXI_story.html?utm_term=.b84f2191878d.
[193] Arizona v. Intertribal Council of Arizona, Inc., 570 U.S. 1 (2013).
[194] Vieth v. Jubelirer, 541 U.S. 267 (2004).
[195] 55 STAT. 761 (1941), 2 U.S.C. §2a (Supp. 1950); 54 STAT. 162 (1940); 46 STAT. 21 (1929); 37 STAT. 13 (1911); 31 STAT. 733 (1901); 26 STAT. 735 (1891); 22 STAT. 5 (1882); 17 STAT. 28 (1872); 12 STAT. 353 (1862); 10 STAT. 25 (1852); 9 STAT. 432(1850); 5 STAT. 491 (1842); 4 STAT. 516 (1832); 3 STAT. 651 (1822); 2 STAT. 669 (1811); 2 STAT. 128 (1802); 1 STAT. 253 (1792).
[196] 2 U.S.C. § 2c
[197] Royden and Li¸ *Extreme Maps*, 23, 26, 29; Laura Royden, Michael Li, and Yurij Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice (2018), 17-19, *available at* https://www.brennancenter.org/sites/default/files/publications/Extreme%20Gerrymandering%204.24.18.pdf.

political fairness. They also kept communities of interest together, increased representation for communities of color, and enhanced the opportunity for competition.[198]

It is little wonder that independent commissions are popular among voters. Last year, a record five states passed redistricting reform for congressional and/or legislative districts. The Ohio proposal carried every single congressional district in the state by a supermajority.[199] Reforms in Colorado and Michigan also passed overwhelmingly, with more than 60 percent of the vote statewide.[200]

H.R. 1 builds on what has been proven to work. Commissions would contain equal numbers of Republican, Democratic, and unaffiliated commissioners, with voting rules that ensure that no one party would be able to dominate the redistricting process. Additionally, all potential commissioners would be screened for conflicts of interest to ensure that they do not have a personal stake in the outcome.

The Act's establishment of a clear set of mapdrawing rules, listed in the order in which they are to be applied,[201] is an important and ground-breaking change. Federal law currently has next to no rules governing how districts are to be drawn.[202] Likewise, most states, with a handful of exceptions, have few rules governing congressional redistricting. This has allowed abuses to run rampant. Left unchanged, this is a situation that will only get worse in coming years. The Act's ban on partisan gerrymandering and enhanced protections for communities of color and communities of interest would further stem the kinds of abuses we saw this decade.

Finally, the Act would transform what has historically been an opaque process into one that is transparent and participatory. Commission business would be done in open public meetings and subject to oversight. Data and other information would be made available and all official communications would be subject to disclosure. Community groups and members would get a say through testimony and other feedback mechanisms. Each commission would be required to show its work and assure fairness by issuing a detailed report before taking a final vote on a plan. In short, redistricting would no longer be done in backroom deals.

These changes would dramatically improve congressional representation for all Americans, combining best practices for assuring fair, effective, and accountable representation. We urge Congress to enact them.

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[198] Royden and Li¸ *Extreme Maps*, 23, 26, 29; Royden, Li, and Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, 17-19.
[199] Peter Miller and Annie Lo, "Support for Ohio's Issue 1 Ballot Measure in the 2018 Primary Election," *Brennan Center for Justice*, Nov. 7, 2018, https://www.brennancenter.org/blog/support-ohio-issue-1-ballot-measure-2018-primary-election.
[200] Peter Miller and Brianna Cea, Brennan Center for Justice, "Everybody Loves Redistricting Reform," Dec. 5, 2018, https://www.brennancenter.org/blog/everybody-loves-redistricting-reform.
[201] The criteria are based on best practices as developed by a number of civil rights and good government groups that study redistricting. See "Redistricting Principles for a More Perfect Union," Common Cause, accessed Feb. 12, 2019, https://www.commoncause.org/redistricting-principles-for-a-more-perfect-union/#.
[202] There are no federal redistricting-specific regulations beyond the requirement that districts be single member and equally populated. For racial and language minorities, there are also protections available under the Equal Protection Clause and the Voting Rights Act.

IV. Election Security

The Elections Security Act, in Titles I and III of H.R. 1, would take critical steps to dramatically improve security and reliability of our election infrastructure.

In the last two years, we learned disturbing details about attacks against American election infrastructure. Foreign adversaries and cyber criminals are alleged to have successfully breached state voter registration systems[203] and election night results reporting websites.[204] Attacks against election systems across the globe give us reason to fear this could be the tip of the iceberg, and that we must guard against even more ambitious efforts in the future.[205] Our intelligence community continues to warn that "numerous actors are regularly targeting election infrastructure."[206] Although we may have escaped a serious cyber breach in the 2018 midterms, as Christopher Krebs of the Department of Homeland Security put it, "the big game we think for the adversaries is probably 2020."[207]

Despite these clear threats, thirteen states continue to use voting machines that have no paper backup (which security experts have consistently argued is a minimum defense necessary to detect and recover from cyberattacks);[208] few states regularly review their paper backups to audit their election results;[209] private voting system vendors are not required to report security breaches which often leaves our election administrators and the public in the dark;[210] and election officials across the country say they lack the resources to implement critical election

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[203] Rick Pearson, "State Officials Say Russian Hackers Stole 76k Illinois Voters' Info in 2016, not 500K," *Chicago Tribune*, August 8, 2018, https://www.chicagotribune.com/news/local/politics/ct-met-illinois-elections-board-russia-2016-election-hacking-20180808-story.html.

[204] Tyler Whetstone, "Knox County election night cyberattack was smokescreen for another attack," *Knox News*, May 17, 2018, https://www.knoxnews.com/story/news/local/2018/05/17/knox-county-election-cyberattack-smokescreen-another-attack/620921002/.

[205] Lawrence Norden and Ian Vandewalker, *Securing Elections from Foreign Interference*, Brennan Center for Justice, 2017, 7, *available at* https://www.brennancenter.org/publication/securing-elections-foreign-interference.

[206] Pete Williams and Pete Dilanian, "DHS Finds Increasing Attempts to Hack U.S. Election Systems Ahead of Midterms," *NBC News*, Oct. 15, 2018, https://www.nbcnews.com/politics/national-security/dhs-finds-increasing-attempts-hack-u-s-election-systems-ahead-n920336.

[207] Colleen Long and Michael Balsamo, "Cybersecurity Officials Start Focusing on the 2020 elections," *Associated Press*, November 8, 2018, https://www.apnews.com/cfaa16f6a86349bebc16e0633d6214dd.

[208] Lawrence Norden and Wilfred U. Codrington III, Brennan Center for Justice, "America's Voting Machines at Risk – An Update," Mar. 8, 2018, https://www.brennancenter.org/analysis/americas-voting-machines-risk-an-update; *see also* Dustin Volz and Patricia Zengerle, "Inability to Audit U.S. elections a 'National security Concern': Homeland Chief," *Reuters*, Mar. 21, 2018, https://www.reuters.com/article/us-usa-trump-russia-security/inability-to-audit-u-s-elections-a-national-security-concern-homeland-chief-idUSKBN1GX200; *see also Securing the Vote: Protecting American Democracy*, National Academies of Sciences, Engineering, and Medicine, 2018.

[209] Chris Deluzio, Brennan Center for Justice, "A Smart and Effective Way to Safeguard Elections," last modified July 25, 2018, https://www.brennancenter.org/blog/smart-and-effective-way-safeguard-elections; Lawrence Norden, Aaron Burstein, Joseph Lorenzo Hall, and Margaret Chen, *Post-Election Audits: Restoring Trust in Elections*, Brennan Center for Justice and Samuelson Law, Technology & Public Policy Clinic, 2007, *available at* https://www.brennancenter.org/publication/post-election-audits-restoring-trust-elections.

[210] Nicole Perlroth, Michael Wines and Matthew Rosenberg, "Russian Election Hacking Efforts, Wider Than Previously Known, Draw Little Scrutiny," *New York Times*, Sept. 1, 2017, https://www.nytimes.com/2017/09/01/us/politics/russia-election-hacking.html.

security measures.[211] Unfortunately, our election security is only as strong as our weakest link.

This Act would dramatically improve the security and resilience of our nation's election administration infrastructure by replacing paperless voting systems; promoting the use of risk-limiting audits; adding electronic poll books to the list of voting systems subject to security standards; regulating election system vendors; and ensuring a consistent stream of dedicated election security funding.

A. Replacing Paperless Voting Systems (Title I, Subtitle F)

First and foremost, the Act would mandate the replacement of all paperless electronic voting machines with machines that require an individual paper record of each vote. Top security experts—from the National Academies of Sciences, Engineering and Medicine, the national intelligence community, academia and industry—agree that replacing paperless voting systems is a top priority.[212] This step is critical to improving election security because, as the National Academies put it, "[p]aper ballots form a body of evidence that is not subject to manipulation by faulty software or hardware and … can be used to audit and verify the results of an election." Without that record and check, software manipulation or a bug could change an election result without detection. Further, as Virginia showed in 2017 when it was forced to replace paperless systems just months before a high-profile gubernatorial election after learning of serious security vulnerabilities in its systems, this transition can easily be accomplished in the timeframe provided in this Act.[213]

B. Supporting Risk Limiting Audits (Title III, Part 2)

The Act would also provide funds for states to implement risk-limiting audits of their elections. Risk-liming audits are considered the "gold standard" of post-election audits because they efficiently provide a high level of statistical confidence in the reported election outcome.[214] While paper records will not prevent programming errors, software bugs, or the insertion of corrupt software into voting systems, risk-limiting audits use these paper records and are

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[211] Lawrence Norden and Christopher Famighetti, *America's Voting Machines at Risk*, Brennan Center for Justice, 2015, 5, *available at* https://www.brennancenter.org/publication/americas-voting-machines-risk.

[212] *Securing the Vote: Protecting American Democracy*, 5; Lawrence Norden, *The Machinery of Democracy: Protecting Elections In An Electronic World*, Brennan Center for Justice, 2006, *available at* https://www.brennancenter.org/publication/machinery-democracy-protecting-elections-electronic-world-0; *Russian Targeting of Election Infrastructure During the 2016 Election: Summary of Initial Findings and Recommendations*, U.S. Senate Select Committee on Intelligence, 2018; Olivia Beavers, "DHS Chief Calls on Officials in all 50 States to Have 'Verifiable' Ballots by 2020 Election," *The Hill*, August 22, 2018, https://thehill.com/policy/cybersecurity/403148-dhs-chief-calls-on-election-officials-in-all-50-states-to-have; *see also* Norden and Famighetti, *America's Voting Machines at Risk*.

[213] Jenny Portnoy, "Va. Board of Elections Votes to Decertify Some Voting Machines," *Washington Post*, April 14, 2015, https://www.washingtonpost.com/local/virginia-politics/va-board-of-elections-votes-to-decertify-some-voting-machines/2015/04/14/46bce444-e2a6-11e4-81ea-0649268f729e_story.html?utm_term=.7e6be4bfcc0a; Laura Vozzella, "Virginia Scraps Touch-screen Voting as Election for Governor Looms," *Washington Post*, Sept. 8, 2017, https://www.washingtonpost.com/local/virginia-politics/virginia-scraps-touch-screen-voting-machines-as-election-for-governor-looms/2017/09/08/e266ead6-94fe-11e7-89fa-bb822a46da5b_story.html.

[214] Mark Lindeman and Philip B. Stark, "A Gentle Introduction to Risk-Limiting Audits," *IEEE Security and Privacy, Special Issue on Electronic Voting* (2012): 1, *available at* https://www.stat.berkeley.edu/~stark/Preprints/gentle12.pdf.

designed to detect and correct any election outcomes impacted by such abnormalities. They are quickly growing in popularity. Two states already mandate them for use in the 2020 election,[215] and election officials in over a dozen jurisdictions across the country have either piloted them in the last year or will do so in 2019.[216]

C. Expanding Definition of Voting Systems to Include Electronic Poll Books (Title III, Part 3)

Also important, the Act would expand the existing voting equipment testing and certification process to include electronic poll books. Although poll books handle some of our most sensitive information, they have not been subject to even voluntary federal certification standards. As multiple states with substantive election IT divisions already have state electronic pollbook certification standards,[217] a voluntary federal certification standard is sorely needed.

D. Regulating Election System Vendors (Title III, Part 8)

Currently, there is almost no federal oversight of private vendors that design and maintain the election systems that store our personal information, tabulate our votes, and communicate important election information to the public. The Brennan Center has documented numerous instances of voting system failures that could have been prevented had vendors notified their clients of previous failures in other jurisdictions using the same voting equipment.[218] Among other things, the Act would require that any vendors who receive payment from grants made under the Act (1) certify that the infrastructure they sell to local election jurisdictions is developed and maintained in accordance with cybersecurity best practices, (2) certify that their own information technology is maintained in accordance with cybersecurity best practices, and (3) promptly report any suspected cybersecurity incident directed against the goods and services they provide under these grants.

E. Ensuring a Consistent Stream of Federal Funding to Secure our Election Infrastructure.

The Act provides funds for critical security measures, both to secure our elections ahead of 2020, and also to cover maintenance and upgrades to voting systems for years to come. These resources are necessary since the race to secure our elections is one without a finish line, and our

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[215] *Securing the Nation's Voting Machines A Toolkit for Advocates and Election Officials*, Brennan Center for Justice, *available at* https://www.brennancenter.org/sites/default/files/publications/Securing%20the%20Nation%27s%20Voting%20Machines_.pdf.

[216] Making Every Vote Count: A Practical Guide to Risk-Limiting Audits, https://youtu.be/gMbz0_dizoA.

[217] See, *e.g.*, Cameron Glenn Sasnett, *Electronic Pollbook Certification Procedures & System Requirements*, Virginia State Board of Elections Election Administration and Compliance Division, 2015, *available at* https://www.eac.gov/assets/1/28/Virginia%20EPB%20Certification%20Procedures%20and%20System%20Requirements%20REV-05151.pdf; *Standards Governing the Examination and Certification of Electronic Poll Books in Use in Ohio*, Ohio Board of Voting Machine Examiners, Feb. 6, 2014, https://www.eac.gov/assets/1/28/Final%20-%20Standards%20for%20the%20Examination%20and%20Certification%20of%20Electronic%20Pollbooks%20for%20Use%20in%20Ohio%20Elections1.pdf.

[218] Lawrence Norden, *Voting System Failures: A Database Solution*, Brennan Center for Justice, 2010, *available at* https://www.brennancenter.org/publication/voting-system-failures-database-solution.

adversaries will undoubtedly change and advance their methods of attack. The responsibility for funding elections must be shared among local, state, and federal governments, and the Act ensures that the federal government pays its fair share of the ongoing cost of voting systems, with a consistent stream of federal funding for states to procure and maintain secure equipment and implement state-of-the-art security measures to ensure the integrity of our elections.

The election security measures in H.R. 1 would not only make our election infrastructure more secure, but it would also help reduce the unconscionably long lines that so many voters experience every election. That would go a long way toward restoring Americans' confidence in our elections. We look forward to continuing to work with Congress to ensure sufficient federal resources for state and local election officials and sufficient national standards to ensure that funding is spent effectively.

V. Ethics (Titles VII-X)

H.R. 1 would establish stronger ethics rules for all three branches of government. Its policies are essential first steps toward strengthening ethics and accountability. The values that undergird our system of representative government are being tested like never before. Ethical constraints on self-dealing at the highest levels of government are eroding.[219] To reverse this process, it is vital that Congress put forward bold reforms to help ensure that officials act for the public good rather than private gain.

As detailed in the testimony of Brennan Center Senior Counsel and Spitzer Fellow Rudy Mehrbani before the House Committee on Oversight and Reform, the Brennan Center strongly supports all the Act's ethics reforms, especially its measures to increase the independence and authority of the Office of Government Ethics, provide better transparency for top officials, and slow the "revolving door" between government and industry. These are especially valuable changes.[220] We also strongly support the Act's requirement that the Judicial Conference of the United States develop a code of conduct that includes Supreme Court justices, as explained in more detail in a letter my colleagues and I sent to the House Judiciary Committee on January 29, 2019.[221] We look forward to continuing to work with Congress on other much-needed reforms.[222]

VI. Authority of Congress

Finally, Congress unequivocally has the authority to enact all the democracy reforms set forth in Act, especially under Article I, Section 4 of Constitution—known as the Elections

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[219] Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law and Democracy, 2018, 2.
[220] Rudy Mehrbani, *For the People Act of 2019: Hearing on H.R. 1, "Strengthening Ethics Rules for the Executive Branch," Before the House Comm. On Oversight and Reform*, Feb. 6, 2019, *available at* https://www.brennancenter.org/analysis/testimony-support-people-act ("*Mehrbani Testimony*").
[221] *H.R. 1, The For the People Act: Letter to the Committee on the Judiciary*, 116th Cong. (2019) (letter from Wendy R. Weiser, Myrna Pérez, Daniel I. Weiner, Max Feldman), *available at* https://www.brennancenter.org/analysis/letter-house-judiciary-committee-support-hr-1-people-act.
[222] *Mehrbani Testimony*, 14-15.

Clause. The Elections Clause empowers Congress, "at any time," to "make or alter" any regulations for federal elections.[223]

With the exception of a 1921 case that has since been overturned, the Supreme Court has consistently interpreted the Elections Clause to endow Congress with sweeping power to regulate the time, place, and manner of elections.[224] As recently as 2013, the Court said, in an opinion by Justice Scalia, that Congress's power under the Elections Clause is so broad that it includes "authority to provide a complete code for congressional elections[.]'"[225] Accordingly, the Supreme Court has found that the Elections Clause authorizes legislation related to voter registration,[226] redistricting,[227] campaign finance,[228] and corruption in presidential elections.[229]

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[223] The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. Const. art. I, § 4, cl. 1

[224] See, *e.g.*, *Inter Tribal Council*, 570 U.S. at 9 ("The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'") (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1879)); *Ex parte Yarbrough*, 110 U.S. 651, 661–62 (1884) ("it is not doubted" "that congress can, by law, protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud"); *United States v. Mosley*, 238 U.S. 383, 386 (1915) ("We regard it as . . . unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."); *Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."); *United States v. Classic*, 313 U.S. 299, 319–20 (1941) ("Unless the constitutional protection of the integrity of 'elections' extends to primary elections, Congress is left powerless to effect the constitutional purpose. . . . Words, especially those of a constitution, are not to be read with such stultifying narrowness. The words of ss 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it."); *Buckley*, 424 U.S. at 13 n.16 (recognizing that *Classic* overturned *Newberry v. United States*, 256 U.S. 232 (1921), which had held that the Elections Clause did not apply to primary elections); *Oregon v. Mitchell*, 400 U.S. 112, 121 (1970) ("The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts."); *Foster v. Love*, 522 U.S. 67, 72 n.2 (1997) ("The [Elections] Clause gives Congress 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'") (quoting *Smiley*, 285 U.S. at 366).

[225] *Inter Tribal Council*, 570 U.S. at 8–9 (quoting *Smiley*, 285 U.S. at 366).

[226] *Id*.

[227] *Vieth*, 541 U.S. at 275 (stating that the Elections Clause "permit[s] Congress to 'make or alter'" the "districts for federal elections"); *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964) ("Speakers at the ratifying conventions emphasized that the House of Representatives was meant to be free of the malapportionment then existing in some of the State legislatures . . . and argued that the power given Congress in Art. I, s 4, was meant to be used to vindicate the people's right to equality of representation in the House.") (citations omitted).

[228] *Buckley*, 424 U.S. at 13 ("The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case.").

[229] *Id.* 132 ("This Court has also held that it has very broad authority to prevent corruption in national Presidential elections.") (citing *Burroughs v. United States*, 290 U.S. 534 (1934)).

There is thus no question that most of the Act's provisions fall squarely within Congress's authority over federal elections. Some, such as Congress's power to strengthen the Voting Rights Act and to restore voting rights to individuals with past convictions under Title I, Subtitle E, are also rooted in authority granted to it under the Fourteenth and Fifteenth Amendments.[230]

In fact, the Act embodies the Framers' central goal in establishing the Elections Clause—ensuring that Congress can override efforts by states to manipulate the federal voting process.[231] As they drafted the Constitution, the Framers were concerned that states, left to their own devices, would suppress or skew the vote. For example, at the Constitutional Convention, James Madison urged that, without the Elections Clause, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed."[232] The Framers therefore designed the Elections Clause to prevent states from manipulating election outcomes and to prevent the development of factions within states that might "entrench themselves or place their interests over those of the electorate."[233] The Framers deliberately granted wide-ranging authority under the Elections Clause to ensure that Congress would be able to combat even those state abuses of power that were unforeseeable at the time.[234] Thus, as Justice Scalia recognized, the states' power to regulate federal elections has always been subject to federal law.[235]

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Voters sent a clear message in 2018: they want to see Congress tackle these problems with bold solutions to ensure that all Americans can participate in the political process and have their voices heard in the halls of government. Now it is up to elected leaders to deliver. H.R. 1 is a down-payment on the promise of a democracy that works for everyone. We urge its prompt passage.

Thank you.

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[230] *Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); *Mitchell*, 400 U.S. at 121, 124 (1970).
[231] The Avalon Project: Documents in Law, History and Diplomacy, "Federalist No. 59," accessed Feb. 11, 2019, http://avalon.law.yale.edu/18th_century/fed57.asp.
[232] Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1941), 2:241.
[233] *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015).
[234] At the Constitutional Convention, James Madison explained that the Elections Clause uses "words of great latitude" because "it was impossible to foresee all the abuses that might be made of the [states'] discretionary power." Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1941), 2: 240.
[235] *Inter Tribal Council*, 570 U.S. at 14–15 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)).

BRENNAN CENTER FOR JUSTICE

Testimony of

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Hearing on Protecting the Right to Vote: Best and Worst Practices

The Committee on Oversight and Reform, U.S. House of Representatives

Subcommittee on Civil Rights and Civil Liberties

May 1, 2019

Chairman Raskin, Ranking Member Roy, and members of the Committee:

Thank you for the opportunity to submit this testimony. The Brennan Center for Justice strongly supports this Committee's examination of voter suppression in the states and encourages efforts to protect every eligible American's right to vote.[1]

State voter suppression is a real, persistent, and urgent threat to our democracy. Since 2010, at least half of the states in our nation have passed new policies that make it harder for people to register and vote. These practices include cutbacks to early voting, new obstacles to voter registration, and onerous voter identification requirements, among others.

Over the same period, we have seen some states implement new, innovative policies to expand access to the ballot. For example, in the past four years, 15 states and the District of Columbia have adopted automatic voter registration. Already this year, New York has passed reforms including early in-person voting, pre-registration for 16- and 17-year olds, and portability of voter registration records, New Mexico has passed same-day voter registration, Virginia has passed early in-person voting, and numerous other states are moving pro-voter reforms through their legislatures. In addition, earlier this year, the House passed the For the People Act (H.R. 1), which contains solutions to many of the ways in which voters are disenfranchised these days.

[1] This written testimony references, and incorporates: Testimony of Wendy Weiser before the House Committee on Administration, Feb. 14, 2019, https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/committee_docs/Weiser_testimony_for_House_Administration_hearing_on_HR1_0.pdf; Supplemental Written Testimony of the Brennan Center for Justice submitted to the Committee on House Administration, Mar. 5, 2019, https://www.brennancenter.org/sites/default/files/legal-work/2019.3.5_Supplemental%20Written%20Testimony%20DRA.pdf; Testimony of Rudy A. Mehrbani before the House Committee on Oversight and Reform, Feb. 6, 2019, https://www.brennancenter.org/analysis/testimony-support-people-act. Those documents are attached as Appendices A–C.

In short, voter suppression in the states continue, but there are bright spots upon which much can be built. My testimony focuses on two perennial problems that voters face—outdated voter registration systems and voter roll purges—along with some of the efforts to restrict voting rights that state legislatures have advanced so far this year. I also briefly lay out some of the successes of automatic voter registration. I additionally submit some relevant testimonies, reports, and analyses performed by the Brennan Center to assist the Committee in its next steps.

Outdated Voter Registration Systems and Automatic Voter Registration

Outdated voter registration systems may not garner much public attention, but they present one of the most consequential obstacles to free and fair elections in our nation today. One in four eligible Americans is not registered to vote.[2] Millions of Americans who *are* registered have trouble voting on Election Day because of registration flaws.[3] In too much of the country, voter registration still largely relies on error-prone pen and paper—in 2012, the Pew Center on the States estimated that roughly one in eight registrations in America is invalid or significantly inaccurate.[4] These problems contribute to low voter turnout.[5]

Automatic voter registration ("AVR")—a policy first proposed by the Brennan Center more than a decade ago—addresses much of these problems, offering a streamlined, cost-effective, and more accurate approach to voter registration. In an AVR system, every eligible citizen who interacts with designated government agencies is automatically registered to vote, unless they decline registration.

AVR has two key components. First, voter information is transferred to election officials electronically, instead of using paper forms and snail mail. Second, AVR switches from "opt-in" registration, where applicants have to affirmatively request to register to vote, to "opt-out" registration, where eligible citizens who apply for services at designated government agencies are registered to vote, unless they decline registration. Everyone is offered a clear opportunity to decline, and no one is registered against their will.

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[2] Pew Center on the States, *Inaccurate, Costly and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade*, 2012, 1, https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf; *see also* U.S. Census Bureau, *Voting and Registration in the Election of 2016, 2017*, Tbl. 1, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

[3] A Caltech/MIT study found that in 2008, approximately 3 million people tried to vote but could not because of registration problems, and millions more were thwarted by other issues. *See* R. Michael Alvarez et al., *2008 Survey of the Performance of American Elections*, (2009), 59, https://elections.delaware. gov/pdfs/SPAE_2008.pdf; *see also* Stephen Ansolabehere, Testimony Before the U.S. Senate Rules Committee 19 (Mar. 11, 2009); Data from 2012 similarly demonstrates that millions of voters experienced registration problems at the polls. Charles Stewart III, *2012 Survey of the Performance of American Elections: Final Report, 2013*, 70, http://dvn.iq.harvard.edu/dvn/dv/measuringelections.

[4] Pew Center on the States, *Inaccurate, Costly and Inefficient*, 2012.

[5] According to a 2001 commission chaired by former Presidents Ford and Carter, "[t]he registration laws in the United States are among the most demanding in the democratic world … [and are] one reason why voter turnout in the United States is near the bottom of the developed world." *See* Carter and Ford: National Commission on Election Reform, Reports of the Task Force on the Federal Election System, 2001, 1–3. In too many parts of America this is still true.

AVR works. The Brennan Center, in a first-of-its-kind study, evaluated the impact of AVR on seven states (and Washington, D.C.) that have been operating the program long enough for meaningful results to be available.[6] The results are clear: AVR substantially increases registration rates, no matter the size the of state, its political leanings, or the details of the policy's implementation. Among the states studied, AVR caused increases in the number of registrations ranging from nine to 94 percent.[7] If adopted fully nationwide, AVR could add millions of new eligible voters to the rolls.[8]

Lawmakers and voters are increasingly recognizing that AVR is a best practice in election administration. In just the last four years, 15 states and the District of Columbia have enacted AVR—many with strong bipartisan support. The House passed AVR as part of the H.R. 1 in March 2019.

Outdated registration systems represent a critical, but too often overlooked, obstacle to voting. We encourage this Committee to examine the status of state voter registration systems to facilitate achievable improvements for American voters. And we encourage the Committee to take all steps necessary to accomplish adoption of AVR nationwide.

Improper Voter Purges

Under federal law, every state is responsible for maintaining accurate statewide voter registration lists. This maintenance includes voter roll purges—the sometimes-flawed process by which election officials attempt to remove from voter registration lists the names of those ineligible to vote. When done correctly, purges ensure the voter rolls are accurate and up-to-date. When done incorrectly, purges disenfranchise legitimate voters—often when it is too close to an election to rectify the mistake—and cause confusion and delay at the polls.

Purges tend be problematic for a few reasons. As an initial matter, they happen behind closed doors. As a result, voters often do not know they have been purged until they show up to cast a ballot on Election Day. Additionally, states often rely on faulty data and poor processes when determining who should be purged from the rolls.

Voter purges are on the rise. Between 2014 and 2016, states removed almost 16 million voters from the rolls—almost 4 million more than between 2006 and 2008.[9] This growth in the number of removed voters represented an increase of 33 percent—far outstripping growth in both total registered voters (18 percent) and total population (six percent). Brennan Center research suggests that the Supreme Court's 2013 decision in *Shelby County v. Holder* has had a

[6] Kevin Morris & Peter Dunphy, *AVR Impact on State Voter Registration*, Brennan Center for Justice, 2019, https://www.brennancenter.org/sites/default/files/publications/2019_04_AVR_Report_Final_0.pdf; *Voting Laws Roundup 2019*, Brennan Center for Justice, Apr. 26, 2019. This testimony incorporates by reference this report, attached as Appendix D, and its additional findings.
[7] *Id.* at 1.
[8] Brennan Center for Justice, The Case for Automatic Voter Registration, 2016, https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf.
[9] Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice 2018, https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.pdf. This testimony incorporates by reference this report, attached as Appendix E, and its additional findings.

profound and negative impact: for the two election cycles between 2012 and 2016, jurisdictions no longer subject to federal preclearance had purge rates significantly higher than jurisdictions that were not subject to pre-clearance in 2013.[10] The Brennan Center calculated that 2 million fewer voters would have been purged over those four years if jurisdictions previously subject to federal preclearance had purged at the same rate as those jurisdictions not subject to that provision in 2013.[11]

Improper purges are regrettably common. Earlier this year, for example, a federal court halted Texas's recent attempt to purge approximately 95,000 alleged noncitizens from the rolls.[12] Texas's plan relied on stale data, weak comparisons between databases, and unfounded claims of voter fraud.[13] In 2016, New York election officials erroneously deleted more than 200,000 names from the voter rolls, with no public warning and little notice to those who had been purged.[14] The same year, the Arkansas Secretary of State sent the state's 75 county clerks more than 7,700 names to be removed because of supposed felony convictions. Yet the roster was highly inaccurate: it included people who had never been convicted of a felony as well as persons with past convictions whose voting rights had been restored.[15] In Virginia in 2013, nearly 39,000 voters were removed from the rolls when the state relied on a faulty database—the Interstate Voter Registration Crosscheck Program—to delete voters who allegedly moved out of the commonwealth. Error rates in some counties ran as high as 17 percent.[16]

These kinds of improper purges, while common, are not inevitable. List maintenance is an important part of election administration, but it must be done in a way that protects eligible voters. The Brennan Center encourages the Committee to study state and local purge practices, in order to identify and rectify the worst voter purge practices. And we applaud the House for passing H.R. 1, which would put some additional protective guardrails on purging.

Bills Restricting Voting Access in 2019

Thus far in 2019, there has been an uptick in state activity around measures to restrict voting access. These measures represent the continuation of a decade-long effort in some states that make it more difficult to vote.

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[10] *Id.* at 3.
[11] *Id.* at 4; *see also* Kevin Morris & Myrna Pérez, *Florida, Georgia, North Carolina Still Purging Voters at High Rates*, Brennan Center for Justice, Oct. 1, 2018, https://www.brennancenter.org/blog/florida-georgia-north-carolina-still-purging-voters-high-rates. This testimony incorporates by reference this article, attached as Appendix F, and its additional findings.
[12] Texas reached a settlement with civil rights organizations on April 26, 2019, agreeing to withdraw its flawed purge list and to instruct local officials to reinstate any voter registrations that were canceled as part of the process. *See* Sam Levine, *Texas To Halt Botched Effort To Find Noncitizens On Its Voter Rolls, Implement Fixes*, HuffPost (Apr. 26, 2019), https://www.huffpost.com/entry/texas-non-citizens-voter-rolls_n_5cc36062e4b08e4e3481ff72.
[13] Sean Morales-Doyle & Rebecca Ayala, *There's Good Reason to Question Texas' Voter Fraud Claims*, Brennan Center for Justice, Jan. 29, 2019, https://www.brennancenter.org/blog/theres-good-reason-question-texas-voter-fraud-claims. This testimony incorporates by reference this article, attached as Appendix G, and its additional findings.
[14] Brater et al., *supra* note 9, at 5–6.
[15] *Id.* at 5.
[16] *Id.* at 8.

This year, in particular, state legislatures have introduced and advanced an unusual number of bills that would restrict efforts by civic groups to assist voters, in registering, applying to vote absentee, or casting a ballot—potentially as a backlash to high voter turnout in the 2018 midterms.[17] The Tennessee legislature, for example, has passed wide-ranging new restrictions on assistance of voter registration, including new registration and training requirements on registration groups, and civil and criminal penalties for submitting too many "deficient" voter registration forms (HB 1079). Similarly, the Texas Senate has passed a bill that significantly increases penalties and risk of prosecution for election code violations by voters; permits poll watchers to inspect voter ID; and imposes new restrictions on people assisting voters with physical limitations or who cannot read the ballot, among other measures (SB 9).

In addition, Florida is poised to passed legislation (HB 7089 / SB 7086) that would cut back on the historic change that voters passed overwhelmingly in November to the state's felony disenfranchisement law by ending permanent disenfranchisement.[18] Both the Florida House and Senate bills would disenfranchise otherwise eligible voters by preventing an individual's rights from being restored until they paid off certain financial obligations. The House bill is even more draconian and would likely result in substantially more people being disenfranchised.

These are just a few examples of attempts by state legislatures to limit access to the ballot so far this year, and they underscore the continuing need for study, investigation, and review from this Committee.

In conclusion, it is precisely within the Committee's purview to study and identify state policies and practices that impermissibly infringe on citizens' right to vote in federal elections. It is well-established that this Committee has broad investigatory authority.[19] Additionally, Congress has robust authority to regulate the federal elections process pursuant to the Constitution's Elections Clause.[20] We enthusiastically support this Committee examining state efforts to undermine voting rights, and the Brennan Center urges this Committee and the House to continue to exercise their powers to ensure that all Americans elections are free, fair, and accessible.

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[17] *Voting Laws Roundup 2019*, Brennan Center for Justice, Apr. 26, 2019, https://www.brennancenter.org/analysis/voting-laws-roundup-2019. This testimony incorporates by reference this analysis, attached as Appendix H, and its additional findings.
[18] Makeda Yohannes, *Florida Lawmakers Attempt to Weaken Voter Rights Restoration*, Brennan Center for Justice, Mar. 20, 2019, https://www.brennancenter.org/blog/florida-lawmakers-attempt-weaken-voter-rights-restoration. This testimony incorporates by reference this analysis, attached as Appendix I, and its additional findings.
[19] House Rule X, clauses 1, 4.
[20] U.S. Const. art. I, § 4, cl. 1; *see also* Testimony of Wendy Weiser before the House Committee on Administration, Feb. 14, 2019, 36-38.

Testimony of

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

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

Subcommittee on the Constitution, Civil Rights and Civil Liberties

September 10, 2019

Thank you for the opportunity to submit this testimony in support of restoring the Voting Rights Act ("VRA" or "Act"), a law that has been an important guardian of American democracy. The Brennan Center for Justice at NYU School of Law strongly supports this Committee's important efforts to restore and revitalize the Act. My oral testimony will focus on voter purges. In this written testimony, I also highlight additional problems caused by the Supreme Court's *Shelby County v. Holder* decision[2] and the concomitant need for an updated VRA.

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

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

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[2] 570 U.S. 529 (2013) (Ex. A).
[3] U.S. Dep't of Justice, "The Effect of the Voting Rights Act," last modified June 19, 2009, https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0 (Ex. A).
[4] *Shelby Cty.*, 570 U.S. at 556-57.
[5] *Id*. at 536-40.
[6] *Id.* at 554, 557.

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

I. The VRA and *Shelby County*

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

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

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

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

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

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

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

[11] *Shelby Cty.*, 570 U.S. at 548.

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

II. Direct Burdens on Voting Since *Shelby County*

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

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

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

- Within hours of the Court's decision, Texas moved forward with implementing what was then the nation's strictest voter identification law, which had been denied preclearance because of its discriminatory impact.[14] Years and years of expensive and burdensome litigation by many dozen lawyers resulted in the federal courts striking down the law as unlawfully discriminatory on two different occasions.[15] But even after all that expense and time, Texas passed a different photo ID law in 2017.[16]

- Mississippi also announced that it would move to implement its voter ID law the same day the Court's decision was handed down.[17] The state had previously submitted the policy for preclearance but had not obtained approval to implement it.[18]

- The day after the *Shelby County* decision, Alabama moved forward with its strict voter ID law. The state passed the law in 2011 and would have been required to obtain preclearance, but state officials never submitted the bill for approval.[19] The law is subject to an ongoing lawsuit in the federal courts. [20]

- Within two months after *Shelby County*, North Carolina enacted a law that imposed a strict photo ID requirement, cut back on early voting, and reduced the window for voter

[13] Weiser & Feldman, *supra* note 7; Brennan Center for Justice, "New Voting Restrictions in America," *supra* note 7; Brennan Center for Justice, "Voting Laws Roundup 2019," *supra* note 7; Wendy Weiser and Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice, 2011, *available at* http://www.brennancenter.org/publication/voting-law-changes-2012 (Ex. B).
[14] Lopez, *supra* note 12.
[15] Brennan Center for Justice, "Texas NAACP v. Steen (consolidated with Veasey v. Abbott)," last modified Sept. 21, 2018, https://www.brennancenter.org/legal-work/naacp-v-steen; *Veasey v. Abbott*, 265 F. Supp. 3d 684, 693 (S.D. Tex. 2017), *rev'd in part*, 888 F.3d 792 (5th Cir. 2018); *Veasey v. Abbott*, 249 F. Supp. 3d 868, 875 (S.D. Tex.), *reconsideration denied*, 265 F. Supp. 3d 684 (S.D. Tex. 2017), *rev'd in part*, 888 F.3d 792 (5th Cir. 2018); *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *aff'd in part, vacated in part, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *on reh'g en banc*, 830 F.3d 216 (5th Cir.), *and aff'd in part, vacated in part, rev'd in part sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (Ex. E).
[16] Brennan Center for Justice, "Texas NAACP v. Steen (consolidated with Veasey v. Abbott)," *supra* note 15.
[17] Press Release, Secretary of State of Mississippi, Statement on Supreme Court Voting Rights Act Opinion, June 25, 2013, https://www.sos.ms.gov/About/Pages/Press-Release.aspx?pr=422 (Ex. F).
[18] Lopez, *supra* note 12.
[19] *Ibid*.
[20] NAACP LDF, "Case: Greater Birmingham Ministries v. Alabama," last accessed Sept. 3, 2019, https://www.naacpldf.org/case-issue/greater-birmingham-ministries-v-alabama/ (Ex. G).

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

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

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

- Georgia has repeatedly implemented—and repeatedly been forced to alter—a requirement that voter registration forms match exactly with other state records in order for an individual to be registered.[23] In 2017, the state enacted a "no match, no vote" law, even though only months earlier, the secretary of state agreed in a court settlement to stop a similar procedure that had blocked tens of thousands of registration applications.[24] The new law drew a court challenge and a federal district court entered a preliminary injunction prior to the 2018 election, halting its effect with respect to certain impacted voters.[25] The state subsequently enacted a law that largely ended the policy.[26]

- Florida this year passed a law cutting back on the expansive changes made by Amendment 4—a constitutional amendment that restores voting rights to many Floridians with a felony conviction and that was passed overwhelmingly by Florida voters in November 2018. The new law is subject to a series of federal court challenges.[27]

- North Carolina lawmakers enacted a law in 2018, initially introduced in the middle of the night, cutting back early voting opportunities.[28] They also put a constitutional amendment enshrining a photo ID requirement for voting on the 2018 ballot, which subsequently passed, and then rushed to pass implementing legislation prior to a change

[21] Lopez, *supra* note 12.
[22] *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (Ex. H).
[23] Jonathan Brater and Rebecca Ayala, "What's the Matter with Georgia?." Brennan Center for Justice, Oct. 12, 2018, https://www.brennancenter.org/blog/whats-matter-georgia (Ex. I).
[24] *Ibid.*; Press Release, Lawyers' Committee for Civil Rights Under Law, "Voting Advocates Announce a Settlement of 'Exact Match' Lawsuit in Georgia," Feb. 10, 2017, https://lawyerscommittee.org/voting-advocates-announce-settlement-exact-match-lawsuit-georgia/ (Ex. J).
[25] *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (Ex. J).
[26] Press Release, Lawyers' Committee for Civil Rights Under Law, "Georgia Largely Abandons Its Broken 'Exact Match' Voter Registration Process, Apr. 5, 2019, https://lawyerscommittee.org/georgia-largely-abandons-its-broken-exact-match-voter-registration-process/ (Ex. J).
[27] Brennan Center for Justice, "Gruver v. Barton (consolidated with Jones v. DeSantis)," last modified Aug. 3, 2019, https://www.brennancenter.org/legal-work/gruver-v-barton; Complaint, *Gruver v. Barton*, No. 1:19-cv-00121 (N.D. Fla. June 28, 2019) (Ex. K). The Brennan Center represents individual returning citizens, the Florida NAACP, and the League of Women Voters of Florida, along with co-counsel at the ACLU, the ACLU of Florida, and the NAACP Legal Defense and Education Fund in one of the cases. That case has been consolidated with others.
[28] Max Feldman, "A Familiar Scene in North Carolina as State Lawmakers Introduce New Voting Restrictions," Brennan Center for Justice, June 15, 2018, https://www.brennancenter.org/blog/familiar-scene-in-north-carolina-as-state-lawmakers-introduce-new-voting-restrictions (Ex. H).

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

- Texas, as described above, implemented its strict photo ID law in 2013. After it was repeatedly struck down, the state enacted a new law in 2017. While an improvement over the law that was implemented in 2013, the new law is still harsher than the temporary, court-ordered ID requirements that were in place for the 2016 election.[31] In addition, this year, the state enacted a new law restricting the use of mobile early voting units.[32]

- Virginia enacted a new photo ID law in 2013, which went into effect in 2014. The state also enacted new limits on third-party voter registration in 2013.[33]

- Arizona enacted a law in 2016 limiting collection of mail-in ballots and making it a felony to knowingly collect and turn in another voter's completed ballot, even with that voter's permission (with some exceptions).[34] This year, the state imposed new restrictions on access to emergency early and absentee voting and extended voter ID requirements to early voting.[35]

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

c. Voter Purges After *Shelby County*

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

[29] Lynn Bonner, "NC Senate overrides Cooper's voter ID veto," The News & Observer, Dec. 18, 2018, https://www.newsobserver.com/news/politics-government/article223216960.html (Ex. H).
[30] Max Feldman and Peter Dunphy, "The State of Voting Rights Litigation (July 2019)," Brennan Center for Justice, July 31, 2019, https://www.brennancenter.org/analysis/state-voting-rights-litigation-july-2019 (Ex. L).
[31] Brennan Center for Justice, "Texas NAACP v. Steen (consolidated with Veasey v. Abbott)," *supra* note 15.
[32] Brennan Center for Justice, "Voting Laws Roundup 2019," *supra* note 7.
[33] Brennan Center for Justice, "New Voting Restrictions in America," *supra* note 7; Brennan Center for Justice, "Voting Laws Roundup 2013," last modified Dec. 19, 2013, https://www.brennancenter.org/analysis/election-2013-voting-laws-roundup (Ex. B).
[34] Brennan Center for Justice, "New Voting Restrictions in America," *supra* note 7; Brennan Center for Justice, "Voting Laws Roundup 2016," last modified Apr. 18, 2016, https://www.brennancenter.org/analysis/voting-laws-roundup-2016 (Ex. B).
[35] Brennan Center for Justice, "Voting Laws Roundup 2019," *supra* note 7; 2019 Ariz. Legis. Serv. Ch. 15 (S.B. 1072); 2019 Ariz. Legis. Serv. Ch. 107 (S.B. 1090) (Ex. M). South Carolina also enacted a voter ID law in 2011. The law obtained pre-clearance after state officials interpreted it to be substantially less restrictive during the course of the pre-clearance litigation. See the materials collected as Exhibit U.
[36] Zachary Roth and Wendy Weiser, Brennan Center for Justice, "This Is the Worst Voter Suppression We've Seen in the Modern Era," last modified Nov. 2, 2018, http://www.brennancenter.org/blog/worst-voter-suppression-weve-seen-modern-era; Rebecca Ayala, Brennan Center for Justice, "Voting Problems 2018," last modified Nov. 5, 2018, https://www.brennancenter.org/blog/voting-problems-2018 (Ex. B).
[37] *See* Myrna Pérez, *Voter Purges*, Brennan Center for Justice 2008 1-3, https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf (explaining voter purge process) (Ex. C).

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

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

Between 2014 and 2016, states removed almost 16 million voters from the rolls—nearly 4 million more than they removed between 2006 and 2008.[39] This growth in the number of removed voters represented an increase of 33 percent, which far outstrips growth in both total registered voters (18 percent) and total population (six percent). Brennan Center research suggests that *Shelby County* has had a profound and negative impact: for the two election cycles between 2012 and 2016, jurisdictions that were previously subject to federal preclearance had purge rates significantly higher than other jurisdictions.[40] We calculated that 2 million fewer voters would have been purged in that period if previously covered jurisdictions had purged at the same rate as other jurisdictions.[41]

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

- Earlier this year, a federal court stopped Texas's attempt to purge approximately 95,000 purported non-citizens from the voter rolls. Texas relied on stale data and weak comparisons between databases to develop its purge plan. As a result of this attempted purge, Texas' Secretary of State resigned.[42]

- In the leadup to the April 2016 primary election, New York election officials improperly removed more than 200,000 names from the voter rolls, giving little notice to those who had been purged.[43] During the September 2018 primary, some voters reported that they continued to encounter significant problems at the polls as a result of the purge.[44]

- In 2016, the Arkansas Secretary of State sent the state's county clerks more than 7,700 names to be removed from the rolls due to felony convictions. The list, however, was

[38] *See, e.g.*, *Curtis v. Smith*, 121 F. Supp. 2d 1054, 1060 (E.D. Tex. 2000); Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep't of Justice to Charlie Crist, Attorney General of Florida (Sept. 6, 2005); Letter from John R. Dunne, Asst. Att'y Gen., Civil Rights Division, U.S. Dep't of Justice to Debbie Barnes, Chairperson, Dallas County (Alabama) Board of Registrars (June 22, 1990) (interposing Section 5 objection to implementation of new purge practices) (Ex. C).
[39] Brater et al., *supra* note 8.
[40] *Id.* at 3.
[41] *Id.* at 4; *see also* Kevin Morris and Myrna Pérez, "Florida, Georgia, North Carolina Still Purging Voters at High Rates," Brennan Center for Justice, Oct. 1, 2018, https://www.brennancenter.org/blog/florida-georgia-north-carolina-still-purging-voters-high-rates (Ex. C).
[42] See the materials collected as Exhibit O.
[43] Brater et al., *supra* note 8, at 5-6.
[44] Ayala, *supra* note 38. See also the materials collected as Exhibit P.

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

- In 2013, in Virginia, nearly 39,000 voters were removed from the rolls after the state relied on a faulty database to delete voters who had allegedly moved out-of-state. In some counties, error rates ran as high as 17 percent.[46]

- The same year, Florida officials sought to purge thousands of purported non-citizens people from the rolls, but ultimately suspended the purge. When the state tried the same thing in 2012, its purge list was reduced from 180,000 supposed non-citizens to approximately 2,700. Notably, that purge list contained a disproportionate number of Latino surnames.[47]

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

III. Congress Should Act to Renew and Revitalize the VRA

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

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

[45] Brater et al., *supra* note 8, at 5. See also the materials collected as Exhibit Q.
[46] Brater et al., *supra* note 8, at 8. See also the materials collected as Exhibit R.
[47] Lopez, *supra* note 7. See also the materials collected as Exhibit S.
[48] Brater et al., *supra* note 8, at 7 (explaining that voters with common names are more likely to match with other individuals in database comparisons and that "African-American, Asian-American, and Latino voters are much more likely than Caucasians to have one of the most common 100 last names in the United States").
[49] Amended Complaint at 5, *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (No. 1:18-cv-04727); Answer at 5, *Georgia Coal.*, 347 F. Supp. 3d at 1251 (No. 1:18-cv-04727) (Ex. J).
[50] *See, e.g.*, *McCrory*, 831 F.3d at 214; *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 904-05 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019) (Ex. T); *Veasey*, 71 F. Supp. 3d at 633.

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

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

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

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

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

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

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[51] *See, e.g.*, Bentele & O'Brien, *Jim Crow 2.0?: Why States Consider and Adopt Restrictive Voter Access Policies*, 11 Perspective on Politics 1088 (Dec. 2013) (Ex. B).
[52] Brennan Center for Justice, "When Politicians Tell the Truth on Voting Restrictions," Aug. 10, 2016, https://www.brennancenter.org/analysis/when-politicians-tell-truth-voting-restrictions (Ex. B).
[53] Lopez, *supra* note 7.
[54] The Brennan Center represented the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives, along with the Lawyers' Committee for Civil Rights Under Law and other co-counsel. The case was consolidated with several others.
[55] Jim Malewitz and Lindsay Carbonell, *Texas' Voter ID Defense Has Cost $3.5 Million*, Texas Tribune, June 17, 2016, https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/ (Ex. E)
[56] *See* NAACP LDF, "Case: Greater Birmingham Ministries v. Alabama," *supra* note 20.
[57] *See, e.g., Veasey v. Perry*, 769 F.3d 890, 893-96 (5th Cir. 2014) (issuing stay and collecting cases) (Ex. E).

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

BRENNAN CENTER FOR JUSTICE

TESTIMONY OF

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HEARING ON VOTING RIGHTS AND ELECTION ADMINISTRATION IN AMERICA
THE COMMITTEE ON HOUSE ADMINISTRATION
U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON ELECTIONS

OCTOBER 17, 2019

One year before ballots are cast in November 2020, our election systems are under extraordinary stress. The research conducted by the Brennan Center, bolstered by our experience in the fight for voting rights in states across the country, confirms that there is strong reason for concern.

The right to vote is at the heart of democracy. Yet over the past decade, 25 states have put in place new laws making it harder to vote, for the first time since the Jim Crow era.[2] Many states continue to disenfranchise people living and working in our communities because they have a past felony conviction.[3] Voter roll purges have surged, particularly in states previously covered by the pre-clearance provisions of the Voting Rights Act.[4] All these obstacles to the ballot hit hardest communities of color, the poor, young, and elderly. Voter suppression remains a potent threat to American democracy, and a bitter challenge to the ideals of equality.

And there is a new and unnerving challenge: foreign interference threatens to disrupt and degrade the 2020 election. We all know that Russia intervened in 2016. Progress has been made since then. But next year, several states will still require voters to cast ballots on hackable

[1] The Brennan Center for Justice at NYU School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice. I have led the Center since 2005. I have authored books on government, the presidency, and the law, including *The Fight to Vote* (Simon & Schuster, 2016), a history of the struggle to win voting rights for all citizens. I previously served as director of speechwriting for President Bill Clinton from 1995 to 1999, and as special assistant to the president for policy coordination from 1993 to 1995. During my government service, I was the senior administration policy aide on political reform. My testimony does not purport to convey the views, if any, of the New York University School of Law. Thank you to Max Feldman and Harold Ekeh for their work on this testimony.
[2] Brennan Center for Justice, *New Voting Restrictions in America*, last accessed Oct. 14, 2019, https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america.
[3] Brennan Center for Justice, *Criminal Disenfranchisement Laws Across the United States*, last accessed Oct. 14, 2019, https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states.
[4] Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote* (Brennan Center for Justice 2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf.

electronic voting machines that do not leave a paper trail. Others will conduct no post-election audits to verify an accurate vote count.[5]

How can we ensure that the 2020 election will be free, fair, and secure? And going forward, how can we modernize our elections so they fully and accurately reflect the voices of Americans? We believe strongly that the best response to attacks on our democracy is to strengthen our democracy.

So we strongly urge Congress to enact bold reform. Here, there is reason for optimism. Earlier this year, this House passed H.R. 1—the For the People Act of 2019. That legislation is the most sweeping democracy reform bill the Congress has taken up since 1965. We encourage the Senate to follow the House and pass this bill now. We also urge the House to pass a revitalized Voting Rights Act, as it committed to doing in H.R. 1. In addition, we urge the Senate to match this House's proposed $600 million appropriation to the states for election security.

Americans are hungry for positive solutions. Despite new barriers to participation, turnout surged from a 72-year low in 2014 to a hundred-year high in 2018.[6] Voters in states across the country passed ballot measures for voting rights and redistricting reform.[7] Citizens are energized and engaged, a true democracy movement. Congress should act with the same urgency as its constituents and undertake bold reform to revitalize our election systems.

I. SIGNIFICANT THREATS TO ELECTION INTEGRITY IN 2020

The Brennan Center monitors challenges to our elections nationwide. Our attorneys, social scientists, and researchers have worked with election officials and citizens in dozens of states.[8] Here are the principal areas of concern for the 2020 election.[9]

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[5] Andrea Córdova McCadney et al., *Voting Machine Security: Where We Stand a Few Months Before the New Hampshire Primary*, Brennan Center for Justice, Aug. 13, 2019, https://www.brennancenter.org/our-work/analysis-opinion/voting-machine-security-where-we-stand-few-months-new-hampshire-primary.

[6] Jose A. DelReal, *Voter Turnout in 2014 Was the Lowest Since WWII*, Washington Post, Nov. 10, 2014, https://www.washingtonpost.com/news/post-politics/wp/2014/11/10/voter-turnout-in-2014-was-the-lowest-since-wwii/; Ed Kilgore, *2018 Turnout Was the Highest of Any Midterm in More Than a Century*, New York Magazine, Nov. 13, 2018, http://nymag.com/intelligencer/2018/11/2018-turnout-was-the-highest-of-any-midterm-since-1914.html.

[7] *See, e.g.*, Lee Drutman, "One Big Winner Last Night: Political Reform," Vox, Nov.7, 2018, https://www.vox.com/polyarchy/2018/11/7/18072204/2018-midterms-political-reform-winner.

[8] In the past year, for example, we have successfully sued Georgia over the security of its voter data, leading to the enactment of new state laws; successfully challenged purge practices in Indiana; and currently are suing to overturn the new Florida law that aims to roll back Amendment 4's restoration of voting rights to as many as 1.4 million Floridians. We are engaged in advocacy in numerous state legislatures, especially in support of enactment of automatic voter registration, rights restoration for people with felony convictions in their past, election security upgrades, and redistricting reform. And we produce cutting-edge research that gives lawmakers and advocates the tools they need to make voting more accessible and secure.

[9] This analysis draws on testimony given by Wendy Weiser, *Hearing on H.R. 1, The For the People Act, Before the Comm. on House Administration*, 116th Cong. (Feb. 14, 2019); Myrna Pérez, *Hearing on Protecting the Right to Vote: Best and Worst Practices, Before the Comm. on House Judiciary*, 116th Cong. (Sept. 10, 2019); and Lawrence Norden, *Election Security Hearing, Before the Comm. on House Administration*, 116th Cong. (May 8, 2019).

a. VOTER PURGES AND VOTER LIST MANIPULATION

Voter purges refer to the process when election officials attempt to remove from registration lists the names of those ineligible to vote. Done right, purges ensure that the rolls are accurate and up-to-date. When done improperly, however, they disenfranchise legitimate voters. Often, that happens too close to an election to correct the error. Bad purges cause confusion and delay at the polls.[10]

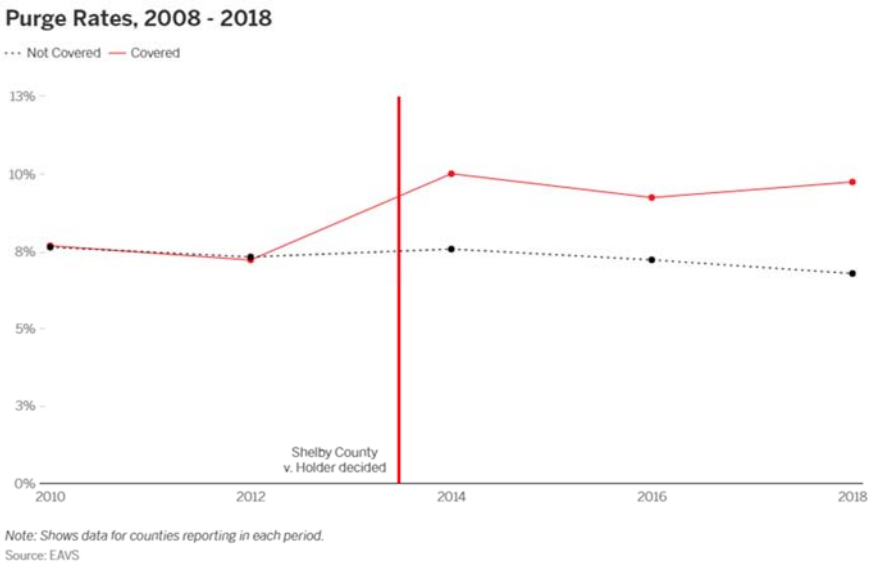
The Brennan Center has documented an alarming surge in voter purges—a surge that began after the U.S. Supreme Court gutted Section 5 of the Voting Rights Act in *Shelby County v. Holder*.[11]

Between 2016 and 2018, officials purged at least 17 million voters nationwide. The median purge rate was 40 percent higher, however, in jurisdictions previously covered by Section 5 of the Voting Rights Act than it was elsewhere. Had purge rates in those jurisdictions been consistent with those in the rest of the country, as many as 1.1 million fewer individuals would have been removed from the rolls.[12]

This continues the trend we documented in a major study last year. Between 2014 and 2016, states removed almost 16 million voters from the rolls—nearly 4 million more than they removed between 2006 and 2008.[13] This reflects a one third increase in the number of removed voters, far outstripping growth in registered voters (18 percent) or population (six percent). This increase was driven by states that had previously been covered by Section 5—that is, states with a history of voting discrimination. The Brennan Center has calculated that two million fewer voters would have been purged between 2012 and 2016 if previously covered jurisdictions had purged at the same rate as other jurisdictions.[14]

[10] Myrna Pérez, *Voter Purges* 1-3, (Brennan Center for Justice 2008), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf.
[11] Brater et al., *Voter Purges: A Growing Threat,* 1.
[12] Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice, Aug. 1, 2019, https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds.
[13] Brater et al., *Voter Purges: A Growing Threat*, 3-5.
[14] *Id*. at 4; see also Kevin Morris and Myrna Pérez, *Florida, Georgia, North Carolina Still Purging Voters at High Rates*, Brennan Center for Justice, Oct. 1, 2018, https://www.brennancenter.org/our-work/analysis-opinion/florida-georgia-north-carolina-still-purging-voters-high-rates.

The apparent impact of *Shelby County* is evident in this chart:



Improper purges, and attempts at improper purges, litter our recent history. Earlier this year, for example, the Texas Secretary of State sent lists of approximately 95,000 alleged non-citizens to county officials for purging—but within days, the state was forced to retreat, once it became clear that the lists were rife with inaccuracies.[15] In 2016, New York officials erroneously deleted hundreds of thousands from the rolls, with no public warning and little notice to those who had been purged.[16] The same year, thousands of Arkansans were purged because of supposed felony convictions—but the lists used were highly inaccurate, and included many who had never committed a felony, or who had had their voting rights restored.[17]

In her dissent in *Shelby County*, Justice Ruth Bader Ginsburg warned 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."[18] As millions of purged voters can attest, her warning was all too prescient.

H.R. 1 contains new protections to prevent improper purges, including new guardrails on the use of inter-state databases that purport to identify voters that have re-registered in a new state, but that have been proven to produce deeply flawed data. It also includes provisions for automatic voter registration and same day registration—policies that ameliorate the impact of improper purges. We urge the Committee to continue to press for these important reforms.

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[15] Sean Morales-Doyle and Rebecca Ayala, *There's Good Reason to Question Texas' Voter Fraud Claims*, Brennan Center for Justice, Jan. 29, 2019, https://www.brennancenter.org/our-work/analysis-opinion/theres-good-reason-question-texas-voter-fraud-claims.
[16] Brater et al., *Voter Purges: A Growing Threat,* 5-6.
[17] *Id*. at 5.
[18] *Shelby County, Ala. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

b. ELECTION SECURITY

Foreign interference and inadequate election security represent a second significant threat in 2020. As the Mueller Report concluded, Russia waged a campaign to interfere in our election "in sweeping and systematic fashion."[19] Moscow did more than hack DNC and campaign emails. In addition to a massive effort on social media, the Russians targeted state and local election officials, breached two state registration databases and extracted data from one, and used spear phishing attacks to gain access to and infect computers of a voting technology company and at least one Florida county.[20]

There is every reason to think these threats continue, especially now that the whole world knows how vulnerable we are. Before the midterm election the Director of National Intelligence testified that the "lights are blinking red."[21] Robert Mueller, in his July congressional testimony, warned, "Many more countries are developing the capability to replicate what the Russians have done." He added, the Russian effort "wasn't a single attempt. They're doing it as we sit here. And they expect to do it during the next campaign."[22]

Indeed, the nation may face even more serious threats in 2020 and beyond. Russia seems to have started its attacks against our election infrastructure in June 2016, late in the day compared to other aspects of their campaign. By 2020, Russia will have had four years to leverage knowledge gained in 2016. Chris Krebs, head of the Cybersecurity and Infrastructure Security Agency at the Department of Homeland Security, has warned that the 2020 election is "the big game" for adversaries looking to attack American democracy.[23] More, we ought not assume we are at risk just from Russia. National security agencies have warned of potential attacks from China, North Korea, and Iran, as well as non-state actors.[24] (Since 2016, there have been reports of alleged Chinese election-related attacks against Indonesia's voter database as well as against Australia's major political parties.)[25]

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[19] Robert S. Mueller III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* 1, (U.S. Department of Justice 2019), https://www.justice.gov/storage/report.pdf.
[20] Ibid. at 51.
[21] Julian E. Barnes, "'Warning Lights Are Blinking Red,' Top Intelligence Officer Says of Russian Attacks," *The New York Times*, July 18, 2018, https://www.nytimes.com/2018/07/13/us/politics/dan-coats-intelligence-russia-cyber-warning.html.
[22] *Hearing on Oversight of the Report on the Investigation into Russian Interference in the 2016 Presidential Election: Former Special Counsel Robert S. Mueller, III, Before the Comm. on the Judiciary*, 116th Congress (July 24, 2018) (statement of Robert S. Mueller, III, former special counsel)
[23] Colleen Long and Michael Balsamo, *Cybersecurity officials start focusing on the 2020 elections*, Associated Press, Nov. 8, 2018, https://www.apnews.com/cfaa16f6a86349bebc16e0633d6214dd.
[24] See, e.g., Daniel R. Coats, Director of National Intelligence, *Statement for the Record: Worldwide Threat Assessment of the US Intelligence Community* 6-7 (2019), https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf; Jordan Fabian, *US warns of 'ongoing' election interference by Russia, China, Iran*, The Hill, October 19, 2018, https://thehill.com/policy/nationalsecurity/412292-us-warns-of-ongoing-election-interference-by-russia-china-iran.
[25] Viriya Singgih, Arys Aditya, and Karlis Salna, *Indonesia Says Election Under Attack From Chinese, Russian Hackers*, Bloomberg, March 13, 2019, https://www.bloomberg.com/news/articles/2019-03-12/indonesia-says-pollunder-attack-from-chinese-russian-hackers; Dean Pennington, *Australia's major parties targeted in 'sophisticated' cyber attack ahead of election*, TechSpot, February 18, 2019, https://www.techspot.com/news/78802-australia-major-parties-targeted-ophisticated-cyberattack-ahead.html.

The country undoubtedly has made progress in protecting our elections. In 2016, 20 percent of votes were cast on machines with no paper backup. By next year, we estimate that number will drop to 12 percent.[26] Several states are replacing outdated voting equipment. But major challenges remain.

At least 26 states, for example, totaling 243 electoral votes, are not currently on track to require post-election audits prior to certification of the election. Traditional post-election audits, which generally require manual inspection of paper ballots cast in randomly selected precincts or on randomly selected voting machines, can provide assurance that individual voting machines accurately tabulated votes.[27]

c. DISENFRANCHISEMENT LAWS

Disenfranchisement laws—a relic of the Jim Crow era that continues to haunt our elections—represent a third significant threat to voters in 2020. Across the country, state laws deny millions of citizens the right to vote because of a criminal conviction, including at least three million who are no longer incarcerated.

These laws vary dramatically from state to state. They range from permanent disenfranchisement for everyone convicted of a felony in Iowa and Kentucky, to no deprivation of voting rights at all in Vermont and Maine. Between these extremes, some states distinguish between different types of felonies, others treat repeat offenders differently, and some have varying rules on what parts of a sentence must be completed before rights are restored. Navigating this patchwork of laws can confuse election officials and prospective voters about who is eligible to participate. The result is large-scale *de facto* disenfranchisement of voters who are eligible but do not know it.[28]

A particularly important fight for fairness is unfolding in Florida right now. The state had the country's harshest law, permanently disenfranchising 1.4 million people. One in four black men in Florida was ineligible to vote. Last November, nearly 65 percent of voters approved Amendment 4, which automatically restored voting rights to Floridians who had completed the terms of their sentence. In the months that followed, Amendment 4 began to fulfil its promise—rapidly restoring voting rights to Floridians who had paid their debt to society. Our research found that nearly 100 times more formerly incarcerated Floridians registered in the first three months of 2019 than in previous comparable years. And more than 44 percent of the formerly incarcerated Floridians who registered to vote between January and March of 2019 identified themselves in their voter registration forms as Black (whereas Black voters comprise 13 percent of Florida's overall voter population).[29] The racial justice implications were profound.

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[26] McCadney et al., *Voting Machine Security*.
[27] Lawrence Norden, *How to Secure Elections for 2020 and Beyond*, Brennan Center for Justice, Oct. 2, 2019, https://www.brennancenter.org/our-work/research-reports/how-secure-elections-2020-and-beyond.
[28] Brennan Center for Justice, *Criminal Disenfranchisement Laws Across the United States*, last accessed October 14, 2019, https://www.brennancenter.org/sites/default/files/legal-work/2019.5.31_Criminal_Disenfranchisement_Map.pdf.
[29] Kevin Morris, *Thwarting Amendment 4* (Brennan Center for Justice 2019), https://www.brennancenter.org/sites/default/files/analysis/2019_05_FloridaAmendment_FINAL-3.pdf.

Then, the Florida Legislature stepped in to roll back this important reform. In June, Governor DeSantis signed a law, which prohibits returning citizens from registering to vote unless they pay off all legal financial obligations ("LFOs") imposed by a court pursuant to a felony conviction, even if they cannot afford to pay. That same day, several civil rights groups, including the Brennan Center, filed a federal lawsuit challenging the new law. A federal district court recently held a hearing on our motion to temporarily enjoin the law, pending a trial. If it is allowed to stand, this modern-day poll tax will have a severe impact.[30]

d. ADDITIONAL CHALLENGES

We face, of course, numerous other challenges to election integrity in 2020. For example, attempts to suppress votes through deception and intimidation remain all too widespread. This is not a new problem, but now social media platforms make the mass dissemination of misleading information easy and allow for perpetrators to target particular audiences with precision. In a recent analysis for the Brennan Center, University of Wisconsin Professor Young Mie Kim documented hundreds of messages on Facebook and Twitter designed to discourage or prevent people from voting in the 2018 election.[31]

Inadequate election day resources and long lines may also deter voters in 2020, particularly voters of color. A Brennan Center study found that, in the 2012 election, voters in precincts with more minorities experienced longer waits and tended to have fewer voting machines.[32] A more recent academic paper using cellphone data found that, in the 2016 election, voters in Black neighborhoods were significantly more likely to wait in long lines than voters in white neighborhoods.[33] The Brennan Center continues to research election resource allocation, and we plan to release a report on this issue early next year.

In addition, state legislatures continue to add new obstacles to the ballot box. This year, at least five states have enacted new laws restricting voting access.[34] These laws continue a decade-long turn toward placing direct burdens on people's right to vote.

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[30] Brennan Center for Justice, *Gruver v. Barton (consolidated with Jones v. DeSantis)*, last accessed Oct. 14, 2019, https://www.brennancenter.org/our-work/court-cases/gruver-v-barton-consolidated-jones-v-desantis.
[31] Young Mie Kim, *Voter Suppression Has Gone Digital*, Nov. 20, 2018, https://www.brennancenter.org/our-work/analysis-opinion/voter-suppression-has-gone-digital.
[32] Christopher Famighetti et al., *Election Day Long Lines: Resource Allocation* 1-2 (Brennan Center for Justice 2014), https://www.brennancenter.org/sites/default/files/2019-08/Report_ElectionDayLongLines-ResourceAllocation.pdf.
[33] Daniel Garisto, *Smartphone Data Show Voters in Black Neighborhoods Wait Longer*, Scientific American, Oct. 1, 2019, https://www.scientificamerican.com/article/smartphone-data-show-voters-in-black-neighborhoods-wait-longer1/.
[34] Brennan Center for Justice, *Voting Laws Roundup 2019*, last modified July 10, 2019, https://www.brennancenter.org/analysis/voting-laws-roundup-2019.

II. BOLD REFORM IS NEEDED TO ADDRESS THESE THREATS

Our elections face urgent threats, and we must respond with equal urgency. And we should take this moment of public engagement to press for long-needed changes to ensure free, fair, and accurate elections every year going forward. We encourage Congress to pass H.R. 1, to restore the Voting Rights Act, and to appropriate necessary funds for election security.

a. H.R. 1—A BREAKTHROUGH FOR VOTING ACCESS

H.R. 1 comprises reforms to revitalize every aspect of American democracy. Among the most important of H.R 1's reforms is automatic voter registration ("AVR"). AVR is a simple but transformative policy that could bring millions into the electoral process. Under AVR, every eligible citizen who interacts with designated government agencies is automatically registered to vote, unless they decline registration. Fully implemented nationwide, it would add fifty million to the rolls, cost less, and improve accuracy and security.[35]

AVR shifts registration from an "opt-in" to an "opt-out" approach. When eligible citizens give information to the government—for example, to get a driver's license, receive Social Security benefits, apply for public services, register for classes at a public university, or become naturalized citizens—they are automatically signed up to vote unless they decline.[36] Registration information is electronically transferred to election officials, avoiding paper forms and snail mail. This significantly increases the accuracy of the rolls and drives down the costs of maintaining them.[37]

AVR works. In the past five years, 16 states and the District of Columbia have adopted AVR (though several are still implementing the policy). A Brennan Center study found that AVR dramatically boosted the number of registrants everywhere it has been implemented, with increases ranging from 9 to 94 percent.[38] FiveThirtyEight recently supplemented our findings. It reported that the eight jurisdictions that implemented AVR by the 2018 registration deadline automatically registered about 2.2 million new voters.[39]

H.R. 1 includes myriad other important measures to expand voting rights and strengthen democracy. Among these, it incorporates the Democracy Restoration Act, which would restore federal voting rights to citizens with past criminal convictions living in our communities.

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[35] Brennan Center for Justice, *The Case for Automatic Voter Registration* (2016), https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf.
[36] *Id.* 6-7.
[37] *Id*. 11.
[38] Kevin Morris and Peter Dunphy, *AVR Impact on State Voter Registration*, (Brennan Center for Justice 2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_AVR_Impact_State_Voter_Registration.pdf.
[39] Nathaniel Rakich, *What Happened When 2.2 Million People Were Automatically Registered to Vote*, FiveThirtyEight, Oct. 10, 2019, https://fivethirtyeight.com/features/what-happened-when-2-2-million-people-were-automatically-registered-to-vote/.

b. REVITALIZE THE VOTING RIGHTS ACT

The Voting Rights Act of 1965 ("VRA") was the nation's most effective civil rights law. In 2013, however, the Supreme Court struck down the "coverage formula" that determined which jurisdictions were subject to pre-clearance.[40] This decision effectively blocked the pre-clearance system from operation. The years since have demonstrated the urgent need to revitalize the law. State and local jurisdictions have continued to implement discriminatory voting rules, disenfranchising voters of color in election after election.[41] Over the course of several months, this Committee has held a series of field hearings in states across the country, documenting serious challenges to voting accessibility and fair election administration.

These ongoing problems demand a strong, but thoughtful response. When the Supreme Court gutted preclearance, it stated explicitly that Congress could fix the VRA, using current data and taking a wider perspective.[42] Moreover, the VRA has long been a bipartisan congressional priority—the reauthorization in 2006 passed the House overwhelmingly and the Senate 98-0—and it should be once again.[43]

For its part, H.R. 1 also contains a strong commitment to revitalizing the VRA. The Voting Rights Advancement Act (H.R. 4), currently under consideration in this House, contains an updated coverage formula and other vital protections carefully tailored to current conditions. We encourage Congress to follow through on its commitment in H.R. 1 and to act expeditiously to restore the VRA to its full strength.

c. STRENGTHEN ELECTION SECURITY

First and foremost, election security in 2020 requires funding. The Brennan Center has long supported both a complete, nationwide transition to paper ballot voting machines and the implementation of risk limiting audits ("RLAs"), an effective check on election results, to ensure security and confidence in electoral results. But these and other critical reforms require money, and states are running out of time to put new machines and systems in place for 2020. We enthusiastically applaud the House for proposing to appropriate $600 million for election

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[40] *Shelby County*, 570 U.S. at 557.
[41] See, e.g., Wendy Weiser and Zachary Roth, *This Is the Worst Voter Suppression We've Seen in the Modern Era*, Brennan Center for Justice, Nov. 2, 2018, https://www.brennancenter.org/our-work/analysis-opinion/worst-voter-suppression-weve-seen-modern-era?utm_source=facebook&utm_medium=socialmedia.; Rebecca Ayala, *Voting Problems 2018*, Brennan Center for Justice, Nov. 5, 2018, https://www.brennancenter.org/our-work/analysis-opinion/voting-problems-2018.; Makeda Yohannes, *New Hampshire's New Voting Law Threatens Student Voters*, Brennan Center for Justice, July 18, 2018, https://www.brennancenter.org/blog/new-hampshires-new-voting-lawthreatens-student-voters; Rebecca Ayala and Jonathan Brater, *What's the Matter with Georgia?*, Brennan Center for Justice, Oct. 12, 2018, https://www.brennancenter.org/our-work/analysis-opinion/whats-matter-georgia.
[42] *Shelby County*, 570 U.S. at 557.
[43] U.S. Senate, *H.R.9 Vote Summary*, July 20, 2006, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212; U.S. House of Representatives, *Final Vote Results for Roll Call 374*, July 13, 2006, http://clerk.house.gov/evs/2006/roll374.xml.

security in the appropriations bill voted on in June.[44] This represents a robust down payment on our overall election security needs—which the Brennan Center estimates will cost approximately $2.2 billion over the next five years.[45] We are encouraged that the Senate has agreed to appropriate $250 million for election security on a bipartisan basis.[46] But we believe it is critical that the final spending bill reflect the House's proposed appropriation, as well as its provisions to ensure that the funds are used for election security rather than unrelated activities.

Funding is an important first step toward securing our elections, but Congress can and should do more. At present, for example, there is almost no federal oversight of the private vendors who design, build, and maintain our election systems. That should change. We recommend that Congress adopt a mandatory reporting system for all cyber security incidents for election vendors and consider additional reforms, such as vendor employee background checks. In addition, Congress should make permanent the Department of Homeland Security's designation of elections systems as "critical infrastructure."[47] A permanent designation will help to guarantee that states are provided with priority access to tools and resources available from DHS and greater access to information on cyber vulnerabilities on a voluntary basis.

III. CONCLUSION

Much work remains to be done to ensure that the 2020 election is free, fair, and secure. I thank this Committee for holding this important hearing and urge Congress to take quick and forceful action to reform our election systems.

[44] Press Release, House Comm. on Appropriations, Appropriations Committee Releases Fiscal Year 2020 Financial Services and General Government Funding Bill, June 2, 2019, https://appropriations.house.gov/news/press-releases/appropriations-committee-releases-fiscal-year-2020-financial-services-and.
[45] Lawrence Norden and Edgardo Cortés, *What Does Election Security Cost?*, Brennan Center for Justice, Aug. 15, 2019, https://www.brennancenter.org/our-work/analysis-opinion/what-does-election-security-cost
[46] Carl Hulse, *After Resisting, McConnell and Senate G.O.P. Back Election Security Funding*, N.Y. Times, Sept. 19, 2019, https://www.nytimes.com/2019/09/19/us/politics/mcconnell-election-security.html?module=inline.
[47] Press Release, U.S. Department of Homeland Security, Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector, Jan. 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.

Testimony of

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Hearing on Protecting the Right to Vote During the COVID-19 Pandemic

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

June 3, 2020

Thank you Chairman Nadler, Ranking Member Jordan, and members of the Committee for the opportunity to submit this testimony describing the steps that this country must take to protect our fundamental right to vote in the throes of a global pandemic. While not the subject of this hearing, I would note that many of these recommendations would also alleviate some of the stresses on election administration during a time of civil unrest – like what we are facing at the moment. The Brennan Center for Justice at NYU School of Law supports this Committee's efforts to ensure that our elections are not only free, fair, and secure, but also accessible during the COVID-19 crisis.

In this written testimony, I outline the features that each state should have to ensure that no voter is left behind. I also provide in the appendix to this testimony a voluminous amount of resources on the topic. **But the single most important thing this Committee can do to ensure that our elections run smoothly in November is for each member of this Committee to play her or his part in getting election administrators at the state and local level additional financial resources.** While Congress has provided $400 million to help states and localities make these changes, this is a mere fraction of what is needed. We urge Congress to provide additional support immediately. Election administrators need those resources now. *Please see Appendix A for additional related information.*

I. The Stresses COVID is Placing on Our Election Requires Ameliorative Action

More than 100,000 people across the country have died from COVID-19. Public health experts repeatedly urge physical distancing practicing and habits if we are to minimize transmission. There are certain steps states and localities must take if we want to ensure that no voter is left behind. *Please see Appendix B for additional related information.*

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

(1) Expand Voter Registration Opportunities. Pre-pandemic, about 1 out of every 5 eligible Americans were not registered to vote.[2] In the past, millions of Americans update their voter registration information or register to vote for the first time the months and weeks before every presidential election.[3] But now, states across the country have reported decreases in registration rates. According to news reports, the number of new registrations in Kentucky was at 7,000 in February and it dropped to just 500 in March.[4] This is no surprise. Government agencies that provide voter registration services are closed. Community groups that register voters are unable to do person-to-person outreach because of transmission risks and shelter-at-home instructions. Even if these community groups could venture out, large groups of Americans are not congregating in venues and public spaces that were once desirable spots to perform voter registration.

Our democracy works best when all of us participate. It is imperative that we undertake efforts to bring those eligible, but unregistered, Americans into our electorate. Online registration opportunities are an obvious part of the solution. Ten states do not currently have a way to register to vote online for November.[5] Those states should develop and implement those systems. Even states with existing registration systems can take steps to maximize their impact. States that limit online registration opportunities to people who have a state identification/driver's license should relax those requirements because motor vehicle offices are closed and people who do not have those IDs cannot get them.

Online registration systems should also be built to withstand increased use by more voters. These systems have crashed in the past at inopportune times.[6] And, of course, online registration systems need to be accessible for voters with disabilities and persons who prefer to conduct important business in another language.

While online registration systems need to be shored up, we must remember that the digital divide is real, and we must also take steps to ensure that unregistered, but eligible Americans

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[2] The Pew Charitable Trusts, *Elections Performance Index*: *Methodology* (August 2016), http://www.pewtrusts.org/~/media/assets/2016/08/epi_methodology.pdf.

[3] See, for instance, Merivaki, Thessalia. 2018. "Access Denied? Investigating Voter Registration Rejections in Florida:" *State Politics & Policy Quarterly*, October. https://doi.org/10.1177/1532440018800334; Gimpel, James G., Joshua J. Dyck, and Daron R. Shaw. 2007. "Election-Year Stimuli and the Timing of Voter Registration." *Party Politics* 13 (3): 351–74. https://doi.org/10.1177/1354068807075941.

[4] Pam Fessler, "Pandemic Puts A Crimp On Voter Registration, Potentially Altering Electorate." *NPR*, May 26, 2020, https://www.npr.org/2020/05/26/860458708/pandemic-puts-a-crimp-on-voter-registration-potentially-altering-electorate.

[5] The following states do not have online voter registration: Arkansas, Maine, Mississippi, Montana, New Hampshire, South Dakota, Texas, and Wyoming. The following two states have not yet implemented this policy: New Jersey and Oklahoma. See Brennan Center for Justice, "Preparing Your State for an Election Under Pandemic Conditions," May 29, 2020, https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions#t1/.

[6] Laura Vozella, "Voter Registration System Crashes in VA., Preventing Some from Signing Up in Time," Washington Post, Oct. 18, 2016, https://www.washingtonpost.com/local/virginia-politics/voter-registration-system-crashes-in-va-preventing%20some-from-signing-up-in-time/2016/10/18/5336f1ae-9558-11e6-9b7c-57290af48a49_story.html?utm_term%20=.6ce77c14627b; Mark Caputo, "'A Mess': Florida's Online Voter Registration System Panned," Politico, Oct. 9, 2018, https://www.politico.com/states/florida/story/2018/10/09/a-mess-floridas-online-voter-registration-system-panned-641953.

who cannot use online systems for whatever reason have a lower-tech way to get activated and registered.

(2) Ensuring all eligible Americans have the option to vote by mail. Every state in the country allows at least some of its citizens to vote by mail, and that option should be available to every eligible American so that no voter has to expose themselves or others to the Coronavirus. Currently, there are 15 states where an American who wants to vote by mail may not meet the criteria for doing so in November.[7] Notwithstanding existing restrictions, we are seeing a massive increase in demand to vote by mail. In Georgia, more than 1 million people have requested a mail ballot than in the 2016 presidential primary.[8] In Wisconsin, nearly 800 thousand more voters cast mail ballots in the 2020 presidential primary than the 2016 presidential primary.[9] That increase in mail balloting requires extra capacity in processing applications, counting returned ballots, and providing notice and cure opportunities to any voters whose returned ballots have issues. *Please see Appendix C for additional related information.*

While there is some incendiary and untrue rhetoric being lobbed around, vote by mail is a necessary, and sensible option—especially at the time we find ourselves in. Indeed, some states like Oregon, Colorado, and Washington have been conducting their elections almost entirely by mail for years. There has been no evidence of systematic or widespread abuse of the mail balloting process in those states. That is not surprising. There are numerous security measures at every step of the vote by mail pipeline. First, the ballot has to get mailed to an address, meaning that election administrators and law enforcement know exactly where to look if any investigation is warranted. And, mail ballots can be accompanied with Intelligent Mail Barcodes (or IMbs) that track where the ballot is at all time in the mail.[10] For ballots that are returned in person, the options are drop boxes that have their own security protections, election offices, or polling places that are secure enough to house voting machines. Before the ballot is actually counted, it is examined for a signature—that was made under oath, and in some states there are even more stringent measures like witness or notary requirements (which we do not believe are justified given the threat level).

(3) Providing Safe in Person Voting Options. While more voters are expected to be voting by mail this November, the country is still going to need an adequate number of safe polling places to ensure that no voters are left behind. Vote by mail will not work for every voter. There will be the inevitable glitches that are expected when undergoing such a massive scale up and polling places need to exist to function as a fail-safe. Additionally, there has historically been a racial and age disparity in the use of vote by mail. For some Americans, this preference for in-

[7] The following states require a voter to provide an excuse to vote by mail: Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New York, South Carolina, Tennessee, Texas, and West Virginia. See Brennan Center for Justice, "Preparing Your State for an Election Under Pandemic Conditions," May 29, 2020, https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions#t1/.
[8] Kevin Morris, "Who's Requesting Mail Ballots in Georgia's Upcoming Primary?" Brennan Center for Justice, May 19, 2020, https://www.brennancenter.org/our-work/research-reports/whos-requesting-mail-ballots-georgias-upcoming-primary.
[9] Wisconsin Elections Commission, *April 7, 2020 Absentee Voting Report*, Wisconsin Elections Commission, 2020, https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf.
[10] Wendy R. Weiser and Harold Ekeh, "The False Narrative of Vote-by-Mail Fraud," Brennan Center for Justice, Apr. 10, 2020, https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud.

person voting may be merely habit and custom, but for others, it is a deeply held value. Consistent with this, early examinations in certain counties still reveal a large racial disparity. For example, as of May 3, 26.6% of White registered voters in Georgia had requested mail ballots for the June 9 primary, while just 18.5% of Black voters and 12% of Latino voters had done so.[11] For other voters, for example voters with visual or physical impairments, or voters who need the language assistance provided at polling places, in-person voting may be a necessity. And finally, there are some voters who have unreliable mail service, and cannot trust the mail to deliver something as important as their ballot.

In order to ensure that these needed polling places are safe, states and localities should undertake a number of steps. First, there should be sufficient hours and days of early voting to smooth out congestion and minimize lines. Polling places should be sited in venues that can comply with physical distancing protocols. The setup of polls sites should minimize transmission risks by, for example, making sure that entrances and waiting spaces allow for enough distance between voters. Polling places should be equipped with cleansers, water, and drying materials for frequent cleaning of spaces, machines, and hands. Poll workers and voters should have PPE like masks and gloves, and the poll site should have disposable implements like pens to mark paper ballots or Q-tips to press buttons.

It is axiomatic that we need enough polling places to ensure equal access for all voters, including those in traditionally underserved communities. Indeed, in a recent report from the Brennan Center, we learned: Black and Latino Americans spend more time waiting in line to vote on Election Day than white voters – and even more seriously – they were more likely to report especially long wait times at the polls.[12] We also found that counties that became less white over the past decade had fewer electoral resources – namely polling places, voting machines, and poll workers – per voter in 2018 than counties that grew whiter.[13] Similarly, counties where incomes shrank over the past decade had fewer electoral resources per voter in 2018 than counties where incomes grew.[14]

As Covid-19 cases continue to rise, it is more important now to distribute critical electoral resources in an equitable manner to minimize voter wait times for all voters. The findings in our report suggest that allocating equal numbers of electoral resources among counties and precincts is not sufficient to produce equal wait times for all voters, particularly those of color and of lower incomes. Rather, election administrators must also focus special attention on those precincts and counties with a history of long wait times and allocate enough resources to these locations to equalize the wait times. *Please see Appendix D for additional related information.*

(4) Educating Voters About Election Processes. Voter education is always important, but given the uncertainty and disruption in American lives because of COVID-19, voter

[11] Brennan Center analysis of data from L2 Political and data from the Georgia Secretary of State, available here: https://elections.sos.ga.gov/Elections/voterabsenteefile.do.
[12] Hannah Klain, Kevin Morris, Max Feldman, and Rebecca Ayala, *Waiting to Vote: Racial Disparities in Election Day Experiences*, 2020, hyperlink forthcoming.
[13] Ibid.
[14] Ibid.

education is more critical than ever. At least 13 states have changed their primary dates,[15] and at least two states have made it possible for any voter to request an absentee ballot this November.[16] There are dozens of lawsuits across the country whose outcome could change one or more significant voting rules. Any increased accessibility will be blunted, however, if voters are not aware of the new rules.

Moreover, amidst changes, Americans are vulnerable to misinformation and disinformation. Election officials may send out materials with a date from a prior election, as occurred in Washington D.C.[17] But, deliberate efforts to mislead voters have also been

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[15] These include the following: Connecticut, Delaware, Georgia, Indiana, Kentucky, Louisiana, Maryland, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and West Virginia. See Connecticut Official State Website, "Governor Lamont Orders Connecticut's Presidential Primary Election Rescheduled to June 2," March 19, 2020, https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/03-2020/Governor-Lamont-Orders-Connecticuts-Presidential-Primary-Election-Rescheduled-to-June-2; State of Delaware Executive Department, Dover, "Sixth Modification of the Declaration of a State of Emergency For The State of Delaware Due to a Public Health Threat," March 24, 2020, https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Sixth-Modification-to-State-of-Emergency-03242020.pdf; Georgia Secretary of State Brad Raffensperger Official Website, "Raffensperger Announces Postponement of Primary Election Until June 9," April 9, 2020, https://sos.ga.gov/index.php/elections/raffensperger_announces_postponement_of_primary_election_until_june_9; Indiana Governor Eric J. Holcomb Official Website, "Gov. Holcomb and Secretary of State Lawson Announce Primary Election to Move to June 2," March 20, 2020, https://calendar.in.gov/site/gov/event/gov-holcomb-and-secretary-of-state-lawson-announce-primary-election-to-move-to-june-2/; Kentucky Official State Website, "Secretary of State Moves To Delay May 19 Elections," March 16, 2020, https://kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prId=300; State of Louisiana Executive Department, "Proclamation Number 46 JBE 2020: Elections – Rescheduled Due to Statewide State of Emergency Caused by COVID-19," March 13, 2020, https://gov.louisiana.gov/assets/Proclamations/2020/46-JBE-2020-Elections-Rescheduled.pdf; State of Maryland Proclamation, "Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency — COVID-19," March 17, 2020, https://elections.maryland.gov/press_room/proclamation_2020_elections.pdf; Frank LaRose, Ohio Secretary of State, "Directive 2020-06: Order from Director of Health Dr. Amy Acton Closing Polls for the March 17, 2020 Presidential Primary Election," March 16, 2020, https://www.ohiosos.gov/globalassets/elections/directives/2020/dir2020-06am.pd; Official Pennsylvania Government Website, "Gov. Wolf Signs COVID-19 Response Bills to Bolster Health Care System, Workers, and Education and Reschedule the Primary Election," March 27, 2020, https://www.governor.pa.gov/newsroom/gov-wolf-signs-covid-19-response-bills-to-bolster-health-care-system-workers-and-education-and-reschedule-the-primary-election/; State of New Jersey, "Executive Order No. 120," April 8, 2020, https://nj.gov/infobank/eo/056murphy/pdf/EO-120.pdf; State of New York Executive Chamber, "No. 202.12: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," March 28, 2020, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.12.pdf; State of Rhode Island and Providence Plantations, "Executive Order 20-11: Ninth Supplemental Emergency Declaration – Delaying the Primary Elections and Preparing for a Predominantly Mail Ballot Election," March 23, 2020, https://governor.ri.gov/documents/orders/Executive-Order-20-11.pdf; State of West Virginia Executive Department At Charleston, "Executive Order No. 18-20: By the Governor," April 1, 2020, https://governor.wv.gov/Documents/2020%20Proclamations/EO%2018-20.pdf.

[16] Both New Hampshire and Virginia will allow any voter to request an absentee ballot for the November general election. See New Hampshire Secretary of State William M. Gardner and Attorney General Gordon J. MacDonald to New Hampshire Election Officials, April 10, 2020, State of New Hampshire, Elections Operations During the State of Emergency, https://www.nhpr.org/sites/nhpr/files/202004/covid-19_elections_guidance.pdf; John Wood, "Gov. Northam signs laws he says will help expand voting accessibility," WHSV newsroom, April 13, 2020, https://www.whsv.com/content/news/Gov-Northam-signs-bills-to-help-with-voter-turnout-569605261.html.

[17] Martin Austermuhle, "Thousands Of D.C. Voters Were Given The Wrong Primary Election Date," *NPR*, February 24, 2020, https://www.npr.org/local/305/2020/02/24/808903582/thousands-of-d-c-voters-were-given-the-wrong-primary-election-date.

documented, for example, on March 3, the Texas Secretary of State's office received reports of a robocall inaccurately informing voters that Democrats were supposed to vote the following day.[18] Likewise, Common Cause has identified "multiple examples of cyber suppression content — social media posts with disinformation or deceptive practices that could cause a voter to be disenfranchised," during the 2020 Primary Elections.[19]

Fortunately, robust voter education efforts from trusted sources can be immensely helpful for motivating and encouraging voters and combatting incorrect information. This education should be culturally competent, in language, and targeted to low information voters and work for voters who do not get their information online. Education methods should include mail, telephone, trusted community leaders, radio, and television.

(5) Be Prepared for New Cybersecurity Threats. Prior to COVID-19, there was high concern that foreign cybercriminals would interfere in our elections. In some ways, this concern should be greater. Resources that should have been available to secure election technology now have to be diverted to ensuring elections happen this November. Additionally, COVID-19 dramatically incentivizes the use of online systems for registration and mail ballot requests by voters, but the increased usage makes those online systems even more attractive targets than they would have been just a few months ago.

The importance of securing our elections against cyber-attack cannot fall off our agenda. We must continue to audit and test those systems. Additionally, we need postelection audits of receipts afterwards to make sure that we can trust the electronic tallies. *Please see Appendix E for additional related information.*

Fortunately, in many places, elected and election officials of both parties are working together to make needed changes. For example, in Kentucky, the Democratic Governor and Republican Secretary of State worked in partnership to expand absentee voting by mail and created a secure online absentee mail ballot application portal for the June 23, 2020 primary election.[20] Republican Secretary of State Pate of Iowa launched poll worker recruitment efforts to guard against these problems in the fall.[21] These leaders should be commended for their bipartisan action. Congress should take heed.

[18] Carrie Levine, "Online Misinformation During The Primaries: A Preview Of What's To Come?" The Center for Public Integrity, March 11, 2020, https://publicintegrity.org/politics/elections/online-_misinformation-during-the-primaries-a-preview-of-whats-to-come/.
[19] Common Cause, "Common Cause Documents and Responds to Voting Issues Across the County," March 3, 2020, https://www.commoncause.org/press-release/common-cause-documents-and-responds-to-voting-issues-across-the-country/.
[20] Commonwealth of Kentucky, "Governor Beshear, Secretary Adams Issue Statements on June Election Procedures," April 24, 2020, https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=139.
[21] Office of the Iowa Secretary of State, " MEDIA RELEASE: Secretary Pate launches statewide poll worker recruitment for June primary," April 29, 2020, https://sos.iowa.gov/news/2020_04_29.html.

II. More Resources are Needed

In March, as part of the CARES Act, Congress gave states $400 million to protect the upcoming presidential and federal elections from any COVID-19 related disruptions.[22] While this was an important start, it is insufficient, given the massive changes that are necessary to leave no voters behind.

The Brennan Center has estimated the national cost of implementing its full set of recommendations for running safe and secure elections in 2020 is approximately $4 billion. Subsequent to release of our estimate, and working in conjunction with the R Street Institute, Alliance for Securing Democracy and the University of Pittsburgh Institute for Cyber Law, Policy and Security, separately interviewed election officials in five states – Georgia, Michigan Missouri, Ohio and Pennsylvania – to determine the steps they were taking, and would like to take, to ensure free, fair and safe elections in 2020 during the COVID pandemic. It is patently clear that more resources are need.[23] Election officials agree, and multiple states associations, plus more than 150 individual local election officials from both parties have signed letters urging Congress to provide them with more resources to run safe and fair elections this fall. *Please see Appendix F for additional related information.*

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Ultimately, the smoothness of the November election will depend in large part on the commitment that elected officials, including Congressmembers, have in supporting our election administrators and their voters during this crisis. During this time of political unrest, we must also recognize the fundamental role voting plays within our democracy and do everything we can to ensure every eligible American is able to have their voice heard. I am hopeful that members of this Committee will model the leadership and commitment our country so desperately needs during this time.

[22] Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, 116th Cong. (2020).
[23] Christopher R. Deluzio, Elizabeth Howard, David Levine, Paul Rosenzweig, and Derek Tisler, *Ensuring Safe Elections: Federal Funding Needs for State and Local Governments During the Pandemic*, Brennan Center for Justice, 2020, https://www.brennancenter.org/sites/default/files/2020-04/2020_04_5StateCostAnalysis_FINAL.pdf.

BRENNAN CENTER FOR JUSTICE

TESTIMONY OF

MICHAEL WALDMAN
PRESIDENT, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

HEARING ON OVERSIGHT OF THE CIVIL RIGHTS DIVISION OF THE DEPARTMENT OF JUSTICE

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

SEPTEMBER 24, 2020

Mr. Chairman, Ranking Member, and members of the subcommittee:

Thank you for the opportunity to testify today on the performance and the future of the Civil Rights Division of the U.S. Department of Justice.[1] The Division has a storied past and should play a vital role in the great fight for American democracy. Its career attorneys and researchers continue to advance its mission. But in this administration, the Civil Rights Division has retreated from civil rights to pursue, instead, divisiveness. Going forward, we should all work to renew the Division so it once again can play its vital role.

This hearing takes place at a solemn moment in a painful year. In July, we lost Rep. John Lewis, whose bravery brought the Voting Rights Act into being in 1965. This past week, we lost Justice Ruth Bader Ginsburg, whose commitment to that very statute was the heart of her most powerful dissent. And it comes at a time of a nationwide reckoning with the reality and consequences of persistent systemic racism against Black Americans and other minorities – the very phenomenon the Civil Rights Division is charged with seeking to combat and eradicate. That embedded discrimination is the worst of America – and at its best, the Justice Department has been the best of America. It should be again.

The Justice Department and the Civil Rights Division work in myriad ways to advance equality and racial justice. On the burning issue of police misconduct, for example, the Department possesses broad authority, particularly through "pattern and practice" investigations of police departments and resulting consent decrees.[2] The Trump Administration abdicated that power in 2017, and has initiated only one such investigation in three years. As a result, key federal oversight powers have gone unused even as issues of policing and race convulsed the country.[3] On education, LGBTQ rights, gender equality, housing, and so many other issues, this Department should play a vital, central role – and must do better.

This testimony will focus on one of the issues the Brennan Center knows best: voting rights and the health of our democracy.

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[1] The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize, and defend our country's system of democracy and justice so they work for all. This year, the Brennan Center has litigated and lobbied in eighteen states for voting rights and strong election administration. I have led the Center since 2005. I have authored books on government, the presidency, and the law, including *The Fight to Vote* (Simon & Schuster, 2016), a history of the struggle for voting rights. I previously served as Director of Speechwriting for President Bill Clinton from 1995-99, and as Special Assistant to the President for Policy Coordination. I would like to thank Alan Beard, Harold Ekeh, Jeanine Chirlin, Sean Morales-Doyle, Max Feldman, Clio Morrison, Spencer LaFata, Izabela Tringali, Emily Eagleton, Myrna Perez, Wendy Weiser, Dan Weiner, Martha Kinsella, Maya Efrati, Kirstin Dunham, Larry Norden, Gowri Ramachandran, Brianna Cea, Taryn Merkl, Lauren-Brooke Eisen, Edgardo Cortes, Hannah Klain, and Liz Howard for research and assistance in drafting this testimony. My testimony does not purport to convey the views, if any, of the NYU School of Law.

[2] Civil Rights Division, U.S. Department of Justice, *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present*, January 2017, https://www.justice.gov/crt/file/922421/download.

[3] For a general discussion of how the Justice Department should augment its work on policing, see *Written Testimony from the Brennan Center for Justice to the President's Commission on Law Enforcement and the Administration of Justice*, (June 8, 2020,) (Statement of Lauren-Brooke Eisen, Director of Brennan Center Justice Program and Spencer Boyer, Director of Brennan Center Washington Office), https://www.brennancenter.org/our-work/research-reports/testimony-brennan-center-presidents-commission-law-enforcement-and.

I. ABDICATION OF DUTY

Under this administration, unfortunately, the Justice Department has retreated from its historic role as a protector of voting rights. Indeed, too often, it has ignored or even embraced voter suppression moves. It has also shifted resources to other areas and enforcement topics, draining focus on the Division's core voting rights work.

Some of the change, of course, is due to the U.S. Supreme Court's 2013 ruling in *Shelby County v. Holder*.[4] This stripped from the Department its most potent tool to prevent voting abuse: Section 5 of the Voting Rights Act (VRA) of 1965. For forty-eight years, the Civil Rights Division was charged with preclearance for changes to voting laws. It did so with minimal bureaucratic burden. From 1998 to 2013, the Division blocked 86 state and local submissions of election changes. These numbers understate the law's effectiveness. Preclearance deterred states and localities from enacting discriminatory voting changes in the first place. Between 1999 and 2005 alone, 153 voting changes were withdrawn and 109 were superseded by altered submissions after DOJ requested more information.[5]

As we all are reminded this week, during oral argument in *Shelby County*, Justice Scalia called the Voting Rights Act little more than a "racial entitlement." Chief Justice Roberts was more decorous. In the majority opinion, he wrote, in effect, that systemic racial discrimination was no longer part of "current conditions," and that states with long histories of discrimination should not be treated differently. In her dissent Justice Ginsburg famously wrote, "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." Plainly, Justice Ginsburg's prediction was right.

In the seven years since *Shelby County*, a wave of disenfranchisement and suppression swept across states previously covered by the preclearance requirement.[6] Soon after the ruling, Texas, Mississippi, and Alabama began to implement and enforce photo ID laws previously barred by preclearance.[7] In states once covered by Section 5, voter purges soared, typically 40 percent higher than in the rest of the country.[8] Were preclearance still in effect, these changes would have been screened before they were enacted and before voters were hurt.[9]

Yet the Division's retreat from its core mission cannot solely be blamed on the Supreme Court. Too often, its officials have actively worked to curb voting rights.

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[4] Shelby County v. Holder, 570 U.S. 557 (2013).
[5] Myrna Pérez and Vishal Agraharkar, *If Section 5 Falls: New Voting Implications*, Brennan Center for Justice (June 13, 2013), https://www.brennancenter.org/sites/default/files/2019-08/Report_Section_5_New_Voting_Implications.pdf.
[6] Myrna Pérez, "7 Years of Gutting Voting Rights," *The Brennan Center for Justice*, June 25, 2020, https://www.brennancenter.org/our-work/analysis-opinion/7-years-gutting-voting-rights.
[7] "The Effects of Shelby County v. Holder," *The Brennan Center for Justice*, August 6, 2018, https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder.
[8] Kevin Morris, "Voter Purge Rates Remain High, Analysis Finds," Brennan Center for Justice, August 21, 2019, https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds.
[9] Myrna Pérez, "7 Years of Gutting Voting Rights," Brennan Center for Justice, June 25, 2020, https://www.brennancenter.org/our-work/analysis-opinion/7-years-gutting-voting-rights.

The Division has flinched in the most basic way: it simply brings no cases. This administration is the first, since the passage of the Voting Rights Act in 1965, to not bring a single enforcement action under the VRA. According to the Justice Department website, during the Obama administration, the Voting Section brought twelve VRA enforcement cases, and during the George W. Bush administration, it brought 46.[10] Even this does not even fully illustrate the abdication of duty. Since Trump was inaugurated on January 20, 2017, the Voting Section has filed claims in only three cases total under any of the statutes it has authority to enforce.[11] (In comparison, it filed claims in 32 cases during the Obama administration and in 69 cases under George W. Bush.[12]) True, in this administration the Voting Section has shown the most interest in enforcing the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), filing two enforcement cases. But it filed sixteen UOCAVA cases under President Obama.[13]

The Voting Section has failed to spend its resources protecting voting rights in other ways as well. In the Obama administration, the Section filed amicus briefs or statements of interest in 24 cases. Since Trump took office, it has filed only five.[14] Moreover, even when it weighs in, often it does not defend voting rights. In two of these five cases, the Voting Section filed a Statement of Interest defending state laws requiring voters to have a witness sign their absentee ballots.[15] (During the Covid-19 pandemic, when absentee voting is on the rise and hard for isolated voters, plaintiffs had sued to challenge these laws as an unlawful "voucher" requirement under the VRA.[16]) At a time of crisis, instead of advancing voting rights, the storied Civil Rights Division instead has defended states' rights.

Indeed, in two key cases the Division switched sides. It lurched abruptly to support policies that just days before it had argued were racially discriminatory. Either the policies suddenly ceased to be discriminatory, or the Justice Department's political overseers suddenly decided such conduct is acceptable. The latter analysis unfortunately is far more likely.

One case concerned the harsh voter ID law in Texas, implemented just hours after the Court announced its ruling in *Shelby County*.[17] (Under this law you could not use a University of Texas ID as a government ID, but could use a concealed carry gun permit.) A federal judge found that

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[10] *See* Voting Section Litigation, https://www.justice.gov/crt/voting-section-litigation.
[11] These cases include two cases under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) that were immediately settled, and an intervening complaint seeking to force Kentucky to remove inactive voters from the rolls. *See* https://www.justice.gov/crt/cases-raising-claims-under-uniformed-and-overseas-citizen-absentee-voting-act#wi_uocava18 (describing *United States v. State of Wisconsin* (W.D. Wisc. 2018) and *United States v. State of Arizona* (D. Ariz. 2018); https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act#nynvra2016 (describing *United States v. Commonwealth of Kentucky* (E.D. Ky. 2018).
[12] *See* Voting Section Litigation, https://www.justice.gov/crt/voting-section-litigation.
[13] *Id.*
[14] *Id.*
[15] *See* Statement of Interest of the United States Concerning Section 201 of the Voting Rights Act, *Thomas v. Andino*, No. 3:20-cv-1552 (D.S.C. 2020); Statement of Interest of the United States Concerning Section 201 of the Voting Rights Act, No. 2:20-cv-619 (N.D. Ala. 2020).
[16] *See* 52 U.S.C. § 10501(b)(4).
[17] SB 14, 82nd Leg, (2011); Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619.

more than 600,000 registered voters lacked the required ID.[18] The Justice Department spent six years opposing Texas's law. Together with private litigants—including parties represented by the Brennan Center—it won federal court rulings that the law was discriminatory and unlawful. Then came Inauguration Day, 2017. The Department abruptly abandoned its longstanding position, and asked the Court of Appeals to allow Texas to enforce the law.[19]

In Ohio, a similar switch occurred. [20] During the Obama administration the Justice Department had successfully opposed the state's effort to purge thousands of voters from the rolls because they had not voted in recent elections. Again, the Justice Department abruptly reversed position, arguing before the Supreme Court that the state's actions were compliant with federal law.

The Civil Rights Division has actively worked, too, to politicize and undermine the Census. The Trump administration tried to add an untested, unprecedented citizenship question; named unqualified political appointees to ill-defined Census Bureau leadership positions late in the census cycle; and refused to comply with congressional subpoenas. The Justice Department actively participated in these moves. For instance, it helped concoct a rationale for adding a citizenship question. Then it defended that pretext in the courts as an authentic reason for the administration's actions. A 5-4 vote of the U.S Supreme Court stopped the scheme, a ruling which turned in part on the Justice Department's purported rationale being little more than a pretext.[21]

The Division also has sought to obscure its actions. In 2017, the head of the Voting Section sent a letter to most states, requesting detailed information on the policies, practices, and procedures related to voter list maintenance. Voting rights advocates feared it was a prelude to a broader effort to force states to aggressively purge voter rolls, and the Brennan Center filed a FOIA request seeking information.[22] Three years later, DOJ refuses to release thousands of pages of documents, asserting that releasing them would interfere with ongoing law enforcement proceedings.

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[18] For a history of the litigation, see Court Case Tracker: Texas NAACP v. Steen (consolidated with Veasey v. Abbott), Brennan Center for Justice, https://www.brennancenter.org/our-work/court-cases/texas-naacp-v-steen-consolidated-veasey-v-abbott.

[19] Sari Horwitz, "Justice Department changes its position in high-profile Texas voter-ID case," *Washington Post*, February 27, 2017, https://www.washingtonpost.com/world/national-security/justice-department-changes-its-position-in-high-profile-texas-voter-id-case/2017/02/27/cfaafac0-fd0c-11e6-99b4-9e613afeb09f_story.html; and Pam Fessler, "Justice Department Reverses Position On Texas Voter ID Law Case," *NPR*, February 27, 2017, https://www.npr.org/2017/02/27/517558469/justice-department-reverses-position-on-texas-voter-id-law-case.

[20] Sari Horwitz, "Justice Dept. sides with Ohio's purge of inactive voters in case headed to Supreme Court," *Washington Post*, August 8, 2017, https://www.washingtonpost.com/world/national-security/justice-department-reverses-position-to-allow-ohio-to-purge-inactive-voters-from-rolls/2017/08/08/e93c5116-7c35-11e7-9d08-b79f191668ed_story.html.

[21] Department of Commerce v. New York, 588 U.S. ___ (2019).

[22] Wendy Weiser to Nelson D. Hermilla, July 20, 2017, Freedom of Information Act Request, Request for Expedited Processing and Fee Waiver, (Brennan Center for Justice, New York, NY), https://www.brennancenter.org/sites/default/files/analysis/Brennan_Center_FOIA_Request.pdf.

II. THE POLITICIZATION OF THE JUSTICE DEPARTMENT

The Civil Rights Division is embedded within a cabinet agency distorted and politicized by its leadership. The Justice Department today is under greater improper political duress than at any point in the past half century. One must return to the days of Richard Nixon and John Mitchell to find anything close.

Attorney General William P. Barr has made clear as a matter of doctrine and brute political will that too often the professional judgments of the prosecutors and attorneys at the Department of Justice mean little. In a recent speech, he stated that non-political staff are not as "equipped [as political appointees] to make the complex judgment calls concerning how we should wield our prosecutorial power." [23] He decried the "criminalization of politics" (even as he pursued former Obama officials seemingly at the behest of the president's Twitter feed).[24] He appears to have intervened in ongoing prosecutions, over and over, to benefit the president's personal and political interests.[25] President Trump's operative Roger Stone had his sentence commuted; his former campaign manager Paul Manafort, jailed for tax evasion and bank fraud, was granted home confinement.[26] The Justice Department, having won a guilty plea from former National Security Advisor Michael Flynn for lying to the FBI about his conversation about sanctions with the Russian ambassador, now has moved to drop the case. The trial judge was so concerned about improper political motive that he has convened an extraordinary inquiry, over the objections of the Justice Department.[27] The president's personal attorney, Michael Cohen, who credibly accused Trump of participation in a criminal campaign finance scheme, was sent back to prison after he was released during the pandemic because he was writing a book critical of the president.[28] Most recently, the Justice Department stepped in to defend Donald Trump in a personal lawsuit alleging sexual assault.[29] The president's personal interest and the actions of the Justice Department appear to have fused. Donald Trump long reportedly has asked, "Where's my

[23] Martha Kinsella, Gareth Fowler, Julia Boland, Daniel L. Wiener, "Trump Administration Abuses That Thwart Pandemic Response," Brennan Center for Justice, updated September 22, 2020, https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response#s7a.
[24] Attorney General William P. Barr, "Remarks by Attorney General William P. Barr at Hillsdale College Constitution Day Event," (speech, Washington, D.C., September 16, 2020), U.S. States Department of Justice, https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event.
[25] Katie Benner, Sharon LaFraniere, and Nicole Hong, "Fearful of Trump's Attacks, Justice Dept. Lawyers Worry Barr Will Leave Them Exposed," *The New York Times*, May 18, 2020, https://www.nytimes.com/2020/02/15/us/politics/trump-barr-justice-department.html.
[26] Peter Baker, Maggie Haberman, and Sharon LaFraniere, "Trump Commutes Sentence of Roger Stone in Case He Long Denounced," *The New York Times*, July 10, 2020, https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html; Eileen Sullivan, "Paul Manafort, Trump's Ex-Campaign Manager, Released to Home Confinement," *New York Times*, May 13, 2020, https://www.nytimes.com/2020/05/13/us/politics/paul-manafort-released-coronavirus.html.
[27] Colbert King, "It's Roger Stone Now. Manafort and Flynn Are Next." *The Washington Post*, July 11, 2020, https://www.washingtonpost.com/opinions/2020/07/11/its-roger-stone-now-manafort-flynn-are-next/.
[28] Benjamin Weiser and Alan Feuer, "Judge Orders Cohen Released, Citing 'Retaliation' Over Tell-All Book," *The New York Times*, July 23, 2020, https://www.nytimes.com/2020/07/23/nyregion/michael-cohen-trump-book.html.
[29] Alan Feuer, "Justice Dept. Intervenes to Help Trump in E. Jean Carroll Defamation Lawsuit," *The New York Times*, September 8, 2020, https://www.nytimes.com/2020/09/08/nyregion/donald-trump-jean-carroll-lawsuit-rape.html.

Roy Cohn," pining for the legendarily ruthless and corrupt attorney and fixer. Startlingly, he has managed to find "his Roy Cohn" in the Attorney General.

All this is in service of Trump's yearning for an imperial presidency. Last July, Trump declared: "I have an Article II [of the Constitution], where I have to the right to do whatever I want as president."[30] Attorney General Barr has given a pseudo-scholarly gloss to this misreading of the Constitution. Barr's words articulating the "unitary executive" assert that the president has untrammeled control over the executive branch, that the attorney general has untrammeled control over the prosecutorial decisions of the Justice Department.[31] His actions assert with equal force that he sees no problem with wielding that absolute control to advance the personal and political interest of the president.

All this raises profoundly alarming questions about the role the Justice Department will play in the upcoming election. In recent months Attorney General Barr has joined in spreading misinformation and threatening misconduct.

- Barr has said that "elections that have been held with mail have found substantial fraud and coercion."[32] This is false.
- Last month, Trump threatened to use law enforcement personnel on Election Day, claiming they were needed to quell "election night riots." "We're going to have sheriffs," he explained, "and we're going to have law enforcement, and we're going to have, hopefully, U.S. attorneys." He added, "We'll put them down very quickly if they do that."[33] Days later during an interview with CNN, Barr defended the president's comments, saying it would be legal to send law enforcement to polling locations on Election day if it were in response to "a particular criminal threat."[34]
- Barr has claimed that mail-in voting leads to substantial voter fraud based on a Texas case in which "we indicted someone in Texas – 1,700 ballots collected from people who could vote, he made them out and voted for the person he wanted to." Barr's description of the case does

[30] President Donald Trump, "Remarks by President Trump at Turning Point USA's Teen Student Action Summit 2019," Washington, D.C., July 23, 2019, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-turning-point-usas-teen-student-action-summit-2019/.

[31] Attorney General William P. Barr, "Attorney General William P. Barr Delivers the 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention," (speech, Washington, D.C., November 15, 2019) U.S. Department of Justice, https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture.

[32] Salvador Rizzo, "Attorney General Barr's False Claims About Voting By Mail," *Washington Post,* September 4, 2020, https://www.washingtonpost.com/politics/2020/09/04/attorney-general-barrs-false-claims-about-voting-by-mail/.

[33] Quint Forgey, "'We'll Put Them Down Very Quickly': Trump Threatens to Quash Election Night Riots." *POLITICO,* September 11, 2020, https://www.politico.com/news/2020/09/11/trump-election-night-riots-412323

[34] Justin Wise, "Barr Suggests Law Enforcement Could Be Sent to Polling Places Over 'Criminal Threat," The Hill, September 3, 2020, https://thehill.com/homenews/administration/514931-barr-suggests-law-enforcement-could-be-sent-to-polling-places-if.

not match the facts: only one ballot was fraudulent, the fraud was detected, and the perpetrator was punished accordingly.[35]

- Barr echoed Trump in claiming that vote by mail somehow opened the way for foreign governments to commit fraud. "I'm saying people are concerned about foreign influence, and if we use a ballot system with a system that some – that states are just now trying to adopt, it does leave open the possibility of counterfeiting, counterfeiting ballots either by someone here or someone overseas."[36]
- Barr said the U.S. will go down a "socialist path" if Trump isn't reelected, a frightening direct step into partisan politics.[37]

How could such power be misused in and around the election? Recently we have seen the executive branch stir division and challenge First Amendment-protected activity. In June, protestors responding to the killing of George Floyd gathered in Lafayette Square. It was the Attorney General who organized federal officials from DOJ and elsewhere – including Bureau of Prisons riot policemen – to blast through the square, using flash grenades and gas, so the President could hold a photo opportunity. In July, the federal government (in this case, the Department of Homeland Security) sent forces into Portland, Oregon, provoking street battles that stirred fear and dominated the news.

Typically the Justice Department under both parties has carefully avoided actions that could affect an election. In 2000, for example, despite the topsy-turvy Florida recount, the Justice Department under Attorney General Janet Reno did not intervene in the counting – let alone on behalf of her own political party. FBI Director James Comey's disruptive public statements about Hillary Clinton in 2016 stood out for that very reason.

But Congress has ample reason for concern, given the recent record of this Attorney General – and should make clear it would be a gross abuse of power for the Justice Department to take partisan actions around the election. One hesitates to enumerate them: Could the Department send federal law enforcement into what President Trump calls "Democrat cities" supposedly to protect federal facilities – but in fact, to suppress the vote in a racially discriminatory manner? Could it seize ballots as they are legitimately counted in service of the President's fevered insistence that ballots cast by mail (other than his) are improper? And so on. We should not risk normalizing such actions by speculating. They would be a breach of our democratic order.

[35] Salvador Rizzo, "Attorney General Barr's False Claims About Voting By Mail," *Washington Post*, September 4, 2020, https://www.washingtonpost.com/politics/2020/09/04/attorney-general-barrs-false-claims-about-voting-by-mail/.
[36] Salvador Rizzo, "Attorney General Barr's False Claims About Voting By Mail," *Washington Post*, September 4, 2020, https://www.washingtonpost.com/politics/2020/09/04/attorney-general-barrs-false-claims-about-voting-by-mail/.
[37] Katie Benner, "In an Interview, Barr Warned of the U.S. Going Down 'the Socialist Path' if Trump is not Re-Elected," *The New York Times*, September 16, 2020, https://www.nytimes.com/2020/09/16/us/elections/in-an-interview-barr-warned-of-the-us-going-down-the-socialist-path-if-trump-is-not-re-elected.html.

III. RENEWING THE CIVIL RIGHTS DIVISION

The task for the Justice Department goes beyond a duty not to abuse power. We should expect more than mere restoration of the Civil Rights Division to its previous work and role. Rather, the deep problems in our electoral system exposed by the pandemic compel us to think anew, and to ask what changes could improve and modernize the Division and its work.

A. Restore the Voting Rights Act

The most important legislative task is to restore the strength of the Voting Rights Act of 1965, the nation's most effective civil rights law.

Congress should promptly pass the John R. Lewis Voting Rights Advancement Act (VRAA), which passed the House of Representatives last year as H.R. 4. When the Supreme Court gutted preclearance, it stated explicitly that Congress could fix the VRA, using current data and taking a wider perspective than the last time it reauthorized the law.[38] Congress has engaged in extensive fact-finding and built a strong record.

The John Lewis Act would update the coverage formula that the Supreme Court struck down in *Shelby County*, renewing the Civil Rights Division's authority to block discriminatory voting rules in states with a recent history of voting rights violations.[39] The Justice Department would once again review proposed changes, before they are implemented, to ensure that they do not make it more difficult for racial and language group minorities to cast a ballot.

The VRAA would also give the Department stronger tools to combat discrimination. It would require preclearance of certain known, discriminatory voting practices nationwide, increase transparency by requiring reasonable public notice for voting law changes, and reinforce the Attorney General's authority to send observers to polling places.[40]

B. Focus On Today's Threats to the Vote

A renewed Civil Rights Division should be an active force that takes on the myriad urgent threats to the vote nationwide.

Abusive voter purges. Rather than pressing states to ever-more-frenetically purge voters, the Division should refocus its list maintenance enforcement efforts around protecting voters from improper purges. Another example: in 2018, voters of color experienced longer wait times at the polls than their white counterparts and were more likely to wait in the longest lines.[41] The Division should investigate and remedy these inequities.

Pay-to-vote schemes. The Division should also step up enforcement of rights guaranteed by the U.S. Constitution. A prime example: in 2018, 64 percent of Florida voters endorsed ending the state's policy of lifetime felony disenfranchisement, a Jim Crow remnant that affected 1.4

[38] Shelby County v. Holder, 570 U.S. 557 (2013).
[39] John R. Lewis Voting Rights Act, H.R. 4, 116th Cong. § 3 (2019).
[40] *See* John R. Lewis Voting Rights Act, H.R. 4, 116th Cong. §§ 5-7 (2019).
[41] Hannah Klain, et al, "Waiting to Vote," Brennan Center for Justice, June 3, 2020, https://www.brennancenter.org/our-work/research-reports/waiting-vote.

million people. But last year, Gov. Ron DeSantis signed into law a requirement that denies people the right to vote unless they pay fees and costs whose primary purpose is to raise revenue for the state. Former Civil Rights Division officials filed an amicus brief decrying the law as a blatant violation of the Twenty-Fourth Amendment, which prohibits making voting rights contingent on the payment of taxes.[42] But the current Department itself sat idly by while a federal appeals court ruled that it was constitutional to deny voting rights to hundreds of thousands of Floridians simply because they were not wealthy enough to pay their fees and fines.

Deceptive practices. American elections are awash in misinformation. These lies and threats, magnified exponentially by social media, are the most effective way to deter Americans from exercising their core right to vote. We may see increasing evidence of this as the November ballot approaches.

The Justice Department should be given stronger authority to police and punish those who deter voting through false information about eligibility or the "time, place and manner" of an election, or who hinder voters through intimidation. The For the People Act (H.R. 1), sweeping democracy reform passed by the House of Representatives last year, includes these and other measures to strengthen the Division's power to address voter suppression through misinformation. It also charges the Department with publicizing corrective information when misinformation is disseminated.

C. Protect Election Security

Cyberattacks put American democracy at risk. They pose real, not imaginary, challenges to Americans' right to vote. The Civil Rights Division could do more to help bolster the nation's defenses.

The Help America Vote Act (HAVA) was passed in 2002 after the Florida recount. It aimed to modernize the nation's election systems. The Justice Department has authority to enforce many of its provisions, authority it has not used during the Trump administration. HAVA enforcement would particularly help effort improve election infrastructure security. For instance, the law requires that when a voter's eligibility is questioned, provisional ballots should be available as a failsafe at polling places.[43] That is important not only for individuals; it is a key resiliency mechanism should registration or pollbook data be corrupted. Some states always offer these ballots,[44] but others do not do so consistently.[45] Indeed, a recent Georgia State Board of

[42] "Brief of Former Officials of the Civil Rights Division of the United States Department of Justice as Amici Curiae in Support of Plaintiffs-Appellees and Affirmance," https://assets.documentcloud.org/documents/7012575/Doj-Lawyers-Florida-2020-08-03.pdf; Marcia Coyle, "36 Former DOJ Civil Rights Attorneys Urge Court to Scrap Florida's 'Pay-to-Vote' System," National Law Journal, August 3, 2020, https://www.law.com/nationallawjournal/2020/08/03/36-former-doj-civil-rights-attorneys-urge-court-to-scrap-floridas-pay-to-vote-system/.

[43] Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, § 302 (2002).

[44] "Provisional Voting," North Carolina State Board of Elections, accessed September 21, 2020, https://www.ncsbe.gov/voting/provisional-voting.

[45] *Georgia Pollworker Manual*, Office of Georgia Secretary of State Raffensperger, August 2020, 74-80, https://georgiapollworkers.sos.ga.gov/Shared%20Documents/Georgia%20Poll%20Worker%20Training%20Manual.pdf.

Elections hearing revealed that during the June primary, multiple polling locations ran out of envelopes and could not offer voters this option.[46] Yet the Department of Justice has not issued clarifying guidance on maintaining the supplies needed to effectuate this right.

In another important provision, HAVA requires that voting systems used in federal elections provide an auditable paper trail, and that voters can change their selections before that permanent paper record is produced.[47] These requirements should prohibit Direct Record Electronic (DRE) devices that lack a paper record in federal elections, as well as any online voting systems in which voters return their ballots through email or over the internet, a method that is not secure. Yet even as some jurisdictions in eight states continue to employ the use of DREs without a paper record,[48] and as jurisdictions have become tempted to permit online ballot return,[49] no clarification or enforcement action has been taken to protect the security of those ballots. Justice Department action matters greatly because the existence of a private right of action to enforce some sections of HAVA is sometimes contested.[50]

Particularly important after the foreign attacks on registration databases in 2016: HAVA's mandate that computerized registration lists be protected by "adequate technological security measures."[51] Russian hackers were able to exfiltrate data from at least one registration database in 2016.[52] We know that Russia is at it again, potentially along with other malevolent foreign governments or groups. Even subtle manipulation of databases can wreak havoc on Election Day and undermine public confidence. It is therefore vital that officials and vendors meet HAVA's requirement for basic cybersecurity standards.

D. Restore the Independence of the Justice Department

A final recommendation goes to a fundamental challenge for American governance: the politicization of law enforcement. Donald Trump is hardly the first president to seek to influence the Justice Department. Nor is William Barr the first Attorney General to oblige. But as discussed above, their misconduct has wrenched the Department, sparking a crisis of confidence within its ranks and with the public.

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[46] *Georgia State Board of Elections Hearing*, (September 10, 2020), recording available at https://sos.ga.gov/admin/files/September%2010,%202020%20State%20Election%20Board%20Meeting.mp4.
[47] Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, § 301 (2002).
[48] For jurisdictions in Ohio, Kansas, Tennessee, Indiana, Mississippi, Louisiana, Texas, and New Jersey that use DREs lacking a paper record for all who vote in person, see, "The Verifier," Verified Voting, accessed September 21, 2020, https://verifiedvoting.org/verifier/#mode/navigate/map/ppEquip/mapType/normal/year/2020.
[49] Eric Geller, "Some States Have Embraced Online Voting. It's a Huge Risk," *Politico*, June 9, 2020, https://www.politico.com/news/2020/06/08/online-voting-304013.
[50] *E.g.*, Memorandum by United States as Amicus Curiae, Bay County Dem. Party v. Land, 347 F.Supp. 404 (E.D. Mich. 2004) (arguing that HAVA does not create a private right of action); County of Nassau v. New York, 724 F.Supp. 295, 305 (E.D. New York 2010). ("[T]here is no indication that HAVA provides any exclusive cause of action or, for that matter, any private right of action with respect to voting machines and procedures.")
[51] Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat.1666, § 303(a)(3) (2002).
[52] U.S. Senate, Select Committee on Intelligence, *Report on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election*, 2019, vol. 1, 22, https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume1.pdf.

The Brennan Center has done a substantial amount of work on partisan abuses at the Department of Justice. Our bipartisan National Task Force on the Rule of Law and Democracy, comprised of former senior political officials who have served in both Republican and Democratic administrations, created a legislative agenda to strengthen guardrails against abuse of power in the executive branch.[53] The Brennan Center has also published a set of proposals for executive actions that the next president can take to rebuild unwritten rules of governance that safeguard our democracy.[54] Additionally, we have a tracker of the Trump administration's abuses of power throughout its response to the Covid-19 pandemic, including those occurring at the Department of Justice.[55]

Undue political interference gravely threatens the work of the Civil Rights Division, and the Department of Justice in general, a threat that has recurred during the past several administrations. For instance, under the George W. Bush presidency, the Department's inspector general and Office of Professional Responsibility found that the political official overseeing the Civil Rights Division "considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys" there.[56] Indeed, when political officials pressured prosecutors to bring voter fraud charges against innocent people, some of the prosecutors refused and were fired. The resulting scandal led to the resignation of Attorney General Alberto Gonzales.

Political interference at the Department of Justice has again reached a crisis point during the current administration. As described above, repeatedly the Department has made prosecution and sentencing decisions about the President's political associates. And the president has meddled in politically sensitive prosecutions, including by firing the U.S. attorney for the Southern District of New York, whose office is investigating matters involving the president and his close associates.[57]

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[53] *National Task Force on Rule of Law & Democracy*, Brennan Center for Justice, 2019, https://www.brennancenter.org/issues/bolster-checks-balances/ethics-rule-law/national-task-force-rule-law-democracy.

[54] Martha Kinsella, Rudy Mehrbani, Wendy Weiser, and Daniel Weiner, *Executive Actions to Restore Integrity and Accountability in Government*, Brennan Center for Justice, 2020, 5, https://www.brennancenter.org/our-work/policy-solutions/executive-actions-restore-integrity-and-accountability-government.

[55] Martha Kinsella, Gareth Fowler, Julia Boland, and Daniel Weiner, *Trump Administration Abuses Thwart US Pandemic Response*, Brennan Center for Justice, 2020, https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response.

[56] U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division* (Washington, D.C.: Department of Justice Office of the Inspector General and Office of Professional Responsibility, 2009): 64, https://www.oversight.gov/sites/default/files/oig-reports/final_9.pdf.

[57] Alan Feuer et al., "Trump Fires U.S. Attorney in New York Who Investigated His Inner Circle," *The New York Times*, June 20, 2020, https://www.nytimes.com/2020/06/20/nyregion/trump-geoffrey-berman-fired-sdny.html. Senior political officials also pressured department attorneys to conduct an antitrust investigation of automakers that attempted to lower their emissions and to cut Trump ally Roger Stone "a break" in sentencing. Kyle Cheney and Leah Nylen, "Prosecutor Says He Was Pressured to Cut Roger Stone 'a Break' Because of His Ties to Trump," *Politico*, June 23, 2020, https://www.politico.com/news/2020/06/23/prosecutor-says-he-was-pressured-to-cut-roger-stone-a-break-because-of-his-ties-to-trump-336075.

This abuse must stop. The Brennan Center has crafted a series of solutions — building on longstanding practices — that would safeguard against undue political interference at the Department of Justice. Among these solutions is a proposal to strengthen the policy of limiting contacts between the White House and the Department.[58] Our Task Force has also proposed expanding the jurisdiction of agency inspectors general to include investigations into improper interference in law enforcement matters.[59] It also makes sense to strengthen safeguards at other agencies that interact with the Justice Department. For example, the Census Bureau and the Commerce Department could be required to maintain publicly accessible logs of the communications that senior officials have with personnel from other federal agencies, such as the Department of Justice.

Congress is already moving to address these issues. Seven committee chairs, including Chairman Nadler, this week introduced groundbreaking legislation that would, among other things, codify new safeguards to prevent improper political interference with the Department of Justice.[60] This proposal is similar to a separate bill introduced by Rep. Jeffries.[61] Another bill sponsored by Rep. Richmond, which passed the House of Representatives, would expand the jurisdiction of the inspector general for the Department of Justice to include allegations relating to a Department attorney's authority to investigate, litigate, or provide legal advice.[62]

There is reason to hope that in a new Congress, such legislation could attract bipartisan support.

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The Civil Rights Division has a storied history. It must play a vital role in the defense of our democracy. At a time of extraordinary stress on our political institutions, it can once again step forward to advance the voting rights of millions of Americans. It must be renewed and revitalized. That will require determination, a resistance to inappropriate political interference, and a commitment to following the law.

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[58] [58] Preet Bharara, Christine Todd Whitman, et al., Proposals for Reform, National Task Force on Rule of Law & Democracy, 2018, 17-20, https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf; and Martha Kinsella, Rudy Mehrbani, Wendy Weiser, and Daniel Weiner, Executive Actions to Restore Integrity and Accountability in Government, Brennan Center for Justice, 2020, 7, https://www.brennancenter.org/sites/default/files/2020-07/ExecutiveActions_Draft03-2.pdf.

[59] Bharara, Whitman, *Proposals for Reform*, 20–21. Relatedly, the Brennan Center has also proposed that the president issue a memorandum laying out standards ensuring that inspectors general are insulated from political pressure. Martha Kinsella, Rudy Mehrbani, Wendy Weiser, and Daniel Weiner, Executive Actions to Restore Integrity and Accountability in Government, Brennan Center for Justice, 2020, 9, https://www.brennancenter.org/sites/default/files/2020-07/ExecutiveActions_Draft03-2.pdf.

[60] Adam Schiff, Jerrold Nadler, Carolyn Maloney, John Yarmuth, Zoe Lofgren, Eliot Engel, and Richard Neal, "Democratic House Chairs: Here's How We Can Protect Democracy from a Lawless President," *Washington Post*, September 23, 2020, https://www.washingtonpost.com/opinions/2020/09/23/democratic-house-chairs-trump-damage-democracy/.

[61] Security from Political Interference in Justice Act of 2019, H.R. 3380, 116th Cong. (2019).

[62] Inspector General Access Act of 2019, H.R. 202, 116th Cong. (2019).

BRENNAN CENTER FOR JUSTICE

TESTIMONY OF MICHAEL WALDMAN

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HEARING ON S. 1, THE FOR THE PEOPLE ACT

THE COMMITTEE ON RULES & ADMINISTRATION
U.S. SENATE

March 24, 2021

Chairwoman Klobuchar, Ranking Member Blunt, and members of the Committee:

Thank you for the opportunity to testify in strong support of the For the People Act (S. 1).[1] This landmark legislation would repair and revitalize our democracy. It would be the most significant democracy reform in at least a half century. It would powerfully restore trust in government. It is the next great civil rights bill, a critical response to the call for racial justice. It should become law.

The For the People Act would markedly improve the workings of American democracy, modernizing it, opening access, and restoring public trust. The legislation:

- sets national standards to ensure that all eligible citizens can cast a ballot—guaranteeing access to vote by mail and early voting, and extending automatic voter registration nationwide;
- bans partisan gerrymandering and sets clear rules for the drawing of congressional districts;
- curbs the corrosive role of big money in politics, requiring disclosure and enforcement, and enacting a system of voluntary small donor matching funds;
- strengthens rules to ensure ethical conduct by executive and judicial branch officials; and
- restores the right to vote for people with past criminal convictions, and commits to strengthening the Voting Rights Act.

Each of these bold reforms meets an urgent need. Each has been found to work at the national, state, or local level. They work together to advance our system of self-government.

The Senate considers S. 1 at a time of crisis for our democracy. Legislatures across the country are moving to enact curbs on voting, an assault on voting rights that targets people of color. This legislation would stop the new wave of voter suppression, cold.[2] Congress has the power to do so—legally and constitutionally. We urge the Senate to meet this moment and act.

I. THE STAKES FOR DEMOCRACY

In 2020, despite the pandemic, voter suppression, and lies about the election, our nation saw the highest voter turnout since 1900.[3] Fully 101 million people voted early or by mail. The federal government's experts confirmed it was the most secure election in history. We should celebrate this achievement.

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[1] The Brennan Center for Justice at NYU Law is a nonpartisan law and policy institute that works to strengthen the systems of democracy and justice so they work for all Americans. Michael Waldman, president of the Center since 2005, is the author of *The Fight to Vote* (Simon & Schuster: 2016). Brennan Center experts and staff contributed to the preparation of this written testimony: Wendy Weiser, Daniel Weiner, Martha Kinsella, Kirstin Dunham, Gareth Fowler, Julia Boland, Katherine Scotnicki, Michael Li, Lawrence Norden, William Wilder, Eliza Sweren-Becker, Derek Tisler, Gowri Ramachandran, Dominique Erney, Harold Ekeh, and Alan Beard. Thank you also to Taylor Larson, Khrystan Policarpio, and Jenna Pearlson for their drafting assistance.

[2] See Gareth Fowler et al., "Congress Could Change Everything," Brennan Center for Justice, March 16, 2021, https://www.brennancenter.org/our-work/research-reports/congress-could-change-everything.

[3] Kevin Schaul, Kate Rabinowitz, and Ted Mellnik, "2020 Turnout Is the Highest in over a Century," *Washington Post*, November 5, 2020, https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/.

Instead, our nation endured months of the Big Lie pushed by the defeated president who insisted that the election was stolen and our democracy illegitimate. These relentless attacks culminated in the violent January 6 insurrection at the Capitol, a sobering low point in our nation's history.

Now, in the first weeks of 2021, we see a new and fierce assault on the vote. Legislators are rushing to enact a wave of voting restrictions, in what would be the most significant cutback since the Jim Crow era. As of our February 19 count, 253 proposed laws in 43 states would curb the vote, seven times more than just two years ago.[4] The number is now well over 300. They amount to a real time attack on our democracy.

Consider the measures before the legislature in Georgia. Some proposals would have effectively ended no-excuse vote by mail, but preserved it for older voters, who tend to be white and Republican. Another proposal would have repealed automatic voter registration, which had been put in place by the Republican governor. Another proposal would have ended early voting on the Sunday before Election Day—the day used by Black churches for "souls to the polls." And now the legislature is still considering proposals allowing for mass challenges and making it a crime to give a bottle of water to someone waiting on line to vote. After a sustained public outcry, in recent days, sponsors have begun to make changes, but egregious proposals continue to move through the legislature.

Georgia is not an anomaly. In Arizona, lawmakers pre-emptively proposed banning automatic and Election Day voter registration (they do not have either now), and are actively trying to: make it harder to vote by mail, push for aggressive purges of voters off of the vote-by-mail list, and require new onerous ID requirements for when voting by mail. In Texas, legislators have proposed requiring voters to prove their citizenship status if it can't be verified by the secretary of state, and prohibiting voters from submitting absentee ballots in person. The governor of Iowa already signed into law a bill cutting back on early voting.

These proposals all disproportionately affect, and often target, voters of color.[5] If enacted, they would result in large-scale disenfranchisement of eligible voters. As more and more people are admitting, that is precisely their purpose. Recently an Arizona legislator, defending that state's proposed voter suppression laws, explained that while some wanted to make sure that everyone could vote, "everybody shouldn't be voting." He added: "Quantity is important, but we have to look at the quality of votes, as well."[6] That ugly sentiment animates too many of these proposed state laws.

Congress can—and must—stop this legislative campaign across the country to suppress the vote. The Brennan Center has analyzed each of the restrictive voting bills pending in the

[4] Brennan Center for Justice, "Voting Laws Roundup: February 2021," last modified February 8, 2021, https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2021.
[5] Kevin Morris, "Georgia's Proposed Voting Restrictions Will Harm Black Voters Most," Brennan Center for Justice, March 6, 2021, https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most.
[6] Timothy Bella, "A GOP Lawmaker Says the 'Quality' of a Vote Matters. Critics Say That's 'Straight Out of Jim Crow,'" *Washington Post*, March 13, 2021, https://www.washingtonpost.com/politics/2021/03/13/arizona-quality-votes-kavanagh/.

states and concludes that The For the People Act would thwart virtually every one. A chart attached to this testimony as an appendix spells out how its provisions would block or override these egregious proposals (Attachment).[7] Some proposed laws would cut back who can vote by mail; S. 1 would require no-excuse absentee balloting. Some proposals would restrict the use of secure drop-boxes, frequently used to vote absentee; S. 1 would ensure that voters can vote securely and conveniently. Some proposals would eliminate same day or automatic registration; S. 1 would protect them. Some proposals would end early voting on Sundays; S. 1 would require 14 days of consecutive early voting.

Within months, too, the redistricting process to draw congressional district lines will begin. Unchecked state legislative majorities will likely use the opportunity to gerrymander, to discriminate, to deny communities a voice and voters meaningful choice. The states with the fastest growing populations—growth that came overwhelmingly from people of color—face the highest risk of racial and partisan gerrymandering that would deny those emerging communities representation. This will be the first redistricting cycle in a half century without the full protections of the Voting Rights Act, which the U.S. Supreme Court gravely weakened in the *Shelby County v. Holder* decision in 2013.[8]

This legislation comes, as well, one decade after *Citizens United* ushered in a new era of big money domination of American politics—a role for big donors not seen since the Gilded Age a century ago. Fully $14.4 billion was spent on the 2020 election, roughly double the amount just four years before. And even with a historic level of participation by small donors—in excess of 20 million during the last election cycle—the power of big donors continues unabated.[9] Indeed, the amount spent by the top 100 individual donors last cycle rivalled the amount spent by more than 20 million small donors combined.[10] Effectively, money in politics has been largely deregulated. Super PACs, dark money, and a frenetic chase for funds have come to dominate.

It comes after four years in which President Trump smashed through ethical norms and longstanding practices designed to prevent abuse of power.

These converging crises demand a full response to the challenges facing American democracy. A key strength of this legislation, in contrast to earlier and narrower reform proposals, is that it links voting and redistricting and campaign finance and ethics. All are essential to the strength of American democracy. All are at or near a crisis point. All combine to

[7] Fowler et al., "Congress Could Change Everything."
[8] Shelby County v. Holder, 570 U.S. 529 (2013).
[9] The small donor estimate was calculated by dividing the total contributions from small donors, which according to OpenSecrets.org was $4,065,263,514, by the average small donation, which based on evidence from prior years is $200. Karl Evers-Hillstrom, "Most Expensive Ever: 2020 Election Cost $14.4 Billion," Center for Responsive Politics, February 11, 2021, https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16.
[10] Center for Responsive Politics, "Who Are the Biggest Donors?" accessed March 22, 2021, https://www.opensecrets.org/elections-overview/biggest-donors; Center for Responsive Politics, "Michael Bloomberg's 2020 Presidential Election Fundraising—Summary," accessed March 22, 2021, https://www.opensecrets.org/2020-presidential-race/michael-bloomberg/candidate?id=N00029349; Center for Responsive Politics, "Tom Steyer's 2020 Presidential Election Fundraising—Summary," accessed March 22, 2021, https://www.opensecrets.org/2020-presidential-race/tom-steyer/candidate?id=N00044966; and Karl Evers-Hillstrom, "Most Expensive Ever."

dampen the voices of millions of Americans—working people, people of color, women, young people, and people with disabilities.

S. 1 emphatically reflects the Constitution's vision of the appropriate role for the federal government. The Constitution's Elections Clause, in particular, gives Congress authority to set the "times, places and manner" of federal elections.[11] At the Constitutional Convention, James Madison insisted on the provision because of the risk that state legislatures would enact manipulative election laws. "It was impossible to foresee all the abuses that might be made of the discretionary power," Madison warned. He sketched out an array of ways to manipulate voting rules: "Whenever the State Legislatures had a favorite measure to carry, they would take care so to mold their regulations as to favor the candidates they wished to succeed."[12] The Supreme Court repeatedly has reaffirmed Congress's power to enact national laws to govern federal elections. Indeed, in 2019, an opinion written by Chief Justice John Roberts pointed to this very legislation as proof that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause."[13]

Throughout, this legislation would set a national standard. Access to our electoral system should be the same regardless of where a citizen lives. Of note, every measure in this bill has been drawn from successful policies at the national, state, and local level. Every one has been honed by election officials over the years. Every one has been supported or used by both parties. They are widely popular with the public, and with voters of all political persuasions.

While Congress sets national standards, states could still innovate and to innovate beyond them. Where states have already met the legislation's goals (such as by implementing automatic voter registration), in many cases they would be exempt from its provisions.

Taken together, the reforms in the For the People Act represent a powerful response to the demand for racial justice heard so passionately throughout the country. Our voting system, politically manipulated gerrymandering, and a dollar-driven campaign finance system all combine to stifle the voices of communities of color. Recent proposed electoral changes in the states would markedly shrink the electorate, again in a manner that would hit those voters hardest. If we are to build a thriving multiracial democracy that reflects a changing country, we have no choice but to modernize our electoral systems and prevent abuse.

Finally, this legislation emphatically repudiates the Big Lie put forward by President Trump and his supporters: that American elections are riddled with misconduct. Voter fraud in the United States is vanishingly rare. You are more likely to be struck by lightning than to commit voter fraud.[14] In 2016, in an election he won, Trump insisted there were three to five million illegal votes. He established a commission to prove his claim. It collapsed without

[11] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. Const. art. I, § 4, cl. 1.
[12] Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1941), vol. 2, 241.
[13] Rucho v. Common Cause, 139 S. Ct. 2484, 2506–7 (2019).
[14] Brennan Center for Justice, "The Myth of Voter Fraud," accessed March 20, 2021, https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud.

finding any evidence. In 2020, the election was confirmed to be smoothly run and extraordinarily secure. The Department of Homeland Security declared that the 2020 election was the "most secure in history."[15] (Trump responded by firing the country's key official who protected elections from cyber threats.[16]) In the frenzy of lawsuits brought to overturn the election, 60 courts considered claims, and rejected them. Trump's attorneys, under oath, were forced to confess repeatedly they could press no charges of fraud. Federal Judge Stephen Bilbas, appointed by President Trump, ruled definitively on behalf of a three-judge appeals court panel: "Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here."[17] Attorney General William Barr confirmed that there was no widespread election fraud.[18] Privately to the president, he used a more colorful barnyard epithet.[19]

Trump relied on these debunked claims to justify bid to cut out, in effect, the votes of cities variously including Atlanta, Philadelphia, Detroit, and Milwaukee. The ugly racial subtext is barely disguised. Unfortunately, the Big Lie has been embraced by millions of Americans. This legislation can help to push back against it by focusing on the true threats to election integrity—which include cybersecurity risks and foreign interference. (Indeed, last week the intelligence community released its report alleging that Russia and Iran sought to interfere in last year's election, albeit backing different candidates.[20])

Were it to become law, the For the People Act would mark a major and hopeful turn in the American story. Our history has been marked over two centuries by the drive toward the democratic ideal. At the start, we were anything but what we would regard today as a democracy. Only white men who owned property could vote. Even so, James Madison set out an aspiration for our Constitution in *Federalist* 57. He asked: "Who are to be the electors of the federal representatives?"

> *Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and*

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

[16] David E. Sanger and Nicole Perlroth, "Trump Fires a Cybersecurity Official Who Called the Election 'the Most Secure in American History,'" *New York Times*, updated December 8, 2020, https://www.nytimes.com/2020/11/18/us/politics/trump-fires-a-cybersecurity-official-who-called-the-election-the-most-secure-in-american-history.html.

[17] Aaron Blake, "The Most Remarkable Rebukes of Trump's Legal Case: From the Judges He Hand-Picked," *Washington Post*, December 14, 2020, https://www.washingtonpost.com/politics/2020/12/14/most-remarkable-rebukes-trumps-legal-case-judges-he-hand-picked/.

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

[19] Jonathan Swan, "Trump Turns on Barr," *Axios*, January 18, 2021, https://www.axios.com/trump-barr-relationship-off-the-rails-b33b3788-e7e9-47fa-84c5-3a0016559eb5.html.

[20] National Intelligence Council, Intelligence Community Estimate, *Foreign Threats to the 2020 U.S. Federal Elections*, 2021, https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf.

unpropitious fortune. The electors are to be the great body of the people of the United States.[21]

This legislation reflects that drive toward the most basic of American ideals. In the following sections, this testimony describes its provisions in greater detail.

II. VOTING RIGHTS

The right to vote is at the heart of effective self-government. It is, as the Supreme Court has noted, "preservative of all other rights."[22] Over two centuries and more, we have worked toward that ideal. Many Americans gave their lives for it. S. 1 would expand and protect this most fundamental right and bring voting into the 21st century.

A. Voter Registration Modernization (Title I, Subtitle A, Parts 1, 2, and 3 & Title 2, Subtitle F)

One of the most important parts of S. 1 is a package to modernize voter registration. The centerpiece of that proposal is a plan for automatic voter registration (AVR). This bold, paradigm-shifting approach would add tens of millions to the rolls, cost less, and bolster security and accuracy. It is now the law in 19 states and the District of Columbia.[23] It should be the law of the land.

Outdated Voter Registration Systems. More than many realize, an outdated registration system poses an obstacle to free and fair elections. One in five eligible Americans is not registered to vote.[24] This quiet disenfranchisement is partly due to an out-of-date, and in some places ramshackle, voter registration system. The United States is the only major democracy that requires individual citizens to shoulder the onus of registering to vote (and re-registering when they move).[25] In much of the country, voter registration still largely relies on error-prone pen and paper. In 2012, the Pew Center on the States estimated that roughly one in eight registrations in America is invalid or significantly inaccurate.[26]

These problems have long contributed to low voter turnout.[27] Each Election Day,

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[21] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Lawrence Goldman (New York: Oxford University Press, 2008), 282.
[22] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
[23] Sixteen states and Washington, DC, enacted AVR legislatively or via ballot initiative; three states (Colorado, Connecticut, and Georgia) adopted it administratively. See Brennan Center for Justice, "History of AVR & Implementation Dates," last modified December 22, 2020, https://www.brennancenter.org/analysis/history-avr-implementation-dates.
[24] Pew Charitable Trusts, *Why Are Millions of Citizens Not Registered to Vote?*, 2017, 1, https://www.pewtrusts.org/-/media/assets/2017/06/ei_why_are_millions_of_citizens_not_registered_to_vote.pdf.
[25] Jennifer S. Rosenberg, *Expanding Democracy: Voter Registration Around the World*, Brennan Center for Justice, 2009, 23, https://www.brennancenter.org/publication/expanding-democracy-voter-registration-around-world.
[26] Pew Center on the States, *Inaccurate, Costly and Inefficient*, 2012, https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf.
[27] According to a 2001 commission chaired by former Presidents Ford and Carter, "[t]he registration laws in the United States are among the most demanding in the democratic world . . . [and are] one reason why voter turnout in

millions of Americans go to the polls only to have trouble voting because of registration flaws.[28] Some find their names wrongly deleted from the rolls.[29] Others fall out of the system when they move.[30] One-quarter of American voters wrongly believe their registration is updated when they change their address with the U.S. Postal Service.[31] Election Protection, the nonpartisan voter assistance hotline, reported that registration issues were the second most common problem voters faced in both the 2018 and 2016 elections.[32] Registration errors affect more than those voters who are not on the rolls. As the bipartisan Presidential Commission on Election Administration found in 2014, registration problems cause delays at the polls and are a principal cause of long lines.[33]

Outdated registration systems also undermine election integrity. Incomplete and error-laden voter lists create opportunities for malefactors to defraud the system or disenfranchise eligible citizens. And they are far more expensive to maintain than more modern systems. Officials with partisan motives can remove voters from the rolls because of minor discrepancies, such as spelling mistakes, incomplete addresses, or other missing information. These systems are also far more expensive to maintain than more modern systems. Arizona's Maricopa County, for

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the United States is near the bottom of the developed world." See Jimmy Carter, Gerald Ford, et al., *Reports of the Task Force on the Federal Election System*, National Commission on Election Reform, 2001, 1–3, http://web1.millercenter.org/commissions/comm_2001_taskforce.pdf. In too many parts of America, this is still true.

[28] A Caltech/MIT study found that in 2008, approximately 3 million people tried to vote but could not because of registration problems, and millions more were thwarted by other issues. See R. Michael Alvarez, Stephen Ansolabehere, et al., *2008 Survey of the Performance of American Elections*, 2009, 59, https://elections.delaware.gov/pdfs/SPAE_2008.pdf; see also Stephen Ansolabehere, *Testimony before the U.S. Senate Rules Committee*, 19, March 11, 2009. Data from 2012 similarly demonstrates that millions of voters experienced registration problems at the polls. Charles Stewart III, *2012 Survey of the Performance of American Elections: Final Report*, 2013, 70, http://dvn.iq.harvard.edu/dvn/dv/measuringelections.

[29] Approximately 2.5 million voters experienced voter registration problems at the polls in the 2012 election. Stewart III, *2012 Survey of the Performance of American Elections*, ii; and U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey*, 2013, 8–10, https://www.eac.gov/assets/1/6/2012ElectionAdministrationandVoterSurvey.pdf. Stewart found 2.8 percent of 2012 voters experienced registration problems when they tried to vote. The Election Administration and Voting Survey found that 131,590,825 people voted in 2012 and that 65.5 percent voted in person on Election Day (56.5 percent) or early (9 percent). 65.5 percent of 131,590,825 voters multiplied by the 2.8 percent figure from Stewart's study, yields 2,413,375.73 voters with registration problems at the polls in the 2012 election.

[30] Thomas Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (New York: Vintage Books, 2002), 178.

[31] Pew Center on the States, *Inaccurate, Costly and Inefficient*, 7.

[32] Laura Grace and Morgan Conley, *Election Protection 2018 Midterm Elections Preliminary Report*, Lawyers' Committee for Civil Rights Under Law, 2018, 4, https://lawyerscommittee.org/wp-content/uploads/2018/12/Election-Protection-Preliminary-Report-on-the-2018-Midterm-Elections.pdf; see also Wendy Weiser and Alicia Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, 6, https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_DEmocracy_FINALpdf.pdf; and Walter Shapiro, "Election Day Registration Could Cut Through Many of the Arguments in the Voting Wars," Brennan Center for Justice, last modified October 16, 2018, https://www.brennancenter.org/blog/election-day-registration-could-cut-through-many-arguments-voting-wars.

[33] Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, 2014, http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.

example, found that processing a paper registration cost 83 cents, compared to 3 cents for applications processed electronically.[34]

The Covid-19 pandemic put outdated registration systems under even greater stress. Quarantines, illnesses, and social distancing reduced access to government offices, voter registration drives were curbed, and the post service was disrupted in the lead-up to the election. The result was a dramatic reduction in voter registration rates in many states.[35]

1. Automatic Voter Registration (Title I, Subtitle A, Part 2)

Under AVR, every eligible citizen who interacts with designated government agencies is automatically registered to vote, unless they decline registration. As noted above, 19 states and the District of Columbia have AVR.[36] If adopted nationwide, it could add as many as 50 million new eligible voters to the rolls.[37]

AVR shifts registration from an "opt-in" to an "opt-out" approach. When eligible citizens give information to the government—for example, to get a driver's license, receive Social Security benefits, apply for public services, register for classes at a public university, or become naturalized citizens—they are automatically signed up to vote unless they decline. This reflects how the human brain works; behavioral scientists have shown that we are hard-wired to choose the default option presented to us.[38]

The policy also requires that voter registration information be electronically transferred to election officials, rejecting paper forms and snail mail. This significantly increases the accuracy of the rolls and drives down the costs of maintaining them.[39]

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[34] Christopher Ponoroff, *Voter Registration in a Digital Age*, Brennan Center for Justice, 2010, 12, https://www.brennancenter.org/publication/voter-registration-digital-age.
[35] Peter Miller, "Voter Registration Has Plummeted in 2020," Brennan Center for Justice, September 21, 2020, https://www.brennancenter.org/our-work/research-reports/voter-registration-has-plummeted-2020.
[36] Sixteen states and Washington, DC, enacted AVR legislatively or via ballot initiative; two states (Colorado and Georgia) adopted it administratively; and one state (Connecticut) adopted it as an agreement between the state secretary of state and state DMV officials. See Brennan Center for Justice, "History of AVR."
[37] Brennan Center for Justice, *The Case for Automatic Voter Registration*, 2016, https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf.
[38] Brennan Center for Justice, *Case for Automatic Voter Registration*, 6–7. Opt-out systems have led to increased program-participation rates across a variety of fields. See, e.g., Alberto Abadie and Sebastian Gay, "The Impact of Presumed Consent Legislation on Cadaveric Organ Donation: A Cross-Country Study," *Journal of Health Economics* 25 (2006): 599–620, http://www.sciencedirect.com/science/article/pii/S016762960600004X (25–30 percent higher participation in organ donation programs); and James J. Choi et al., "Defined Contribution Pensions: Plan Rules, Participant Decisions, and the Path of Least Resistance," *Tax Policy and the Economy* 16 (2002): 67–114, http://www.nber.org/papers/w8655.pdf (401(k) participation over 30 percentage points higher with automatic enrollment).
[39] Brennan Center for Justice, *Case for Automatic Voter Registration*, 11.

AVR Works. Oregon and California became the first states to adopt AVR in 2015.[40] Since then, 17 more states and the District of Columbia have followed—many with strong bipartisan support.[41] In Illinois, for example, the state legislature passed AVR unanimously, and a Republican governor signed it into law.

The new system has increased registration rates in nearly every state where it has been implemented. In Vermont, for example, DMV registrations went up by 60 percent after it adopted AVR, and in Georgia, they increased 94 percent.[42] In eight jurisdictions that implemented AVR for the 2018 election, 2.2 million people were registered to vote through AVR, and up to 6 million people had their registration information updated.[43]

There is strong reason to believe that the reform also boosts turnout.[44] When citizens are automatically registered, they are relieved of an obstacle to voting, thus increasing the likelihood they will cast a ballot. Automatic registration also exposes more voters to direct outreach from election officials, political parties, candidates, and others.[45] Indeed, Oregon saw the nation's largest turnout increase in the 2016 election after it adopted AVR in 2015. It had no competitive statewide races, yet the state's turnout increased by 4 percent in 2016—2.5 percentage points higher than the national average.[46] According to a 2018 analysis of registration and turnout statistics in eight jurisdictions by the website FiveThirtyEight, AVR resulted in hundreds of thousands of new voters at the polls.[47] Other reforms that make it easier to register have also increased turnout, such as permitting registrants who move anywhere within a state to transfer their registration and vote on Election Day at their new polling place.[48] These measures send a

[40] Brennan Center for Justice, "History of AVR."
[41] Brennan Center for Justice, "Automatic Voter Registration, a Summary," last modified February 16, 2021, https://www.brennancenter.org/analysis/automatic-voter-registration.
[42] Christopher Famighetti, "First Look Shows Automatic Voter Registration Was a Success in Vermont," Brennan Center for Justice, last modified August 17, 2017, https://www.brennancenter.org/blog/first-look-shows-automatic-voter-registration-was-success-vermont.
[43] Kevin Morris and Peter Dunphy, *AVR Impact on State Voter Registration*, Brennan Center for Justice, 2019, https://www.brennancenter.org/sites/default/files/publications/2019_04_AVR_Report_Final_0.pdf; and Nathaniel Rakich, "What Happened When 2.2 Million People Were Automatically Registered To Vote," *FiveThirtyEight*, October 10, 2019, https://fivethirtyeight.com/features/what-happened-when-2-2-million-people-were-automatically-registered-to-vote/.
[44] Wendy Weiser, "Automatic Voter Registration Boosts Political Participation," *Stanford Social Innovation Review*, January 28, 2016, https://ssir.org/articles/entry/automatic_voter_registration_boosts_political_participation#.
[45] Weiser, "Automatic Voter Registration Boosts"; and Donald Green et al., "Field Experiments and the Study of Voter Turnout," *Journal of Elections, Public Opinion and Parties* 23 (2013): 27–48, https://www.researchgate.net/publication/271937319_Field_Experiments_and_the_Study_of_Voter_Turnout.
[46] Rob Griffin et al., *Who Votes with Automatic Voter Registration?*, Center for American Progress, 2017, https://www.americanprogress.org/issues/democracy/reports/2017/06/07/433677/votes-automatic-voter-registration/; United States Elections Project, "2016 November General Election Turnout Rates," last modified September 5, 2018, http://www.electproject.org/2016g; and United States Election Project, "2012 November General Election Turnout Rates," last modified September 3, 2014, http://www.electproject.org/2012g.
[47] Rakich, "2.2 Million People Were Automatically Registered To Vote."
[48] For example, one study found that simply making registration portable can boost turnout by more than 2 percent. Michael McDonald, "Portable Voter Registration," *Political Behavior* 30 (2008): 491–501, https://www.jstor.org/stable/40213330?seq=1#page_scan_tab_contents.

strong message that all eligible citizens are welcome and encouraged to participate in our democracy.

Many election officials support AVR because it improves administration and saves money. Virtually every state to have transitioned to electronic transfer of registration information has reported substantial savings from reduced staff hours processing paper, and lower printing and mailing expenses.[49] Eliminating paper forms improves accuracy, reduces voter complaints about registration problems, and reduces the need for the use of provisional ballots.[50]

Voters strongly support the reform. According to recent polling, 69 percent of Americans favor it.[51] Michigan and Nevada adopted AVR in 2018 by popular referendum, with overwhelming support from voters, including Democrats, Republicans, and Independents.[52] Alaska voters passed AVR in 2016 with nearly 64 percent of the vote.[53]

AVR Should be the National Standard. S. 1 sensibly makes AVR a national standard, building on past federal reforms to the voter registration system.[54] Critically, the Act requires states to put AVR in place at a wide variety of government agencies beyond state motor vehicle agencies, including those that administer Social Security or provide social services, as well as higher education institutions. It also requires a one-time "look back" at agency records to register individuals who have previously interacted with government agencies while protecting voters' sensitive information from public disclosure.

AVR also includes multiple safeguards to ensure that ineligible voters are not registered and to prevent people from being punished for innocent mistakes. The government agencies designated for AVR regularly collect information about individuals' citizenship status and age, and they are already required to obtain an affirmation of U.S. citizenship during the registration transaction. Before anyone is registered, agencies must inform individuals of eligibility

[49] Brennan Center for Justice, *Case for Automatic Voter Registration*, 11.
[50] Brennan Center for Justice, *Case for Automatic Voter Registration*, 10–11.
[51] Pew Research Center, "Two-Thirds of Americans Expect Presidential Election Will Be Disrupted by Covid-19," last modified April 28, 2020, https://www.pewresearch.org/politics/2020/04/28/two-thirds-of-americans-expect-presidential-election-will-be-disrupted-by-covid-19/.
[52] New York Times, "Michigan Election Results," last modified May 15, 2019, https://www.nytimes.com/interactive/2018/11/06/us/elections/results-michigan-elections.html; and New York Times, "Nevada Election Results," last modified May 15, 2019, https://www.nytimes.com/interactive/2018/11/06/us/elections/results-nevada-elections.html.
[53] New York Times, "Alaska Ballot Measure 1—Allow Qualified Individuals to Register to Vote When Applying for a Permanent Fund Dividend—Results: Approved," last modified August 1, 2017, https://www.nytimes.com/elections/2016/results/alaska-ballot-measure-1-pfd-application-voter-reg.
[54] The National Voter Registration Act of 1993 required states to offer voter registration at their motor vehicle, public assistance, and disabilities agencies, among other things. 52. U.S.C. §§ 20504-20506. S. 1's AVR provisions build on this by expanding the agencies that offer voter registration and by making the registration process paperless at those agencies. The Help America Vote Act of 2002 pushed states into the digital age, by requiring them to create a centralized, computerized voter registration list. 52 U.S.C. § 21083. S. 1 extends the benefits of that legislation by seamlessly transmitting voter information between registration agencies and the election officials that control the computerized voter list.

requirements, the penalties for illegal registration, and offer them the opportunity to opt out of registration. Election officials too are required to send individuals a follow up notice by mail. In light of these checks, there is no basis for critics' alarmist speculation that AVR would result in an increase in the registration of ineligible persons. Indeed, election officials report that AVR's elimination of paper forms *enhances* the accuracy of the rolls.[55] As a precaution, S. 1 also includes protections in the unlikely event that an ineligible person is inadvertently registered, to ensure that they are not harmed as a result.

2. Same-Day Registration (Title I, Subtitle A, Part 3)

S. 1 would boost voter participation further by establishing same-day registration (SDR), which allows eligible citizens to register and vote on the same day. It is a strong complement to AVR, available to those eligible voters who have not interacted with government agencies or whose information has changed since they did. Because it provides eligible Americans an opportunity to vote even if their names are not on the voter rolls, SDR safeguards against improper purges, registration system errors, and cybersecurity attacks.

SDR has been used successfully in several states since the 1970s. Today, 21 states and the District of Columbia offer some form of same-day registration, either on Election Day, during early voting, or both.[56] At least 18 additional states had introduced bills to implement same-day registration during the current legislative session.[57] Studies indicate that SDR boosts voter turnout by 5 to 7 percent.[58] And it is highly popular. In 2018, supermajorities of voters in Michigan and Maryland passed ballot measures that, respectively, implemented and expanded same-day registration. According to recent polls, more than 60 percent of Americans support SDR.[59] As part of the full package of reforms, SDR's use would be limited, since AVR would capture the vast majority of voters well before Election Day. Taken together, AVR and SDR would ensure that no eligible voter is left out.

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[55] Brennan Center for Justice, *Case for Automatic Voter Registration*, 10–11

[56] National Conference of State Legislatures, "Same Day Voter Registration," last modified October 6, 2020, http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx.

[57] Brennan Center for Justice, "Voting Laws Roundup: February 2021" (AK, AZ, DE, FL, GA, IN, KY, MS, MO, NJ, NY, OR, PA, SC, TX); and Brennan Center for Justice, "State Voting Bills Tracker 2021," February 24, 2021, https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021.

[58] McDonald, "Portable Voter Registration," 491–511; see also Jacob R. Neisheisel and Barry C. Burden, "The Impact of Election Day Registration On Voter Turnout and Election Outcomes," *American Politics Research* 40 (2012): 636, 638–39 (citing studies finding that same-day registration increases turnout by 3 to 6 percent, and by as much as 14 percent). In the 2016 election, voter turnout was, on average, 7 percent higher in states with SDR than in those without. See George Pillsbury and Julian Johannesen, *America Goes to the Polls 2016: A Report on Voter Turnout in the 2016 Election*, Nonprofit Vote, 2016, https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf/; and Mijin Cha and Liz Kennedy, *Millions to the Polls: Same Day Registration*, Dēmos, 2014, https://www.demos.org/sites/default/files/publications/Millions%20to%20the%20Polls.pdf.

[59] Pew Research Center, "Elections in America"; The Atlantic and Public Religion Research Institute, "PRRI/The Atlantic 2018 Voter Engagement Survey," *The Atlantic*, July 17, 2018, https://www.prri.org/wp-content/uploads/2018/07/PRRI-The-Atlantic-2018-Voter-Engagement-Survey-Topline.pdf.

3. Online Registration (Title I, Subtitle A, Part 1)

Online registration also increases voter participation by eliminating cumbersome paperwork and waiting periods. S. 1 requires states to offer secure and accessible online registration. At a time when many Americans do everything from banking to reviewing medical records online, voters want this convenient method of registration. The online registration provisions in S. 1 would let all voters register, update registration information, and check registrations online. This option has been especially critical during the Covid-19 pandemic, when voters were prevented from registering by other means. The Act would also ensure that these benefits are available to citizens who do not have driver's licenses.

In addition to convenience and safety, online registration saves money and improves voter roll accuracy. Processing electronic applications is a fraction of the cost of processing paper applications. Washington State reported savings of 25 cents with each online registration (for a total of about $176,000 in savings) in the first two years of the program, and its local officials save between 50 cents and two dollars per online transaction.[60] Election officials also report that letting voters enter their own information significantly reduces the likelihood of incomplete applications and mistakes.[61]

It is not surprising, therefore, that online registration is incredibly popular and has spread rapidly. In 2010, only six states offered online voter registration. Now, 40 states and the District of Columbia do.[62] Taken together, AVR, SDR, and online registration would ensure that no eligible voter is left out of our democratic process.

4. Voter Purge Protections (Title I, Subtitle A; Title II, Subtitle F)

Modernizing our system means not only registering all eligible voters, but also making sure they stay on the rolls. Voter purges—the large-scale deletion of voters' names from the rolls, often using flawed data—are on the rise.[63] In 2018, they were a key form of vote suppression used by election officials around the country.[64] In 2020, as the Covid-19 pandemic created new voting challenges, improper purges made it difficult for states such as Iowa to

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[60] See Holly Maluk et al., *Voter Registration in a Digital Age: 2015 Update*, Brennan Center for Justice, 2015, 6, https://www.brennancenter.org/sites/default/files/publications/Voter_Registration_Digital_Age_2015.pdf.
[61] Maluk et al., *Voter Registration in a Digital Age*, 8.
[62] Brennan Center for Justice, "VRM in the States: Online Registration," last modified February 1, 2021, https://www.brennancenter.org/analysis/vrm-states-online-registration.
[63] Kevin Morris, "Voter Purge Rates Remain High, Analysis Finds," Brennan Center for Justice, last modified August 21, 2019, https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds; Myrna Pérez, "How the Midterm Elections May Be Compromised," *New York Times*, July 19, 2018, https://www.nytimes.com/2018/07/19/opinion/midterms-voting-purges-elections-registration.html; see also Kevin Morris and Myrna Pérez, "Florida, Georgia, North Carolina Still Purging Voters at High Rates," Brennan Center for Justice, last modified October 1, 2018, https://www.brennancenter.org/blog/florida-georgia-north-carolina-still-purging-voters-high-rates.
[64] Pérez, "Midterm Elections May Be Compromised"; see also Morris and Pérez, "Florida, Georgia, North Carolina Still Purging Voters."

distribute mail ballot request forms to many eligible voters.[65] In the aftermath of the 2020 election, bills have been introduced in 17 states that would expand voter roll purges or adopt flawed practices that would create a risk of improper purges.[66] S. 1 addresses this growing threat by curbing improper efforts to remove eligible voters.

Purges soared in those states with a history of discrimination in voting that once had been subject to federal oversight under the Voting Rights Act before *Shelby County*.[67] The Brennan Center has calculated that more than 17 million voters were purged from the rolls nationwide between 2016 and 2018.[68] Over the same period, the median purge rate in jurisdictions previously covered by the VRA was 40 percent higher than the purge rate elsewhere.[69] Georgia, for example, purged twice as many voters—1.5 million voters—between the 2012 and 2016 elections as it did between 2008 and 2012. The state also saw most of its counties purge *more than 10 percent* of their voters between 2016 and 2018.[70] Texas purged 363,000 more voters between 2012 and 2014 than it did between 2008 and 2010.[71] We ultimately found that *2 million fewer voters* would have been purged between 2012 and 2016, and 1.1 million fewer between 2016 and 2018, if jurisdictions previously subject to preclearance had purged at the same rate as other jurisdictions.[72]

Incorrect purges disenfranchise legitimate voters and cause confusion and delay at the polls. In 2019, for example, the Texas secretary of state sent lists of approximately 95,000 alleged non-citizens to county officials for purging, but within days, it became clear the tallies were rife with inaccuracies.[73] In 2016, New York election officials erroneously deleted hundreds of thousands from the rolls, with no public warning and little notice to those who had been purged.[74] The same year, thousands of Arkansas voters were purged because of supposed felony convictions—but the lists that were used were highly inaccurate and included many voters who had never committed a felony or had had their voting rights restored.[75]

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[65] Rebecca Ayala, "With Mail Ballots More Important During Covid-19, Improper Voter Purges Can Do Even More Damage," Brennan Center for Justice, last modified May 8, 2020, https://www.brennancenter.org/our-work/analysis-opinion/mail-ballots-more-important-during-covid-19-improper-voter-purges-can-do.
[66] Brennan Center for Justice, "Voting Laws Roundup: February 2021" (AK, AZ, DE, FL, GA, IN, KY, MS, MO, NJ, NY, OR, PA, SC, TX); and Brennan Center for Justice, "State Voting Bills Tracker 2021."
[67] Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice, 2018, 3–5, https://www.brennancenter.org/publication/purges-growing-threat-right-vote.
[68] Morris, "Purge Rates Remain High."
[69] Morris, "Purge Rates Remain High," 1.
[70] Morris and Pérez, "Florida, Georgia, North Carolina Still Purging Voters."
[71] Brater et al., *Purges: A Growing Threat*, 1.
[72] Brater et al., *Purges: A Growing Threat*, 1–5; and Kevin Morris, "How Purges Threaten to Disenfranchise Voters Under the Radar," Brennan Center for Justice, last modified July 20, 2018, https://www.brennancenter.org/blog/how-purges-threaten-disenfranchise-voters-under-radar.
[73] Sean Morales-Doyle and Rebecca Ayala, "There's Good Reason to Question Texas' Voter Fraud Claims," Brennan Center for Justice, last modified January 29, 2019, https://www.brennancenter.org/our-work/analysis-opinion/theres-good-reason-question-texas-voter-fraud-claims.
[74] Brater et al., Purges*: A Growing Threat*, 5–6.
[75] Brater et al., *Purges: A Growing Threat*, 5.

Purges can be carried out in discriminatory ways that disproportionately affect minority voters.[76] In particular, when voter lists are matched with other government databases to ferret out ineligible people, it can generate discriminatory results if done without adequate safeguards. Black, Asian American, and Latino voters are much more likely than white voters to have one of the most common 100 last names in the United States, resulting in a higher rate of false positives.[77]

S. 1 puts strong protections in place to prevent improper purges. It puts new guardrails on the use of inter-state databases (such as the now defunct and much maligned Crosscheck system) that purport to identify voters that have re-registered in a new state, but that have been proven to produce deeply flawed data. It prohibits election officials from relying on a citizen's failure to vote in an election as a reason to remove them from the rolls. And it requires election officials to provide timely notice to removed voters, as well as an opportunity to remedy their registration before an election.

B. Commitment to Restore the Voting Rights Act (Title II, Subtitle A)

As recent experiences with purges and other vote suppression tactics make clear, Congress must restore the full protections of the Voting Rights Act, which the U.S. Supreme Court hobbled in 2013 in *Shelby County*. While the Act's affirmative voting standards would negate many of the abusive proposals now being advanced in states,[78] a fully functional VRA is also a check against future discriminatory efforts to restrict voting.

The VRA is widely regarded as the single most effective piece of civil rights legislation in our nation's history.[79] As recently as 2006 it won reauthorization with overwhelming bipartisan support.[80] For nearly five decades, the linchpin of the VRA's success was the Section 5 preclearance provision, which required certain states with a history of discriminatory voting practices to obtain advance approval from the federal government for voting rules changes. Section 5 deterred and prevented discriminatory changes to voting rules right up until the time the Supreme Court halted its operation. Between 1998 and 2013, Section 5 blocked 86 discriminatory changes (13 in the final 18 months before the *Shelby County* ruling), caused

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[76] Myrna Pérez, *Voter Purges*, Brennan Center for Justice, 2008, 31–32, https://www.brennancenter.org/publication/voter-purges.
[77] Brater et al., *Purges: A Growing Threat*, 7.
[78] Fowler et al., "Congress Could Change Everything."
[79] 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.
[80] The vote was unanimous in the Senate and 390–33 in the House. See U.S. Senate, "H.R.9 Vote Summary," July 20, 2006, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212; and U.S. House of Representatives, "Final Vote Results for Roll Call 374," July 13, 2006, http://clerk.house.gov/evs/2006/roll374.xml. The reauthorization was signed into law by President George W. Bush. See The White House, Press Release, "Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006," July 27, 2006, https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html.

hundreds more to be withdrawn after a Justice Department inquiry, and prevented still more from being put forward because policymakers knew they would not pass muster.[81]

Shelby County eviscerated Section 5 by striking down the "coverage formula" that determined which states were subject to preclearance. That resulted in a predictable flood of discriminatory voting rules, contributing to a now decade-long trend in the states of restrictive voting laws, which the Brennan Center has documented extensively.[82] Within hours of the Court's decision, Texas announced that it would implement what was then the nation's strictest voter identification law—a law that had previously been denied preclearance because of its discriminatory impact. Ultimately a federal court found, after an extensive trial, that more than 608,000 Texas voters lacked the necessary ID.[83] Shortly afterward, Alabama, Arizona, Florida, Mississippi, North Carolina, and Virginia also moved ahead with restrictive voting laws or practices that previously would have been subject to preclearance.[84] In the years since, federal courts have repeatedly found that new laws passed after *Shelby* made it harder for minorities to vote, some intentionally so.[85] Our research regarding last year's election confirmed the persistence of voter suppression and the willingness of too many state officials to continue developing new tactics to keep people from voting.[86]

Section 2 of the VRA—which prohibits discriminatory voting practices nationwide and permits private parties and the Justice Department to challenge those practices in court—remains an important bulwark against discrimination. But Section 2 lawsuits are not a substitute for preclearance. They are far more lengthy and expensive, and often do not yield remedies for impacted voters until after an election (or several) is over.[87] Our case against Texas's 2011 voter ID law illustrates this point.[88] The law initially did not go into effect because a three-judge

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[81] Tomas Lopez, Shelby County*: One Year Later*, Brennan Center for Justice, 2014, https://www.brennancenter.org/analysis/shelby-county-one-year-later.
[82] Wendy Weiser and Max Feldman, *The State of Voting 2018*, Brennan Center for Justice, 2018, https://www.brennancenter.org/our-work/research-reports/state-voting-2018; Brennan Center for Justice, "New Voting Restrictions in America," last modified November 19, 2019, https://www.brennancenter.org/new-voting-restrictions-america; Brennan Center for Justice, "Voting Laws Roundup: February 2021"; and Wendy Weiser and Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice, 2011, http://www.brennancenter.org/publication/voting-law-changes-2012.
[83] Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014).
[84] Lopez, Shelby County.
[85] Danielle Lang and J. Gerald Hebert, "A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation," *Yale Law Journal Forum* 127 (2017–2018): 780 n. 4. For example, the Fourth Circuit Court of Appeals found that a 2013 voting law passed by North Carolina targeted Black voters with "surgical precision." North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).
[86] Brennan Center for Justice, "State Voting Bills Tracker 2021"; Michael Waldman, "The Big Lie and the Push to Restrict Voting," last modified February 2, 2021, https://www.brennancenter.org/our-work/analysis-opinion/big-lie-and-push-restrict-voting; Morris, "Georgia's Proposed Voting Restrictions Will Harm Black Voters Most"; and Eliza Sweren-Becker and Hannah Klain, "The Fight for Voting Rights in 2021," Brennan Center for Justice, February 24, 2021, https://www.brennancenter.org/our-work/analysis-opinion/fight-voting-rights-2021.
[87] Lopez, Shelby County.
[88] The Brennan Center represented the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives, along with the Lawyers' Committee for Civil Rights

federal court refused to preclear it under Section 5. But that decision was vacated after *Shelby County*, spurring multi-year litigation under Section 2. Despite the fact that every court that has considered the law found it discriminatory (and a federal district court found it intentionally so), the law remained in effect until a temporary remedy was ordered for the November 2016 election. In the interim, Texans voted in 3 federal and 4 statewide elections and numerous local elections under discriminatory rules.

Congress has the power to address these problems, by updating the VRA's coverage formula, examining its coverage, and restoring the VRA to its full power. As this Committee recognizes, any new coverage formula must be supported by a thorough legislative record. We commend the commitment to restoring the VRA reflected in S. 1. VRA restoration is accomplished through separate legislation, the John Lewis Voting Rights Advancement Act, which passed the last Congress as H.R. 4.[89] The bill, which will soon be reintroduced, updates the VRA's coverage formula to restore the act's full force. It will be backed by a thorough legislative record documenting the recent history of voter suppression in U.S. elections. This crucial legislation must become law in order to fortify the right to vote and the integrity of our elections. We urge Congress to make passage of a renewed VRA a top priority.

C. Nationwide Early Voting (Title I, Subtitle H)

S. 1 also provides all voters with the flexibility to vote early during the two weeks before Election Day, which will boost turnout and make it easier for hard-working Americans to vote.

Holding elections on a single workday in early November is a relic of the nineteenth century; it was done for the convenience of farmers who had to ride a horse and buggy to the county seat in order to cast a ballot.[90] This no longer works for many Americans, who must find time to cast a ballot between jobs, childcare, and the everyday obligations of modern life. Sometimes, even after making the time and the journey, long lines cause them to turn away.

Early voting works well. Forty-five states and the District of Columbia offered some opportunity to vote in person before Election Day in 2020, which was crucial during the pandemic.[91] More than a dozen of those states offer early voting for a period comparable to or

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Under Law and other co-counsel. The case was consolidated with several others. For more information, see Brennan Center for Justice, "Texas NAACP v. Steen (consolidated with Veasey v. Abbott)," September 21, 2018, https://www.brennancenter.org/legal-work/naacp-v-steen.

[89] The Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/4.

[90] Kevin J. Coleman, Joseph E. Cantor, and Thomas H. Neale, *Presidential Elections in the United States: A Primer*, CRS No. RL30527 (Washington, DC: Congressional Research Service, 2000), 38.

[91] Brennan Center for Justice, "Preparing Your State for an Election Under Pandemic Conditions," last modified February 1, 2021, https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions; National Conference of State Legislatures, "State Laws Governing Early Voting," last modified October 22, 2020, http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx; National Conference of State Legislatures, "Voting Outside the Polling Place: Absentee, All-Mail

greater than the two-week period leading to Election Day required by S. 1.[92] It was widely used where available even before the 2020 election. In 2016, 24 million Americans cast their ballot via in-person early voting.[93]

Despite the popularity of early voting, the absence of a national standard means that some states have few or inconsistent early voting hours, and others have been able to engage in politicized cutbacks to early voting.[94] Over the past decade, multiple states have reduced early voting days or sites used disproportionately by Black voters (such as the elimination of early voting on the Sunday before Election Day), and federal courts have struck down early voting cutbacks in North Carolina and Wisconsin because they were intentionally discriminatory.[95] As of February 19, 2021, 15 bills restricting early voting had been introduced in state legislatures during the current legislative session.[96] At least some of these bills would have a racially disparate impact on voters, such as a bill in Georgia that would tightly restrict early voting on Sundays, which have historically been important turnout days for Black Americans.[97]

S. 1 will make voting more manageable by requiring that states provide two weeks of early voting and equitable geographic distribution of early voting sites. A guaranteed early voting period will reduce long lines at the polls[98] and ease the pressure on election officials and poll workers on Election Day, by spreading out the days on which people cast their ballots. For this reason, it was one of the principal recommendations of the bipartisan Presidential Commission of Election Administration for reducing long lines.[99] It will also make it easier for election officials to spot and solve problems like registration errors or voting machine glitches before they impact most voters.[100] For these reasons, election officials report high satisfaction with early voting. The Brennan Center's research indicates that two weeks is an effective minimum time period for generating the benefits of early voting.[101]

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and Other Voting at Home Options," last modified September 24, 2020, http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx; and Hannah Klain, "Six Ways for Election Officials to Prepare for High Voter Turnout in 2020," Brennan Center for Justice, November 12, 2019, https://www.brennancenter.org/our-work/analysis-opinion/six-ways-election-officials-prepare-high-voter-turnout-2020.

[92] National Conference of State Legislatures, "State Laws Governing Early Voting."

[93] U.S. Election Assistance Commission, "EAVS Deep Dive: Early, Absentee and Mail Voting," October 17, 2017, https://www.eac.gov/documents/2017/10/17/eavs-deep-dive-early-absentee-and-mail-voting-data-statutory-overview.

[94] Brennan Center for Justice, "New Voting Restrictions in America."

[95] *North Carolina State Conference of NAACP*, 831 F.3d at 204, 219; and One Wisconsin Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016).

[96] Brennan Center for Justice, "State Voting Bills Tracker 2021."

[97] Morris, "Georgia's Proposed Voting Restrictions Will Harm Black Voters Most."

[98] See Hannah Klain, Kevin Morris, and Rebecca Ayala, *Waiting to Vote: Racial Disparities in Election Day Experiences*, Brennan Center for Justice, 2020, https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf.

[99] Presidential Commission on Election Administration, *The American Voting Experience*.

[100] Diana Kasdan, *Early Voting: What Works*, Brennan Center for Justice, 2013, 5–6, https://www.brennancenter.org/publication/early-voting-what-works.

[101] Kasdan, *Early Voting*, 12.

Early voting is popular with voters, too, with study after study showing a significant positive effective on voter satisfaction.[102] It is a critical element of a convenient and modern voting system. A national standard is long overdue.

D. Voting Rights Restoration (Title I, Subtitle E)

S. 1 would restore federal voting rights to citizens with past criminal convictions living in our communities, strengthening those communities, offering a second chance to those who have paid their debts to society, and removing the stain of a policy born out of Jim Crow.

Harms of Current Disenfranchisement Laws. A confusing patchwork of discriminatory disenfranchisement laws causes profound harm across the country. Nationally, state laws deny more than 4.5 million citizens the right to vote because of a criminal conviction[103]—3.2 million of whom are no longer incarcerated and live in our communities, work, pay taxes, and raise families.[104]

Disenfranchisement laws vary dramatically from state to state. In states like Vermont and Maine, there is no disenfranchisement—people currently in prison are allowed to vote. Other states distinguish between different types of felonies, while others treat repeat offenders differently. Jurisdictions also have varying rules on what parts of a sentence must be completed before rights are restored, such as paying off debt or other legal financial obligations.[105] Navigating this patchwork of state laws causes confusion for everyone—including election officials and prospective voters—about who is eligible to vote. The real-world result is large-

[102] Kasdan, *Early Voting*, 7–8.
[103] Scholars previously estimated that about 6.1 million citizens were disenfranchised nationwide. See Christopher Uggen et al., *6 Million Lost Voters: State-level Estimates of Felony Disenfranchisement*, The Sentencing Project, 2016, 4. Florida accounted for approximately 1.5 million of these because its constitution permanently disenfranchised everyone convicted of a felony. See Uggen et al., *6 Million Lost Voters*, 4. Since then, in November 2018, Florida voters approved the Voting Restoration Amendment, which restores voting rights to anyone who has completed all terms of their sentence. See Fl. Const. Art. VI, § 4 (2019). And Kentucky, New Jersey, Iowa, and Virginia have restored rights to various groups of formerly incarcerated people. Michael Wines, "Kentucky Gives Voting Rights to Some 140,000 Former Felons," *New York Times*, December 12, 2019, https://www.nytimes.com/2019/12/12/us/kentucky-felons-voting-rights.html; Vanessa Romo, "New Jersey Governor Signs Bills Restoring Voting Rights to More Than 80,000 People," *NPR*, December 18, 2019, https://www.npr.org/2019/12/18/789538148/new-jersey-governor-signs-bills-restoring-voting-rights-to-more-than-80-000-peop; Katarina Sostaric, "Governor Acts to Restore Voting Rights to Iowans with Felony Convictions," *NPR*, August 5, 2020, https://www.npr.org/2020/08/05/899284703/governor-acts-to-restore-voting-rights-to-iowans-with-past-felony-convictions; and Gregory S. Schneider, "Northam Restores Voting Rights for 69,000 with Felony Convictions," *Washington Post*, March 16, 2021, https://www.washingtonpost.com/local/virginia-politics/virginia-voting-felons-northam/2021/03/16/b171271e-868d-11eb-82bc-e58213caa38e_story.html. Unless otherwise noted, all numbers cited in this testimony adjust for these changes. Brennan Center for Justice, "Restoring Voting Rights," https://www.brennancenter.org/issues/restoring-voting-rights.
[104] Brennan Center for Justice, "Restoring Voting Rights."
[105] Brennan Center for Justice, "Criminal Disenfranchisement Laws Across the United States," last modified March 16, 2021, https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states.

scale disenfranchisement not only of ineligible persons, but also of potential voters who are eligible to register but wrongly believe they are barred from doing so by a prior conviction.[106]

Regardless of these particulars, disenfranchisement laws are discriminatory and especially impact Black voters. In 2016, one in 13 voting-age Black citizens could not vote, a disenfranchisement rate more than 4 times that of all other Americans.[107] In three states, the ratio was one in five.[108] This unequal impact is no accident—many states' criminal disenfranchisement laws are rooted in nineteenth-century attempts to evade the Fifteenth Amendment's mandate that Black men be given the right to vote.[109]

This disproportionate impact on people of color means that all too often entire communities are shut out of our democracy. Disenfranchisement laws have a negative ripple effect beyond those people within their direct reach. Research suggest that these laws may affect turnout in neighborhoods with high incarceration rates, even among citizens who are eligible to vote.[110] This is not surprising. Children learn civic engagement habits from their parents. Neighbors encourage each other's political participation. And when a significant portion of a community is disenfranchised, it sends a damaging message to others about the legitimacy of democracy and the respect given to their voices.

The Promise of Voting Rights Restoration. S. 1 adopts a simple and fair rule: if you are out of prison and living in the community, you get to vote in federal elections. It also requires states to provide written notice to individuals with criminal convictions when their voting rights are restored.

These changes would have a profoundly positive impact on affected citizens and society. We all benefit from the successful reentry of formerly incarcerated citizens into our communities. Restoring their voting rights sends the message that they are truly welcome to participate and are entitled to the respect, dignity and responsibility of full citizenship. That

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[106] Erika Wood and Rachel Bloom, *De Facto Disenfranchisement,* American Civil Liberties Union and Brennan Center for Justice, 2008, http://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf. The ACLU found that many elections officials misunderstand their state's felony disenfranchisement laws, meaning that "untold hundreds of thousands of eligible, would-be voters throughout the country" may be getting turned away by misinformation.

[107] Uggen et al., *6 Million Lost Voters*, 3.

[108] Uggen et al., *6 Million Lost Voters*, 3. These states are Kentucky, Tennessee, and Virginia. The ratio in Florida was one in five as well but has likely improved as a result of the passage of the Voting Restoration Amendment, notwithstanding the subsequent passage of a law prohibits returning citizens from voting unless they pay off all legal financial obligations (LFOs) imposed by a court pursuant to a felony conviction, including LFOs converted to civil obligations, even if they cannot afford to pay. Brennan Center for Justice, "Litigation to Protect Amendment 4 in Florida," last modified September 11, 2020, https://www.brennancenter.org/our-work/court-cases/litigation-protect-amendment-4-florida.

[109] Erin Kelley, *Racism and Felony Disenfranchisement*, Brennan Center for Justice, 2017, 2, https://www.brennancenter.org/publication/racism-felony-disenfranchisement-intertwined-history.

[110] Erika Wood, *Restoring the Right to Vote*, Brennan Center for Justice, 2009, 12, https://www.brennancenter.org/publication/restoring-right-vote.

message pays concrete dividends. One study found "consistent differences between voters and non-voters in rates of subsequent arrests, incarceration, and self-reported criminal behavior."[111] For this reason, criminal justice professionals support automatic restoration of voting rights upon release from prison.[112]

Voting rights restoration also benefits the electoral process, by reducing confusion and easing the burdens on elections officials to determine who is eligible to vote. If every citizen living in the community can vote, officials have a bright line rule to apply. This clear rule also eliminates one of the principal bases for erroneous purges of eligible citizens from the voting rolls.[113] In past elections, states have botched attempts to remove Americans with past criminal convictions from the rolls, improperly removing many eligible citizens. For example, in 2016 thousands of Arkansans were purged because of supposed felony convictions—but the lists used were highly inaccurate, and included many who had never committed a felony, or who had had their voting rights restored.[114]

For these reasons, rights restoration is immensely popular among Americans of all political stripes. In November 2018, for example, 65 percent of Florida voters passed a ballot initiative restoring voting rights to 1.4 million of their fellow residents, with a massive groundswell of bipartisan support.[115] Unfortunately, the state legislature significantly undercut the will of the people by conditioning rights restoration on the payment of criminal justice fees and fines, a move that was later upheld by a federal court of appeals—demonstrating why congressional action is necessary.

Since Florida's historic vote, other states have followed. Louisiana, through bipartisan legislation, restored voting rights to nearly 36,000 people convicted of felonies. In December of 2019, newly elected Governor Andy Beshear signed an executive order restoring the vote to some 140,000 Kentuckians. Shortly after, the New Jersey legislature restored voting rights to

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[111] Christopher Uggen & Jeff Manza, "Voting and Subsequent Crime and Arrest: Evidence from a Community Sample," *Columbia Human Rights Law Review* 36 (2004): 193.
[112] See, e.g., American Probation and Parole Association, *Resolution Supporting Restoration of Voting Rights Released*, 2007, https://appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IE_NewsRelease&wps_key=a587deaf-9cbf-4efd-bd8d-025c14143f65; and Association of Paroling Authorities International, *Resolution on Restoring Voting Rights*, 2008, http://www.apaintl.org/resolutions.html.
[113] Angela Caputo, "In the South, an Aggressive Effort to Purge Former Felons from Voting Rolls," *Pacific Standard*, November 6, 2018, https://psmag.com/social-justice/former-confederate-states-have-purged-a-growing-number-of-felons-from-voting-lists.
[114] Brater et al., *Purges*, 5–6.
[115] See, e.g., Brennan Center for Justice, "Voting Rights Restoration Efforts in Florida," last modified September 11, 2020, https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida; Kevin Morris, "A Transformative Step for Democracy in Florida," Brennan Center for Justice, last modified November 7, 2018, https://www.brennancenter.org/blog/transformative-step-democracy-florida; Myrna Pérez, "What Victory in Florida Means to Me," Brennan Center for Justice, last modified November 7, 2018, https://www.brennancenter.org/blog/what-victory-florida-means-me; and Ballotpedia, "Florida Amendment 4, Voting Rights Restoration for Felon Initiative (2018)," accessed March 12, 2021, https://ballotpedia.org/Florida_Amendment_4,_Voting_Rights_Restoration_for_Felons_Initiative_(2018).

80,000 people on parole or probation. Governor Kim Reynolds, Republican of Iowa, recently signed an executive order that restores voting rights to Iowans who have completed their sentences, and has supported a constitutional amendment to codify the process,[116] and Governor Ralph Northam of Virginia recently restored voting rights to an estimated 69,000 people on probation or parole via executive order.[117] The Washington State House recently approved a bill that would automatically restore voting rights to more than 20,000 individuals who are on parole and probation in the state.[118] New York's legislature is poised to codify and improve a 2018 executive action to restore voting rights to New Yorkers on parole by passing S.830B.[119] Overall in the past two decades, 18 states have restored voting rights to segments of the population.[120]

Congress has the authority to act. The Supreme Court has previously upheld congressional expansion of the pool of voters qualified for federal elections when Congress lowered the voting age to 18.[121] Here, there are three sources of congressional power: the Elections Clause of Article I, section 4, the Fourteenth Amendment, and the Fifteenth Amendment. As detailed below, Congress has very broad powers to regulate federal elections under the Elections Clause.[122] Because many state criminal disenfranchisement laws were enacted with a racially discriminatory intent and have a racially discriminatory impact, Congress can also act under its powers to enforce the Fourteenth and Fifteenth Amendments, which guarantee equal protection of the laws and prohibit denial of the right to vote on the basis of race, respectively. The Supreme Court has described this enforcement power as "a broad power indeed," one that gives Congress a "wide berth" to devise appropriate remedial and preventative measures for discriminatory actions.[123]

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[116] Brennan Center for Justice, "Voting Rights Restoration Efforts in Iowa," last modified August 5, 2020, https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-iowa.
[117] Vanessa Romo, "Virginia Governor Clears Path for Ex-Convicts to Regain Voting Rights," *NPR*, March 16, 2021, https://www.npr.org/2021/03/16/978009022/virginia-governor-clears-path-for-ex-convicts-to-regain-voting-rights.
[118] Brennan Center for Justice, "Brennan Center Statement on Washington State House Voting to Restore Voting Rights to People on Probation and Parole," February 24, 2021, https://www.brennancenter.org/our-work/analysis-opinion/brennan-center-statement-washington-state-house-voting-restore-voting.
[119] Brennan Center for Justice, "Voting Rights Restoration in New York," last modified February 24, 2021, https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-new-york.
[120] See, e.g., Brennan Center for Justice, "Voting Rights Restoration Efforts in Florida"; Kevin Morris, "A Transformative Step for Democracy in Florida"; Myrna Pérez, "What Victory in Florida Means to Me"; Ballotpedia, "Florida Senate Bill 7066 (2019)," accessed March 12, 2021, https://ballotpedia.org/Florida_Senate_Bill_7066_(2019); Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, The Sentencing Project, 2018, 3; Wines, "Kentucky Gives Voting Rights"; Reid Wilson, "New Jersey Governor Signs Voting Rights Restoration Bill," *The Hill*, December 18, 2019, https://thehill.com/homenews/state-watch/475101-new-jersey-governor-signs-voting-rights-restoration-bill; Office of the Governor of Iowa Kim Reynolds, "Gov. Reynolds Signs Executive Order to Restore Voting Rights of Felons Who Have Completed Their Sentence," August 5, 2020, https://governor.iowa.gov/press-release/gov-reynolds-signs-executive-order-to-restore-voting-rights-of-felons-who-have; and Rosemary Westwood, "The Battle for Voting Rights in the Age of Mass Incarceration," *Vox*, November 15, 2019, https://www.vox.com/the-highlight/2019/11/8/20953476/louisiana-election-voting-rights-ex-prisoners-felons-florida.
[121] Oregon v. Mitchell, 400 U.S. 112 (1970).
[122] See Part VII.
[123] Tennessee v. Lane, 541 U.S. 509, 518, 520 (2004).

E. Voting by Mail (Title I, Subtitle I)

S. 1 would create a baseline standard for access to mail voting in federal elections. The 2020 election season, which took place during a global pandemic, made clear that Americans need different options for how to vote to accommodate the needs of a diverse electorate. More than 65 million Americans successfully and securely voted by mail,[124] contributing to the surge in participation in the 2020 elections, which reached 66.7 percent of the voting-eligible population (over 159 million people), the highest rate in over a century.[125] Even before the pandemic, mail voting was popular with voters. Roughly one-quarter of American voters cast mail ballots in the 2014, 2016, and 2018 presidential elections.[126] Additionally, mail voting lightens the administrative burden on our in-person voting systems.[127] Election officials and experts also agree that mail voting is highly secure. All mail ballots are marked by hand, which means there is a paper trail to enable effective post-election audits.[128]

This surge in mail voting was enabled by significant expansions of access to mail voting in many states. These reforms included broadening the scope of who could vote by mail; automatically mailing ballot applications or ballots to eligible voters; implementing better processes for voters to receive notice of and cure defective mail ballots; and extending ballot return deadlines, among other critical reforms.[129]

Unfortunately, although the 2020 election demonstrated the value of mail voting, it also exposed the deficiencies and inequities of mail voting systems in many states. First, many of the changes that increased access to mail voting were made through temporary legislation or timebound executive orders that expired after the 2020 general election. Second, even in the face of the pandemic, a number of states continued to place unreasonable restrictions on the ability to vote by mail. For example, five states continued to require voters to provide an excuse for not

[124] United States Elections Project, "2016 November General Election Early Voting," accessed January 27, 2021, http://www.electproject.org/early_2016.
[125] United States Elections Project, "2020 General Election Turnout Rates," last modified December 7, 2020, http://www.electproject.org/2020g; Schaul, et al, "2020 Turnout Is the Highest."
[126] United States Elections Project, "2020 General Election Early Vote Statistics," last modified November 23, 2020, https://electproject.github.io/Early-Vote-2020G/index.html; U.S. Election Assistance Commission, *Election Administration and Voting Survey, 2018 Comprehensive Report, A Report to the 116th Congress*, June 2019, 11, https://eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.
[127] Wendy Weiser and Dominique Erney, *Bipartisan Support for Expanded Mail Voting for 2020 Elections*, Brennan Center for Justice, April 15, 2020, https://www.brennancenter.org/our-work/research-reports/bipartisan-support-expanded-mail-voting-2020-elections; and Amy Gardner, Elise Viebeck, and Joseph Marks, "Election Officials in Both Parties Call for Emergency Funding to Expand Voting by Mail Before November," *Washington Post*, March 24, 2020, https://www.washingtonpost.com/politics/election-officials-in-both-parties-call-for-emergency-funding-to-expand-voting-by-mail-before-november/2020/03/23/7d619400-6d24-11ea-aa80-c2470c6b2034_story.html.
[128] Danetz, *Mail Ballot Security Features.*
[129] Wendy Weiser et al, *Mail Voting: What Has Changed in 2020*, Brennan Center for Justice, September 17, 2020, https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020.

voting in person. That was down from 17 states the previous election cycle, but only 1 of the states that eliminated excuse requirements passed legislation to do so permanently.[130]

In addition, eight states still required voters to obtain a witness signature or notary to cast a mail ballot. And in 28 states, ballots could still be rejected for technical defects unrelated to voter eligibility, without any notice or opportunity to correct the issue after Election Day.[131] Three closely contested states—Iowa, Ohio, and Texas—also limited the use of secure ballot drop boxes for voters to submit their absentee ballots. Similarly, Pennsylvania tossed thousands of votes from eligible voters who did not place their absentee ballots in a so-called "privacy sleeve" (an extra envelope that encases a ballot within a mailing envelope).[132] Barriers to mail voting had a disproportionately negative impact on voters of color.[133] And they would have likely disenfranchised far more people had voter mobilization not been so high.

In the first few months of 2021 alone, at least 125 bills to limit mail voting have been introduced in state legislatures across the country.[134] Fourteen bills in nine states would make the "excuse" requirement for mail voting more stringent for absentee voting or eliminate "no excuse" mail voting.[135] Bills have been introduced across the country that would make it harder to obtain ballots, create barriers to completing mail ballots, and place limits on ballot counting, such as stricter ballot receipt deadlines.[136] As with other recently-introduced voting restrictions, at least some of these new mail voting restrictions would have a racially disparate impact. For instance, the Georgia Senate recently voted to end no-excuse absentee voting for people under 65. While a majority of Georgia voters over the age of 65 who cast mail ballots in 2020 were white, less than half of those younger than 65 who voted by mail that same year were white.[137]

In the face of ongoing efforts to unreasonably limit mail voting options, S. 1 would guarantee all voters reasonable, secure access to this method for casting a ballot. To start, the Act

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[130] United States Elections Project, "2020 General Election Early Vote Statistics"; and Eliza Sweren-Becker, Anne Glatz, and Elisabeth Campbell, "Voting During Covid-19," Brennan Center for Justice, last modified November 20, 2020, https://www.brennancenter.org/our-work/research-reports/voting-during-covid-19.
[131] Brennan Center for Justice, "Preparing Your State."
[132] David Montgomery, "The Texas Supreme Court Upholds the Governor's Order for a Single Ballot Drop Box Per County," *New York Times*, October 28, 2020, https://www.nytimes.com/2020/10/28/us/elections/the-texas-supreme-court-upholds-the-governors-order-for-a-single-ballot-drop-box-per-county.html; NBC, "Dispute over Ohio Mail Ballot Drop Box Limit Ends as Advocates Drop Suit," October 23, 2020, https://www.nbcnews.com/politics/2020-election/dispute-over-ohio-mail-ballot-drop-box-limit-ends-advocates-n1244584; Ryan Foley, "Judge Backs Iowa's Limits on Absentee Ballot Drop Box Sites," *Gazette*, October 29, 2020, https://www.thegazette.com/subject/news/government/iowa-election-absentee-ballot-drop-box-paul-pate-20201029; and Pat Beall, "Fewer Rejected Ballots Seemed to Be a Win for Voter Access. Trump and Others Disagree," *USA Today*, December 28, 2020, https://www.usatoday.com/story/news/investigations/2020/12/28/trump-and-others-not-happy-lower-2020-rejected-ballot-numbers/3964007001/.
[133] Jane Timm, "A White Person and a Black Person Vote by Mail in the Same State. Whose Ballot is More Likely to Be Rejected?" *NBC*, August 9, 2020, https://www.nbcnews.com/politics/2020-election/white-person-black-person-vote-mail-same-state-whose-ballot-n1234126.
[134] Brennan Center for Justice, "State Voting Bills Tracker 2021."
[135] Brennan Center for Justice, "Voting Laws Roundup: February 2021," n. 1–2.
[136] Brennan Center for Justice, "Voting Laws Roundup: February 2021."
[137] Morris, "Georgia's Proposed Voting Restrictions Will Harm Black Voters Most."

requires states to give every voter the option to vote by mail and specifies that state or local election officials must transmit mail-in ballot applications to all registered voters at least 60 days before Election Day. It also removes key barriers to accessing mail voting by prohibiting notary, witness, and documentary ID requirements and requiring prepaid postage for all election materials, including registration forms and ballot applications. In addition to making it easier to request a mail ballot, the Act simplifies the process of returning ballots by requiring states to provide drop boxes for federal races, as well as by clarifying that all voted mail ballots should be carried free of postage.[138] It does not, it is worth noting, mail a ballot to any voter unless it has been requested.

S. 1 would also require states to provide voters with a way to track their mail ballot and confirm its receipt. The ability to track a ballot is important for election security, as election officials can locate lost ballots. Likewise, it empowers voters to confirm the arrival of their ballot.[139] S. 1 lets states access funds allocated in the Help America Vote Act to develop such a program.

Finally, S. 1 would require states to begin processing and scanning ballots cast by mail and during early voting for tabulation at least 14 days prior to the date of the election, which would help prevent delays in the certification of election results.[140]

F. Preventing Unreasonable Wait Times at the Polls (Title I, Subtitle N, Part 1)

S. 1 will require states to make voting more accessible by cutting down on long wait times at the polls.

Far too often, voters arrive at their precincts only to find out that they must wait in unreasonably long lines in order to cast a ballot. In the 2020 primary elections, for example, voters in metropolitan areas across the country—from Atlanta to Philadelphia to Milwaukee—were forced to wait in hours-long lines at the polls.[141] A Brennan Center study of the 2018

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[138] In states where most or all voters vote by mail, easy access to drop boxes is considered a best practice, as drop boxes are secure and convenient, enabling a speedier ballot delivery than the postal service. In 2016, a majority of voters in Colorado (73 percent), Oregon (59 percent), and Washington (65 percent)—all "vote at home" states—chose to return their ballots to a physical location rather than send them via mail. Lisa Danetz, *Mail Ballot Security Features: A Primer*, Brennan Center for Justice, 2020, https://www.brennancenter.org/our-work/research-reports/mail-ballot-security-features-primer.
[139] Danetz, *Mail Ballot Security Features*.
[140] Anthony Izaguirre, "Delays in Verifying Mail-In Ballots Will Slow Election Tally," *AP News*, October 4, 2020, https://apnews.com/article/virus-outbreak-election-2020-donald-trump-elections-voting-2020-b382942a72809ab70a32d7dc1a93ee40.
[141] Astead W. Herndon and Stephanie Saul, "Major Problems With Voting in Atlanta as 5 States Hold Primaries," *New York Times*, June 9, 2020, https://www.nytimes.com/2020/06/09/us/politics/georgia-primary-voting-atlanta.html; Reid J. Epstein and Nick Corasaniti, "Pandemic, Protests and Police: A Primary Election Like No Other," *New York Times*, June 2, 2020, https://www.nytimes.com/2020/06/02/us/politics/june-2-primary-election-day-voting.html; and Mary Spicuzza, "'A Very Sad Situation for Voters': Milwaukeeans Brave Wait Times as Long as 2 1/2 hours, Top Election Official Says," *Milwaukee Journal Sentinel*, April 7, 2020,

midterm elections estimated that 3 million voters waited longer than half an hour to vote (and many waited much longer).[142] The unconscionably (but all-too-familiar) long lines in the 2012 election prompted President Obama to institute a bipartisan commission to develop recommendations to reduce wait times.[143] Long lines are inconvenient for all voters, but they are an especially heavy burden for voters with disabilities, those who may be missing work to vote, and those with caregiving responsibilities. For too many, a long line can mean a lost vote.

Long lines do not affect all equally. A growing body of research shows that they disproportionately plague Black and Latino voters.[144] A Brennan Center study of the 2018 midterm elections found that Black and Latino voters waited on average 45 and 46 percent longer than white voters, respectively.[145] These racial disparities persisted in the 2020 primary elections, in which the longest wait times were seen in jurisdictions with the largest concentrations of nonwhite voters.[146]

Excessive wait times are an avoidable problem. S. 1 sets a legal standard that no individual shall be required to wait longer than 30 minutes to cast a ballot. (This was the standard recommended by the bipartisan Presidential Commission on Election Administration in 2013.) Additionally, it directs states to equitably allocate voting systems, poll workers, and other election resources to ensure fair and equitable wait times for all voters. And it directs the Election Assistance Commission and the comptroller general to study the places that have struggled the most with long lines to ensure that the most effective practices can be put in place.

G. Prohibiting Deceptive Practices (Title I, Subtitle D)

S. 1 increases protections against, and remedies for, efforts to use deception or intimidation to prevent people from voting or registering to vote. Unfortunately, attempts to suppress votes through deception and intimidation remain all too widespread. Every election cycle, journalists and non-partisan Election Protection volunteers document attempts at voter

https://www.jsonline.com/story/news/politics/elections/2020/04/07/wisconsin-election-milwaukee-voters-brave-long-wait-lines-polls/2962228001/

[142] Klain et al., *Waiting to Vote*.

[143] Brennan Center for Justice, "Bipartisan Presidential Commission Endorses Modernizing Voter Registration," December 1, 2014, https://www.brennancenter.org/our-work/research-reports/bipartisan-presidential-commission-endorses-modernizing-voter.

[144] Michael C. Herron and Daniel A. Smith, "Precinct Closing Times in Florida During the 2012 General Election," *Election Law Journal* 14.3 (2015): 220–238; Stephen Pettigrew, "The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials," *Political Science Quarterly* 132 (2017): 527; M. Keith Chen, et al., "Racial Disparities in Voting Wait Times: Evidence from Smartphone Data," *Review of Economic Statistics* (2019): 1–27; and Stephen Pettigrew, "The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout," *Electoral Studies* 102188 (2020).

[145] Klain et al., *Waiting to Vote*.

[146] Evan Nicole Brown, "What It's Been Like to Vote in 2020 So Far," *New York Times*, July 14, 2020, https://www.nytimes.com/2020/07/14/us/politics/voting-lines-2020-elections.html.

deception and intimidation.[147] This is not a new problem, but now social media platforms make the mass dissemination of misleading information easy and allow for perpetrators to target particular audiences with precision. In an analysis for the Brennan Center, for example, University of Wisconsin professor Young Mie Kim documented hundreds of messages on Facebook and Twitter designed to discourage or prevent people from voting in the 2018 election.[148] In 2016, these false statements were extremely prevalent, and not just on the part of domestic actors. Russian operatives also engaged in a concerted disinformation and propaganda campaign over the internet that aimed, in part, to suppress voter turnout, especially among Black voters.[149] These efforts by the Russian government continued, and in many ways became more brazen, in the 2020 election cycle.[150] Congress should increase protections against such efforts.

While federal law already prohibits voter intimidation, fraud, and intentional efforts to deprive others of their right to vote,[151] existing laws have not been strong enough to deter misconduct. Moreover, no law specifically targets deceptive practices, nor is there any authority charged with investigating such practices and providing voters with corrected information.

S. 1 protects voters from deception and intimidation in three ways. First, it increases criminal penalties for false and misleading statements and intimidation aimed at impeding or preventing a person from voting or registering to vote. Second, it empowers citizens to go to court to stop voter deception. Third, it blunts the effect of deceptive information by requiring designated government officials to disseminate accurate, corrective information to voters. These

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[147] *See e.g.* Ian Vandewalker, *Digital Disinformation and Vote Suppression*, Brennan Center for Justice, 2020, https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression; Kristen Clarke, "Voter Intimidation Is Surging in 2020. The Fight for the Right That Begets All Other Rights," *USA Today*, October 28, 2020, https://www.usatoday.com/story/opinion/2020/10/27/voter-intimidation-surging-2020-protect-minority-voters-column/6043955002/; Danny Hakim et al., "Trump Renews Fears of Voter Intimidation as G.O.P. Poll Watchers Mobilize," *New York Times*, September 30, 2020, https://www.nytimes.com/2020/09/30/us/trump-election-poll-watchers.html; Ayala, "Voting Problems 2018"; Sean Morales-Doyle and Sidni Frederick, "Intentionally Deceiving Voters Should Be a Crime," *The Hill*, August 8, 2018, https://thehill.com/opinion/civil-rights/400941-intentionally-deceiving-voters-should-be-a-crime; Wendy Weiser and Adam Gitlin, *Dangers of "Ballot Security" Operations: Preventing Intimidation, Discrimination, and Disruption*, Brennan Center for Justice, 2016, https://www.brennancenter.org/analysis/dangers-ballot-security-operations-preventing-intimidation-discrimination-and-disruption; and Wendy Weiser and Vishal Agraharkar, *Ballot Security and Voter Suppression: What It Is And What the Law Says*, Brennan Center for Justice, 2012, https://www.brennancenter.org/publication/ballot-security-and-voter-suppression.

[148] Young Mie Kim, "Voter Suppression Has Gone Digital," Brennan Center for Justice, last modified November 20, 2018, https://www.brennancenter.org/blog/voter-suppression-has-gone-digital.

[149] New Knowledge, *SSCI Research Summary: An Assessment of the Internet Research Agency's U.S.-Directed Activities in 2015–2017 Based on Platform-Provided Data*, 2018, 5, 106, https://cdn2.hubspot.net/hubfs/4326998/SSCI%20Presentation%20final.pdf; and Vandewalker, *Digital Disinformation and Voter Suppression*.

[150] Young Mie Kim, "New Evidence Shows How Russia's Election Interference Has Gotten More Brazen," Brennan Center for Justice, 2020, https://www.brennancenter.org/our-work/analysis-opinion/new-evidence-shows-how-russias-election-interference-has-gotten-more.

[151] Weiser and Gitlin, *Dangers of "Ballot Security" Operations*; and Michael German, Elizabeth Goitein, Sean Morales-Doyle, Daniel Weiner, and Wendy Weiser, *Voters Should Not Be Intimidated*, Brennan Center for Justice, 2020, brennancenter.org/our-work/research-reports/voters-should-not-be-intimidated.

provisions will give federal law enforcement agencies and private citizens the opportunity to stop bad actors from undermining our elections. We encourage Congress to enact them.

III. CAMPAIGN FINANCE

A. Small Donor Public Financing (Title V, Subtitles B and C)

S. 1 also significantly overhauls federal campaign finance law. The centerpieces of these reforms are a voluntary small-donor matching program for Senate elections (the counterpart to the program for congressional elections passed by the House) and an overhaul of the presidential public financing system, which also includes expanded small donor matching. These changes will give ordinary citizens a louder voice, even in the face of Super PACs and dark money. They are the single best means to counteract the worst effects of the Supreme Court's decision in *Citizens United* and other misguided cases.

Of note, the reform in S. 1 does not impose minute detailed regulations on campaign contributions or spending. It does not seek to end private money in campaigns. Rather, it would boost the most encouraging trend in campaign fundraising, the rise of small donors.

Big Money Undermines American Democracy. Thanks to *Citizens United* and related cases, a small class of wealthy donors has gained vast new clout in American politics, an imbalance not seen since the Gilded Age[152] That distorts our democracy and undermines the will of American voters. Super PACs, political committees that can raise and spend unlimited funds, have raised more than $8 billion to spend on influencing elections.[153] As of 2018, roughly $1 billion had come from just 11 people.[154] Another $1.2 billion in campaign ads has come from dark money groups that keep all their donors secret (these groups also give hundreds of millions more to other groups to spend on electoral advocacy).[155] While dark money donors are hidden

[152] Ian Vandewalker, "Since Citizens United, a Decade of Super PACs," Brennan Center for Justice, January 14, 2020, https://www.brennancenter.org/our-work/analysis-opinion/citizens-united-decade-super-pacs (showing the influence of super PACs since *Citizens United*); Ian Vandewalker and Lawrence Norden, "Small Donors Still Aren't as Important as Wealthy Ones," *The Atlantic*, October 18, 2016, https://www.theatlantic.com/politics/archive/2016/10/campaign-finance-fundraising-citizens-united/504425/ (showing the portion of contributions from donors of $100,000 or more increasing in presidential cycles since 2010); and Daniel I. Weiner, Citizens United *Five Years Later*, Brennan Center for Justice, 2015, 3, https://www.brennancenter.org/sites/default/files/analysis/Citzens_United_%20Five_Years_Later.pdf (explaining how *Citizens United* changed the legal landscape for campaign finance).

[153] See Center for Responsive Politics, "Super PACs," accessed March 12, 2021, https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S.

[154] Michelle Ye Hee Lee, "Eleven Donors Have Plowed $1 Billion into Super PACs Since They Were Created," *Washington Post*, October 26, 2018, https://beta.washingtonpost.com/politics/eleven-donors-plowed-1-billion-into-super-pacs-since-2010/2018/10/26/31a07510-d70a-11e8-aeb7-ddcad4a0a54e_story.html.

[155] Center for Responsive Politics, "Political Nonprofits (Dark Money)," accessed March 16, 2021, https://www.opensecrets.org/outsidespending/nonprof_summ.php; Ashley Balcerzak, "How Democrats Use Dark Money – and Win Elections," *NBC*, February 20, 2018, https://www.nbcnews.com/politics/congress/how-democrats-use-dark-money-win-elections-n849391; and Maggie Haberman, "Ad by Pro-Trump Group Attacks the Club for

from public scrutiny, we know that these groups are often funded by many of the same donors who back super PACs.[156] All of these groups are supposed to operate independently of candidates and parties, but many actually have close ties to elected officials, to the point where they basically function as a campaign arm.[157]

Recent elections saw a surge in giving by small donors (donors who give $200 or less),[158] but these funds still account for well under a quarter of the total raised and spent on campaigns.[159] Despite record small donor participation in 2018, the top 100 super PAC donors in that cycle gave almost as much as all the millions of small donors combined, as also happened in 2014.[160] The roughly 3,500 donors who contributed at least $100,000 in 2018 easily outspent all individual small donors, who numbered at least seven million.[161] Even in 2020, which featured

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Growth," *New York Times*, April 18, 2017, https://www.nytimes.com/2017/04/18/us/politics/attack-ad-sheldon-adelson-club-for-growth.html. As noted, dark money groups increasingly funnel money into Super PACs or other avenues where donation sources are ostensibly disclosed but are, in practice, impossible to trace to their real origins. Dark money groups contributed an estimated $430 million to political committees in the 2020 election alone. Anna Massoglia, "'Dark Money' Groups Find New Ways to Hide Donors in 2020 Election," Center for Responsive Politics, October 30, 2020, https://www.opensecrets.org/news/2020/10/dark-money-2020-new-ways-to-hide-donors/.

[156] Soo Rin Kim, "'Dark Money,' Used by Both Parties, Featured in $100 Million Pro-Biden Ad Blitz," *ABC*, October 28, 2020, https://abcnews.go.com/Politics/dark-money-parties-featured-100-million-pro-biden/story?id=73863672; and Michela Tindera, "California Billionaire Gave $1 Million To Pro-Trump 'Dark Money' Group," *Forbes*, December 3, 2020, https://www.forbes.com/sites/michelatindera/2020/12/03/california-billionaire-gave-1-million-to-pro-trump-dark-money-group/?sh=1376c8f53d62.

[157] See generally Ian Vandewalker, "The Rise of Shadow Parties," Brennan Center for Justice, October 22, 2018, https://www.brennancenter.org/our-work/analysis-opinion/rise-shadow-parties; Ian Vandewalker and Eric Petry, *Shadow Campaigns: The Shift in Presidential Campaign Funding to Outside Groups*, Brennan Center for Justice, August 4, 2015, https://www.brennancenter.org/publication/shadow-campaigns-shift-presidential-campaign-funding-outside-groups; and Daniel P. Tokaji and Renata E.B. Strause, *The New Soft Money: Outside Spending in Congressional Elections*, Election Law @ Moritz, 2014, 76–79, https://www.seattlelwv.org/uploads/1/1/7/8/117877553/book.pdf (quoting members of Congress and staff about the influence of outside spending on elected officials).

[158] See Center for Responsive Politics, "Small Donors Give Big Money in 2020 Election Cycle," accessed March 10, 2021, https://www.opensecrets.org/news/2020/10/small-donors-give-big-2020-thanks-to-technology/; Peter Overby, "Democrats Built a Small-Donor Money Machine. Now, Republicans Want Their Own," *NPR*, November 23, 2018, https://www.npr.org/2018/11/23/670084581/democrats-built-a-small-donor-money-machine-now-republicans-want-their-own; Max Greenwood, "Small-dollar Donations Explode in the Trump Era," *The Hill*, October 19, 2018, https://thehill.com/homenews/campaign/412231-small-dollar-donations-explode-in-the-trump-era; and Kenneth P. Vogel and Rachel Shorey, "Eyeing 2020, Trump Fund-Raisers Return to a Familiar Well: Small Donors," *New York Times*, April 15, 2018, https://www.nytimes.com/2018/04/15/us/politics/trump-campaign-fec-financial-reports.html.

[159] The 2020 elections cost a record $14 billion, of which only about 22 percent came from individual small donors. Center for Responsive Politics, "2020 Election to Cost $14 billion, Blowing Away Spending Records," October 28, 2020, https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/. That 22 percent figure was nonetheless much higher than for other recent elections, as discussed below.

[160] Center for Responsive Politics, "Super PACs: How Many Donors Give," accessed March 16, 2021, https://www.opensecrets.org/outside-spending/donor-stats?cycle=2018&type=B. The 2018 midterms were also notable for how many wealthy self-funders won office. Center for Responsive Politics, "Most Expensive Midterm Ever: Cost of 2018 Election Surpasses $5.7 billion," February 6, 2019, https://www.opensecrets.org/news/2019/02/cost-of-2018-election-5pnt7bil/.

[161] Ian Vandewalker, "The 2018 Small Donor Boom Was Drowned Out by Big Donors, Thanks to Citizens United," Brennan Center for Justice, January 10, 2020, https://www.brennancenter.org/our-work/analysis-opinion/2018-small-donor-boom-was-drowned-out-big-donors-thanks-citizens-united.

truly unprecedented voter engagement, small donors accounted for barely 20 percent of total donations.[162]

The dominance of wealthy donors and special interests directly affects policy. Studies have repeatedly shown that campaign donors wield outsized clout – far more than voters[163] – which they often use to pursue objectives most Americans do not share.[164] One recent example was the successful push in 2017 for a $1.5 trillion corporate tax overhaul, an avowedly donor-driven initiative that was consistently unpopular with the general public.[165]

The dominance of private big money also tilts the political terrain against broadly popular legislation. For example, although almost 80 percent of Americans support raising the minimum wage to make it a living wage, there is far less support for doing so among those who fund campaigns.[166] Paid sick leave for workers is another overwhelmingly popular policy, with more than 85 percent support according to one survey.[167] Political spending helps to explain why the United States is virtually the only developed country not to guarantee this basic protection, with powerful groups repeatedly killing proposals that have come before Congress.[168]

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[162] Vandewalker, "2018 Small Donor Boom"; Center for Responsive Politics, "Most Expensive Midterm Ever"; and Center for Responsive Politics, "2020 Election to Cost $14 Billion."

[163] Chris Tausanovitch, "Income, Ideology and Representation," *Russell Sage Foundation Journal of the Social Sciences* 2 (2016): 33, 49; Martin Gilens and Benjamin I. Page, "Testing Theories of American Politics: Elites, Interest Groups, and American Citizens," *Perspectives on Politics* 12 (2014): 564, 575; Christopher Ellis, "Social Context and Economic Biases in Representation," *Journal of Politics* 75 (2013): 773, 779; Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton: Princeton University Press, 2012), 84; and Larry Bartels, *Unequal Democracy: The Political Economic of the New Gilded Age* (Princeton: Princeton University Press, 2010), 285.

[164] As Connecticut Senator Chris Murphy said of the daily calls he has had to make to wealthy donors: "I talked a lot more about carried interest inside of that call room than I did at the supermarket." Wealthy donors "have fundamentally different problems than other people…And so you're hearing a lot about problems that bankers have and not a lot of problems that people who work in the mill in Thomaston, Conn., have." Paul Blumenthal, "Chris Murphy: 'Soul-Crushing' Fundraising Is Bad for Congress," *HuffPost*, May 7, 2013, https://www.huffpost.com/entry/chris-murphy-fundraising_n_3232143.

[165] See Daniel I. Weiner, "The Tax Overhaul is Proof that Money in Politics Affects All of Us," Brennan Center for Justice, December 4, 2017, https://www.brennancenter.org/blog/tax-overhaul-proof-money-politics-affects-all-us; and Alex Isenstadt and Gabriel Debenedetti, "Angry GOP Donors Close Their Wallets," *Politico*, October 5, 2017, https://www.politico.com/story/2017/10/05/republican-donors-trump-mcconnell-anger-243449.

[166] David Callahan and J. Mijin Cha, *Stacked Deck: How the Dominance of Politics by the Affluent & Business Undermines Economic Mobility in America*, Dēmos, 2013, 5, https://www.demos.org/sites/default/files/publications/StackedDeck_1.pdf.

[167] Juliana Menasce Horowitz, Kim Parker, Nikki Graf, and Gretchen Livingston, "Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies," Pew Research Center, March 23, 2017, 5, https://www.pewresearch.org/social-trends/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/.

[168] Kent Hoover, "Worker Laws on Congress' Radar," *Triangle Business Journal*, September 10, 2007, https://www.bizjournals.com/triangle/stories/2007/09/10/smallb4.html; Center for Responsive Politics, "US Chamber of Commerce: Contributions," accessed March 18, 2021, https://www.opensecrets.org/orgs/us-chamber-of-commerce/totals?id=D000019798 (the U.S. Chamber of Commerce has spent $116,877,308 in outside spending and spent $2,871,177 in direct contributions); and Danielle Kurtzleben, "Lots of Other Countries Mandate Paid

The disconnect between elite priorities and those of everyday Americans has profoundly undermined faith in our democracy. Overwhelming majorities across the political spectrum feel that corruption is widespread in the federal government, that people who give large amounts of money to elected officials have more influence than others, that money has too much influence in political campaigns, and that money in politics and wealthy donors are responsible dysfunction is the U.S. political system.[169]

The central focus on large campaign donors also forces candidates to spend an inordinate amount of time fundraising. One party fundraising presentation suggested that new representatives spend four hours a day soliciting large contributions.[170] In 2014—when elections were much cheaper than they are now—Republican leadership told sitting House members they needed to raise as much as $18,000 per day.[171]

The outsized role of private wealth in our campaigns especially harms communities of color, helping to perpetuate longstanding racial wealth disparities and allowing those who have benefited the most from systemic inequality to translate their affluence into political power. Large donors are overwhelmingly white — white Americans gave 90 percent of reported federal campaign contributions between 1980 and 2012.[172] Major corporate and individual donors have

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Leave. Why Not the U.S.?" *NPR*, July 15, 2015, https://www.npr.org/sections/itsallpolitics/2015/07/15/422957640/lots-of-other-countries-mandate-paid-leave-why-not-the-us.

[169] Scott Rasmussen, "Voters Rate Political Corruption as America's Biggest Crisis," *RealClearPolitics*, April 25, 2019, https://www.realclearpolitics.com/articles/2019/04/25/voters_rate_political_corruption_as_americas_biggest_crisis_140156.html; Bradley Jones, "Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence," Pew Research Center, May 8, 2018, https://pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/; New York Times, "Americans' Views on Money in Politics," June 2, 2015, https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html?_r=0; John Wagner and Scott Clement, "'It's Just Messed Up': Most Think Political Divisions as Bad as Vietnam Era, New Poll Shows," *Washington Post*, October 28, 2017, https://www.washingtonpost.com/graphics/2017/national/democracy-poll/; Michael W. Traugott, "Americans: Major Donors Sway Congress More Than Constituents," *Gallup*, July 6, 2016, https://news.gallup.com/poll/193484/americans-major-donors-sway-congress-constituents.aspx; and Rasmussen Reports, "Voters Say Money, Media Have Too Much Political Clout," February 16, 2016, http://www.rasmussenreports.com/public_content/politics/general_politics/february_2016/voters_say_money_media_have_too_much_political_clout.

[170] Ryan Grim and Sabrina Siddiqui, "Call Time for Congress Shows How Fundraising Dominates Bleak Work Life," *HuffPost*, last modified December 6, 2017, https://www.huffpost.com/entry/call-time-congressional-fundraising_n_2427291.

[171] Norah O'Donnell, "Are Members of Congress Becoming Telemarketers?" *60 Minutes*, April 24, 2016, https://www.cbsnews.com/news/60-minutes-are-members-of-congress-becoming-telemarketers/.

[172] Among elite donors giving more $5,000, 93 percent were white in 2012 and 94 percent were white in 2014. Sean McElwee, Brian Schaffner, Jesse Rhodes, *Whose Voice, Whose Choice?* Dēmos, 2016, 2, https://www.demos.org/sites/default/files/publications/Whose%20Voice%20Whose%20Choice_2.pdf. Since 2009, only one Black American donor has appeared in the top 100 political spenders list. Lateshia Beachum, "There are Many Rich Minorities. So Why Are There No Black Koch Brothers?" *Center for Public Integrity*, July 23, 2018, https://www.pri.org/stories/2018-07-18/there-are-many-rich-minorities-so-why-are-there-no-black-koch-brothers;

helped to drive policies that disproportionately hurt communities of color, from opposing paid sick leave and limiting affordable housing to shaping lenient financial regulations for predatory mortgage and student loan lenders.[173] Barriers related to fundraising also disproportionately keep prospective candidates of color from running, especially women of color, who still face persistent discrimination and are less likely to have wealthy networks they can tap for support.[174] In 2018, Black women running for Congress raised only a third of what other female candidates received from large donors.[175]

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and Jacob M. Grumbach and Alexander Sahn, "Race and Representation in Campaign Finance," *American Political Science Review* 114, no. 1 (2019): 213.

[173] Hazel Millard, "Battle over Paid Sick Days in Covid-19 Response Bill Shows What's Wrong with Campaign Finance System," Brennan Center for Justice, April 16, 2020, https://www.brennancenter.org/our-work/analysis-opinion/battle-over-paid-sick-days-covid-19-response-bill-shows-whats-wrong; Julia Kirschenbaum, "Covid-19 Housing Crisis Highlights Racial Inequity of Campaign Finance System," Brennan Center for Justice, October 14, 2020, https://www.brennancenter.org/our-work/analysis-opinion/covid-19-housing-crisis-highlights-racial-inequity-campaign-finance; Sarah Burd-Sharps and Rebecca Rasch, *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*, Social Science Research Council, June 2015, 8, https://www.aclu.org/sites/default/files/field_document/discrimlend_final.pdf; Gillian B. White, "The Recession's Racial Slant," *The Atlantic*, June 24, 2015, https://www.theatlantic.com/business/archive/2015/06/black-recession-housing-race/396725/; Mark Huelsman, "Betrayers of the Dream," *American Prospect*, July 12, 2015, https://prospect.org/labor/betrayers-dream; Genevieve Bonadies, Joshua Rovenger, Eileen Connor, Brenda Shum, and Toby Merrill, "For-Profit Schools' Predatory Practices and Students of Color: A Mission to Enroll Rather Than Educate," *Harvard Law Review* Blog, July 30, 2018, https://blog.harvardlawreview.org/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate/; and Dyvonne Body, "Worse Off than When They Enrolled: The Consequence of For-Profit Colleges for People of Color," Aspen Institute, March 19, 2019, https://www.aspeninstitute.org/blog-posts/worse-off-than-when-they-enrolled-the-consequence-of-for-profit-colleges-for-people-of-color/.

[174] Women of color are approximately 20 percent of the U.S. population but despite historic gains still make up less than ten percent of the voting membership of the House of Representatives and only four percent of the Senate. Center for American Women and Politics ,"Women of Color in Elective Office 2019," accessed March 12, 2021, http://cawp.rutgers.edu/women-color-elective-office-2019. According to one scholar, "[t]he support infrastructure available to women of color has historically not been as strong, particularly when it comes to things like campaign trainings, recruitments, and financial support." Linda Kramer Jenning, "Women of Color Face Significant Barriers When Running for Office. But They're Finding Support," *Yes! Magazine*, July 31, 2018, https://www.yesmagazine.org/people-power/women-of-color-face-significant-barriers-when-running-for-office-but-theyre-finding-support-20180731. The founder of Collective PAC, which raises money for candidates of color, notes that "especially for black women, raising money is oftentimes a major deterrent to why they don't get into politics or run for election." Kate Ackley, "Women – and the Power of the Purse – Will Be Key in 2018," *Roll Call*, October 26, 2017, https://www.rollcall.com/news/politics/99810-2. See also Asha DuMonthier, Chandra Childers, and Jessica Milli, *The Status of Black Women in the United States*, Institute for Women's Policy Research, 2017, 4–5, https://www.domesticworkers.org/sites/default/files/SOBW_report2017_compressed.pdf (finding that fundraising pressure is disproportionately discouraging to potential candidates who are female, Black, or represent less-affluent districts).

[175] Sarah Bryner and Grace Haley, *Race, Gender, and Money in Politics: Campaign Finance and Federal Candidates in the 2018 Midterms*, working paper, March 15, 2019, 23, https://www.pgpf.org/sites/default/files/US-2050-Race-Gender-and-Money-in-Politics-Campaign-Finance-and-Federal-Candidates-in-the-2018-Midterms.pdf; and Nirali Vyas, Chisun Lee, and Gregory Clark, *Small Donor Public Financing Could Advance Race and Gender Equity in Congress*, Brennan Center for Justice, October 15, 2020, https://www.brennancenter.org/our-work/research-reports/small-donor-public-financing-could-advance-race-and-gender-equity.

1. Small-Donor Matching for Senate Races (Title V, Subtitle B, Part 2)

Title V, Subtitle B, Part 2 of S. 1 establishes a small donor matching system for Senate races. Small donor matching is a transformative solution to the challenge posed by big money politics. The basics of this system are simple. Candidates opt into the system by raising enough small start-up donations to qualify and accepting certain conditions such as lower contribution limits. Donors who give to participating candidates in small amounts will then see their contributions matched.[176] The Act matches donations of $1-$200 to participating Senate candidates at a six-to-one ratio.

Small Donor Matching Works. Public financing has a long and successful history in American elections. It was first proposed more than a century ago by President Theodore Roosevelt.[177] Congress incorporated a one-to-one small donor match for primaries into the presidential public financing system enacted in 1971. The vast majority of major party presidential candidates from 1976 to 2008 used matching funds in their primary campaigns.[178] This was coupled with a grant that paid for the general election campaign of major party candidates.

After Watergate, the public financing system produced presidential campaigns that were far less corrupt and more competitive than before. (In the first five publicly financed presidential elections, challengers defeated incumbents three times.) Thanks to the presidential public financing system, Ronald Reagan was reelected by a landslide in 1984 without holding a single fundraiser.[179] Two years later, the bipartisan Commission on National Elections concluded that: "Public financing of presidential elections has clearly proved its worth in opening up the process, reducing the influence of individuals and groups, and virtually ending corruption in presidential election finance."[180]

Small donor matching has also found success at the state level, where it has been adopted in a wide variety of jurisdictions—including most recently in New York State.[181] The system

[176] Brennan Center for Justice, "Annotated Guide to the For the People Act of 2021," last modified March 18, 2021, https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021.
[177] Adam Skaggs and Fred Wertheimer, *Empowering Small Donors in Federal Elections*, Brennan Center for Justice and Democracy 21, August 22, 2012, 8, https://www.brennancenter.org/sites/default/files/2019-08/Report_Empowering_Small_Donors_Federal_Elections.pdf.
[178] Skaggs and Wertheimer, *Empowering Small Donors*, 10.
[179] Skaggs and Wertheimer, *Empowering Small Donors*, 11.
[180] Skaggs and Wertheimer, *Empowering Small Donors*, 10 (quoting Fred Wertheimer, *Testimony to DNC Commission on Presidential Nomination Timing and Scheduling*, September 30, 2005).
[181] See Brennan Center for Justice, "Guide: New York State's Small Donor Public Financing System," December 18, 2020, https://www.brennancenter.org/our-work/research-reports/guide-new-york-states-small-donor-public-financing-system. A number of other states, including Florida, Michigan, and New Jersey, provide matching funds in governor races. See Juhem Navarro-Rivera and Emmanuel Caicedo, *Public Funding for Electoral Campaigns: How 27 States, Countries, and Municipalities Empower Small Donors and Curb the Power of Big Money in Politics*, Dēmos, 2017, https://www.demos.org/research/public-funding-electoral-campaigns-how-27-states-counties-and-municipalities-empower-small. Comprehensive matching also exists in many other large, diverse municipalities

that has been studied the most is New York City's, which has existed since the 1980s and currently matches donations of up to $175.[182] The vast majority of city candidates participate.[183] Studies of the 2009 and 2013 city elections found that participating candidates took in more than 60 percent of their funds from small donors and the public match.[184]

New York City's system has improved its politics. Most notably, it has increased the diversity of viewpoints influencing officeholders. Small donors far better reflect city residents than big donors in terms of race, income, education level, and where they live, and officeholders who court these campaign contributions spend more time talking to everyday New Yorkers.[185] The comparison to state races, which do not have small donor matching, is remarkable. A Brennan Center study found that participating city candidates raised money from 90 percent of the city's census blocs, as compared to roughly 30 percent for state assembly candidates running

besides New York City, including Los Angeles; Tucson; Washington, DC; Montgomery County, Maryland; Prince George's County, Maryland; and others. See Navarro-Rivera and Caicedo, *Public Funding for Electoral Campaigns*; Martin Austermuhle, "Bowser Signs Bill Creating Public Financing Program For Political Campaigns—And Will Fund It," *WAMU*, March 13, 2018, https://wamu.org/story/18/03/13/bowser-signs-bill-creating-public-financing-program-political-campaigns-will-fund/#.XFzEYmfsZaQ; and Rachel Chason, "Prince George's Approves Matching Funds for Local Candidates – Starting in 2026," *Washington Post*, October 24, 2018, https://www.washingtonpost.com/local/md-politics/prince-georges-approves-public-finance-system-for-local-candidates/2018/10/24/47f7b75a-d738-11e8-a10f-b51546b10756_story.html.

[182] New York City Campaign Finance Board, "How It Works," accessed March 12, 2021, https://www.nyccfb.info/program/how-it-works/; and Angela Migally, Susan M. Liss, and Frederick A.O. Schwartz, Jr., *Small Donor Matching Funds: The NYC Election Experience*, Brennan Center for Justice, 2010, https://www.brennancenter.org/publication/small-donor-matching-funds-nyc-election-experience.

[183] In 2017, 84 percent of candidates in New York City primaries opted to accept public funds; in 2013 it was 91 percent. New York City Campaign Finance Board, *Keeping Democracy Strong: New York City's Campaign Finance Program in the 2017 Citywide Elections*, 2018, 45–46, https://www.nyccfb.info/pdf/2017_Post-Election_Report_2.pdf.

[184] Michael Malbin, *Testimony before the New York City Campaign Finance Board*, Campaign Finance Institute, February 13, 2013, http://www.cfinst.org/Press/PReleases/14-02-13/Testimony_before_the_New_York_City_Campaign_Finance_Board_Says_Small_Donor_Matching_Funds_a_Success_but_the_City_Should_Look_at_Changes_Moving_Forward.aspx. Candidates who did not participate in the public financing system raised most of their money from donors of $1,000 or more. Michael J. Malbin, Peter W. Brusoe, and Brendan Glavin, *What Is and What Could Be: The Potential Impact of Small-Donor Matching Funds in New York State Elections*, Campaign Finance Institute, 2013, 3, http://www.cfinst.org/pdf/state/NY/CFI_Impact-Matching-on-NYS.pdf.

[185] As New York State Senator (and former City Council Member) Jose Serrano explained: "Imagine if you could spend a little less time [making fundraising calls], and a little more time in someone's living room, listening to conversations that they have, hearing the ideas that they may have. You can become a much more engaged and responsive candidate and hopefully elected official." DeNora Getachew and Ava Mehta, *Breaking Down Barriers: The Faces of Small Donor Public Financing*, Brennan Center for Justice, 2016, 29, https://www.brennancenter.org/sites/default/files/publications/Faces_of_Public_Financing.pdf. Councilmember Eric Ulrich, a Queens Republican, makes a similar point: "[t]he matching funds program has allowed for the voice of small donors and regular people to have a greater say in outcomes . . .. That has helped us transform how we serve our constituents. I have no choice but to listen to and engage the [constituents] in an overall discussion about what direction the city should go." Getachew and Mehta, *Breaking Down Barriers*, 34.

in the same areas.[186] A similar analysis of the 2017 city elections found that participating candidates raised a nine times greater share of their money from small donors than did non-participating candidates, and a 12 times greater share from small donor constituents.[187] The city's system has also helped a more diverse array of candidates run, including the city's first Black mayor and New York State's first female and first Black elected attorney general, who began her career on the city council.[188] Candidates in other jurisdictions with small donor public financing systems report similar benefits.[189]

S. 1's small donor matching provisions would allow all candidates to power their campaign with small donations from ordinary Americans. Recent Brennan Center studies of congressional fundraising found that almost all congressional candidates would be able to raise as much or more as they do under the current system, and that the greatest benefits would go to female candidates of color.[190] Based on our experience and past research, we would anticipate a similar result for Senate candidates.

Campaign funds from citizens are a vital counterweight to the often polarizing influence of big money and secretive donors.[191] Incumbents know well that today it is often the biggest donors, who can threaten a sudden spending spree in a primary, who exercise the most significant pull to the extremes. Indeed, research shows that states with higher individual

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[186] Elisabeth Genn, Michael J. Malbin, Sundeep Iyer, and Brendan Glavin, *Donor Diversity Through Public Matching Funds*, Brennan Center for Justice and Campaign Finance Institute, 2012, 4, www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

[187] Nirali Vyas, Chisun Lee, and Joanna Zdanys, *The Constituent-Engagement Effect of Small Donor Public Financing*, Brennan Center for Justice, 2019, 7, https://www.brennancenter.org/sites/default/files/2019-09/Report_Constituent-Engagement%20Effect_.pdf.

[188] As New York State Attorney General Letitia James put it: "I wouldn't be where I am today if not for public financing... The public financing system in New York City gave me the opportunity to compete and succeed, allowing me to represent individuals whose voices have been historically ignored and who wanted a representative who looked like them, who understood their values, and recognized their struggles." Brennan Center for Justice, "Faces of Small Donor Public Financing 2021," March 11, 2021, https://www.brennancenter.org/our-work/research-reports/faces-small-donor-public-financing-2021.

[189] Montgomery County Councilmember Evan Glass noted "The public financing system encourages small intimate gatherings, and it is so refreshing to have one-on-one time with a voter rather than trying to raise money in a back room or a boardroom. It's a better way to campaign and it's a better way to govern. … In order to successfully participate in public financing, you need solid roots in the community because that's the only way you're going to tap into the large network that you need to be successful." Arizona State Senator Victoria Steele reflected "As a Native American woman—I am Seneca and Mingo—public financing gave me an advantage. It's really hard for anybody to raise money to run for office, but women are generally more disadvantaged in raising money for races. A lot of us are not at the table where the big money is." Brennan Center for Justice, "Faces of Public Financing."

[190] Ian Vandewalker and Kevin Morris, "The Reform Law Needed to Counter Citizens United: H.R. 1," Brennan Center for Justice, January 21, 2020, https://www.brennancenter.org/our-work/analysis-opinion/reform-law-needed-counter-citizens-united-hr-1; Nirali Vyas et al., *Public Financing Could Advance Race and Gender Equity*. Although there is currently a dearth of public research, it likely that most Senate candidates would also fare as well or better under the act's small donor matching system as they do now.

[191] Ian Vandewalker, "How to Change Incentives for both Politicians and Donors," Brennan Center for Justice, February 4, 2021, https://www.brennancenter.org/our-work/analysis-opinion/how-change-incentives-both-politicians-and-donors.

contribution limits have more ideologically extreme legislators.[192] By contrast, many federal lawmakers who raise the most funds from small dollar contributions tend to be moderates, and success at raising campaign funds from small donors is due to factors such as prominence in the news cycle and the competitiveness of a race.[193]

Conserving Taxpayer Funds. It is important to note that all of these changes will be accomplished at no cost to taxpayers. The public match will instead be funded by a small surcharge on criminal and civil penalties against corporate wrongdoers, with an explicit bar on the use of taxpayer funds.[194]

Ultimately, political campaigns cost money, which must come from somewhere. Whether the source is a handful of wealthy special-interest donors or millions of everyday Americans is up to Congress.[195] Small donor matching stands on firm constitutional ground.[196] No reform has the potential to be more transformative. The time to pass this system is now.

2. Presidential Public Financing (Title V, Subtitle C)

S. 1 also revamps the presidential public financing system, which currently provides matching funds to primary candidates and block grants to general election nominees. Despite its success, that system ultimately failed because it did not afford candidates sufficient funds to compete in light of the dramatic growth in campaign costs.[197] The Act addresses this problem by increasing the primary match to a six-to-one ratio, providing matching funds to party nominees in the general election, and repealing burdensome limits on how much participating candidates can spend. The Brennan Center supports all of these changes.

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[192] Vandewalker, "How to Change Incentives."
[193] Vandewalker, "How to Change Incentives."
[194] Gareth Fowler and Dan Weiner, "Small Donor Matching in the 'For the People Act,'" Brennan Center for Justice, last modified February 11, 2021, https://www.brennancenter.org/our-work/research-reports/small-donor-for-the-people-act.
[195] As one political scientist put it: "There are no free lunches. If the public doesn't foot the cost of political campaigns, wealthy donors and lobbyists will. And they will get something in return. And it will be far more than what they paid in. That's how the system works. If we enact public financing through a small-donor matching system, the public will also get something in return. And it will be far more than what they paid in. That's how the system works." Lee Drutman, "Democrats' Small-Donor Campaign Finance Proposal Is a Great Deal for Taxpayers," *Vox*, January 14, 2019, https://www.vox.com/polyarchy/2019/1/14/18182579/democrats-hr1-donor-campaign-finance-proposal-taxpayers.
[196] As the Supreme Court observed in upholding the presidential system: "Public financing is an effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [it] furthers, not abridges, pertinent constitutional values." Buckley v. Valeo, 424 U.S. 1, 92–93 (1976).
[197] Skaggs and Wertheimer, *Empowering Small Donors*, 11.

B. Improving Federal Disclosure Law (Title IV, Subtitles B and C)

S. 1 also updates federal campaign disclosure rules, including by closing the main loopholes in federal disclosure law that have given rise to dark money and extending basic transparency requirements to online political ads.

The Rise of Dark Money. Over the last decade, secret money has become one of the biggest challenges for the campaign finance system. As recently as 2006, almost all federal campaign spending was transparent. But *Citizens United* made it possible for new types of entities to spend limitless funds on electoral advocacy—including 501(c)(4) and (c)(6) nonprofit corporations that are not required to make their sources of funding public.[198] These dark money groups have spent about $1.2 billion on federal elections since 2010.[199] They have given millions more to super PACs, in a manner that allows those entities (which in theory must disclose their donors) to keep major underlying funders anonymous.[200] In total, only about 26 percent of outside spending in the 2020 election was fully disclosed.[201] Secret spending tends to be concentrated in the closest races. One Brennan Center study of the 2014 midterms, for instance, showed that more than 90 percent of dark money spending in Senate contests was concentrated in the eleven most competitive contests.[202]

Dark money deprives voters of critical information needed to make informed decisions.[203] Citizens are entitled to know who is trying influence their votes and what those spenders want from the government. It is donor disclosure, as the *Citizens United* Court itself pointed out, that allows voters to determine whether elected leaders "are in the pocket of so-called 'moneyed interests.'"[204] Dark money also harms shareholders in many publicly-traded companies, which frequently use dark money groups as conduits for political spending.[205] Research shows that the corporate managers who drive this giving sometimes do so for their own

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[198] Weiner, Citizens United *Five Years Later*, 7.
[199] Center for Responsive Politics, "Political Nonprofits"; and Ciara Torres-Spelliscy, "Dark Money in the 2020 Election," Brennan Center for Justice, November 20, 2020, https://www.brennancenter.org/our-work/analysis-opinion/dark-money-2020-election. According to Open Secrets and the Wesleyan Media Project, dark money groups spent more than $750 million in 2020 elections through ad spending and record-breaking contributions to political committees such as super PACs. Massoglia, "'Dark Money' Groups."
[200] As discussed previously, dark money groups contributed an estimated $430 million to political committees in the 2020 election alone. Massoglia, "'Dark Money' Groups."
Chisun Lee and Douglas Keith, "How Semi-Secret Spending Took Over Politics," *The Atlantic*, June 28, 2016, https://www.theatlantic.com/politics/archive/2016/06/the-rise-of-gray-money-in-politics/489002/.
[201] Center for Responsive Politics, "Outside Spending by Disclosure, Excluding Party Committees," accessed March 16, 2021, https://www.opensecrets.org/outsidespending/disclosure.php.
[202] Ian Vandewalker, *Election Spending 2014: Outside Spending in Senate Races Since* Citizens United, Brennan Center for Justice, 2015, 4, https://www.brennancenter.org/sites/default/files/analysis/Outside%20Spending%20Since%20Citizens%20United.pdf.
[203] *Buckley*, 424 U.S. at 66–67 (explaining voters' interest in knowing the sources of political money "to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.").
[204] Citizens United v. Federal Election Commission, 558 U.S. 310, 370 (2010).
[205] Weiner, Citizens United *Five Years Later*, 10.

reasons, and not to maximize shareholder value.[206] Shareholders need transparency so they can monitor how their money is being spent.[207]

The Threat of Foreign Interference. More recently, it has come to light that gaps in disclosure rules provide multiple avenues for foreign governments and other entities to manipulate the U.S. electorate. As President Biden wrote in 2018, "The lack of transparency in our campaign finance system combined with extensive foreign money laundering creates a significant vulnerability for our democracy."[208]

Foreign-backed disinformation and election interference campaigns have been a feature of the last three election cycles.[209] The problem goes well beyond traditional dark money spending. During the 2020 Democratic primary, Russian state media and government-backed social media trolls impersonated candidates, promoted division, and spread false allegations of voter fraud and election rigging.[210] In 2016, Kremlin operatives also took advantage of weak disclosure rules for paid Internet ads, whose prevalence in U.S. political campaigns increased almost eight-fold between 2012 and 2016.[211]

Online ads are cheap to produce and disseminate instantly to vast potential audiences across great distances without regard for political boundaries.[212] Moreover, sophisticated micro-targeting tools have given rise to the "dark ad," which is seen only by a narrow audience,

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[206] John C. Coates IV, "Corporate Politics, Governance, and Value Before and After Citizens United," *Journal of Empirical Legal Studies* 9 (2012): 657.
[207] David Earley and Ian Vandewalker, *Transparency for Corporate Political Spending: A Federal Solution*, Brennan Center for Justice, 2012, 5–6, https://www.brennancenter.org/publication/transparency-corporate-political-spending-federal-solution; and Ciara Torres-Spelliscy, "How Corporate Law Can Help Democracy Post–Citizens United," Brennan Center for Justice, January 21, 2020, https://www.brennancenter.org/our-work/analysis-opinion/how-corporate-law-can-help-democracy-post-citizens-united.
[208] Joseph Biden and Michael Carpenter, "Foreign Dark Money Is Threatening American Democracy: Here's How to Put a Stop to It," *Politico*, November 27, 2018, https://www.politico.com/magazine/story/2018/11/27/foreign-dark-money-joe-biden-222690/; see also Josh Rudolph and Thomas Morley, *Covert Foreign Money*, Alliance for Securing Democracy, 2020, 34–35, https://securingdemocracy.gmfus.org/wp-content/uploads/2020/08/ASD-Covert-Foreign-Money.pdf.
[209] Julian E. Barnes, "Russian Interference in 2020 Included Influencing Trump Associates, Report Says," *New York Times*, March 16, 2021, https://www.nytimes.com/2021/03/16/us/politics/election-interference-russia-2020-assessment.html; Jonathan Landay and Mark Hosenball, "Russia, China, Iran Sought to Influence U.S. 2018 Elections: U.S. Spy Chief," *Reuters*, December 21, 2018, https://www.reuters.com/article/us-usa-election-interference/russia-china-iran-sought-to-influence-u-s-2018-elections-u-s-spy-chief-idUSKCN1OK2FS; Jordan Fabian, "US Warns of 'Ongoing' Election Interference by Russia, China, Iran," *The Hill*, October 19, 2018, https://thehill.com/policy/national-security/412292-us-warns-of-ongoing-election-interference-by-russia-china-iran; and Brennan Center for Justice, *The Mueller Report Exposed Weaknesses in U.S. Democratic Institutions that H.R. 1 Would Address*, July 10, 2019, https://www.brennancenter.org/our-work/research-reports/mueller-report-exposed-weaknesses-us-democratic-institutions-hr-1-would.
[210] Vandewalker, *Digital Disinformation and Voter Suppression*; and Kim, "New Evidence Shows."
[211] Sean J. Miller, "Digital Ad Spending Tops Estimates," *Campaigns & Elections*, January 4, 2017, https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates.
[212] Nathaniel Persily, "Can Democracy Survive the Internet?" *Journal of Democracy* 28 (2017): 72.

threatening to remove much of the political debate around elections from public view.[213] Russian operatives exploited these capabilities to purchase millions of targeted ads in an attempt to influence and foment discord around the 2016 election.[214] Moscow's efforts in 2016 served as a blueprint for its own future campaigns and those of other hostile actors.[215]

Common Sense Reforms. S. 1 takes several key steps to deal with these problems. It closes legal loopholes that have allowed dark money groups to refrain from disclosing their donors.[216] It also expands disclosure and disclaimer requirements for "electioneering communications"[217]—campaign ads that mention a candidate during the time leading up to an election—to include paid Internet or digital communications. And it requires the largest online platforms, with over 50 million unique visitors per month, to establish a public file of requests to purchase political ads akin to the file broadcasters have long been required to maintain.[218] These changes will make U.S. campaigns significantly more transparent.[219]

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[213] Christopher S. Elmendorf, Ann Ravel and Abby Wood, "Open Up the Black Box of Political Advertising," *San Francisco Chronicle*, September 23, 2017, http://www.sfchronicle.com/opinion/openforum/article/Open-up-the-black-box-of-political-advertising-12221372.php. Some platforms, such as Google, have elected to limit the targeting of political ads, but such steps are voluntary and could be reversed at any time. Daisuke Wakabayashi and Shane Goldmacher, "Google Policy Change Upends Online Plans for 2020 Campaigns," *New York Times*, November 20, 2019, https://www.nytimes.com/2019/11/20/technology/google-political-ads-targeting.html.

[214] For a more complete discussion of Russia's use of Internet ads in 2016, see Ian Vandewalker, *Oversight of Federal Political Advertisement Laws and Regulations: Statement before the Committee on House Oversight and Government Reform, Subcommittee on Information Technology*, Brennan Center for Justice, October 24, 2017, https://www.brennancenter.org/analysis/oversight-federal-political-advertisement-laws-and-regulations; see also Brennan Center for Justice, *The Mueller Report Exposed Weaknesses*.

[215] Mark Scott, "Russia Is Back, Wilier Than Ever—And It's Not Alone," *Politico*, September 14, 2020, https://www.politico.com/news/2020/09/14/russia-cyberattacks-election-413757. As recently publicized by the National Intelligence Council, Putin and a range of Russian government organizations conducted continued influence organizations aimed at denigrating President Biden's campaign and the Democratic Party in 2020, as well as seeking to undermine public confidence in the election, while the Iranian government sought to undercut former President Trump and sow societal divisions. National Intelligence Council, *Foreign Threats*, i.

[216] The Act amends statutory text that had been interpreted to require dark money groups to disclose only those donors who earmark their contributions to pay for a specific ad, which virtually never happens. It also prevents donors from funneling contributions through front groups to hide their true origin.

[217] 52 U.S.C. § 30104(f)(3).

[218] 47 C.F.R. 73.3526(e)(6), 73.3527(e)(5).

[219] Critics have suggested that these provisions will chill Americans' freedom of speech and association. John York, "The 'For the People Act' Demonstrates the Flaws of Progressive Campaign Finance Reform," Heritage Foundation, December 4, 2020, https://www.heritage.org/progressivism/report/the-the-people-act-demonstrates-the-flaws-progressive-campaign-finance-reform. But there is little basis for these charges. Disclosure requirements "impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (internal quotation marks and citations omitted). Moreover, the vast majority of new transparency rules would apply to the wealthy corporations and individuals who give to dark money groups; there is no evidence that large numbers of ordinary Americans will be impacted. See Derek Willis, "Shedding Some Light on Dark Money Political Donors," *ProPublica*, September 12, 2018, https://www.propublica.org/nerds/shedding-some-light-on-dark-money-political-donors. The Act does require relatively modest purchases of paid Internet ads to be included in platforms' public files, which is necessary because such ads can have a wide impact at relatively low cost. Russia's 2016 ads reached tens of millions of people, at a cost of roughly $400,000. Ian Vandewalker and Lawrence Norden, *Getting Foreign Funds Out of America's Elections*, Brennan Center for Justice, 2018, 7,

Disclosure continues to stand on firm constitutional ground, with the Supreme Court repeatedly affirming that robust transparency is a permissible—and often preferred—means to prevent "abuse of the campaign finance system."[220] And transparency remains overwhelmingly popular with the general public.[221] These are valuable reforms that, like small donor public financing, will help blunt the worst effects of *Citizens United*. Congress should pass them without delay.

C. FEC Overhaul (Title VI, Subtitle A)

S. 1 also overhauls the dysfunctional Federal Election Commission, which has failed to meaningfully enforce existing rules and would almost certainly struggle to implement the other ambitious campaign finance reforms in the Act.

A Deadlocked and Dysfunctional Commission. The FEC's mission is to interpret and enforce federal campaign finance laws.[222] Its structure, which dates back to the 1970s, was designed to prevent the agency from taking any decisive action without bipartisan agreement among its commissioners. No more than three of its six members can be affiliated with any one party at the time they are nominated, and at least four votes are required to enact regulations, issue guidance, or even investigate alleged violations of the law.[223] By longstanding tradition (though not pursuant to any legal requirement), each of the two major parties takes half the FEC's seats.[224] For much of 2019 and 2020, the Commission did not even have a quorum of commissioners, because only 3 of its 6 seats were occupied.[225]

The FEC's design dates back to a time when disagreements over the government's role in regulating money in politics did not necessarily overlap with party affiliation. Today, while ordinary Americans of all political stripes still overwhelmingly support strong campaign finance laws, party elites are sharply divided, which has left the Commission gridlocked.[226] Even when it has a quorum, the Commission routinely deadlocks on whether to pursue significant campaign

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https://www.brennancenter.org/publication/getting-foreign-funds-out-americas-elections. These provisions only apply to the purchase of paid ads; they do not cover unpaid posting to an individual's personal website, social media account, or email.

[220] McCutcheon v. FEC, 134 S. Ct. 1434, 1459 (2014) (plurality opinion).

[221] Center for Public Integrity, "Center for Public Integrity/Ipsos Poll: How Should Presidential Campaigns Be Regulated?," February 18, 2019, https://publicintegrity.org/politics/elections/center-for-public-integrity-ipsos-poll-elections-2019; and "A New York Times/CBS News Poll on Money in Politics," *New York Times*, June 2, 2015, https://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html.

[222] 52 U.S.C. § 30106(b)(1).

[223] 52 U.S.C. §§ 30106(c), 30106(f), 30107.

[224] Thomas E. Mann, "The FEC: Administering and Enforcing Campaign Finance Law," in Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, and Trevor Potter., eds., *The New Campaign Finance Sourcebook*, Brookings Institute, 2005, 233, https://www.brookings.edu/book/the-new-campaign-finance-sourcebook/.

[225] Brian Naylor, "The Federal Election Commission Can Finally Meet Again. And It Has A Big Backlog," *NPR*, December 24, 2020, https://www.npr.org/2020/12/24/949672803/the-federal-election-commission-can-finally-meet-again-and-it-has-a-big-backlog.

[226] Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, Brennan Center for Justice, 2019, 4, https://www.brennancenter.org/sites/default/files/publications/2019_04_FECV_Final.pdf.

finance violations—often after sitting on allegations for years without even investigating them.[227] Its process for issuing new regulations has virtually ground to a halt.[228] Increasingly, commissioners cannot even agree on how to answer requests for interim guidance they receive through the Commission's advisory opinion process, leaving candidates, parties, and others to decipher the law for themselves.[229]

The Commission is also beset with management problems. It has not had a permanent general counsel (its chief legal officer and one of the two most important staff members) since 2013.[230] Morale among its rank-and-file staff consistently ranks nears the bottom of the federal government.[231]

FEC dysfunction has exacerbated many problems with our campaign finance system, including dark money,[232] rampant coordination between candidates and supposedly independent

[227] See Office of FEC Commissioner Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, 2017, 2, 4, https://shpr.legislature.ca.gov/sites/shpr.legislature.ca.gov/files/Ravel%20-%20FEC%20Dysfunction.pdf. In one notorious case, in which a donor admitted that he had formed an LLC solely for the purpose of hiding a $1 million contribution to a super PAC, the Commission delayed more than four years before deadlocking on whether to proceed, notwithstanding that all six commissioners appear to have agreed that the donor broke the law. See Certification (February 23, 2016), MUR 6485 (W Spann LLC et al.), https://www.fec.gov/files/legal/murs/6485/16044390516.pdf; Statement of Reasons, Commissioners Walther, Ravel & Weintraub, MUR 6485 (W Spann LLC et al.), https://www.fec.gov/files/legal/murs/6485/16044391123.pdf; and Statement of Reasons, Commissioners Petersen, Hunter & Lee, MUR 6485 (W Spann LLC et al.), http://eqs.fec.gov/eqsdocsMUR/16044393039.pdf.

[228] Among other things, the Commission has repeatedly deadlocked on proposals for a comprehensive rulemaking to address the effects of *Citizens United*. Minutes of an Open Meeting of the Federal Election Commission, Wednesday June 15, 2011 (approved June 30, 2011 as Agenda Document No. 11-39), https://www.fec.gov/resources/updates/agendas/2011/approved2011_39.pdf; Minutes of an Open Meeting of the Federal Election Commission, Thursday December 15, 2011 (approved January 12, 2012 as Agenda Document No. 12-02), https://www.fec.gov/resources/updates/agendas/2012/approved2012_02.pdf; and Minutes of an Open Meeting of the Federal Election Commission, Thursday March 7, 2013 (approved April 11, 2013, as Agenda Document No. 13-11), https://www.fec.gov/resources/updates/agendas/2013/approved_1311.pdf. See also "Statement of Commissioner Ellen L. Weintraub on the 2014 *Citizens United* Rulemaking," October 9, 2014, http://www.fec.gov/members/weintraub/statements/2014-10-09_Statement_of_Commissioner_Weintraub_on_2014_CU_Rulemaking.pdf.

[229] See 52 U.S.C. §§ 30107(a)(7), 30108. Deadlocks on advisory opinion requests have increased exponentially. Weiner, *Fixing the FEC*, 3–5.

[230] Dave Levinthal and Suhauna Hussain, "Five Years Ago, the Federal Election Commission's Top Lawyer Resigned. No Permanent Replacement Has Yet been Named," *Center for Public Integrity*, July 4, 2018, https://www.pri.org/stories/2018-07-04/five-years-ago-federal-election-commission-s-top-lawyer-resigned-no-permanent; and Federal Election Commission, "FEC Offfices," accessed March 10, 2021, https://www.fec.gov/about/leadership-and-structure/fec-offices/.

[231] Dave Levinthal, "Report: FEC Leaders, Managers Share Blame for Horrid Morale," *Center for Public Integrity*, July 26, 2016, https://publicintegrity.org/federal-politics/report-fec-leaders-managers-share-blame-for-horrid-morale/.

[232] Lawrence Norden, Brent Ferguson, and Douglas Keith, *Five to Four*, Brennan Center for Justice, 2016, 7, https://www.brennancenter.org/publication/five-four.

outside groups,[233] and vulnerability to foreign interference in our campaigns.[234] As a bipartisan group of lawmakers wrote in 2018, a dysfunctional FEC "hurts honest candidates who are trying to follow the letter of the law and robs the American people of an electoral process with integrity."[235] If not addressed, the Commission's problems could stymie implementation of the other ambitious reforms in the Act. Moreover, the agency's inability to enforce campaign finance laws contributes to a broader culture of impunity at a time of eroding respect for the rule of law and democratic values more generally.[236]

A Necessary Overhaul. S. 1 addresses the FEC's main flaws through several targeted changes. It curtails gridlock by reducing the number of commissioners from six to five, with no more than two affiliated with any party (effectively requiring one commissioner to be an independent). It creates clear lines of accountability for management issues by allowing the president to name a real chair to serve as the FEC's chief administrative officer, with responsibility for the agency's day-to-day management.[237] It helps ensure that commissioners will have the right temperament and qualifications by establishing a bipartisan blue ribbon advisory commission to publicly vet potential nominees. It ensures that the Commission will periodically have fresh leadership by ending the practice of allowing commissioners to hold over in office indefinitely past the expiration of their terms (which has likely contributed to the agency's loss of quorum in recent years).[238] And it helps streamline the enforcement process by giving the Commission's nonpartisan staff authority to investigate alleged campaign finance

[233] See Weiner, Citizens United *Five Years Later*, 8.
[234] Jordan Muller, "FEC Rejects Proposal to Consider New Rules on Foreign Spending in U.S. Elections," Center for Responsive Politics, May 25, 2018, https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/.
[235] "Kilmer, Buck Lead Bipartisan Call to President Trump: Fill Vacant Seats on Federal Election Commission Immediately," press release, February 14, 2018, https://kilmer.house.gov/news/press-releases/kilmer-buck-lead-bipartisan-call-to-president-trump-fill-vacant-seats-on-federal-election-commission-immediately.
[236] Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law & Democracy, 2018, 16, https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf.
[237] Currently the office rotates annually and is largely symbolic. See 52 U.S.C. § 30106(a)(5).
[238] Before 1997, commissioners could be re-appointed to new terms an unlimited number of times. Congress eliminated reappointment with the goal of ensuring that the agency would periodically have fresh leadership, and to reinforce commissioners' independence in the face of congressional attempts to use the reappointment process as leverage to deter enforcement. Exec. Office Appropriations Act of 1998, 105 Pub. L. No. 61, 111 Stat. 1272 (October 10, 1997). But allowing indefinite holdovers has created the worst of both worlds. There is still very little turnover, and commissioners whose terms have expired are even more beholden to the president and Congress, who can theoretically replace them at any time. Weiner, *Fixing the FEC*, 7. At the start of President Trump's tenure, four of the commissioners had been in office since the George W. Bush administration, notwithstanding that they are theoretically limited to one six-year term. Federal Election Commission "All Commissioners," accessed March 3, 2021, https://www.fec.gov/about/leadership-and-structure/commissioners/. The departures of two of these commissioners following other resignations caused the Commission to be without a quorum for most of the period between September 2019 and December 2020. Daniel I. Weiner, "FEC Dormant Heading into 2020 Election," Brennan Center for Justice, July 29, 2020, https://www.brennancenter.org/our-work/analysis-opinion/fec-dormant-heading-2020-election; and Naylor, "Federal Election Commission Can Finally Meet Again."

violations and dismiss frivolous complaints—subject to overrule by a majority vote of commissioners.[239]

These changes are similar to those in a bipartisan bill that has been introduced in the last three Congresses.[240] They would bring the FEC's structure more in line with other independent agencies, but with significantly greater safeguards to prevent either party from weaponizing the agency against its opponents. For instance, S. 1 seeks to ensure partisan balance on the new FEC by providing that nominees to seats on the commission are considered affiliated with a party if they have had any connection to the party—including as a registered voter, employee, consultant, or attorney—within the previous five years. That will minimize the risk of the Senate confirming someone who has disguised their true partisan leanings.[241] It also creates a new, bipartisan vetting process for nominees. And it provides for more robust judicial oversight of the enforcement process. Ending the ability of commissioners to remain indefinitely past the expiration of their terms will also be a safeguard against excessive partisanship, since holdover commissioners are more subject to pressure from the president and Congress, who have the power to replace them at any time.[242]

These measures provide significantly more formal protection than exists under current law. They are part of an overall package of sensible reforms that would help ensure that the campaign finance laws we have on the books will be fairly and effectively enforced.

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[239] Under the Commission's present structure, even those wrongfully accused of violations must sometimes wait years for their names to be cleared. See, e.g., Notification with Factual and Legal Analysis, MUR 6896 (Margie Wakefield for Kansas), https://www.fec.gov/files/legal/murs/6896/15044385209.pdf; and Notification with General Counsel's Report, MUR 6904 (Cat Ping for Congress), https://www.fec.gov/files/legal/murs/6904/16044396706.pdf.

[240] To amend the Federal Election Campaign Act of 1971 to reduce the number of members of the Federal Election Commission from 6 to 5, to revise the method of selection and terms of service of members of the Commission, to distribute the powers of the Commission between the Chair and the remaining members, and for other purposes, H.R. 1414, 117th Cong. (2021); Restoring Integrity to America's Election Act, H.R. 1272, 116th Cong. (2019); and Restoring Integrity to America's Election Act, H.R. 2034, 115th Cong. (2017).

[241] See Daniel Weiner, "FEC's Status Quo is Hazardous—Proposed Legislation Would Help Fix It," *The Hill*, February 10, 2019, https://thehill.com/opinion/campaign/429294-fecs-status-quo-is-hazardous-proposed-legislature-would-help-fix-it.

[242] Weiner, *Fixing the FEC*, 7. Thus, charges from critics that S. 1 would effectuate a partisan takeover of the FEC are completely unfounded. See, e.g., Heritage Foundation, "The Facts about H.R. 1: The 'For the People Act of 2021,'" February 21, 2021, https://www.heritage.org/election-integrity/report/the-facts-about-hr-1-the-the-people-act-2021. As a legal matter, the president already has constitutional authority to nominate whomever they want to serve on the FEC, provided no more than three of the nominees are affiliated with one party at the time they are nominated. *Buckley*, 424 U.S. at 140. The tradition of deferring to party leaders has no force of law. By providing for public bipartisan vetting of nominees, S. 1 actually establishes stronger safeguards than currently exist. Weiner, "FEC's Status Quo." The charge by some critics that a presidentially appointed FEC chair would be tantamount to an "election czar," with vast power to persecute the president's opponents, is similarly baseless. See, e.g., Eric Wang, "Analysis of H.R. 1 (Part One)," Institute for Free Speech, February 22, 2021, https://www.ifs.org/expert-analysis/analysis-hr1-2021-disclose-honest_ads-disclaimers/. The role of chair envisioned by the Act is identical to that which exists at many other independent agencies, except without a working majority of commissioners from the chair's own party.

D. Reforming Coordination Rules (Title V, Subtitle B)

S. 1 also tightens restrictions on coordination between candidates and outside groups like super PACs that can raise unlimited funds, another important reform.

The Supreme Court has long held that outside campaign expenditures coordinated with a candidate can be "treated as contributions," because "[t]he ultimate effect is the same as if the [spender] had contributed the dollar amount [of the expenditure] to the candidate."[243] *Citizens United* did nothing to change that. When the Supreme Court struck down limits on how much outside groups could spend in federal elections, it did so on the assumption that these groups would operate independently of candidates. The Court reasoned that the absence of "prearrangement and coordination" would "undermine[] the value of the expenditure to the candidate" and alleviate the danger of quid pro quo corruption or its appearance.[244]

Whether or not that was a correct assumption,[245] in reality, the independence of much outside spending is illusory. In 2016, most presidential candidates had personal super PACs run by top aides or other close associates, whose only purpose was to get the candidate elected and for which the candidate often personally raised funds or even appeared in ads.[246] The trend continued in the 2020 election.[247] These entities are also becoming increasingly common in Senate and House races, as well.[248] Other forms of collaboration are also on the rise, such as the practice of super PACs and other outside groups republishing flattering b-roll footage that campaigns make available online, sharing vendors or staffers with campaigns, and coordinating

[243] *Buckley*, 424 U.S. at 36–37.
[244] *Citizens United*, 558 U.S. at 360.
[245] There is evidence to suggest it was not. See Lawrence Norden and Iris Zhang, "Fact Check: What the Supreme Court Got Wrong in its Money in Politics Decisions," Brennan Center for Justice, January 30, 2017, https://www.brennancenter.org/analysis/scotus-fact-check.
[246] Brent Ferguson, *Candidates & Super PACs: The New Model in 2016*, Brennan Center for Justice, 2015, 3, https://www.brennancenter.org/publication/candidates-super-pacs-new-model-2016.
[247] Ashley Balcerzak, "Inside Donald Trump's Army of Super PACS and MAGA Nonprofits," Center for Public Integrity, February 18, 2019, https://publicintegrity.org/politics/donald-trump-army-super-pacs-maga-nonprofits/; Theodoric Meyer and Maggie Severns, "Ex-Biden Aide Forms Unite the Country Super Pac," *Politico*, October 29, 2019, https://www.politico.com/news/2019/10/29/ex-biden-aide-super-pac-unite-the-country-061096; Ferguson, *Candidates & Super PACs*, 3; Soo Rin Kim, "Mine, All Mine: Single Candidate Super PACs, Creeping Down-Ballot," Center for Responsive Politics, November 10, 2016, https://www.opensecrets.org/news/2016/11/mine-all-mine-single-candidate-super-pacs-creeping-down-ballot/; Kevin Robillard, "How Super PACs Took over The 2020 Democratic Primary," *HuffPost*, February 20, 2020, https://www.huffpost.com/entry/super-pacs-took-over-2020-democratic-primary_n_5e4efc9fc5b6b82aa65044b7; and Center for Responsive Politics, "2020 Outside Spending by Single-Candidate Super PACs," accessed March 18, 2021, https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=V&disp=O&type=C.
[248] In the 2018 midterm elections, single-candidate super PACs spent $120 million in support of candidates, compared to only $50 million in the previous midterm. Center for Responsive Politics, "2018 Outside Spending by Single-Candidate Super PACs." See also Fred Wertheimer, "The Case for Ending Individual-Candidate Super PACs," Democracy 21, February 26, 2019, https://democracy21.org/news-press/op-eds/the-case-for-ending-individual-candidate-super-pacs-wertheimer-opinion-piece; and Kim, "Mine, All Mine."

advertisements or fundraising.[249] Even blatant instances of cooperation, like super PAC ads in which a candidate appears, have been excluded from the definition of "coordinated communication" and thus deemed not to count as contributions under federal rules.[250] These developments make it easy to circumvent contribution limits, especially for the class of billionaire mega-donors who have gained unprecedented influence in our elections.

S. 1 shores up federal coordination rules in important respects. It specifies that if a candidate and any outside group or individual collaborate on a communication that promotes, attacks, supports, or opposes that candidate (the so-called PASO standard), the communication will be deemed a contribution. It also clarifies that any reproduction of campaign footage or materials also constitutes a contribution. And it creates a new category of "coordinated spenders," groups whose actual ties to a candidate are so close that it is simply not plausible to think that the group's spending in support of the candidate is truly independent.

These changes are plainly constitutional, and in line with regulatory trends in the states.[251] They are necessary to restore the integrity of campaign contribution limits and we strongly support their passage.

IV. REDISTRICTING REFORM

S. 1 packages together a powerful set of reforms that collectively would be the biggest attack on gerrymandering in the country's history.

[249] Kate Ackley, "Super PACs after 10 Years: Often Maligned but Heavily Used," *Roll Call*, January 16, 2020, https://www.rollcall.com/2020/01/16/super-pacs-after-10-years-often-maligned-but-heavily-used/; Ernest Luning, "FEC Complaint Alleges Republican Super PAC Making Illegal Contributions to Cory Gardner," *Colorado Politics*, April 10, 2020, https://www.coloradopolitics.com/news/fec-complaint-alleges-republican-super-pac-making-illegal-contributions-to-cory-gardner/article_221da9ea-7b56-11ea-88ae-5b92b7b53ef6.html; Maggie Severns, 'Pro-Buttigieg Super PAC Hired Buttigieg Finance Staffer Amid Ad Blitz," *Politico*, February 21, 2020, https://www.politico.com/news/2020/02/21/pete-buttigieg-super-pac-staffer-116607; and Paul Blumenthal, "How Super PACs and Campaigns Are Coordinating in 2016," *HuffPost*, November 14, 2015, https://www.huffpost.com/entry/super-pac-coordination_n_56463f85e4b045bf3def0273.

[250] Adam Wollner and National Journal, "10 Ways Super PACs and Campaigns Coordinate, Even Though They're Not Allowed To," *The Atlantic*, September 27, 2015, https://www.theatlantic.com/politics/archive/2015/09/10-ways-super-pacs-and-campaigns-coordinate-even-though-theyre-not-allowed-to/436866/; and Comment of Brennan Center for Justice at NYU School of Law (November 15, 2011), AO 2011-23 (American Crossroads), https://www.fec.gov/files/legal/aos/2011-23/1189190.pdf.

[251] McConnell v. FEC, 540 U.S. 93, 219–20, 221 (overruled on other grounds by *Citizens United*). See also O'Keefe v. Chisholm, 769 F.3d 936, 942 (7th Cir. 2014) (Easterbrook, J.) ("[n]o opinion issued by the Supreme Court, or by any court of appeals, establishes ("clearly" or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups"). For state regulations, see, e.g., Conn. Gen. Stat. § 9-601c (2013), Cal. Code Regs. tit. 2, § 18225.7 (2015); and Chisun Lee, Brent Ferguson, and David Earley, *After* Citizens United: *The Story in the States*, Brennan Center for Justice, 2014, https://www.brennancenter.org/publication/after-citizens-united-story-states.

Key among S. 1's reforms is a prohibition on extreme partisan gerrymandering in congressional redistricting, which has reached levels unseen in the last 50 years.[252] Any map that has the intent or effect of unduly favoring or disfavoring a political party on a statewide basis would be required to be redrawn. To help courts measure effect, the Act sets out an easy-to-apply two-part statistical test that will let courts quickly block maps that are skewed in favor of one party or the other. S. 1 would also standardize rules for drawing congressional districts, strengthen existing protections for communities of color, and require preserving, where possible, towns, neighborhoods, and other communities of interest, where people have shared identities or interests.[253] It also adds enhanced judicial remedies to ensure that discriminatory maps can quickly be challenged in court and fixed and would open the process to public oversight and participation. Finally, it would transfer congressional map drawing authority to independent commissions, starting in 2021 if there is enough time.

The need for reform is urgent. As Brennan Center research has shown, this decade's skewed maps have consistently given one party (Republicans) 15-17 extra congressional seats over the course of the whole decade.[254] Shifts in political winds have virtually no electoral impact in the most heavily gerrymandered states. For example, in 2018—a political tsunami year for Democrats—no districts changed parties in Ohio and North Carolina, two states with extremely biased maps. Despite the fact that Democrats earned nearly half the vote in both states, they won only a quarter of the seats. The overwhelming majority of the seats that did change parties in 2018—72 percent—were drawn by commissions and courts instead of partisan legislatures.[255]

To be clear, Republicans are not alone in rigging districts to their advantage. A Democratic gerrymander in Maryland was proven to be just as unbreakable in the Republican wave of 2014.[256] Redistricting abuse is a bipartisan problem—both parties will draw districts that serve their partisan ends if given the opportunity.

Too often, communities of color bear the brunt of these efforts. When Republican-drawn maps in Virginia, North Carolina, and Texas were successfully challenged on the grounds that they discriminated against minority voters, Republicans defended the maps by arguing that politics, rather than race, had been the driving force behind their maps. Likewise, Democrats in Maryland rejected a congressional map that would have given Black voters additional electoral

[252] Laura Royden and Michael Li, *Extreme Maps*, Brennan Center for Justice, 2017, 6–13, https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf.
[253] Shared interests that merit collective representation could be social, cultural, ethnic, economic, religious, or political. Communities of interest are complex, but they are a crucial part of our social fabric, and the For the People Act recognizes their importance by prioritizing their cohesion. See Justin Levitt and Erika Wood, *A Citizen's Guide to Redistricting*, Brennan Center for Justice, 2010, https://www.brennancenter.org/sites/default/files/analysis/a-citizens-guide-to-redistricting.pdf.
[254] Royden and Li, *Extreme Maps*, 6–13.
[255] Annie Lo, "How Did Democrats Flip the House? Fairer Maps," Brennan Center for Justice, December 7, 2018, https://www.brennancenter.org/blog/how-did-democrats-flip-house-fairer-maps.
[256] Benisek v. Lamone, 348 F. Supp. 3d 493 (D. Md. 2018).

opportunities because that would have created an additional Republican seat.[257] Without a rule that makes disadvantaging minority voters for partisan gain illegal, this type of discrimination will persist and grow, particularly as the U.S. population continues to become more racially and ethnically diverse.

Congressional action is necessary to stop partisan gerrymandering and discriminatory line drawing. If not reined in, the problem will only get worse during future cycles. New map drawing tools and ever more powerful data and analytics about voters enable modern line drawers to lock in a durable partisan advantage with shocking accuracy.

The courts alone will not and cannot solve the problem. In 2019, the Supreme Court's opinion in *Rucho v. Common Cause* held that although partisan gerrymandering is harmful and anti-democratic, it is a political issue that federal courts lack the authority to address.[258] When considered alongside the 2013 elimination of Section 5 preclearance requirements for maps drawn by states with a history of racial discrimination in *Shelby County v. Holder*, this means that the legal landscape for challenging unfair maps will become more ominous starting with the current redistricting cycle.[259] And even when voters have succeeded in court, they have had to resort to expensive, time-consuming, and complicated litigation in order to obtain a remedy years later. The burden that this places on communities that are the most affected by gerrymandering is unacceptable.

Congress has the authority to fix congressional redistricting.[260] As the Supreme Court has recognized, "the Framers provided a remedy" in the Constitution for redistricting abuses through the "power bestowed on Congress to regulate elections, and . . . to restrain the practice of political gerrymandering."[261] Over the years, Congress has repeatedly exercised its power under article I, section 4 to do just that.[262]

These reforms are also popular among voters. In 2018, a record-high number of states passed redistricting reform for congressional and/or legislative districts. In Ohio, one proposal

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[257] Guy-Uriel E. Charles and Luis Fuentes-Rohwer, "Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA," *William and Mary Law Review* 59, no. 5 (2018): 1559–1600; and Aaron C. Davis, "Redistricting in Md. Has Element of Racial Friction," *Washington Post*, July 24, 2011, https://www.washingtonpost.com/local/dc-politics/redistricting-in-md-has-element-of-racial-friction/2011/07/23/gIQAU86MXI_story.html.
[258] *Rucho*, 139 S. Ct. at 2506–7.
[259] Michael Li, *The Redistricting Landscape, 2021–22*, Brennan Center for Justice, 2021, 9–10, https://www.brennancenter.org/our-work/research-reports/redistricting-landscape-2021-22.
[260] Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1 (2013).
[261] Vieth v. Jubelirer, 541 U.S. 267 (2004).
[262] 55 Stat. 761 (1941), 2 U.S.C. §2a (Supp. 1950); 54 Stat. 162 (1940); 46 Stat. 21 (1929); 37 Stat. 13 (1911); 31 Stat. 733 (1901); 26 Stat. 735 (1891); 22 Stat. 5 (1882); 17 Stat. 28 (1872); 12 Stat. 353 (1862); 10 Stat. 25 (1852); 9 Stat. 432 (1850); 5 Stat. 491 (1842); 4 Stat. 516 (1832); 3 Stat. 651 (1822); 2 Stat. 669 (1811); 2 Stat. 128 (1802); 1 Stat. 253 (1792). In 1967, for example, Congress required all states to use single member congressional districts to end the drawing of racially discriminatory multimember districts, a practice adopted to defy the call of the Voting Rights Act. See 2 U.S.C. § 2c.

carried every single congressional district in the state by a supermajority.[263] Reforms in Colorado and Michigan also passed overwhelmingly, with more than 60 percent of the vote statewide.[264]

S. 1 builds on what has been proven to work. Commissions would contain equal numbers of Republican, Democratic, and unaffiliated and third-party commissioners, with voting rules that ensure that no one group would be able to dominate or hijack the redistricting process. Additionally, all potential commissioners would be subject to a thorough vetting process to ensure that they have the requisite qualifications and community knowledge and are free from conflicts of interest. The experience of states like California and Arizona shows that reforms work. California went from having a congressional map that was one of the least responsive to shifts in voter opinion to one of the most.[265] And California's maps did not just improve political fairness—they also kept communities of interest together, increased representation for communities of color, and expanded opportunities for competition.[266] Indeed, nearly a quarter of the congressional seats picked up by Republicans in the 2020 election were commission-drawn seats in California. In short, fair maps aren't just good for Democrats, they are good for Republicans—and good for democracy.

S. 1's establishment of a clear set of map drawing rules, listed in the order in which they are to be applied, is another important and ground-breaking change.[267] Federal law currently has next to no rules governing how districts are to be drawn.[268] Likewise, most states (with a handful of exceptions) have few laws governing congressional redistricting. This has allowed abuses to run rampant. Left unchanged, this is a situation that will only get worse in coming years. The Act's ban on partisan gerrymandering and enhanced protections for communities of color and communities of interest directly address the most egregious abuses of the past decade, like the intentional dilution of political power of communities of color mentioned earlier.

Finally, S. 1 transforms what has historically been an opaque process into one that is transparent and participatory. The business of map drawing would be conducted in open public meetings and subject to oversight. Data would be made available, and all official communications would be subject to disclosure. Community groups and everyday citizens would get a chance to review and comment on proposed maps and submit their own alternatives. States

[263] Peter Miller and Annie Lo, "Support for Ohio's Issue 1 Ballot Measure in the 2018 Primary Election," Brennan Center for Justice, November 7, 2018, https://www.brennancenter.org/blog/support-ohio-issue-1-ballot-measure-2018-primary-election.
[264] Peter Miller and Brianna Cea, "Everybody Loves Redistricting Reform," Brennan Center for Justice, December 5, 2018, https://www.brennancenter.org/blog/everybody-loves-redistricting-reform.
[265] Royden and Li¸ *Extreme Maps*, 23, 26, 29; and Laura Royden, Michael Li, and Yurij Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice, 2018, 17–19, https://www.brennancenter.org/sites/default/files/publications/Extreme%20Gerrymandering%204.24.18.pdf.
[266] Royden and Li¸ *Extreme Maps*, 23, 26, 29; and Royden, Li, and Rudensky, *Extreme Gerrymandering*, 17–19.
[267] The criteria are based on best practices as developed by a number of civil rights and good government groups that study redistricting. See "Redistricting Principles for a More Perfect Union," Common Cause, accessed March 10, 2021, https://www.commoncause.org/redistricting-principles-for-a-more-perfect-union/#.
[268] There are no federal redistricting-specific regulations beyond the requirement that districts be single member and equally populated. For racial and language minorities, there are also protections available under the Equal Protection Clause and the Voting Rights Act.

would be required to show their work and issue a detailed report before taking a final vote on a plan. In short, redistricting would no longer be done through backroom deals.

These changes would transform congressional representation for all Americans, combining best practices for assuring fair, effective, and accountable representation. Congress plainly has the power to enact these changes and should do so without delay.

Depending on when S. 1 is enacted into law, there may or may not be sufficient time to implement independent commissions for the 2021-22 cycle of redistricting. But there is no reason that S. 1's uniform map drawing rules, ban on partisan gerrymandering, strengthened protections for communities of color, and enhanced judicial remedies could not be made immediately applicable to states regardless of what entity draws this cycle's maps.

V. ELECTION SECURITY

S. 1 would take critical steps to dramatically improve security and reliability of our election infrastructure.

The 2016 election put a spotlight on election infrastructure security, after foreign adversaries and cyber criminals successfully breached state voter registration systems[269] and election night results reporting websites.[270] Foreign adversaries continue to demonstrate an interest in election interference[271]—including the recent revelation that the Russian government sought to undermine confidence in the electoral process and influence the outcome of the election[272]—and recent hacks into software used throughout the federal government show that such attacks have grown increasingly sophisticated.[273]

Despite these clear threats, seven states continue to use voting machines that have no paper backup (which security experts have consistently argued is a minimum defense necessary

[269] Rick Pearson, "State Officials Say Russian Hackers Stole 76k Illinois Voters' Info in 2016, not 500K," *Chicago Tribune*, August 8, 2018, https://www.chicagotribune.com/news/local/politics/ct-met-illinois-elections-board-russia-2016-election-hacking-20180808-story.html.
[270] Tyler Whetstone, "Knox County Election Night Cyberattack Was Smokescreen For Another Attack," *Knox News*, May 17, 2018, https://www.knoxnews.com/story/news/local/2018/05/17/knox-county-election-cyberattack-smokescreen-another-attack/620921002/.
[271] Cybersecurity & Infrastructure Security Agency "Iranian Advanced Persistent Threat Actor Identified Obtaining Voter Registration Data," last modified November 3, 2020, https://us-cert.cisa.gov/ncas/alerts/aa20-304a.
[272] National Intelligence Council, *Foreign Threats*, i.
[273] Julian E. Barnes and David E. Sanger, "Iran and Russia Seek to Influence Election in Final Days, U.S. Officials Warn," *New York Times*, October 21, 2020, https://www.nytimes.com/2020/10/21/us/politics/iran-russia-election-interference.html; David E. Sanger, Nicole Perlroth, and Eric Schmitt, "Scope of Russian Hacking Becomes Clear: Multiple U.S. Agencies Were Hit," *New York Times*, February 9, 2021, https://www.nytimes.com/2020/12/14/us/politics/russia-hack-nsa-homeland-security-pentagon.html.

to detect and recover from cyberattacks).[274] Of the states that do use paper ballots, too few conduct sufficient reviews of their paper backups to audit their election results; private voting system vendors are not required to report security breaches which often leaves our election administrators and the public in the dark; and election officials across the country say they lack the resources to implement critical election security measures.[275] Unfortunately, our election security is only as strong as our weakest link.

S. 1 would significantly bolster the security and resilience of our nation's election administration infrastructure. Among the most critical reforms, it requires states to replace unsecure paperless voting systems, promotes robust audits of machine-tabulated election results, and ensures that federal funds may only be used to purchase systems or services from private election system vendors who meet minimum security standards.

A. Replacing Paperless Voting Systems (Title I, Subtitle F)

First and foremost, S. 1 would mandate the replacement of all paperless electronic voting machines with machines that require an individual paper record of each vote. Top security experts—from the National Academies of Sciences, Engineering and Medicine, the national intelligence community, academia, and industry—agree that replacing paperless voting systems is a top priority. This step is critical to improving election security because, as the National Academies put it, paper ballots form "a body of evidence that is not subject to manipulation by faulty hardware or software" and can be used to audit and verify the results of an

[274] See Verified Voting, "The Verifier—Polling Place Equipment—November 2020," accessed March 10, 2021, https://verifiedvoting.org/verifier/#mode/navigate/map/ppEquip/mapType/normal/year/2020; Lawrence Norden, Derek Tisler, and Lisa Danetz, "Our Election System Is Resilient—But Still Has Room for Improvement," Brennan Center for Justice, September 22, 2020, https://www.brennancenter.org/our-work/research-reports/our-election-system-resilient-still-has-room-improvement; Lawrence Norden and Christopher Famighetti, *America's Voting Machines at Risk*, Brennan Center for Justice, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; and National Academies of Sciences, Engineering, and Medicine, *Securing the Vote: Protecting American Democracy*, 2018, https://www.nap.edu/catalog/25120/securing-the-vote-protecting-american-democracy.

[275] Andrea Córdova McCadney, Elizabeth Howard, and Lawrence Norden, "Voting Machine Security: Where We Stand Six Months Before the New Hampshire Primary," Brennan Center for Justice, August 13, 2019, https://www.brennancenter.org/our-work/analysis-opinion/voting-machine-security-where-we-stand-six-months-new-hampshire-primary; Lawrence Norden, Aaron Burstein, Joseph Lorenzo Hall, and Margaret Chen, *Post-Election Audits: Restoring Trust in Elections*, Brennan Center for Justice and Samuelson Law, Technology & Public Policy Clinic, 2007, 3–4, https://www.brennancenter.org/our-work/research-reports/post-election-audits-restoring-trust-elections; Lawrence Norden, Gowri Ramachandran, and Christopher Deluzio, *A Framework for Election Vendor Oversight*, Brennan Center for Justice, November 12, 2019, https://www.brennancenter.org/our-work/policy-solutions/framework-election-vendor-oversight; Nicole Perlroth, Michael Wines, and Matthew Rosenberg, "Russian Election Hacking Efforts, Wider Than Previously Known, Draw Little Scrutiny," *New York Times*, September 1, 2017, https://www.nytimes.com/2017/09/01/us/politics/russia-election-hacking.html; Norden and Famighetti, *America's Voting Machines*; and Lawrence Norden and Wilfred U. Codrington III, "America's Voting Machines at Risk—An Update," Brennan Center for Justice, March 8, 2018, https://www.brennancenter.org/our-work/research-reports/americas-voting-machines-risk-update.

election.[276] Without that record and check, software manipulation or a bug could change an election result without detection. Further, as Virginia showed in 2017 when it was forced to replace paperless systems just months before a high-profile gubernatorial election after learning of serious security vulnerabilities in its systems, this transition can easily be accomplished in the timeframe provided in this Act.[277] S. 1 provides funding to help facilitate the transition for the remaining states.

B. Promoting Robust Audits of Election Results (Title III, Subtitle A, Part 2)

S. 1 provides funds for states to implement robust audits of election results using statistical models to ensure that a sufficient number of paper ballots are checked to corroborate the tallied outcomes (known as "risk-limiting audits").[278] While paper records alone will not prevent programming errors, software bugs, or the insertion of corrupt software into voting systems, risk-limiting audits use these paper records and are designed to detect and correct any election outcomes impacted by such abnormalities. These audits are quickly growing in popularity. Twelve states now require risk-limiting audits, use risk-limiting audits optionally, or piloted the use of these audits in the 2020 election.[279]

C. Expanding Definition of Voting Systems to Include Electronic Poll Books (Title III, Subtitle A, Part 3)

Also important, S. 1 would expand the existing voting equipment testing and certification process to include electronic poll books, which are growing in popularity because they are useful for the provision of expanded early voting, vote centers, and pre-Election Day absentee ballot processing.[280] Although poll books handle some of our most sensitive information, they have not been subject to even voluntary federal certification standards, and technical failures have been a

[276] National Academies, *Securing the Vote*, 94; Lawrence Norden, "The Machinery of Democracy: Protecting Elections In An Electronic World," Brennan Center for Justice, September 20, 2019, https://www.brennancenter.org/our-work/research-reports/machinery-democracy-protecting-elections-electronic-world; U.S. Senate Select Committee on Intelligence, "Russian Targeting of Election Infrastructure During the 2016 Election: Summary of Initial Findings and Recommendations," May 8, 2018, https://www.intelligence.senate.gov/publications/russia-inquiry; and Olivia Beavers, "DHS Chief Calls on Officials in All 50 States to Have 'Verifiable' Ballots by 2020 Election," *The Hill*, August 22, 2018, https://thehill.com/policy/cybersecurity/403148-dhs-chief-calls-on-election-officials-in-all-50-states-to-have; see also Norden and Famighetti, *America's Voting Machines*.

[277] Laura Vozzella, "Virginia Scraps Touch-Screen Voting as Election for Governor Looms," *Washington Post*, Sept. 8, 2017, https://www.washingtonpost.com/local/virginia-politics/virginia-scraps-touch-screen-voting-machines-as-election-for-governor-looms/2017/09/08/e266ead6-94fe-11e7-89fa-bb822a46da5b_story.html.

[278] Mark Lindeman and Philip B. Stark, "A Gentle Introduction to Risk-Limiting Audits," *IEEE Security and Privacy, Special Issue on Electronic Voting* (2012): 1, https://www.stat.berkeley.edu/~stark/Preprints/gentle12.pdf.

[279] National Conference of State Legislatures, "Risk-Limiting Audits," February 17, 2020, https://www.ncsl.org/research/elections-and-campaigns/risk-limiting-audits.aspx.

[280] Andrea Córdova McCadney, "Want a Simple Way to Increase Election Security? Use Paper," Brennan Center for Justice, October 8, 2018, https://www.brennancenter.org/our-work/analysis-opinion/want-simple-way-increase-election-security-use-paper.

cause of significant lines and delays in elections over the past few years.[281] While some states have tried setting up their own electronic pollbook standards, others may lack the resources and expertise to do so.[282] Moreover, a patchwork of state standards cannot effectively guarantee that these systems meet security best practices. The federal government is far better positioned to oversee this increasingly important technology.

D. Increasing Security at Election System Vendors (Title III, Subtitle A, Part 8)

S. 1 provides for greater federal oversight of the private vendors who design and maintain the election systems that store our personal information, tabulate our votes, and communicate important election information to the public. The Brennan Center has documented numerous instances of voting system failures that could have been prevented had vendors notified their clients of previous failures in other jurisdictions using the same voting equipment.[283] Among other things, the Act would require that any vendors who receive payment from grants made under the Act: (1) certify that the infrastructure they sell to local election jurisdictions is developed and maintained in accordance with cybersecurity best practices; (2) certify that their own information technology is maintained in accordance with cybersecurity best practices; (3) ensure that they have personnel policies and practices in place that are consistent with personnel best practices, including cybersecurity training and background checks; and (4) promptly report any suspected cybersecurity incident directed against the goods and services they provide under these grants.

E. Ensuring a Consistent Stream of Federal Funding to Secure our Election Infrastructure (Title III, Subtitle A)

S. 1 provides funds for critical security measures and to cover maintenance and upgrades to voting systems for years to come. These resources are necessary since the race to secure our elections is one without a finish line, and our adversaries will undoubtedly change and advance their methods of attack. The responsibility for funding elections must be shared among local, state, and federal governments, and the Act ensures that the federal government pays its fair share of the ongoing cost of voting systems, with a consistent stream of federal funding for states to procure and maintain secure equipment and implement state-of-the-art security measures to ensure the integrity of our elections.

The election security measures in S. 1 would not only make our election infrastructure more secure but also help reduce the unconscionably long lines that so many voters experience

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[281] See Kim Zetter, "The Election Security Hole Everyone Ignores," *Politico*, August 31, 2020, https://www.politico.com/news/2020/08/31/election-security-hole-406471.
[282] See, e.g., Cameron Glenn Sasnett, *Electronic Pollbook Certification: Procedures & System Requirements*, Virginia State Board of Elections Election Administration and Compliance Division, 2015, https://www.eac.gov/sites/default/files/eac_assets/1/28/Virginia%20EPB%20Certification%20Procedures%20and%20System%20Requirements%20REV-05151.pdf; and Ohio Board of Voting Machine Examiners, *Standards Governing the Examination and Certification of Electronic Poll Books in Use in Ohio*, February 6, 2014, https://www.ohiosos.gov/globalassets/elections/bvme/epollbooks/standards.pdf.
[283] Norden et al., *Election Vendor Oversight*.

every election. That would go a long way toward restoring Americans' confidence in our elections. We look forward to continuing to work with Congress to ensure sufficient federal resources for state and local election officials and sufficient national standards to ensure that funding is spent effectively.

VI. STRENGTHENING GOVERNMENT ETHICS

S. 1 would establish stronger ethics rules for all three branches of government. It is a strong first step toward strengthening ethics and accountability. The Brennan Center strongly supports all of S. 1's ethics reforms.

The last four years witnessed an increasingly rapid erosion of the ethical guardrails that have in the past prevented self-dealing by public officials.[284] Recent transgressions range from senior officials utilizing their official positions for their own personal financial benefit[285] to selective or lax enforcement of ethics rules when senior or well-connected officials run afoul of them.[286] There have also been many examples of political appointees working on regulatory matters on which they previously lobbied the government for industry.[287] Among the most troubling examples, conflicts of interest and other ethics lapses marred the federal government's initial response to the Covid-19 pandemic, hampering its ability to address the crisis effectively.[288]

A poll published in the fall of 2020 showed only 20 percent of Americans trust their government to "do the right thing" just about always or most of the time.[289] In the lead-up to the

[284] Bharara, Whitman, et al., *Proposals for Reform*, 2.
[285] See, e.g., Lisa Friedman, "Scott Pruitt Sought 'Business Opportunity' with Chik-fil-A While Leading E.P.A." *New York Times*, June 5, 2018, https://www.nytimes.com/2018/06/05/climate/pruitt-epa-chick-fil-a.html; Ana Swanson, "Wilbur Ross Says He Will Sell Stock after Watchdog Warns of Potential for Criminal Violation," *New York Times*, July 13, 2018, https://www.nytimes.com/2018/07/13/us/politics/wilbur-ross-stocks.html; and Lisa Friedman, "A Guide to the Ryan Zinke Investigations," *New York Times*, October 31, 2018, updated December 15, 2018, https://www.nytimes.com/2018/10/31/climate/ryan-zinke-investigations.html.
[286] See, e.g., Richard Pérez-Peña and Rachel Abrams, "Kellyanne Conway Promotes Ivanka Trump Brand, Raising Ethics Concerns," *New York Times*, February 9, 2017, https://www.nytimes.com/2017/02/09/us/politics/kellyanne-conway-ivanka-trump-ethics.html; and Michelle Ye Hee Lee, "White House Adviser Kellyanne Conway Violated Hatch Act, Federal Investigator Says," *Washington Post*, March 6, 2018, https://www.washingtonpost.com/politics/white-house-adviser-kellyanne-conway-violated-hatch-act-federal-investigator-says/2018/03/06/28995c06-2162-11e8-94da-ebf9d112159c_story.html.
[287] See, e.g., David Pittman, "Former Drug Industry Lobbyist Helps Steer Trump Drug Plan," *Politico*, May 27, 2018, https://www.politico.com/story/2018/05/27/trump-drug-plan-lobbyist-joe-grogan-609170; and Laura Peterson, "The Snack Food and Corn Syrup Lobbyist Shaping Trump's Dietary Guidelines for Americans," Project on Government Oversight, August 23, 2018, https://www.pogo.org/investigation/2018/08/the-snack-food-and-corn-syrup-lobbyist-shaping-trumps-dietary-guidelines-for-americans/.
[288] Kinsella et al., "Trump Administration Abuses Thwart US Pandemic Response," Brennan Center for Justice, last modified January 21, 2021, https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response.
[289] Pew Research Center, "Americans' Views of Government: Low Trust, But Some Positive Performance Ratings," September 14, 2020, https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/.

2020 election, political corruption ranked second on the list of voters' top concerns, above the Covid-19 pandemic.[290] These statistics show that we are facing a crisis of confidence in American democracy. That is why Congress must help ensure that officials act for the public good rather than private gain.

There is longstanding bipartisan support for ethics reforms. Prohibitions on conflicts of interest by government employees have been in place for more than a century.[291] In the wake of Watergate, Congress strengthened existing conflict of interest laws by passing the Ethics in Government Act of 1978 (EGA), which mandated a public financial disclosure requirement, the establishment of the Office of Government Ethics to promote and lead the administration of an ethics program in the executive branch, and prohibitions to slow the "revolving door" between public service and private business.[292] In 1989, President George H. W. Bush signed into law amendments to strengthen key provisions of the EGA.[293] In 1995, Congress passed the Lobbying Disclosure Act to prevent undue private sector influence over governmental activities, strengthening disclosure requirements and transparency for lobbyists and lobbying firms.[294] S. 1 contains the next wave of much-needed ethical reforms, including the following:

A. Supreme Court Ethics (Title VII, Subtitle A)

S. 1 would require a code of ethics for the United States Supreme Court. The Court's nine justices are the only U.S. judges—state or federal—not bound by a written code of ethical conduct.[295] All other federal judges are subject to the official Code of Conduct for United States Judges, which requires them to uphold the integrity and independence of the judiciary and governs matters like recusal, financial disclosure, outside employment, partisan political engagement, and gifts. S. 1 would require the Judicial Conference of the United States to issue a code of ethics for the entire federal judiciary, including the justices of the Supreme Court, within one year of enactment.

B. Presidential and Vice Presidential Tax Transparency (Title X)

S. 1 would require sitting presidents, vice presidents, and major-party candidates for those offices to disclose their tax returns. While tax returns do not reveal everything about a

[290] Change Research, "Change Research—CNBC 'State of Play' Poll, September 4–6, 2020," 2020, 4, https://changeresearch.com/wp-content/uploads/2020/09/CNBC-CR_National-Toplines_Wave-13_September-4-6-Wave-13_-9_4-6.pdf.
[291] Olivia B. Waxman, "Questions of Profit in Politics Raised by Trump Administration Are Older than You May Think," *TIME*, March 10, 2017, http://time.com/4669729/conflict-of-interest-history/.
[292] S. Rep. No. 95-170 (1977), reprinted in 1978 U.S.C.C.A.N. 4216.
[293] President George H. W. Bush, "Statement on Signing the Ethics Reform Act of 1989," *Weekly Complication of Presidential Documents*, vol. 25, no. 48 (November 30, 1989), 1855.
[294] 2 U.S.C. § 1603.
[295] Johanna Kalb and Alicia Bannon, *Supreme Court Ethics Reform*, Brennan Center for Justice, 2019, 1, https://www.brennancenter.org/sites/default/files/2019-09/Report_2019_09_SCOTUS_Ethics_FINAL.pdf.

candidate or officeholder's personal finances, they can shed light on potential conflicts of interest and confirm that the individual is paying their fair share.[296]

After President Richard Nixon released his personal tax returns in 1973,[297] all major party presidential nominees voluntarily disclosed their returns to the public until 2016,[298] when President Trump refused to disclose personal tax information, a practice he continued once elected.[299] This raised doubts about his financial ties and whether he was paying his fair share.[300] The Act would restore the longstanding norm of tax return disclosure by, among other things, requiring disclosure of personal income tax returns and the returns of any businesses of which the filer is the sole or principal owner, going back ten years.

C. Executive Branch Conflicts of Interest (Title VIII, Subtitle A)

S. 1 would take important steps to address conflicts of interest in the executive branch. It is common for high-level officials to move back and forth between government and the private sector. Ethics rules do not prevent senior government officials from overseeing matters likely to be of interest to past or future employers, leaving government to lobby their former colleagues (following a brief one-year cooling-off period), or even selling goods and services to the government. S. 1 tightens ethics standards by requiring officials to recuse from matters in which they know or should have known that a former employer or client had a financial interest,[301] imposing restrictions to slow the revolving door, and restricting federal funds from being spent at businesses owned or controlled by the president, vice president, cabinet members, or any of their families.

D. Presidential Conflicts of Interest (Title VIII, Subtitle B)

S. 1 would codify the practice of presidents and vice presidents of complying with conflict of interest law, from which they are exempt. Going back to the 1960s, presidents limited

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[296] Daniel I. Weiner and Lawrence Norden, *Presidential Transparency: Beyond Tax Returns*, Brennan Center for Justice, 2017, https://www.brennancenter.org/our-work/research-reports/presidential-transparency-beyond-tax-returns; and Bharara, Whitman, et al., *Proposals for Reform*, 7.
[297] Revelations that President Nixon had sought to evade his federal income tax obligations in the early 1970s using dubious charitable deductions seriously damaged his credibility with the public and arguably set the stage for his resignation from office. Stephen Mihm, "Nixon's Failed Effort to Withhold His Tax Returns," *Bloomberg*, August 2, 2016, https://www.bloomberg.com/view/articles/2016-08-02/nixon-s-failed-effort-to-withhold-his-tax-returns.
[298] See "Presidential Tax Returns," *Tax History Project*, accessed March 17, 2021, http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns.
[299] Alan Rappeport, "Donald Trump Breaks With Recent History By Not Releasing Tax Returns," *New York Times*, May 11, 2016, https://www.nytimes.com/politics/first-draft/2016/05/11/donald-trump-breaks-with-recent-history-by-not-releasing-tax-returns/.
[300] Kristen Doerer, "Why Do People Want to See Donald Trump's Tax Returns?" *ProPublica*, July 1, 2020, https://www.propublica.org/article/why-do-people-want-to-see-donald-trumps-tax-returns; and Pew Research Center, *Trump Begins Third Year With Low Job Approval and Doubts About His Honesty*, 2019, 4, https://www.pewresearch.org/politics/2019/01/18/1-views-of-trump-2/ (January 2019 poll showing 64 percent of Americans wanted President Trump to disclose his tax returns).
[301] Brennan Center for Justice, *The Mueller Report Exposed Weaknesses*, 8.

their personal holdings to assets like cash and treasury bonds, or used a blind trust,[302] reinforcing the view that our most senior leaders should only take official action in the public's best interest, without consideration of their own personal financial interest.

President Trump broke with this tradition, maintaining effective ownership and control of his many businesses.[303] According to ethics experts, this created at least an appearance of numerous conflicts of interest, making it hard to discern where the public's interests end and the former president's self-interest began.[304] This underscores why Congress must require the president and vice president to divest from any personal financial holdings that could pose a conflict of interest with their official duties.

E. Executive Branch Ethics Enforcement (Title VIII, Subtitle D)

S. 1 would increase the independence and authority of the Office of Government Ethics (OGE), which is responsible for administering executive branch ethics rules, so it is better positioned to prevent ethics violations, investigate allegations, and hold violators accountable.[305]

Currently, OGE can promulgate regulations, but it has limited investigative and enforcement power, and Trump administration officials questioned whether the agency's rules applied to White House staff.[306] OGE also exercises little direct control over agency ethics officials, who typically report to political appointees. And the agency lacks many of the hallmarks of a truly independent watchdog.[307] This subtitle would bring OGE more in line with other independent watchdog agencies by: limiting the president's authority to remove OGE's director;[308] empowering the director to submit their own budget proposals to Congress;

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[302] Bharara, Whitman, et al., *Proposals for Reform*.
[303] Numerous situations have arisen where it is hard to discern whether President Trump acted in support of his personal financial interest or the public's interest. See, e.g., Thomas Kaplan, "Trump's Focus on a Washington Building Draws Scrutiny," *New York Times*, October 18, 2018, https://www.nytimes.com/2018/10/18/us/politics/fbi-headquarters-building-trump.html; and U.S. General Services Administration Office of Inspector General, *Evaluation of GSA's Management and Administration of the Old Post Office Building Lease*, U.S. General Services Administration Office of Inspector General, 2019, 4–6, https://www.gsaig.gov/sites/default/files/ipa-reports/JE19-002%20OIG%20EVALUATION%20REPORT-GSA%27s%20Management%20%26%20Administration%20of%20OPO%20Building%20Lease_January%2016%202019_Redacted.pdf.
[304] Richard Painter and Norman Eisen, "The White House May Claim Mueller Has Conflicts of Interest. Oh, the Irony." *Washington Post*, May 22, 2017, https://www.washingtonpost.com/opinions/the-white-house-may-claim-mueller-has-conflicts-of-interest-thats-ridiculous/2017/05/22/affa0c6c-3f28-11e7-8c25-44d09ff5a4a8_story.html; Brennan Center for Justice, *The Mueller Report Exposed Weaknesses*, 8.
[305] See Daniel I. Weiner, *Strengthening Presidential Ethics Law*, Brennan Center for Justice, 2017, 11–12, http://www.brennancenter.org/publication/strengthening-presidential-ethics-law.
[306] Stefan C. Passantino to Walter M. Shaub, Jr., U.S. Office of Government Ethics, February 28, 2017, https://i2.cdn.turner.com/cnn/2017/images/03/01/white-house-letter-office-of-government-ethics-feb28.pdf?iid=EL.
[307] Bharara, Whitman, et al., *Proposals for Reform*, 16.
[308] Congress and the courts have recognized the need for the leaders of watchdog agencies to be insulated from political pressure. See Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010); and Federal Election Commission v. NRA Political Victory Fund, 6 F.3d 821, 826 (DC Cir. 1993). A recent Supreme

clarifying that OGE ethics regulations and other guidance are binding on all federal employees, including White House staff; and vesting OGE with new authority to, among other things, conduct formal investigations of suspected ethics violations—including through the issuance of subpoenas—and to review and approve conflict of interest and similar determinations by agency ethics officials, as well as waivers of conflict of interest rules.

These are only a few of the critical ethics reforms in S. 1. Collectively, they would help restore the ideal of public service as a public trust and ensure that leaders put the interests of the interests of the American people first. We urge Congress to pass these critical reforms.

VII. CONGRESS'S AUTHORITY TO ACT

Finally, Congress unequivocally has the authority to enact all the democracy reforms set forth in S. 1, especially under Article I, Section 4 of Constitution—known as the Elections Clause. The Elections Clause empowers Congress, "at any time," to "make or alter" any regulations for federal elections.[309] It is one of the most explicit grants of power to override the states anywhere in the Constitution.[310]

The Supreme Court has consistently interpreted the Elections Clause to endow Congress with sweeping power to regulate the time, place, and manner of elections.[311] (The only exception

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Court decision struck down the single-director model for the Consumer Financial Protection Bureau, while recognizing the constitutionality of other for-cause removal protections. Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

[309] The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. Const. art. I, § 4, cl. 1.

[310] For a history of the drafting of the Elections Clause and the debate over it during ratification, see Michael Waldman, *The Fight to Vote* (New York: Simon & Schuster, 2016), 25–28.

[311] See, e.g., *Inter Tribal Council*, 570 U.S. at 9 ("The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'") (quoting Ex parte Siebold, 100 U.S. 371, 392 (1879)); Ex parte Yarbrough, 110 U.S. 651, 661–62 (1884) ("it is not doubted" "that congress can, by law, protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud"); United States v. Mosley, 238 U.S. 383, 386 (1915) ("We regard it as . . . unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."); Smiley v. Holm, 285 U.S. 355, 366 (1932) ("It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."); United States v. Classic, 313 U.S. 299, 319–20 (1941) ("Unless the constitutional protection of the integrity of 'elections' extends to primary elections, Congress is left powerless to effect the constitutional purpose. . . . Words, especially those of a constitution, are not to be read with such stultifying narrowness. The words of ss 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within

is a 1921 case that has since been overturned.) As recently as 2013, the Court said, in an opinion by Justice Scalia, that Congress's power under the Elections Clause is so broad that it includes "authority to provide a complete code for congressional elections[.]'"[312] Accordingly, the Supreme Court has found that the Elections Clause authorizes legislation related to voter registration,[313] redistricting,[314] campaign finance,[315] and corruption in presidential elections.[316]

In the last two years, several members of the Court have gone out of their way to reaffirm Congress's broad authority under the Elections Clause. In 2019, for instance, Chief Justice Roberts, writing for the Court, recognized that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause[,]" and pointed to the 116th Congress's version of the For the People Act, H.R. 1, as example of the exercise of that power.[317] The Chief Justice likewise acknowledged Congress's wide-ranging and longstanding power under the Elections Clause, noting that Congress had used that power to enact, among other things, a "comprehensive federal statute dealing with elections as a way enforce the Fifteenth Amendment" in 1870 and "a series of laws to protect the right to vote" beginning in the 1950s.[318] Similarly, Justices Gorsuch and Kavanaugh noted last year that under the Elections Clause, "[i]f state rules need revision, Congress is free to alter them."[319]

There is thus no question that the Act's provisions fall squarely within Congress's authority over federal elections. Some, such as Congress's power to strengthen the Voting Rights Act and to restore voting rights to individuals with past convictions under Title I, Subtitle E, are also rooted in authority granted to it under the Fourteenth and Fifteenth Amendments.[320]

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the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it."); *Buckley*, 424 U.S. at 13 n.16 (recognizing that *Classic* overturned Newberry v. United States, 256 U.S. 232 (1921), which had held that the Elections Clause did not apply to primary elections); Oregon v. Mitchell, 400 U.S. 112, 121 (1970) ("The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts."); and Foster v. Love, 522 U.S. 67, 72 n.2 (1997) ("The [Elections] Clause gives Congress 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'") (quoting *Smiley*, 285 U.S. at 366).

[312] *Inter Tribal Council*, 570 U.S. at 8–9 (quoting *Smiley*, 285 U.S. at 366).

[313] *Inter Tribal Council*, 570 U.S. at 8–9.

[314] *Vieth*, 541 U.S. at 275 (stating that the Elections Clause "permit[s] Congress to 'make or alter'" the "districts for federal elections"); and Wesberry v. Sanders, 376 U.S. 1, 16 (1964) ("Speakers at the ratifying conventions emphasized that the House of Representatives was meant to be free of the malapportionment then existing in some of the State legislatures . . . and argued that the power given Congress in Art. I, s 4, was meant to be used to vindicate the people's right to equality of representation in the House.") (citations omitted).

[315] *Buckley*, 424 U.S. at 13 ("The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case.").

[316] *Buckley*, 424 U.S. at 132 ("This Court has also held that it has very broad authority to prevent corruption in national Presidential elections.") (citing Burroughs v. United States, 290 U.S. 534 (1934)).

[317] *Rucho*, 139 S. Ct. at 2508.

[318] *Rucho*, 139 S. Ct. at 2495.

[319] DNC v. Wisconsin State Legislature, 592 U.S. ___ (2020) (Gorsuch, J., concurring).

[320] Kusper v. Pontikes, 414 U.S. 51, 57 n.11 (1973); and *Mitchell*, 400 U.S. at 121, 124 (1970).

In fact, the Act embodies the Framers' central goal in establishing the Elections Clause—ensuring that Congress can override efforts by states to manipulate the federal voting process.[321] As they drafted the Constitution, the Framers were concerned that states, left to their own devices, would suppress or skew the vote. Delegates from South Carolina, which was notoriously malapportioned, sought to strike the Clause. Madison insisted that it remain. Without it, he said, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed."[322] The Framers therefore designed the Elections Clause to prevent states from manipulating election outcomes and to prevent the development of factions within states that might "entrench themselves or place their interests over those of the electorate."[323] As was well understood and reflected at the founding, during state ratification of the Constitution, and throughout decades of congressional debate, Congress's power to regulate federal elections is comprehensive. The Framers deliberately granted wide-ranging authority under the Elections Clause to ensure that Congress would be able to combat even those state abuses of power that were unforeseeable at the time.[324] Thus, as Justice Scalia recognized, the states' power to regulate federal elections has always been subject to federal law.[325]

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[321] Avalon Project: Documents in Law, History and Diplomacy, "Federalist No. 59," accessed March 11, 2021, http://avalon.law.yale.edu/18th_century/fed57.asp.
[322] Farrand, ed., *Records of the Federal Convention*, vol. 2, 241.
[323]Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 815 (2015). During the state debates over the ratification of Constitution, ratification supporters and opponents both emphasized the importance of the overriding power that the Clause gives to Congress. (Federalists were pleased; Anti-Federalists aghast.) For example, Theophilus Parsons, later a Massachusetts chief justice, explained that the "controuling [sic] power" of Congress would "preserve and restore to the people their equal and sacred rights of election." *The Documentary History of the Ratification of the Constitution* (hereinafter "*DHRC*"), vol. VI, Ratification by the States: Massachusetts, No. 3, 1218 (January 16, 1788). Thomas McKean (Pennsylvania's Chief Justice) likewise noted that it was Congress's duty to ensure that its members were "fairly chosen" and to do so, "it is proper they should have it in their power to provide that the times, places, and manner of election should be such as to insure free and fair elections." *DHRC*, vol. II, Ratification by the States: Pennsylvania, 537 (December 10, 1787).
Six states proposed amendments to the Constitution to narrow Congress's power under the Elections Clause, reflecting that even opponents to the Clause understood it to confer broad authority. Those efforts failed. See Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1836) (hereinafter "Elliot's Debates"), vol. 1, 322 (February 7, 1788, Massachusetts), 325 (May 25, 1788, South Carolina)), 326 (June 21, 1788, New Hampshire), 329–30 (July 26, 1788, New York); Elliot's Debates, vol. 4, 246 (August 1, 1788, North Carolina); *DHRC*, Vol. XXVI: Rhode Island, No. 3 at 999–1000 (May 29, 1790) (Rhode Island Form of Ratification and Amendments); see also Elliot's Debates, vol. 2, 545 (September 3, 1788, Meeting at Harrisburg, after Pennsylvania had ratified the Constitution). Similarly, in 1789, the First Congress rejected a constitutional amendment that would have let Congress "alter, modify, or interfere in the times, places, or manner" of congressional elections *only* "when any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such election." *Annals of Congress*, vol. 1, 767–74 (1789).
[324] At the Constitutional Convention, James Madison explained that the Elections Clause uses "words of great latitude" because "it was impossible to foresee all the abuses that might be made of the [states'] discretionary power." Farrand, *Records of the Federal Convention*, vol. 2, 240.
[325] *Inter Tribal Council*, 570 U.S. at 14–15 (quoting Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 347 (2001)).

Since the initial passage of the For the People Act by the House in 2019, the need for this legislation has only become more apparent, as underscored by the pandemic, the Big Lie that fueled the January 6 insurrection at the Capitol, and the spate of bills to restrict voting rights at the state level. Now it is up to elected leaders to deliver. S. 1 is a down-payment on the promise of a democracy that works for everyone. We urge its prompt passage.

Thank you.

APPENDIX C

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BRENNAN
CENTER
FOR JUSTICE

VOTER PURGES

Myrna Pérez

Brennan Center for Justice *at New York University School of Law*

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

ABOUT THE BRENNAN CENTER'S VOTING RIGHTS AND ELECTIONS PROJECT

The Voting Rights and Elections Project works to expand the franchise, to ensure that every eligible American can vote, and to ensure that every vote cast is accurately recorded and counted. The Center's staff provides top-flight legal and policy assistance on a broad range of election administration issues, including voter registration systems, voting technology, voter identification, statewide voter registration list maintenance, and provisional ballots.

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EXECUTIVE SUMMARY

Voter registration lists, also called voter rolls, are the gateway to voting. A citizen typically cannot cast a vote that will count unless her name appears on the voter registration rolls. Yet state and local officials regularly remove — or "purge" — citizens from voter rolls. In fact, thirty-nine states and the District of Columbia reported purging more than 13 million voters from registration rolls between 2004 and 2006.[1] Purges, if done properly, are an important way to ensure that voter rolls are dependable, accurate, and up-to-date. Precise and carefully conducted purges can remove duplicate names, and people who have moved, died, or are otherwise ineligible.

Far too frequently, however, eligible, registered citizens show up to vote and discover their names have been removed from the voter lists. States maintain voter rolls in an inconsistent and unaccountable manner. Officials strike voters from the rolls through a process that is shrouded in secrecy, prone to error, and vulnerable to manipulation.

While the lack of transparency in purge practices precludes a precise figure of the number of those erroneously purged, we do know that purges have been conducted improperly before. Over the past several years, every single purge list the Brennan Center has reviewed has been flawed. In 2004, for example, Florida planned to remove 48,000 "suspected felons" from its voter rolls. Many of those identified were in fact eligible to vote.[2] The flawed process generated a list of 22,000 African Americans to be purged, but only 61 voters with Hispanic surnames, notwithstanding Florida's sizable Hispanic population. To compound the problem, the purge list over-represented African Americans and mistakenly included thousands who had had their voting rights restored under Florida law. [3] Under pressure from voting rights groups, Florida ordered officials to stop using the purge list.[4] To compound the problem, the purge list over-represented African Americans and mistakenly included thousands who had had their voting rights restored under Florida law.

In New Jersey in 2005, the Brennan Center worked with a political science professor to analyze a purge list prepared by a political party using "matching" techniques. We found that the list was compiled using a number of faulty assumptions and that it would have harmed eligible voters if used as the basis for a purge. In 2006, the Secretary of State of Kentucky attempted to purge the state's rolls based on a flawed attempt to identify voters who had moved from Kentucky to neighboring South Carolina and Tennessee. A resulting lawsuit uncovered the fact that eligible voters who had not, in fact, moved out of the state of Kentucky were caught up in the purge; a state court ordered the state to reverse the purge.

The purges reviewed for this report give no greater grounds for comfort. While the reasons vary from state to state, no state reviewed in this report uses purge practices or procedures that are free from risk of error or manipulation, that have sufficient voter protections, or that have adequate procedures to catch and correct errors.

The secret and inconsistent manner in which purges are conducted make it difficult, if not impossible, to know exactly how many voters are stricken from voting lists erroneously. And when purges are made public, they often reveal serious problems. Here are a few examples recent examples:

- In Mississippi earlier this year, a local election official discovered that another official had wrongly purged 10,000 voters from her home computer just a week before the presidential primary.

- In Muscogee, Georgia this year, a county official purged 700 people from the voter lists, supposedly because they were ineligible to vote due to criminal convictions. The list included people who had never even received a parking ticket.

- In Louisiana, including areas hit hard by hurricanes, officials purged approximately 21,000 voters, ostensibly for registering to vote in another state. A voter could avoid removal if she provided proof that the registration was cancelled in the other state, documentation not available to voters who never actually registered anywhere else.

FINDINGS

This report provides one of the first systematic examinations of the chaotic and largely unseen world of voter purges. In a detailed study focusing on twelve states, we identified four problematic practices with voter purges across the country:

Purges rely on error-ridden lists. States regularly attempt to purge voter lists of ineligible voters or duplicate registration records, but the lists that states use as the basis for purging are often riddled with errors. For example, some states purge their voter lists based on the Social Security Administration's Death Master File, a database that even the Social Security Administration admits includes people who are still alive.[5] Even though Hilde Stafford, a Wappingers Falls, NY resident, was still alive and voted, the master death index lists her date of death as June 15, 1997.[6] As another example, when a member of a household files a change of address for herself in the United States Postal Service's National Change of Address database, it sometimes has the effect of changing the addresses of all members of that household. Voters who are eligible to vote are wrongly stricken from the rolls because of problems with underlying source lists.

Voters are purged secretly and without notice. None of the states investigated in this report statutorily require election officials to provide public notice of a systematic purge or even individual notice to those voters whose names are removed from the rolls as part of the purge. Additionally, with the exception of registrants believed to have changed addresses, many states do not notify individual voters before purging them. In large part, states that do provide individualized notice do not provide such notice for all classes of purge candidates. For example, our research revealed that it is rare for states to provide notice when a registrant is believed to be deceased. Without proper notice to affected individuals, an erroneously purged voter will likely not be able to correct the error

before Election Day. Without public notice of an impending purge, the public will not be able to detect improper purges or to hold their election officials accountable for more accurate voter list maintenance.

Bad "matching" criteria leaves voters vulnerable to manipulated purges. Many voter purges are conducted with problematic techniques that leave ample room for abuse and manipulation. State statutes rely on the discretion of election officials to identify registrants for removal. Far too often, election officials believe they have "matched" two voters, when they are actually looking at the records of two distinct individuals with similar identifying information. These cases of mistaken identity cause eligible voters to be wrongly removed from the rolls. The infamous Florida purge of 2000 — conservative estimates place the number of wrongfully purged voters close to 12,000 — was generated in part by bad matching criteria.[7] Florida registrants were purged from the rolls in part if 80 percent of the letters of their last names were the same as those of persons with criminal convictions.[8] Those wrongly purged included Reverend Willie D. Whiting Jr., who, under the matching criteria, was considered the same person as Willie J. Whiting.[9] Without specific guidelines for or limitations on the authority of election officials conducting purges, eligible voters are regularly made unnecessarily vulnerable.

NO EFFECTIVE NATIONAL STANDARD GOVERNS VOTER PURGES. THIS MAKES THE RISK OF BEING PURGED UNPREDICTABLE AND DIFFICULT TO GUARD AGAINST.

Insufficient oversight leaves voters vulnerable to manipulated purges. Insufficient oversight permeates the purge process beyond just the issue of matching. For example, state statutes often rely on the discretion of election officials to identify registrants for removal and to initiate removal procedures. In Washington, the failure to deliver a number of delineated mailings, including precinct reassignment notices, ballot applications, and registration acknowledgment notices, triggers the mailing of address confirmation notices,[10] which then sets in motion the process for removal on account of change of address. Two Washington counties and the Secretary of State, however, reported that address confirmation notices were sent when any mail was returned as undeliverable, not just those delineated in state statute. Since these statutes rarely tend to specify limitations on the authority of election officials to purge registrants, insufficient oversight leaves room for election officials to deviate from what the state law provides and may make voters vulnerable to poor, lax, or irresponsible decision-making.

POLICY RECOMMENDATIONS

No effective national standard governs voter purges; in fact, methods vary from state to state and even from county to county. A voter's risk of being purged depends in part on where in the state he or she lives. The lack of consistent rules and procedures means that this risk is unpredictable and difficult to guard against. While some variation is inevitable, every American should benefit from basic protections against erroneous purges.

Based on our review of purge practices and statutes in a number of jurisdictions, we make the following policy recommendations to reduce the occurrence of erroneous purges and protect eligible voters from erroneous purges.

A. Transparency and Accountability for Purges

States should:

- **Develop and publish uniform, non-discriminatory rules for purges.**

- **Provide public notice of an impending purge.** Two weeks before any county-wide or state-wide purge, states should announce the purge and explain how it is to be conducted. Individual voters must be notified and given the opportunity to correct any errors or omissions, or demonstrate eligibility before they are stricken from the rolls.

- **Develop and publish rules for an individual to prevent or remedy her erroneous inclusion in an impending purge.** Eligible citizens should have a clear way to restore their names to voter rolls.

- **Stop using failure to vote as a trigger for a purge.** States should send address confirmation notices only when they believe a voter has moved.

- **Develop directives and criteria with respect to the authority to purge voters.** The removal of any record should require authorization by at least two officials.

- **Preserve purged voter registration records.**

- **Make purge lists publicly available.**

- **Make purge lists available at polling places.** Purge lists should be brought to the polls on Election Day so that errors can be identified and pollworkers can find the names of erroneously purged voters and allow them to vote regular ballots.

B. Strict Criteria for the Development of Purge Lists

States should:

- **Ensure a high degree of certainty that names on a purge list belong there.** Purge lists should be reviewed multiple times to ensure that only ineligible voters are included.

- **Establish strict criteria for matching voter lists with other sources.**

- **Audit purge source lists.** If purge lists are developed by matching names on the voter registration list to names from other sources like criminal conviction lists, the quality and accuracy of the information in these lists should be routinely "audited" or checked.

- **Monitor duplicate removal procedures.** States should implement uniform rules and procedures for eliminating duplicate registrations.

C. "Fail-Safe" Provisions to Protect Voters

States should ensure that:

- **No voter is turned away from the polls because her name is not found on the voter rolls.** Instead, would-be voters should be given provisional ballots, to which they are entitled under the law.

- **Election workers are given clear instructions and adequate training as to HAVA's provisional balloting requirements.**

D. Universal Voter Registration

States should:

- **Take the affirmative responsibility to build clean voter rolls consisting of all eligible citizens.** Building on other government lists or using other innovative methods, states can make sure that all eligible citizens, and only eligible citizens, are on the voter rolls.

- **Ensure that voters stay on the voter rolls when they move within the state.**

- **Provide a fail-safe mechanism of Election Day registration for those individuals who are missed or whose names are erroneously purged from the voter rolls.**

I. INTRODUCTION

In 1959, the local Citizens Council, a white supremacist group with an organizational mission of maintaining racial segregation, together with a local election official removed 85% of the African American voters from the registration rolls of Washington Parish, Louisiana, under the guise of removing from the rolls all persons illegally registered.[11]

In 2007, almost 50 years after a court found that the Washington Parish purge was unconstitutional both in purpose and effect, election officials in Louisiana removed more than 21,000 people from the voter registration rolls, the majority from areas most devastated by Hurricane Katrina a year earlier.[12] Almost a third of those removed were from Orleans Parish,[13] which has a majority African American population.[14] A voter could avoid removal if she provided proof that the registration was cancelled in the other state, documentation not available to voters who never actually registered anywhere else.[15]

While we may be past the days in which election officials are complicit with those who intentionally seek to target persons of color for removal from the voter rolls, the way in which voter registration lists are maintained in this country may sometimes have a similar effect.[16]

WHEN PURGES GO WRONG, ELIGIBLE VOTERS OFTEN DISCOVER THEY HAVE BEEN KNOCKED OFF VOTER ROLLS ONLY WHEN THEY SHOW UP AT THE POLLS TO VOTE—AND CAN'T.

Voter registration lists are the gateway to voting. In most instances,[17] a citizen can only vote and have her vote count if her name appears on the registration rolls. Yet officials regularly remove, or "purge," citizens each day from voter registration lists. In fact, at least 13 million people were purged from voter rolls between the close of registration for the 2004 federal general election and the close of registration for the 2006 federal general election. A voter has been "purged" if her registration status has changed such that she is no longer listed on the registration list as a person who is able to cast a regular ballot or a ballot that will be counted.

Dependable, accurate, and up-to-date voter registration lists increase the integrity of our elections in many ways. They let candidates and get-out-the-vote groups work more efficiently. Dependable lists also reduce confusion at the polls, make turnout numbers more precise and election misconduct easier to detect and deter. To the extent that they help insure that registration lists correctly reflect eligible registrants, precise, carefully conducted purges are important.

Unfortunately, many of the voter purges in this country are performed in a slipshod manner and leave ample room for abuse and manipulation. When purges go wrong, eligible voters are removed from the rolls, frequently with no notice or knowledge until they show up at the polls to vote.

This report examines what goes wrong with those purges, how voter purges are conducted, and how to minimize the risk that eligible voters will be incorrectly purged across the county. Our analysis is based on a review and examination of state statutes, regulatory materials, and news reports in the following twelve states, representing a cross-section of regions, election systems, and purge practices: Florida, Kentucky, Indiana, Michigan, Missouri, Nevada, New York, Ohio, Oregon, Pennsylvania, Washington, and Wisconsin. In five states — Kentucky, Missouri, Nevada, Ohio, and Washington — we also conducted extensive interviews with state and local election officials charged with the maintenance of voter registration lists.

Due to the secret nature of purges, it is difficult to know the full extent of the problem, or the exact number of people who have been wrongfully kept from voting. What we do know is that in the states studied, purge practices are unnecessarily secretive and in need of improvement. When purges are made public, they reveal serious problems. Given the margins by which elections are won, these purges matter greatly, and there is reason to believe that the number of people wrongfully purged makes a difference. There is no reason for purges to be kept secret — they undermine confidence in elections, and cast doubt on our concept of fairness.

The Brennan Center is dedicated to investigating the precise nature of these purges conducted behind closed doors. We encourage election officials, legislators, advocates and concerned members of the public to use this report to improve voter purge practices and ensure that the rights of eligible voters are not jeopardized.

II. TYPES OF VOTER PURGES

Purges occur as part of a process of "list maintenance" that states and localities use to update and clean their voter registration lists. Depending on the state, purges are conducted by local officials, state officials, or both. Voters are generally purged on one of the following grounds: (1) changes of address, (2) death, (3) disenfranchising criminal conviction, (4) duplication of other records, (5) inactivity or failure to vote, and (6) mental incapacitation.

Three statutes provide the bulk of the few existing federal requirements and voter protections for conducting purges — the National Voter Registration Act of 1993 ("NVRA"), the Help America Vote Act of 2002 ("HAVA"), and the Voting Rights Act of 1965. Under the NVRA, any state purge practice must be "uniform, non-discriminatory, and in compliance with the Voting Rights Act of 1965."[18] The NVRA also imposes certain limitations on election officials as to when and how registrants can be removed from the voter rolls on account of change of address,[19] which afford some protections against one type of purge. HAVA emphasizes that voter purges must be done in accordance with the NVRA,[20] and requires that the process for maintaining statewide computerized voter registration databases, which HAVA requires, include minimum standards of accuracy to ensure that registration records are accurate and regularly updated.[21]

Purges can be "systematic," meaning that they are large-scale and done in an organized and pre-planned fashion, or they can be "routine," meaning that they affect an individual voter and are based on individualized information. A systematic purge is one in which all people believed to be deceased are removed from the registration rolls; a routine purge is one in which a son brings his mother's death certificate to the local registrar and asks that she be removed from the rolls. Routine purges can have serious consequences for individual voters, but given the sheer number of persons affected, it is especially important to ensure that systematic purges are done well, with adequate protections for affected voters.

This section examines the statutes, policies, and procedures employed by states and localities for purging voters, and explains the policy choices that may affect the ability of voters to cast ballots which count. The particulars of how purges are conducted reveal how purge practices vary dramatically from jurisdiction to jurisdiction, how there is also a lack of consistent protections for voters, and how there are opportunities for mischief in the purge process.

A. CHANGE OF ADDRESS

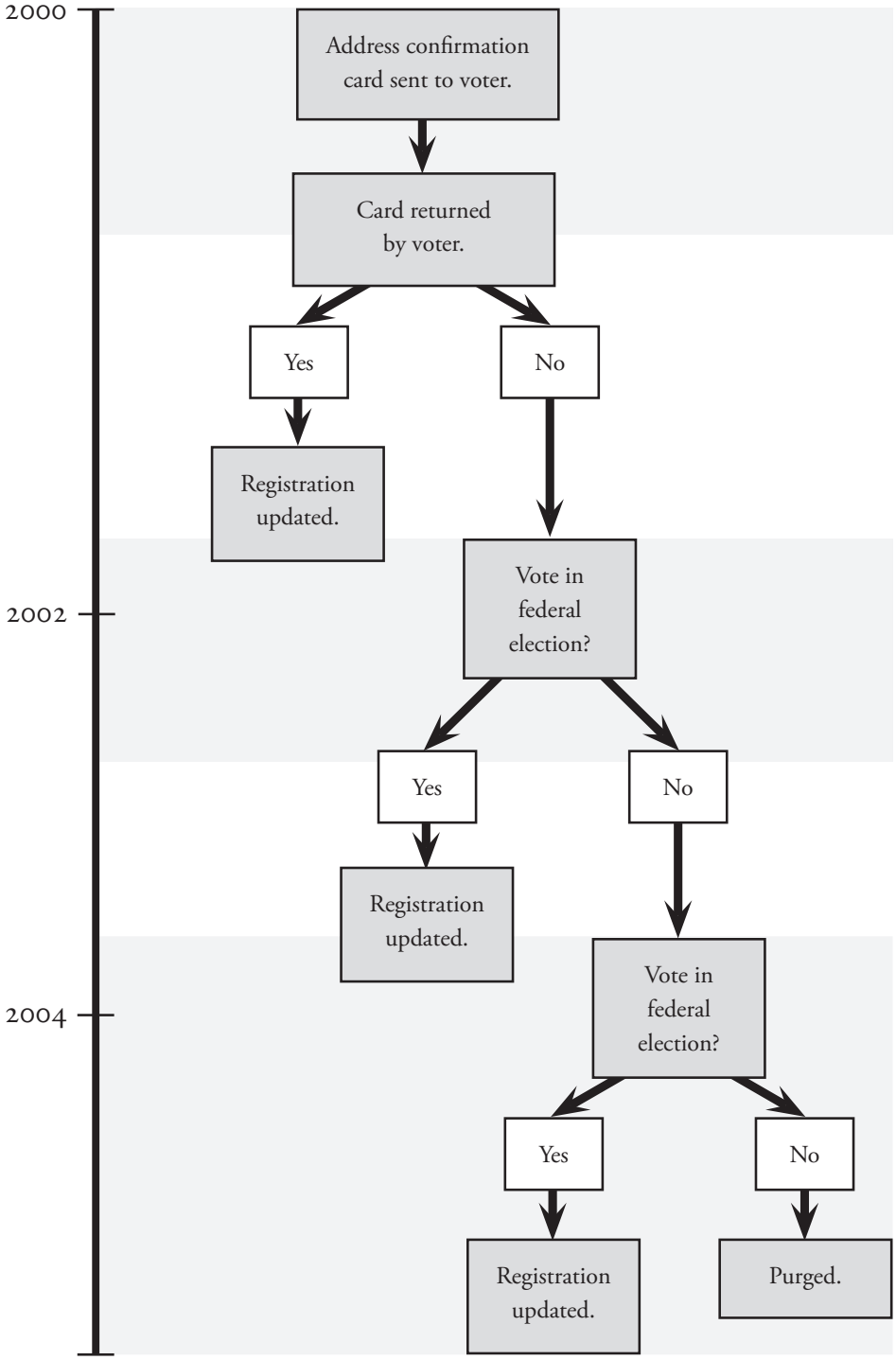
Twenty-nine million voting-age Americans move each year.[22] Accordingly, it is no surprise that changes of name and address accounted for 43% of all voter registration transactions for the time period between the close of the 1996 elections to right after the close of the 1998 elections.[23] From the close of the 2004 elections to the close of the 2006 elections, changes of name, address, and political party accounted for more than 30% of all voter registration transactions.[24]

IF A JURISDICTION USES UNDELIVERABLE MAIL FROM A MASS MAILING AS THE SOLE BASIS FOR PURGING A VOTER, IT BREAKS FEDERAL LAW.

Election officials we interviewed reported that changes of address are the most difficult aspect of list maintenance.[25] A number of election officials believe that changes of address account for the bulk of duplicate registrations on the voter rolls[26] because people who have moved often re-register at their new places of residency without notifying election officials in their former places of residence of the address change.[27]

Under federal law, election officials may purge a registrant believed to no longer be a resident of the election jurisdiction if two conditions are satisfied. First, the registrant must fail to respond to an address confirmation notice from the relevant election office in the time period designated under state law. The notice must be sent by forwardable mail and include a postage prepaid, pre-addressed response card. Second, the registrant must fail to vote in two federal general elections following the mailing of the address confirmation notice.[28] The sending of these notices starts the running of the clock for the time period in which a person must vote in two subsequent federal general elections or be removed from the rolls in those states that conduct purges.[29]

SAMPLE TIMETABLE FOR CHANGE-OF-ADDRESS PURGE



Timeline not drawn to scale.

In spite of this federal mandate, there are great discrepancies in the methods states and localities use to implement purges based on changes of address, including: differences in which events trigger the mailing of a notice seeking address confirmation; which information sources are used to identify registrants who have moved; how registrants' addresses are verified; and how officials proceed when a person does not respond to an address confirmation notices.

1. Post Card Purges and other Triggers for Address Confirmation Notices

The most common triggers causing a local election official to send an address confirmation notice include: the return of a mailing sent to the person from the election office; an acceptable source provides information suggesting that the person has moved; or the election office undertakes a program to verify addresses and finds an address that appears questionable.

In several states, officials are given the authority to send an address confirmation notice to a registrant if other undeliverable mail is returned to the election office in certain circumstances.[30] States, and even counties within states, vary in the type of mail that can trigger the mailing of a confirmation notice. Some states or counties will send an address confirmation notice based on the return of a mailing sent to all registered voters designed to ferret out bad addresses. This is sometimes referred to as a "canvass." In other jurisdictions, a wider array of undeliverable election mail may trigger the mailing of an address confirmation notice, such as absentee ballots, registration acknowledgement notices, and precinct reassignment notices.[31]

If a purge arises from a mass mailing, typically a non-forwardable postcard, it is referred to as a "postcard purge."[32] In some cases, a postcard mailing is part of a jurisdiction's canvassing efforts. When postcards are returned as undeliverable, the jurisdiction usually sends an address confirmation notice to the voter. If the voter does not respond to the notice and fails to vote in two subsequent federal elections, the voter can be lawfully purged from the voter registration list, provided that the removal does not take place within 90 days of a federal election. If a jurisdiction uses undeliverable mail from a mass mailing as the sole basis for purging a voter, it breaks federal law. A Michigan law is legally vulnerable on this ground because if the original "voter identification" card — the card sent to new registrants — is returned as undeliverable to the local clerk, the clerk cancels the registration.[33]

Although returned postcards from mass mailings probably form the most common basis for supposed changes of address, this kind of returned mail is not a reliable indicator that a person has moved for the reasons set forth below. Several of the factors that make this method unreliable affect voters in poor and minority communities more than those in other communities. Before presuming that returned mail means a person has moved, states and localities should consider the following sources of error:

a. Voter registration lists suffer from typos and other clerical errors

Mail sent to a listed registration address may be returned as undeliverable because of a typo or other data entry errors on the voter rolls. Large government databases are notoriously vulnerable to

such flaws.[34] One study found that as many as 26% of records in a Florida social service database included city names that were spelled differently from the same names on a master list, including more than 40 spelling variations of Fort Lauderdale, one of the largest cities in the state.[35] Address numbers and names may be mistyped or transposed. Portions of addresses apartment numbers or house numbers or directional indicators (e.g., S. Main St. or N. Main St.) may be dropped. Addresses may be entered incorrectly (e.g., 211-2 Main St. becomes 21 Main St.).

b. A voter may not be listed on the mailbox of her residential voting address

Mail sent to a listed registration address may be returned as undeliverable because the United States Postal Service does not know that the voter actually lives at the address listed. Couples, roommates, or family members may list only one or two members of the residential unit on the mailbox. Particularly when the unlisted members of the unit do not share the same surname as the listed member, the postal delivery person may simply presume that the individual in question does not live at the listed address.

c. A voter may live at a non-traditional residence

Mail sent to a listed registration address may be returned as undeliverable because the voter does not live at a traditional address. Homeless individuals, who have the right to register and vote in every state, are a prime example of this problem.[36] Depending on the law of the state, these citizens may list a homeless shelter or government building as their legal voting residence, even if the institution listed will not accept their mail.

d. A voter may be temporarily away from her permanent residence

Mail sent to a listed registration address may be returned as undeliverable because the voter is temporarily away from her permanent residence, and does not receive mail there. For example, an active duty member of the military may have difficulty receiving mail. In one notorious Louisiana case, a member of Congress who received her mail in Washington D.C. rather than at her home address in her district was challenged after a letter to her home was returned as undeliverable.[37]

e. A voter's permanent mailing address may differ from her residential voting address

Mail sent to a listed registration address may be returned as undeliverable because the voter receives mail elsewhere — at a post office box, for example. When individuals register to vote, they list their physical residences, but not all Americans receive mail at their residential addresses.

f. Mail may not be properly delivered

Sometimes, of course, mail sent to a listed registration address is returned as undeliverable because it was not delivered properly, through no fault of the voter.[38] Mail can be lost or misrouted, causing

it to be returned to the sender. Erratic mail problems can be quite significant. In the 1990 census, for example, the *New York Times* reported that "[a]lthough at least 4.8 million [census] forms were found to be undeliverable by the Postal Service, 1.8 million of those were later delivered by hand."[39] Moreover, ineffective mail delivery is more common in poor and minority communities.[40]

g. A voter's street name may have changed

Mail sent to a listed registration address may be undeliverable because the street name may have changed since the voter registered, even though the voter remains in the same residence. In Milwaukee in 2006, for example, when street addresses were checked against a postal service address program, city officials reviewing the list of discrepancies found that some addresses were flagged because of changes to the street names themselves.[41]

h. A voter may refuse to accept certain mail

Mail sent to a listed registration address may be undeliverable because the voter refuses to accept the piece of mail in question. There is no requirement that an individual accept a piece of mail offered for delivery, rather than sending it back with the delivery person. Catherine Herold of Ohio, for example, reported that she refused to accept delivery of a partisan mailing — which was returned undelivered and then used as purported evidence of her allegedly invalid registration.[42]

i. A voter may have moved permanently, but nevertheless remains eligible to vote

State rules differ as to when a voter who has moved must inform election officials of her new address. At a minimum, however, federal law provides that if a voter has moved within the same area covered by a given polling place — if, for example, a voter moves from one apartment to another within the same apartment complex — she may legitimately vote at that polling place even if she has not yet notified a registrar of her move.[43]

Federal law prohibits systematic purges within 90 days of an election.[44] Voter advocacy groups have criticized jurisdictions which have sent or have contemplated sending a mass mailing as the first step to confirm addresses when the initial mailing has taken place within 90 days of an election.[45] Mass mailings of this kind are inadvisable not only because undelivered mail is an unreliable indicator that a person has moved (as explained above), but also because of timing. Election officials are busiest in the 90 days preceding an election: they must process new registrations, update registration records, identify polling locations, prepare voting materials, and more. Without the time to exercise due care, data entry and other mistakes are more likely, subjecting eligible voters to the risk of a purge.

2. Information Sources Used to Identify Registrants Who Have Moved

Often voters do not tell election officials they have moved out of a jurisdiction, and so it is hard for officials to identify invalid records on voter registration lists. States, therefore, turn elsewhere to

identify voters who have moved. Given the NVRA's explicit authorization to do so, it is no surprise that states often rely heavily on information provided by the United States Postal Service, its licensees, and the USPS's National Change of Address database.[46] This method, though, has its own problems, including inaccuracies in postal service data and cost to election officials.[47] Some states use information gained in connection with jury notices and information from other departments, such as the bureau of motor vehicles to identify address changes.[48] For example, in Kentucky, one election official used information on changes of address for updating driver's licenses to update addresses in the voter registration list.[49]

In some states, individuals can provide information about someone else's change of address that is then acted upon by election officials. In Nevada, county clerks can send an address confirmation notice based on information gained from another voter or other "reliable person" who submits an affidavit stating that a particular voter has moved outside the county with the intent to abandon her residence.[50]

3. Address Verification Procedures

Some state statutes permit broad canvasses to confirm voters' addresses. For example, some states allow local election officials to conduct door-to-door canvasses to find voters.[51] In actuality, however, a local election official we interviewed reported that this was not a widespread practice.[52]

Some state statutes permit localities to initiate their own efforts to identify registrants who have moved. In some cases, the acceptable methods are unspecified or unlimited. Missouri law grants election officials broad authority and wide latitude to verify a person's address. The statute reads, in relevant part: "[t]he election authority may investigate the residence or other qualifications of any voter at any time it deems necessary. The election authority shall investigate material affecting any voter's qualifications brought to its attention from any source, and such investigations shall be conducted in the manner it directs."[53]

4. Voter Classification After an Address Confirmation Notice is Sent

While the details of the process differ, after sending address confirmation notices states tend to follow one of two schemes: states designate any voter who is sent an address confirmation notice as "inactive,"[54] while others do not designate a voter as "inactive" until after the voter fails to respond to the address confirmation notice in a timely matter.[55] This distinction is relevant because in some states, the voting experience of someone designated "inactive" may be different from, and more difficult than, that of an "active" voter. In Massachusetts, for example, inactive voters shoulder additional identification burdens when they show up to vote.[56] In Oregon, where all elections in the state are allowed to be conducted by mail, inactive voters are not statutorily required to be given ballots by mail.[57] Additionally, some polling stations are reported to have a list of inactive voters that is separate and apart from the active voter list. There is at least some anecdotal evidence that sometimes the lists of inactive voters are not available at the polling stations, putting inactive voters at a disadvantage when attempting to vote.

B. DEATH

Both HAVA and the NVRA address the removal of deceased voters from the voter rolls. Under the NVRA, states must make a "reasonable effort" to remove those who have died from the registration rolls.[58] HAVA directs each state to coordinate its voter registration database with state death records for the purposes of removing names of deceased persons from the voter rolls.[59]

Different agencies in different states maintain records of deaths, and so election officials get information about deceased registrants from varying sources. In some states, the department of health sends a list to election officials.[60] Elsewhere, local and state registrars or departments of vital statistics send a list of deceased persons to voting officials.[61] Still other states do not designate which agency is charged with providing information on decedents.[62]

Some states permit election officials to consider sources other than data from state agencies in gathering information on decedents. In some states, for example, election officials are permitted to use newspaper obituaries to identify deceased registrants.[63] In Washington State, a registrant may be removed from the registration rolls if another registered voter signs a statement of personal knowledge or belief that the registrant is deceased.[64] Elsewhere, state law authorizes the use of other sources, without specifying what sources may be considered.[65]

C. DISENFRANCHISING CRIMINAL CONVICTIONS[66]

State have a blizzard of varying laws regarding the voting rights of people with criminal convictions. Kentucky and Virginia permanently disenfranchise all people with felony convictions unless their rights are specifically restored by the government, while in Maine and Vermont, people with criminal convictions do not lose their voting rights at all — even prisoners are permitted to vote. Most state laws, however, fall somewhere in between those two positions.

Thirteen states and the District of Columbia automatically restore voting rights to formerly incarcerated persons upon their release from prison.[67] In contrast, eight states permanently disenfranchise citizens convicted of certain crimes unless the government approves individual rights restoration.[68] Five states allow probationers to vote and automatically restore the voting rights of persons with criminal convictions after release from prison and discharge from parole.[69] It is most common for a state to restore an individual's voting rights upon completion of his sentence, including prison, parole, and probation.[70]

Federal law provides little guidance or voter protections in this area. The NVRA permits states to purge people with felony convictions from the voter rolls consistent with state law.[71] HAVA requires states to "coordinate the computerized list with State agency records on felony status" to remove registrants made ineligible by criminal convictions.[72] As with other types of purges addressed in this report, state purge practices for people ineligible because of felony convictions are varied in numerous ways.

1. Authority and Responsibility

The responsibility for purging people with disenfranchising convictions differs from state to state. In some states, like Kentucky, the statutory responsibility rests with state election officials.[73] In other states, like Nevada, local officials are responsible.[74] There are also hybrid systems for removing people with disenfranchising convictions: in Washington, for example, local officials remove some people convicted of felonies while state officials remove others.[75] In Florida, local officials are required to conduct removals, but do so in accordance with information provided by state officials.[76] In other cases, state election law does not clearly delineate which officials are responsible for removing ineligible persons with felony convictions.[77]

2. Sources of Information

Under federal law, United States Attorneys are required to notify states' chief election officials of felony convictions in federal court.[78] State election officials, then, in turn notify relevant local election officials. In addition to the provision of information by U.S. Attorneys, some state statutes provide that election officials are to obtain information on people with disenfranchising convictions from a number of other sources.[79] State statutes, however, do not always provide clear guidance as to what sources election officials can rely on in gathering information about registrants rendered ineligible by criminal convictions.[80] Consequently, sources vary on a county-by-county basis.[81]

D. DUPLICATE RECORDS

Often when voters move within a state, they register to vote in a new neighborhood without canceling their registration in the old one. Or, accidentally, a voter can register from the same address multiple times. Federal law says that state systematic purge programs should screen for and eliminate duplicate names from the centralized state voter registration list. But the federal law gives no specific guidance on how states should identify such duplicate records, or what processes should be followed.[82] As a result, from state to state and county to county, officials remove duplicates in an inconsistent and confusing manner. There is not even any uniformity as to how duplicate registration records should be resolved once they are detected. For example, while a number of officials, when encountering what they presume to be duplicate registrations for the same person, presume that the more recent registration is the accurate one,[83] one election official in Michigan reported a practice of removing the newer registration when confronted with a duplicate.[84]

Given the errors and inconsistencies in the records on state voter rolls, it may be impossible to tell with certainty whether two records indeed refer to the same person and therefore are duplicates — unless the affected individuals are contacted and can confirm the duplication. States and localities therefore typically rely to some extent on approximation and assumptions, which may not be accurate in some circumstances.

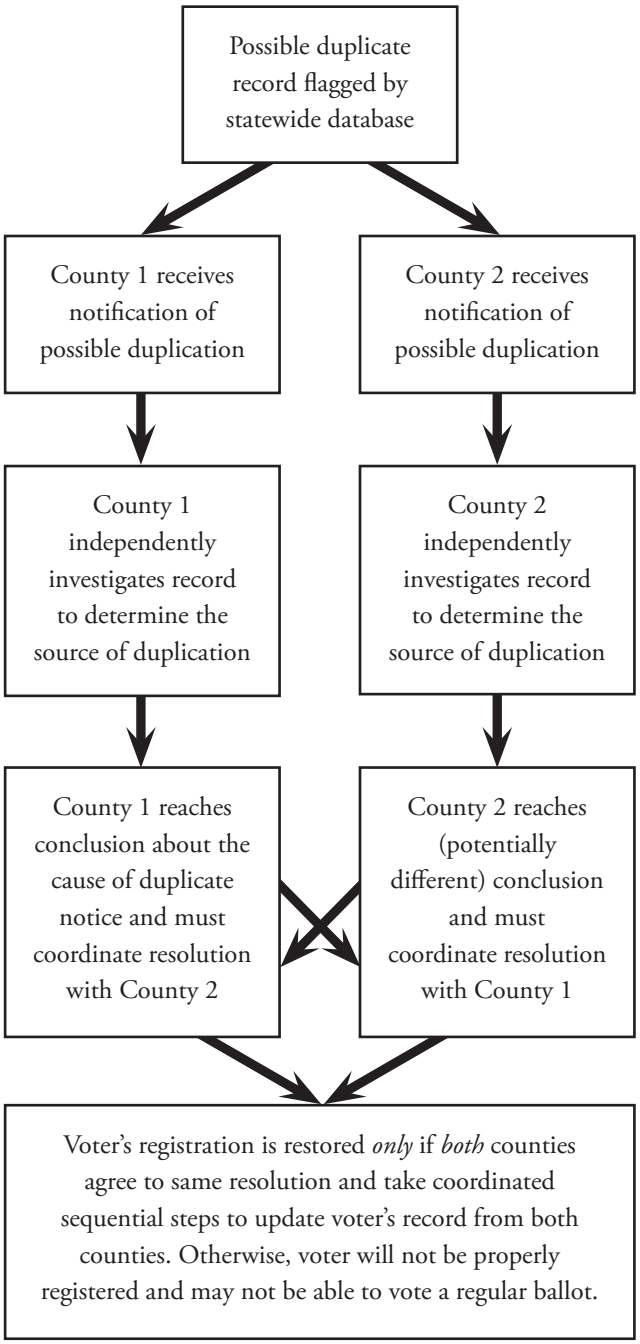
Some statewide list maintenance programs identify potential duplicate records automatically, but rely on local election officials to sort through the flagged records. These registrars are supposed to

purge only actual duplicates, while leaving untouched any records falsely flagged as duplicates.[85] The process is often confusing and time-consuming. For example, Missouri law gives local election officials explicit authority to identify and remove duplicate records, but it does not specify how duplicates should be identified or what evidence is enough to remove a voter.[86] As a result, different county election officials in Missouri follow very different procedures for identifying duplicate records. In one county, election officials request confirmation from voters for possible duplicate records, and the duplicate record is purged if the voter does not respond or appear to vote in the following election.[87] In a different county, election officials simply flag possible duplicates and monitor for voting fraud but take no further action.

Most state statutes, in fact, offer very little guidance to local election officials and do not specify what identifying characteristics should be verified, or what degree of approximation is permitted.[88] One election official in Ohio stated that their ability to identify duplicates is further complicated by, among other things, name changes after marriage and poorly programmed registration software that slows down the process.[89] When local election offices become busy with processing large numbers of new registrations prior to elections, they tend to relax the level of scrutiny they pay to checking the accuracy of duplicate matches.[90]

Despite vague laws and scarce resources, local election officials reported increased pressure from state officials to "clean" the voter registration list of duplicate records.[91] Such pressure, in the absence of counterbalancing restrictions or guidelines, is likely in the future to result in larger numbers of improperly purged registrants.

AN EXAMPLE OF DUPLICATE RESOLUTION



Source: Jennifer Brunner, Ohio Secretary of State, Statewide Voter Registration Database (SWVRD) System Manual (2008), 31-32, *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-52.pdf.

E. INACTIVITY/FAILURE TO VOTE

Federal law explicitly states that a person cannot be purged merely for a failure to vote — a basic protection for registered voters who may only vote sporadically.[92] This protection ensures that a voter does not lose her right to vote simply because she chooses not to exercise that right in a particular election. Accordingly, federal law prevents election officials from relying on the fact that a voter has not voted for some time to conclude that she moved, died, or otherwise becomes ineligible and then to cancel her registration based on that conclusion.

Election officials are, however, permitted to remove voters pursuant to the NVRA's change of address process. Under the NVRA, states must send forwardable address confirmation notices to voters believed to have moved with a postage prepaid and pre-addressed response card to either confirm a continuing address or update the state with a new address. If the card is not returned, the state cannot remove the voter unless the voter not only does not return the card confirming her address, but also does not vote in at least one of the two general federal elections following the notice's mailing.[93]

1. Inadequate Guidance

Voters who have not voted for a designated period of time, or have not responded to an address confirmation notice, nor presented themselves to vote in the subsequent elections are often referred to as "inactive voters."[94] Most of the state statutes surveyed for this report fail to provide clear guidance on how to meet the NVRA's requirements relating to "inactive voters."

The Kentucky statute, for example, reiterates the NVRA requirement outlined above, but does not provide any guidance on how an inactive voter should be allowed to vote (for example, by signing a written affidavit confirming her address). As a result, local election officials impose inconsistent requirements for inactive voters who turn up at the polls on Election Day. One Kentucky county requires inactive voters to sign an affidavit before being allowed to vote, whereas another county requires an election officer at the polling place to call a central election office to confirm the registration before allowing inactive voters to receive a ballot.

The inconsistent requirements at different polling places can lead to the de facto disenfranchisement of inactive voters who should, instead, be protected by the NVRA. For example, in locations where telephone confirmations are required before inactive voters are allowed to vote, the polling places are sometimes not equipped with sufficient telephone lines to keep up with the high volume of voters in heavy turnout precincts, effectively forcing precincts to turn away inactive voters rather than allowing them to vote.[95] Thus, voters who would otherwise have been classified as active again could instead find themselves purged for failure to vote, despite attempting to do so. This problem reportedly occurred to inactive voters in St. Louis County in 2006.[96]

2. Programs Targeting Voters who Failed to Vote

Some jurisdictions' policies stretch compliance with the NVRA's prohibition against purging a

voter merely for failure to vote. For example, in Ohio, though not required to do so by law,[97] many jurisdictions send address confirmation cards exclusively to registered voters who did not vote in the most recent election, rather than to all registered voters, as many other states do.[98] Ninety days following each general election in Wisconsin, state election officials are required to identify persons who have not voted within the previous four years and mail them a notice that informs the addressees that their registration will be "suspended" unless they apply to continue their registration.[99] Thus, the simple failure to vote in these jurisdictions is sufficient to trigger a process that could ultimately result in being purged from the voter registration list.

F. INCAPACITATION[100]

Federal law offers even fewer guidelines for removing voters from the registration rolls because of mental incapacitation. In contrast to its references to purges based on felony convictions or death, HAVA does not mention the removal of persons adjudged incapacitated. The NVRA simply provides that states must comply with state law in removing names from the registration list of voters because of mental incapacity.[101]

1. Varying Rights

State laws vary with respect to the voting rights of persons who are mentally incapacitated. Pennsylvania, Michigan and Indiana, for example, do not by statute disenfranchise persons who are adjudged mentally incapacitated. In fact, Pennsylvania's statute goes as far as specifying the means for determining the residency of individuals who live at institutions for mentally ill patients expressly for the purpose of voter registration.[102] Indiana's law specifies that the "[d]etention or commitment of an individual…does not deprive the individual of . . . [t]he right to . . . [v]ote."[103] Like Pennsylvania, Indiana law specifies the residency of persons who are committed so that they may be able to vote.[104] In contrast, the Oregon Constitution contains a disenfranchising provision that renders ineligible those specifically adjudicated incompetent to vote.[105]

The statutory practices for purging voters for mental incapacitation similarly vary. States like Missouri and New York provide only the most general standards for disenfranchising persons on account of mental incapacitation, providing that persons who are declared incapacitated may be removed from the rolls.[106] Similarly, Nevada requires cancellation of a registration when "the insanity or mental incompetence of the person registered is legally established."[107] By contrast, states like Florida indicate that the declaration of mental incapacitation must be specifically with respect to voting before a person can be removed from the voter rolls.[108]

The experience of election officials suggests that the public is not always informed as to the state voting protections for persons perceived to be mentally incapacitated. For example, local officials in Nevada and Ohio reported that they have had removal requests made by individuals relating to another voter on the grounds of mental incapacitation even when there was no court adjudication.[109]

2. Sources for Identifying Individuals

In a number of states, like Kentucky,[110] election officials are supposed to receive, pursuant to statute, lists indicating the names of persons who may no longer be eligible to vote on account of mental incapacity from state circuit or probate courts, district courts, or in the case of some states, for example, Washington[111] and New York,[112] the office of the court administrator. These practices are consistent with the policy of not depriving a person of the franchise absent court adjudication. In practice, however, the lists of those ineligible to vote on account of mental incapacitation do not always come from the court system. At least one locality in Missouri claims to receive incapacitation lists from the state Department of Health and Human Services. One county election official in Ohio reported that local board of elections staff, sent to nursing facilities to help the elderly vote, sometimes determine that a particular person is incapable of voting.

III. PROBLEMS WITH PURGES

Our review of state purge practices reveals a number of shortcomings. Across the country, problems occur because the lists used to identify people to be purged are unreliable, purges are done in secret, election officials use bad matching criteria, and purges are conducted with insufficient oversight.

A. SOURCE LISTS ARE RIDDLED WITH ERRORS

States regularly purge their voter registration lists of ineligible voters or duplicate registration records, but the lists states use as the basis for purging voters are often riddled with errors, which result in the removal of many eligible voters. For example, some states purge voter registration rolls of individuals based on the Social Security Administration's Death Master File,[113] a database of 77 million deaths, dating back to 1937.[114] Unfortunately, even the Social Security Administration admits there are people in its master death index who are not actually dead.[115] The master death index lists the date of death of Hilde Stafford, a Wappingers Falls, NY resident, as June 15, 1997. The 85-year-old's response: "I'm still alive," Stafford said, "I still vote."[116] Indeed, from January 2004 to September 2005, the Social Security Administration had to "resurrect" the records of 23,366 people wrongly added to its Death Master File, meaning that the Administration was presented with irrefutable evidence that it had incorrectly listed 1,100 people a month, or more than 35 a day, as deceased.[117]

EVEN THE SOCIAL SECURITY ADMINISTRATION ADMITS THERE ARE PEOPLE IN ITS MASTER DEATH INDEX WHO ARE NOT ACTUALLY DEAD.

Lists can be inaccurate because they are overbroad, lack specificity, or simply contain errors. For example, when a member of a household files a change of address for herself in the United States Postal

Service's National Change of Address database, the filing sometimes has the incorrect effect of changing the address of all members of that household.[118] Lists may also fail to contain sufficiently specific identifying information, for example, only names and ages.[119]

Indeed, Florida's infamous purge of people presumed to have felony convictions in 2000 is a prime example of a bad purge based on unreliable underlying lists. The purge list wrongly included some, such as Reverend Willie Dixon, because the list contained inaccurate information — Reverend Dixon had been pardoned of a crime he committed in his youth and had his voting rights restored.[120] In other cases, the list reflected a misunderstanding of what types of crimes resulted in permanent disenfranchisement. Floridian Wallace McDonald was purged from the voter rolls for committing a misdemeanor, even though misdemeanors do not affect one's voting rights.[121] Additionally, the purge wrongly included more than 300 individuals who had conviction dates in the future.[122] Other problems with this purge are addressed below.

B. PURGES ARE CONDUCTED IN SECRET, WITHOUT NOTICE TO VOTERS

Approximately one week before the Mississippi's March 2008 presidential primary election, the circuit clerk of Madison County, Mississippi discovered that a local election commissioner had purged more than 10,000 residents from the voter registration rolls. County Election Commissioner Sue Sautermeister reportedly accessed the voter registration list from her home computer and purged the voters, including a Republican congressional candidate, his wife and daughter, and some people who had voted as recently as the November 2007 elections.[123] Fortunately, the Secretary of State's office and others recognized that Sautermeister's actions violated the NVRA, and worked to restore the purged voters in time for the March election.[124]

The public — voters, advocates, and others — rarely, if ever, receive meaningful notice of systematic purges. In fact, none of the states we studied have statutes requiring election officials to notify the public in advance of systematic purges. The statutes themselves generally do not provide notice by specifying when systematic purges will or should occur — a typical indication would be that such a purge must take place at least 90 days before an election,[125] but offering no further specificity. Adequate advance notice is essential to prevent erroneous purges. When registrants are properly informed of pending purges, they can act to correct or clarify a situation. Conversely, registrants may be denied due process of law if they are disenfranchised without notice and without a meaningful opportunity to challenge the purge. An Election Day discovery that a purge has taken place is generally too late for the affected voter to cast a ballot that is counted.

Except for registrants believed to have changed addresses, many states do not notify individual registrants believed to be candidates for purges either. When states do give individual notice, they rarely do so for all types of purges. For example, states rarely require notice when a voter is believed to have died. Florida and New York, for instance, statutorily require the provision of notice prior to removal in other circumstances, but appear to omit the notice requirement when the person is believed to be dead.[126] Without such notice, it is far harder to correct errors when the voter has been confused with an unfortunate decedent, or is, in any case, very much alive.

In certain circumstances in some states, officials are statutorily required to notify registrants after they are removed.[127] While that is better than no notice at all, notice after the fact could preclude an erroneously purged voter from being reinstated in time for an upcoming election.

Some state laws require officials to tell registrants with disqualifying convictions before they are purged; indeed, in some states these voters may have more protections than those affected by other types of purges. In Florida and Washington, election officials must give advance warning to voters with disqualifying convictions, and give them an opportunity to respond prior to removal.[128] Indiana law requires election officials to send a notice to the last known address of all people who are disenfranchised because they are imprisoned no later than the day after the registration has been canceled from the rolls.[129]

With notice provided neither to the public nor to the affected voter, election officials can conduct purges with little outside scrutiny or oversight. The lack of transparency makes voters vulnerable to manipulated or haphazard purges.

C. BAD "MATCHING" CRITERIA LEAVES VOTERS VULNERABLE TO PURGES

In 2008, the Elections Director for Muscogee County, Georgia, sent out 700 letters to local residents informing them that they were ineligible to vote because they were convicted felons. More than one-third of the voters called to report that there had been a mistake. The purged voters included an octogenarian who insisted she had never even received a parking ticket. According to media reports, the list that went to Muscogee County was generated by a new computer program, and included voters whose names, but not necessarily other information, corresponded or "matched" the names of those with felony convictions.[130]

Largely because of HAVA, states now have computerized statewide voter registration databases. These digital lists have improved the registration process substantially. But they can also boost the danger of wrongful purging since large numbers of people can now be purged at one time. The inadequacies of existing purge protections are apparent in the use of bad "matching" criteria.

Computerized database "interoperability" allows for election officials to purge registrants because of an apparent "match" of identifying information in a voter registration record to records found in lists of people ineligible to vote for various reasons. However, far too often what appears to be a "match" will actually be the records of two distinct registrants with similar identifying information. States have failed to implement protections to ensure that eligible voters are not erroneously purged.

There are many reasons states have trouble with matching requirements. Often, state statutes do not often specify what information — what fields and how many — must match to warrant removal of a registrant from the voter registration list.[131] This means that local purging officials use their own, often varied and insufficient, matching standards. For example, two Nevada county election officials reported different match standards for the removal of deceased registrants. One reported that if a person's name and address or age on the report provided by the Department of Vital Statistics matches

the record of a registrant, the official would remove that registrant from the rolls. Another reported that she removed registrants when the date of birth, social security number, and first and last names of deceased people provided by the state's Department of Vital Statistics matched a registrant's record.

States that do set forth requirements for the kind of identifying information elections officials should use frequently require too little information — for example name and date of birth — to be confident that a particular registered voter is the same person listed on a list subject to purging.[132]

Elementary statistics preclude reaching such a conclusion on such little information. In a group of 23 people, it is more likely than not that two will share the same day and month of birth; in a group of 180, it is more likely than not that two will share the same birth date, including year of birth.

Also, in any group of significant size, statistics teaches us that there will be many with the same first and last names — and it is likely that at least two such individuals will be born on the same day.[133] Certain names are more popular in certain years. For example, it would be unsurprising to find two Jessica Smiths born on the same day in 1985, or Lisa Smiths in 1965, or Mildred Smiths in 1925. Likewise, the prevalence of surnames will fluctuate with the immigration patterns of particular ethnicities, which vary from decade to decade.

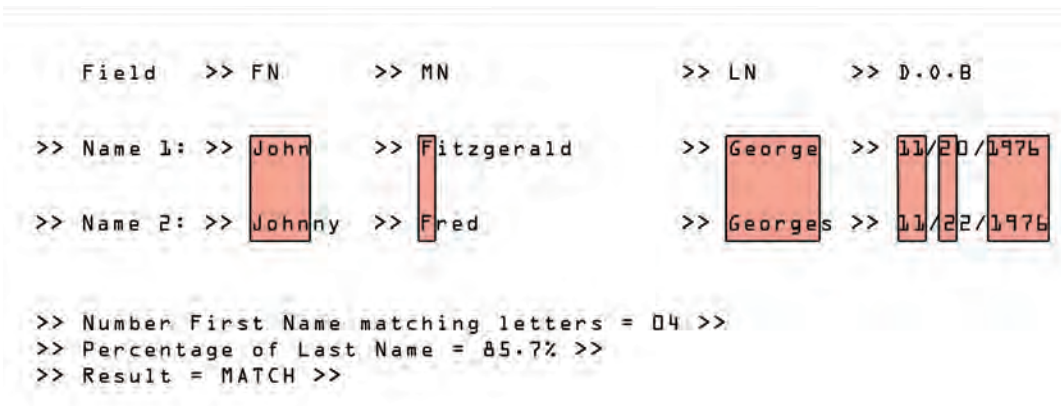
Purging officials who ignore prefixes or suffixes can increase the likelihood of erroneous matches. A 2005 attempt to identify double voters and duplicate registrations on the New Jersey voter rolls was flawed in this respect: in seeking duplicates, it ignored middle names and suffixes, alleging that the voter records of distinct registrants J.T. Kearns Jr. and J.T. Kearns Sr. belonged to the same individual.[134]

IN A LARGE GROUP, STATISTICS TEACHES US THAT THERE WILL BE MANY WITH THE SAME FIRST AND LAST NAMES — AND IT IS LIKELY THAT AT LEAST TWO SUCH INDIVIDUALS WILL BE BORN ON THE SAME DAY.

Another problem arises when states do not specify how exacting purging officials must be when comparing fields. For example, in Missouri, where exact matches are not required, one election official reportedly deemed an approximate date of birth (e.g., a difference by one month or one day) as sufficient to establish a match.

In Florida, lists of ineligible people provided to election officials must contain certain identifying information, but the Florida statutes does not establish how or to what extent the information must exactly match that of a registrant before the registrant can be removed.[135] The Florida purge of 2000 discussed above — conservative estimates place the number of wrongfully purged voters close to 12,000 — was generated in part by bad matching criteria. Florida registrants were purged from the rolls if, in part, 80 percent of the letters of their last names were the same as those of known felons.[136]

HOW BAD MATCHING CRITERIA CAN RESULT IN DISENFRANCHISEMENT



Source: Gregory Palast, *The Wrong Way to Fix the Vote*, Wash. Post, June 10, 2001, at B01.

Those wrongly purged included Reverend Willie D. Whiting Jr., who under the matching criteria, was considered to be the same person as Willie J. Whiting.[137] These purges were wildly inaccurate. In Miami-Dade County, for example, over half of the African American registrants who appealed their placement on the felon exclusion list were found to be eligible voters.[138]

The matching criteria some states use, however, may not differ greatly from the criteria responsible for the erroneous purge in Florida. To identify possible duplicates, New York requires only that the first three letters of the first name, the first five letters of the last name, and date of birth match, although it will consider other information if it is available.[139]

D. PURGES ARE CONDUCTED WITH INSUFFICIENT OVERSIGHT

Insufficient oversight permeates the purge process beyond just the issue of matching. For example, state statutes often rely on the discretion of election officials to identify registrants for removal and to initiate removal procedures. Since these statutes rarely tend to specify limitations on the authority of election officials to purge registrants, eligible registrants may be unnecessarily made vulnerable to poor, lax, or irresponsible decision-making.[140]

Insufficient oversight also leaves room for election officials to deviate from what the state law provides. In Washington, the failure to deliver a number of delineated mailings, including precinct reassignment notices, ballot applications, and registration acknowledgment notices, triggers the mailing of address confirmation notices,[141] which then sets in motion the process for removal on account of change of address. Two Washington counties and the Secretary of State, however, reported that address confirmation notices were sent when any mail was returned as undeliverable, not just those delineated in state statute. Although Ohio's election law expressly provides that information regarding the deaths of persons over age 18 must come directly from government health agencies, one local official reported using obituaries as a source to identify deceased registrants, and another official reported a practice of sending inquiries to local funeral homes, a practice also not condoned by statute.[142] An election official in Missouri reported relying on both personal knowledge and obituaries, even though the state election code does not provide for the use of those sources.

The state statutes examined are generally more specific with respect to the amount of discretion election officials have to remove registrants for mental incapacitation than they are with respect to other grounds for removal. In a number of states we examined, a determination to purge someone because of mental incapacitation occurs only if individuals meet certain legal criteria, for example, if they are declared mentally incapacitated with respect to voting.[143] However, elections officials interviewed for this report indicated that in spite of these statutory strictures, they sometimes make their own determinations that particular residents are incapable of voting and deny ballots according to that determination.[144]

IV. POLICY RECOMMENDATIONS

While much of election administration is governed by state law, the NVRA and HAVA provide guidance, and in some cases, explicit requirements, for how voters' rights to register and participate in the political process should be protected. Through the NVRA,[145] Congress minimized the states' historical ability to function as a gatekeeper for registration in many ways by requiring states to use and accept the Federal Mail Voter Registration Application.[146] It also made it easier to get on the voter rolls by requiring states to: distribute the Federal Mail Voter Registration Application to public and private entities and voter registration organizations;[147] permit a person to register to vote at the same time as applying for or renewing a driver's license;[148] and provide voter registration services at designated public agencies.[149]

WHEN THERE IS A QUESTION, FEDERAL LAW CLEARLY FAVORS THE INCLUSION OF ALL ELIGIBLE REGISTRANTS RATHER THAN THE REMOVAL OF EACH AND EVERY INELIGIBLE REGISTRANT.

HAVA facilitates voter registration by requiring states to create and maintain a single statewide computerized database of its registered voters, and to coordinate that database with other state databases, including state agency records on felony status[150] and state agency records on death.[151]

The text of these two laws clearly prioritizes the inclusion of all eligible registrants over the removal of each and every ineligible registrant when there is a question. The relevant section in the NVRA begins with "each State shall ensure that any eligible applicant is registered to vote in an election."[152] While the NVRA also requires states to

undertake a program to conduct list maintenance, they must only conduct a "reasonable" effort to purge the names of registrants who are ineligible because they have died or, in certain circumstances, have changed their addresses."[153] The NVRA permits, but does not require, a state to remove a registrant from the official list of eligible voters when a registrant has requested removal or when the law of the state disenfranchises persons on account of criminal conviction or mental incapacity.[154]

HAVA requires that states perform regular "list maintenance" and make "reasonable effort[s]" to ensure that ineligible voters and duplicate records are removed from the voter rolls.[155] Before addressing purges, HAVA expressly requires states to "ensure that each registered voter appears in the computerized list" and that "only voters who are not registered or who are not eligible to vote are removed from the computerized list."[156]

The existing federal requirements and voter protections do not go far enough, however, to protect voters. Indeed, the NVRA and HAVA do not specifically address most aspects of purge practices. Given the problems identified in our review of state purge practices and statutes, we recommend that states take action to reduce the occurrence of erroneous purges. Below are some recommendations of best practices based on our research.

A. TRANSPARENCY AND ACCOUNTABILITY FOR PURGES

Purges of voter registration lists should be conducted in a transparent and uniform manner. Any rules or procedures developed with respect to purges should establish accountability at all stages of a purge.

1. Develop and publish uniform, non-discriminatory rules for purges.

State election officials should publicly post consistent and fair rules that describe when, why, how, and by whom a voter registration record can be purged from the voter rolls. States should clearly identify appropriate sources of information on ineligible people and ensure that all localities are conforming to the same standards when relevant. State election officials should work with local election officials to ensure that state protocols are understood and being followed.

While the state of Ohio is not without its troubles in election administration, it can be commended for publicly posting all directives, advisories, and memoranda related to elections on the Secretary of State's website. Not only does this practice allow local election officials easy access to the documents, it also gives members of the public the opportunity to be informed and educated as to election-related policies. Armed with this knowledge, watchdogs and individuals can help encourage compliance and hold localities accountable for any lapses. Irrespective of the nature of the rules, their transparency is necessary to ensure that they are fair and effective protocols.

2. Provide public notice of an impending purge.

States should provide public notification of any organized county-wide or state-wide purge at least two weeks prior to the purge, and provide a detailed explanation of how that purge is to be conducted.

Before a voter is removed from the voter registration list for any reason, she should be individually notified and given the opportunity to correct any errors or omissions, or demonstrate eligibility.

For most types of purge candidates, New York notifies registrants at risk of being purged 14 days in advance of the purge.[157] Best practices would extend this protection to all individuals who are candidates for purges and give each 30 days to respond before purging them from the voter rolls.

3. Develop and publish rules to remedy erroneous inclusion in an impending purge.

The rules and procedures for curing erroneous inclusion in an impending purge should be publicly posted and widely available. Additionally, for registrants who have been purged from the voter registration list, states should explicitly set out means by which they may be restored easily to the voter registration list, without regard to the voter registration deadline.

Pennsylvania, by statute, provides certain registrants both notice of an impending purge and a process for responding to any erroneous purge. Pennsylvania is required to send written notice to each individual whose registration is canceled.[158] Pennsylvania law also offer an additional protection: its statutes specifically contemplate the possibility that a registrant can be incorrectly reported as dead or incorrectly removed on the grounds of death and sets forth a process for addressing these instances.[159] States could and should apply this protection to all classes of purges.

4. Do not use failure to vote as a trigger for a purge.

States should ensure that registrants are sent address confirmation notices only in response to an indication that the registrant has moved — not when a registrant has not voted for some time. All voters who have been inactive should be allowed to vote by regular ballot up until they are purged. If an inactive registrant votes during any of the two federal election cycles, they should remain on the voter registration list.

5. Develop directives and criteria with respect to who has the authority to purge voters.

No one person, acting alone, should be able to remove names from the list. The removal of any record should require authorization by at least two officials. Good directives for purge authorization minimize opportunities for mischief in the process.

Although majority support from the local election commission is required in Mississippi prior to the removal of any voter from the voter registration list, Madison County election commissioner Sue Sautermeister managed to purge more than 10,000 names from the list, alone, reportedly from her home computer.[160] This example highlights the importance of purge protocols which preclude non-compliance, for example, by designing the database so two people must enter an authorization code before voters can be removed.

6. Preserve purged voter registration records.

Statewide voter registration databases should have the design capacity to keep the records of names removed from the voter registration list, including who authorized the removal and on what grounds. Maintenance of this information ensures that the removal of any registrants is properly documented, allows for easier restoration to the list, and assigns accountability for the purge.

All media reports suggest that the Mississippi Secretary of State was successfully able to reinstate the voters purged by the Madison County commissioner.[161] Officials from the Secretary of State's office indicated that the database is designed such that voting records are retained, even when the voter status changes.[162] This design feature of the database makes for easier restoration than when the record is erased.

7. Make purge lists publicly available.

The records of voters purged from the list and the reason for removal should be made available for public inspection and copy. If any code is used to identify the reason for removal, a key defining each code symbol shall be made accessible to the public. These lists should also be brought to the polls on Election Day. This allows the public to verify that purged records were removed for fair reasons.

For example, Washington requires the Secretary of State and each county auditor to compile lists of everyone who is removed from the voting rolls and the reason for their removal; these lists must be preserved and kept available for public inspection for at least two years.[163] Additionally, some states allow voters to check their registration status electronically via voter portal functions on their websites that allow voters to check the status of their registration by entering their name and/or other personal information.[164]

While these portals are a useful resource, there are some limits to their helpfulness. For example, not all interfaces inform the voter when the system was last updated. This is problematic because a voter unable to find her registration record might, instead of waiting for the system to be updated, send in an additional form out of desire to ensure that her name make it onto the rolls. Additional registration forms for the same individual increase administrative burdens for the registrar and the likelihood that there are errors in the registration. This problem can be ameliorated simply by noting when the interface was last updated. Another problem with portals is that not everyone will search for their record using the information as exactly listed on their registration application, or an inputting error will prevent a voter from being able to find her registration record. This problem can be corrected by designing the interface such that when a registration record is not found, more information is solicited and then the interface displays to the seeker similar names affiliated with the information provided. Individuals who suspect that they have found their record, but that the record contains misspellings or other errors, can then call the registrar's office and correct the problem.

Notwithstanding the usefulness of portals, they are an inferior substitute to purge lists because portals confine the information provided to a unique voter and do not allow voters and their advocates to observe trends.

8. Make purge lists available at polling places.

The records of voters purged from the list over the past two federal election cycles should be made available at the polls so that individuals erroneously purged can be identified and allowed to vote by regular ballot.

B. STRICT CRITERIA FOR THE DEVELOPMENT OF PURGE LISTS

To ensure a high degree of accuracy, states should use strict criteria for the development of purge lists. States should establish measures to protect eligible people from erroneous removal from the voter registration list.

1. Ensure a high degree of certainty that names on a purge list belong there.

Before purging any name from the voter registration list, authorized officials should have a high degree of certainty that a name belongs to an ineligible person or a duplicate record. Purge lists should be reviewed multiple times to ensure that only ineligible people are included.

2. Establish strict criteria for matching.

If purge lists are developed by matching names on the voter registration list to names from other sources, states should specify the information sufficient for attaining a high degree of certainty, including, at a minimum, last name, first name, middle name, prefix, suffix, date of birth, and address or driver's license number. Exact matches of a large number of fields substantially reduce the risk that such purges will erroneously remove eligible people.

As discussed throughout the report, the Florida purge in 2000 underscores the need for strict matching criteria. When records were deemed a match because 80% of the last name was the same, approximately 12,000 people were misidentified as disenfranchised felons.

3. Audit purge source lists.

If purge lists are developed by matching names on the voter registration list to names from other sources (for example, criminal conviction lists) the quality and accuracy of the information in these lists should be routinely "audited" or checked. Errors in source lists may lead to the erroneous removal of eligible people. Accordingly, election officials should calibrate reliance based on the known accuracy of the source list.

4. Monitor duplicate removal procedures.

States should implement uniform rules and procedures for eliminating duplicate registrations in accordance with HAVA. States should provide clear guidance to election officials with respect to when to flag a possible duplicate registration, how to verify that the registration is in fact duplicative, and when to remove that registration from the voter registration list.

C. "FAIL-SAFE" PROVISIONS TO PROTECT VOTERS

While inaccurate purges will be mitigated with the implementation of the previously mentioned recommendations, there must still be mechanisms in place to protect voters in the event that a person is incorrectly removed from the voter registration list.

1. No voter should be turned away from the polls because her name is not found on the voter registration list.

Instead, she should be provided a provisional ballot which will be counted upon determination by election officials that she is eligible to vote. In many states, however, voters have not been given the provisional ballots to which they are entitled.[165]

2. Election workers should be given clear instructions and adequate training as to HAVA's provisional balloting requirements.

HAVA sets forth a number of requirements with respect to the use of provisional ballots as a fail-safe in the event that a voter's name does not appear on the registration list. Election workers should clearly understand that: no voter should be denied a provisional ballot; all voters must be given the opportunity to substantiate their eligibility to vote; all voters must be informed as to how they can substantiate their eligibility and how they can determine whether a ballot was counted; and the ballots must be counted when a voter confirms that she is eligible and registered to vote.

D. UNIVERSAL VOTER REGISTRATION

The purge systems currently in place are rife with error and vulnerable to manipulation. Even the best processes for culling the voter rolls will inevitably be imperfect and will erroneously lead to purges of at least some eligible voters. No eligible citizen should be deprived of the right to vote or put through an obstacle course because of these system malfunctions. Currently, eight states have a backup system in place that will protect the votes of those American caught up in a faulty purge — a system of Election Day registration which enables eligible citizens to register and vote on Election Day (or other days on which voting takes place). Some fear that Election Day registration may overwhelm election officials with a swarm of new and unexpected voters. Although those fears are baseless, they can be completely eliminated if Election Day registration is embedded within a system of universal voter registration in which the government takes the

affirmative responsibility of adding all eligible citizens in its records to the voter lists. Under such a system, there would be far fewer unregistered voters who show up at the polls on Election Day since virtually all eligible citizens would be registered. In addition to providing a fail-safe for those voters wrongly purged, universal voter registration would increase confidence in the accuracy of voter registration lists since they would have been assembled by election officials rather than by voters.

Universal voter registration has other benefits as well: it would add up to 50 million unregistered Americans to the voter rolls; eliminate the opportunity for partisan or other gamesmanship with voter registration rules and procedures; reduce fears of potential voter fraud, as those derive largely from the potential for fraudulent registrations; and reduce burdens on election officials, who currently devote substantial resources to processing voter registration forms in the months and days leading up to an election. The elements of a system of universal registration are as follows:

- The government takes affirmative responsibility to build clean voter lists consisting of all eligible citizens.
- Each eligible citizen only has to register once within a state; the government ensures that voters stay on the lists when they move within state.
- Election Day registration is available as a fail-safe for those eligible citizens whose names are erroneously not added to or erroneously purged from the voter rolls.

V. EMERGING ISSUES WITH RESPECT TO PURGES

There are numerous blemishes in our country's voting history. Since the end of Reconstruction in the late nineteenth century, the voting rights of poor and minority citizens have been restricted through a complex system of laws enacted by state legislatures and intended to limit or ignore the commands of the 14th and 15th Amendments. In the immediate aftermath of the Civil War and the Reconstruction Amendments, voting among African American men briefly soared in the former slave states.[166] In Louisiana in 1867, for example, approximately 90% of the eligible black male population had registered to vote.[167] However, by the end of the Reconstruction era in 1877, most Southern states had erected significant new barriers to minority voting that re-established control by the white Democratic Party, eliminating these hard-won rights from the vast majority of non-white voters.[168] At first glance, these new voting laws appeared race-neutral, so as not to violate the 14th and 15th Amendments, but in effect they purposely excluded many African Americans from the polls. Poll taxes, literacy tests, and grandfather clauses, for example, proved to be effective barriers to African American voting. Though these new restrictions did not, on face, target one group of voters over another, they were discriminatorily applied to African American voters.[169]

Some commentators argue that voter purges are simply a variation of older, more overt methods of disenfranchisement intended to reduce minority participation.[170] Courts have agreed: one court overturned the aforementioned Louisiana purge, finding it "massively discriminatory in

purpose and effect,"[171] and another referred to a Texas statute requiring yearly re-registration as a "direct descendant of the poll tax" that unconstitutionally disenfranchised voters.[172] Although other courts differ on the motivations of purges, they do not deny that their effect can be discriminatory.[173]

Irrespective of whether purging officials act with racial animus, if done without adequate protections, voter purges can have the same disenfranchising effect as the overt voter restrictions used in earlier decades. While new nuances to problematic purges are always emerging, there are at least two relatively new issues for which problems are predictable.

A. VOTER CAGING

In the later half of the twentieth century, a category of voter purges known as "voter caging" arose as a new tactic to generate lists of voters to be purged from voter registration lists or challenged at the polls. Adapted from a direct mail marketing practice of sorting mailing addresses,[174] voter caging is a controversial method of targeting voters in which non-forwardable mail is sent to registered voters at their voter registration address. Some percentage of that mail is returned to the sender as undeliverable for a variety of reasons, many unrelated to the recipient's status as a voter.[175] On this basis alone, the sender (typically a political operative) uses the list of returned mail to either request election officials to purge the names from the registration list or later challenge the validity of the voter's registration at the polls on Election Day, or both.

COMPUTERIZED VOTER REGISTRATION LISTS NOW MAKE IT POSSIBLE FOR THOUSANDS OF VOTERS TO BE DISENFRANCHISED WITH A SINGLE KEYSTROKE.

Voter caging has been demonstrated to produce grossly inaccurate results and has threatened to disenfranchise thousands of legitimately registered voters.[176] The history of voter caging is littered with examples of political operatives targeting poor and minority neighborhoods where mail delivery might be less reliable or where voters are believed to be threatening to certain political interests. First uncovered in 1958, the practice has frequently been used to generate purges of thousands of voters. In 1986, for example, the Republican National Committee ("RNC") hired a vendor to conduct a voter caging effort in at least three states, intending to purge voters residing in primarily African American neighborhoods.[177] Unearthed in subsequent litigation, an RNC internal memorandum discussing the targeting of Louisiana voters stated the goal of the voter caging program:

> I would guess that this program will eliminate at least 60-80,000 folks from the rolls . . . If it's a close race, which I'm assuming it is, this could really keep the black vote down considerably.[178]

In more modern times, reports of intended voter caging efforts have surfaced in Ohio, Michigan, and Virginia.[179] Because voters who are victims of caging cannot cast a regular ballot, purges of this kind pose a significant threat to the completeness of voter registration lists, and ultimately, to the legitimacy of our nation's elections.

B. COMPARING DATABASES WITHIN AND ACROSS STATE LINES

HAVA's requirement of centralized computer voter registration databases has allowed election officials to maintain their voter lists with greater ease as states move away from many separate voter lists, but it also significantly amplifies the potential for large-scale disenfranchisement.[180] Indeed, computerized voter registration lists now make it possible for thousands of voters to be disenfranchised with a single keystroke.

Officials have increasingly focused attention on ways of making state databases "interoperable" with other databases that may contain relevant information on registered voters. "Interoperability" is generally defined as a method of connecting or integrating multiple databases so that changes in one database can be recognized and mirrored in a second database automatically. Seizing on language in HAVA which requires or recommends states to "coordinate" voter registration databases with felony conviction databases, death records, and records of voter moves through state DMV databases,[181] several groups of states have started to compare voter registration lists among each other and initiate voter purges based on matches between records on different states' lists, presuming that individuals who have moved from one state to another have neglected to notify the original state before registering to vote in the new state.[182]

The problem is that there are not always sufficient protections to ensure that the same individuals are identified as opposed to two different individuals with similar identifying information. In 2006, for example, the Kentucky State Board of Elections attempted to match names on its registration database against lists of voters in Tennessee and South Carolina, and purged 8,000 voters as a result of the match — without notifying the voters, and in violation of specific provisions of federal law.

Interoperability technology grants many opportunities to improve election administration and the maintenance of voter registration databases. Yet because of the speed and scale at which information can be shared, interoperability in many ways poses a greater threat to the right to vote than traditional methods of record coordination. State and local officials should strive to use existing computer and electronic technology in a way that enhances the experiences of voters and minimizes disenfranchising errors during the voter registration processes.

VI. CONCLUSION

Purges should be a carefully calibrated process designed to account for the complications that invariably arise. Without adequate safeguards, voters experience an unreasonable risk of disenfranchisement, and purges are vulnerable to manipulation. The above recommendations will go far in minimizing unnecessary risks to voters and should be implemented without delay.

ENDNOTES

1 U.S. Election Assistance Comm'n, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2005-2006: A Report to the 110th Congress,* 50 (2007), *available at* http://www.eac.gov/clearinghouse/docs/the-impact-of-the-national-voter-registration-act-on-federal-elections-2005-2006/attachment_download/file).

2 Ford Fessenden, *Florida List for Purges of Voters Proves Flawed*, N.Y. Times, July 10, 2004, at A02.

3 *Id.*

4 *Florida Scraps Flawed Felon Voting List*, Assoc. Press, USA Today, July 10, 2004.

5 John Ferro, *Deceased Residents on Statewide Voter List*, Poughkeepsie Journal, Oct. 29, 2006.

6 *Id.*

7 Adam C. Smith, *No Telling if Voter Rolls are Ready for 2004,* St. Petersburg Times, Dec. 21, 2003.

8 Gregory Palast, *The Wrong Way To Fix the Vote*, Wash. Post, June 10, 2001, at B1.

9 *Id.*

10 Wash. Rev. Code Ann. § 29A.08.620 (2008).

11 *See United States v. McElveen*, 180 F. Supp. 10, 11-14 (E.D. La. 1960) (ruling that the removals were in violation of the Fifteenth Amendment and that the voters taken off the registration rolls were illegally removed) *Id.* at 14.

12 Marsha Shuler, *Registrar Drops More than 21,000 from Voters Rolls*, The Advocate, Aug. 17, 2007, at A10.

13 *Id.*

14 Joe Gyan Jr., *Study: N.O. Population Older, Less Poor, City Remains Majority Minority*, The Advocate, Sept. 13, 2007, at A1 (reporting that New Orleans' black population dropped from 67% before Hurricane Katrina to 58% a year later).

15 Press Release, Secretary of State Jay Dardenne, Voters Registered in Multiple States Should Notify Registrar of Voters to Avoid Being Cancelled (June 15, 2007); Letter from Robert Poche to Voter entitled "Notice: Letter of Intent to Challenge" (June 15, 2007). Both documents were attached as exhibits to the Complaint filed in *Segue v. Louisiana*, No. 07-5221, 2007 U.S. Dist. LEXIS 74428 (E.D. La. Oct. 3, 2007) and are available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/exhibit_000.pdf.

16 Although, it was not too long ago in which a political operative involved in a voter caging effort noted, "I would guess that this program will eliminate at least 60-80,000 folks from the rolls. . . . If it's a close race, which I'm assuming it is, this could really keep the black vote down considerably." *See* Martin Tolchin, G.O.P. Memo Tells of Black Vote Cut, N.Y. Times, Oct. 25, 1986, at 7.

17 North Dakota is the only state that does not require voter registration. Eight other states — Idaho, Maine, Minnesota, Montana, New Hampshire, Wisconsin and Wyoming — have Election Day registration, which allows voters to register and vote on Election Day. *See* Iowa Code Ann. § 48A.7A (2008); Idaho Code Ann. § 34-408A (2008); Me. Rev. Stat. Ann. tit. 21-A, § 122.4 (2008); Minn. R. 8200.5100 (2007); Mont. Admin. R. 44.3.2015(1)(a) (2008); N.H. Rev. Stat. Ann. § 654:7-a (2008); Wis. Stat. Ann. § 6.55 (2007); Wyo. Stat. Ann. § 22-3-104(f) (2008).

18 42 U.S.C. § 1973gg-6(b)(1) (2008).

19 *See* 42 U.S.C. § 1973gg-6(d)(1)-(2) (2008).

20 42 U.S.C. § 15483(a)(2)(A)(i) (2008).

21 42 U.S.C. § 15483(a)(4) (2008).

22 Lawrence Norden *et. al*, Better Ballots 10 (Brennan Center for Justice ed., 2008), *available at* http://www.brennancenter.org/page/-/Democracy/Better%20Ballots.pdf (calculated average of number of voting-age persons who moved between 2000 and 2006, as reported by the U.S. Census Bureau).

23 U.S. Federal Election Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 1997-1998: A Report to the 106th Congress* 11 (July 1999), *available at* http://www.eac.gov/files/clearinghouse/reports_surveys/The%20Impact%of%20the%20NVRA%20of%201993%20on%20Admin%20of%20Elections%20for%2097-98/pdf.

24 U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2005-2006: A Report to the 110th Congress* 10 (June 2007), *available at* http://www.eac.gov/program-areas/research-resources-and-reports/copy_of_docs/the-impact-of-the-national-voter-registration-act-on-federal-elections-2005-2006/attachment_download/file.

25 Confirmed by interviews with local boards of election officials in Missouri and Washington conducted in 2007. All interviews are on file at the Brennan Center.

26 Confirmed by interviews with local boards of election officials in Kentucky, Missouri, and Washington conducted in 2007. All interviews are on file at the Brennan Center.

27 While the NVRA does not specifically raise the issue of duplicates, and instead clarifies that the limitations imposed by the NVRA are not interpretable as precluding "correction of registration records," 42 U.S.C. § 1973gg-6(c)(2)(B)(ii), (2008) HAVA instructs states to conduct list maintenance "in a manner that ensures that . . . duplicate names are eliminated from the computerized list," 42 U.S.C. § 15483(a)(2)(B)(iii). Some states, like Washington, Wash. Rev. Code Ann. § 29A.08.610 (2008) and Florida, Fla. Stat. Ann. §§ 98.075, 98.073 (2008), have codified some guidance for addressing the problem of duplicate registrations, albeit with varying degrees of helpfulness. Election statutes in other states, for example, Ohio, and Wisconsin, however, remain silent on the topic of duplicate registration. A number of local officials indicated that duplicates are generally the result of change of addresses, and as such, their processes for responding to duplicates are essentially the purge practices with respect to change of addresses.

28 The NVRA makes clear that no person is to be removed from the statewide registration list solely on account of failure to vote. 42 U.S.C. § 1973gg-6(b)(2). The NVRA does permit, however, the removal of a name from the registration list if a person does not respond to an address confirmation notice AND does not vote in the subsequent two federal elections. *Id*.

29 A problem occurred in Travis County, Texas whereby individuals believed to have moved because of returned mail were purged despite having voted in at least one of the two subsequent federal elections after the mail was returned. Any update or information needed by election officials should have occurred while the person was at the polls voting. But for reasons not entirely clear, these voters were purged despite their having voted. *See* Marty Toohey, *Glen Maxey TV Ads Allege Voter Disenfranchisement*, Austin American-Statesman, Feb. 3, 2008.

30 Arkansas, Florida, Maine and Oklahoma all permit the mailing of address confirmation notices in such circumstances. *See* Ark. Const. amend. 51, § 7 (2008); Fla. Stat. § 98.065(4) (2008); Me. Rev. Stat. Ann. tit. 21-A, § 162-A (2008); Okla. Stat. ANN. tit. 26, § 4-120.2 (2008).

31 Wash. Rev. Code § 29A.08.620 (2008).

32 The section that follows is taken in large part from: Justin Levitt & Andrew Allison, Brennan Ctr. for Justice, A Guide to Voter Caging 3-6 (2007), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_49608.pdf.

33 MCLS § 168.499(3) (2008).

34 *See* Association for Computing Machinery, Statewide Databases of Registered Voters 21 (Feb. 2006), *available at* http://www.acm.org/usacm/PDF/VRD_report.pdf.

35 Nancy Cole & Ellie Lee, Abt Assocs., Inc., Feasibility and Accuracy of Record Linkage to Estimate Multiple Program Participation, Vol. III, Results of Record Linkage 20 (Econ. Research Serv., Elec. Publ'ns from the Food Assistance & Nutrition Research Program, 2004).

36 *See* Nat'l Coalition for the Homeless, State-by-State Chart of Homeless People's Voting Rights (2008), *available at* http://www.nationalhomeless.org/getinvolved/projects/vote/chart.pdf; *cf.* Sec'y of State of Mo., Mandate for Reform: Election Turmoil in St. Louis, November 7, 2000 27 (2001), *available at* http://bond.senate.gov/mandate.pdf.

37 Jon Margolis, *GOP Sued Over Voters Tactic*, Chi. Tribune, Oct. 8, 1986, at C9. There are many other examples of voters who are temporarily away from their permanent residences. A college student may legally reside at her parents' home address and register to vote there while she is away at school, even though she does not receive mail at her parents' house. A voter may be on an extended vacation and have canceled or transferred mail service, or may have done the same for a temporary job transfer. *See* Steve Suo, *Some Inactive Voters Aren't*, The Oregonian, Aug. 27, 2000, at C1. A citizen living overseas, but registered to vote at her last domestic residence, might also receive no mail at her registered address; for example, mail sent to one such voter in New Hampshire was returned undelivered despite the fact that the voter was eligible to vote. Memorandum from Bud Fitch, Deputy Att'y Gen., N.H. Dep't of Justice, to Robert Boyce, Chairman, N.H. Sen. Internal Aff. Comm., et al. 3 (Apr. 6, 2006), *available at* http://doj.nh.gov/publications/nreleases/pdf/040606wrongful_voting.pdf. Similarly, a member of the armed forces, stationed away from his voting residence, could illegitimately get caught up in the purge process.

38 *More Mail Undelivered*, Ft. Lauderdale Sun-Sentinel, Apr. 16, 1994, at 3A.

39 Felicity Barringer, *Cities Seek Bush's Backing to Avert Census 'Crisis,'* N.Y. Times, Apr. 18, 1990, at A17. *See also*, *e.g.*, James Barron, *Sign of Approval, But Will It Bring Mail?*, N.Y. Times, Aug. 2, 2004, at B1. Also, in larger group residential homes, the voting residence may quite properly list the street address, but mail will not be delivered without a unit number.

40 *See* Dayne L. Cunningham, *Who Are To Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 Yale L. & Pol'y Rev. 370, 393-94 & nn.134-35 (1991) (considering studies of the distribution of census surveys and tax forms shows that ineffective mail delivery is more common in poor and minority communities). *Cf.* Chandler Davidson et al., Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression—or Both? 14 (2004), http://www.votelaw.com/blog/blogdocs/GOP_Ballot_Security_Programs.pdf.

41 Larry Sandler & Greg Borowski, *Parties Spar Over City Voter Lists*, Milwaukee J. Sentinel, Oct. 27, 2006, at B1; *see also* Tom Kertscher, *Landlord Sees a Lot in a Name*, Milwaukee J. Sentinel, June 8, 2004 at B5. The same apparently happened to some challenged voters in Louisiana in 1986. *See* Thomas M. Burton, *Democrats Sue Over GOP Bid to Mail Down the Vote*, Chi. Tribune, Sept. 25, 1986, at C1.

42 John Riley, *Complications, Challenges Abound*, Newsday, Oct. 31, 2004, at A37; *see also*, Sandy Theis, *Fraud-busters Busted*, Cleveland Plain Dealer, Oct. 31, 2004, at H1.

43 42 U.S.C. § 1973gg-6(e)(1)(2008). Similarly, a voter who has moved within the same registrar's jurisdiction and congressional district may return to vote at her former polling place without re-registering. 42 U.S.C. § 1973gg-6(e)(2)(A)(i)(2008). Especially in urban areas where there is high mobility within a particular neighborhood, undeliverable mail may simply reflect the recent move of a voter who remains fully eligible to vote.

44 42 U.S.C. § 1973gg-6(2)(A).

45 *See also* Kandiss Crone, *Hosemann: Voter Purge Violated Federal Law*, WLBT News 3, Mar. 5, 2008, http://www.wlbt.com/Global/story.asp?s=7973229; Joint Press Release, Advancement Project, MERA, Michigan NAACP and ACORN, Voting Groups Caution Michigan Election Officials on Eve of National Secretary of State Conference (July 24, 2008), *available at* http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=159x12543.

46 42 U.S.C. § 1973gg-6(c)(2008).

47 For example, one Kentucky election official reported that the information compiled by the Postal Service does not match the criteria his county uses to identify voters.

48 Indiana and Florida are examples of states that use jury notices and information from other government agencies to identify people who may have moved. Ind. Code Ann. § 3-7-38.2-2(c)(2), (4) (2008) (permitting the use of information from a court regarding jury notices and from the bureau of motor vehicles regarding the surrender of a person's Indiana license for the operation of a motor vehicle to another jurisdiction); Fla. Stat. Ann. § 98.065(4) (2008) (permitting the use of information regarding jury notices signed by a voter and returned to the courts and information from the Department of Highway Safety and Motor Vehicles indicating that the legal address of a registered voter might have changed).

49 Unless another authority is otherwise cited, information in this report about Kentucky was derived from interviews with county clerks conducted in April 2007 and an interview with an official from the State Board of Election conducted in September 2008. All interviews are on file at the Brennan Center.

50 Nev. Rev. Stat. Ann. § 293.535 (2008).

51 Mich. Comp. Laws Serv. § 168.509dd(3)(a) (2008) (permitting house-to-house canvasses as part of a program to remove the names of unqualified voters from the voter registration list); Wis. Stat. Ann. § 6.40(2)(b) (2007) (permitting municipal clerks to conduct door-to-door canvasses to identify voters who no longer reside at their registered addresses); 25 Pa. Cons. Stat. Ann. § 1901(b)(2) (2008) (allowing election officials to visit registered addresses to supplement other list maintenance activities); Nev. Rev. Stat. Ann. § 293.530(2) (2008) (permitting county clerks to conduct house-to-house canvasses to investigate registrations). New York's statute provides a variation whereby New York Board of Elections employees are required to conduct a canvass upon written request of any Board of Elections member. N.Y. Elec. Law § 5-710 (Consol. 2008).

52 This was reported to us by an interviewee from Nevada in March 2007. Unless another authority is cited, information in this report about Nevada was derived from interviews conducted with county clerks and registrars in March, 2007.

53 Mo. Rev. Stat. § 115.191 (2008).

54 Wash. Rev. Code Ann. § 29A.08.620(1) (2008) (designating voters as inactive if certain pieces of mail are returned to sender as undeliverable); N.Y. Elec. Law § 5-712(5) (Consol. 2008) (designating all voters who are sent an address confirmation notice as inactive); Or. Rev. Stat. § 247.563(3) (2007) (designating the registration of voters sent address confirmation notices as inactive until further determination).

55 Fla. Stat. Ann. § 98.065 (4)(c) (2008) (designating as inactive all voters who have been sent an address confirmation notice and who have not returned the postage prepaid, preaddressed return form

within 30 days or for which an address confirmation notice has been returned as undeliverable.); Mo. Rev. Stat. § 115.193(5) (2008) (designating any voter as an inactive voter if . . . the voter fails to respond to the notice . . . within thirty days after the election authority sends such notice).

56 *See* 950 Mass. Code Regs. 54.04(6) (2008).

57 *Cf.* Or. Rev. Stat. § 254.470(2)(a) (2007) (directing that ballots be sent "to each *active* elector") (emphasis added).

58 42 U.S.C. § 1973gg-6(a)(4)(A) (2008).

59 42 U.S.C. § 15483(a)(2)(A)(ii)(II) (2008).

60 *See e.g.* Fla. Stat. Ann. § 98.093(2)(a) (2008) (requiring the Department of Health to furnish monthly to the department a list containing the name, address, date of birth, date of death, social security number, race, and sex of each deceased person 17 years of age or older.); Ind. Code Ann. § 3-7-45-2.1(b)(1) (2008) (stating that the state department of health provides election officials with information on decedents); N.Y. Elec. Law § 5-708(1) (Consol. 2008) (stating that state health department must deliver to the state board of elections monthly records of the names of all persons of voting age for whom death certificates were issued); Ohio Rev. Code Ann. § 3503.18 (2008) (directing the chief health officer and director of health to file list of decedents with board of elections); 4 Pa. Code § 183.6(d)(1) (2008) (stating that death notices are received from the department of health for the purposes of removing records).

61 *See e.g.*, Mo. Rev. Stat. § 115.195(1) (2008) (state or local registrar of vital statistics provides election officials with a list of decedents); Wash. Rev. Code Ann. § 29A.08.510(1) (2008) (state department of vital statistics provides the list to the Secretary of State).

62 Nevada statute does not specify what state agency provides the names of Nevada residents who have died. In fact, the statute permits local officials to cancel the registration of a voter only if the county clerk "has personal knowledge of the death of the person registered, or if an authenticated certificate of the death of any elector is filed in his office." Nev. Rev. Stat. § 293.540(1) (2008).

63 Wash. Rev. Code Ann. § 29A.08.510(2) (2008) (permitting county auditors to use newspaper obituary articles to cancel a voter's registration). Election officials in three Washington counties confirmed the use of this practice.

64 Wash. Rev. Code Ann. § 29A.08.510(3) (2008).

65 Kentucky permits the removal of a deceased registrant based on the notification of "other reliable sources." Ky. Rev. Stat. Ann. § 116.113(1) (2008). Similarly, Florida law suggests that the state permits removal of deceased registrants based on information from "other sources." Fla. Stat. Ann. § 98.093(3) (2008).

66 For more information on the voting rights of persons with criminal convictions, please visit the Brennan Center's website at: http://www.brennancenter.org/content/section/category/voting_after_criminal_conviction/. *See also* Erika Wood, Restoring the Right to Vote (Brennan Center for Justice ed., 2008) *available at* http://www.brennancenter.org/content/resource/restoring_the_right_to_vote/ for a discussion of why voting rights should be restored to persons with criminal convictions upon release from prison.

67 The thirteen states are Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah.

68 Those eight states are Alabama, Arizona, Delaware, Florida, Mississippi, Nevada, Tennessee, and Wyoming.

69 The five states are California, Colorado, Connecticut, New York, and South Dakota.

70 These twenty states are Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Washington, West Virginia, Wisconsin. (Nebraska imposes a two-year waiting period after completion of sentence.)

71 42 U.S.C. § 1973gg-6(a)(3)(b) (2008).

72 42 U.S.C. § 15483(a)(2)(A)(ii)(I) (2008).

73 *See* Ky. Rev. Stat. Ann. § 116.113 (2008).

74 *See* Nev. Rev. Stat. Ann. § 293.540(3) (2008) (vesting county clerks with the task of canceling the voter registrations of persons convicted of felonies).

75 Unless otherwise cited, information pertaining to Washington was derived from interviews with four county board of elections officials as well as with staff from the Secretary of State's office conducted during February-April, 2007. All interviews are on file with the Brennan Center.

76 Fla. Stat. Ann. § 98.075(5) (2008).

77 For example, the Missouri statute specifically requires the county's election authority, which is generally the county auditor, to *remove* registrants reported dead or adjudged incapacitated, but with respect to those with criminal convictions, the statute only directs that the election authority to determine the voting qualifications of those reported convicted or pardoned. Mo. Rev. Stat. § 115.199 (2008). Some local officials in Missouri indicated that it is not their practice to purge persons convicted of disenfranchising crimes from the rolls. Instead, the registrant is placed in a particular status indicating current ineligibility. When the registrant's sentence has been completed, the person's eligibility is reactivated upon a showing of the appropriate documentation. *See* interviews with officials from city boards of election in Missouri conducted in 2007. Also, Pennsylvania, which automatically restores voting rights upon release from prison, does not indicate in its election statutes that individuals are removed because of incarceration — instead, the statute specifies that incarcerated persons are not eligible for absentee ballots. *See* 25 Pa. Cons. Stat. Ann. § 2602(w) (2008).

78 42 U.S.C. §§ 1973gg-6(g)(1), (g)(5) (2008).

79 Fla. Stat. Ann. § 98.093(2)(c)-(f) (2008) (stating that the department of law enforcement, board of executive clemency, and department of corrections, in addition to the U.S. Attorney, will provide information about people with criminal convictions to election officials); Ind. Code Ann. §§ 3-7-46-4.1, 3-7-46-6 (2008) (stating that department of correction and county sheriffs will provide information about people with criminal convictions).

80 For example, in Nevada, the state statute does not specify where the purging officials are to receive information on who has been convicted of disqualifying convictions. Nev. Rev. Stat. Ann. § 293.540(3) (2008). Note, however that Nevada statutes do require the Director of the Department of Corrections to submit monthly to each county clerk in this state a list which provides the name of each persons released from prison by expiration of term of imprisonment during the previous month or who was discharged from parole during the previous month. *See* Nev. Rev. Stat. Ann. § 209.134 (2008).

81 In Nevada, local election officials reported varying practices with respect to the removal of individuals with criminal convictions. One local official reported a practice of obtaining information on disqualifying convictions from jury questionnaires. Another stated that he receives such information from the state Department of Corrections. A third reported finding information on disqualifying convictions by reviewing courts' judgments.

82 42 U.S.C. § 15483(a)(2)(B)(iii) (2008).

83 Nevada officials offered examples of this assumption.

84 Interview with a county election official in Michigan conducted in September 2008 is on file at the Brennan Center. A county official in Washington similarly reported that the newer registration record is removed when faced with a known duplicate.

85 *E.g.*, Missouri's statewide voter registration database creates a duplicate list on a monthly basis, and local election officials are responsible for working through the list. (Confirmed by a Missouri county board of election official.) Washington's statewide voter registration list produces a potential duplicate report that local election officials check daily. (Confirmed by a Washington county board of elections official.) The Ohio Secretary of State's office creates a daily duplicate list that is accessed by county elections officials. (Confirmed by a Ohio county board of elections officials.)

86 Mo. Ann. Stat. § 115.165(4) (2008).

87 Unless another authority is otherwise cited, information in this report about Missouri was derived from interviews with staff from the Secretary of State's office, officials from city boards of election, a county election official, and voter protection advocates conducted in 2007. All interviews are on file with the Brennan Center.

88 *See*, *e.g.*, Nev. Rev. Stat. Ann. § 293.540(9) (2008) (authorizing removal of duplicate records, but providing no criteria for identifying matching records). *But see* Wash. Rev. Code Ann. § 29A.08.610 (2008) (providing required criteria of identical date of birth, similar names and compared signatures; the only statute of those surveyed to provide such detailed criteria).

89 Unless another otherwise cited, information in this report about Ohio was derived from interviews with county board of elections officials conducted during February-March, 2007. All interviews are on file with the Brennan Center.

90 A Missouri board of election official attested to the consequences of these periods of heightened activity.

91 This has been the case, for instance, in Missouri and Ohio according to local elections officials there.

92 *See* 42 U.S.C. § 1973gg-6(b)(2) (2008).

93 42 U.S.C. § 1973gg-6(d)(2) (2008).

94 *See*, *e.g.*, U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2005-2006* 97 (2007), *available at* http://www.eac.gov/clearinghouse/docs/the-impact-of-the-national-voter-registration-act-on-federal-elections-2005-2006/attachment_download/file.

95 This scenario reportedly occurred in both 2000 and 2006 in precincts in St. Louis, Missouri according to voter protection advocates working in the state.

96 Interviews with voter protection advocates in Missouri conducted in 2007.

97 Ohio Rev. Code Ann. § 3503.21(B) (2008).

98 Ohio boards of election officials confirmed this practice.

99 Wis. Stat. Ann. § 6.50(1)-(3) (2007). Note that Wisconsin, a state with Election Day registration, is exempt from the NVRA.

100 While the NVRA and some state laws contemplate the removal of persons from voter registration rolls for the reason of mental incapacitation in accordance with state law, our interviews with local officials indicate that very few registrants are purged from voter rolls on this basis.

101 42 U.S.C. § 1973gg-6(a)(3)(b) (2008).

102 25 Pa. Cons. Stat. § 1302(a)(4) (2008).

103 Ind. Code Ann. § 12-26-2-8(1)(F) (2008).

104 *See Id.* § 3-5-5-17 (2008) (specifying that individuals who are committed to institutions for the mentally ill do not gain residency in the precinct of the institution).

105 Or. Const. art. 2, § 3 (2007).

106 Mo. Rev. Stat. §§ 115.199, 115.133 (2) (2008); N.Y. ELEC. LAW § 5-400(1)(c) (Consol. 2008) (cancelling a voter's registration, including the registration of a voter in inactive status, if he has been adjudicated incompetent).

107 Nev. Rev. Stat. Ann. § 293.540(2) (2008).

108 Fla. Stat. Ann. § 98.075(4) (2008). Washington and Ohio similarly indicate that the declaration of mental incapacitation must be specifically with respect to voting to warrant removal from the rolls. Wash. Rev. Code Ann.§ 29A.08.515 (2008) (cancelling the voter registration for one who has been appointed a guardian and adjudicated incompetent with respect to voting); Ohio Rev. Code Ann. § 3503.21(4) (2008) (cancelling a registration based upon adjudication of incompetency of the registered elector for the purpose of voting).

109 Confirmed by interviews with local boards of election officials in Kentucky, Nevada, and Ohio conducted in 2007. All interviews are on file at the Brennan Center.

110 Ky. Rev. Stat. §116.113(2) (2008) (circuit court). In Florida, Missouri, Nevada, and Ohio, election officials also receive lists of individuals ineligible to vote due to adjudication of mental incapacity from state courts. Fla. Stat. Ann. § 98.093(2)(b) (2008) (circuit court); Mo. Rev. Stat. § 115.195(3) (2008) (probate division of the circuit court); Nev. Rev. Stat. Ann. § 293.542 (2008) (district court); Ohio Rev. Stat. § 3503.18 (2008) (probate judge).

111 Washington's statutes strongly suggest as much. The text of the statute indicates that the computerized statewide voter registration list must be coordinated with other agency databases within the state, including the office of the administrator for the courts. *See* Wash. Rev. Code Ann. § 29A.08.651(5) (2008). However, the statute is not more explicit than the county auditor will receive official notice that a court has imposed a guardianship for an incapacitated person and has determined that the person is incompetent for the purpose of rationally exercising the right to vote. *See Id.* § 29A.08.515.

112 *See* N.Y. Elec. Law §§ 5-614(5), 5-106(6) (Consol. 2008). Note that lists can be also be supplied by any court with jurisdiction over such matters. *Id.* § 5-708(3).

113 This was confirmed by county boards of election officials in Washington; Press Release, Wash. Sec'y of State, State's First Consolidated List of Registered Voters Combats Voter Fraud (Feb. 20, 2007), *available at* http://www.secstate.wa.gov/office/osos_news.aspx?i=FenKyLcm7pnRO0P0kcR9kA%3d%3d.

114 John Ferro, *Deceased Residents on Statewide Voter List*, Poughkeepsie Journal, Oct. 29, 2006.

115 *Id.*

116 *Id.*

117 Office of the Inspector General, Social Security Administration, *Audit Report* 2 (Sept. 2006), *available at* http://www.ssa.gov/oig/ADOBEPDF/A-06-06-26020.pdf.

118 An Ohio election official reported that entire households were removed when an address appeared in the national change of address list on account of one individual associated with that address moving. A

Kentucky county official similarly reported that the National Change of Address database is unreliable and that the postal service is incapable of differentiating which person in a household has moved.

119 An Ohio county official reported that the list he received with the names of deceased residents sometimes contained records without dates of birth, making it hard to use to guide the removal of deceased registrants. A Nevada official opined that the lists from the Department of Vital Statistics were of an adequate quality, but sometimes hard to use because they provided a decedent's age instead of providing the decedent's date of birth.

120 *Id*.

121 *Id*.

122 Greg Palast, *Ex-Con Game: How Florida's "Felon" Voter-Purge Was Itself Felonious*, Harper's Mag., Mar. 1, 2002, *available at* http://www.ejfi.org/voting/voting-95.htm.

123 Kandiss Crone, *Hosemann: Voter Purge Violated Federal Law*, WLBT News 3, Mar. 5, 2008, http://www.wlbt.com/Global/story.asp?s=7973229; Lucy Weber, *Purged Voting Rolls to be Fixed*, Clarion Ledger, Mar. 6, 2008, at 1A; Lucy Weber, *Thousands of Names Removed From Madison County Voter Rolls*, Clarion Ledger, Mar. 5 2008, at 1; Lucy Weber, *Resignation, Investigation Urged in Madison Co. After Vote-Roll Purge*, Clarion Ledger, Mar. 7, 2007, at 1A; Cheryl Lasseter, *Landrum Asking for Voter-Roll Investigation*, WLBT News 3, Mar. 6, 2008, http://www.wlbt.com/Global/story.asp?s=7977823.

124 Andrew Ujifusa, *Change to Voter Rolls Called Into Question*, Madison County Herald J., Mar. 13, 2008, at 1; Kandiss Crone, *Hosemann: Voter Purge Violated Federal Law*, WLBT News 3, Mar. 5, 2008, http://www.wlbt.com/Global/story.asp?s=7973229; Lucy Weber, *Purged Voting Rolls to be Fixed*, Clarion Ledger, Mar. 6, 2008, at 1A; Lucy Weber, *Thousands of Names Removed From Madison County Voter Rolls*, Clarion Ledger, Mar. 5 2008, at 1; Lucy Weber, *Resignation, Investigation Urged in Madison Co. After Vote-Roll Purge*, Clarion Ledger, Mar. 7, 2007, at 1A; Cheryl Lasseter, *Landrum Asking for Voter-Roll Investigation*, WLBT News 3, Mar. 6, 2008, http://www.wlbt.com/Global/story.asp?s=7977823

125 *See generally* Wash. Rev. Code Ann. § 29A.08.605 (2008); Ky. Rev. Stat. Ann. § 116.112(6) (2008).

126 *See* Fla. Stat. Ann. § 98.075(3) (2008); N.Y. Elec. Law § 5-402(2) (Consol. 2008). Interestingly, Florida's decision to exempt persons presumed deceased from notice requirements is in contrast to its statute squarely requiring that a registrant be given notice and the opportunity to respond to the charge of ineligibility on account of mental incapacitation prior to removal from the registration rolls, Fla. Stat. Ann. § 98.075(4), (7) (2008), protections for which Florida is unique among the states studied in expressly providing.

127 Ind. Code Ann. § 3-7-46-9 (2008) (requiring notification after removal from the registration list, specifically sent to the last known address of all people disenfranchised on account of imprisonment not later than the day following the day that the registration has been canceled from the rolls).

128 Fla. Stat. Ann. § 98.075(7) (2008); Wash. Rev. Code Ann. § 29A.08.520(1) (2008) (requiring that if a registrant is found on a list of felons, the canceling authority must send a notice of the proposed cancellation and an explanation of the requirements for restoring the right to vote once all terms of sentencing have been completed; if the person fails to respond within thirty days, the registration is to be canceled).

129 Ind. Code Ann. § 3-7-46-9 (2008).

130 *See*, *e.g.*, Alan Riquelmy, *Political Confusion: Removal Letter Confuses Law-Abiding Voters*, Columbus Ledger-Enquirer, April 3, 2008, at A01.

131 *See e.g.*, American Civil Liberties Union, *Purged!: How Flawed and Inconsistent Voting Systems Could Deprive Millions of Americans of the Right to Vote* 8 (2004), *available at* http://tinyurl.com/4vdl75.

132 Election officials in Washington state reported only using a few fields to identify voters for removal.

133 Michael P. McDonald & Justin Levitt, *Seeing Double Voting* 11 (July 1, 2007) (unpublished manuscript, submitted to the 2007 Conference on Empirical Legal Studies), *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID997888_code698321.pdf?abstractid=997888&mirid=1.

134 Brennan Center for Justice at NYU School of Law & Michael McDonald, Preliminary Analysis of the September 15, 2005 Report Submitted to the New Jersey Attorney General by the New Jersey Republican Party 6-7 (2005), *available at* http://www.brennancenter.org/page/-/d/download_file_35010.pdf.

135 Fla. Stat. Ann. § 98.093(2)(a) (2008).

136 Gregory Palast, *The Wrong Way To Fix the Vote*, Wash. Post, June 10, 2001, at B1.

137 *Id.*

138 U.S. Commission on Civil Rights, Voting Irregularities in Florida During the 2000 Presidential Election, Ch. 5 (June 2001) available at http://www.usccr.gov/pubs/vote2000/report/ch5.htm. African Americans constituted over 65% of the voters on the county's exclusion list. Id. Ch. 1, available at http://www.usccr.gov/pubs/vote2000/report/ch1.htm.

139 N.Y. COMP. CODES R. & REGS. tit. 9 § 6217.8 (2008).

140 Missouri's statutes are an example of a wide grant of authority given to election officials regarding the sources and methods permitted to verify a person's address, reading "[t]he election authority may investigate the residence or other qualifications of any voter at any time it deems necessary. The election authority shall investigate material affecting any voter's qualifications brought to its attention from any source, and such investigations shall be conducted in the manner it directs." Mo. Ann. Stat. § 115.191 (2008).

141 Wash. Rev. Code Ann. § 29A.08.620 (2008).

142 Ohio Rev. Code Ann. § 3503.18 (2008).

143 Fla. Stat. Ann. § 98.075(4) (2008). Wash. Rev. Code Ann. § 29A.08.515 (2008) ("Upon receiving official notice that a court has imposed a guardianship for an incapacitated person and has determined that the person is incompetent for the purpose of rationally exercising the right to vote, under chapter 11.88 RCW, if the incapacitated person is a registered voter in the county, the county auditor shall cancel the incapacitated person's voter registration."); Ohio Rev. Code Ann. § 3503.21(4) (2007) ("The adjudication of incompetency of the registered elector for the purpose of voting as provided in section 5122.301 [5122.30.1] of the [Ohio] Revised Code.").

144 Confirmed by county boards of election officials in Ohio.

145 42 U.S.C. § 1973gg *et. seq.*

146 42 U.S.C. § 1973gg-4(a)(1) (2006); *see Charles H. Wesley Educ. Found. v. Cox,* 408 F.3d 1349, 1355 (11th Cir. 2005) (holding that NVRA prohibited state from rejecting voter registration applications postmarked by correct date under state law); *see also Assoc. of Cmty. Organizations for Reform Now v. Edgar*, 56 F.3d 791, 792-3, 795 (7th Cir. 1995) (overriding state law to the extent that it conflicts with the NVRA).

147 42 U.S.C. § 1973gg-4(b) (2006).

148 42 U.S.C. § 1973gg-3(a)(1) (2006).

149 42 U.S.C. § 1973gg-5(a)(2)(A) (2006).

150 42 U.S.C. § 15483(a)(2)(A)(ii)(I) (2006).

151 42 U.S.C. § 15483(a)(2)(A)(ii)(II) (2006).

152 42 U.S.C. § 1973gg-6(a)(1) (2006) (enumeration omitted) (emphasis added).

153 42 U.S.C. § 1973gg-6(a)(4)(A)-(B) (2006).

154 42 U.S.C. § 1973gg-6(a)(3)(A)-(B) (2006).

155 42 U.S.C. § 15483(a)(4)(A) & (B)(2)(iii) (2006).

156 *Id.* § 15483(a)(2)(B)(i) & (ii).

157 The New York Board of Elections must notify voters by mail and wait 14 days prior to cancellation for any reason except request to be removed (which includes registering in another state), death, or inactivity for two general elections. N.Y. Election Law § 5-402(2) (McKinney 2007).

158 25 Pa. Cons. Stat. Ann. § 1203(h) (2006).

159 *Id.* § 1505(c) (2006).

160 Lucy Weber, *Purged Voter Rolls To Be Fixed*, Clarion-Ledger, Mar. 6, 2008 at 1A.

161 Lucy Weber, *Resignation, Investigation Urged in Madison Co. After Voter-Roll Purge*, madison county journal, Mar.7, 2008 at 1; Andrew Ujifusa, *Change to Voter Rolls Called Into Question*, Madison County Journal, Mar. 13, 2008 at 1.

162 *See* Letter from C. Delbert Hosemann, Mississippi Secretary of State (Mar. 31, 2008) (on file with the Brennan Center). A later conversation with staff from the Secretary of State's office clarified this feature.

163 Wash. Rev. Code § 29A.08.770 (2008). Other states grant the public varying degrees of access to records of voters purged. *See*, *e.g.*, Fla. Stat. Ann. § 98.045(2)-(3) (2007); Mich. Comp. Laws § 168.514 (2007); Wis. Stat. §§ 6.33, 6.36 (2007).

164 Of the twelve states covered in this report, for example, the following ten provide readily accessible voter portal functions on their websites: Indiana, Kentucky, Michigan, Missouri, Nevada, New York, Ohio, Pennsylvania, Washington, and Wisconsin.

165 *See, e.g.*, People for the American Way et al., *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections*, at 8 (December 2004); Demos, *Continuing Failures in "Fail-Safe" Voting*, at 4 (Dec. 2005), *available at* http://www.demos-usa.org/pubs/December%20PB%20Report%20Draft%2015.pdf.

166 *See* Robert M. Goldman, Reconstruction And Black Suffrage: Losing The Vote In Reese And Cruikshank 13 (Univ. Press of Kansas 2001).

167 Chandler Davidson and Bernard Grofman eds., Quiet Revolution In The South 104 (Princeton Univ. Press 1994).

168 *Id.* at 105.

169 *Id.*

170 Steve Barber *et al.*, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 Harv. C.R.-C.L. L. Rev. 483, 486-87 (1988).

171 *United States v. McElveen*, 180 F.Supp. 10, 11-13 (E.D. La. 1960) (finding that purges for errors in voter registration affected 85% of black voters and only 0.07% of white voters, despite similar errors among half of white registrations).

172 *Beare v. Smith*, 321 F. Supp. 1100, 1103 (S.D. Tex. 1971), *aff'd sub nom. Beare v. Briscoe*, 498 F.2d 244, 248 (5th Cir. 1974).

173 *See*, *e.g.*, *Toney v. White*, 488 F.2d 310, 312 (5th Cir. 1973) (voiding the results of an election on the ground that a voter purge conducted 30 days prior to the election had a racially discriminatory effect, notwithstanding a lack of evidence suggesting the purge was racially motivated).

174 Paul Kiel, TPMMuckraker.com, Cage Match: Did Griffin Try to Disenfranchise African American Voters in 2004?, http://www.tpmmuckraker.com/archives/003523.php (June 26, 2007).

175 Justin Levitt & Andrew Allison, A Guide to Voter Caging 3-6 (Brennan Center for Justice ed., 2007) *available at* http://www.brennancenter.org/dynamic/subpages/download_file_49608.pdf.

176 *Id.*

177 Chandler Davidson et al., Center for Voting Rights and Protection, Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression or Both? 17 (2004) *available at* http://www.votelaw.com/blog/blogdocs/GOP_Ballot_Security_Programs.pdf.

178 Martin Tolchin, *G.O.P. Memo Tells of Black Vote Cut*, N.Y. Times, Oct. 25, 1986, at 7.

179 *See 2004 Presidential Election: Hearing Before the Committee on House Judiciary Subcommittee on Constitution, Civil Rights, and Civil Liberties*, (2008) (statement of J. Gerald Hebert, Executive Director & Director of Litigation, The Campaign Legal Center); Chandler Davidson *et al.*, *Election Law: Vote Caging as a Republican Ballot Security Technique*, 34 Wm. Mitchell L. Rev. 533, 561 (2008); Teresa James, *Caging Democracy: A 50-Year History of Partisan Challenges to Minority Voters* 16-20, 22 (Project Vote ed., Sept. 2007), *available at* http://projectvote.org/index.php?id=355.

180 At the time of publication, most, but not all, states have implemented centralized statewide voter registration databases. For example, California's VoteCal system is not expected to be fully deployed until 2010. *See* http://www.sos.ca.gov/elections/bidders_library/q_a_rfp_regional_co.pdf.

181 42 U.S.C. § 15483(1)(A)(iv); *see also* §§ 15483(2)(A)(ii)(I)-(II), (5)(B)(i)-(ii).

182 *See* Memorandum of Understanding Between the States of Missouri, Iowa, Nebraska and Kansas for the Improvement of Election Administration, December 2005, *available at* http://www.sos.mo.gov/elections/2005-12-11_MO-KS-IA-NE-MemorandumOfUnderstanding.pdf; *see also* Sean Greene, *Midwest Voter Registration Data-Sharing Project Moves Forward: Kansas Leads Groups of States Crosschecking Information; Advocates Voice Concern*, electionline.org, Dec. 13, 2007, http://www.pewcenteronthestates.org/report_detail.aspx?id=33612; M. Mindy Moretti, *Western States Contemplate Voter Information Sharing: Interstate Cooperation Has Promise and Pitfalls, Officials Decide*, electionline.org, Feb. 2, 2006, http://www.pewcenteronthestates.org/report_detail.aspx?id=33814.

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Voter Suppression Incidents 2008

A list of voter suppression incidents from the 2008 election.



Wendy R. Weiser Margaret Chen

PUBLISHED: November 3, 2008

With less than two weeks before Election Day, substantial barriers remain that will continue making it difficult – and occasionally impossible – for some eligible voters to vote, and to be certain that their votes will count. The past year has seen a spike in challenges facing voters – from no match-no vote policies, to partisan challenges to voter eligibility, voter purges, misguided voter matching policies, and voter intimidation. Additionally, other systemic problems, including problems with ballots and voting technology, continue to plague the elections process. In light of this developing story, the Brennan Center has compiled a comprehensive synopsis of current voter suppression incidents around the country. The stories are categorized by theme, and this document will be continually updated in the days prior to the election. Download PDF **here**.

The Brennan Center will be updating and re-posting this document regularly until Election Day.

No Match, No Vote

*Some states will not register voters or will **purge** them from the voter rolls if election officials cannot match their voter registration information against information in other government databases. The problem is the computer match processes states use are inherently unreliable. Between 15% and 30% of all match attempts fail because of typos, other administrative errors, and minor discrepancies between database records, such as a maiden name in one record and a married name in another or a hyphen in one record and not another. No match, no vote policies can block hundreds of thousands of voters through no fault of their own. More information on no match, no vote policies is available **here**. This year, no match, no vote efforts across the country, if successful, could have a significant impact on the election, affecting tens of thousands of new voters.*

Ohio. On September 26, 2008, the Ohio Republican Party **asked** a federal court to issue an emergency ruling requiring the state to generate a list of more than 200,000 new voters whose information did not match other state records, presumably so those voters could be purged from the rolls right before the election, forced to vote provisional ballots, or challenged at the polls. They asked the court before the absentee ballots cast by new registrants were opened and counted. A federal court granted the temporary restraining order, and after a three-judge panel on the U.S. Court of Appeals for the Sixth Circuit stayed that order, the full appeals court, sitting *en banc*, **reinstated** it. On emergency review, the U.S. Supreme Court vacated the TRO on October 17, 2008, preventing chaos in the election in Ohio and **protecting** hundreds of thousands of Ohio citizens from disenfranchisement-by-typo. That same day, one of the plaintiffs in the federal lawsuit **filed** a virtually identical suit with the Ohio Supreme Court, seeking essentially the same relief they lost in the federal courts. He also asked the court to prevent the counting of absentee ballots cast by unmatched voters unless or until the mismatches are cleared. The plaintiff **voluntarily dismissed** the lawsuit on October 21, 2008, and on October 22, 2008, the Secretary of State issued **two directives**, which ensure that (1) no voter may be challenged at the polls solely on the basis of a mis-match; and (2) no absentee ballot may be rejected (or not counted) solely on the basis of a mis-match. Despite these directives and the failure of the efforts in court, Representative John Boehner of Ohio **wrote** to President Bush asking him to pressure the Department of Justice to weigh in on the issue. President Bush **forwarded** the request to Attorney General Mukasey, but press reports have **indicated** that the Attorney General will refrain from getting involved.

Florida. On September 8, 2008, the Florida Secretary of State instructed election officials to reject voter registration applications that do not pass an error-prone computer match process. In the first three weeks of the policy, 15% of registrations were initially bounced because of failed computer matches; election officials were able to catch and correct obvious typos in about ¾ of these cases, but to date, **more than 12,000** voters are being kept off the rolls. An analysis of the list reveals that African Americans make up 39% of blocked voters, and Latinos make up 34% of blocked voters whose race is known. There will likely be not enough time for election officials to correct the errors in the tens of thousands of registrations that came in right, but there is some reason for optimism. On October 21, 2008, legal counsel for the Florida Association of Supervisors of Elections **issued a legal opinion** stating that election officials could implement an Election Day solution in which un-matched voters could resolve matching problems at the polls, ensuring that their votes will count. The Brennan Center and other groups have **called upon** the supervisors to adopt a polling-place solution. Even Secretary of State Kurt Browning, who initially took the position that county election officials were prohibited from developing an Election Day fix, has acknowledged in recent public statements that they are authorized to do so. More information about "no match, no vote" in Florida, including the pending lawsuit filed by the Brennan Center in 2007, is available **here**.

Wisconsin. After the Wisconsin Government Accountability Board (the state's election board) rejected a proposal in July to retroactively implement a no "match, no vote" policy for all voters who registered since 2006, on September 10, the Attorney General **sued** the board seeking to force such a policy right before the election. The Board conducted an audit of its voter rolls and found a 22% match failure rate, including for **4 of the 6** members of the board. On October 23, 2008, the court **dismissed** the Attorney General's lawsuit, after concluding he lacked standing to bring the case; HAVA did not require the Government Accountability Board to link voters' eligibility to a successful match; and that doing so would violate the materiality provision of the Voting Rights Act. More information can be found **here**.

Other states. No match, no vote policies are in place also in Louisiana, Iowa, and South Dakota pursuant to policies adopted well before the 2008 elections. Tens of thousands of voters have been denied registration in

those states. Evidence suggests that Colorado also may be treating some voter registrations that fail to match as incomplete.

Voter Purges

*Election officials across the country routinely **purge** millions of names from the voter rolls. Although purging is necessary to keep the voter rolls up to date and accurate, a recent Brennan Center **study** demonstrates that the processes states use for purging are prone to error and vulnerable to manipulation. Purges are typically done without notice to affected voters or the public, and without any public scrutiny whatsoever. As a result, thousands of registered voters show up at the polls each election year only to find that they are not on the rolls and cannot cast a ballot that will be counted. This year, unreliable and possibly illegal purges could keep thousands of votes from being counted.*

Possible Illegal Purges Reported by New York Times. According to a recent **front-page article** by the New York Times, several states have been illegally purging their voter rolls this year, including Colorado, Georgia, Indiana, Louisiana, Michigan, Ohio, and Nevada. (The Brennan Center has not independently verified all these purges.)

Michigan. Michigan illegally purged its voter rolls this year within 90 days of an election and using non-forwardable mailings to recently registered voters, according to a recent federal court **ruling**. The court **ordered** the restoration of about 1,400 voters who had been removed because their voter identification cards were returned as undelivered.

Colorado. In response to a New York Times **article**, the Colorado Secretary of State **admitted** that at least 2,454 voters were purged illegally within 90 days of a federal election. Several thousand additional records were purged as potential "duplicates" within 90 days of the election, also in violation of federal law. Another several thousand were illegally purged based on non-forwardable mailings to newly registered voters. Voting rights groups **filed** a lawsuit in federal court on October 24, 2008, alleging that the Colorado Secretary of State's recent purges violate federal law. On October 30, 2008, the parties entered into a court-approved agreement ensuring that the ballots of any wrongfully purged voter will be counted. The following day, after the Secretary of State told reporters that he was continuing to purge the voter rolls, Judge Kane **ordered** him to cease all efforts to remove names from the voter rolls before the election.

Georgia naturalized citizens. Georgia recently began using an unreliable matching process to purge the voter rolls of alleged non-citizens. The process they use misses naturalized citizens because it only checks the citizenship documents used to obtain driver's licenses, no matter how long ago, and those records are not updated when legal residents become naturalized. According to a State attorney, 4,538 voters, 3,821 of them newly registered, have been **flagged** as non-citizens. A federal court refused to block this practice in a recent **lawsuit** filed by the Mexican American Legal Defense and Education Fund and the Lawyers' Committee for Civil Rights Under Law. The United States has also **intervened** and said that the practice should have been pre-cleared. On October 27, 2008, a three-judge panel **ruled** that the State **must allow** voters whose names were flagged because of an attempted purge of alleged non-citizens to cast a ballot on Election Day.

Muscogee County, Georgia. Earlier this year, a county election administrator in Muscogee County, Georgia **purged** 700 people who were supposedly ineligible because of criminal convictions. The purge was highly

inaccurate and included people who never received even a parking ticket.

Madison County, Mississippi. About a week before the Mississippi primary, an election administrator in Madison County, Mississippi improperly purged **approximately 10,000** voters, reportedly from her home computer. Reportedly, the purge was detected when it was discovered that a local candidate was removed from the voter rolls. By all accounts, the Secretary of State's staff successfully reinstated the erroneously purged voters in time for the primary.

Voter Challenges

*Political operatives sometimes **challenge** voters' eligibility either before Election Day or at the polls, based on names culled from unreliable **caging lists** or other lists they develop. While the rules and procedures for voter challenges vary from state to state, these challenges can lead to voter intimidation, long lines at the polls, and disenfranchisement of eligible voters. **Historically and in recent years**, caging and challenge operations have targeted minority communities, students, and homeless citizens. Widespread challenges are expected across the country on Election Day. Recent incidents include:*

Montana. The Republican Party of Montana **challenged** the registrations of over 6,000 voters in 7 counties based on change of address information. Many were **service members** and students eligible to vote in Montana but who had their mail forwarded to where they were serving or going to school. Under Montana's challenge rules, these voters would have had to answer the challenges to the satisfaction of election officials before being allowed to vote. After a public outcry-including **criticism** by the Republican Lieutenant Governor-the party **abandoned** the challenges. For more information, click **here**. In a resulting lawsuit brought by the Montana Democratic Party, on October 10, 2008, a federal judge **found** that the challenges were frivolous and that it would violate federal law for state election officials to deny anyone the ability to vote based on these challenges.

No home, no vote. The Chairman of the Republican Party of Macomb County, Michigan reportedly told an **online publication** that the party planned to mount challenges to voters whose names appeared on foreclosure lists. After public criticism and instructions by the Michigan Director of Elections that these challenges are insufficient under Michigan law, the Chairman **denied** that there were such plans (and even sued the publication for libel). There have been fears and **reports** that similar challenges will be mounted in other states, particularly battleground states such as Ohio where **more than 5%** of homes are currently in the foreclosure process. Similar challenges are possible across the country on Election Day unless election officials take immediate steps to ensure that those in danger of losing their homes do not also lose their vote. On October 20, 2008, the Democratic and Republican parties **agreed** that appearance on a foreclosure list is not a reasonable basis to challenge a voter and that no voter will be challenged on that basis. On October 24, 2008, an Indiana state court **ruled** that the appearance of a name on a foreclosure or eviction list is not a sufficient basis for a challenge or for a ballot not to be counted.

Ohio mailer. Ohio election officials sent a non-forwardable mailer to voters on the rolls, and over 600,000 were returned as undeliverable. The list was provided to the political parties, and there were fears that this list would be the basis of challenges. After concerns were raised, the Ohio Secretary of State issued a **directive** explaining that returned mail alone is not a sufficient basis to cancel a voter's registration or to sustain a pre-Election Day

challenge. More information on why returned mail is an unreliable indicator of residence or eligibility can be found **here**.

Ashland County, Ohio. A man **filed** challenges to the registrations of 21 young people currently incarcerated at a juvenile correctional facility arguing that they should have registered using their original home addresses, not the address of the correctional facility. There is no allegation and no reason to question that these individuals are not eligible to vote in Ohio. The Board of Elections **upheld** the challenges.

Lake County, Illinois. On October 28, 2008, the Illinois Republican Party **filed** a lawsuit seeking to segregate the ballots cast by Lake County voters who registered to vote through a particular voter registration group and to treat those ballots as provisional ballots instead of regular ballots. If the lawsuit succeeds, hundreds, perhaps thousands, of voters could face hurdles to having their votes counted.

Indiana. The Indiana Secretary of State **stated** that voters whose voter registration acknowledgment cards were returned to election officials as undeliverable may be challenged on Election Day. Thousands of voters could be affected. As noted above and **here**, there are a number of reasons why undeliverable mail is an unreliable indicator of voter eligibility.

Technical Barriers to Voter Registration and Voting

*In the Jim Crow era, technical barriers to voter registration and voting were common. In the 1960s, Congress **tried to put an end** to these types of barriers, prohibiting officials from denying the right to vote based on any immaterial "error or omission" on voting-related paperwork or records. In this election cycle, there has been a resurgence of technical barriers based on the failure to check unnecessary boxes on forms.*

Colorado registrations. Colorado is **treating** applications missing **unnecessary checkmarks** to indicate that the registrant lacks a driver's license as incomplete. **Thousands** of recent registrations are already affected, and there will likely be **more** as counties process new forms. Two counties, Larimer and Jefferson, processed applications with missing checkmarks, prompting the Colorado Secretary of State to ask the state Attorney General for an informal opinion on the issue. The **opinion**, dated October 24, 2008, **supports** the Secretary of State's position, stating that applications with missing checkmarks are incomplete and should not be processed. On October 29, 2008, the Denver Elections Division **announced** that it would allow the remaining Denver voters whose applications are missing checkmarks to fix the problem and vote a regular ballot at the polls on Election Day.

Florida registrations. Florida still rejects voter registration forms submitted **without checkmarks** in check boxes that are duplicative of other information on the forms. Thousands of votes were lost in prior federal elections because of this practice.

Ohio absentee ballots. In September 2008, the Ohio Secretary of State announced the election officials must reject absentee ballot requests made by voters whose eligibility was not in serious doubt because of their failure to check an unnecessary check box. A federal court **ordered** the Secretary of State to process those ballot requests.

Nevada voter registration corrections. On October 20, 2008, the Nevada Republican Party **wrote** to the Secretary of State asking him to stop county officials from allowing voters who registered before the voter registration deadline but whose applications were incomplete to vote after correcting their applications. Nevada law allows voters to correct their applications within fifteen days after receiving notice from the state. On October 22, 2008, the Nevada Secretary of State **rejected** this request and **ruled** that applications corrected after the voter registration deadline but within 15 days after the county clerk sends notice are timely.

Voter errors on absentee ballots. In Cuyahoga County, Ohio, **2,700 absentee ballots** have been rejected and may not be counted because voters did not sign or seal their ballots properly. In Palm Beach County, Florida, election officials **rejected** hundreds of absentee ballots because voters did not sign their ballot envelopes or signed in the wrong place.

New Mexico hand-tallied ballots. The New Mexico Secretary of State, on the advice of the Attorney General, planned to reject hand-tallied paper ballots that voters failed to mark properly. The state **Supreme Court ruled** that votes must be counted if election judges unanimously agree on the voter's intent in marking the ballot. Improper marks on ballots may be an **indication** of poor ballot design and instructions.

Student Voting Barriers

*Students who attend school away from their homes often fulfill residency and other requirements to be able to register and vote in the communities in which they attend school, but there are obstacles and efforts to discourage them to register and vote. Across the country, there have been reports of widespread misinformation about **student voting rights**, misleading and intimidating statements, and registration and residency barriers unique to students. The fact that students are readily identifiable at their college community polling stations also makes them easy targets for partisan challengers or voter intimidation efforts. The **result** is a disproportionate number of student voters being challenged at the polls, discouraged from voting, or prematurely told to cast a provisional ballot.*

Dorm room addresses. Local registrars in several states, including in **Virginia**, were denying registration to students who provided dorm room addresses even though those are valid registration addresses.

Misleading and intimidating information. A registrar in Montgomery County, Virginia, affecting Virginia Tech University, issued a memo giving incorrect and intimidating information to students about the consequences of registering to vote, including possible loss of financial aid and tax dependence status. Similarly, a county clerk in Colorado Springs, Colorado **incorrectly told** students at Colorado College that they could not vote at school if their parents claimed them as dependents on their federal tax returns. The websites of the **Virginia** and Indiana Secretary of States still contain misleading information that **could dissuade** eligible student voters.

Prairie View, Texas. On October 10, 2008, the registrar of Waller County, Texas entered into a **consent decree** with the U.S. Department of Justice to stop imposing unfair and illegal barriers to student voting.

Restrictive residency rules. Several states make it very difficult for students to establish residency for voting purposes. In Idaho and Tennessee, for example, students cannot establish voting residency unless they have

affirmative plans to remain in the state after graduation. Virginia and Indiana also make it difficult for students to establish residency.

Restrictive absentee voting. Michigan and Tennessee require all first-time voters who registered by mail to vote in person; they cannot vote absentee. This makes it nearly impossible for college students (a great percentage of whom are young, first-time voters) to vote in their hometowns. 66 of the Michigan's 83 county clerks have partnered to verify students' identities where they attend school to allow these first-time voters to cast absentee ballots instead of crossing the state to vote in their hometowns. A state legislator has asked the Attorney General to block the practice.

Intimidation aimed at students. A **flier** recently disseminated on the campus of Drexel University in Philadelphia warned that undercover officers would be present at the polls, looking for voters with outstanding warrants or parking violations.

Voter Registration Access

*According to the **U.S. Census Bureau**, 30% of Americans were not registered to vote in 2006. A range of barriers to voter registration access could affect registration rates in certain communities. Several states have enacted laws that impose **unnecessary burdens** on organized efforts to register voters, which target communities that have the greatest barriers to registration. Threats of criminal penalties and crippling civil fines for failure to comply with requirements have forced community groups to **stop or substantially cut down** on registering voters. A policy brief on restrictions to voter registration drives can be found **here**.*

Veterans. The Department of Veterans' Affairs **denied** voter registration access to residents and patients of its facilities, refusing to allow election officials or nonpartisan groups to offer voter registration services, and failing to provide such services itself. A last-minute **change** in policy offered only a **partial fix** to this problem. More information is available **here**.

Voter registration drive restrictions. Several states, including **New Mexico** and **Florida**, have enacted restrictive laws that interfere with the ability of groups to do voter registration drives. The Florida law was tied up in **litigation** filed by the Brennan Center and so has not been in effect for this election season. A court **refused** to block the New Mexico law, and a number of community groups, especially those that work with volunteers, have not been able to register new voters.

Noncompliance with federal voter registration law. A number of states have not been providing voter registration services at social service agencies, as **required** by the federal Motor Voter law. Recent lawsuits filed by **Project Vote** and **Demos** seek to enforce states' compliance with the implementation of the NVRA. On October 28, 2008, a federal appeals court **ruled** that Ohio state officials violated federal law by failing to provide voter registration services at public assistance offices.

Voter Intimidation and Deceptive Practices C059

*In recent elections, robo-phone calls and misleading flyers, often targeting minority and low-income communities, have spread false information regarding elections and voting qualifications. For examples of such documents, click **here**.*

New Mexico. Two families reported visits by a private investigator inquiring about relatives that the state Republican Party **alleges** voted fraudulently in the June primary. The **private investigator** requested identification for relatives in question as proof of their eligibility, potentially **in violation** of federal law. The Bernalillo County Clerk confirmed both individuals' legitimate registrations. On October 27, 2008, the Mexican American Legal Defense and Education Fund filed a **lawsuit** seeking an injunction to stop further intimidation.

Virginia. A phony State Board of Elections flier was **posted** around the Hampton Roads area, stating that Republicans vote on Tuesday, November 4th, and Democrats vote on Wednesday, November 5th. The Virginia State Police **determined** that flier was an "office joke" and not intended to deceive voters.

Philadelphia fliers. Deceptive fliers about the consequences of voting were **distributed** in a predominantly African American neighborhood in Philadelphia.

Greene County, Ohio. A law enforcement officer in Greene County, Ohio sought the names of 300 voters who registered and voted at the beginning of Ohio's early voting period in a town **made up** largely of students. The effort, which was later withdrawn, was criticized as an effort to intimidate student voters and deter others from voting.

Hamilton County, Ohio. In a move that could intimidate and deter voters, Hamilton County Prosecutor Joe Deters recently requested, via subpoena, personal information for 40% of the voters who registered and immediately cast a ballot during the weeklong period in which Ohio allows same-day registration and voting.

California. Dozens of voters **reported** that a firm hired by the California Republican Party tricked them into registering with the GOP when **signing a petition** they believed to toughen penalties against child molesters. The Los Angeles County Registrar-Recorder is reviewing 9,000 registration affidavits submitted by the firm to determine if any of the party affiliation changes were involuntary.

Travis County, Texas. County officials are looking for a man who may be **providing** misleading information regarding the state's straight-party voting option, telling voters that in addition to a straight-party vote, they must also select the name of the candidate they would like vote for president. In actuality, doing this would de-select the mark automatically made by the straight-party vote.

Madison County, North Carolina. Residents have complained of misleading calls that provide inaccurate information regarding absentee ballot deadlines. The State Board of Elections is investigating.

Kern County, California. A radio host **announced** that Republicans are being urged to vote on November 4 and Democrats on November 5. Although the host has said he meant it as a joke, the county elections chief has asked the radio station to stop providing misleading information.

Baltimore City, Maryland. In Maryland, people with felony convictions can register to vote when they have completed the terms of their sentence, including probation and parole. The Baltimore city elections board **sent**

letters to 422 people with felony convictions who registered to vote asking them to verify that they had completed their sentence, but the letter did not provide any information on what proof these voters must provide, who to contact, or a deadline for response. Although the state Attorney General has said it would attempt to contact these individuals, it is unclear if they will be added to the rolls for the November election.

Texas. In early October, an email widely circulated **falsely warned** voters that a straight-party vote would not register a vote for president. In fact, if a voter using Texas ballots separately records a vote for president after voting straight-party, the vote for president will be deselected and will not count.

Florida. The St. Petersburg Times reported that the Republican National Committee **sent** non-forwardable mailings to older Democratic voters, falsely stating that recipients are registered as Republicans and suggested that undeliverable mailings could be used to compile challenge lists. The RNC claimed that the controversial mailing was just a fundraising piece.

Wisconsin. The Wisconsin Attorney General announced that he will deploy more than 50 assistant attorney generals and state agents on Election Day to polling places around the state to guard against voter fraud. This is **expected** to intimidate voters.

Minnesota. The non-profit group Minnesota Majority, pretending to be from the Secretary of State's office, **made calls** to voters questioning their registrations in a supposed attempt to uncover voting irregularities.

Poor Ballot Design

*Poorly designed ballots-remember the butterfly ballot?-can lead to the loss of thousands of votes. A recent Brennan Center **report** demonstrates that ballot design problems are still widespread and have caused thousands of lost votes in recent elections. Already, there have been problems relating to November's election:*

Mississippi Senate race. Mississippi election officials were sharply criticized, in a New York Times **editorial** and in a **letter** sent by the Brennan Center, for their decision to place the Wicker-Musgrove U.S. Senate race at the bottom of Mississippi's ballot. This "ballot trick" placed the Senate race far below the other federal races listed in the 2008 election, creating a confusing layout for the ballot, one that could potentially mislead and disenfranchise hundreds of thousands of Mississippi voters in that race, particularly low-income and minority voters. More information can be found **here**.

Twelve Ohio counties. Twelve Ohio counties released sample paper ballots that split the presidential contest over two columns for this November's election. As the Brennan Center's **study** found, this particular layout often confuses voters and causes them to double-vote, an action which ultimately results in an uncounted ballot. On September 17, 2008, the Brennan Center sent a **letter** to the board of elections in all Ohio counties, urging them to reconsider their ballot layout and place the presidential contest in a single column on the paper ballot. The Ohio Secretary of State forwarded the letter to all county board of elections as well. Further details can be found **here**.

North Carolina straight-party voting. As a result of a **ballot design problem** in North Carolina, votes for president may have already been lost in the early voting period. The ballot is **designed**, counter-intuitively, so that a straight-party vote *does not* include a vote for president; voters must separately mark their presidential contest choice. In **previous** federal elections, between 2.5% and 3.2% of ballots in North Carolina did not include a vote for president. A Brennan Center **study** found that if more than 1% of voters fail to cast a vote for president, it is typically an indication of a ballot design flaw or other problem.

Election Day Preparedness

*Inadequate staffing, poor resource allocation, ballot shortages, and machine malfunctions can to lead to long lines at the polls, or worse, discourage people from voting at all. These problems have already been reported from across the country in early voting. The Brennan Center, Common Cause, and Verified Voting recently released a 50-state **study** of states' contingency plans and vote counting procedures, finding that many states need improvement. A **report** released by the Advancement Project finds that several battleground states are not prepared for unprecedented voter turnout in November, and that resources are inequitably allocated. This document is not tracking the incidence of these problems.*

* * *

For more information, or if you have incidents you would like to bring to our attention,

please email **brennancenter@nyu.edu**.

BRENNAN CENTER FOR JUSTICE

Shelby County: One Year Later

By Tomas Lopez

One year ago, the U.S. Supreme Court gutted the most powerful provision in the Voting Rights Act of 1965 — a law widely regarded as the most effective piece of civil rights legislation in American history. Specifically, in *Shelby County v. Holder*, the Court invalidated the formula that determined which states and localities, because of a history of discrimination, had to seek federal "preclearance," or approval, from either the Department of Justice or a federal court before implementing any changes to their voting laws and procedures. For nearly 50 years, preclearance (set forth in Section 5 of the Voting Rights Act) assured that voting changes were transparent, vetted, and fair to all voters.

Before the *Shelby County* decision, the Brennan Center examined the potential consequences of a ruling against the preclearance process in *If Section 5 Falls: New Voting Implications*. In just the year since *Shelby County*, most of the feared consequences have come to pass — including attempts to: revive voting changes that were blocked as discriminatory, move forward with voting changes previously deterred, and implement new discriminatory voting restrictions.

The decision has had three major impacts:

- Section 5 no longer blocks or deters discriminatory voting changes, as it did for decades and right up until the Court's decision.
- Challenging discriminatory laws and practices is now more difficult, expensive, and time-consuming.
- The public now lacks critical information about new voting laws that Section 5 once mandated be disclosed prior to implementation.

This paper summarizes some of the stories behind these facts, and tracks the voting changes that have been implemented in the states and other jurisdictions formerly covered by Section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia in their entirety; and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota.

I. The Loss of Section 5 Has Removed an Effective Deterrent Against Harmful Election Law Changes

Section 5 was a uniquely effective law that blocked or otherwise prevented scores of discriminatory voting changes from being implemented. While the *Shelby County* decision argued that the law was effectively obsolete, Section 5 remained a powerful tool through June 2013. In the 15 years before its operation was halted, Section 5 blocked 86 laws through its administrative process[1] and several more through litigation.[2] At least 13 of these laws were blocked in just the final 18 months before the *Shelby* Court's ruling.[3]

Its effectiveness went beyond the laws it blocked. In one recent six-year period, 262 voting changes were withdrawn or altered after the Department of Justice (DOJ) asked the jurisdictions for more information to assess whether they were discriminatory under the Voting Rights Act (VRA).[4] That figure does not include the hundreds of voting changes that were deterred because jurisdictions knew they would not withstand VRA review.

A. Statewide Voting Changes That Were or Would Likely Have Been Blocked

Immediately after *Shelby County*, one state moved forward with implementing laws that were previously blocked, two states moved forward with passed laws that may have been blocked, and one state passed new restrictive legislation:

- **Texas:** On the very day of the *Shelby County* ruling, Texas officials announced[5] they would implement the state's strict photo ID law, which was previously blocked by Section 5 because of its racial impact. "[U]ndisputed… evidence demonstrates that racial minorities in Texas are disproportionately likely to live in poverty, and [that the ID law] will weigh more heavily on the poor," a federal court held.[6] Early assessments indicated that between 600,000 and 800,000 registered voters in Texas lacked photo ID, over 300,000 of them Latino.[7] Voter advocates, including the Brennan Center and the DOJ, have now sued the state of Texas over this law under Section 2 of the Voting Rights Act, among other claims.

- **North Carolina:** Also shortly after the *Shelby County* decision, the state legislature passed a law that imposed a strict photo ID requirement, significantly cut back on early voting, and reduced the window for voter registration. This law is widely regarded as the most restrictive piece of voting legislation passed in recent years. Lawmakers waited until after preclearance was gone to move forward with the legislation, with a State Senate committee chair telling the press after the Court's decision, "now we can go with the full bill," rather than a pared down, less restrictive version.[8] Prior to *Shelby County*, the legislation, which is currently being challenged under Section 2 of the VRA, among other claims, would have required preclearance review before going into effect. Data shows the law will disproportionately affect minorities. In North Carolina, the State Board of Elections identified more than 300,000 registered voters who lack a DMV-issued ID, the most common form of ID accepted under the state's strict law.[9] One-third of these voters are African American.[10] And 7 in 10 African Americans who cast ballots

in 2008 used the early voting period (23 percent of whom did so during the week that was cut by the law).[11]

- **Alabama:** After the *Shelby County* decision, the state moved ahead with its law requiring strict photo ID to vote. This law passed in 2011 and would have required preclearance. However, state officials never submitted the bill for preclearance[12] and did not announce plans for implementation until after the Supreme Court's ruling.[13] More than 30 percent of Alabama's voting-age citizens live more than 10 miles from the nearest state-ID issuing office.[14] According to a Brennan Center study, in 2012, 11 counties with substantial black populations had state driver's licenses offices that were open only once or twice per week.[15] Even those looking to register to vote in Alabama will experience challenges — legislators also passed a law requiring individuals to provide documentary proof of citizenship when registering to vote.[16] This measure is not currently in effect.

- **Mississippi:** Shortly following the Supreme Court's ruling, state officials moved to enforce its photo ID law, which the state submitted for preclearance but was never allowed to implement.[17] Nearly 35 percent of the state's voting-age population lives more than 10 miles from the nearest office that will issue ID and,[18] in 2012, 13 contiguous counties with sizable African-American populations lacked a single full-time driver's license office.[19]

These laws exist alongside other attempted or proposed statewide policy measures that can restrict the ability to vote through design and/or poor implementation:

- In 2013, Florida officials attempted to purge thousands of people from the state's voter's rolls because of suspicions they were non-citizens.[20] The state ultimately suspended these efforts.[21] When it tried the same thing in 2012, its purge list began with 180,000 suspected non-citizens on the voter rolls and was reduced to approximately 2,700.[22] That purge list contained a disproportionately high number of Latino surnames. While Latinos compose 13 percent of Florida's registered voters, an analysis found they made up 58 percent of that group of approximately 2,700.[23] From the 180,000 to fewer than 3,000, Florida eventually found fewer than 40 non-citizens suspected of voting illegally.[24]

- Also in 2013, Virginia officials sought to purge the names of tens of thousands of voters from the state's rolls. While a federal court allowed the purge to proceed,[25] the state's efforts were error-prone and taken unnecessarily close to that year's elections.[26] One month before the election, one county registrar found that of a list of 1,000 names he was told to purge, more than 170 were in error.[27]

- Arizona officials have proposed implementing separate voter registration systems for federal and state elections. The U.S. Supreme Court ruled last year that Arizona cannot ask for documentary proof of citizenship when voters sign up using the federal registration form.[28] State officials then devised a two-tiered system that would allow the state to require proof of citizenship documents for anyone registering to vote in a state election.[29] The Department of Justice has previously used Section 5 to block such dual registration systems.[30]

B. Local Voting Changes That Were or Would Likely Have Been Blocked

Section 5's loss will perhaps be felt most acutely at the local level. The great majority of voting law changes that were blocked as discriminatory under the Voting Rights Act were local: counties, municipalities, and other places that operate below the state level.[31] In the past year, the following changes and attempted changes have already taken place in jurisdictions previously covered in whole or in part by preclearance:

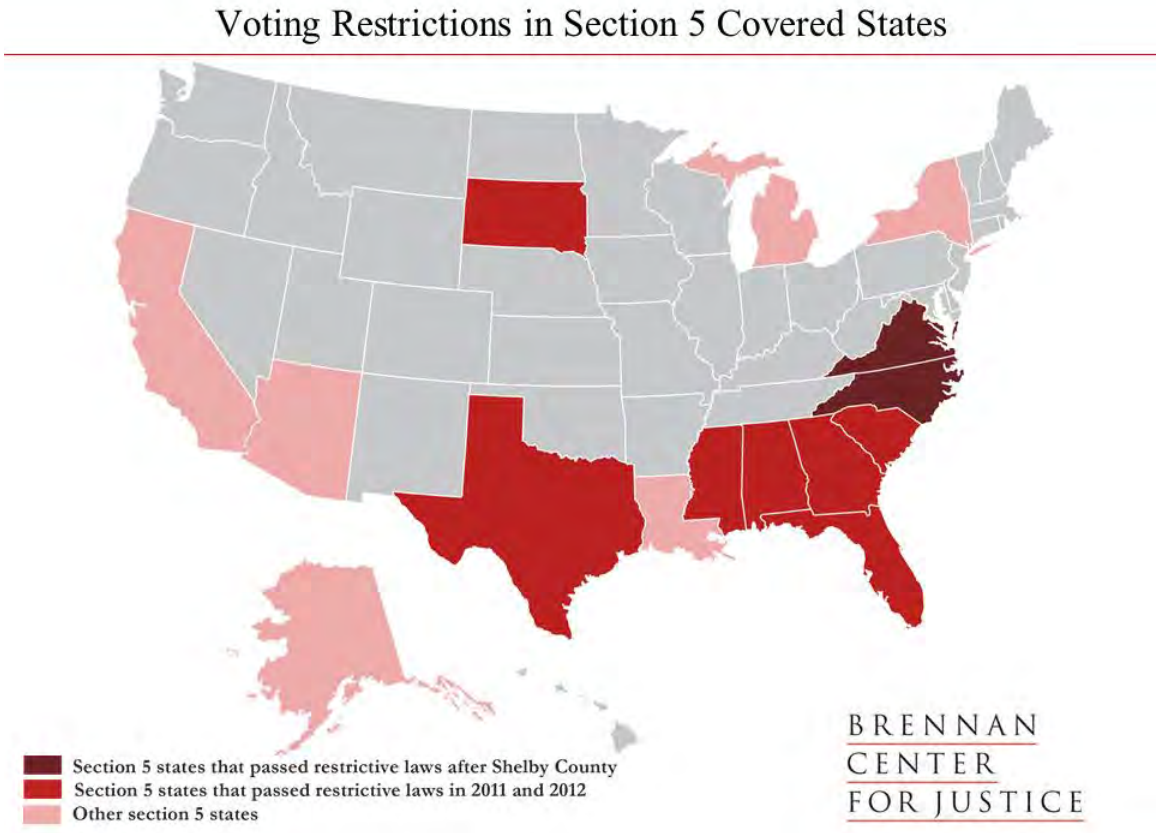
- In 2013, Galveston County, Texas, revived a redistricting plan for electing justices of the peace that was previously blocked by the DOJ because it discriminated against minority voters. The new map diminished minority voting strength by reducing the number districts where minority voters would have a fair and effective voice.[32]The Justice Department blocked a similar proposal under Section 5 only two years ago out of concern that "minority voters possess the ability to elect candidates of choice."[33] Now, without Section 5's protections, the districts are slated to be implemented in 2015,[34] but are being challenged in an ongoing case in federal court in the Southern District of Texas. The case went to trial this spring and is awaiting a decision.[35]

- The city of Pasadena, Texas, is redrawing its city council districts in a way that is expected to diminish the influence of its Latino voters in municipal government.[36] A functioning Section 5 would have blocked any new redistricting plan that would have made it harder for Latinos to elect their candidates of choice.

- After *Shelby County*, Georgia officials moved the dates of municipal elections in two counties with substantial African American populations from the traditional November date to another date. This may reduce black voter participation in local elections because the municipal elections are not occurring when citizens are voting in state and federal general elections. The DOJ blocked a similar proposal under Section 5 in 2012 because turnout is lower outside of November elections, and the drop in turnout is "significantly greater" for black voters than white voters.[37] After a federal court dismissed a challenge to the new date for one of the counties, municipal elections took place in May 2014.[38] Data as to minority participation is not yet available for that election, but overall turnout in that county was down nearly 20 percent (30.02 percent in 2014)[39] from the previous mayoral election (49.54 percent turnout in 2010).[40]

C. Restrictive Voting Legislation in States Previously Covered by Section 5

In 2013 and 2014, at least 10 of the 15 states that had been covered in whole or in part by Section 5 introduced new restrictive legislation that would make it harder for minority voters to cast a ballot. These have passed in two states: Virginia (stricter photo ID requirement and increased restrictions on third-party voter registration) and North Carolina (the above-discussed omnibus bill, which included the ID requirement, early voting cutbacks, and the elimination of same-day voter registration). Further, seven other formerly covered states also passed restrictive legislation in 2011 and 2012, prior to the *Shelby County* decision.



II. Challenging Discriminatory Voting Laws is Now More Difficult, Expensive, and Time Consuming

As described above, under Section 5, discriminatory voting laws could not go into effect unless they were vetted through the preclearance process, which consisted of either an effective administrative process or through litigation before a federal court. The jurisdiction had the choice of which preclearance route to take, and the vast majority of preclearance actions were done through the administrative process because it was cheaper, faster, and easier than preclearance litigation.

Consider Texas, where state lawmakers passed one of the country's most restrictive photo ID laws. That law did not and could not go into effect unless and until it was precleared by the DOJ or a three-judge federal court. In this instance, Texas first sought preclearance from the DOJ, but then eventually elected to litigate the matter before a federal court. Both the DOJ and the court denied preclearance, finding the restrictive photo ID requirement violated Section 5.

After the *Shelby County* decision, Texas put the previously blocked law into effect, and it remains so until voters can win a new lawsuit under another provision of the VRA, Section 2, making a similar showing, albeit under a different legal standard.[41] The photo ID law has been in place for local elections and the March 2014 primaries. The case is currently scheduled to go to trial before the 2014 election.

Challenging restrictive laws one by one under Section 2 or some other law is considerably more expensive than the administrative preclearance process these individual challenges now have to replace. The active Texas photo ID suit, which is a number of consolidated lawsuits, now lists more than 50 counsel of record on all sides.[42] In the months since that litigation began, the parties have produced more than 300 court filings, including motions, notices, and briefs, large and small. The consolidated North Carolina lawsuits include 40 counsel of record and have filed more than 120 documents.[43] The total cost of these lawsuits will be substantial. As a point of reference, three lawyers who participated in the Texas photo ID preclearance case in 2012 sought more than $350,000 in attorneys' fees to cover their expenses.[44] The expenses for the active Texas photo ID litigation can expect to run into the millions.

III. Without Section 5, Thousands of Voting Law Changes Lack Accountability

Section 5 used to cover more than 8,000 state and local jurisdictions. That is gone now, and it is a large loss. In 2012, the final full calendar year before the *Shelby County* decision, the Justice Department received 18,146 election law and procedure changes from Section 5 jurisdictions.[45] From 2009 to 2013, the DOJ received 58,692 such changes.[46]

One of the statute's most important functions was to impose transparency on these many thousands of election law changes. For example, the preclearance process included the possibility of input from the public, who could consult with the DOJ during its review or weigh in during any preclearance litigation before a court. Because covered jurisdictions had to provide notice to the DOJ whenever they made a change to their voting systems, there was also a centralized method to monitor those changes before they were implemented. The public benefited from that accountability. Without Section 5, thousands of changes to voting procedures may go unnoticed.

While advocates and community leaders remain vigilant and are working to build monitoring systems, Section 5's mandate to centralize information for thousands upon thousands of voting law changes will be very difficult to replicate. Public notice by election officials and constant awareness by community members may well keep the public informed to a certain extent, but no *ad hoc* method of learning about incidents will adequately replace a tool with considerable coverage.

IV. Conclusion

Section 5 protected voting rights by regulating, deterring, and blocking harmful voting law changes for nearly 50 years. The above information speaks to the fact that it remained active well after its enactment in 1965, and the continued existence of harmful, discriminatory voting laws rebuts the Supreme Court's claim that progress has made the statute obsolete.

For all the real progress Section 5 facilitated, the nation and its voters now lack a critical tool to protect those earned advances. Bad laws with lasting, harmful consequences now lack a review mechanism, the method of fighting these laws is now limited to costly and time-intensive litigation, and the public has lost the one centralized means to track the thousands of changes annually that affect Americans' right to vote.

The year since *Shelby County* tells only the beginning of a story, but even that beginning points to the tools and accountability that have been lost, and the necessity that our lawmakers recover them.

Endnotes

[1] This is the number of submissions of voting changes from the beginning of 1998 to which DOJ has interposed an objection. Some objections were later withdrawn or were superseded by a declaratory judgment action for court preclearance in the U.S. District Court for the District of Columbia. For state-by-state chronological listings of Section 5 objections, *see Section 5 Objection Letters*, U.S. Dept. of Justice, http://www.justice.gov/crt/records/vot/obj_letters/index.php (listing 86 objections since the beginning of 1998).
[2] *See, e.g.*, *Florida v. United States*, 885 F. Supp. 2d 299, 357 (D.D.C. 2012) (denying preclearance for reduction in early voting opportunities but granting preclearance for procedures for inter-county movers); *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012) (denying preclearance for Texas voter photo ID law); *Texas v. United States*, 887 F. Supp. 2d 133, 178 (D.D.C. 2012) (denying preclearance for Texas's redistricting plans).
[3] *Supra* notes 1 and 2. This is the number of objections interposed from the beginning of 2012 through the date of the *Shelby County* decision, combined with the preclearance litigation described in note 2.
[4] Myrna Pérez & Vishal Agraharkar, *If Section 5 Falls: New Voting Implications* 5 (2013) (*citing* Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, *in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power, 47, 57-58 (Ana Henderson ed., 2007), *available at* http://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf.
[5] Ed Pilkington, *Texas Rushes Ahead with Voter ID Law after Supreme Court Decision*, The Guardian (June 25, 2013), http://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision.
[6] *Texas v. Holder*, 888 F. Supp. 113, 127 (D.D.C. 2012), *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/340%20Opinion%20Denying%20States%20Request%20for%20a%20Declaratory%20Judgment.pdf.
[7] Letter from Thomas E. Perez, Assistant Att'y Gen., to Keith Ingraham, Director of Elections, Office of the Texas Secretary of State (Mar. 12, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/l_120312.pdf.
[8] Laura Leslie, *NC Voter ID Bill Moving Ahead With Supreme Court Ruling*, WRAL.com (June 25, 2013), http://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/.
[9] North Carolina State Board of Elections, *April 2013 SBOE-DMV ID Analysis* 9 (April 17, 2013), *available at* http://canons.sog.unc.edu/wp-content/uploads/2013/12/St-Bd-voter-ID-report.pdf.
[10] *Id.*
[11] Compl., *United States v. North Carolina*, No. 13-861 (M.D.N.C. Sept. 30, 2013), *available at* http://www.justice.gov/iso/opa/resources/646201393013723793555.pdf.
[12] Kim Chandler, *State Has Yet to Seek Preclearance of Photo Voter ID Law Approved in 2011*, AL.com (June 12, 2013), http://blog.al.com/wire/2013/06/photo_voter_id.html.
[13] Kim Chandler, *Alabama Photo Voter ID Law to be Used in 2014, State Officials Say*, AL.com (June 26, 2013), http://blog.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html.
[14] Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Photo Identification*, Brennan Center for Justice, at 7, *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf.
[15] *Id.*
[16] Ala. Code § 31-13-28.
[17] Letter from Delbert Hosemann, Mississippi Secretary of State, to T. Christian Herren, Jr., U.S. Dept. of Justice (Jan. 18, 2013), *available at* http://sos.ms.gov/links/voter_id/Cover%20letter.pdf. *See Voting Determination Letters for Mississippi*, U.S. Dept. of Justice, *available at* http://www.justice.gov/crt/records/vot/obj_letters/state_letters.php?state=ms (listing no objection letter as to Mississippi's ID law).
[18] Gaskins & Iyer, *supra* note 14, at 3 (Table 1).
[19] *Id*. at 8.
[20] *See* Steve Bousquet & Michael Van Sickler, *Governor to Launch New Purge of Florida Voter Rolls*, Miami Herald (Aug. 4, 2013), http://www.miamiherald.com/2013/08/04/3538862/governor-to-launch-new-purge-of.html; Amy Sherman, *Many Questions, Few Answers on State's Voter Purge Plan*, Miami Herald, (Oct. 9, 2013), http://www.miamiherald.com/2013/10/09/3680007/many-questions-few-answers-on.html.

[21] Steve Bousquet & Amy Sherman, *Florida Halts Purge of Noncitizens from Voter Rolls*, Tampa Bay Times, (Mar. 27, 2014), http://www.tampabay.com/news/politics/elections/florida-halts-purge-of-noncitizens-from-voter-rolls/2172206.
[22] Lizette Alvarez, *Ruling Revives Florida Review of Voting Rolls*, N.Y. Times, (Aug. 7, 2013), http://www.nytimes.com/2013/08/08/us/ruling-revives-florida-review-of-voting-rolls.html?_r=0.
[23] Marc Caputo, *Feds to Florida: Halt Non-Citizen Voter Purge*, Miami Herald, (May 31, 2012), http://www.miamiherald.com/2012/05/31/2826708/feds-demand-florida-cease-its.html.
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[25] Matt Zapotosky, *Virginia's Democratic Party loses challenge against purge of 38,000 voters from rolls*, Wash. Post (Oct. 18, 2013), http://www.washingtonpost.com/local/virginia-politics/federal-judge-rejects-democratic-challenge-to-virginia-voter-roll-purge/2013/10/18/26235068-3809-11e3-8a0e-4e2cf80831fc_story.html.
[26] *See* Jonathan Brater, *Virginia Offers Lessons for Voter List Maintenance*, Brennan Center for Justice (Nov. 25, 2013), http://www.brennancenter.org/analysis/virginia-offers-lessons-voter-list-maintenance *see also Virginia Removes 40K From Voter Rolls Over Democrats' Objections*, Associated Press (Oct. 17, 2013), http://www.timesdispatch.com/news/state-regional/va-removes-k-from-voter-rolls-over-democrats-objections/article_2d111de4-49de-523b-bd9c-5d93b7c0a00e.html.
[27] Jim Nolan, *Chesterfield registrar delays purge of voter rolls*, Richmond Times-Dispatch (Oct. 9, 2013), http://www.timesdispatch.com/news/local/chesterfield/chesterfield-registrar-delays-purge-of-voter-rolls/article_162e36b5-0be7-5dc8-af9f-48876a167b43.html.
[28] *Arizona v. Inter-Tribal Council of Arizona*, 133 S. Ct. 2247 (2013).
[29] Ariz. Op. Att'y Gen. No. I13-011 (Oct. 7, 2013); *see* Cindy Carcamo, *Arizona officials say rule may keep thousands from voting*, L.A. Times (Oct. 8, 2013), http://articles.latimes.com/2013/oct/08/nation/la-na-ff-arizona-voting-20131009.
[30] *See* Letter from Sandra M. Shelson, Special Assistant Att'y Gen., U.S. Dept. of Justice, to State of Mississippi (Sept. 22, 1997), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/MS/MS-2650.pdf (denying preclearance for a two-tier system, noting that "a similar requirement had led to pronounced discriminatory effects on black voters"). *See Young v. Fordice*, 520 U.S. 273, 275 (1997) (holding that Mississippi needed to seek preclearance for its proposed change to a two-tier system).
[31] *See Section 5 Objection Letters*, Dept. of Justice, *available at* http://www.justice.gov/crt/records/vot/obj_letters/index.php. Unfortunately, because of the loss of Section 5's notice requirement, it is difficult to learn of voting changes at the local level, which typically are not as high profile as the state-level changes. While some local voting changes have come to light, many others (like polling place closures, local election cancellations, and the like) are undoubtedly undiscovered.
[32] Galveston County, Tex., Redistricting Order Establishing Justice of the Peace Precinct Boundaries (Aug. 19, 2013), *available at* http://www.guidrynews.com/13August/23113GalvestonCo.pdf. *See also* Harvey Rice, *Lawsuit says Galveston remap discriminatory*, Houston Chronicle (Aug. 26, 2013), http://www.houstonchronicle.com/news/houston-texas/texas/article/Lawsuit-says-Galveston-remap-discriminatory-4761878.php (paywall only).
[33] Letter from Thomas E. Perez, Assistant Att'y Gen., to James E. Trainor, III, Counsel for Galveston County, Texas (March 5, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/l_120305.pdf
[34] Annette Baird, *Candidates compete for fewer Galveston County justices of peace positions*, Houston Chronicle (Feb. 18, 2014), http://www.chron.com/neighborhood/bayarea/news/article/Candidates-compete-for-fewer-Galveston-County-5245671.php.
[35] *Petteway, et al. v. Galveston County, Texas, et al.*, No. 3:13-cv-308 (S.D. Tex. Aug. 26, 2013).
[36] Sylvia Garcia & Larry Peacock, Garcia, *Peacock: Redistricting proposal targets Hispanic gains*, Houston Chronicle (Nov. 1, 2013), http://www.chron.com/opinion/outlook/article/Garcia-Peacock-Redistricting-proposal-targets-4947300.php.
[37] Letter from Thomas E. Perez, Assistant Att'y Gen., to Dennis R. Dunn, Deputy Att'y Gen., State of Georgia (Dec. 21, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/GA/l_121221.pdf.
[38] Sandy Hodson, *City Wins Lawsuit over Change in Election Date for Local Offices*, The Augusta Chronicle (May 13, 2004), http://chronicle.augusta.com/news/government/elections/2014-05-13/city-wins-lawsuit-over-change-election-date-local-offices; Maggie Lee, *Macon-Bibb Legislators React After Tuesday Wins*, The Telegraph (Macon,

Ga.) (May 21, 2014), http://www.macon.com/2014/05/21/3109205/macon-bibb-legislators-react-after.html?sp=/99/148/198/415/.

[39] Table of Voter Turnout in General Primary/General Nonpartisan/Special Election (May 20, 2014), Georgia Secretary of State, *available at* http://results.enr.clarityelections.com/GA/51345/132192/en/vt_data.html.

[40] Augusta-Richmond County General Election Results 2010, Augusta-Richmond County Board of Elections, *available at* http://appweb.augustaga.gov/board_elections/voter/electab10ge/totals.asp?RaceID=310.

[41] Some private plaintiffs also raised constitutional and state law claims, which could also be a basis for striking down the law. *See Ortiz, et al. v. State of Texas*, No. 2:13-cv-00348 (S.D. Tex. Nov. 5, 2013), ECF No. 1. The *Ortiz* suit has been consolidated with other challenges to the Texas ID law. Order, *Veasey v. Perry*, No. 2:13-cv-193 (S.D. Tex., Jan. 10, 2014), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Consolidating.pdf (granting motion to consolidate cases).

[42] *See* Notice of Pending Matters and Submission of Proposed Orders at 8-10, *Veasey v. Perry*, No. 2:13-cv-193 (S.D. Tex., June 4, 2014), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Veasey3441.pdf.

[43] *See* Joint Status Report Regarding Defs.' and the State Legislators' Doc. Produc. at 4-7, *N.C. State Conference of the NAACP, et al. v. McCrory*, No. 1:13-cv-658 (M.D.N.C. May 22, 2014), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/League168.pdf (listing counsel of record).

[44] *See* Kennie Def.-Intervenors' Mot. For Att'ys' Fees, Expenses, and Costs With Supporting P. & A. at 27, *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. Sept. 10, 2013), ECF No. 130.

[45] U.S. Dept. of Justice, *Section Five Changes by Type and Year*, http://www.justice.gov/crt/about/vot/sec_5/changes_10s.php.

[46] *Id.*

6 Million Lost Voters:

State-Level Estimates of Felony Disenfranchisement, 2016



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OVERVIEW

The United States remains one of the world's strictest nations when it comes to denying the right to vote to citizens convicted of crimes. An estimated 6.1 million Americans are forbidden to vote because of "felony disenfranchisement," or laws restricting voting rights for those convicted of felony-level crimes.

In this election year, the question of voting restrictions is once again receiving great public attention. This report is intended to update and expand our previous work on the scope and distribution of felony disenfranchisement in the United States (see Uggen, Shannon, and Manza 2012; Uggen and Manza 2002; Manza and Uggen 2006). The numbers presented here represent our best assessment of the state of felony disenfranchisement as of the November 2016 election.

Our key findings include the following:

- As of 2016, an estimated 6.1 million people are disenfranchised due to a felony conviction, a figure that has escalated dramatically in recent decades as the population under criminal justice supervision has increased. There were an estimated 1.17 million people disenfranchised in 1976, 3.34 million in 1996, and 5.85 million in 2010.
- Approximately 2.5 percent of the total U.S. voting age population – 1 of every 40 adults – is disenfranchised due to a current or previous felony conviction.
- Individuals who have completed their sentences in the twelve states that disenfranchise people post-sentence make up over 50 percent of the entire disenfranchised population, totaling almost 3.1 million people.
- Rates of disenfranchisement vary dramatically by state due to broad variations in voting prohibitions. In six states – Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia – more than 7 percent of the adult population is disenfranchised.
- The state of Florida alone accounts for more than a quarter (27 percent) of the disenfranchised population nationally, and its nearly 1.5 million individuals disenfranchised post-sentence account for nearly half (48 percent) of the national total.
- One in 13 African Americans of voting age is disenfranchised, a rate more than four times greater than that of non-African Americans. Over 7.4 percent of the adult African American population is disenfranchised compared to 1.8 percent of the non-African American population.
- African American disenfranchisement rates also vary significantly by state. In four states – Florida (21 percent), Kentucky (26 percent), Tennessee (21 percent), and Virginia (22 percent) – more than one in five African Americans is disenfranchised.

STATE DISENFRANCHISEMENT LAW

To compile estimates of disenfranchised populations, we take into account new U.S. Census data on voting age populations and recent changes in state-level disenfranchisement policies, including those reported in *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010* (Porter 2010). For example, in 2007, Maryland repealed its lifetime voting ban that had applied to some individuals post-sentence, and in 2016 eliminated the voting ban for persons on probation or parole. Other states have revised their waiting periods and streamlined the process for regaining civil rights. As shown in the following table, Maine and Vermont remain the only states that allow persons in prison to vote. Thirty U.S. states deny voting rights to felony probationers, and thirty-four states disenfranchise parolees. In the most extreme cases, twelve states continue to deny voting rights to some or all of the individuals who have successfully fulfilled their prison, parole, or probation sentences (for details, see notes to Table 1).

Table 1. Summary of State Felony Disfranchisement Restrictions in 2016

No restriction (2)	Prison only (14)	Prison & parole (4)	Prison, parole, & probation (18)	Prison, parole, probation, & post-sentence (12)
Maine	Hawaii	California[3]	Alaska	Alabama[1]
Vermont	Illinois	Colorado	Arkansas	Arizona[2]
	Indiana	Connecticut	Georgia	Delaware[4]
	Massachusetts	New York	Idaho	Florida
	Maryland[6]		Kansas	Iowa[5]
	Michigan		Louisiana	Kentucky
	Montana		Minnesota	Mississippi
	New Hampshire		Missouri	Nebraska[7]
	North Dakota		New Jersey	Nevada[8]
	Ohio		New Mexico	Tennessee[9]
	Oregon		North Carolina	Virginia[12]
	Pennsylvania		Oklahoma	Wyoming[13]
	Rhode Island[10]		South Carolina	
	Utah		South Dakota[11]	
			Texas	
			Washington	
			West Virginia	
			Wisconsin	

Notes:

1. Alabama - In 2016, legislation eased the rights restoration process after completion of sentence for persons not convicted of a crime of "moral turpitude."
2. Arizona - Permanently disenfranchises persons with two or more felony convictions.
3. California - In 2016, legislation restored voting rights to people convicted of a felony offense housed in jail, but not in prison.
4. Delaware - The 2013 Hazel D. Plant Voter Restoration Act removed the five-year waiting period. People convicted of a felony, with some exceptions, are now eligible to vote upon completion of sentence and supervision. People who are convicted of certain disqualifying felonies - including murder, bribery, and sexual offenses - are permanently disenfranchised.
5. Iowa - Governor Tom Vilsack restored voting rights to individuals who had completed their sentences via executive order on July 4, 2005. Governor Terry Branstad reversed this executive order on January 14, 2011 returning to permanent disenfranchisement for persons released from supervision after that date.
6. Maryland – Eliminated the ban on voting for persons on probation or parole supervision in 2016.
7. Nebraska - Reduced its indefinite ban on post-sentence voting to a two-year waiting period in 2005.
8. Nevada - Disenfranchises people convicted of one or more violent felonies and people convicted of two or more felonies of any type.
9. Tennessee - Disenfranchises those convicted of certain felonies since 1981, in addition to those convicted of select crimes prior to 1973. Others must apply to Board of Probation and Parole for restoration.
10. Rhode Island – A 2006 ballot referendum eliminated the ban on voting for persons on probation or parole supervision.
11. South Dakota - State began disenfranchising people on felony probation in 2012.
12. Virginia – When the Virginia Supreme Court overturned Governor Terry McAuliffe's blanket restoration of voting rights for people who had completed their sentences, he individually approved voting rights for 12,832 individuals in August, 2016.
13. Wyoming - Voting rights restored after five years to people who complete sentences for first-time, non-violent felony convictions in 2016 or after.

METHODOLOGY

We estimated the number of people released from prison and those who have completed their terms of parole or probation based on demographic life tables for each state, as described in Uggen, Manza, and Thompson (2006) and Shannon et al. (2011). We modeled each state's disenfranchisement rate in accordance with its distinctive felony voting policies, as described in Table 1. For example, some states impose disenfranchisement for five years after release from supervision, some states only disenfranchise those convicted of multiple felonies, and some only disenfranchise those convicted of violent offenses.[1]

In brief, we compiled demographic life tables for the period 1948-2016 to determine the number of released individuals lost to recidivism (and therefore already included in our annual head counts) and to mortality each year. This allows us to estimate the number of individuals who have completed their sentences in a given state and year who are no longer under correctional supervision yet remain disenfranchised. Because data on correctional populations are currently available only through year-end 2014, we extended state-specific trends from 2013-2014 to obtain estimates for 2016. Our duration-specific recidivism rate estimates are derived from large-scale national studies of recidivism for prison releasees and probationers. Based on these studies, our models assume that most released individuals will be re-incarcerated (66 percent) and a smaller percentage of those on probation or in jail (57 percent) will cycle back through the criminal justice system. We also assume a substantially higher mortality rate for people convicted of felony offenses relative to the rest of the population. Both recidivists and deaths are removed from the post-sentence pool to avoid overestimating the number of individuals in the population who have completed their sentences. Each release cohort is thus reduced each successive year – at a level commensurate with the age-adjusted hazard rate for mortality and duration-adjusted hazard rate for recidivism – and added to each new cohort of releases. Overall, we produced more than 200 spreadsheets covering 68 years of data.[2] These provide the figures needed to compile disenfranchisement rate estimates that are keyed to the appropriate correctional populations for each state and year.

1 In Florida, some can avoid a formal felony conviction by successfully completing a period of probation. According to the Florida Department of Law Enforcement, as much as 40 percent of the total probation population holds this "adjudication withheld" status. According to reports by the Bureau of Justice Statistics, only about 50 percent of Florida probationers successfully complete probation. In light of this, we reduce the annual current disenfranchised felony probation numbers by 40 percent and individuals disenfranchised post-sentence by 20 percent (.4*.5=.20) in each year in the life tables.

2 Our data sources include numerous United States Department of Justice (DOJ) publications, including the annual *Sourcebook of Criminal Justice Statistics*, *Probation and Parole in the United States*, as well as the *Prisoners and Jail Inmates at Midyear* series. Where available, we used data from state departments of corrections rather than national sources, as in the case of Minnesota. For early years, we also referenced *National Prisoner Statistics*, and *Race of Prisoners Admitted to State and Federal Institutions, 1926-1986*. We determined the median age of released prisoners based on annual data from the National Corrections Reporting Program. The recidivism rate we use to decrease the releasee population each year is based upon the Bureau of Justice Statistics (1989) "Recidivism of Prisoners Released in 1983" study and "Recidivism of Felons on Probation 1986-1989." For those in prison or on parole, we use a reincarceration rate of 18.6% at one year, 32.8% at two years, 41.4% at 3 years. Although rearrest rates have increased since 1983, the overall reconviction and reincarceration rates used for this study are much more stable (Langan and Levin 2002, p. 11). For those on probation or in jail, the corresponding three-year failure rate is 36%, meaning that individuals are in prison or jail and therefore counted in a different population. To extend the analysis to subsequent years, we calculated a trend line using the ratio of increases provided by Hoffman and Stone-Meierhoefer (1980) on federal prisoners. By year 10, we estimate a 59.4% recidivism rate among released prisoners and parolees, which increases to 65.9% by year 62 (the longest observation period in this analysis). Because these estimates are higher than most long-term recidivism studies, they are likely to yield conservative estimates of the ex-felon population. We apply the same trend line to the 3-year probation and jail recidivism rate of 36%; by year 62, the recidivism rate is 57.3%. 1948 is the earliest year for which detailed data are available on releases from supervision.

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DISENFRANCHISEMENT IN 2016

Figure 1 shows the distribution of the 6.1 million disenfranchised individuals across correctional populations. People currently in prison and jail now represent less than one-fourth (23 percent) of those disenfranchised. The majority (77 percent) are living in their communities, having fully completed their sentences or remaining supervised while on probation or parole.

VARIATION ACROSS STATES

Due to differences in state laws and rates of criminal punishment, states vary widely in the practice of disen-

Figure 1. Disenfranchisement Distribution Across Correctional Populations, 2016

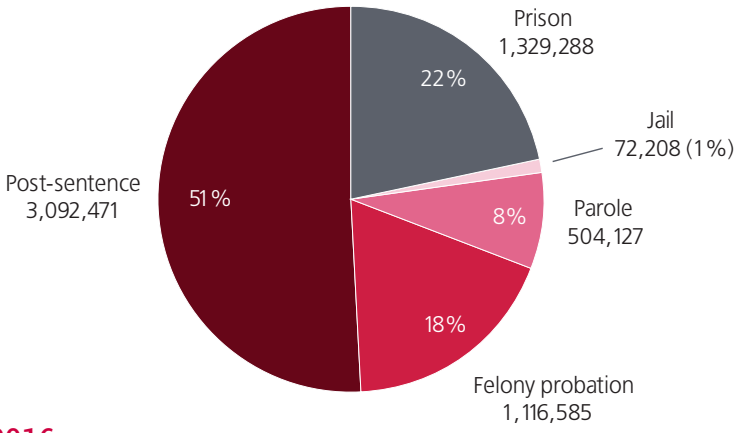
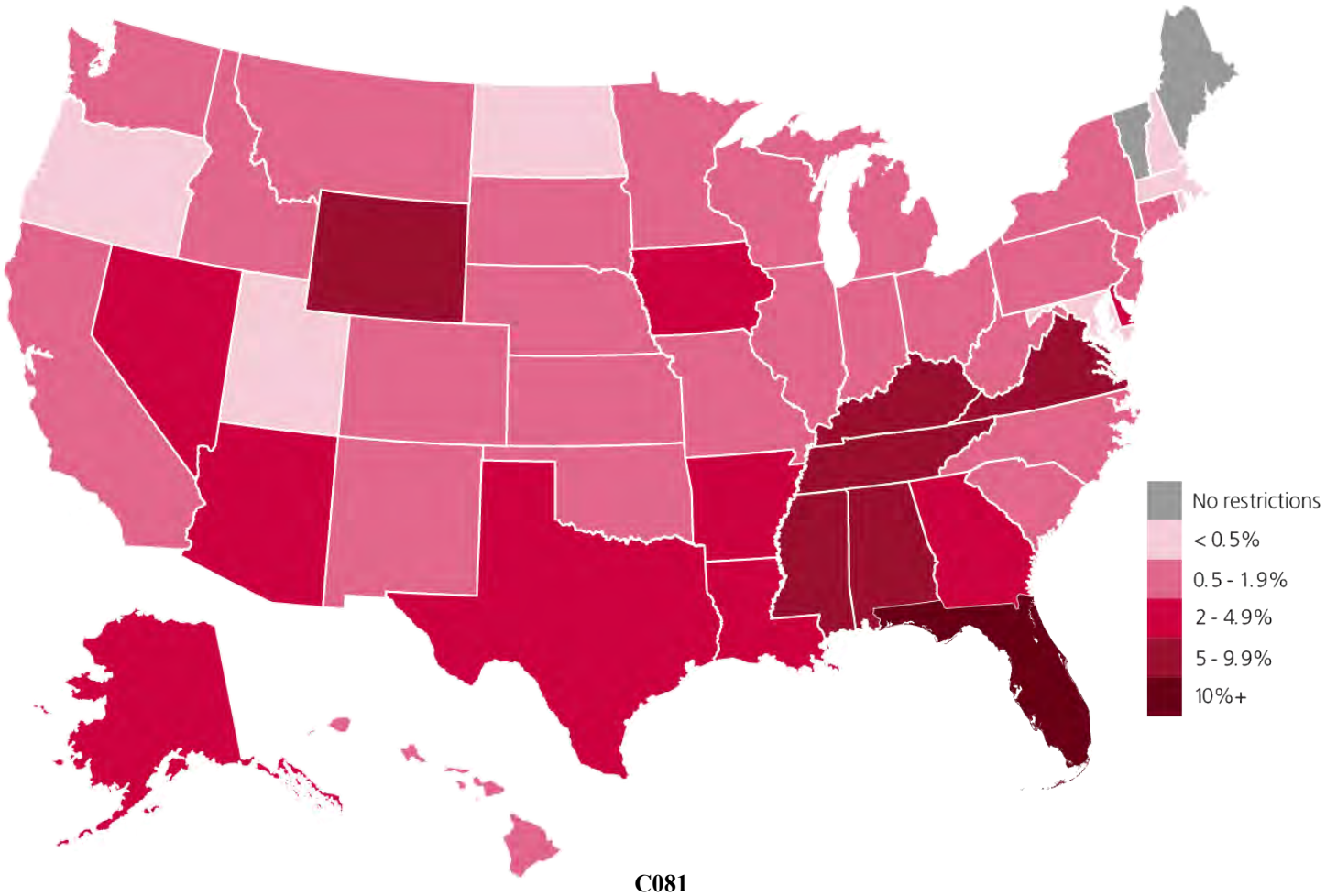
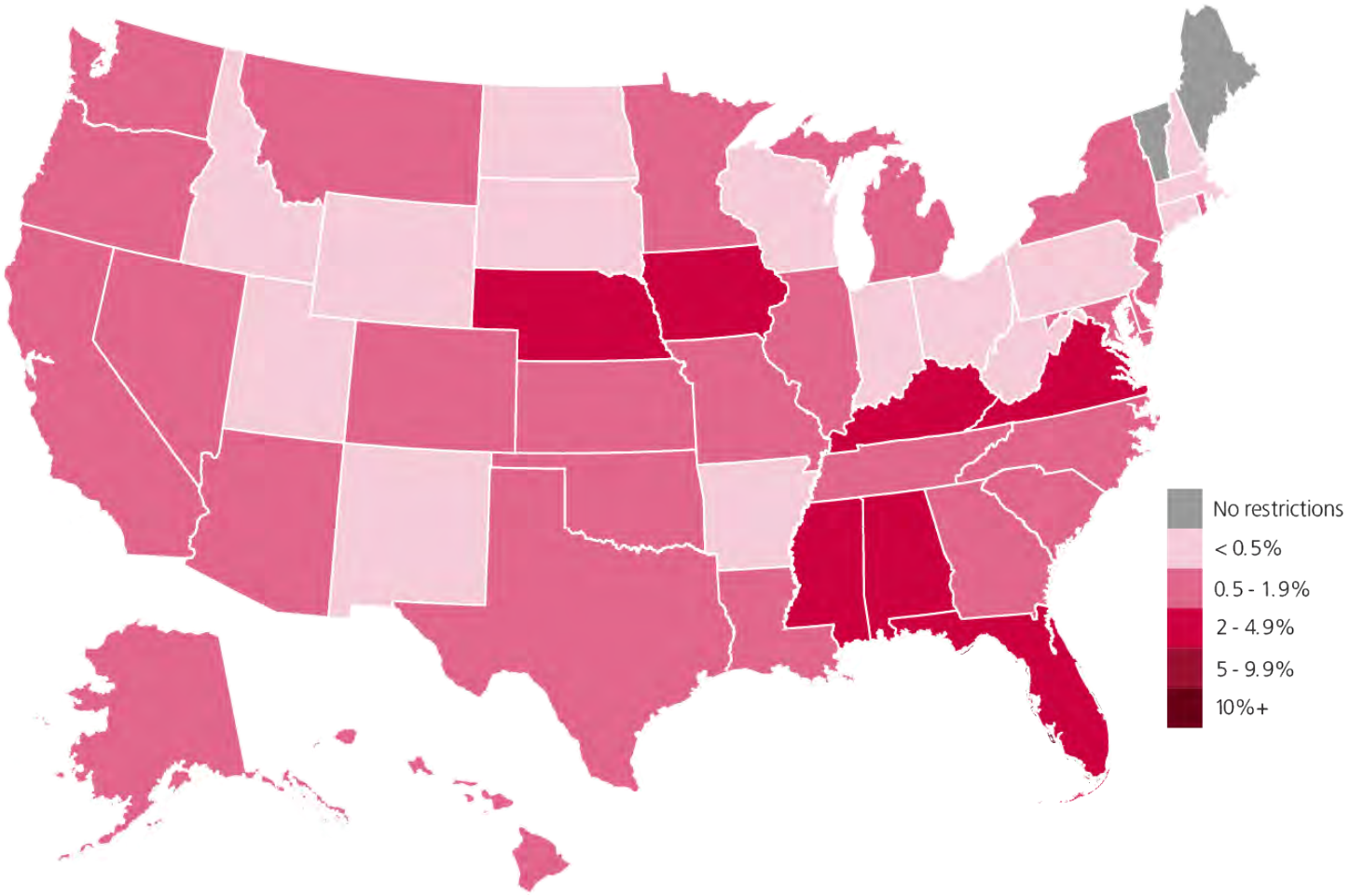


Figure 2. Total Felony Disenfranchisement Rates, 2016



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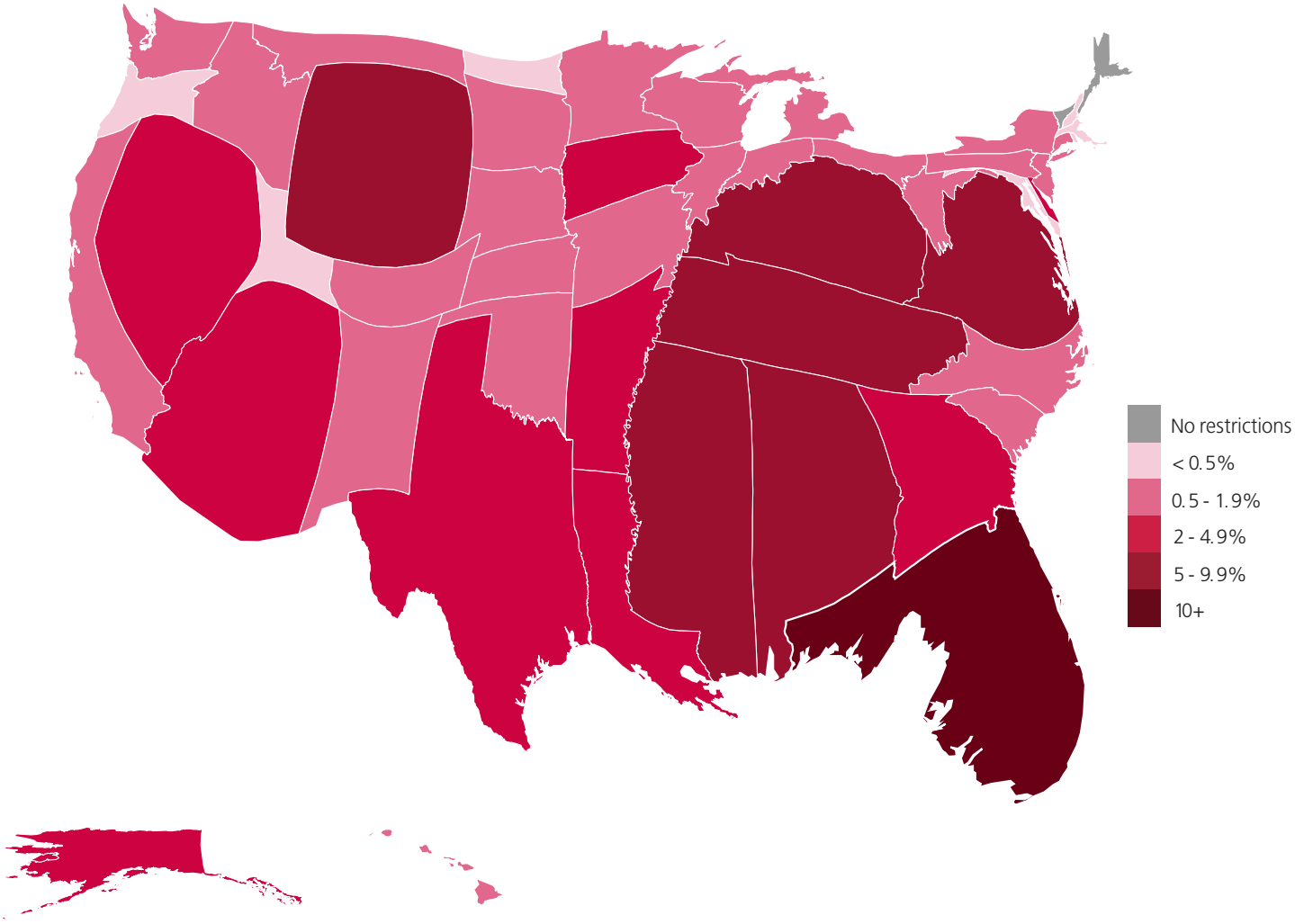
Figure 3. Total Felony Disenfranchisement Rates, 1980



franchisement. These maps and tables represent the disenfranchised population as a percentage of the adult voting age population in each state. As noted, we estimate that 6.1 million Americans are currently ineligible to vote by state law. As Figure 2 and the statistics in Table 3 show, state-level disenfranchisement rates in 2016 varied from less than .5 percent in Massachusetts, Maryland, New Hampshire, North Dakota, Oregon, Rhode Island, and Utah (and zero in Maine and Vermont) to more than 7 percent in Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia.

These figures show significant growth in recent decades, even as many states began to dismantle voting restrictions for formerly disenfranchised populations. Figure 3 displays disenfranchisement rates in 1980, retaining the same scale as in Figure 2. At that time, far more of the nation had disenfranchisement rates below .5 percent and no state disenfranchised more than 5 percent of its adult citizens.

Figure 4. Cartogram of Total Disenfranchisement Rates by State, 2016



The cartogram in Figure 4 provides another way to visualize the current state of American disenfranchisement, highlighting the large regional differences in felony disenfranchisement laws and criminal punishment. Cartograms distort the land area on the map according to an alternative statistic, in this case the total felony disenfranchisement rate. Southeastern states that disenfranchise hundreds of thousands of people who have completed their sentences, such as Florida, Kentucky, and Virginia, appear bloated in the cartogram. In contrast, the many Northeastern and Midwestern states that only disenfranchise individuals currently in prison shrivel in size. This distorted map thus provides a clear visual representation of the great range of differences in the scope and impact of felony disenfranchisement across the 50 states.

TRENDS OVER TIME

Figure 5 illustrates the historical trend in U.S. disenfranchisement, showing growth in the disenfranchised population for selected years from 1960 to 2016. The number disenfranchised dropped from approximately 1.8 million to 1.2 million between 1960 and 1976, as states expanded voting rights in the civil rights era. Many states have continued to pare back their disenfranchisement provisions since the 1970s (see Behrens, Uggen, and Manza, 2003; Manza and Uggen, 2006). Nevertheless, the total number banned from voting continued to rise with the expansion in U.S. correctional populations. The total disenfranchised population rose from 3.3 million in 1996 to 4.7 million in 2000, to 5.4 million in 2004, to 5.9 million in 2010. Today, we estimate that 6.1 million Americans are disenfranchised by virtue of a felony conviction.

Figure 5. Number Disenfranchised for Selected Years, 1960-2016

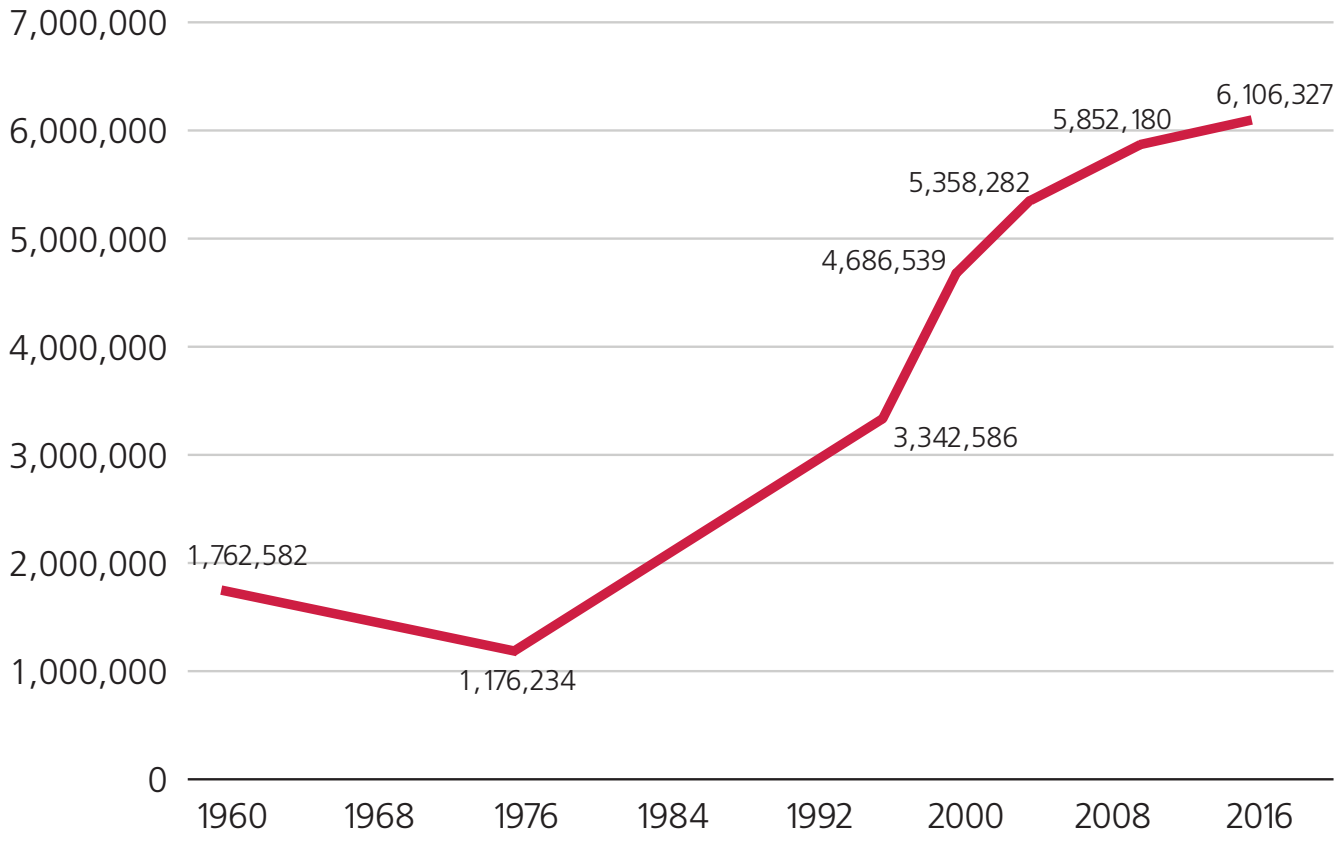
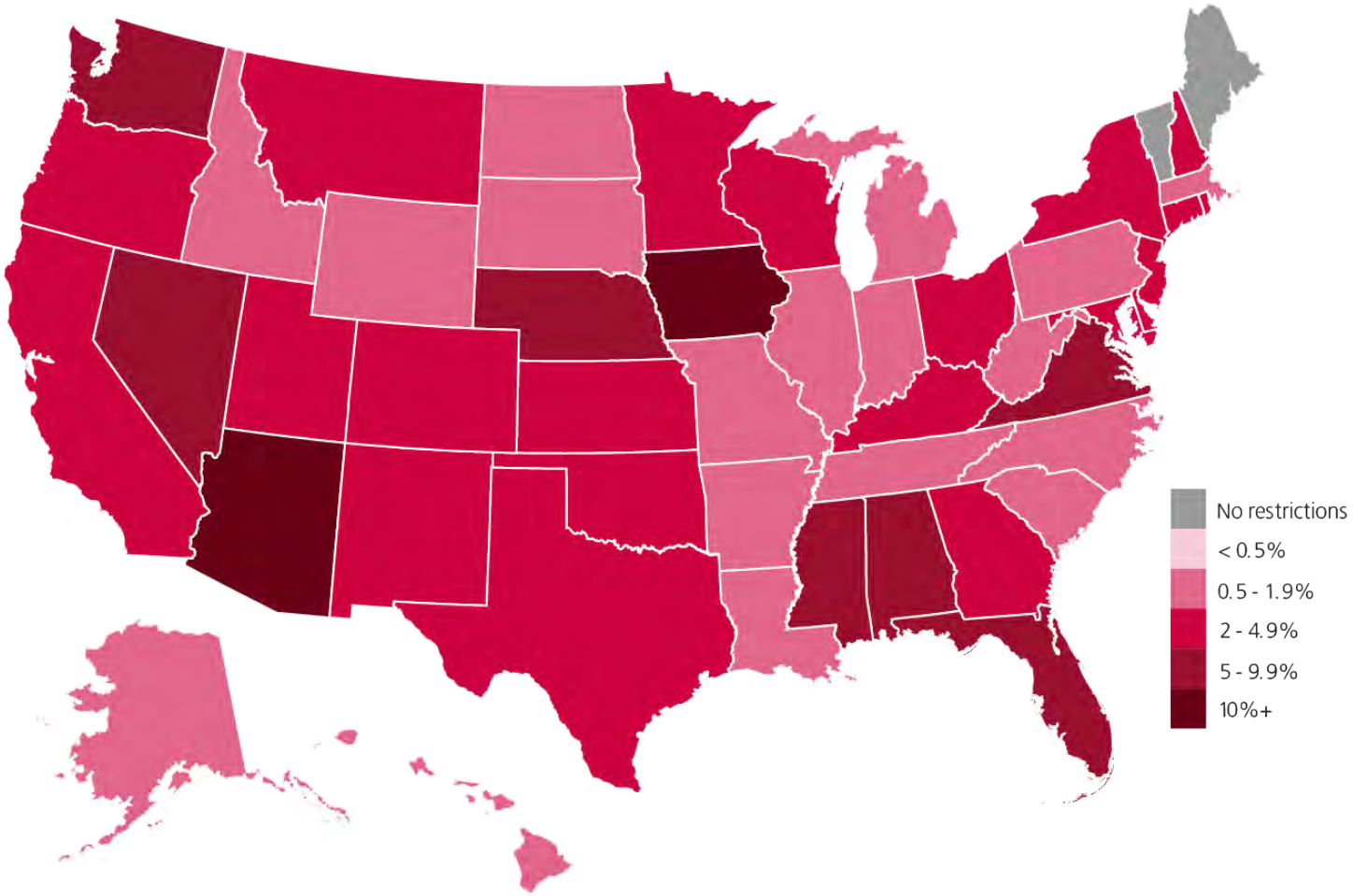


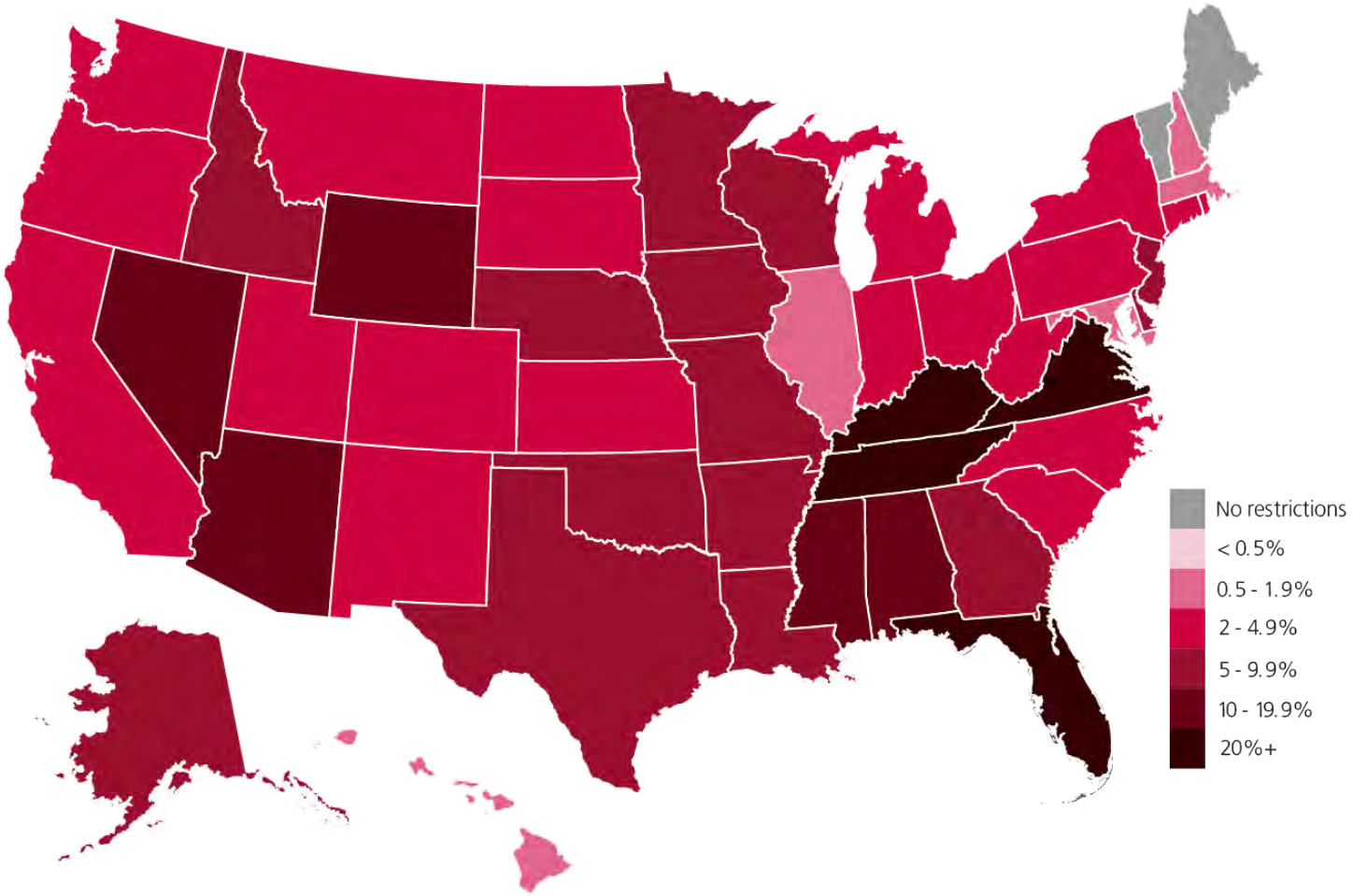
Figure 6. African American Felony Disenfranchisement Rates, 1980



VARIATION BY RACE

Disenfranchisement rates vary tremendously across racial and ethnic groups, such that felony disenfranchisement provisions have an outsized impact on communities of color. Race and ethnicity have not been consistently collected or reported in the data sources used to compile our estimates, so our ability to construct race-specific estimates is limited. This is especially problematic for Latinos, who now constitute a significant portion of criminal justice populations. Nevertheless, we used the most recent data available from the Bureau of Justice Statistics to develop a complete set of state-specific disenfranchisement estimates for the African American voting age population, as shown in Figures 6 and 7. We first show a map of the African American disenfranchisement rate for 1980, and then show how the picture looks today. By 1980, the African American disenfranchisement rate already exceeded 10 percent of the adult population in states such as Arizona and Iowa, as shown in Figure 6. The figure also

Figure 7. African American Felony Disenfranchisement Rates, 2016



indicates that several Southeastern states disenfranchised more than 5 percent of their adult African American populations at that time.

Figure 7 shows the corresponding rates for 2016, again retaining a common scale and shading to keep the map consistent with the 1980 map in Figure 6. African American disenfranchisement rates in Kentucky, Tennessee, and Virginia now exceed 20 percent of the adult voting age population. Whereas only 9 states disenfranchised at least 5 percent of their African American adult citizens in 1980, 23 states do so today.

RECENT CHANGES

The rate of total individuals disenfranchised in 2016 (2.47 percent) is quite similar to the 2010 figures reported by Uggen et al. for 2012 (2.50 percent) and Manza and Uggen in 2006 (2.42 percent), despite state changes in disenfranchisement policy and population growth. Our estimates for African American disenfranchisement in 2016, however, are slightly lower than those for 2010 – 7.44 percent versus 7.66 percent, and for 2004, 8.25 percent. For these estimates, we used the most inclusive denominator for the African American voting age population available from the U.S. Census to ensure that we do not overestimate the disenfranchisement rate for this population. While growth in the baseline population for African Americans contributes to the decline in the disenfranchisement rate from previous estimates, the lion's share of the difference is due to an important refinement in our estimation procedures. For 2016 and for 2010, we used race-specific recidivism rates (resulting in a higher rate for African Americans) that more accurately reflect current scholarship on recidivism. This results in a higher rate of attrition in our life tables, but produces a more conservative and, we believe, more accurate portrait of the number of disenfranchised African Americans. Though lower than in 2004, the 7.44 percent rate of disenfranchisement for African Americans remains four times greater the non-African American rate of 1.78 percent.

Given the size of Florida's disenfranchised population, we also note our estimation procedure for this state. Based on a state-specific recidivism report in 1999, our 2004 estimates included much higher recidivism rates for African Americans in Florida (up to 88% lifetime). A 2010 report from the Florida Department of Corrections shows that rates of recidivism for African Americans are now more closely in line with the national rates we apply to other states. In light of this more recent evidence, we begin applying our national rate of recidivism for African Americans (up to 73% lifetime) to Florida's African American population with prior felony convictions from 2005 onward. In 2016, more people were disenfranchised in Florida than in any other state and Florida's disenfranchisement rate remains highest among the 50 states.

As Table 1 noted, there have been several significant changes in state disenfranchisement policies over the past decade. Most notably, Delaware removed its five-year waiting period for most offenses in 2013 and South Dakota began disenfranchising felony probationers in 2012. Governor Tom Vilsack of Iowa re-enfranchised all state residents who had completed their sentences by executive order on July 4, 2005 – though that order was then reversed by his successor, Governor Terry Branstad, in January 2011. In 2016 the Alabama legislature eased the rights restoration process after completion of sentence for persons not convicted of a crime of "moral turpitude." Other states have also reduced disenfranchisement through streamlining restoration of rights or re-enfranchising certain groups of individuals with felony convictions. For example, both Rhode Island and Maryland now restrict voting rights only for those in prison as opposed to all individuals currently serving a felony sentence, including those on probation and parole. And in 2016, California restored voting rights to people convicted of a felony offense housed in jail, but not in prison.

Our intent here is to provide a portrait of disenfranchisement that would be accurate as of the 2016 November election, though we stress that all data reported here are estimates rather than head counts.

DISENFRANCHISEMENT AND RESTORATION OF CIVIL RIGHTS

States typically provide some limited mechanism for disenfranchised persons to restore their right to vote. These vary greatly in scope, eligibility requirements, and reporting practices. It is thus difficult to obtain consistent information about the rate and number of disenfranchised Americans whose rights are restored through these procedures. Nevertheless, we contacted each of the appropriate state agencies by email and phone and compiled the information they made available to us in Table 2. This provides some basic information about the frequency of state restoration of rights in those 12 states that disenfranchise beyond sentence completion. The table shows how many people were disenfranchised and the number of restorations reported by state officials in a given reporting period.

While we were unable to obtain complete data from all states, we subtracted all known restorations of civil rights (including full pardons) from each state's total disenfranchised post-sentence figure. Even accounting for these restorations, it is clear that the vast majority of such individuals in these states remain disenfranchised. Indeed, some states have significantly curtailed restoration efforts since 2010, including Iowa and Florida.

Table 2. Restoration of Voting Rights in States that Disenfranchise Residents Post-Sentence

State	Restorations	Period of Restoration Estimates
Alabama	16,022	2004-2015
Arizona	31	2010-2015
Delaware	2,285	1988-2015
Florida	271,982	1990-2015
Iowa	115,325	2005-2015
Kentucky	10,479	2008-2015
Mississippi	335	2000-2015
Nebraska	N/A	-
Nevada	281	1990-2011
Tennessee	11,581	1990-2015
Virginia	21,664	2002-2016
Wyoming	107	2003-2015

SUMMARY

This report provides new state-level estimates on felony disenfranchisement for 2016 in the United States to update those provided by Uggen, Shannon, and Manza (2012) for previous years. In Tables 3 and 4, we provide state-specific point estimates of the disenfranchised population and African American disenfranchised population, subject to the caveats described below.

Despite significant legal changes in recent decades, over 6.1 million Americans remained disenfranchised in 2016. When we break these figures down by race, it is clear that disparities in the criminal justice system are linked to disparities in political representation. The distribution of disenfranchised individuals shown in Figure 1 also bears repeating: less than one-fourth of this population is currently incarcerated, meaning that about 4.7 million adults who live, work, and pay taxes in their communities are banned from voting. Of this total, over one million are African Americans who have completed their sentences. Public opinion research shows that a significant majority of Americans favor voting rights for people on probation or parole who are currently supervised in their communities, as well as for individuals who have completed their sentences (Manza, Brooks, and Uggen 2004). How much difference would it make if state laws were changed to reflect the principles most Americans endorse? The answer is straightforward: Voting rights would be restored to 77 percent of the 6.1 million people currently disenfranchised.

CAVEATS

We have taken care to produce estimates of current populations and "post-sentence" populations that are reliable and valid by social science standards. Nevertheless, readers should bear in mind that our state-specific figures for the 12 states that bar individuals from voting after they have completed their sentences remain point estimates rather than actual head counts. In addition, the prison, probation, parole, and jail populations we report for 2016 are also estimated, based on the recent state-specific trends in each state. In other work, we have presented figures that adjust or "bound" these estimates by assuming different levels of recidivism, inter-state mobility, and state-specific variation. With these caveats in mind, the results reported here present our best account of the prevalence of U.S. disenfranchisement in 2016. These estimates will be adjusted if and when we discover errors or omissions in the data compiled from individual states, U.S. Census and Bureau of Justice Statistics sources, or in our own spreadsheets and estimation procedures.

Table 3. Estimates of Disenfranchised Individuals with Felony Convictions, 2016

State	Prison	Parole	Felony probation	Jail	Post-sentence	Total	VAP	% Disenfranchised
Alabama	30,585	6,580	15,626	1,578	231,896	286,266	3,755,483	7.62%
Alaska	5,497	2,035	6,900	7		14,439	552,166	2.61%
Arizona	44,509	7,241	51,362	1,341	116,717	221,170	5,205,215	4.25%
Arkansas	19,224	21,811	24,695	975		66,705	2,272,904	2.93%
California	136,302	86,254				222,557	30,023,902	0.74%
Colorado	21,207	8,673		1,066		30,946	4,199,509	0.74%
Connecticut	14,926	2,419				17,345	2,826,827	0.61%
Delaware	6,858	716	4,074		4,067	15,716	741,548	2.12%
Florida	102,555	4,208	86,886	4,822	1,487,847	1,686,318	16,166,143	10.43%
Georgia	50,900	23,545	170,194	4,112		248,751	7,710,688	3.23%
Hawaii	6,364					6,364	1,120,770	0.57%
Idaho	7,873	5,057	9,863	314		23,106	1,222,093	1.89%
Illinois	47,537			2,089		49,625	9,901,322	0.50%
Iowa	9,127	6,133	12,365	410	23,976	52,012	2,395,103	2.17%
Indiana	28,028			1,630		29,658	5,040,224	0.59%
Kansas	9,466	4,023	3,426	679		17,594	2,192,084	0.80%
Kentucky	22,968	16,729	27,323	2,039	242,987	312,046	3,413,425	9.14%
Louisiana	35,614	31,450	37,761	3,211		108,035	3,555,911	3.04%
Maine						0	1,072,948	0.00%
Maryland	20,378			1,087		21,465	4,658,175	0.46%
Massachusetts	10,254			921		11,176	5,407,335	0.21%
Michigan	42,661			1,560		44,221	7,715,272	0.57%
Minnesota	11,369	8,148	43215	608		63,340	4,205,207	1.51%
Mississippi	13,752	8,051	28463	1,422	166,494	218,181	2,265,485	9.63%
Missouri	32,768	16,808	38,870	1,219		89,665	4,692,196	1.91%
Montana	3,816			330		4,146	806,529	0.51%
North Carolina	37,446	10,977	40,867	1,888		91,179	7,752,234	1.18%
North Dakota	2,042			136		2,178	583,001	0.37%
Nebraska	6,377	782	2,952	384	7,069	17,564	1,425,853	1.23%
Nevada	11,560	6,828	8,097	701	62,080	89,267	2,221,681	4.02%
New Hampshire	2,856			175		3,031	1,066,610	0.28%
New Jersey	19,964	14,831	58,123	1,396		94,315	6,959,192	1.36%
New Mexico	7,205	2,838	13,352	891		24,286	1,588,201	1.53%
New York	50,513	44,590		2,477		97,581	15,584,974	0.63%
Ohio	51,102			1,736		52,837	8,984,946	0.59%
Oklahoma	27,857	2,572	26,475	1,398		58,302	2,950,017	1.98%
Oregon	14,228			519		14,748	3,166,121	0.47%
Pennsylvania	49,269			3,705		52,974	10,112,229	0.52%
Rhode Island	3,355					3,355	845,254	0.40%
South Carolina	20,141	4,621	21,464	1,011		47,238	3,804,558	1.24%
South Dakota	3,464	2,643	4,114	170		10,392	647,145	1.61%
Tennessee	29,271	13,186	52,654	2,763	323,354	421,227	5,102,688	8.26%
Texas	161,658	111,632	216,033	6,605		495,928	20,257,343	2.45%
Utah	6,925			744		7,669	2,083,423	0.37%
Vermont						0	506,119	0.00%
Virginia	38,694	1,604	56,908	2,905	408,570	508,680	6,512,571	7.81%
Washington	18,395	3,811	25,164	1,182		48,552	5,558,509	0.87%
West Virginia	7,042	3,187	4,109	389		14,727	1,464,532	1.01%
Wisconsin	22,851	19,537	22,101	1,118		65,606	4,476,711	1.47%
Wyoming	2,536	607	3,148	141	17,414	23,847	447,212	5.33%
Total	1,329,288	504,127	1,116,585	63,855	3,092,471	6,106,327	247,219,588	2.47%

Table 4. Estimates of Disenfranchised African Americans with Felony Convictions, 2016

State	Prison	Parole	Felony probation	Jail	Post-sentence	Total	VAP	% Disenfranchised
Alabama	17,775	3,957	7,740	823	113,629	143,924	952,671	15.11%
Alaska	519	211	718	2		1,450	21,219	6.83%
Arizona	5,879	952	5,654	361	12,645	25,492	214,412	11.89%
Arkansas	8,524	8,844	8,676	62		26,106	333,472	7.83%
California	39,451	23,939				63,390	1,858,353	3.41%
Colorado	4,098	1,439		320		5,858	172,849	3.39%
Connecticut	6,222	1,041				7,263	273,185	2.66%
Delaware	3,910	396	1,869		1,937	8,113	151,584	5.35%
Florida	50,110	2,328	26,259	2,385	418,224	499,306	2,338,940	21.35%
Georgia	31,814	13,927	98,740	64		144,546	2,301,258	6.28%
Hawaii	269					269	23,868	1.13%
Idaho	192	105	207	77		580	8,308	6.98%
Illinois	27,292			135		27,427	1,387,719	1.98%
Iowa	2,341	1,065	1,881	159	1,434	6,879	69,892	9.84%
Indiana	10,280			37		10,317	444,706	2.32%
Kansas	3,130	1,164	1,021	286		5,601	130,602	4.29%
Kentucky	6,080	4,393	5,007	389	53,902	69,771	266,806	26.15%
Louisiana	24,848	20,284	21,829	1,104		68,065	1,084,997	6.27%
Maine						0	10,940	0.00%
Maryland	14,960			423		15,383	1,348,123	1.14%
Massachusetts	2,906			60		2,966	355,908	0.83%
Michigan	23,015			664		23,679	1,057,458	2.24%
Minnesota	4,032	2,121	9,151	127		15,432	210,110	7.34%
Mississippi	9,158	5,049	18,074	524	94,325	127,130	801,471	15.86%
Missouri	12,807	5,714	11,584	269		30,374	525,285	5.78%
Montana	106			98		204	4,245	4.80%
North Carolina	21,304	6,414	14,979	208		42,905	1,630,848	2.63%
North Dakota	144			38		182	8,799	2.07%
Nebraska	1,675	185	362	115	1,202	3,540	63,187	5.60%
Nevada	3,299	2,270	2,409	25	13,566	21,568	183,389	11.76%
New Hampshire	177			27		204	12,994	1.57%
New Jersey	12,294	6,466	28,243	467		47,470	899,227	5.28%
New Mexico	560	192	777	51		1,581	33,582	4.71%
New York	25,524	19,851		911		46,286	2,277,485	2.03%
Ohio	24,111			718		24,829	1,069,118	2.32%
Oklahoma	7,955	892	6,220	49		15,116	223,354	6.77%
Oregon	1,453			140		1,593	60,807	2.62%
Pennsylvania	24,360			1,235		25,596	1,041,629	2.46%
Rhode Island	963					963	47,566	2.03%
South Carolina	13,067	3,123	22,303	424		38,916	1,014,456	3.84%
South Dakota	189	151		24		363	9,316	3.90%
Tennessee	13,918	6,010	20,887	1,038	132,042	173,895	817,457	21.27%
Texas	58,254	41,812	47,428	233		147,727	2,393,055	6.17%
Utah	462			263		724	22,763	3.18%
Vermont						0	5,244	0.00%
Virginia	23,593	1,087	29,321	184	217,759	271,944	1,241,868	21.90%
Washington	3,470	703	3,789	24		7,987	215,438	3.71%
West Virginia	902	364	399	127		1,792	50,496	3.55%
Wisconsin	9,664	7,590	4,945	248		22,447	256,592	8.75%
Wyoming	113	32	93	16	712	966	5,621	17.18%
Total	557,169	194,071	400,568	14,033	1,061,377	2,228,118	29,932,674	7.44%

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6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016

Christopher Uggen, Ryan Larson, and Sarah Shannon

October 2016

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MINORITY REPRESENTATION: NO CONFLICT WITH FAIR MAPS

Michael Li and Laura Royden

Brennan Center for Justice *at New York University School of Law*

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Introduction

The Conventional Narrative About Majority-Minority Districts and Partisan Bias

The Voting Rights Act requires states, under some situations, to create legislative and congressional districts where minorities are a majority of the district's population.[1] Majority-minority districts are intended to remedy vote dilution and ensure minorities have a fair chance to participate in the political process.[2] This prescription worked: beginning in the 1990s majority-minority districts are credited with increasing minority representation in legislatures and Congress. [3]

Yet from the start, some conventional wisdom took hold about how majority-minority districts resulted in unfair maps. The widespread belief became that majority-minority districts, particularly in the South, gave Republicans a big and unfair advantage.[4] According to this narrative, heavily concentrating reliably Democratic voters in majority-minority districts "bleached" the surrounding districts. These bleached districts, which had a history of electing white Democrats, then flipped and began electing Republicans. Some political commentators have even argued that majority-minority districts were a significant factor in the 54-seat swing in House seats in the 1994 election, giving the GOP control of the chamber for the first time in 42 years.[5]

Insofar as it goes, there is some truth in the narrative. The lack of minority-majority districts before 1990 had preserved the incumbency of many white Democrats even as southern white voters were shifting en masse towards the Republican Party. Ben Ginsberg, general counsel to the Republican National Committee in 1990 and one of the principal architects of the GOP strategy to urge creation of majority-minority districts, recalled, "We began looking at the data, and we saw that white Southern Democrats had dominated the redistricting process literally since the Civil War, and that had created underrepresentation for two groups—Republicans and minority voters."[6]

Rep. Bobby Scott, an African-American Democrat first elected to Congress after Virginia's 3rd Congressional district was redrawn as a majority-minority district, told *The New Yorker's* Jeffrey Toobin in 1993 that before the 1990s the strategy for preserving artificially large Democratic majorities was "to keep African-American percentages at around thirty-five or forty per cent. That was enough for the white Democrats to keep winning these districts, but not enough to elect any black Democrats. The white Democrats called these 'influence districts.'"[7]

But while Republicans derived some level of benefit from rapid growth in majority-minority districts after 1990 in the South, the question is whether that advantage means that creating majority-minority districts to comply with the Voting Rights Act is inherently at odds with the goal of partisan fairness. Some have argued that is the case. For example, the Republican National Congressional Committee has argued in recent court filings that "a [proposed] test for partisan gerrymandering creates conflicts between districting and Section 2 of the Voting Rights Act."[8] In other words, you can have one or the other but not both.

With the Supreme Court set to take up the constitutionality of partisan gerrymandering, it is an apt time to test the thesis of inherent tension.[9]

It turns out the answer is an emphatic no. The authors reviewed three decades of redistricting in twenty states with majority-minority districts and found that the creation of these districts did not result in biased maps. In fact, if anything, majority-minority districts tended to reduce overall partisan bias.

Methodology and Key Findings

This study considered election results from the last three decades, the 1990s, 2000s, and 2010s. Only states with six or more congressional districts in at least one of these decades were included. The authors assessed "partisan bias," or whether one party had an advantage in turning converting its vote totals into seats. In total, this data set included election results from twenty states. We also used statewide election results to examine how proposed but un-adopted maps in Texas that would have further increased minority representation fare in terms of partisan bias.

What we found was that the assumed "tension" between Voting Rights Act compliance and maps with low partisan bias does not bear up on closer examination. To the contrary:

- The empirical evidence shows that majority-minority districts do not result in maps that unfairly favor either party.

- Majority-minority districts increased nationwide by nearly 60 percent in the 1990s. Despite this growth, states that maintained or created majority-minority districts had low, and in most cases negligible, rates of partisan bias. The one exception is Texas, where congressional maps exhibit durably high rates of bias in favor of Democrats. This result was due to successful efforts to pack white Republicans into districts and spread out both white and non-white Democrats out to maximize Democratic seat share.

- The first decades of this century also show no correlation between minority-majority districts consistently high rates of partisan bias. In fact, in several states partisan bias actually declined.

- On the other hand, there is evidence from this decade that creating new majority-minority districts could, in fact, help reduce the high partisan bias in some of this decade's maps, particularly in states with racially polarized voting. Similarly, there is evidence from at least one state this decade and several states in earlier decades that undoing racial gerrymandering can materially improve partisan fairness levels.

A. Backgrounder: Understanding the Problem of Partisan Bias

As a starting point, it is useful to understand the redistricting abuse measured by partisan bias.

Redistricting abuses run the gamut from allegations about incumbent protection to the failure to keep communities together. Here, we focus on one of the most egregious and sinister of these abuses: the manipulation of district lines to give the party drawing the map a share of seats grossly at odds with statewide election results, thus ensuring that one party is overrepresented and the other underrepresented in a delegation.

In measuring the fairness of a map, then, the question is not whether any particular district favors one party or the other, nor is it about the geographic shape of any single district. Instead, the question is whether any political party is receiving – and more importantly locking in – a disproportionate and unfair share of seats overall across a map. This systematic advantage that one party receives over another in turning votes into seats from a map is known as "partisan bias" and used in this report to examine the fairness of maps.

Take North Carolina, for example. North Carolina routinely is a battleground state when it comes to statewide elections. In 2016, Donald Trump won the state's electoral votes at the same time that Democrat Roy Cooper narrowly won the governorship. But since 2016, Republicans have had a secure lock on 10 out of 13 congressional seats in the state. In fact, since 2012, exactly one seat has changed hands, and most races have not been remotely close.[10] Such an extreme disparity between statewide and congressional level results suggests a problem caused by high partisan bias in the congressional map.

To assess whether the advantage such as the sizeable pro-GOP one seen in North Carolina's map is problematic, political and social scientists have developed various tests to gauge whether the outcome is statistically likely to be random. The three we use in this study are:

- **The efficiency gap** looks at the number of "wasted votes" in a state's elections. In any election, nearly 50 percent of votes are wasted: all votes cast for a losing candidate, and any votes cast for a winning candidate beyond the threshold needed to win (50 percent of the total + 1 vote). In a hypothetical map with perfect partisan symmetry, both parties would waste the same number of votes. A large difference between the parties' wasted votes suggests gerrymandering could be at play, giving one party an advantage by disproportionately wasting the other's votes. The efficiency gap was brought to prominence by Nicholas Stephanopoulos and Eric McGhee in *Partisan Gerrymandering and the Efficiency Gap*[11] and was subsequently referenced in a lawsuit called *Whitford v.Gill*, where a three-judge panel ruled that Wisconsin's state assembly map was an unconstitutional partisan gerrymander.[12] The case has been appealed to the Supreme Court, which will hear arguments in the case on October 3, 2017.

- **The seats-to-votes curve** compares the share of seats won by a party to historical averages based on that party's statewide vote share. Using results from the past four decades of congressional elections, the relationship between a party's average share of the statewide vote and the share of seats in a statewide congressional delegation can be modeled by fitting a curve to the plotted data. Statewide vote shares from recent elections can then be placed on this curve to find the "expected" seat share, and comparing the expected seat share to the actual seat share reveals the degree to which current maps deviate from historical norms. As with the efficiency gap, large discrepancies between actual seat share and expected seat share illustrates partisan bias in a plan. Seats-to-votes curves have been used for decades by prominent political scientists such as Gary

King and Edward Tufte, and recently by Bernie Grofman and Nicholas Goedert.[13]

- **The mean-median district vote share difference** compares a party's mean district vote share to its median vote share. The difference between the mean and median is a common analysis long used by statisticians to measure skew in many academic fields; here, a state's mean and median district vote shares are used to examine whether states have skewed election results that were unlikely to have arisen by chance in the absence of gerrymandering. This approach was proposed by Michael D. McDonald and Robin Best in *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*[14] and further quantified by Sam Wang in *Three Tests for Practical Evaluation of Partisan Gerrymandering.*[15]

B. Majority-Minority Districts and Partisan Bias: The Historical Evidence

1. The 1990s

The 1990s are a particularly robust period for testing the thesis that creation of majority-minority districts contributes to high pro-Republican bias, as the decade's redistricting saw majority-minority congressional districts increase sizably from 32 to 51. This rapid growth was driven not only by demographic change but by an interpretation of the Voting Rights Act that decade, later curtailed by the Supreme Court, that led mapdrawers to believe that they needed to maximize the number of majority-minority districts.[16]

All told in the redistricting cycle of the 1990s, twenty states adopted congressional plans (or had a court-adopted plan) that contained at least one majority-minority district. These include five states where majority-minority districts were created for the first time and eight states where the number of majority-minority districts increased as a result of redistricting.[17] Fourteen of nineteen of the new majority-minority districts were in the South.[18]

State	*Majority-minority districts in 1990*	*Majority-minority districts immediately post-redistricting*	*Majority-minority districts as percentage of total*
Alabama	0	1 (+1)	14.3%
California	5	7 (+2)	13.4%
Florida*	0	5 (+5)	21.7%
Georgia*	2	3 (+1)	27.3%
Hawaii	1	2 (--)	100.0%
Illinois	3	4 (+1)	20.0%
Louisiana*	1	2 (+1)	28.6%
Maryland	1	2 (+1)	20.0%
Michigan	2	2 (--)	12.5%
Mississippi	1	1(--)	20.0%
Missouri	1	1(--)	11.1%
New Jersey	1	1 (--)	7.7%
New York*	4	5 (+1)	12.9%
North Carolina*	0	2 (+2)	16.7%
Ohio	1	1 (--)	5.3%
Pennsylvania	1	2 (+1)	9.5%
South Carolina	0	1 (+1)	16.7%
Tennessee	1	1 (--)	11.1%
Texas*	5	7 (+2)	23.3%
Virginia*	0	1 (+1)	9.1%
Total	32	51	

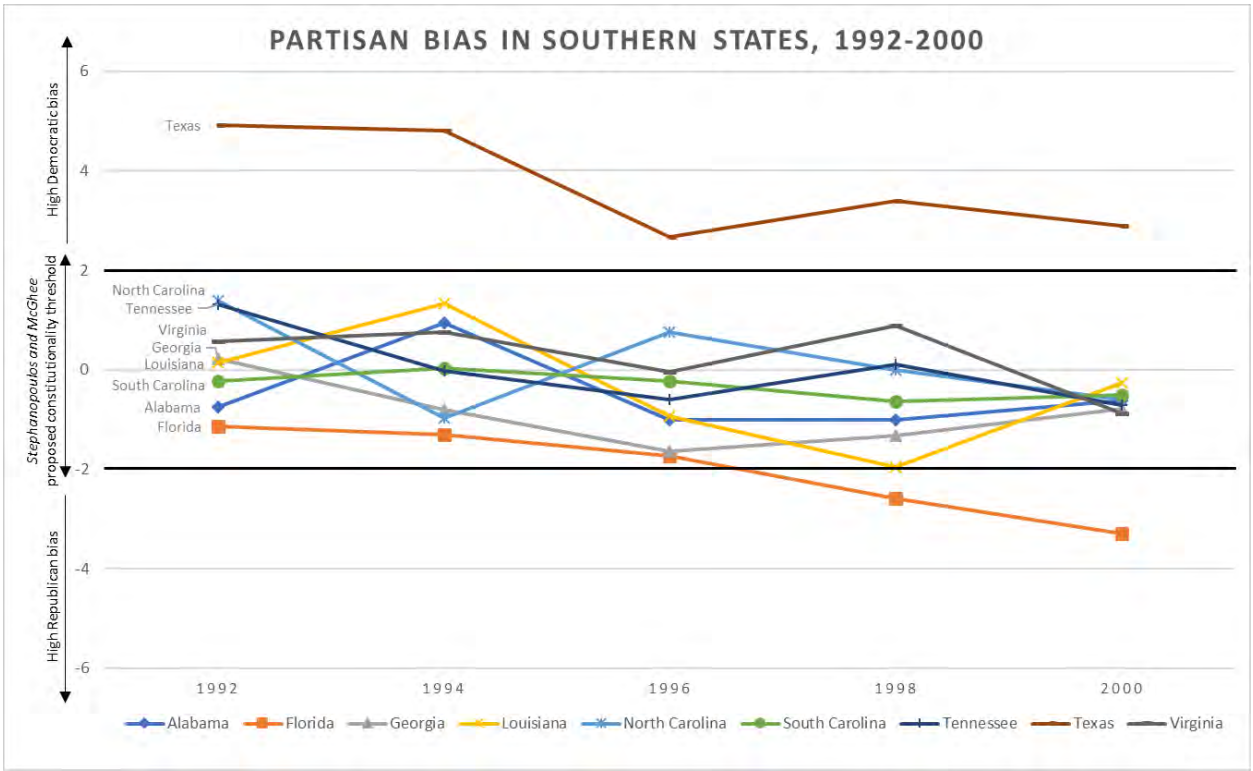
* Map redrawn at least in part later in the decade as a result of litigation.

Despite this rapid growth, states with majority-minority districts in the 1990s exhibit almost non-existent partisan bias. Indeed, only Texas has high partisan bias under multiple measures for each election of the decade.[19] And, in the case of Texas, the bias ran in favor of Democrats, not Republicans – counter to what the "bleaching" thesis would predict. Rather, the plan's massive pro-Democratic advantage came through "creatively drawn lines in unlikely places . . . [in] which white urban Democrats, long dependent on black

votes, were given districts where Democratic rural counties were substituted for urban black neighborhoods."[20]

In fact, despite seeing a greater increase in majority-minority congressional districts than any other part of the country, southern states had an average net efficiency gap of just 0.01 Democratic seats per election and an average absolute efficiency gap of 1.19 seats over the course of the decade. Southern states had equally low levels of partisan bias under the seats-to-votes and mean-median tests. See Appendices.

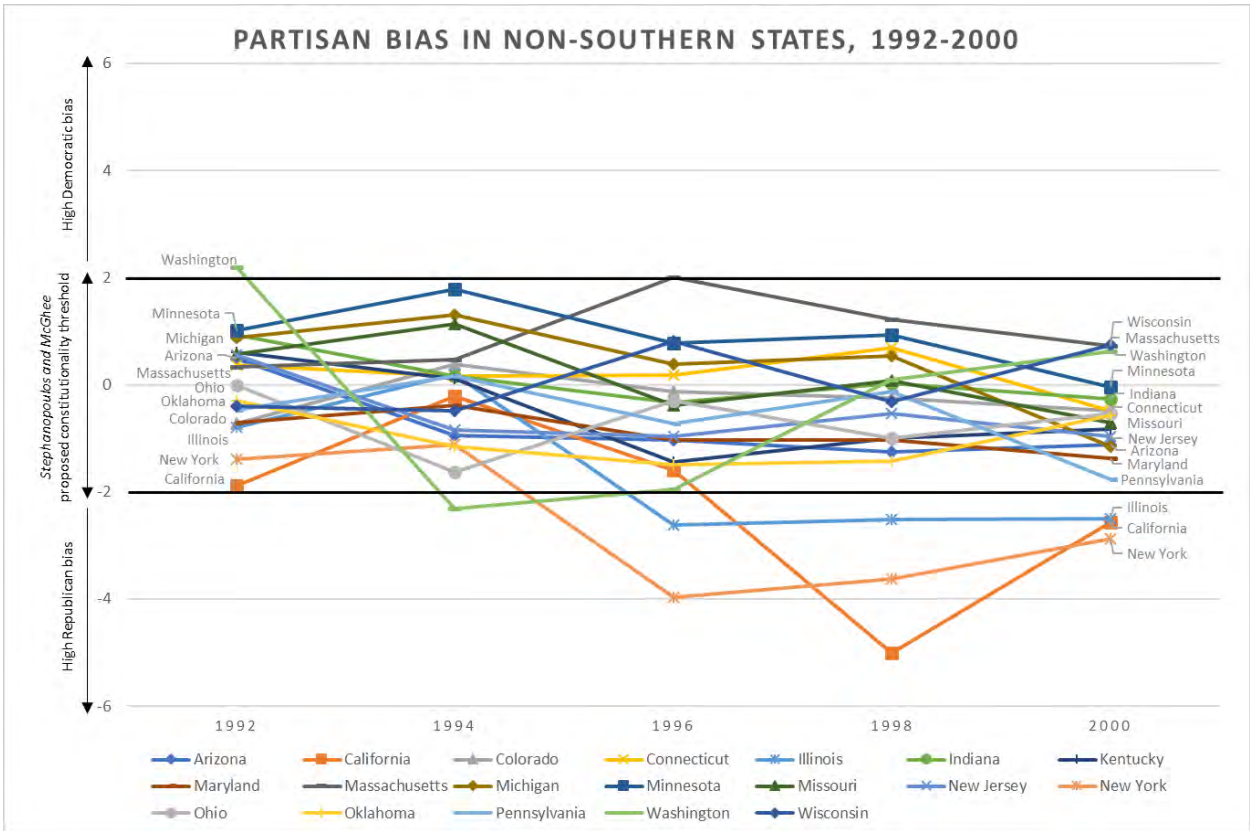
Figure 1



Of southern states, only Florida had a significant pro-Republican high efficiency gap for any part of the 1990s. However, the emergence of this gap after 1996 does not appear easily connected with the existence of majority-minority districts. The state's two Latino majority districts, for instance, were heavily Cuban-American and elected Republicans rather than Democrats throughout this period – if anything suggesting that those districts might generate pro-Democratic rather than pro-Republican bias if the conventional narrative is correct.[21] Moreover, the gap emerges only after one of Florida's three majority African-American districts was redrawn in 1996, as a result of litigation, in a way that *decreased* its African-American percentage from 51 percent to 40 percent.[22]

Non-southern states that maintained or expanded the number of majority-minority districts in the 1990s also experienced low levels of partisan bias.[23] (Figure 2) Notably, no non-southern state had a persistently high efficiency gap in favor of a single party in each of the decade's elections. A number of the maps, in fact, exhibit significant electoral volatility over the course of their lifecycle, going from having somewhat of a Democratic skew to having somewhat of a Republican skew (or vice versa) over the course of the decade. As with southern states, non-southern states with majority-minority districts also had low rates of partisan bias under the seats-to-votes and mean-median measures. See Appendices.

Figure 2



Only three maps (those of California, Illinois, and New York) eventually developed a significant skew in favor of one party or the other. But, in all three cases, the larger Republican skews come late in the decade when all three states' voters became significantly more Democratic but Republicans nevertheless managed to hold onto a high percentage of their seats.

However, it is hard to find a connection between majority-minority districts and the emergence of that bias. In all three states, majority-minority congressional districts with one exception, were located in heavily Democratic urban areas (New York City, Chicago, and Los Angeles) where neighboring districts remained reliably Democratic.[24] Unlike in the South, there was no realignment of white voters. The only majority-minority district not in these regions was California's 20th Congressional District in the state's Central Valley, but it too was surrounded mostly by districts that continued to elect Democrats.[25] Notably, in the case of New York, the increased pro-Republican bias observed later in the decade coincides with a court ordered redrawing of a Latino majority district that decreased Latino percentages "from about 57% to about 45%, altering five adjoining districts which became even more Democratic."[26]

Rather, the emergence of high levels of bias in California, New York, and Illinois appears to be mainly the product of Republicans to hold onto a number of white majority districts elsewhere in the states (e.g., upstate New York or downstate Illinois) despite improved Democratic performance. For example, in 1998, Republicans won five congressional districts in California with less 52 percent or less of the vote and many Republican won seats in New York had no Democratic candidate despite strong Democratic performance in the district overall.[27]

2. The 2000s

i. *A slowdown in new majority-minority districts*

In contrast to the 1990s, the redistricting cycle of the 2000s saw almost no growth in the number of majority-minority congressional districts. In fact, several districts that once were majority-minority in both southern and non-southern states were allowed to fall below 50 percent, although they continued to perform in electing minority-preferred candidates.

Three factors helped contribute to this slowdown. The first was concerns about running afoul of the Supreme Court's racial gerrymandering decisions, which struck down districts if they were drawn "predominately" on the basis of race and otherwise unjustified.[28] This put practical limits on the ability of mapdrawers to creatively join far-flung minority communities to create a majority district. But the bigger limitation was likely practical – in many, though not all, states the growth of majority-minority districts in the 1990s had been so thorough that most politically feasible majority-minority congressional districts had already been created. Likewise, for African Americans, improved voter turnout and political effectiveness in many states meant that African Americans increasingly could elect their community's preferred candidates in districts that were less than majority African American.

The only places where new majority-minority districts were created in the redistricting cycle of the 2000s were California, Arizona, and Florida where new congressional maps each included one additional performing Latino majority district.[29] No state that did not already have a majority-minority district created one for the first time in the decade of the 2000s.[30]

ii. *Continued low levels of partisan bias in the twenty states with majority-minority congressional districts*

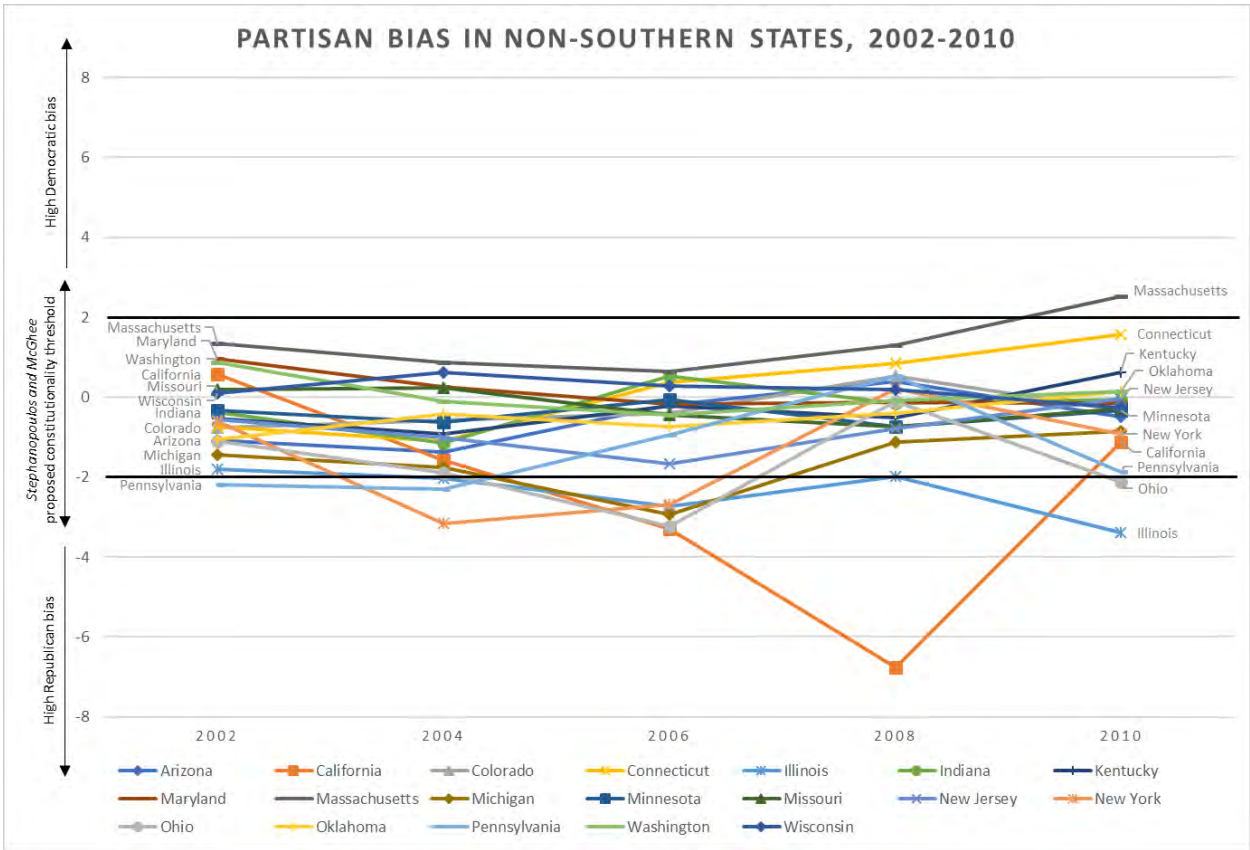
As with the maps of the 1990s, there is no apparent linkage between the creation or maintenance of majority-minority congressional districts and a persistent rate of high partisan bias.

No non-southern state, for example, had a durably high efficiency gap in favor of either party, and many maps show significant electoral volatility. (Figure 3)

Among non-southern states, Illinois had the highest levels of bias, skewing in favor of Republicans at a significant level in three out of five elections. Yet this was due not to majority-minority districts – which did not change appreciably – but to an incumbent protection plan negotiated between Democratic and Republican leaders that resulted in a high number of non-compact and uncompetitive districts in suburban and rural Illinois.[31]

Incumbent protection also appears responsible for the high Republican bias that California experienced in 2006 and 2008 – both Democratic wave years.[32]

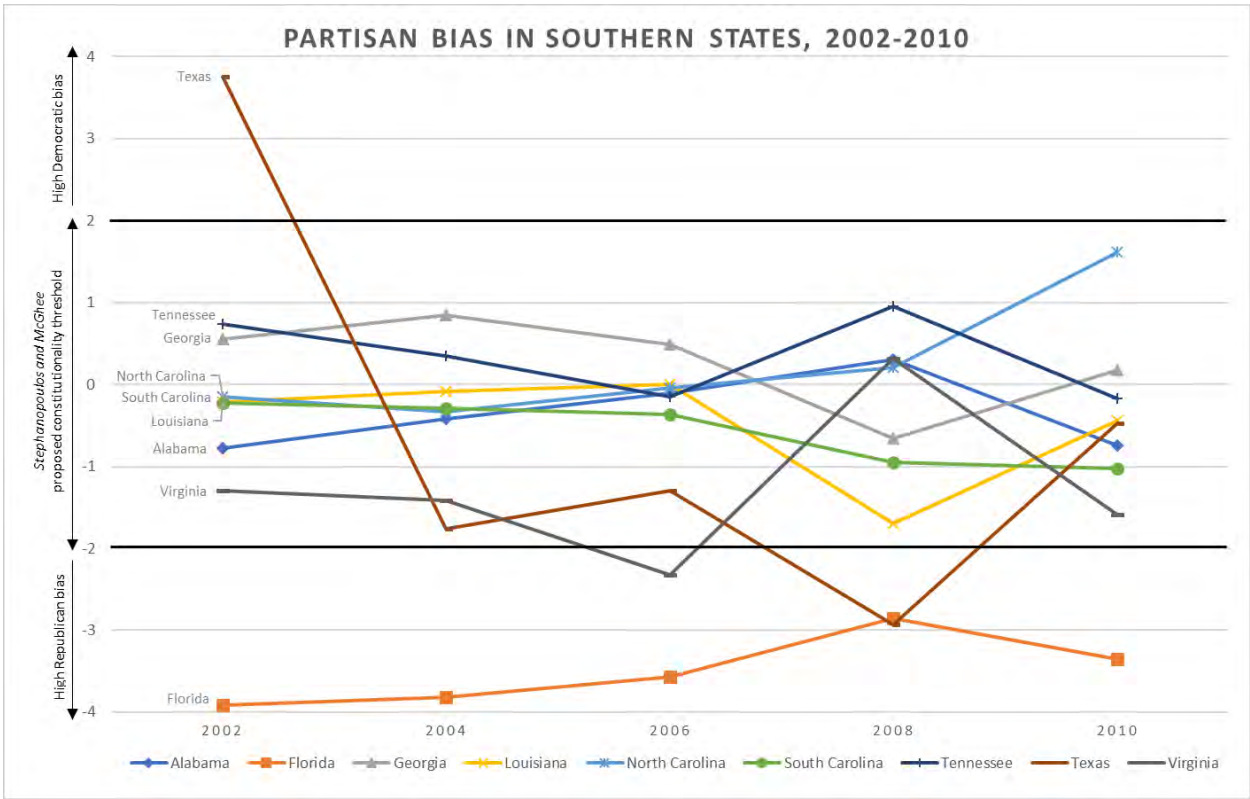
Figure 3



Southern states, similarly, continued to exhibit low rates of partisan bias despite a high percentage of majority-minority districts and an increase in racially polarized voting as the southern realignment reached its fruition.

As shown in Figure 4, elections in most states in the region, in fact, continued to produce skews that moved from one party to the other over the course of the decade.

Figure 4



The one exception among southern states is Florida, which had a significant pro-Republican bias in all five elections of the decade, under a map drawn for the first time since Reconstruction under sole Republican control.

But the bias observed in Florida in the 2000s does not fit in neatly with the conventional narrative, given that the congressional map adopted that decade made only modest changes to the configurations of the three African-American majority districts (and, in fact, decreased the African-American percentage in one district), while the state's three Latino majority districts continued to overwhelmingly elect Republicans rather than Democrats.[33] Rather, as in Illinois and California, bias in favor of Republicans was largely the product of the way that white majority districts were redrawn.

3. The 2010s

i. *Slow growth in majority-minority congressional districts continues*

The 2010s, like the 2000s, saw no significant growth in the number of majority-minority congressional districts.

By the start of the decade, a number of historically African-American districts had fallen below 50 percent – in some cases substantially – as a result of Latino and Asian population growth and gentrification. Outside the South, most of these districts simply were redrawn with African-American citizen voting age percentages less than 50 percent and have continued to perform as African-American districts.

In the South, however, Republican mapdrawers intentionally decided to push African-American percentages above 50 percent wherever possible – diluting African-American political effectiveness and leading to allegations of racial gerrymandering in congressional maps of North Carolina, Virginia, and Texas.[34]

The growth of Latino majority districts in the 2010s also was modest. Only California saw a net increase in the number of performing Latino majority congressional districts from seven to eight, though Texas added a court-ordered coalition district that could emerge as a Latino opportunity district in the future.[35]

As in the 2000s, no state that did not already have a majority-minority congressional district created one for the first time.

ii. *Continued low rates of partisan bias in the twenty states with majority-minority congressional districts*

Thirteen of the twenty states with majority-minority congressional districts – including California, where the number of majority-minority districts increased slightly – continue to experience low to negligible levels of durable partisan bias this decade. California, where maps were drawn for the first time by an independent redistricting commission, even shows signs of a declining level of partisan bias from prior decades despite adding a Latino majority congressional district.

However, seven states with majority-minority congressional districts did see a statistically significant increase in partisan bias this decade, reversing the low rates of bias that these states had all experienced in earlier decades. In all seven instances, the bias ran in favor of Republicans.

However, there does not seem to be a clear or obvious connection between majority-minority districts and this increase in partisan bias. None of these states increased the number of majority-minority districts this decade and, of the seven, only Texas had an increase in coalition districts. Moreover, in non-southern states like Pennsylvania and Michigan, majority-minority districts are located in heavily Democratic areas where the surrounding districts continue to be reliably Democratic. Instead, the high partisan bias this decade in Pennsylvania, Michigan, and Ohio appears to be driven by ruthless packing and cracking of white Democrats in places like the suburbs of Philadelphia.[36]

Majority-minority districts in Virginia and North Carolina this decade do, by contrast, appear partially related to sudden emergence of high levels of bias: the aggressive overpacking of African-American districts, subsequently found to be racial gerrymanders, contributed to the pro-Republican bias throughout the states.[37] This included transforming a non-majority African-American district that had historically and

consistently elected African-American preferred candidates into a majority black district – despite protests that it was not necessary to do so and would dilute African-American political power statewide. Similarly, as shown in Part C, high levels of partisan bias in Texas in favor of Republicans this decade seem to stem both from the packing of African-American districts and, more crucially, the failure of the state to create additional Latino majority districts.

C. The Counterfactual Evidence: The Failure to Create Minority Districts in Texas as the Driver of Partisan Bias

If, in the 1990s, the creation of majority-minority districts in the South helped create fairer representation of both minorities and Republicans by reducing high levels of pro-Democratic partisan bias, there is evidence today that creating more minority electoral opportunities would similarly reduce the high pro-Republican bias that has emerged this decade in southern states like Texas.

With the growth of racially polarized voting, minorities today are often the only large and geographically concentrated blocks of reliable Democrats in southern states. As a practical matter, a would-be gerrymanderer would find it hard to engineer a large and durable pro-Republican advantage without either packing or cracking minorities.

Conversely undoing the packing and cracking of minority communities by increasing minority electoral opportunities – whether through majority-minority districts or through coalition districts – would be expected to reduce high pro-Republican bias, not unlike the reduction of pro-Democratic bias in the 1990s.

Texas this decade provides a robust testing ground for both theses because its legislature enacted a highly aggressive congressional plan in 2011 that created no additional minority opportunity districts, despite Latinos and African Americans collectively comprising nearly 90 percent of the state's population gain between 2000 and 2010. By comparing the partisan bias of this plan, the subsequent court-modified plan, and plans offered by minority advocates, we can assess the relationship between fairness for minority communities and partisan fairness.

For this analysis, we looked at four congressional plans:

- **Plan C185** – the plan originally adopted by the Texas Legislature in 2011 but never used because of court-ordered modifications to address vote dilution and Voting Rights Act problems.

- **Plan C235** – the 2012 court-drawn interim plan which was adopted by the Texas Legislature in 2013 on a permanent basis without any changes. Plan C235 created an African-American and Latino coalition district in the Dallas-Fort Worth area and made adjustments to TX-23 along the border to improve its performance as a Latino district. It did not, however, make changes to other parts of the map.

- **Plan C213** – a plan proposed by the Texas Latino Redistricting Task Force.

- **Plan C286** - a demonstration plan offered by some of the Latino and African-American plaintiffs in litigation over the Texas congressional plan.

Under the four plans, the number of performing majority-minority, coalition, and crossover districts range from 10 to 13 out of Texas' 36 congressional districts:[38]

Plan	*African-American majority*	*African-American plurality*	*Latino majority – (performing)*	*Coalition*	*Total (%)*
C185 (state original)	1	2	7	0	10 (27.8%)
C235 (court modified plan)	1	2	7	1	11 (30.6%)
C213 (Latino Task Force)	0	3	8	2	13 (36.1%)
C286 (Rodriguez plaintiffs plan)	1	2	8	2	13 (36.1%)

By calculating the partisan bias scores for actual plans with plans proposed by minority groups, we were able to measure the effect that increasing minority representation would have on partisan bias. What we found bears out the thesis that disadvantaging minority voters was central to enabling the Texas Legislature to draw a map with a significant advantage in favor of Republicans (just as disadvantaging minorities previously was central to drawing maps that favored Democrats). As the number of minority opportunity districts increases in the various plans, levels of partisan bias decrease. The plans with a greater number of minority electoral opportunities were, in short, also the fairest plans from a partisan perspective.

Under the efficiency gap, the state's original plan (Plan C185) gave Republicans a significantly high share of seats in all three elections since 2012. The court-modified plan (Plan C235), which increased the total number of minority seats by one, reduced the rate of pro-Republican bias, but still had a bias of nearly three seats in both 2012 and 2016. By contrast, the two plans offered by minority groups – which each would have added two additional minority seats to the court-drawn plan – would have had negligible partisan bias.

Plan	*2012*	*2014*	*2016*
C185 (state original)	3.72 extra R	2.07 extra R	3.64 extra R
C235 (court modified)	2.98 extra R	1.35 extra R	2.96 extra R
C213 (minority proposal)	0.19 extra D	0.93 extra D	0.22 extra D
C286 (minority proposal)	0.08 extra R	0.59 extra D	0.08 extra R

In short, the maps with the highest levels of minority representation were also the maps with the lowest partisan bias. In other words, increasing minority representation in Texas is consistent with reducing partisan unfairness.

Appendix 1: Partisan Bias in States with Six or More Congressional Districts (1992-2000)

Efficiency Gap: 1990s

Efficiency gap results displayed below include both the magnitude of the seat gap and the party advantaged by the gap. States with persistent results above the threshold of two seats that Stephanopoulos and McGhee propose for presumptive unconstitutionality are displayed in bold.

State	CDs	1992	1994	1996	1998	2000	Average
Alabama	7	R: 0.75	D: 0.94	R: 1.00	R: 1.00	R: 0.62	R: 0.48
Arizona	6	D: 0.48	R: 0.94	R: 1.03	R: 1.26	R: 1.12	R: 0.77
California	52	R: 1.89	R: 0.21	R: 1.59	R: 5.00	R: 2.56	R: 2.25
Colorado	6	R: 0.72	D: 0.38	R: 0.12	R: 0.24	R: 0.49	R: 0.24
Connecticut	6	D: 0.36	D: 0.16	D: 0.18	D: 0.69	R: 0.49	D: 0.18
Florida	23	R: 1.14	R: 1.30	R: 1.74	R: 2.58	R: 3.29	R: 2.01
Georgia	11	D: 0.22	R: 0.80	R: 1.64	R: 1.32	R: 0.78	R: 0.86
Illinois	20	R: 0.80	D: 0.19	R: 2.62	R: 2.52	R: 2.50	R: 1.65
Indiana	10	D: 0.93	D: 0.17	R: 0.33	D: 0.02	R: 0.27	D: 0.10
Kentucky	6	D: 0.61	D: 0.11	R: 1.45	R: 1.00	R: 0.82	R: 0.51
Louisiana	7	D: 0.15	D: 1.33	R: 0.94	R: 1.95	R: 0.26	R: 0.34
Maryland	8	R: 0.70	R: 0.39	R: 1.03	R: 1.04	R: 1.37	R: 0.91
Massachusetts	10	D: 0.34	D: 0.47	D: 2.00	D: 1.22	D: 0.73	D: 0.95
Michigan	16	D: 0.88	D: 1.31	D: 0.39	D: 0.53	R: 1.16	D: 0.39
Minnesota	8	D: 1.02	D: 1.78	D: 0.78	D: 0.93	R: 0.05	D: 0.89
Missouri	9	D: 0.57	D: 1.14	R: 0.39	D: 0.07	R: 0.71	D: 0.14
New Jersey	13	D: 0.56	R: 0.85	R: 0.96	R: 0.53	R: 0.97	R: 0.55
New York	31	R: 1.39	R: 1.12	R: 3.96	R: 3.63	R: 2.87	R: 2.59
North Carolina	12	D: 1.38	R: 0.97	D: 0.75	R: 0.01	R: 0.59	D: 0.11
Ohio	19	R: 0.00	R: 1.63	R: 0.30	R: 0.99	R: 0.54	R: 0.69
Oklahoma	6	R: 0.30	R: 1.15	R: 1.50	R: 1.42	R: 0.58	R: 0.99
Pennsylvania	21	R: 0.47	D: 0.16	R: 0.73	R: 0.13	R: 1.77	R: 0.59
South Carolina	6	R: 0.22	D: 0.03	R: 0.23	R: 0.64	R: 0.50	R: 0.31
Tennessee	9	D: 1.31	R: 0.02	R: 0.60	D: 0.10	R: 0.71	D: 0.02
Texas	**30**	**D: 4.91**	**D: 4.80**	**D: 2.67**	**D: 3.40**	**D: 2.90**	**D: 3.74**
Virginia	11	D: 0.58	D: 0.75	R: 0.05	D: 0.89	R: 0.87	D: 0.26
Washington	9	D: 2.20	R: 2.32	R: 1.95	D: 0.10	D: 0.63	R: 0.27
Wisconsin	9	R: 0.40	R: 0.48	D: 0.81	R: 0.31	D: 0.75	D: 0.07

Seats-to-Votes Curve: 1990s

Seats-to-votes curve results displayed below include both the magnitude of the seat skew and the party advantaged by the skew. States with persistent results above the threshold of two seats that we use for presumptive unconstitutionality are displayed in bold.

State	CDs	1992	1994	1996	1998	2000	Average
Alabama	7	R: 0.72	D: 1.01	R: 0.98	R: 1.07	R: 0.66	R: 0.48
Arizona	6	D: 0.62	D: 1.22	R: 0.87	R: 1.09	R: 0.87	R: 0.20
California	52	R: 1.76	D: 3.46	R: 0.23	R: 4.12	R: 0.88	R: 0.70
Colorado	6	R: 0.82	D: 0.29	R: 0.11	R: 0.22	R: 0.45	R: 0.26
Connecticut	6	D: 0.15	R: 0.03	D: 0.09	D: 0.56	R: 0.58	D: 0.04
Florida	23	R: 1.35	D: 0.26	R: 1.51	R: 2.85	R: 3.17	R: 1.73
Georgia	11	D: 0.26	D: 2.33	R: 1.79	R: 1.24	R: 0.65	R: 0.22
Illinois	20	R: 0.71	D: 2.34	R: 2.67	R: 2.23	R: 2.03	R: 1.06
Indiana	10	D: 0.91	D: 3.19	R: 0.30	D: 0.07	R: 0.25	D: 0.72
Kentucky	6	D: 0.54	D: 1.94	R: 1.56	R: 1.11	R: 0.98	R: 0.24
Louisiana	7	D: 0.03	D: 1.40	R: 1.12	R: 2.06	R: 0.38	R: 0.43
Maryland	8	R: 0.43	R: 0.00	R: 0.69	R: 0.68	R: 0.97	R: 0.55
Massachusetts	10	D: 0.46	D: 0.52	D: 2.32	D: 1.79	D: 1.43	D: 1.30
Michigan	16	D: 0.96	D: 2.38	D: 0.57	D: 0.76	R: 0.82	D: 0.77
Minnesota	8	D: 0.95	D: 2.70	D: 0.80	D: 0.95	D: 0.02	D: 1.08
Missouri	9	D: 0.46	D: 1.05	R: 0.38	D: 0.13	R: 0.64	D: 0.12
New Jersey	13	D: 0.98	D: 1.70	R: 0.48	R: 0.03	R: 0.37	D: 0.36
New York	31	R: 0.30	D: 1.18	R: 1.85	R: 1.59	R: 1.04	R: 0.72
North Carolina	12	D: 1.43	D: 3.15	D: 0.81	R: 0.17	R: 0.76	D: 0.89
Ohio	19	R: 0.24	D: 2.22	R: 0.38	R: 0.88	R: 0.42	D: 0.06
Oklahoma	6	R: 0.26	D: 1.75	R: 1.65	R: 1.61	R: 0.73	R: 0.50
Pennsylvania	21	R: 0.64	D: 1.11	R: 0.75	R: 0.06	R: 1.62	R: 0.39
South Carolina	6	R: 0.32	D: 0.94	R: 0.28	R: 0.63	R: 0.48	R: 0.15
Tennessee	9	D: 1.25	D: 1.78	R: 0.64	R: 0.00	R: 0.81	D: 0.32
Texas	**30**	**D: 5.26**	**D: 7.42**	**D: 2.85**	**D: 3.45**	**D: 3.73**	**D: 4.54**
Virginia	11	D: 0.55	D: 1.74	D: 0.20	D: 0.68	R: 0.94	D: 0.45
Washington	9	D: 2.03	D: 3.51	R: 2.10	R: 0.09	D: 0.53	D: 0.78
Wisconsin	9	R: 0.42	D: 0.48	D: 0.82	R: 0.32	D: 0.81	D: 0.27

Mean-Median Difference: 1990s

Mean-median difference results displayed below include both the magnitude of the significance level and the party advantaged by it. States with persistent results above the threshold of 1.75 that Wang uses for statistical significance are displayed in bold.

State	CDs	1992	1994	1996	1998	2000	Average
Alabama	7	D: 0.66	D: 0.62	D: 0.46	R: 0.84	R: 1.11	R: 0.04
Arizona	6	R: 0.28	R: 0.47	R: 1.14	R: 0.80	R: 1.26	R: 0.79
California	52	R: 1.34	R: 0.32	R: 1.47	R: 0.54	R: 1.32	R: 1.00
Colorado	6	R: 0.88	R: 1.89	R: 0.85	R: 0.44	R: 0.91	R: 0.99
Connecticut	6	R: 0.13	R: 0.06	R: 0.83	D: 0.42	R: 0.41	R: 0.20
Florida	23	R: 2.82	R: 1.93	R: 2.92	R: 1.27	R: 1.68	R: 2.12
Georgia	11	R: 0.05	R: 1.32	R: 1.36	R: 1.24	R: 1.48	R: 1.09
Illinois	20	D: 0.31	D: 0.10	R: 1.67	R: 1.73	R: 1.23	R: 0.84
Indiana	10	D: 0.93	D: 0.87	R: 0.49	R: 0.57	R: 0.49	D: 0.05
Kentucky	6	D: 1.18	D: 0.83	D: 0.54	D: 1.12	D: 0.23	D: 0.78
Louisiana	7	R: 0.06	D: 1.11	R: 0.83	R: 0.05	R: 1.68	R: 0.30
Maryland	8	R: 0.41	R: 0.77	R: 1.19	R: 0.61	R: 0.43	R: 0.68
Massachusetts	10	D: 1.00	D: 0.30	D: 0.33	D: 0.51	R: 0.50	D: 0.33
Michigan	16	D: 0.19	D: 0.89	D: 0.44	D: 0.68	D: 1.10	D: 0.66
Minnesota	8	R: 0.06	D: 0.33	D: 0.36	D: 0.47	R: 0.17	D: 0.18
Missouri	9	D: 0.08	D: 1.18	D: 1.36	D: 0.90	R: 0.68	D: 0.57
New Jersey	13	D: 0.98	R: 1.97	R: 0.89	R: 0.59	R: 1.28	R: 0.75
New York	31	R: 1.61	D: 0.58	R: 0.58	R: 0.13	D: 0.68	R: 0.21
North Carolina	12	D: 0.86	R: 0.03	D: 0.08	R: 0.05	R: 1.30	R: 0.09
Ohio	19	R: 0.19	R: 0.38	R: 0.76	R: 2.64	R: 0.58	R: 0.91
Oklahoma	6	D: 0.48	R: 0.27	D: 0.40	D: 1.22	R: 0.62	D: 0.24
Pennsylvania	21	R: 0.79	R: 0.22	D: 0.33	D: 0.15	R: 1.73	R: 0.45
South Carolina	6	D: 0.76	R: 1.09	R: 1.17	R: 1.14	R: 1.20	R: 0.77
Tennessee	9	D: 0.51	R: 0.23	R: 1.68	R: 1.58	R: 2.61	R: 1.12
Texas	30	D: 2.64	D: 2.32	D: 1.51	D: 3.44	D: 2.60	D: 2.50
Virginia	11	D: 0.55	D: 1.12	D: 2.04	D: 0.67	R: 2.40	D: 0.39
Washington	9	R: 0.59	R: 0.24	R: 0.83	D: 0.20	D: 0.34	R: 0.23
Wisconsin	9	R: 0.58	R: 0.65	D: 0.93	R: 0.44	D: 0.57	R: 0.03

Appendix 2: Partisan Bias in State with Six or More Congressional Districts (2002-2010)

Efficiency Gap: 2000s

Efficiency gap results displayed below include both the magnitude of the seat gap and the party advantaged by the gap. States with persistent results above the threshold of two seats that Stephanopoulos and McGhee propose for presumptive unconstitutionality are displayed in bold.

State	Districts	2002	2004	2006	2008	2010	Average
Alabama	7	R: 0.78	R: 0.42	R: 0.11	D: 0.30	R: 0.75	R: 0.35
Arizona	8	R: 1.07	R: 1.37	R: 0.20	D: 0.39	R: 0.48	R: 0.55
California	53	D: 0.57	R: 1.58	R: 3.30	R: 6.75	R: 1.13	R: 2.44
Colorado	7	R: 0.77	R: 0.58	R: 0.40	D: 0.52	R: 0.33	R: 0.31
Connecticut	5	R: 0.73	R: 1.09	D: 0.37	D: 0.85	D: 1.58	D: 0.20
Florida	**25**	**R: 3.92**	**R: 3.82**	**R: 3.57**	**R: 2.85**	**R: 3.35**	**R: 3.50**
Georgia	13	D: 0.55	D: 0.84	D: 0.49	R: 0.66	D: 0.17	D: 0.28
Illinois	19	R: 1.80	R: 2.03	R: 2.74	R: 1.99	R: 3.39	R: 2.39
Indiana	9	R: 0.37	R: 1.14	D: 0.52	R: 0.14	R: 0.06	R: 0.24
Kentucky	6	R: 0.53	R: 0.92	R: 0.21	R: 0.51	D: 0.61	R: 0.31
Louisiana	7	R: 0.21	R: 0.09	D: 0.00	R: 1.70	R: 0.44	R: 0.49
Maryland	8	D: 0.97	D: 0.26	R: 0.18	R: 0.12	R: 0.15	D: 0.16
Massachusetts	10	D: 1.35	D: 0.88	D: 0.65	D: 1.30	D: 2.53	D: 1.34
Michigan	15	R: 1.44	R: 1.76	R: 2.93	R: 1.13	R: 0.86	R: 1.62
Minnesota	8	R: 0.34	R: 0.62	R: 0.05	R: 0.74	R: 0.33	R: 0.42
Missouri	9	D: 0.18	D: 0.23	R: 0.45	R: 0.73	R: 0.29	R: 0.21
New Jersey	13	R: 0.56	R: 1.00	R: 1.67	R: 0.79	R: 0.03	R: 0.81
New York	29	R: 0.60	R: 3.16	R: 2.68	D: 0.21	R: 0.92	R: 1.43
North Carolina	13	R: 0.15	R: 0.33	R: 0.04	D: 0.21	D: 1.61	D: 0.26
Ohio	18	R: 1.09	R: 1.90	R: 3.22	R: 0.11	R: 2.11	R: 1.69
Oklahoma	5	R: 1.06	R: 0.42	R: 0.73	R: 0.39	D: 0.15	R: 0.49
Pennsylvania	19	R: 2.18	R: 2.31	R: 0.94	D: 0.52	R: 1.86	R: 1.35
South Carolina	6	R: 0.23	R: 0.29	R: 0.37	R: 0.95	R: 1.03	R: 0.57
Tennessee	9	D: 0.74	D: 0.35	R: 0.15	D: 0.95	R: 0.17	D: 0.35
Texas	32	D: 3.76	R: 1.76	R: 1.30	R: 2.93	R: 0.48	R: 0.54
Virginia	11	R: 1.30	R: 1.42	R: 2.33	D: 0.32	R: 1.59	R: 1.26
Washington	9	D: 0.87	R: 0.11	R: 0.44	R: 0.08	D: 0.15	D: 0.08
Wisconsin	8	D: 0.11	D: 0.61	D: 0.29	D: 0.19	R: 0.26	D: 0.19

Seats-to-Votes Curve: 2000s

Seats-to-votes curve results displayed below include both the magnitude of the seat skew and the party advantaged by the skew. States with persistent results above the threshold of two seats that we use for presumptive unconstitutionality are displayed in bold.

State	Districts	2002	2004	2006	2008	2010	Average
Alabama	7	R: 0.92	R: 0.57	R: 0.24	D: 0.15	R: 0.91	R: 0.50
Arizona	8	R: 0.70	R: 1.00	D: 0.07	D: 0.74	R: 0.19	R: 0.21
California	53	D: 2.22	R: 0.55	R: 2.51	R: 5.17	D: 0.31	R: 1.14
Colorado	7	R: 0.76	R: 0.62	R: 0.47	D: 0.57	R: 0.27	R: 0.31
Connecticut	5	R: 0.80	R: 1.12	D: 0.41	D: 1.00	D: 1.54	D: 0.21
Florida	**25**	**R: 4.11**	**R: 4.15**	**R: 3.84**	**R: 2.78**	**R: 2.86**	**R: 3.55**
Georgia	13	D: 0.68	D: 0.90	D: 0.69	R: 0.62	D: 0.18	D: 0.37
Illinois	19	R: 1.48	R: 1.36	R: 2.03	R: 1.41	R: 2.63	R: 1.78
Indiana	9	R: 0.43	R: 1.21	D: 0.47	R: 0.15	R: 0.07	R: 0.28
Kentucky	6	R: 0.74	R: 1.06	R: 0.34	R: 0.67	D: 0.33	R: 0.49
Louisiana	7	R: 0.08	D: 0.04	R: 0.15	R: 1.55	R: 0.56	R: 0.46
Maryland	8	D: 1.15	D: 0.44	D: 0.10	D: 0.36	D: 0.08	D: 0.43
Massachusetts	10	D: 1.75	D: 1.51	D: 1.39	D: 1.74	D: 2.59	D: 1.80
Michigan	15	R: 1.44	R: 1.58	R: 2.85	R: 1.06	R: 0.48	R: 1.48
Minnesota	8	R: 0.38	R: 0.62	D: 0.01	R: 0.66	R: 0.25	R: 0.38
Missouri	9	D: 0.14	D: 0.18	R: 0.39	R: 0.85	R: 0.27	R: 0.24
New Jersey	13	D: 0.16	R: 0.68	R: 1.27	R: 0.51	D: 0.49	R: 0.36
New York	29	D: 0.94	R: 1.39	D: 0.07	D: 2.54	D: 1.21	D: 0.67
North Carolina	13	R: 0.14	R: 0.42	R: 0.17	D: 0.09	D: 1.47	D: 0.16
Ohio	18	R: 1.25	R: 2.08	R: 3.25	R: 0.18	R: 2.11	R: 1.77
Oklahoma	5	R: 1.14	R: 0.52	R: 0.77	R: 0.48	R: 0.07	R: 0.60
Pennsylvania	19	R: 2.07	R: 2.45	R: 1.09	D: 0.30	R: 2.06	R: 1.48
South Carolina	6	R: 0.32	R: 0.31	R: 0.38	R: 1.03	R: 1.13	R: 0.63
Tennessee	9	D: 0.71	D: 0.29	D: 0.02	D: 0.87	R: 0.32	D: 0.32
Texas	32	D: 4.18	R: 1.10	R: 0.39	R: 2.10	D: 0.49	D: 0.22
Virginia	11	R: 1.46	R: 1.44	R: 2.38	D: 0.20	R: 1.62	R: 1.34
Washington	9	D: 0.67	R: 0.27	R: 0.49	R: 0.23	R: 0.03	R: 0.07
Wisconsin	8	R: 0.11	D: 0.58	D: 0.30	D: 0.04	R: 0.26	D: 0.11

Mean-Median Difference: 2000s

Mean-median difference results displayed below include both the magnitude of the significance level and the party advantaged by it. States with persistent results above the threshold of 1.75 that Wang uses for statistical significance are displayed in bold.

State	Districts	2002	2004	2006	2008	2010	Average
Alabama	7	R: 1.13	R: 0.84	R: 1.69	D: 0.32	D: 0.52	R: 0.57
Arizona	8	R: 1.69	R: 1.76	R: 0.68	D: 0.45	R: 0.19	R: 0.77
California	**53**	**D: 3.23**	**D: 3.70**	**D: 3.18**	**D: 4.46**	**D: 2.84**	**D: 3.48**
Colorado	7	R: 0.36	R: 0.81	D: 0.04	D: 1.19	R: 0.20	R: 0.03
Connecticut	5	R: 1.28	R: 1.50	R: 1.04	D: 0.14	D: 0.81	R: 0.58
Florida	25	R: 2.52	R: 1.23	R: 2.40	R: 3.19	R: 1.36	R: 2.14
Georgia	13	D: 0.65	R: 0.51	R: 3.11	R: 2.61	R: 2.54	R: 1.62
Illinois	19	R: 2.19	R: 1.25	R: 1.43	R: 0.32	R: 1.68	R: 1.37
Indiana	9	D: 1.01	D: 0.75	D: 0.79	D: 1.66	R: 0.80	D: 0.68
Kentucky	6	R: 0.08	R: 0.76	D: 0.59	R: 0.89	R: 1.31	R: 0.49
Louisiana	7	R: 0.67	D: 0.06	R: 1.32	0.51	R: 0.27	R: 0.34
Maryland	8	D: 0.69	D: 1.49	D: 0.75	D: 1.27	D: 0.45	D: 0.93
Massachusetts	10	R: 0.18	R: 1.05	R: 0.86	R: 0.96	R: 1.82	R: 0.97
Michigan	15	R: 2.20	R: 2.63	R: 1.93	R: 1.14	R: 1.16	R: 1.81
Minnesota	8	D: 0.50	D: 0.20	D: 0.58	D: 1.63	R: 0.30	D: 0.52
Missouri	9	R: 2.04	R: 2.33	R: 2.54	R: 0.51	R: 1.54	R: 1.79
New Jersey	13	D: 1.94	D: 0.96	D: 1.87	D: 1.41	D: 0.40	D: 1.32
New York	29	D: 1.08	D: 1.63	D: 0.45	R: 1.03	R: 0.74	D: 0.28
North Carolina	13	R: 0.92	R: 1.26	D: 0.53	D: 2.64	D: 2.64	D: 0.73
Ohio	18	R: 2.79	R: 2.48	R: 1.79	R: 0.58	R: 0.64	R: 1.66
Oklahoma	5	R: 0.42	R: 1.00	R: 1.19	R: 0.83	R: 1.22	R: 0.93
Pennsylvania	19	R: 2.05	R: 2.94	R: 1.51	D: 0.23	R: 1.13	R: 1.48
South Carolina	6	R: 1.43	R: 1.55	R: 1.67	R: 0.62	R: 0.31	R: 1.12
Tennessee	9	D: 0.85	D: 0.83	D: 2.38	D: 0.93	R: 0.84	D: 0.83
Texas	**32**	**D: 2.54**	**R: 3.11**	**R: 3.31**	**R: 2.50**	**R: 2.42**	**R: 1.76**
Virginia	11	R: 1.06	R: 2.19	R: 1.65	R: 0.23	R: 0.52	R: 1.13
Washington	9	D: 1.00	D: 1.24	D: 0.96	D: 1.30	R: 0.25	D: 0.85
Wisconsin	8	D: 0.72	R: 0.78	D: 0.71	D: 0.56	D: 0.05	D: 0.25

Appendix 3: Partisan Bias in States with Six or More Congressional Districts (2012-2016)

Efficiency Gap: 2010s

Efficiency gap results displayed below include both the magnitude of the seat gap and the party advantaged by the gap. States with persistent results above the threshold of two seats that Stephanopoulos and McGhee propose for presumptive unconstitutionality are displayed in bold.

State	CDs	2012	2014	2016	Average
Alabama	7	R: 0.97	R: 0.41	R: 0.70	R: 0.69
Arizona	9	D: 1.10	D: 0.38	R: 0.11	D: 0.46
California	53	D: 0.17	D: 4.32	R: 1.35	D: 1.05
Colorado	7	R: 0.59	R: 0.22	R: 0.38	R: 0.40
Connecticut	5	D: 0.95	D: 1.47	D: 1.15	D: 1.19
Florida	27	R: 3.46	R: 1.78	R: 1.45	R: 2.23
Georgia	14	R: 0.81	R: 0.87	R: 1.38	R: 1.02
Illinois	18	D: 0.56	R: 0.18	R: 0.04	D: 0.11
Indiana	9	R: 1.77	R: 0.63	R: 0.67	R: 1.02
Kentucky	6	R: 0.69	R: 0.32	R: 0.11	R: 0.37
Louisiana	6	R: 0.61	R: 0.32	R: 0.03	R: 0.32
Maryland	8	D: 0.54	D: 1.57	D: 0.86	D: 0.99
Massachusetts	9	D: 1.35	D: 2.04	D: 1.20	D: 1.53
Michigan	**14**	**R: 2.84**	**R: 2.48**	**R: 2.09**	**R: 2.47**
Minnesota	8	R: 0.07	D: 0.63	D: 0.64	D: 0.40
Missouri	8	R: 0.89	R: 0.19	R: 0.38	R: 0.49
New Jersey	12	R: 1.92	R: 1.09	R: 0.64	R: 1.22
New York	27	R: 1.78	R: 1.38	R: 2.86	R: 2.01
North Carolina	**13**	**R: 2.77**	**R: 2.74**	**R: 2.56**	**R: 2.69**
Ohio	16	R: 3.93	R: 1.77	R: 1.60	R: 2.43
Oklahoma	5	R: 0.75	R: 0.31	R: 0.37	R: 0.48
Pennsylvania	**18**	**R: 4.17**	**R: 2.87**	**R: 3.25**	**R: 3.43**
South Carolina	7	R: 1.55	R: 1.19	R: 1.20	R: 1.31
Tennessee	9	R: 0.51	R: 0.16	D: 0.02	R: 0.22
Texas	36	R: 1.95	R: 0.50	R: 3.18	R: 1.88
Virginia	11	R: 2.34	R: 1.52	R: 1.13	R: 1.66
Washington	10	D: 0.29	D: 0.38	D: 0.03	D: 0.23
Wisconsin	8	R: 1.17	R: 0.62	R: 0.50	R: 0.76

Seats-to-Votes Curve: 2010s

Seats-to-votes curve results displayed below include both the magnitude of the seat skew and the party advantaged by the skew. States with persistent results above the threshold of two seats that we use for presumptive unconstitutionality are displayed in bold.

State	CDs	2012	2014	2016	Average
Alabama	7	R: 1.18	R: 0.67	R: 0.86	R: 0.90
Arizona	9	D: 1.12	D: 0.34	D: 0.09	D: 0.52
California	53	D: 0.26	D: 3.62	R: 1.04	D: 0.95
Colorado	7	R: 0.82	R: 0.38	R: 0.54	R: 0.58
Connecticut	5	D: 0.15	D: 1.43	D: 1.19	D: 1.22
Florida	27	R: 3.61	R: 1.27	R: 1.47	R: 2.12
Georgia	14	R: 1.17	R: 1.03	R: 1.56	R: 1.25
Illinois	18	D: 0.79	D: 0.20	R: 0.13	D: 0.29
Indiana	9	R: 1.88	R: 0.72	R: 0.83	R: 1.14
Kentucky	6	R: 0.92	R: 0.57	R: 0.40	R: 0.63
Louisiana	6	R: 0.73	R: 0.54	R: 0.31	R: 0.53
Maryland	8	D: 0.69	D: 1.61	D: 0.97	D: 1.09
Massachusetts	9	D: 1.67	D: 2.14	D: 1.57	D: 1.79
Michigan	**14**	**R: 2.99**	**R: 2.47**	**R: 2.06**	**R: 2.51**
Minnesota	8	R: 1.12	D: 0.57	D: 0.58	D: 0.01
Missouri	8	R: 1.06	R: 0.29	R: 0.49	R: 0.61
New Jersey	12	R: 1.53	R: 0.44	R: 0.19	R: 0.72
New York	27	R: 0.14	R: 0.83	R: 1.81	R: 0.93
North Carolina	**13**	**R: 2.95**	**R: 2.81**	**R: 2.83**	**R: 2.86**
Ohio	16	R: 4.00	R: 1.70	R: 1.67	R: 2.46
Oklahoma	5	R: 1.01	R: 0.75	R: 0.79	R: 0.89
Pennsylvania	**18**	**R: 4.56**	**R: 3.04**	**R: 3.58**	**R: 3.73**
South Carolina	7	R: 1.68	R: 1.32	R: 1.27	R: 1.42
Tennessee	9	R: 0.74	R: 0.25	R: 0.19	R: 0.39
Texas	36	R: 0.91	R: 0.26	R: 2.06	R: 1.08
Virginia	11	R: 2.46	R: 1.62	R: 1.30	R: 1.79
Washington	10	R: 0.04	D: 0.17	R: 0.08	D: 0.02
Wisconsin	8	R: 1.25	R: 0.67	R: 0.69	R: 0.87

Mean-Median Difference: 2010s

Mean-median difference results displayed below include both the magnitude of the significance level and the party advantaged by it. States with persistent results above the threshold of 1.75 that Wang uses for statistical significance are displayed in bold.

State	CDs	2012	2014	2016	Average
Alabama	7	R: 0.69	R: 0.68	R: 0.94	R: 0.77
Arizona	9	D: 1.06	D: 1.35	R: 1.15	D: 0.42
California	53	D: 0.45	D: 0.79	D: 1.51	D: 0.92
Colorado	7	R: 0.48	R: 0.72	R: 0.87	R: 0.69
Connecticut	5	D: 1.36	D: 1.44	D: 1.13	D: 1.31
Florida	**27**	**R: 1.86**	**R: 2.98**	**R: 1.90**	**R: 2.25**
Georgia	14	R: 2.38	R: 2.04	R: 1.38	R: 1.93
Illinois	18	R: 0.66	D: 0.34	D: 1.04	D: 0.24
Indiana	9	R: 0.46	R: 1.48	R: 1.26	R: 1.07
Kentucky	6	R: 0.97	R: 0.95	R: 1.27	R: 1.06
Louisiana	6	R: 0.79	R: 0.65	R: 1.00	R: 0.81
Maryland	8	D: 0.78	D: 0.84	D: 0.44	D: 0.69
Massachusetts	9	R: 0.63	R: 0.32	D: 0.46	R: 0.16
Michigan	**14**	**R: 1.87**	**R: 2.38**	**R: 2.32**	**R: 2.19**
Minnesota	8	R: 0.23	D: 0.06	R: 0.58	R: 0.25
Missouri	8	R: 1.48	R: 1.62	R: 2.00	R: 1.70
New Jersey	12	R: 0.76	R: 0.59	D: 0.07	R: 0.43
New York	27	R: 0.57	R: 1.45	R: 1.34	R: 1.12
North Carolina	**13**	**R: 2.47**	**R: 1.77**	**R: 1.75**	**R: 2.00**
Ohio	**16**	**R: 2.59**	**R: 2.47**	**R: 2.60**	**R: 2.55**
Oklahoma	5	D: 0.41	R: 1.01	R: 0.59	R: 0.40
Pennsylvania	**18**	**R: 2.41**	**R: 2.08**	**R: 2.49**	**R: 2.33**
South Carolina	7	R: 1.57	R: 1.04	R: 0.50	R: 1.04
Tennessee	9	R: 1.76	R: 1.86	R: 1.73	R: 1.78
Texas	**36**	**R: 2.89**	**R: 2.49**	**R: 1.82**	**R: 2.40**
Virginia	**11**	**R: 2.05**	**R: 1.85**	**R: 1.85**	**R: 1.92**
Washington	10	D: 0.73	D: 0.46	D: 0.59	D: 0.59
Wisconsin	8	R: 1.68	R: 1.58	R: 1.82	R: 1.69

[1] Thornburg v. Gingles, 478 U.S. 30, 47 (1986), Bartlett v. Strickland, 556 U.S. 1, 22-5 (2009).

[2] Ibid.

[3] Lisa Handley, Bernard Grofman, and Wayne Arden, "Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates" in *Race and Redistricting in the 1990s*, ed. Bernard Grofman (New York: Agathon Press, 1998), 13-38.

[4] Steven Hill, "How the Voting Rights Act Hurts Democrats and Minorities," *The Atlantic*, June 17, 2013, https://www.theatlantic.com/politics/archive/2013/06/how-the-voting-rights-act-hurts-democrats-and-minorities/276893/.

[5] Steven A. Holmes, "Did Racial Redistricting Undermine Democrats?," *New York Times*, November 13, 1994, http://www.nytimes.com/1994/11/13/us/the-1994-election-voters-did-racial-redistricting-undermine-democrats.html.

[6] Michael Kelly, "Segregation Anxiety," *New Yorker*, November 20, 1995, 46, 48. http://www.newyorker.com/magazine/1995/11/20/segregation-anxiety.

[7] Jeffrey Toobin, "The Great Election Grab," *New Yorker*, December 8, 2003, http://www.newyorker.com/magazine/2003/12/08/the-great-election-grab.

[8] Brief of Amicus Curiae The National Republican Congressional Committee in Support of Appellants, Gill v. Whitford, No. 16-1161 (U.S. filed March 24, 2017), 39-41.

[9] Gill v. Whitford, No. 16-1161 (U.S. filed March 24, 2017).

[10] North Carolina's 11th Congressional District changed hands in 2012 from Democrat to Republican.

[11] Nicholas O. Stephanopoulos and Eric M. McGhee, "Partisan Gerrymandering and the Efficiency Gap," *University of Chicago Law Review* 82 (2015): 831.

[12] Whitford v. Gill, No. 15-CV-421-BBC, 2016 WL 6837229 (W.D. Wis. Nov. 21, 2016).

[13] Nicholas Goedert, "Gerrymandering or geography? How Democrats won the popular vote but lost the Congress in 2012," *Research & Politics* 1 no. 1 (2014): 1, doi 10.1177/2053168014528683.

[14] Michael D. McDonald & Robin E. Best, "Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases." *Election Law Journal* 14 no. 4(2015):doi: 10.1089/elj.2015.0358.

[15] Samuel S-H Wang. "Three Tests for Practical Evaluation of Partisan Gerrymandering," *Stanford Law Review* 68 (2016):1263, http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2016/06/3_-_Wang_-_Stan._L._Rev.pdf.

[16] Some have attributed this aggressive interpretation to stances by Bush Justice Department. See Miller v. Johnson, 515 U.S. 900, 924-6 (1995), *but see* Mark A. Posner, "Post-1990 Redistricting and the Preclearance Requirement of Section 5 of the Voting Rights Act," in *Race and Redistricting in the 1990s*, ed. Bernard Grofman (New York: Agathon Press, 1998), 80-117.

[17] Michael Barone and Grant Ujifusa, *The Almanac of American Politics 1994* (Washington D.C.: National Journal, 1993).

[18] For purposes of this study, we define the South as the states of the former Confederacy.

[19] Partisan bias measures are generally only used to measure bias in states with at least six districts. Therefore, Mississippi is not included in this analysis.

[20] Barone and Ujifusa, *The Almanac of American Politics 1994*, 1209.

[21] Florida's 18th and 21st Congressional Districts were both located in Miami-Dade County under the two congressional plans used in the 1990s and were represented by Republicans Ileana Ros-Lehtinen and Lincoln Diaz-Balart throughout this period. Michael Barone and Grant Ujifusa, *The Almanac of American Politics 2002* (Washington, D.C.: National Journal 2001), 411-13, 418-20.

[22] Michael Barone and Grant Ujifusa, *The Almanac of American Politics 1998* (Washington, D.C.: National Journal, 1997), 344.

[23] Hawaii is excluded from this analysis for the same reasons set forth in endnote 19.

[24] Barone and Ujifusa, *The Almanac of American Politics 2002*.

[25] Ibid.

[26] Michael Barone and Grant Ujifusa, *The Almanac of American Politics 2000* (Washington, D.C.: National Journal, 1999), 1097.

[27] Ibid., 175-316, 1100-1184.

[28] See Samuel Issacharoff, *Gerrmandering and Political Cartels,* 116 Harv. L. Rev. 593, 631-36 (2002) for a discussion of the Supreme Court's racial gerrymandering jurisprudence.

[29] Michael Barone and Richard E. Cohen, *The Almanac of American Politics 2006* (Washington, D.C.: National Journal, 2005), 117, 156, 467.

[30] Michael Barone and Richard Cohen, *The Almanac of American Politics 2010* (Washington, D.C.: National Journal, 2009), 105, 135, 408.

[31] Ibid., 487-88.

[32] Ibid., 135-36.

[33] Ibid., 389, 397, 407.

[34] Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 Fl. St. U. L. Rev. 573-610 (2016).

[35] TX-33 is a coalition district in the Dallas-Fort Worth area.

[36] Christopher Ingraham, "What 60 Years of Political Gerrymandering Looks Like," *Washington Post*, May 21, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/05/21/what-60-years-of-political-gerrymandering-looks-like/?utm_term=.8cb5bdf77052.

[37] Bethune-Hill v. Virginia State Bd. of Elections, 137 S.Ct 788 (2017) (reversing and remanding decision holding that Virginia's 2012 congressional plan was not racial gerrymander) and Cooper v. Harris, 147 S.Ct. 1455 (2017) (affirming decision invalidating two districts in North Carolina's 2011 congressional plan as racial gerrymanders).

[38] Brennan Center analysis based on data from the Texas Legislative Council.

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ANALYSIS

Voter Purges: The Risks in 2018

by Jonathan Brater[†]

Introduction

Voter purges — the often controversial practice of removing voters from registration lists in order to keep them up to date — are poised to be one of the biggest threats to the ballot in 2018. Activist groups and some state officials have mounted alarming campaigns to purge voters without adequate safeguards. If successful, these efforts could lead to a massive number of eligible, registered voters losing their right to cast a ballot this fall.

Properly done, efforts to clean up voter rolls are important for election integrity and efficiency. Done carelessly or hastily, such efforts are prone to error, the effects of which are borne by voters who may show up to vote only to find their names missing from the list.

Many of the voter purge efforts examined by the Brennan Center for Justice here not only risk disenfranchisement, but also run afoul of federal legal requirements. These efforts point to a decentralized, hard-to-trace mode of voter suppression — one that is perhaps less sweeping than voter ID, proof-of-citizenship, and similar legislation enacted by 23 states over the last decade. But the effect of voter purges can be equally devastating.

One example? In 2016, Arkansas' secretary of state sent county clerks the names of more than 50,000 people who were supposedly ineligible to vote because of felony convictions. Those county clerks began to remove voters without any notice. The state later discovered the purge list was riddled with errors: It included at least 4,000 people who did not have felony convictions.[1] And among those on the list who once had a disqualifying conviction, up to 60 percent of those individuals were Americans who were eligible to vote because they had their voting rights restored back to them.[2]

> The Arkansas incident also illustrates the confusion arising from many state laws that disenfranchise persons with past criminal convictions. Nationally, **more than 6 million Americans cannot vote** because of a past felony conviction. Up to 4.7 million of them have been released from incarceration and are living and working in their communities. In Arkansas, voting rights are not restored until the terms of the sentence are complete, including prison, parole, and probation. In this case, it appears that thousands of individuals who had met those conditions and had their rights restored were still removed.

Counties scrambled to fix the mistakes right before a school board race and weeks before the presidential election, but clerks admitted they

would have a hard time restoring all the voters to the rolls in time. "There's an old saying that you can't unring a bell, and that's where we are," said one official, Pulaski County Clerk Larry Crane.[3]

In 2014 and 2015, the Brooklyn Board of Elections purged more than 110,000 voters who had not voted since 2008, and another 100,000 who had supposedly changed their addresses. There was no public announcement that this would be done. Some of those voters were given a paltry three weeks' notice before removal,[4] and thousands of voters showed up at the 2016 primary elections and discovered that their names were missing from the rolls. After a lawsuit, the Board of Elections restored registration records — but by that point, the voters had missed their opportunity to cast a ballot in the primary.

A decade ago, the Brennan Center published the first comprehensive examination of voter purges.[5] We found a patchwork of inconsistent, error-prone practices for removing voters from the rolls. These problematic purges have occurred for a variety of reasons. Election officials depend on unreliable sources to determine that individuals are no longer eligible to vote, use poor methodology to compare the voter registration list with sources of potentially ineligible individuals, conduct voter removal without notice, or fail to provide appropriate protections to voters before removing them.

There is reason to believe problems will be especially acute and widespread in 2018. Here are four voter purge vulnerabilities to watch out for this year.

1. "Challenge Purges" and Other Misuse of Challenger Laws

Most states have "challenger" laws allowing officials, or even private parties, to question voters' eligibility at the polls on Election Day.[6] These laws are designed to apply to a different set of circumstances than the laws governing purges, but are sometimes being used in their stead.

Under federal law, states may not conduct large-scale, systematic purges of the voter rolls within 90 days of a federal election.[7] This buffer, Congress found, is needed to detect and correct the inevitable errors that arise from mass purges.

Challenger laws, on the other hand, operate much closer to elections without this safeguard. Traditionally, they have been used to target voters *individually* as they seek to vote rather than to delete large numbers of voter registrations at the same time.

Recently, election officials and outside agitators have attempted to blur these lines by issuing batch challenges to a large pool of voters all at once. They have been helped by laws in at least fifteen states that allow challenges not only to *voting*, but also to *registration*, before the election even occurs.[8] Challenger laws were already troublesome to those voters who were challenged individually, but now they're being exploited to conduct what is, in effect, a mass purge.

A purge of this variety can both be an end-run around federal protections against wrongful removals and, like with most purges, be difficult to detect until it is too late. This risk is not hypothetical: High-profile attempts to use challenger laws to accomplish "challenge purges" have been exposed before each of the last few elections.

Just before the 2012 election, former Colorado Secretary of State Scott Gessler tried to use challenge procedures to remove alleged non-citizens from the voter rolls.[9] A large-scale removal would have violated the federal 90-day buffer.[10] Instead, Gessler sent letters to 4,000 voters (most of whom turned out to be citizens) threatening to challenge their registrations. Under Colorado law, challenges can be issued up

to 60 days before an election, and a hearing can occur 30 days after that.[11] Effectively, then, Gessler was trying to systematically purge voters from the rolls as close as 30 days before the election. Gessler, after much public criticism, retreated from these efforts.[12]

Former Iowa Secretary of State Matt Schultz tried a similar tactic until he was blocked by a state court.[13] In 2013, a judge rebuffed his first try to purge suspected noncitizens using federal immigration data (again, most turned out to be citizens).[14] Schultz then attempted to send the names of suspected noncitizens to county officials so they could challenge the voters' qualifications themselves. Voters identified as noncitizens, based on unreliable information, would be forced to "show their papers" or else be challenged by election officials, with no restriction on removals within 90 days of an election. In March 2014, less than three months before the primary election, a court blocked Schultz's challenge scheme. The court found Schultz did not have authority to create a new voter removal program simply by calling it a challenge.[15]

In other states, officials have used challenges on an ad hoc basis, but in large numbers. For example, prior to a 2015 state election, Hancock County, Georgia challenged 174 of the city of Sparta's 988 voters. Almost all the challenged voters were African Americans, alleged court filings.[16] The county eventually settled a lawsuit over their actions, agreeing they had failed to consider federal law. [17]

The 2016 election brought an even more brazen "challenge purge." In North Carolina, individuals used challenge laws to try to knock large groups of voters off registration lists under the guise of promoting "election integrity." In a technique similar to voter caging, these individuals claimed that they had sent mail to voters, and were challenging the eligibility of those whose mailing was returned as undeliverable. This was the only evidence they used to make their case. But, instead of questioning voters at the polls on Election Day, these individuals went a step further and challenged the voters' registrations, trying to remove the identified voters from the rolls. The challengers were temporarily successful: only weeks before the 2016 election, they got 6,700 voters purged from the rolls — including a disproportionately high number of African Americans.[18] A federal court ultimately reversed the removals,[19] but the statutory provision[20] that was used to purge voters still remains on the books to this day, even though the judge in the case called it "insane."[21]

> In the past, activists and political operatives have taken advantage of challenger laws to conduct "voter caging." The term refers to mail cages at post offices: caging involves sending mass mailers out to registered voters, and challenging voters at the polls if mail sent to their address was returned as undeliverable.[1] **Caging operations have intimidated voters and led to chaos at the polls.** Operations to challenge registrations, however, present the additional danger that voters will show up to the polls not to find their vote challenged, but instead to find out that they cannot vote because they have been deleted from the rolls altogether.

2. New Potential for "Noncitizen" Voter Purges

There is a substantial threat that some election officials will initiate purges of suspected noncitizens this year. Without any evidence of a problem, the president[22] and like-minded allies have raised the specter of noncitizen voting since the 2016 election. This creates a political incentive to hunt for noncitizen voters on the rolls. In the past, these types of efforts have threatened to disenfranchise many eligible voters.

One notorious example was Florida's 2012

purge. The secretary of state initially reported that a cross-reference of the voter rolls with driver's license data showed up to 180,000 noncitizens were registered in the state. State officials then compiled a list of more than 2,600 voters for counties to purge, right before the federal election that year. The program was ultimately blocked by a federal court.[23] As it turned out, upon further examination only 85 individuals were found appropriate for removal on the grounds that they were noncitizens[24] (and only one was actually charged for voting[25]).

Florida's experience is illustrative of a broader problem with noncitizen voter purges. The state relied on its driver's license database to create a purge list, but DMV records are unreliable for this purpose. A noncitizen could get a driver's license in 2014, become a U.S. citizen in 2015, and register to vote in 2016 — not at all an unusual occurrence given that state driver's licenses last many years without requiring renewal.[26]

In almost all instances, initial estimates of noncitizens on voter registration rolls based on DMV lists prove vastly inflated. In Colorado, the secretary of state claimed he had a list of 3,900 noncitizens that he later ended up dropping to 141.[27] In Iowa, 3,500 supposed noncitizens, who Secretary of State Matt Schultz also wanted to challenge, became 248,[28] and in Michigan, 4,000 individuals became 600.[29]

This year, though, could present a unique problem: DHS Secretary Kirstjen Nielsen has made clear that the agency will help states "concerned that those who are not [eligible] from an immigration perspective" to check those records, although she has not offered specifics. [30]

In the past, states' access to federal immigration information has been limited to use of the Systematic Alien Verification for Entitlements (SAVE) program. SAVE works as follows: The user submits a name and an Alien Registration Number (for example, for someone who showed a Green Card when getting a driver's license). SAVE then attempts to verify the person's current immigration status by checking that record against multiple federal immigration lists. When using SAVE, there are mandatory subsequent steps to verify the information.[31]

Of course, SAVE can sometimes actually be helpful in proving individual voters are eligible. For example, when Colorado ran suspected noncitizens' names through SAVE, 88 percent were found to be citizens.[32]

Experience has shown, however, that the required subsequent verification steps are important in avoiding error when using SAVE. For one, the SAVE database is incomplete because native-born citizens (and undocumented noncitizens) are not in SAVE. Also, using SAVE is vulnerable to the same problems that plague other large-scale database matching attempts, like out-of-date source lists and poor matching criteria.

The worry is that Secretary Nielsen's comments, which provided no bounds or limits on data access, are an indicator that states will have the ability in the future to directly access the DHS lists outside of SAVE. This would have all the problems of the initial cross-reference attempts using SAVE, but without the subsequent verification steps that are required when using SAVE.

3. Interstate Crosschecking is Posing New Threats

This year, there are new reasons for concern over efforts to purge the voter rolls using the Interstate Voter Registration Crosscheck ("Crosscheck") program. Crosscheck contains records for 26 states and nearly 100 million voters.[33]

Sharing voter data across state lines is not new, but there are problems with Crosscheck that

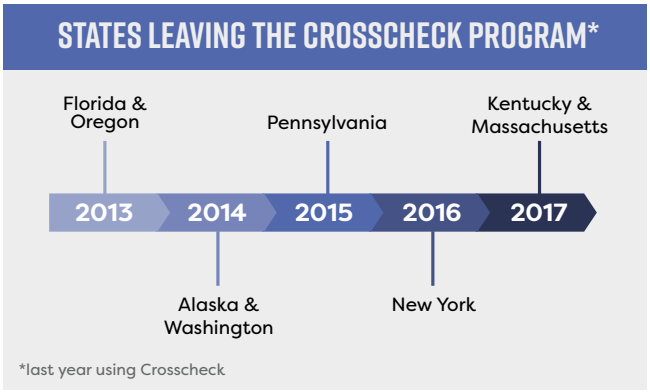
should cause concern. First, Crosscheck data is inaccurate. It is supposed to tell election officials when someone moved *from* their state, but sometimes does the opposite. More than 2,500 voters whom Crosscheck said left Iowa prior to 2012 voted in the state that year.[34] One voter purged from Virginia's rolls because Crosscheck said he moved to South Carolina had actually moved *from* South Carolina *to* Virginia.[35]

Under Crosscheck, it's easy to confuse two different individuals as the same person. Crosscheck can create a match if only the first name, last name, and date of birth are the same. Shared names and birthdates are extremely common, making this an insufficient and imprecise method of identifying potentially ineligible voters. In a group of more than 180 people, it is more likely than not that two people will have the exact same date, month, and year of birth.[36] In the past, the Crosscheck system has even listed men with different middle initials — "Robert Wendell Brown" and "Robert B. Brown" — as the same person.[37]

A recent study estimated that only 0.5 to 2.7 percent of nearly 800,000 Crosscheck double-vote "matches" represented actual double votes.[38] A review of 1,483 pairings in Iowa with the same name and birthdate found that 99.5 percent had *different* social security numbers, so they clearly were not the same person.[39] In 2017, Virginia found that more than 250,000 out of 350,000 Crosscheck "potential matches" were inaccurate after checking more data.[40] Crosscheck confused an Idaho voter for another man in Arizona, even though he had never set foot in the state.[41] The list goes on.

To top it off, Crosscheck data is not secure. Indivisible Chicago, an advocacy group, discovered that program administrators sent Crosscheck passwords in unsecured emails to more than 80 recipients.[42] The passwords are simple and infrequently changed.[43] This risks access to or even manipulation of data for nearly 100 million registered voters at a time when foreign actors are actively seeking this information.[44] Florida just announced that it accidentally disclosed nearly 1,000 voters' partial social security numbers that had previously been provided to Crosscheck.[45] Inspiring even less confidence, Kansas, which administers the Crosscheck program, disclosed personal data for thousands of state employees.[46]

Unsurprisingly, many states are re-evaluating their use of the program. Illinois has announced[47] it will delay sending data to Crosscheck and is considering leaving the program altogether, joining a number of states that have already done so. Oregon left "because the data … was unreliable"[48] and officials elsewhere have voiced similar concerns.



Nonetheless, new states are joining the program. Alabama first sent data to Crosscheck in 2016,[49] and New Hampshire joined the next year.[50] This is a concern because significant Crosscheck problems have occurred when states receive Crosscheck data for the first time. When state or local officials first get the data, they may not understand that it is unreliable or that further checks are needed before removing voters. In 2013 state elections, Virginia found error rates as high at 17 percent when it removed 40,000 voters during its initial use of the program.[51] The next year, Ada County, Idaho, used the pro-

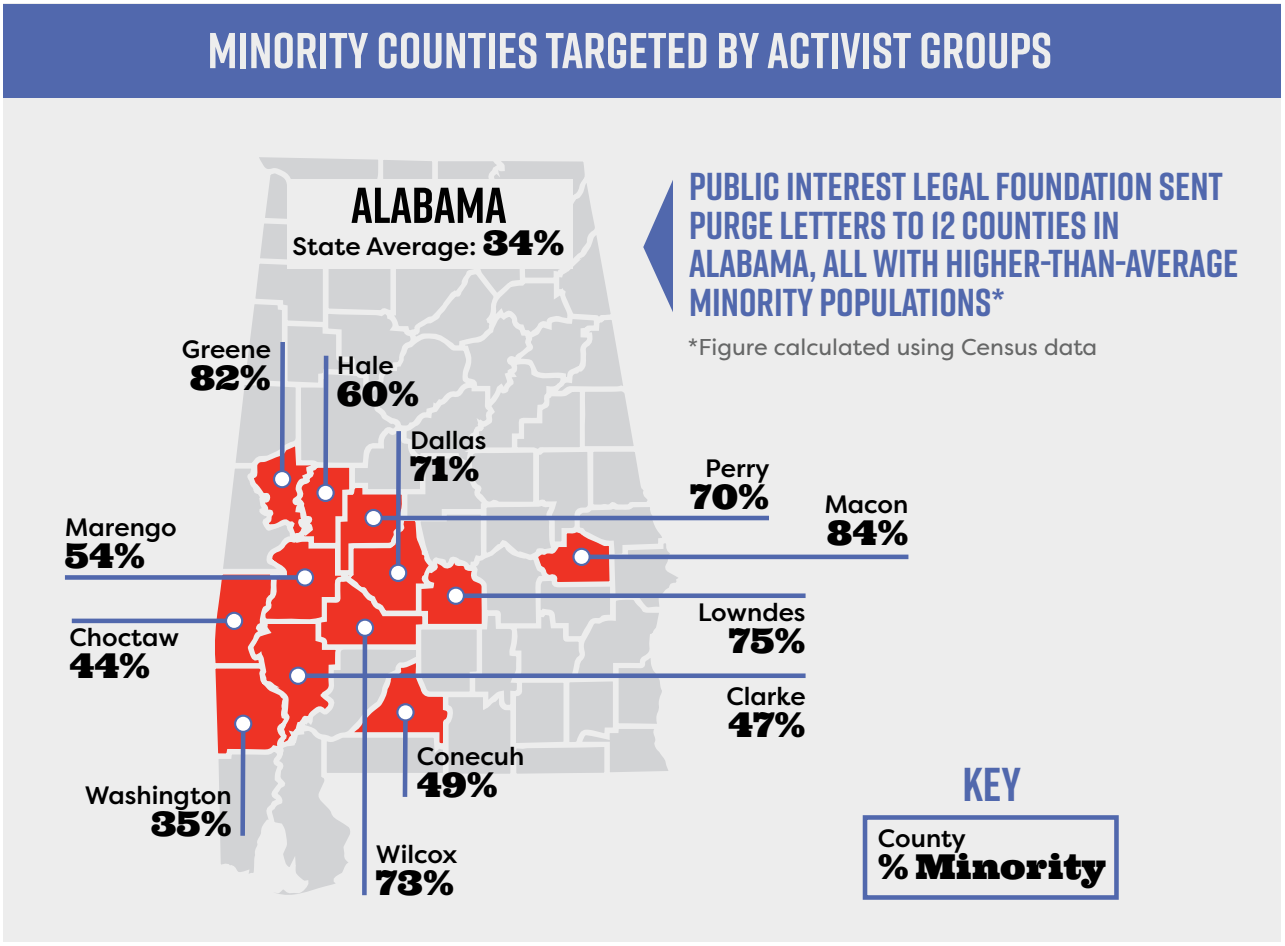
gram for the first time and removed 765 people without prior notice. Many voters pointed out errors, and counties scrambled to restore registrations.[52]

In other states, 2018 could mark the first time that voters who were flagged by Crosscheck several years ago will actually be removed. Federal law allows states to begin a multi-year removal process for voters flagged as potentially ineligible.[53] States first send voters a notification in the mail. If the voter does not respond, and does not vote in the next two federal elections, the voter can be removed. So, the effects of problematic matches that occurred four or five years ago could first materialize this election — in 2013 and 2014, six states joined Crosscheck.[54]

Meanwhile, Indiana passed a law in 2017 that allows voters to be removed *immediately* based on a Crosscheck match. Previously, the state removed voters only after notice, then waiting two even-year elections, as required by federal law.[55] This illustrates the danger posed by the program. If Crosscheck erroneously lists an Indiana voter as having registered in another state, that voter could be purged right away.

4. "Voter Fraud Vigilantes" and the Trump Administration are Pressuring States

Voter fraud alarmists are increasingly focusing their efforts on the registration rolls. In recent years, organizations such as the American Civil Rights Union (ACRU), Judicial Watch, Public Interest Legal Foundation (PILF), and True the Vote have both threatened and filed lawsuits seeking to institute more aggressive purge practices.



These groups have targeted more than 250 jurisdictions in 2017 alone, and more than 400 jurisdictions across the country since 2014.[56] The most strident attempts to force purges often focus on minority counties.[57] Some of the counties contacted have limited resources to defend themselves.[58]

In some cases, these groups have convinced or forced jurisdictions to implement voter removal practices that are problematic. In one high-profile example, Judicial Watch sued Ohio for not purging aggressively enough, and the parties eventually agreed to expand a purge of voters who did not vote or otherwise respond to an election mailing in three federal elections. Under the settlement, Ohio agreed to send a letter initiating the purge on an annual basis. Previously, Ohio had sent the mailing every other year. The Supreme Court is currently weighing whether this new policy of Ohio's, which has purged hundreds of thousands from the rolls, is lawful.[59]

Two counties in Texas agreed to a similar purge practice after being sued by ACRU. Those jurisdictions said they would initiate removals for voters who had not cast ballots in the last two elections. They also agreed to obtain lists of persons with felony convictions and purge them from the voter rolls no more than five days before elections. The specific requirement that voters be removed so close to an election is problematic because it would leave little or no time to correct errors.[60]

These groups frequently have dubious bases for their legal claims. They justify targeting jurisdictions by making a rudimentary comparison between census data and voter lists. When scrutinized, the groups' conclusions usually do not hold up.[61] Moreover, in at least two cases, the groups were rebuked by courts for misrepresenting laws or purge practices. [62]

Another threat looms as well. In June 2017, the Department of Justice quietly demanded that 44 states provide detailed information on how they maintain voter registration lists.[63] Observers noted that this could be a prelude to legal action to force states to conduct purges. A former head of the DOJ's Civil Rights Division called the mass request for information "virtually unprecedented."[64] DOJ could be actively pressuring more states to purge the rolls.

The letter is concerning, and hearkens back to a troubling effort from the Bush Administration in the mid-2000's when DOJ pressured U.S. Attorneys to sue states over failing to purge their voter rolls aggressively enough.[65] The Department used their power to put eligible voters at risk, rather than protect voters against disenfranchisement as the federal voting laws they invoked were originally designed to do.

. . .

Although many problems that have persisted with purges for more than a decade remain the same, new threats are emerging in 2018. Those wishing to purge the rolls, whether they be elected officials or private parties, are finding increasingly inventive ways to do so, such as abuse of challenger laws. The politicization of noncitizen voting and immigration in general provides an incentive to hunt for noncitizens on the rolls in a dangerous way, possibly with an assist from DHS. In some states, Crosscheck errors could present themselves for the first time this year, and all across the country, there is increased pressure on states and localities to purge the rolls, whether brought by individual fraud vigilantes or the Trump Administration itself. Voters, civic groups, and election officials must remain alert and guard against these threats in 2018.

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EXTREME GERRYMANDERING & THE 2018 MIDTERM

by Laura Royden, Michael Li, and Yurij Rudensky

Brennan Center for Justice at *New York University School of Law*

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EXECUTIVE SUMMARY

The 2018 elections will test the grip of modern gerrymandering. Voters appear poised to speak loudly. Early indications point to an exceptional wave election. But will that voice translate into electoral results?

While Americans have had wave elections before, one complicating new factor this decade is the pervasiveness of extreme gerrymandering in the drawing of congressional maps. Both parties gerrymander when they can but the practice has been worsened by increasingly sophisticated data and map-drawing techniques. The U.S. Supreme Court considers two partisan gerrymandering cases this year, but rulings will come too late to likely affect the 2018 elections. Instead, Americans in key states will vote again under gerrymandered maps that thus far have proven highly resistant to change.

This comprehensive study poses a stark warning to both courts and the public. What looks to be one of the most important recent midterm elections may turn out, in fact, to show how effectively extreme gerrymandering distorts American democracy and blunts the public's voice.

Because of maps designed to favor Republicans, Democrats would need to win by a nearly unprecedented nationwide margin in 2018 to gain control of the House of Representatives. To attain a bare majority, Democrats would likely have to win the national popular vote by nearly 11 points. Neither Democrats nor Republicans have won by such an overwhelming margin in decades. Even a strong blue wave would crash against a wall of gerrymandered maps.

This high barrier to a Democratic majority is at odds with early polls showing Democrats with a significant advantage in the generic congressional ballot. As of mid-March, Democrats held an average lead of nearly eight percentage points, 48-40.[1] Based on historical election results, a lead of this magnitude should net Democrats around 30 additional seats — comfortably more than the 24 they need to retake control of the U.S. House of Representatives.[2] Because of gerrymandering, however, that is no longer the case.[3] Even the court-ordered redrawing of Pennsylvania's congressional map will only improve Democrats' chances slightly.[4]

As the table on the next page shows, the disparities are sobering. This decade, gerrymandering has helped Republicans. In the future, it may help Democrats. Although this report focuses on Democrats, its warnings apply with equal force to Republicans.

Projected Democratic Seat Gain in U.S. House

Democrats Win National Popular Vote by	Historical Expectation of Democratic Seat Gain (Abramowitz)[i]	Brennan Center Projection of Democratic Seat Gain — with New PA Map (Royden)[ii]
+2	19	5
+4	23	7
+6	27*	13
+8	30	15
+10	34	21
+11	36	28**
+12	38	31
+14	42	41
+16	46	56

* Projected four-seat Democratic majority
** Projected five-seat Democratic majority

To be sure, Democrats might carry some districts they are not projected to win. The March 13, 2018 special election in PA-18 is a recent example. But surprise results under remarkable political circumstances should not obscure the more fundamental lesson of this decade's maps — gerrymandering matters and it matters a lot. Even if 2018 proves to be an unusual year in a greater than normal number of districts, and produces a surprise surplus of Democratic wins, the effects of gerrymandering will return with a vengeance if 2020 looks more like 2012, 2014, or 2016.

Individual states paint an even clearer picture. As gerrymanders become ever more sophisticated, generic ballot leads no longer effectively predict how many seats a party might pick up. Some state maps are carefully designed to withstand significant electoral swings while others respond more nimbly to shifting political preferences. Thus, even if 2018 sees a fairly consistent — and even sizable — national shift in favor of Democrats that is replicated in the states, the party's seat yield is likely to vary significantly between gerrymandered and non-gerrymandered states. While seat turnover in non-gerrymandered states might be close to the number predicted by historic data, gerrymandered states will see lower rates of change or, perhaps, even no change at all.

Political scientists call the relationship between the votes a party gets in a state and how many seats it picks up "responsiveness." In a highly responsive map, a party steadily increases its seats as it increases

its share of the vote. That is how most assume a democracy should function. A non-responsive map would be the reverse: one in which a party can increase its vote share by 10 or even 20 percent without gaining a single extra seat. A handful of states have non-responsive maps that are especially stark:

- In **Michigan**, even if Democrats win five seats with 38.38 percent of the statewide vote, they are not projected to compete for a sixth seat until their statewide vote share reaches 54.89 percent, an increase of 16.51 percentage points.
- In **North Carolina**, even if Democrats win three seats with 29.66 percent of the statewide vote, they are not projected to compete for a fourth seat until their statewide vote share reaches 52.78 percent, an increase of 23.12 percentage points.
- In **Ohio**, even if Democrats win four seats with around 26.07 percent of the statewide vote, they are not projected to compete for a fifth seat until their statewide vote share reaches 54.71 percent, an increase of 28.64 percentage points.
- In **Texas**, even if Democrats win 11 seats with around 31.92 percent of the statewide vote, and because of court-made modifications to the map, compete for a twelfth seat at around 41.07 percent of the vote, they will not compete for a thirteenth seat until their statewide vote share reaches 51.15 percent, an increase of 10.08 percentage points.

The disparity is even greater when looking at the vote share needed to win a bare majority of the congressional delegations of highly gerrymandered states.

This study is the first to gauge the magnitude of change necessary on a state-by-state basis to flip seats under current congressional maps and the first to visualize the responsiveness of maps, highlighting the stark differences between gerrymandered and non-gerrymandered states.

It also illustrates the need for clear legal boundaries in the age of computerized gerrymandering. Although gerrymandering has long been a feature of American political life, this decade's maps durably lock in advantages for both parties with unprecedented precision. Even when an election sees massive changes in the votes a party receives, there can be zero change in the number of seats that party can expect to win. An effectively gerrymandered state's congressional delegation can remain completely static unless confronted with a true tsunami in favor of one party.

This state of affairs turns on its head the Framers' notion that frequent elections would ensure Congress was a "miniature, an exact portrait" of the people as a whole. While much of the focus in partisan gerrymandering litigation has been on measuring the degree of bias, even more troubling is the lack of responsiveness in this decade's maps. Regardless of the 2018 midterms' outcome, this report's findings serve as a wake-up call: Courts must act to rein in extreme partisan gerrymandering or 2021's redistricting will see even more unresponsive, durable, and undemocratic congressional maps.

Key Findings:

- Gerrymandering will materially hamper the Democrats' efforts in the mid-terms. Their average generic ballot lead, as of March 20, 2018, was 9.4 points. But while a roughly 5.4-point lead in 2006 netted Democrats a total of 31 new seats, a comparably sized lead today is projected to give them only 12 seats. This is barely half the number of seats that Democrats need to retake a majority in 2018.
- The lack of responsiveness to electoral shifts is driven in substantial part by a handful of large

states where maps were drawn under single-party control. In the battleground states of **Michigan** and **Ohio**, for example, even if Democrats match their exceptional performance in 2006 and 2008 — the best Democratic years in two decades in both those states — they are not projected to win a single additional seat under the current maps.

Other states with high rates of partisan bias (**North Carolina** and **Texas**) have equally unresponsive maps. Putting even a few seats in play would require Democrats to win a larger share of the vote than they have all decade.

Projected Democratic Seat Gain in Highly Gerrymandered States

State — Delegation Split After 2016 Election	2016 Democratic Vote Share	Extra GOP Seats Attributable to Partisan Bias[i]	Projected Statewide Popular Vote for Democrats to Put One Additional Seat in Play (Royden)	Projected Statewide Popular Vote for Democrats to Have Chance of Winning Majority of Seats (Royden)
Michigan 9R | 5D	49.44%	2-3	54.89% (+5.45 points)	57.60% (+8.16 points)
North Carolina 10R | 3D	46.68%	3	52.78% (+5.1 points)	55.08% (+7.4 points)
Ohio 12R | 4D	41.83%	2-4	54.71% (+12.88 points)	56.53% (+14.7 points)
Texas 25R | 11D	42.29%	1-2	41.07% (-- points)	53.62% (+11.33 points)

The situation would have been even worse for Democrats had the congressional map in **Pennsylvania** not been redrawn in early 2018 by the Pennsylvania Supreme Court. Under the state's 2011 congressional map, Democrats would not have been projected to win 6 of 13 seats unless they matched their 2008 performance level and would not be projected to win a majority of seats unless they won 57.07 percent of the statewide vote (a 14-point statewide margin).

- Democratic gerrymanders in states like **Maryland** are equally durable. In the past decade, Republicans have won between 31.25 percent (2008) and 41.86 percent (2014) of the statewide vote. But, as a result of an aggressive redraw of Maryland's congressional map after the 2010 Census, they will win only 1 out of 8 congressional districts at those rates of performance. Only when Republicans win 45 percent of the vote do they win a third of congressional districts.

- By contrast, maps drawn by independent commissions, courts, and split-control legislatures not only had lower levels of partisan bias but are significantly more responsive to electoral swings (i.e., have a high number of seats that could change parties). **California**'s commission-drawn congressional map and **New York**'s special-master drawn congressional map are among the most responsive in the country.

- Maps in many states show signs of "faux competitiveness." While seats on these maps might look relatively competitive on paper, in reality, they are positioned outside of a state's historic election outcome range. Flipping these seats would require extraordinary circumstances, such as an unprecedented, large wave election.

- In many states, lack of responsiveness to statewide electoral swings appears to be driven at least in part, and often in significant part, by adverse treatment of communities of color.
    - In **Texas**, for example, the fracturing (cracking) of sizeable Latino, African-American, and Asian-American communities in the Dallas-Fort Worth and Houston regions accounts for a large portion of the non-responsiveness in both the state's 2011 legislatively drawn plan and its 2013 court-modified plan.
    - Likewise, the concentration (packing) of African-American voters in **Virginia** into just two congressional districts enabled map-drawers to create additional safe Republican districts. When a special master redrew the map to undo the packing of African-American voters, it also significantly improved responsiveness.

ANALYSIS

I. OVERVIEW: MEASURING RESPONSIVENESS

In *Extreme Maps* — a report the Brennan Center published in 2017 — we examined how skewed this decade's congressional maps were in terms of favoring one party over the other.[5] We found that a handful of states, where Republicans had sole control of the map-drawing process, were responsible for giving Republicans an advantage of 16-17 seats, on average, in the U.S. House.[6] We also found evidence of Democratic gerrymandering in states like Maryland — though the levels of Democratic gerrymandering were much lower, in part, because Democrats controlled redistricting in fewer states. By contrast, our study shows much lower and often negligible rates of bias in congressional maps drawn by commissions (regardless of the type of commission) and courts, as well as those drawn under split political control.[7]

In this report, we test the durability of the partisan bias that we identified in *Extreme Maps* — and gauge just how much vote share Democrats would have to win to pick up additional seats in each state. While *Extreme Maps* looked at the partisan bias of each state's congressional map, this report looks at how "locked in" that bias is — in political science terms, how responsive each state's map is to electoral shifts.

Examining U.S. House elections on a state-level for electoral responsiveness helps provide a more nuanced look at likely electoral outcomes given gerrymandering. The charts in the report and Appendix 1 illustrate in a vivid and easily discernible manner how gerrymandering and redistricting choices contribute to, and exacerbate, partisan over- and underperformance.

A. Responsive Maps: How Fair Maps Reflect Shifts in Voter Preference

In political science terms, a responsive map is one that allows a political party to win more seats as it wins more votes. If a map is perfectly responsive, a party progressively wins more seats as it wins a progressively larger share of the statewide vote. This allows changes in voter preference at the polls (e.g., voter input) to lead to changes in a legislature's composition (e.g., electoral outcome).

As political scientists have long observed, American congressional maps — at least in the absence of manipulation — have a high, and predictably constant, degree of responsiveness.[8] For each percentage point increase in a party's vote share, a party should, under normal circumstances, expect to gain around two seats at a national level. Thus, a two-point increase in vote share should yield a gain of four seats, and a three-point increase in vote share should increase a party's seat share by around six.

In reality, responsiveness varies greatly by state. One way to test the responsiveness of a map is to look at a map's seats-to-votes curve, plotting out the points at which a party is expected to win an additional seat.

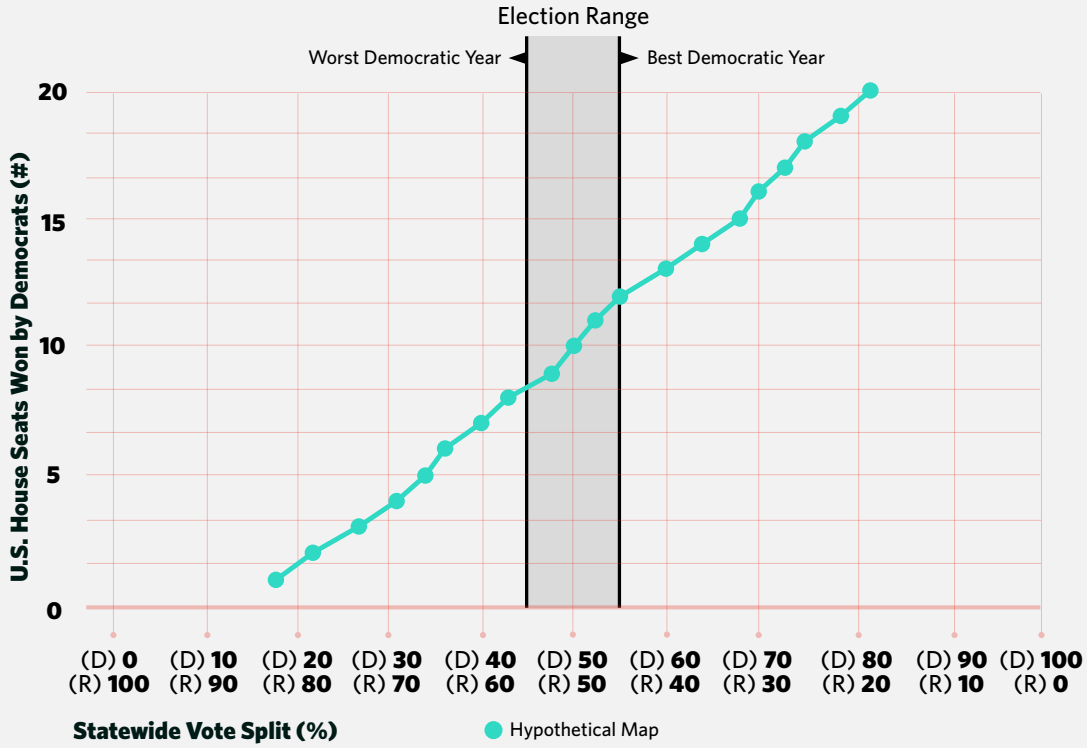
This can be done because of another long-observed facet of American elections: that state-level vote share and district-level vote share move reliably in tandem in the majority of districts.[9] Thus, if, in the last election, a party won 52 percent of the statewide vote and 47 percent of the vote in District A and the party's statewide vote share in the next election increases by 3 points, we can predict that the party's vote share in District A also will increase by around 3 points. This consistent relationship between statewide and district-level vote share allows us to calculate what the statewide vote share would likely need to be in order for a party to win any district that it does not currently control. In

turn, because we know what each party's statewide vote share was for past elections, we can make assessments of how easy or difficult it will be for a party to win additional seats under different election scenarios. To be sure, factors like the quality of candidates and campaigns, the advantage of incumbency, and other district-specific factors can impact results in any given race, particularly in races just on the border of the model's projections. In an extreme case, a party might even win a district well outside the bounds of what the model projects, especially if enthusiasm among one party's voters, donors, and volunteers collapses drastically while rising dramatically among the opposing party's supporters. But in the vast majority of contests, as gerrymanderers know well and count on in constructing gerrymandered maps, how a party does will be driven by things that are not district specific. In short, the national and state level political environment typically matter much more.

Based on political scientists' observation of American elections since the late 1940s, a responsive map in the United States would be expected to yield a fairly steady, smooth, often S-shaped curve that approximately follows a 2:1 seats-to-votes ratio.[10]

Figure 1

Responsive Map



To illustrate, the graph above (Figure 1) shows a hypothetical state with 20 house districts and a highly responsive map. As the statewide Democratic vote share increases along the x-axis, the expected number of seats won by Democrats, as represented by the points, increases as well. The curve is smooth and the slope is relatively constant, meaning there is a fair partisan alignment of voters in each district. No districts are clumped at either extreme of the chart. Reading from left-to-right,

Democrats win their first district at roughly 20 percent of the overall vote share. Reading from right-to-left, the Republicans would likewise win their first seat with approximately 20-percent of the vote share. If the curve is extended to (0 percent, 0 seats) and (100 percent, 20 seats), the S-shape becomes visible. The same is true, of course, in inverse, for Republicans. As Republicans win more votes, they also win more seats.

B. Non-Responsive Maps: How Gerrymandering Alters the Expected Distribution of Seats

By contrast, a non-responsive map is one where an increasing level of support for a party does not result in a regular, corresponding increase in the number of seats won.

Generally, an unresponsive map allows a party (or, in certain cases, both parties) to gain a handful of seats with very little statewide vote share but makes it exceedingly difficult for them to gain additional seats unless the party wins a historically unprecedented share of the vote.

There are many reasons why a map might be non-responsive. In a small number of cases, a lack of responsiveness is attributable to adherence to neutral and legitimate redistricting criteria, such as keeping communities of interest together or following naturally occurring or political boundaries. However, in the overwhelming number of cases, non-responsiveness is driven by map-drawers' desire to secure a partisan gain or protect incumbents.

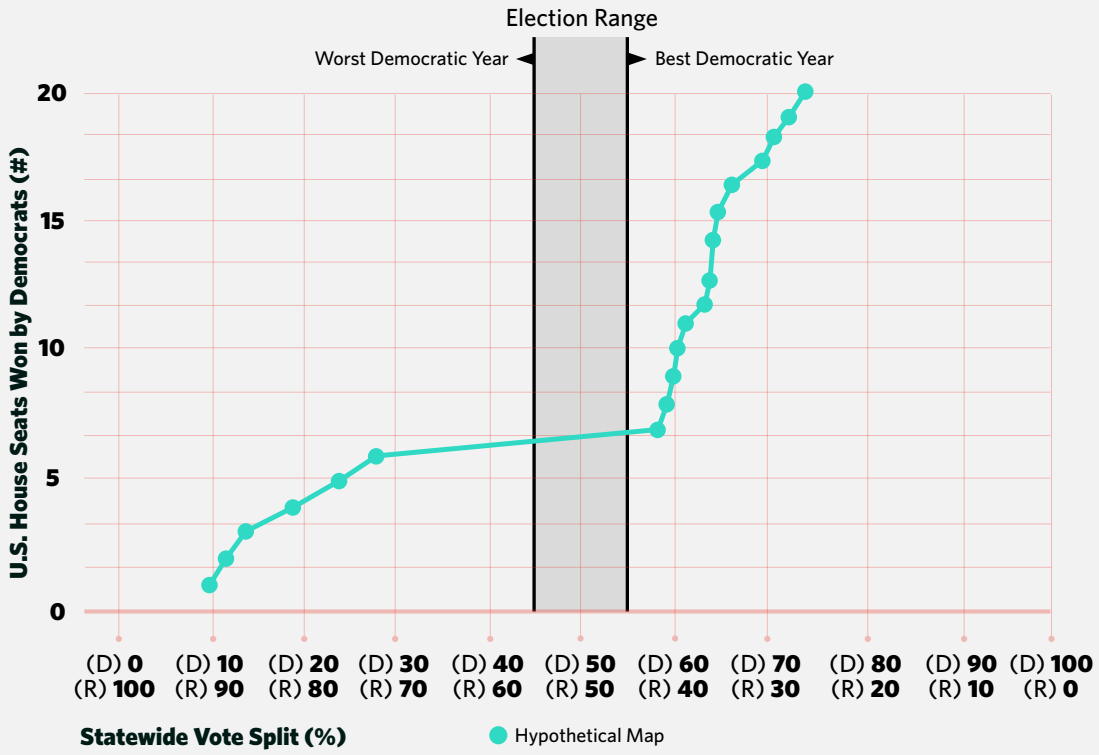
By limiting seat gains within certain commonly occurring vote share bands (i.e., the actual range of election outcomes), gerrymanders destroy the expected responsiveness of a map by making it harder for the opposing party to win seats, resulting in an observable and often vividly noticeable effect on the normal seats-to-votes distribution.

As the illustrative examples on the following pages show, the result is deeply undemocratic — and visibly so.

1. Gerrymandering Favoring a Single Party

Figure 2

Non-responsive Single-Party Gerrymander



The chart above (Figure 2) shows the distribution of seats in a hypothetical state where there has been an extreme partisan gerrymander. On the left side, Democrats pick up six seats before reaching 30 percent of the statewide vote share. These six districts have been packed overwhelmingly full of Democratic supporters and there is a notable absence of equally concentrated Republican districts on the other side of the chart. To pick up additional seats under this map, Democrats must increase their vote share to more than 57 percent statewide. The noticeable gap in the curve represents a severe stagnation in the composition of the congressional delegation: Democrats win the same number of seats at a 27 percent vote share as they do at a 55 percent vote share. On the other hand, in a super-wave year, a significant number of districts would go Democratic with comparatively modest gains beyond the 60 percent threshold: Democrats would pick up the remaining 14 districts by increasing their vote share from 60 to 75 percent.

Figure 2 illustrates both tools of extreme partisan gerrymanders — packing, which overwhelmingly concentrates the opposing party's voters into a handful of districts (seen on the left side of the chart), and cracking (seen on the right side of the chart), which wastes an opposing party's votes by dividing its voters across the remaining districts in a way that makes it near impossible for them to constitute a majority. Cracking, in particular, can lead to "faux competition" — districts that may seem close and competitive from election results, but have been designed to be reliable, narrow wins for the gerry-mandering party.

The increased use of data technology in the redistricting process allows gerrymanderers to deploy these tools with increasing precision, efficiently allocating voters among districts to craft maps with surgically cracked districts clustered just out of reach of the opposing party. That is precisely why there are two clumps of districts. It is also why with an even split of the statewide vote share, Republicans enjoy a 14 to 6 advantage.

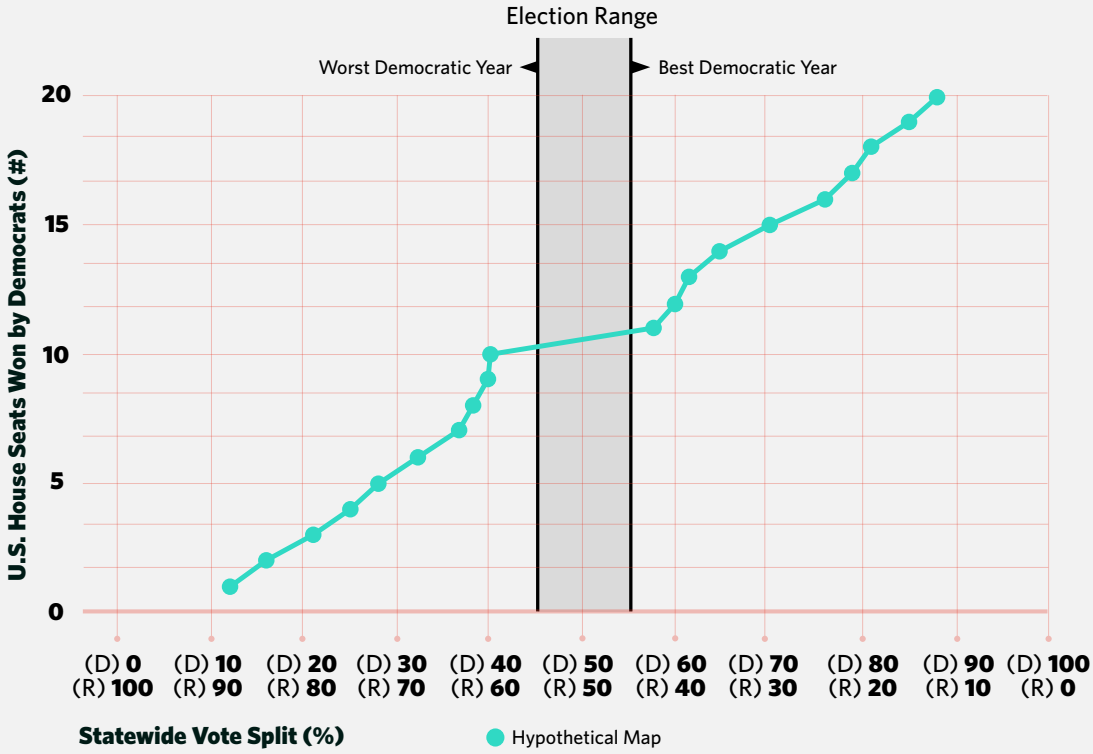
Of course, if an electoral wave is large enough, the gerrymander seawall can be breached. That is precisely what happens in the hypothetical scenario above should Democrats cross 60 percent of the statewide vote threshold. Whether a gerrymander can be overwhelmed, however, should not be a barometer for a map's responsiveness or the effect of a gerrymander — the unresponsiveness is still plainly visible and undesirable.

2. Bipartisan (or Incumbent Protection) Gerrymanders

Not all gerrymanders advantage just one party. Bipartisan or incumbent protection gerrymanders look slightly different, but still contain a plateau in responsiveness that generally covers the state's historic and projected partisan vote split.

Figure 3

Non-responsive Bipartisan Gerrymander



The chart above (Figure 3) shows the distribution of seats in a hypothetical state where there has been a bipartisan gerrymander designed to protect incumbents of each party. There is a large gap in the

middle, but unlike the extreme partisan gerrymander, the two halves of the curve have relatively similar shapes. Both sides are smooth and steady curves similar to the responsive map, but they appear to have been pushed towards the ends of the chart creating safe districts for both parties, leaving a gap in the middle.

The difference in shape can be explained by analyzing the purpose of a bipartisan gerrymander. These gerrymanders protect both parties' incumbents from electoral waves, but do not award a party with a disproportionate share of seats.

Cracking and packing may still be used in a bipartisan gerrymander but are not as pronounced — the districts just need to be uncompetitive enough for the incumbent party to be reasonably protected from shifts in the electorate. While these charts may appear responsive at the extremes, the range of expected and historical two-party vote shares is typically firmly inside the plateau where there is no change to any seats thus yielding very little responsiveness.

C. Notes on Reading the Charts and Some Caveats

To examine the current level of responsiveness in this decade's congressional maps, we used election results from 2012, 2014, and 2016 to generate seats-to-votes curves for all states with more than six congressional seats.[11] This allowed us to conduct a uniform vote swing analysis to gauge the level of statewide support Democrats would have to win to pick up seats in each state given district boundaries and past electoral outcomes. As importantly, these seats-to-votes curves also allowed us to visualize the distribution of seats in each state and to flag tell-tale indicators of likely gerrymandering. Indeed, in Appendix 1, it is remarkably easy to spot states with high rates of bias. Not only is it difficult for a party (in this decade usually Democrats) to win additional seats, but it is easy to tell why — districts were carefully placed just outside the opposing party's reasonably anticipated vote share.

We focus on Democrats in this report for two reasons. First, Republicans controlled far more states than Democrats in the round of redistricting that took place after the 2010 Census and are accused of having been particularly aggressive in attempting to lock in an advantage through gerrymandering. Second, 2018 appears, at least at the time of writing, as if it will be an extraordinarily good year for Democrats electorally. Looking at how hard (or easy) it will be for Democrats to win the 24 seats they need to regain the U.S. House offers a chance to probe the extent of gerrymandering and its durability. Similar charts could be easily constructed, however, to gauge how easy or hard it is for Republicans to win seats absent a super wave.

There are a few final caveats. This study uses a state-level view to specifically examine the role of gerrymandering in widening the gap between mathematically expected seat-share and actual seat-share. But at this relatively early stage in the 2018 general election cycle, it does not attempt to factor qualitative, district-specific factors, such as incumbency, the presence of third-party or independent candidates, shifting demographics, differing levels of movement toward (or against) the parties in subgroups of voters (e.g., white college educated women versus non-college educated women), turnout, or scandalous behavior by one or more candidates. All of these could have an impact on the actual number of seats each party wins. This year, a large and growing number of retirements, in particular, could make it somewhat easier for Democrats to win a majority than the model predicts. An especially strong wave, likewise, could produce "winner's bonus" by depressing turnout, volunteering, and fundraising among Republicans while increasing it among Democrats, enabling Democrats to pick up seats normally out of reach. For that reason, this model can and should be supplemented with additional information from other sources and models as they become available.

For the reasons above, the model also should not be used to predict which exact districts Democrats will win. While the data points in each curve represent individual districts, this study aims to assess the impact of map-drawing on responsiveness broadly in states. It is possible that Democrats win districts that the model projects they are unlikely to win and, conversely, they could lose races in districts that the model suggests that they should easily win.

However, while district-specific dynamics could, and likely will, have an impact in individual races, it remains true that it will be significantly harder for Democrats, in the aggregate, to win a majority than at any point in modern American history.

II. CASE STUDIES: RESPONSIVENESS IN THE CONGRESSIONAL MAPS OF 2010 REDISTRICTING CYCLE

This report provides short case studies, looking at the seats-to-votes curves for Pennsylvania, Maryland, California, New York, Texas, Virginia, and North Carolina. These states were chosen for specific reasons. Pennsylvania is a notable Republican gerrymander. Maryland is a notable Democratic gerrymander. California is a notable example of an incumbent protection gerrymander that was remedied by an independent redistricting commission. New York is a notably responsive map drawn by a court in a state where non-responsiveness in past maps had been previously justified by political geography (e.g., the heavy concentration of Democrats in New York City). Texas, Virginia, and North Carolina are notable examples of how race factors into gerrymandering — and, conversely, how improving minority representation results in maps that are also far more responsive to electoral swings.

Each state's curve was analyzed for the responsiveness characteristics discussed in this section. Specifically, we looked at whether there is a single, consistent rate of change along the curve; whether the curve includes a significant plateau; whether there is an equal distribution of homogenous (or extreme) Democratic and Republican districts; and whether an even split in vote share results in a relatively even allocation of congressional seats. We then augmented these descriptive observations with state-specific demographic and other narrative elements to complete the analysis.

Appendix 1 contains a responsiveness analysis for each of the 26 states with six or more congressional districts, which collectively account for 85 percent of congressional seats in the current U.S. House.

Appendix 2 looks at how many congressional seats could be in play in each state under different election scenarios ranging from a modestly improved year for Democrats to a Democratic tsunami.

Maps Drawn Under Single-Party Control

Maps produced under sole Democratic and Republican party control are markedly less responsive to electoral swings than maps drawn using more neutral processes and often show tell-tale evidence of manipulation.

Case Study: Pennsylvania

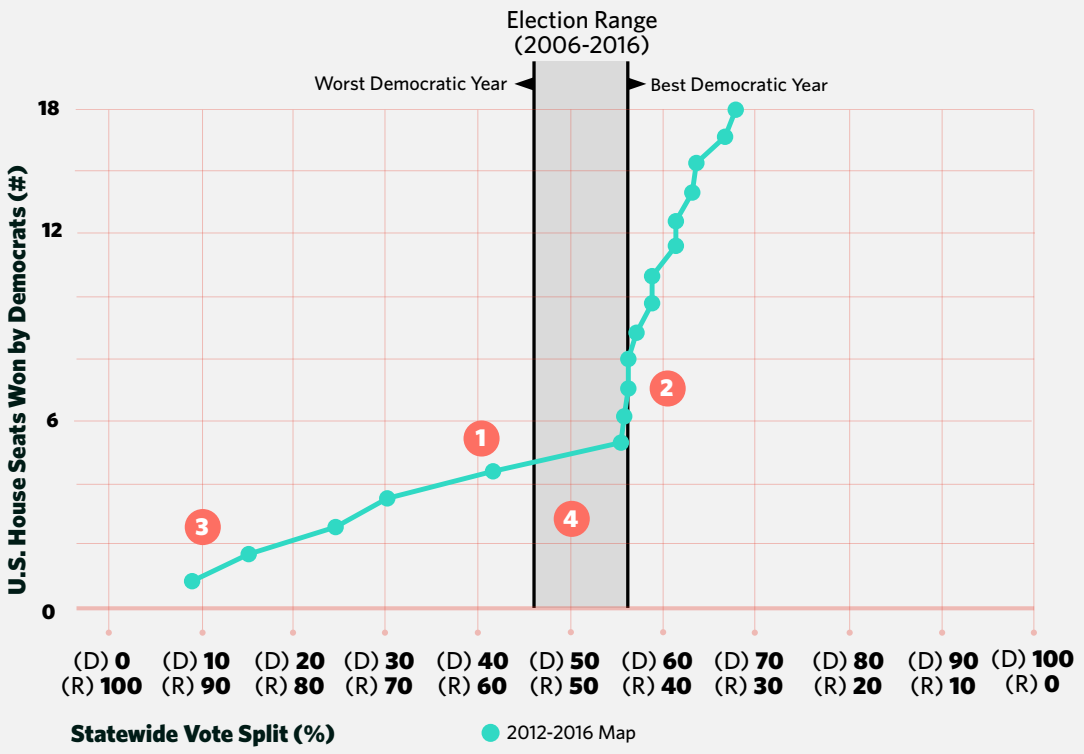
With majorities in both houses of the Pennsylvania General Assembly and control of the governor's office, Republicans had unilateral control over the 2010 congressional redistricting.[12] The resulting map, which the Pennsylvania Supreme Court recently deemed to be an unconstitutional partisan gerrymander, provided Republicans with a secure 13 to 5 advantage in the state's congressional delegation over the first three elections of the decade. It is also decidedly not responsive, with Democrats needing to win a historically large share of the vote to gain any additional seats.

This skewed result is at odds with Pennsylvania's status as one of the most competitive states in the nation. Indeed, in statewide races, Democrats and Republicans have jockeyed for favor without any decisive advantage in recent decades. Since 1994, there have been three Democratic and three Republican governors. Over that span, Pennsylvania voters have tended to favor Republican candidates for the United States Senate, who have won six out of eight elections, and Democratic candidates for president, who have won five out of six contests.

This competitiveness also is reflected in the party's vote share in congressional races. In recent years,

Democrats have won somewhere between 48 and 56 percent of the statewide congressional vote share. But these significant electoral swings had little impact on the outcome under the congressional map drawn by Pennsylvania Republicans in 2011. Indeed, unless Democrats reach 2006 levels of support — when they won 56.13 percent of the congressional vote — they were not projected to garner any additional seats under the now invalidated map.

Figure 4 *Single Party (Republican)*



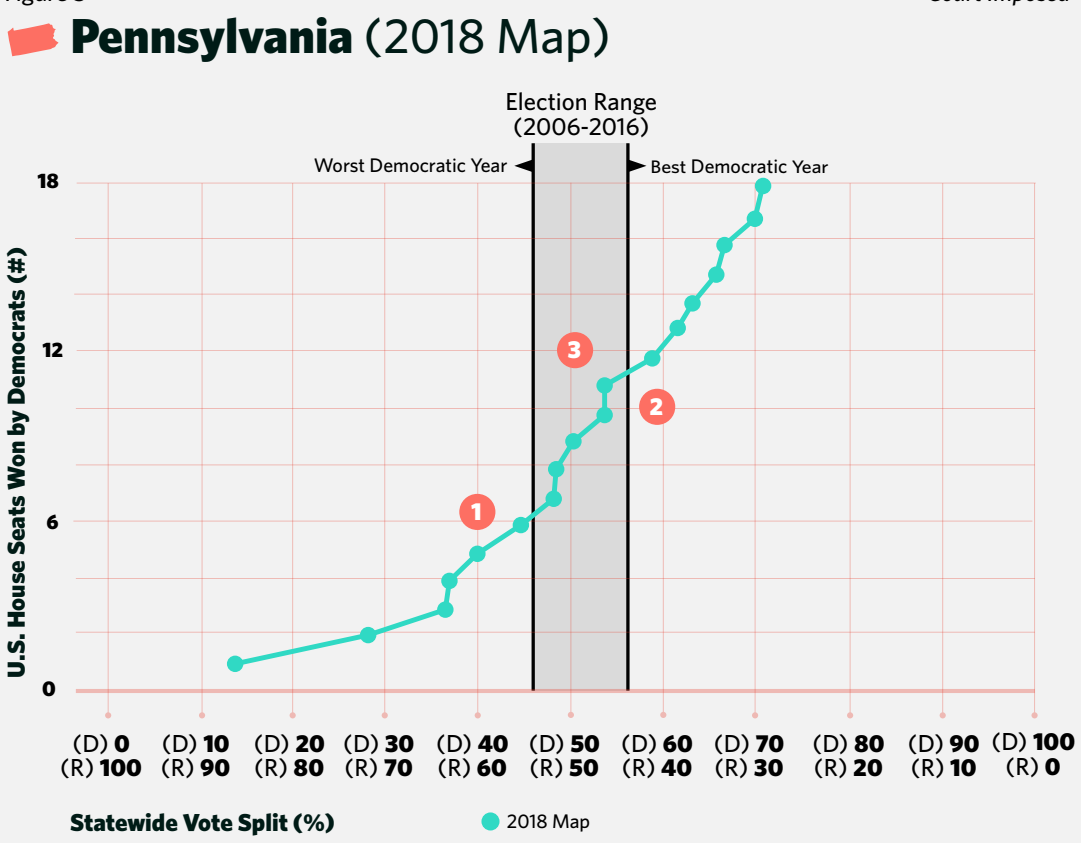
1. The aggressive Republican gerrymander in this map visibly distributes districts to maximize seats for Republicans.
2. The clustering of Republican districts in a near vertical line suggests a strategic spreading out of Republican voters to earn narrow but consistent victories for Republicans in those districts.
3. Democratic districts are much more heavily Democratic than Republican districts are Republican, suggesting packing of Democrats so that they win fewer seats.
4. At a 50-50 vote split that has been typical in Pennsylvania between 2006 and 2016, Republicans were expected to comfortably win 13 of 18 seats. Seats only began to come in play when Democrats matched their best electoral vote split from 2006.

The distribution of seats under the struck down map (Figure 4) bears many of the hallmarks of a particularly aggressive seat-maximizing gerrymander. No fewer than seven of the districts won by Republicans from 2012 to 2016 cluster between 55 and 59 percent of the Democratic vote share. This is highly indicative of an artful spreading out of Republican voters to win as many seats as possible — particularly given that Democratic vote share in more recent elections has been consistently lower and has only exceeded 56 percent in the 2006 Democratic wave election. Indeed, in the more recent elections between 2010 and 2016, Democratic vote share in Pennsylvania has been between 46.60 and 50.76 percent, making all of the districts in that range safely Republican.

While Republican voters were tactfully spread to maximize their voting strength, the congressional map does the opposite with their Democratic counterparts. Two of the districts expected to be won by Democrats are won with just 9.02 and 15.15 percent of the statewide vote. These are among the most Democratic districts in the country. As a comparison, in California, Democrats are not expected to win any seats unless they secure 22 percent of the statewide vote. In Pennsylvania, they are projected to win three with just over 24 percent.[13] This dense packing of Pennsylvania Democrats into a few districts, without similarly packed Republican districts, leaves fewer Democratic voters to be split among the other, more competitive districts.

The result, of course, is a remarkably unresponsive map. Democrats are projected to win their first four districts with just 30 percent of the statewide vote. At 41 percent, they are expected to win their fifth. It takes more than 55 percent of the statewide total to project Democrats winning six congressional seats or one third of the Pennsylvania delegation. In other words, the composition of Pennsylvania's congressional delegation remains static even with a 14-point swing in favor of Democrats.

Figure 5 *Court Imposed*



1. Under the 2018 court-drawn map that replaced the 2012-2016 plan, each party is expected to steadily gain seats as its statewide vote share increases. This holds true despite the significant concentration of Democratic voters in densely populated Philadelphia, demonstrating that political geography does not preclude responsive districting.

2. Up to five districts could be won by either party given electoral vote splits in Pennsylvania between 2006 and 2016.

3. At a 50-50 vote split, Democrats are expected win 8-9 of 18 seats.

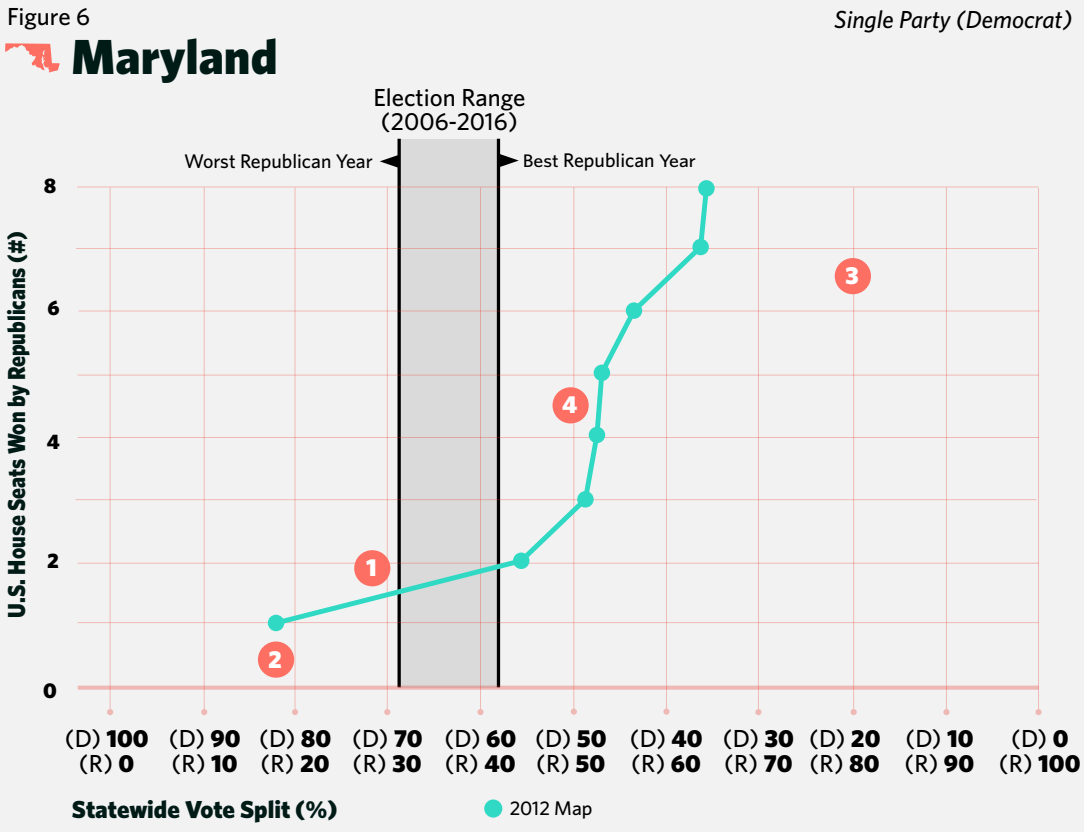
These manipulations allow a state that regularly returns even splits for Democrats and Republicans to send a delegation that is over 70 percent Republican to Congress. By contrast, the replacement map drawn with guidance from a special master and ordered into effect for the 2018 election (Figure 5) is much more responsive.[14] As a party wins more votes, it wins more seats. At least five seats are located in the band representing Pennsylvania's recent vote share splits.

Case Study: Maryland

If Pennsylvania is an example of an aggressive Republican gerrymander, Maryland's 2011 congressional map is its Democratic counterpart.

In Maryland, Democrats had supermajorities in both houses of the legislature, plus held the governor's office, during the 2010 congressional redistricting.[15] This allowed Maryland Democrats to follow a similar playbook to that of Pennsylvania Republicans. The resulting map all but guarantees Democrats seven out of eight districts (up from six before redrawing of the maps) even during strong Republican years like the wave election of 2014. It is also the subject of a partisan gerrymandering

Figure 6



1. Republicans win their first district with just 17.7 percent vote share, but do not win another until they increase their vote share to 44.4 percent, a point they have not reached in the last six elections.
2. The one district won by Republicans, MD-01, is overwhelmingly Republican, consistent with packing of Republican voters.
3. No districts have similar concentrations of Democratic voters, which is irregular given that Maryland is both very Democratic and has one of the country's larger African-American populations.
4. Districts cluster in a near vertical line just outside the best Republican year, suggesting a strategic distribution of Democratic voters to ensure that Democrats win a larger share of seats.

lawsuit that reached the Supreme Court.[16]

Overall, Maryland is a decisively Democratic state. Maryland's residents are among the best educated in the nation and have among the highest median incomes.[17] The population is largely clustered in dense metropolitan areas around Baltimore and greater-Washington, D.C. Maryland also has a very large African-American population, comprising more than 30 percent of residents.[18]

Given this demographic profile, it is no surprise that Democrats, who have historically won between 58 and 69 percent of the statewide congressional vote, hold a significant partisan advantage. Nonetheless, the Maryland map's lack of responsiveness indicates that this electoral dominance comes, in part, from a concerted effort to keep certain districts well beyond the reach of Republicans.

Like the gerrymander in Pennsylvania, Maryland's map does not respond to the usual shifts in partisan preference (Figure 6). There are no competitive seats, even during wave election years. And, under a hypothetical scenario where Democrats and Republicans evenly split the statewide vote, Democrats are still expected to win six contests and the Republicans two. Such outcomes are possible thanks to the efficient distribution of Democratic voters among seven districts and the efficient packing of Republican voters into one.

Under this map, Democrats must receive over 35 percent of the statewide vote to be expected to win a single seat, while Republicans need less than 20 percent. Put differently, the most Republican district — Maryland's 1st Congressional District — is more densely Republican than the most Democratic district is Democratic. This is highly suspect considering the overwhelming statewide partisan advantage held by Democrats, the state's large African-American population, and the presence of urban centers with dense concentrations of Democratic voters. Such a result, as it turns out, is only possible because of surgical line drawing to place the heavily Republican suburbs of Harford and Baltimore into the district.[19]

Maps Drawn by Independent Redistricting Commissions

The two congressional maps drawn this decade by independent commissions — in California and Arizona — are considerably more responsive than those drawn under single party control, even in the instance where the commission was forbidden from considering political outcomes.

Case Study: California

In 2008, California voters approved Proposition 11, a constitutional amendment that dramatically changed the state's map-drawing process. Instead of the legislature drawing maps, voters created a 14-member independent commission to draw California's districts starting with the 2010 cycle. The result was a much more responsive map.

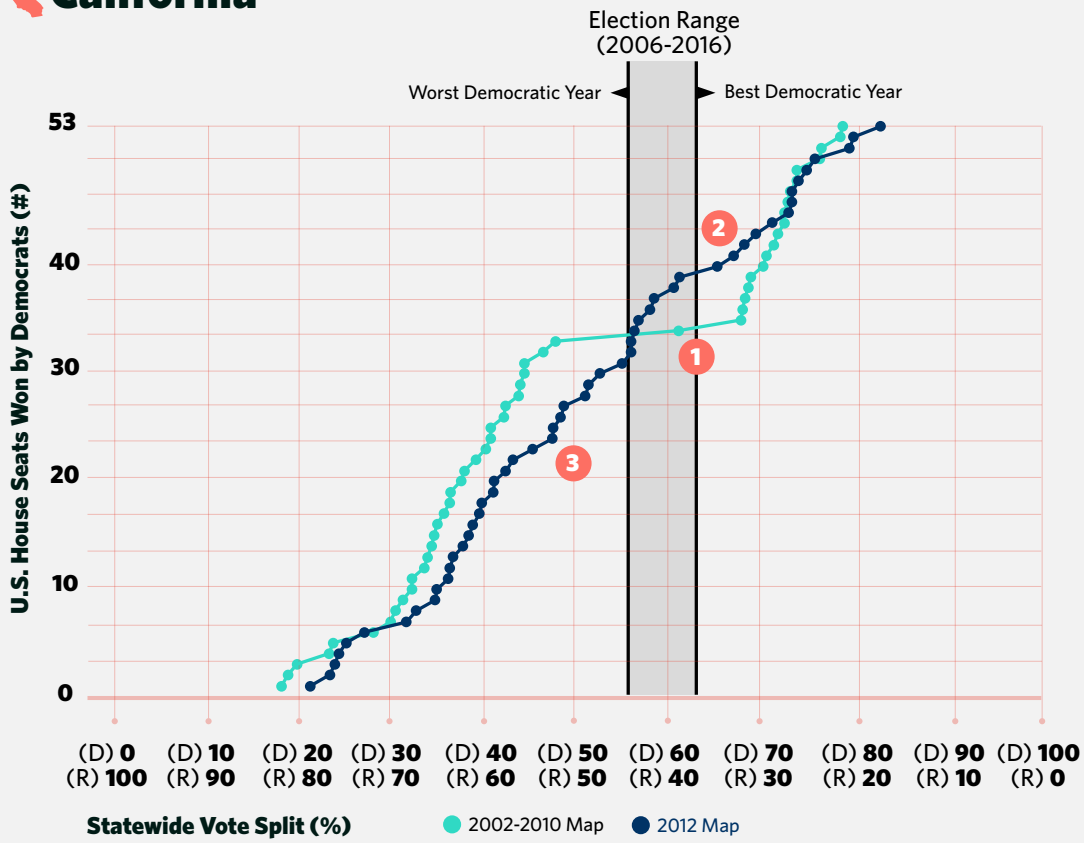
The chart on the next page (Figure 7) compares California's current congressional plan (in effect 2012 to present) with the plan from the previous decade (used from 2002 to 2010). The 2012 plan (districts plotted in dark blue) was drawn by a citizen commission with support from Republican, Democratic, and independent members. The 2002 plan (plotted in light blue) was an infamous bipartisan gerrymander drawn by the legislature to protect incumbents.[20]

Because the 2002 plan was designed to have safe districts for both parties, almost all districts are clustered at either end of the statewide vote share spectrum — either strongly Democratic (the left-

Figure 7

California

Independent Commission



1. The bipartisan gerrymander in the 2002-2010 map had districts clustered on either side of the statewide vote split range suggesting a strategic choice to split turf between the parties and better protect incumbents.

2. The independent commission drawn 2012 map is much more responsive to electoral swings, with seats steadily increasing with increasing vote share across the curve.

3. At a 50-50 vote split, under the 2002-2010 bipartisan gerrymander, Democrats were expected to win 33 of 53 seats or 62 percent of the districts. Under the 2012 commission drawn map, they should win 27-28 of 53 seats or just over half.

most 33 districts) or strongly Republican (the right-most 18 districts). This plan is not responsive to changes in voters' preferences. While Democrats are expected to win 33 of the 53 seats with just 47 percent of the statewide vote, they must win 66 percent of the statewide vote to add two seats.

Conversely, under the 2002 plan, Republicans were expected to win 18 seats when they received 34 percent of the statewide vote. But, to add an additional district to that projection, they had to increase the vote share to 40 percent. To get to 20 expected seats, the Republican vote share had to top 53 percent statewide. Under this legislatively drawn plan, only one seat fell within the historic range of statewide election results so that it would be competitive. This district was originally drawn to be a safe Republican seat but unexpectedly changed hands halfway through the decade due to shifting politics. Every other district was safe — a prototypical example of a bipartisan, incumbent-protecting gerrymander. Republicans and Democrats in the legislatures settled on turf and carved up the state accordingly.

This is in sharp contrast to this decade's commission-drawn plan. The districts under the 2012 plan spread evenly from the most Democratic to most Republican. When Democrats win half of the statewide vote, they are projected to win about half of the seats, either 27 or 28 out of 53. Eight districts fall within the range of historic competitive elections. Most notably, an increase in statewide vote share for either party results in a corresponding increase in the number of districts won.

Of course, there are numerous Republican and Democratic seats that are not competitive. These are a function of California's political geography, which includes heavily Republican areas, such as the rural Central Valley, and heavily Democratic areas, such as central Los Angeles and San Francisco. It is virtually impossible to draw competitive districts in these areas without running afoul of other legitimate redistricting criteria. But the map as a whole is responsive to voter preference. This is why the responsiveness analysis, rather than one focusing on competitiveness alone, provides a better gauge of fairness. Under this measure, the independent redistricting commission's map is significantly fairer than the legislatively created effort it replaced.

Maps Drawn by Courts

Court-drawn maps this decade are markedly more responsive than maps drawn under single-party control. The responsiveness in court-drawn maps exists even in states like New York where a high percentage of the state's Democrats are densely concentrated in New York City.

Case Study: New York

As a result of reapportionment after the 2010 census, New York lost two congressional seats, reducing its representation in the House from 29 to 27.

In 2012, New York Democrats, who controlled the governor's mansion and state assembly, and Republicans, who controlled the state senate, were unable to agree on a congressional redistricting plan in time. As a result, a federal district court appointed a special master to draw a new map.[21]

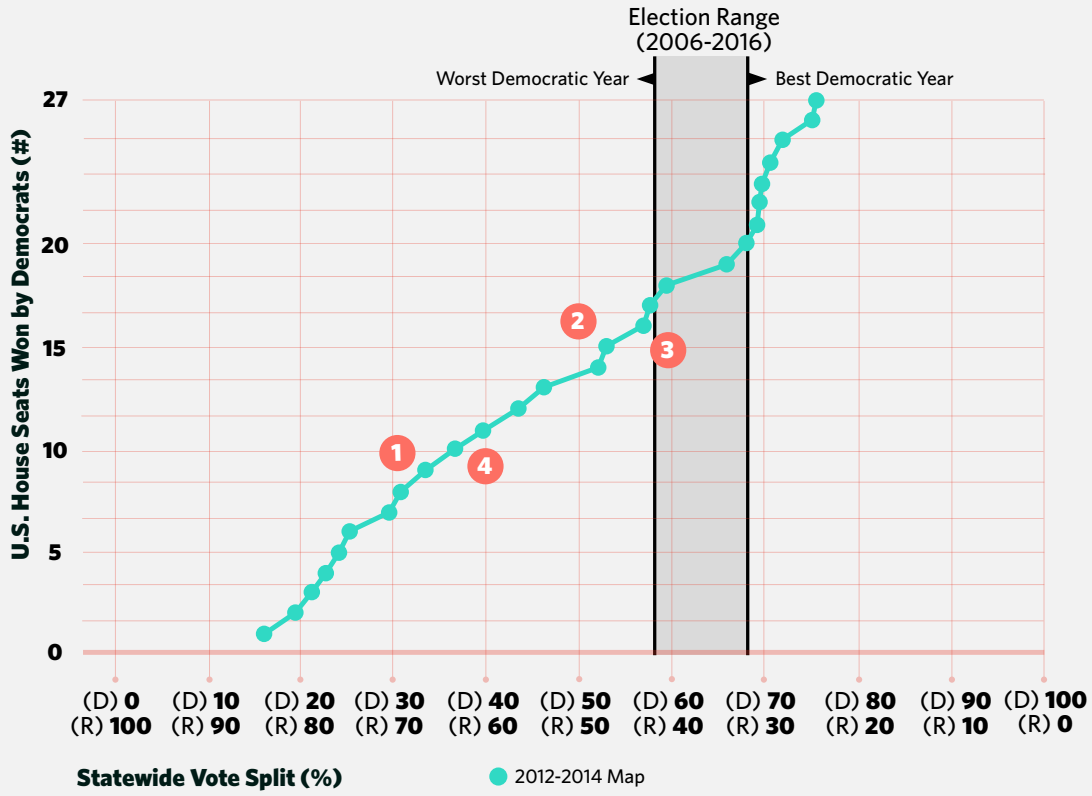
The court required that the map produced by the special master comply with "traditional principles" of compactness, contiguity, and respect for political subdivisions and to the extent possible preserve communities of interest.[22] However, the court rejected recommendations of legislative leaders and did not require that the map preserve the cores of existing districts or protect incumbents.[23]

The resulting map — drawn using the relatively strict criteria set by the court — is one of the most responsive of the decade (Figure 8), with Democrats and Republicans each steadily gaining seat share as their vote share increases (and vice versa).

Figure 8

Court Imposed

New York



1. The curve is responsive, showing that each party gains seats in rough proportion to its increase in vote share. This holds true despite the significant concentration of Democratic voters in densely populated New York City, demonstrating that political geography does not preclude responsive districting.
2. At a 50-50 vote split, Democrats should win 13-14 out of 27 seats.
3. If Democrats win 60 percent of the vote, they should win around 66 percent of the seats.
4. If Democrats win 40 percent of the vote, they should win around 41 percent of the seats.

Overall, the responsiveness of the New York map compares favorably to California's commission-drawn map and contradicts the arguments that the large and dense concentration of Democrats in urban centers like New York City (or Philadelphia) makes it difficult to draw balanced maps. New York City is both overwhelmingly Democratic and represents almost half the state's population. Yet the map is highly responsive to electoral swings. New York Republicans may not have much of a chance to win districts in New York City, but there are plenty of other places on the map where they can, and do, compete.

The New York map, indeed, has had a high number of competitive districts in each of the four elections since 2012, including 2018, where more than a quarter of New York congressional races were rated as competitive as of the end of February 2018.[24] Notably, this competitiveness exists despite the fact that 13 of 27 districts retained 70 percent or more of their population from the prior decade's incumbent protection map.[25] It is possible that if more aggressive changes had been made to the 2002 map, the map could have been even more responsive.

III. HOW TREATMENT OF MINORITY COMMUNITIES AFFECTS RESPONSIVENESS

Congressional maps from Texas, Virginia, and North Carolina offer a vivid illustration of how weakening the political power of minority communities can be a key, and often essential, ingredient in gerrymandering — enabling map-drawers to easily and efficiently entrench an advantage for the political party in control of redistricting.

Conversely, maps drawn to end the adverse treatment of minority communities offer important lessons about how greater minority representation can move hand in hand with creating more responsive maps, even if the latter was not a goal. Maps in Virginia and Texas that unwound the adverse treatment of minority communities not only increased minority electoral opportunities — as expected — but also resulted in maps that are substantially more responsive to electoral swings — a benefit for all voters.

This stands in contrast to the experience of North Carolina, where a court threw out the state's congressional map for racial gerrymandering. Ordered to redraw the map, the state's Republican legislature publicly stated their intent to simply replace the racially gerrymandered map with "a political gerrymander."[26] The result was a map that became only nominally more responsive to electoral swings and, at the same time, essentially locked in the discriminatory effect experienced by African-Americans under the old map.

Case Study: Texas

Between 2000 and 2010, Texas grew faster than any state in the country, adding nearly 4.3 million people and gaining four congressional seats as a result.[27] Minorities accounted for the overwhelming share of that population gain — with Latinos and African-Americans collectively making up 89 percent of the growth and Latinos themselves accounting for nearly two-thirds.[28]

In Texas, minority groups challenged the congressional map drawn by the Texas legislature, contending that, despite the rapid growth in Texas' minority populations, the state had failed to create any additional districts where minorities could elect candidates of choice. The groups argued that Texas achieved this result by dividing Latino communities among a large number of districts, often joining urban Latino neighborhoods with larger suburban communities where white voters were an overwhelming majority with distinct, if not conflicting, political interests.[29]

When the legislature adopted the map in 2011, Section 5 of the Voting Rights Act required Texas's plan to win approval from a federal court or the Department of Justice. Because Texas failed to do so in time for the 2012 election, a federal court partially redrew the map to remedy what it considered some of the more blatantly discriminatory features of the map. The most significant change was the creation of a new district in the Dallas-Fort Worth region that partially reunited Latino communities that had been divided among eight districts in the legislature's plan. The court's map also made modifications to a Latino-majority district in West Texas, that Latino groups contended the state had made significantly less likely to elect a Latino-preferred candidate.

Despite these judicially imposed changes, minority groups continued their challenges, contending that the court-drawn map (which the Texas legislature made permanent in 2013) did not go far enough in remedying discrimination against Latinos and African-Americans.

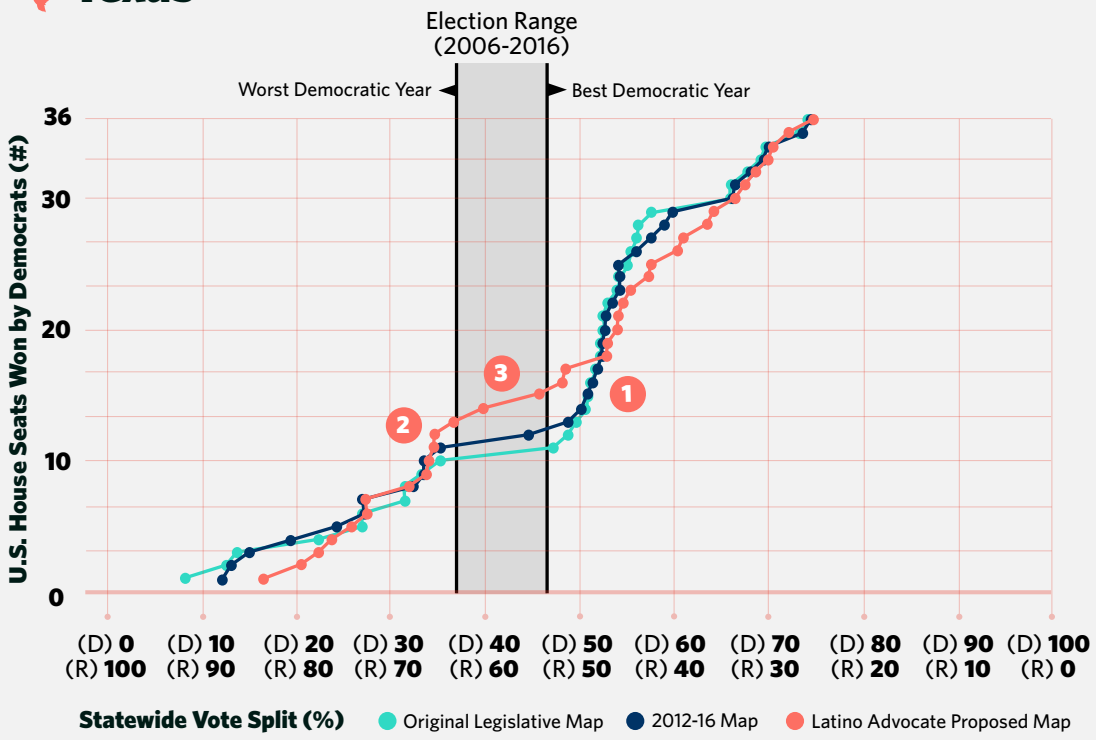
drawn map in creating additional electoral opportunities for Latinos and African-Americans. A plan proposed by Latino plaintiffs, for example, would have more aggressively reunited minority communities in the Dallas-Fort Worth region by adding a Latino majority district and as well as an African-American plurality district to give the region three rather than two minority-controlled seats.[30] The plan also would have unwound the fracturing of minority communities in Houston and in South Texas.

From a responsiveness standpoint (Figure 9), the plan originally adopted by the Texas legislature bears many of the hallmarks of a seat-maximizing gerrymander drawn to favor one party. The map's Republican-controlled districts are won by relatively narrow margins, but nevertheless cluster safely beyond the band representing Democrats' best year in recent history, which was 2008. For Democrats to win more than one-third of seats under the 2011 Texas map, they would need to win close to half the vote.

Figure 9

Court Modified

Texas



1. The Texas legislature's original legislative map has a seat distribution curve consistent with an aggressive gerrymander to maximize seats for the mapdrawing party. Republican-held districts cluster in a near vertical line outside Democrats best recent performance and Democratic districts show evidence of packing.

   A federal court's modification of the legislature's plan (2012-16 map) improves responsiveness to electoral swings modestly by creating two additional minority electoral opportunities, but tell-tale signs of gerrymandering remain in the uneven distribution of seats.

2. By ending the aggressive splitting of Latino neighborhoods, a plan proposed by Latino advocates not only creates additional Latino electoral opportunities but also significantly improves the responsiveness of the map overall.

3. Under the Latino advocate map, several districts are in play at the vote split levels Texas saw in elections between 2006 and 2016.

By contrast, court-ordered modifications to the map — which reunited minority communities in Dallas and Fort Worth and improved the performance of a Latino district in West Texas — produced a map with greater responsiveness despite the fact that the changes were relatively modest.

Had courts (or Texas) been more aggressive in undoing the fragmenting of urban Latinos and the packing of African-Americans, the improvements in responsiveness would have been even greater — coming close to an ideal distribution. Indeed, the Latino plaintiffs' plan, by reuniting minority communities separated in both legislative and court-drawn maps, is highly responsive to electoral swings with the number of seats a party can expect to win being closely correlated to its vote share.

Case Study: Virginia and North Carolina

In contrast to Texas, where minorities were disadvantaged primarily through the strategic splitting apart of minority communities, in Virginia and North Carolina, minority voters were disadvantaged by packing them in only a few districts.

In both states, African-American voters challenged the congressional maps as racial gerrymanders, contending that lawmakers joined together disparate communities solely on the basis of race. And in both states, courts struck down the maps and ordered them redrawn for the 2016 election.

The remedial process in the two states diverged, however.

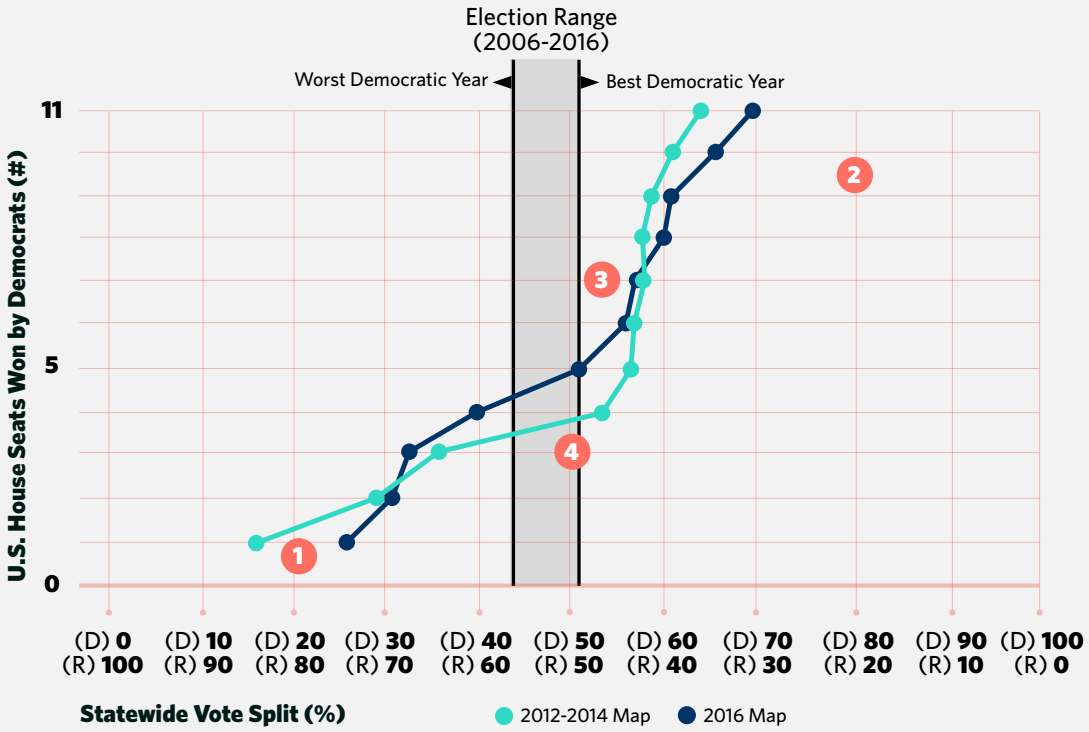
In Virginia, the Republican-controlled legislature and Democratic governor were unable to agree on a new map, and a court-appointed special master re-drew it.[31] The special master's map undid the aggressive packing of African-Americans into a single district — placing African-Americans in central Virginia and African-Americans in coastal tidewater Virginia in separate districts.[32] The result created two electoral opportunities for African-Americans where there had previously been one.

The unpacking of African-Americans in the new map significantly improved electoral responsiveness (Figure 10), giving Democrats a reasonable opportunity to win 5 out of 12 seats. Despite being significantly more responsive than the old map, the new map is not, however, as responsive as maps in California and New York. The continued clustering of a large number of seats outside the zone of competitiveness suggests uncured gerrymandering and that the packing of African-Americans was only one of the techniques used to maximize Republican seat share.

Figure 10

Virginia

Court Modified



1. VA-3, the state's one African-American majority district under the 2012-2014 map, is much more Democratic than it is under the 2016 map because it packed overwhelmingly African-American voters into a single district.
2. There were no districts that had similar concentrations Republican voters, but after a federal court imposed the 2016 map there are now Republican counterparts to the most Democratic districts.
3. The clustering of districts in the 2012-2014 map outside the best Democratic year suggests a strategic spreading out of Republican voters to earn narrow but consistent victories for Republicans in a large number of districts. The 2016 plan made the map more responsive.
4. Under the 2012-2014 map, at a 50-50 vote split, Democrats were expected to win only 4 of 11 seats. Under the 2016 map, they should win 5 of 11 seats.

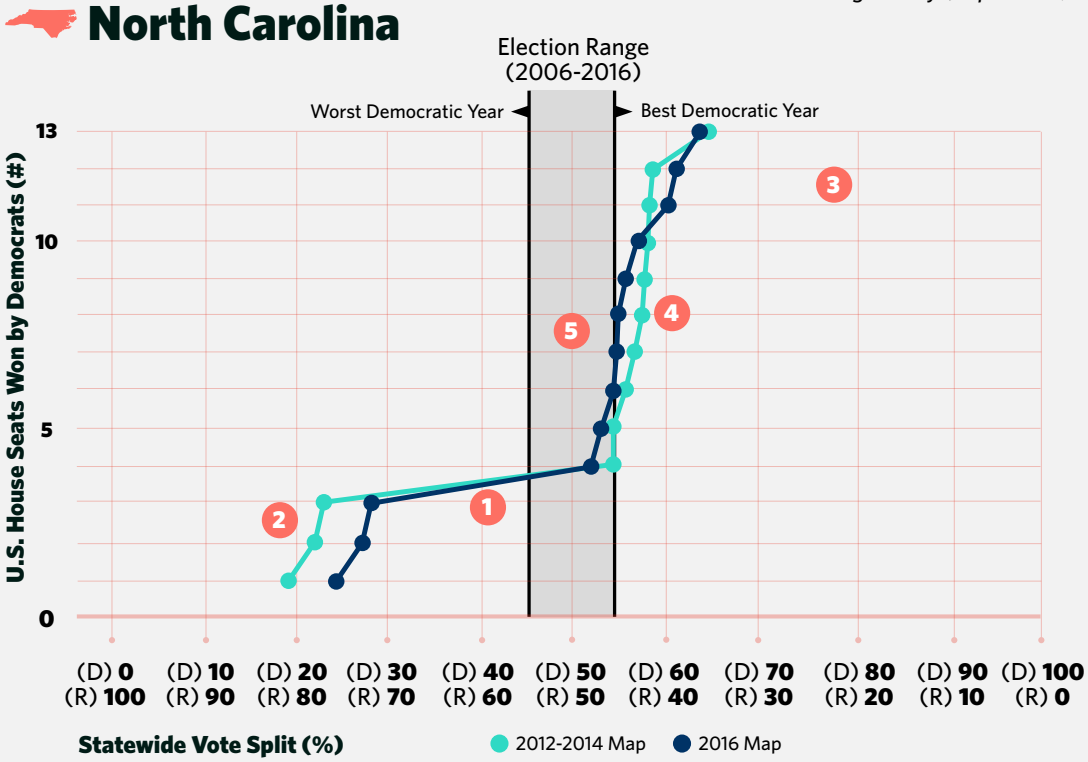
In contrast to Virginia, the North Carolina governor lacks the power to veto a redistricting bill.[33] As a result, when a court struck down the state's 2011 congressional map as a racial gerrymander, the leaders of North Carolina's Republican-controlled legislature announced that they would simply redraw the map as "a political gerrymander."[34] Republican lawmakers, in fact, went so far as to adopt written rules requiring that any map considered by the legislature contain at least 10 safe Republican districts out of 13.[35]

After the legislature passed their "political gerrymander" map in a party-line vote in early 2016, the African-American plaintiffs in the racial gerrymandering case filed objections and asked that the trial court block the new map on the grounds that the legislature had not only failed to adequately undo racial gerrymandering in the old map, it had also created an unconstitutional partisan gerrymander.[36] The trial court, however, allowed the map to go into effect, overruling the racial gerrymandering objections and holding that it did not have sufficient information to decide the partisan gerrymandering claims.[37]

From a responsiveness perspective (Figure 11), there is little difference between the North Carolina congressional map struck down as a racial gerrymander and its replacement.

Figure 11

Single Party (Republican)



1. No significant difference in the number of seats won by each party or responsiveness under the 2012-2014 map, which was struck down as a racial gerrymander, and the 2016 map that replaced it.
2. Three districts won by Democrats are disproportionately Democratic, consistent with packing of Democratic voters.
3. No districts have similarly extreme concentrations of Republican voters.
4. The clustering of districts just outside the best Democratic year suggests a strategic spreading out of Republican voters to earn narrow but consistent victories in a large number of districts.
5. Under either map, at a 50-50 vote split that has been typical in North Carolina elections between 2006 and 2016, Republicans should safely win 10 out of 13 seats.

Under the 2016 map, the two African-American controlled districts became slightly less Democratic as did the state's one non-minority controlled Democratic district — indicating that Democrats had been less ruthlessly packed. However, the new map, like the original, has notable signs of gerrymandering, with a significant number of Republican-won districts clustering just outside the 2006-2016 electoral boundary.

The degree to which both maps entrench Republicans is remarkable. Democrats do not gain a fourth seat until their vote share exceeds 52 percent, something that has happened in only one election out of the last six — the exceptional Obama wave election of 2008. While another wave election like 2008 might result in one or two competitive seats, in every other election of the past decade, Republicans could safely count on winning a 10 to 3 advantage in the state's congressional delegation under both the 2011 and 2016 maps. And, in order for more than two Republican seats to be at risk, an electoral wave unlike anything North Carolina has seen in recent history would be required.

METHODOLOGY

A. Data Sources

We obtained district-level election results compiled by Dave Wasserman at Cook Political Report in his National House Popular Vote Trackers.[38]

For districts without both a Democrat and Republican running in the general election, we estimated the vote share both parties would have received in a contested two-party election based on the prior election's House results, the most recent district-level presidential results using totals calculated and compiled by Daily Kos Elections for both 2012 and 2016, and the winning candidate's incumbency status.[39]

B. Calculations

All calculations were done using two-party vote shares and excluded third-party and independent candidate results.

We assessed responsiveness by conducting a uniform vote swing analysis — making the key assumption that individual district vote shares change in direct proportion with the statewide vote share — to derive the expected seats-to-votes curve for all possible statewide vote shares. Using algebra, we determined how much more or less Democratic each district is than the overall state, and the statewide vote share needed for each district to flip (assuming, for these purposes, that a district flips at 50 percent).

Charting these values gives us the shape of the curve. A maximally responsive map would yield a fairly steady, smooth curve — as Democrats gradually win a larger share of the statewide vote, they should likewise win gradually more seats. We expect gerrymandered curves to appear more piecewise, with large gaps and sudden steep increases where districts are clustered together in the chart. This indicates intentional cracking and packing, and helps visualize how gerrymanders can be designed to avoid responsiveness and entrench power.

C. Hypothetical Example

To illustrate, consider a hypothetical state with five districts, each with 20 voters.

District	Democratic Votes	Republican Votes	Democratic Vote Share
1	10	10	50%
2	15	5	75%
3	7	13	35%
4	12	8	60%
5	6	14	30%
Total	50	50	50%

Using a uniform vote swing analysis, we assume that the statewide vote changes in direct proportion

with district vote shares. So, in our hypothetical state, an extra 1 percent shift in favor of Democrats would lead to a statewide vote share of 51 percent and district-level vote shares of 51 percent, 76 percent, 36 percent, 61 percent, and 31 percent.

District	Democratic Vote Share	District Difference from Statewide (Statewide – District)	Statewide Vote Share Needed for District to Flip (50% – Difference)
1	50%	*EVEN*	50%
2	75%	25%	25%
3	35%	-15%	65%
4	60%	10%	40%
5	30%	-20%	70%
Total	50%		

The results in the last column tell us the statewide vote shares at which Democrats should be expected to win individual districts in our hypothetical state. In this case, we expect Democrats to win one district when they win 25 percent of the statewide vote, another when they win 40 percent, a third when they win 50 percent, a fourth when they win 65 percent, and a fifth when they win 70 percent of the overall statewide vote.

D. Caveats on Uniform Vote Swing

This study uses a uniform vote swing to examine responsiveness. This assumes that the statewide vote share moves in tandem with the vote share of all individual districts — as one increases, the others increase the same amount as well. This assumption is well-documented and defended in political science to predict broad electoral outcomes, as national factors strongly influence district-level results.[40] In the redistricting field, it is commonly used to test the sensitivity of proposed redistricting plans, and likely by map-drawers and gerrymanderers to assess the outcomes of potential plans.[41]

However, we caution against using the model to predict any individual race, as it does not take into account incumbency, candidate quality, local issues, electoral population shifts, scandals, or any other district-level factors. As a result, some districts — particularly those on the edge of predicted vote shares — are likely to be toss ups, and Democrats are likely to have an easier time winning some than others due to these aforementioned factors. The high number of retirements, in particular, makes it likely that Democrats could win slightly more districts than we predict, as more Democratic challengers will be facing fresh Republican candidates as well. A lack of Republican enthusiasm in a given district could, likewise, impact fundraising, volunteering, and turnout, possibly putting unexpected districts in play. These uncertainties are not reflected in our model, as we approach this issue from the perspective of map-drawers concerned about broad outcomes rather than that of election forecasters.

Finally, a uniform vote swing is less observable in heavily Republican or Democratic districts. A district that votes 95 percent Democratic in a state that is only 50 percent Democratic overall is unlikely to swing completely to 100 percent Democratic if the overall statewide vote share shifts to 55 percent. However, these districts are so far away from both the historical and potential two-party vote share range that the variation in swing for these districts has little to no impact on the model.

E. Note on Categorization of States

For purposes of this report, we placed states in one of the following categories based on their map-drawing process:

1. States whose maps were drawn under sole **Republican control**. These are mostly states where Republicans controlled both the state legislature and governship and could pass a redistricting plan without any Democratic votes. States with Democratic governors are also included in this category if the Republican-controlled legislature had a veto-proof majority, as are states with a Republican-controlled legislature where the governor did not have veto power. These states are Alabama, Florida (2012, 2014), Georgia, Indiana, Louisiana, Michigan, North Carolina, Ohio, South Carolina, Tennessee, Virginia (2012, 2014), and Wisconsin. We also analyzed Pennsylvania as a map drawn under Republican control since that map was the one used in the 2012, 2014, and 2016 elections.

2. States whose maps were drawn under sole **Democratic control**. Democrats controlled both the state legislature and governship and could pass a redistricting plan without any Democratic votes. These states are Illinois, Maryland, and Massachusetts.

3. States whose maps were drawn under **split control**, where the governor and legislatures were not all held by the same party. These states are Kentucky and Missouri.

4. States whose maps were drawn by an **independent commission**. These states are Arizona and California.

5. States whose maps were drawn by a **political appointee commission**. These commissions are separated from independent commissions because of the stronger partisan ties and roles of their members. These states are New Jersey and Washington.

6. States whose maps were **court-imposed**, which typically happens because of a legislative deadlock. This category includes states whose maps were chosen by a court or drawn by a court (or a court-appointed panel or special masters). These states are Colorado, Minnesota, and New York. For purposes of the election scenarios in Appendix 2, we also included Pennsylvania as a court-drawn map since the Pennsylvania Supreme Court has put a new map in place for the 2018 elections to replace the legislatively drawn map that it struck down as a partisan gerrymander.

7. States whose maps were **court-modified**, which typically results from a court decision overturning or changing part of a map but leaving the bulk of the map intact. These states are Florida (2016), Texas (2012, 2014, 2016), and Virginia (2016).

APPENDIX 1

A State-by-State Look at Electoral Responsiveness

Key to Charts: Democratic Vote Share

	2006	2008	2010	2012	2014	2016
Alabama	39.95%	44.57%	37.13%	39.45%	34.95%	36.75%
Arizona	48.83%	50.81%	44.15%	45.80%	44.57%	45.98%
California	59.03%	62.05%	56.09%	60.39%	57.82%	63.13%
Colorado	56.24%	55.97%	47.57%	51.52%	48.35%	49.52%
Florida	49.91%	49.78%	41.84%	49.43%	45.13%	47.35%
Georgia	44.65%	49.69%	42.72%	46.30%	42.12%	44.09%
Illinois	55.96%	60.02%	52.17%	55.41%	51.42%	55.17%
Indiana	49.41%	52.82%	41.13%	45.81%	38.90%	39.63%
Kentucky	43.70%	46.47%	37.49%	39.99%	36.42%	34.52%
Louisiana	39.21%	42.39%	33.84%	38.11%	36.09%	33.51%
Maryland	61.98%	68.75%	62.08%	65.46%	58.14%	62.97%
Massachusetts	71.69%	68.45%	62.16%	67.45%	63.61%	68.41%
Michigan	53.71%	54.44%	45.85%	52.73%	50.88%	49.44%
Minnesota	55.49%	60.13%	50.79%	56.32%	51.90%	51.80%
Missouri	48.60%	51.16%	42.32%	43.34%	37.99%	39.42%
New Jersey	56.11%	57.11%	49.27%	55.64%	51.03%	54.16%
New York	65.61%	67.01%	58.66%	65.04%	59.51%	61.72%
North Carolina	51.77%	54.68%	45.53%	50.93%	46.62%	46.68%
Ohio	52.67%	52.49%	43.97%	49.25%	41.94%	41.83%
Pennsylvania	56.13%	55.05%	48.09%	50.76%	46.60%	48.08%
South Carolina	44.08%	49.46%	41.91%	43.33%	40.59%	40.16%
Tennessee	51.85%	47.20%	36.18%	39.08%	35.73%	35.28%
Texas	45.17%	46.29%	36.71%	42.07%	39.53%	42.29%
Virginia	48.68%	50.56%	45.23%	49.04%	45.27%	48.32%
Washington	60.92%	59.20%	52.16%	54.44%	53.37%	54.66%
Wisconsin	53.58%	55.29%	44.60%	50.76%	47.20%	47.29%

Figure 1

Single Party (Republican)

Alabama

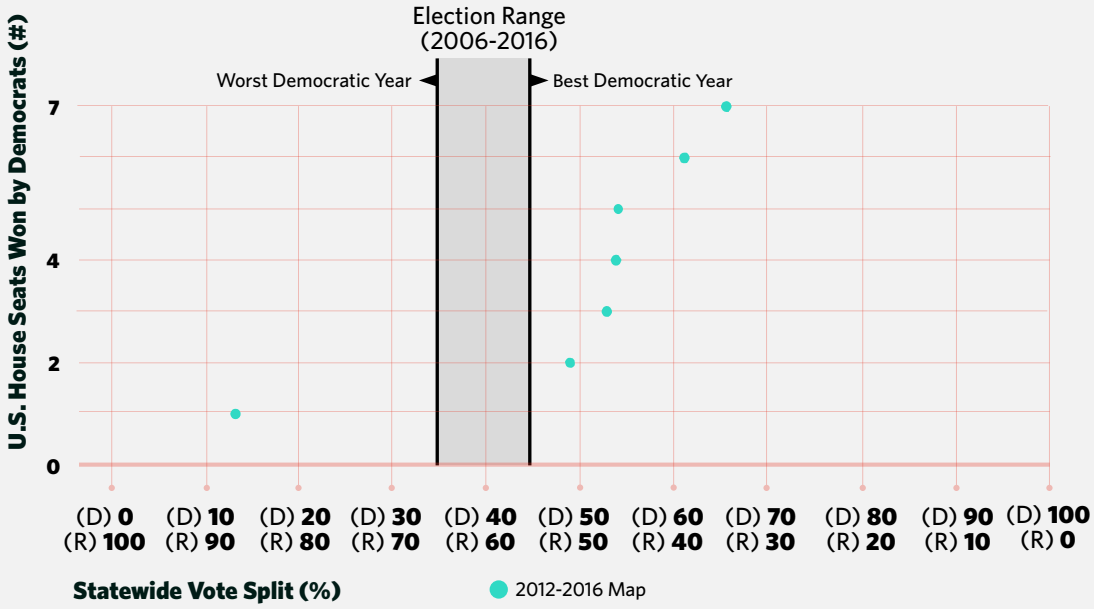


Figure 2

Independent Commission

Arizona

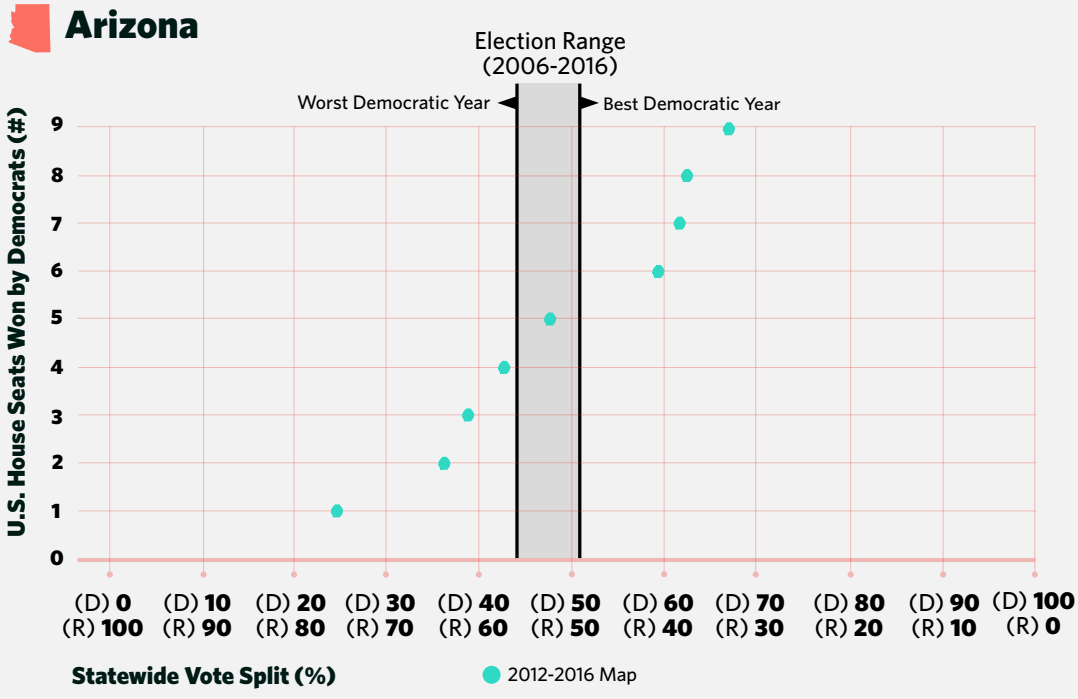


Figure 4 *Independent Commission*

California

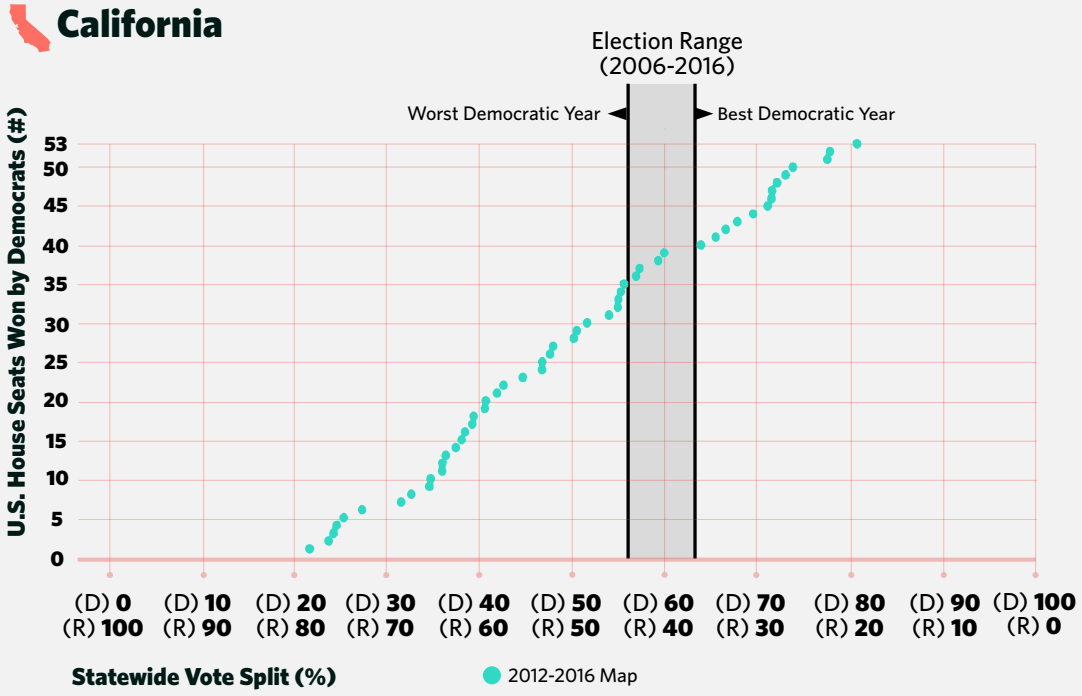


Figure 5 *Court Imposed*

Colorado

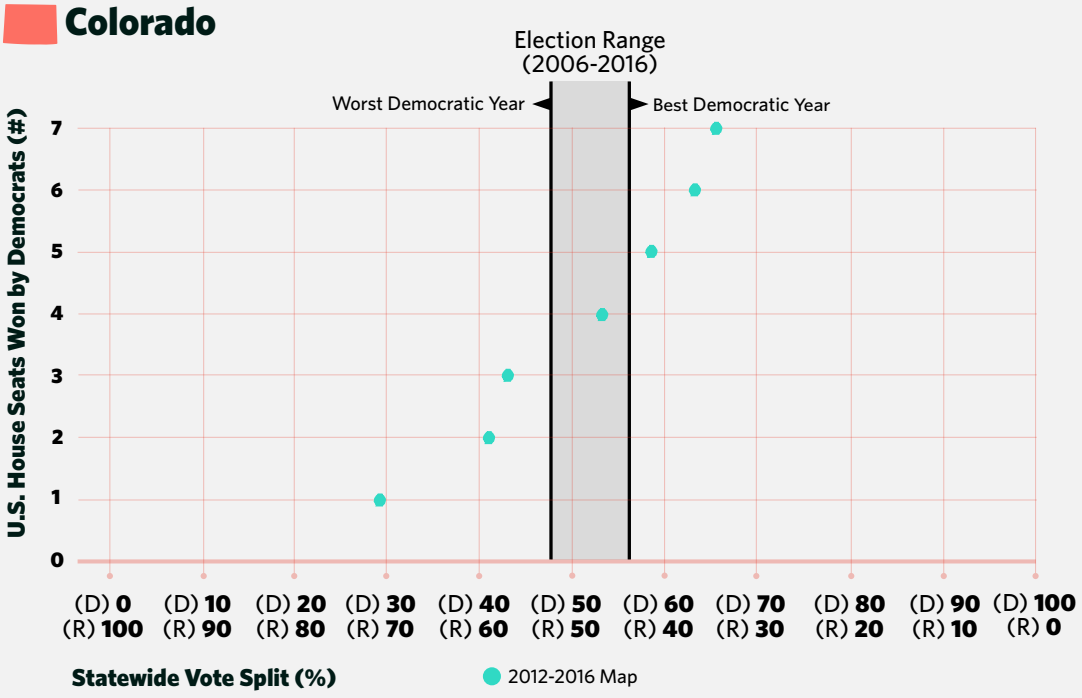


Figure 6

Court Modified

Florida

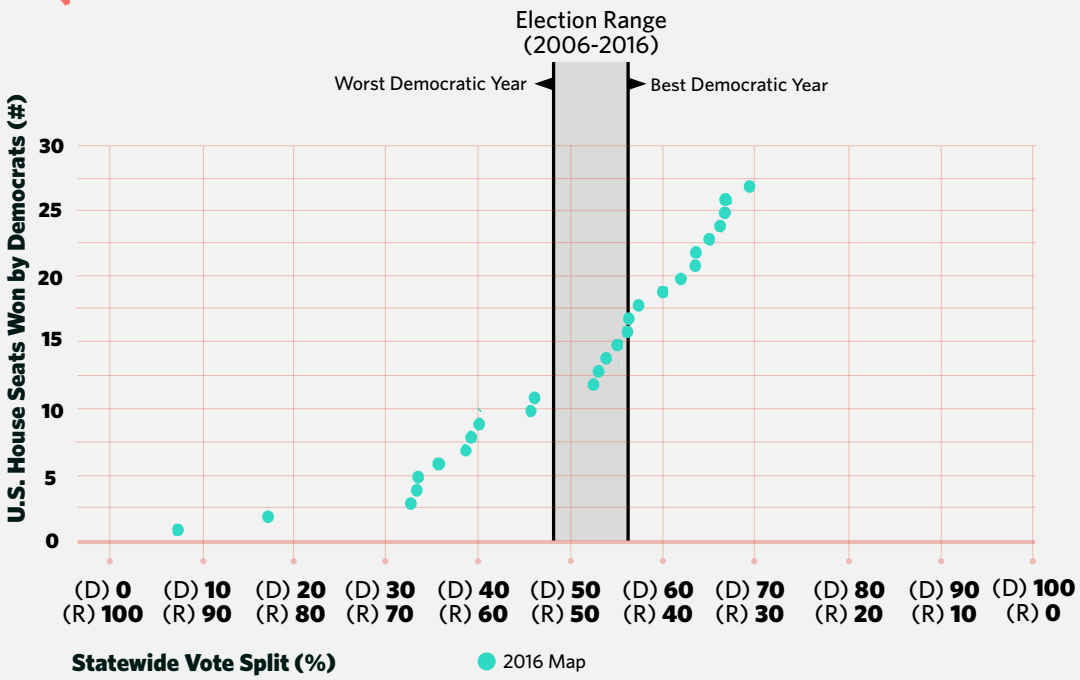


Figure 7

Single Party (Republican)

Georgia

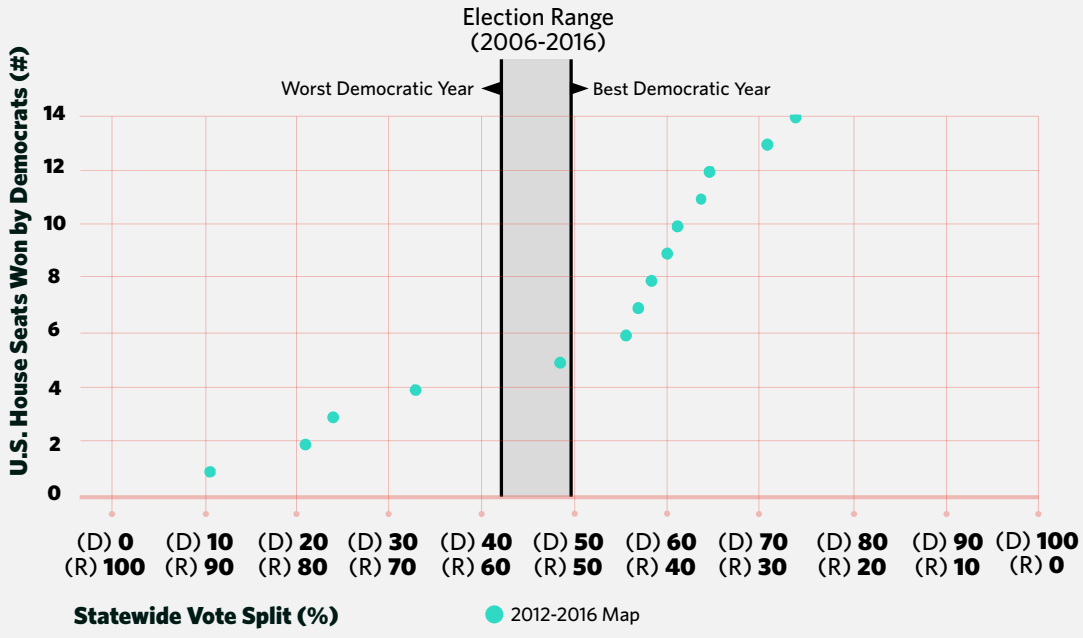


Figure 8

Single Party (Democrat)

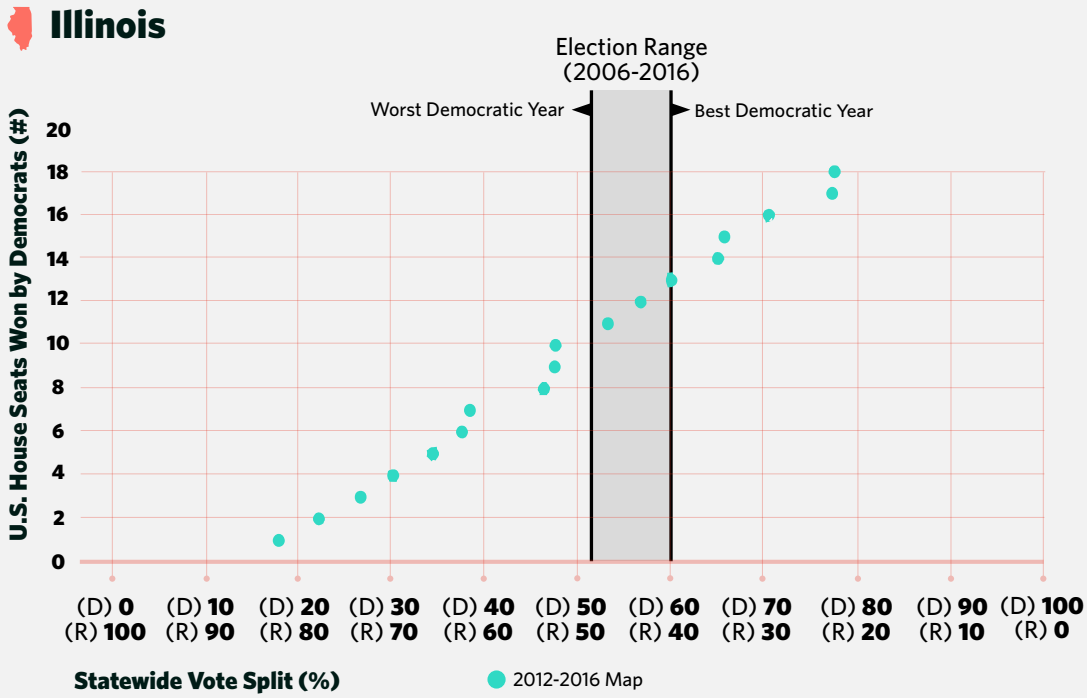


Figure 9

Single Party (Republican)

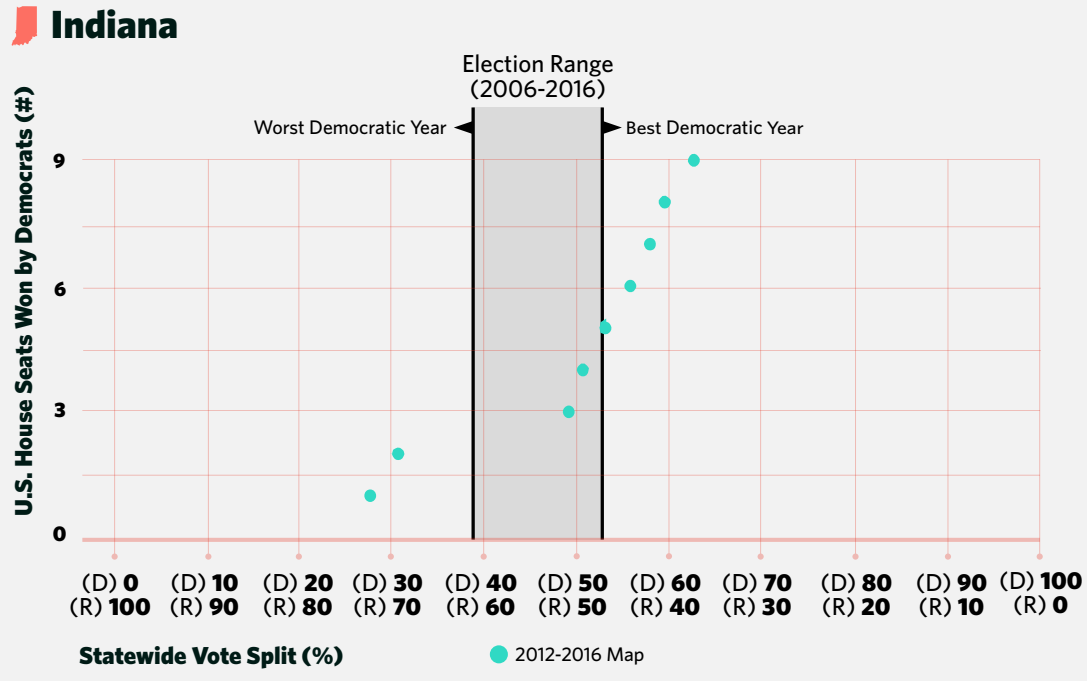


Figure 10

Split Control

Kentucky

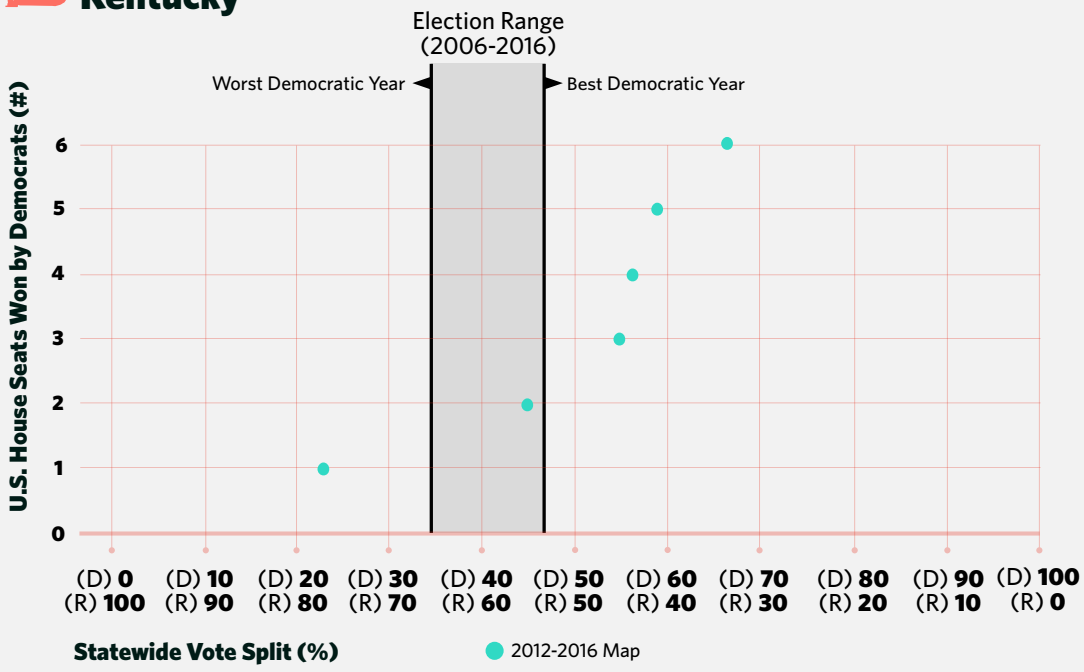


Figure 10

Single Party (Republican)

Louisiana

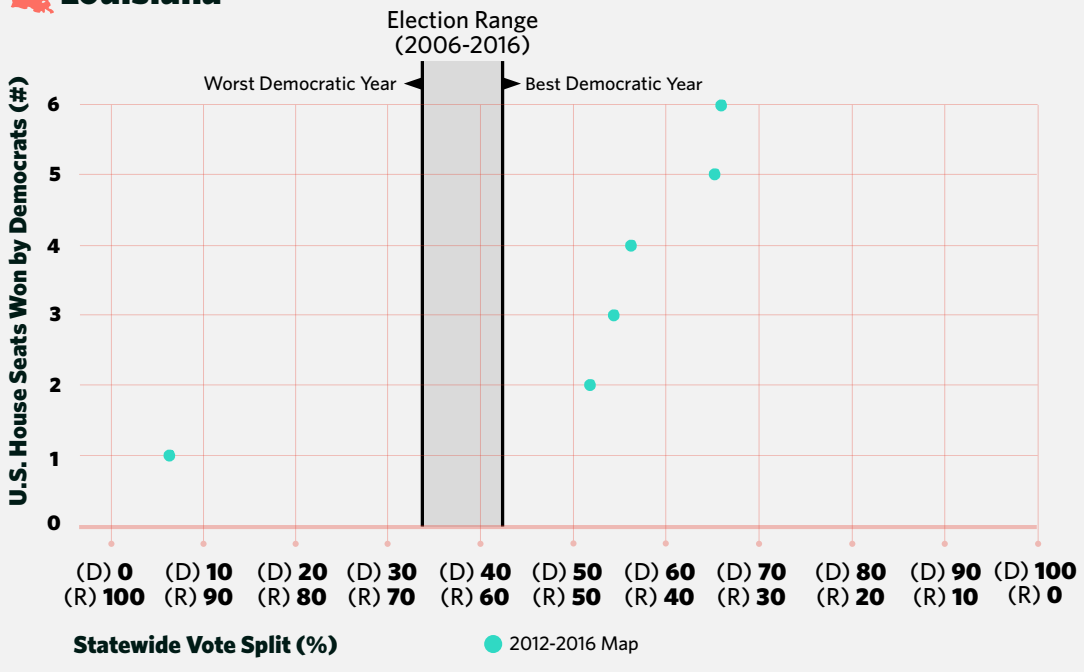


Figure 12

Single Party (Democrat)

Maryland

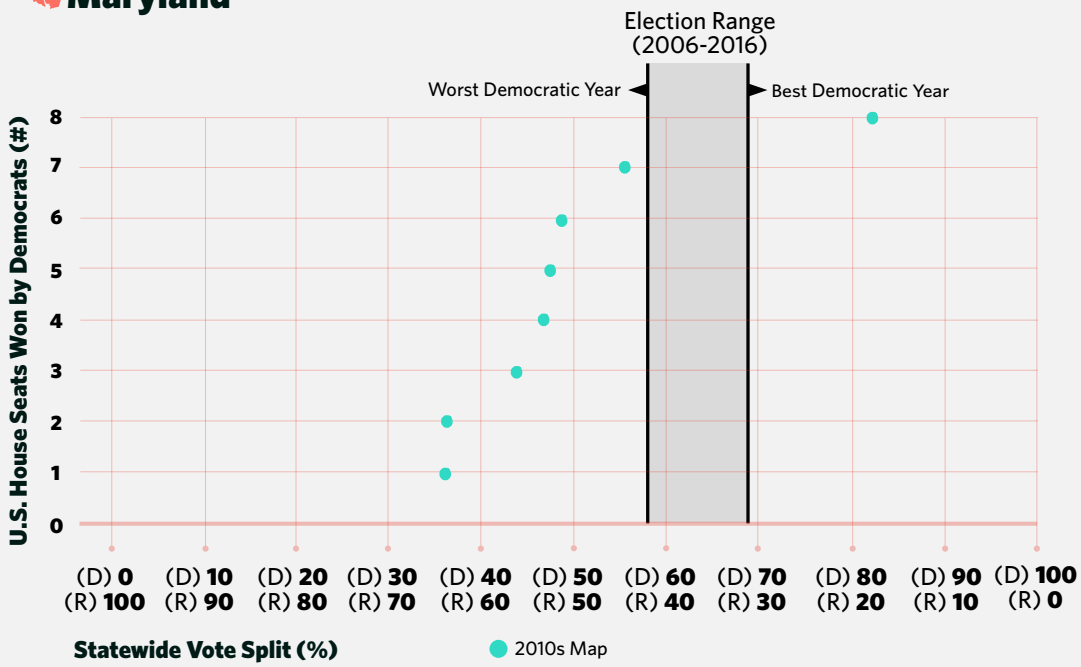


Figure 13

Single Party (Democrat)

Massachusetts

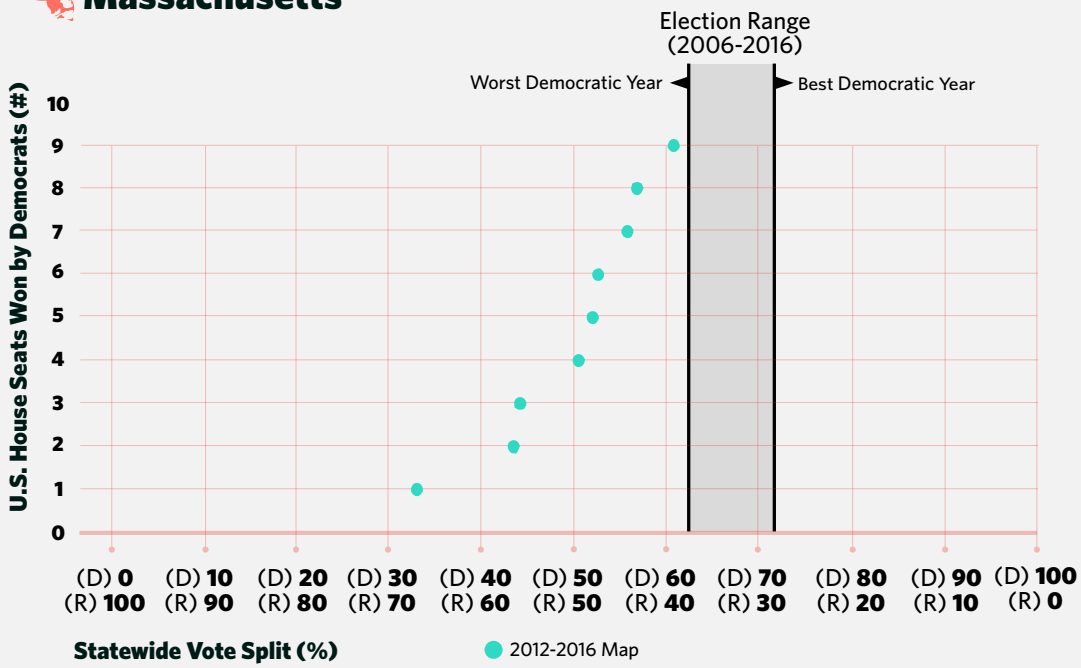


Figure 14

Michigan

Single Party (Republican)

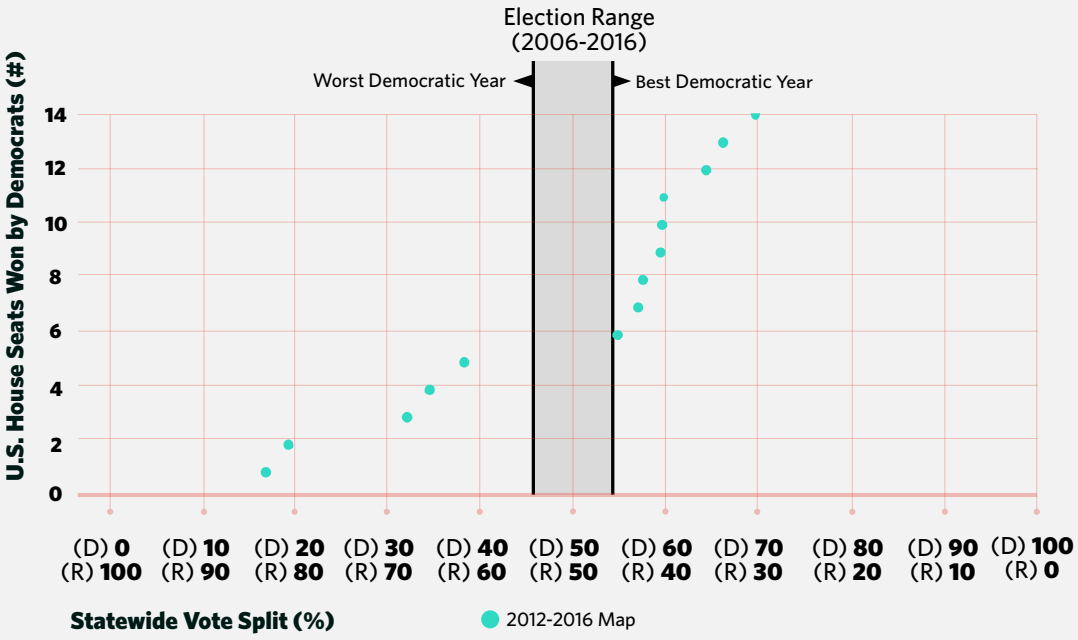


Figure 15

Minnesota

Court Imposed

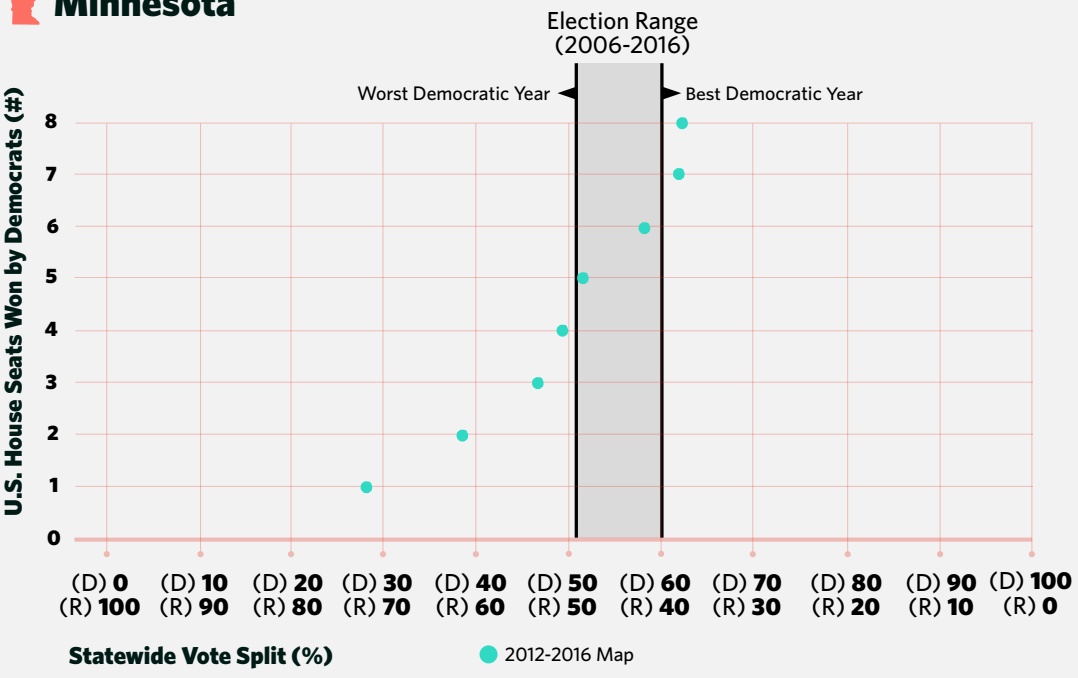


Figure 16 *Split Control*

Missouri

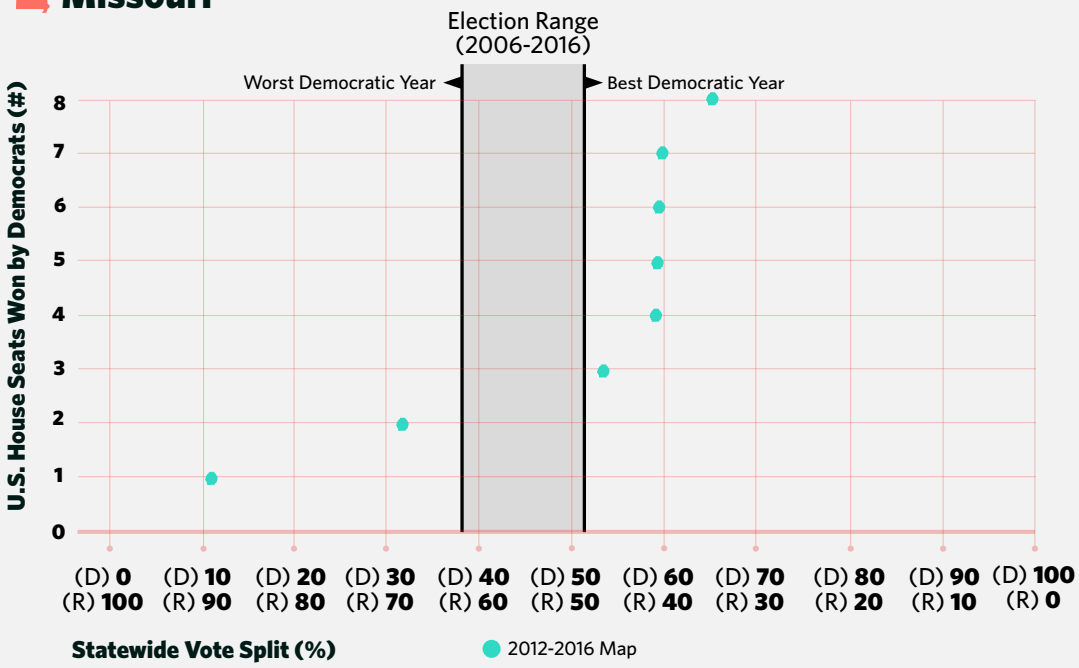


Figure 17 *Political Appointee Commission*

New Jersey

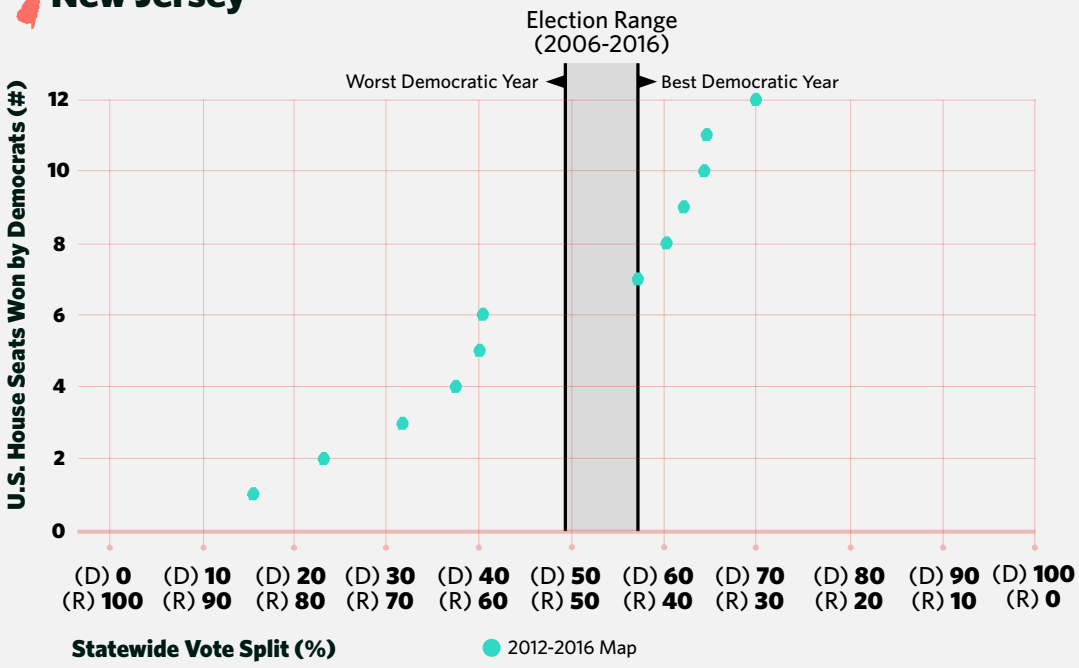


Figure 18

Court Imposed

New York

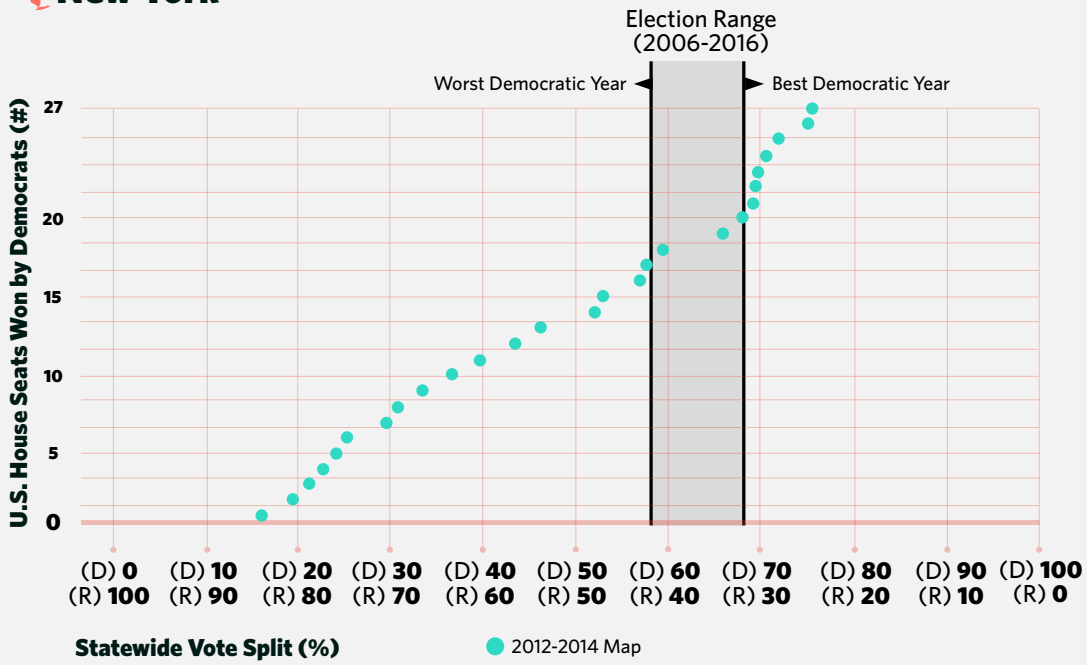


Figure 19

Single Party (Republican)

North Carolina

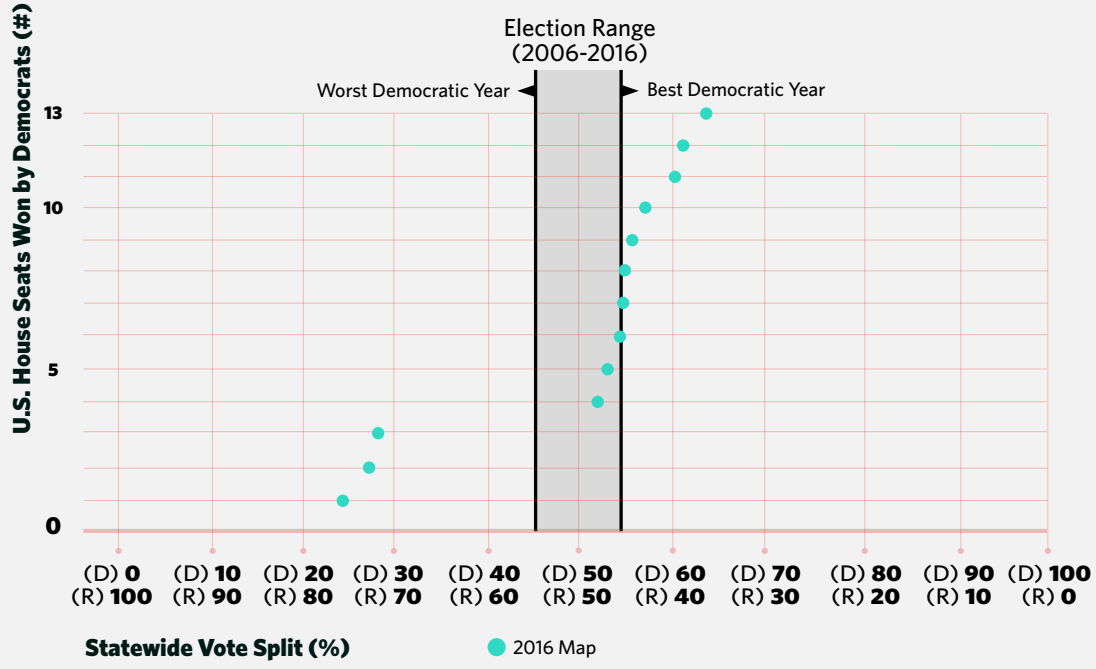


Figure 20

Single Party (Republican)

Ohio

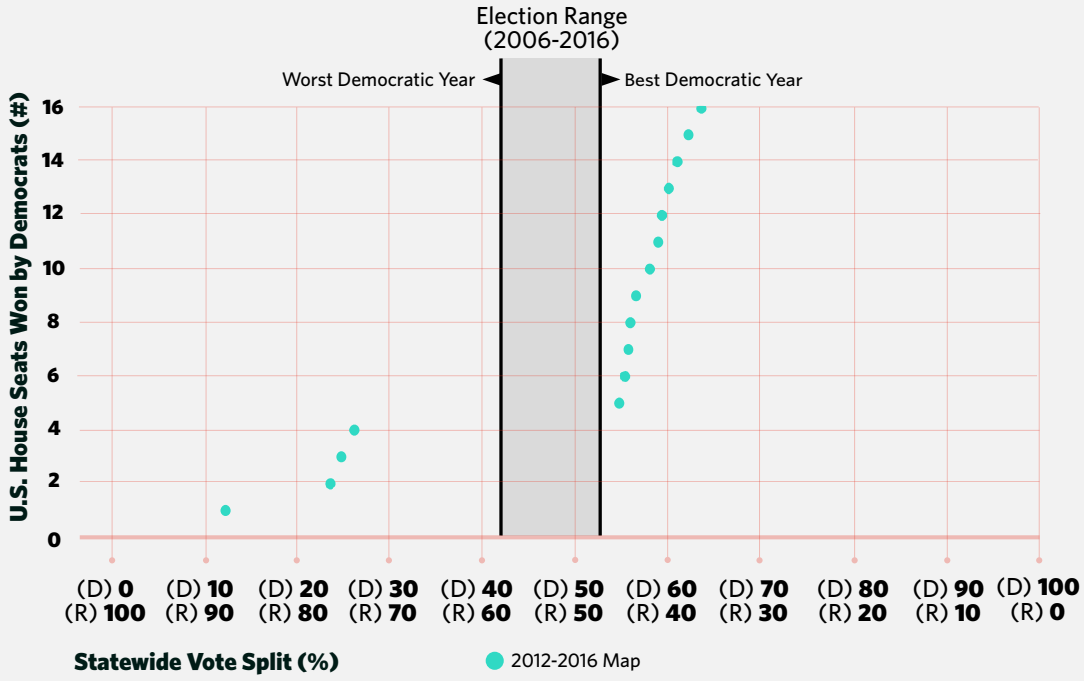


Figure 21

Court Imposed

Pennsylvania

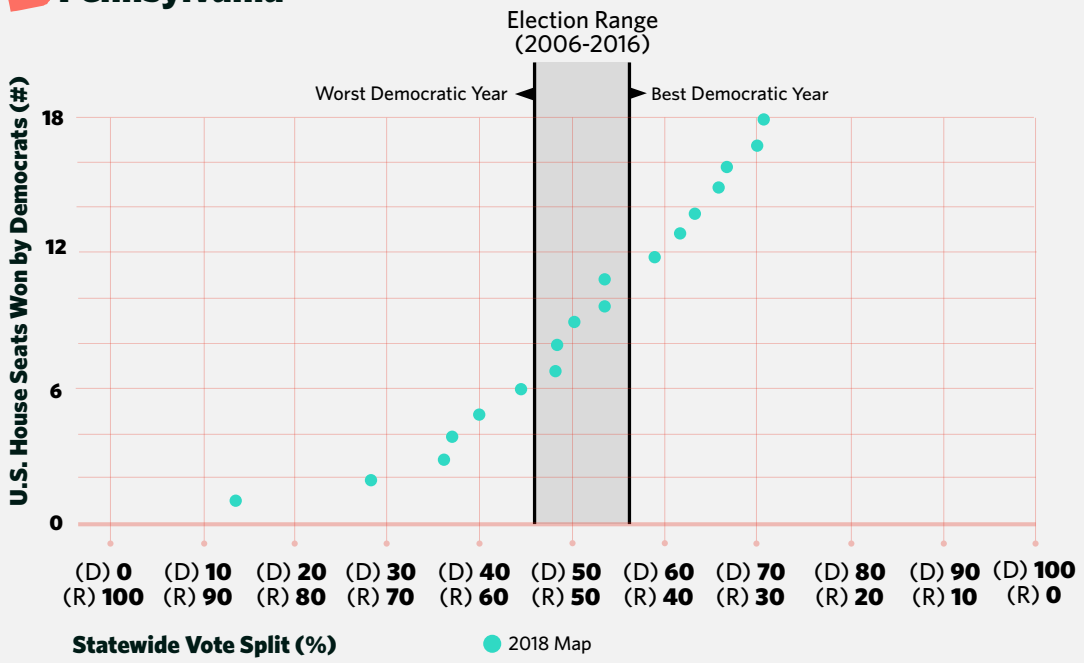


Figure 22

Single Party (Republican)

South Carolina

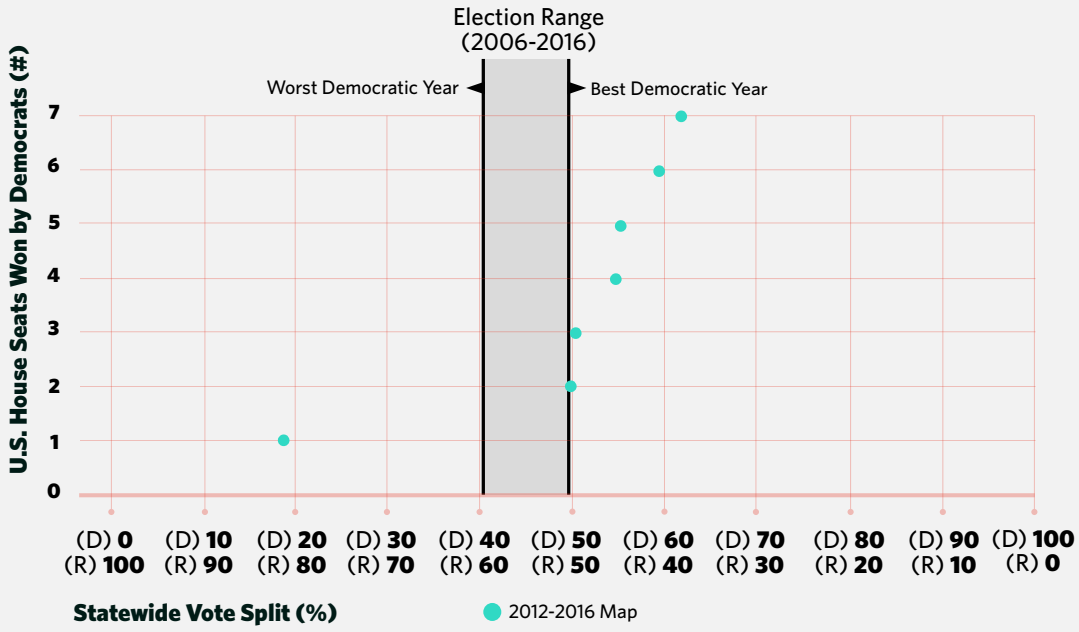


Figure 23

Single Party (Republican)

Tennessee

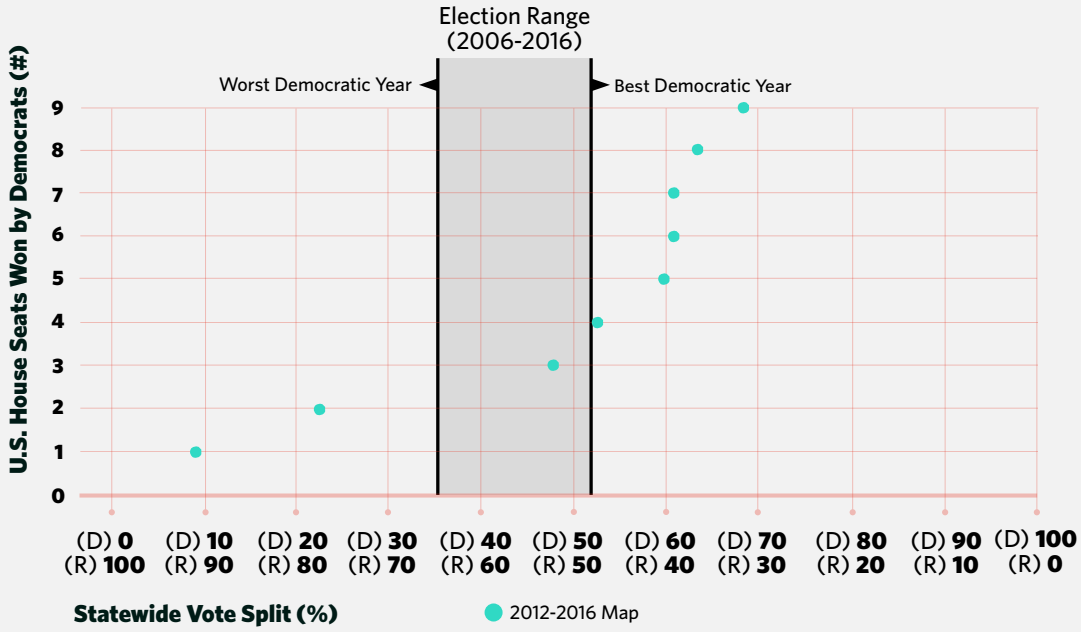


Figure 24

Court Modified

Texas

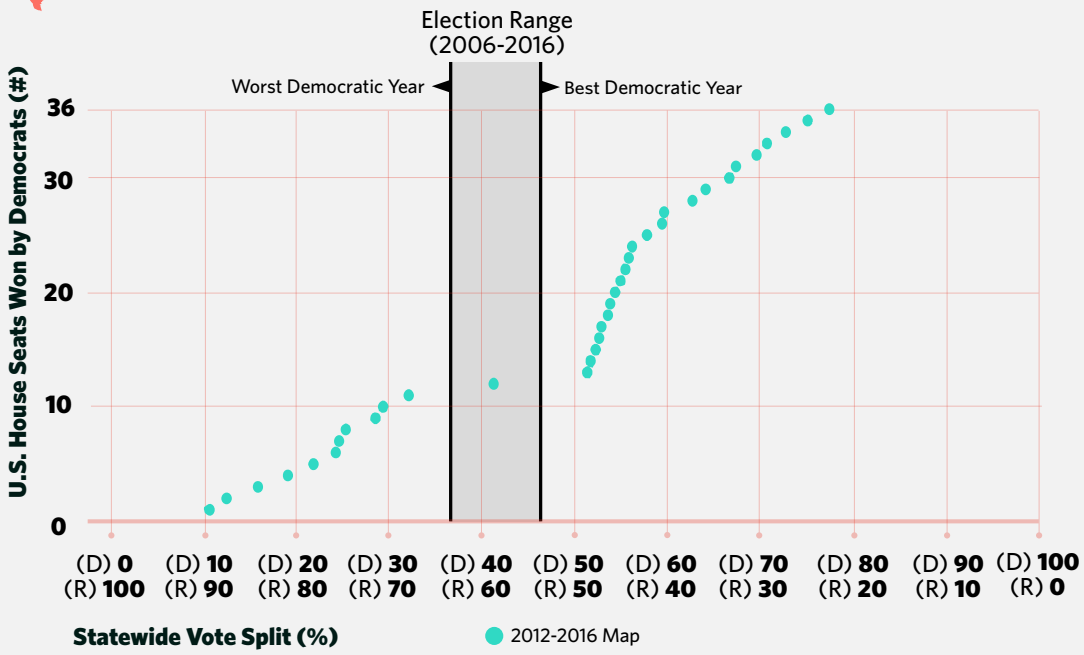


Figure 25

Court Modified

Virginia

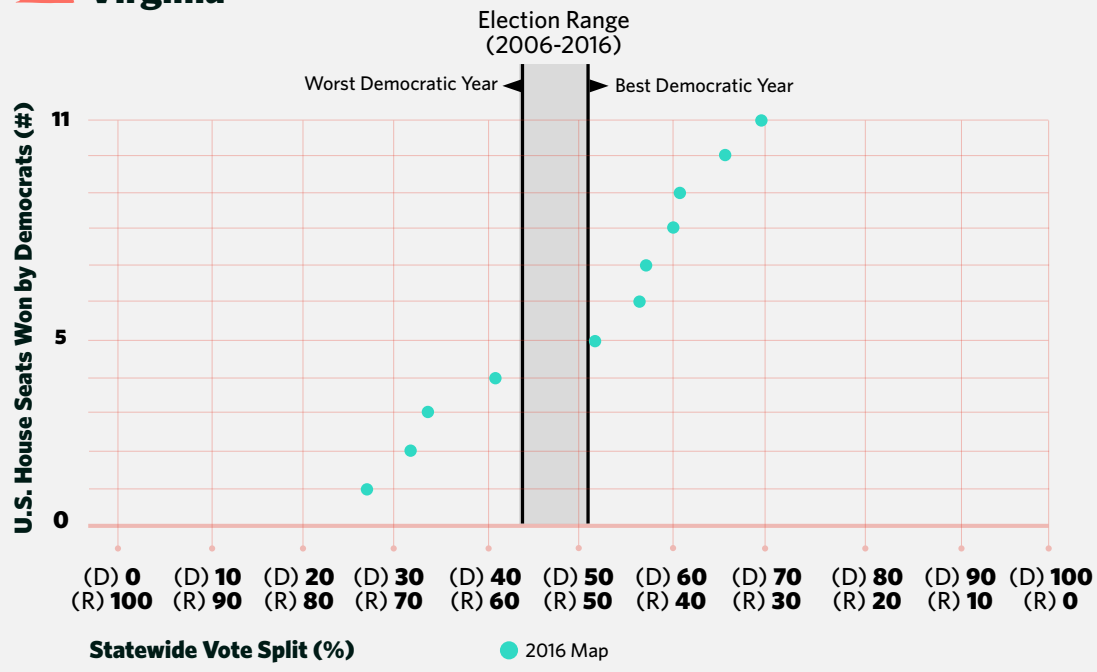


Figure 26

Political Appointee Commission

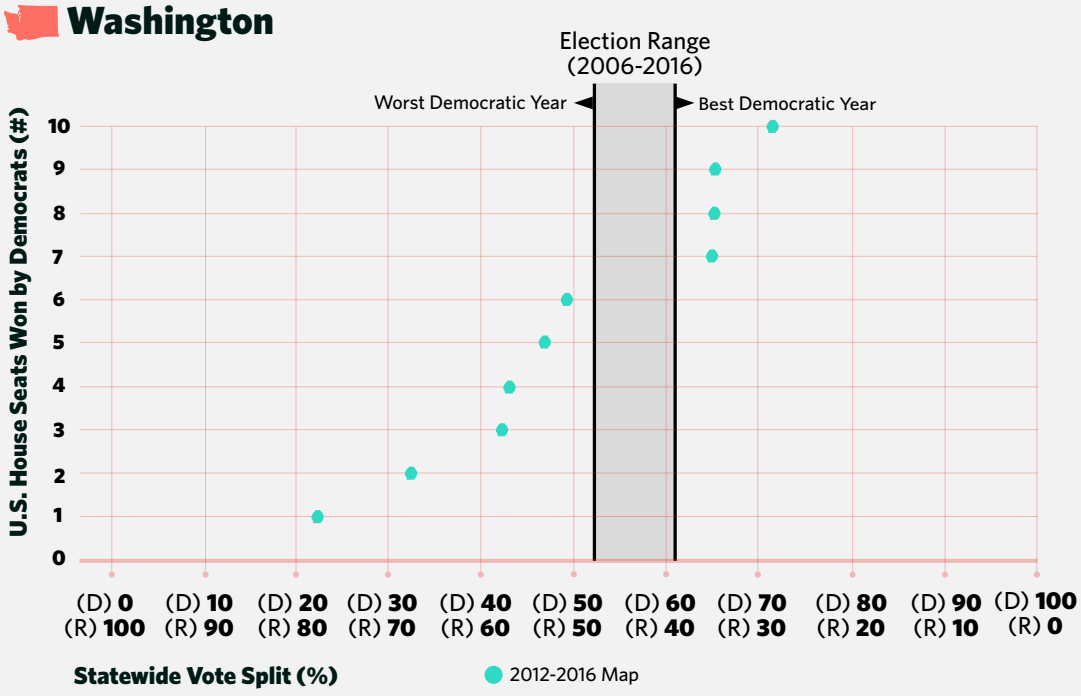
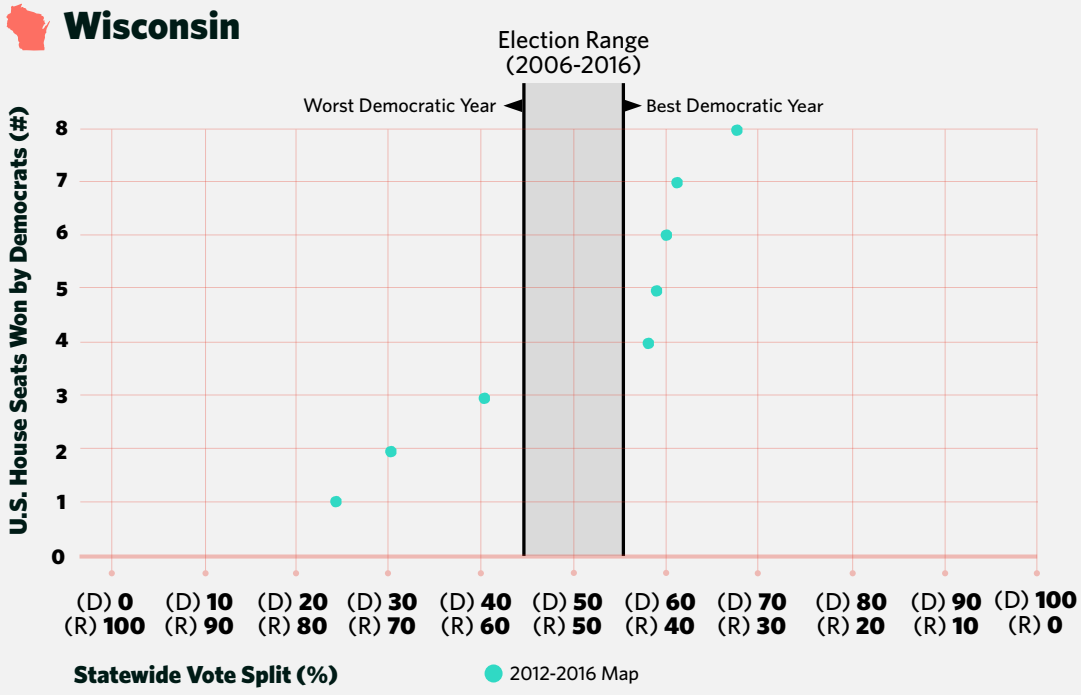


Figure 27

Single Party (Republican)



APPENDIX 2

Seats in Play Under Different 2018 Election Scenarios

Four 2018 Election Scenarios

- **Modest Democratic Year.** This scenario assumes that that statewide Democratic vote share in 2018 increases by 2 percentage points over 2016.

  In some states, like California, 2016 was a strong year for Democrats and a two-point increase in vote share would represent an all-time high for Democrats. In other states, particularly in the Midwest, 2016 was a much weaker Democratic year and a two-point increase would still result in a fairly, and in some cases significantly, Republican-leaning year.

- **Strong Democratic Year.** This scenario assumes that statewide Democratic vote share in 2018 increases by four percentage points over 2016. Although increasing vote share by four points would be difficult in heavily Democratic states, it would be a reasonable reversion to the historic mean in states like Ohio and could be in reach of Democrats in certain other states.

- **Democratic Wave.** This scenario assumes that statewide Democratic vote share in 2018 increases by 7 percentage points over 2016.

- **Democratic Tsunami.** This scenario assumes that statewide Democratic vote share in 2018 increases by 10 percentage points over 2016.

An 11-point win for Democrats in the national popular vote is consistent with:

- a wave election in Alabama, Indiana, Kentucky, Louisiana, Michigan, Minnesota, North Carolina, Ohio, South Carolina, Tennessee, Texas, and Wisconsin,
- a strong to wave election in Arizona, Colorado, Florida, Georgia, Missouri, New York, Pennsylvania, Virginia, and Washington,
- a strong election in Maryland, Massachusetts, and New Jersey, and
- a modest to strong election in California and Illinois.

If states' 2018 elections align with these election scenarios, around 28.5 seats not currently held by Democrats are projected to be in play in these states in this year's mid-terms in an 11-point national win scenario.

For purposes of this appendix, we included a seat as being in play if it is not currently held by Democrats and is located on the seats to votes curve for that state no more than one percentage point higher than the projected statewide vote under a scenario. For example, if the statewide vote share under the Strong Democratic Gain scenario is 52.48 percent, we counted a seat located on the curve at 52.98 percent as being in play. Statewide vote share figures represent Democrats' share of the two-party congressional vote.

Single Party (Republican)

State* — Democratic Share of Vote in 2016	Congressional Seats and Split After 2016 Election	Modest Democratic Year — Seats in Play if Ds Increase Vote by 2 points	Strong Democratic Year — Seats in Play if Ds Increase Vote by 4 points	Democratic Wave — Seats in Play if Ds Increase Vote by 7 points	Democratic Tsunami — Seats in Play if Ds Increase Vote by 10 points
Alabama 37%	7 (6R, 1D)	0	0	0	0
Georgia 44%	14 (10R, 4D)	0	1	1	1
Indiana 40%	9 (7R, 2D)	0	0	0	1-2
Louisiana 34%	6 (5R, 1D)	0	0	0	0
Michigan 49%	14 (9R, 5D)	0	0	2	6
North Carolina 47%	13 (10R, 3D)	0	0	2	7
Ohio 42%	16 (12R, 4D)	0	0	0	0
South Carolina 40%	7 (6R, 1D)	0	0	0	2
Tennessee 35%	9 (7R, 2D)	0	0	0	0
Wisconsin 47%	8 (5R, 3D)	0	0	0	1
Total	103	0	1	5	18-19

* See section on court-imposed maps for Pennsylvania.

Single Party (Democrat)

State — Democratic Share of Vote in 2016	Congressional Seats and Split After 2016 Election	Modest Democratic Year — Seats in Play if Ds Increase Vote by 2 points	Strong Democratic Year — Seats in Play if Ds Increase Vote by 4 points	Democratic Wave — Seats in Play if Ds Increase Vote by 7 points	Democratic Tsunami — Seats in Play if Ds Increase Vote by 10 points
Illinois 56%	18 (7R, 11D)	0	1	2	3
Maryland 63%	8 (1R, 7D)	0	0	0	0
Massachusetts 68%	9 (0R, 9D)	0	0	0	0
Total	35 (8R, 27D)	0	1	2	3

Split Control

State — Democratic Share of Vote In 2016	Congressional Seats and Split After 2016 Election	Modest Democratic Year — Seats in Play if Ds Increase Vote by 2 points	Strong Democratic Year — Seats in Play if Ds Increase Vote by 4 points	Democratic Wave — Seats in Play if Ds Increase Vote by 7 points	Democratic Tsunami — Seats in Play if Ds Increase Vote by 10 points
Kentucky 35%	6 (5R, 1D)	0	0	0	1
Missouri 40%	8 (6R, 2D)	0	0	0	0
Total	14 (11R, 3D)	0	0	0	1

Independent Commission

State — Democratic Share of Vote In 2016	Congressional Seats and Split After 2016 Election	Modest Democratic Year — Seats in Play if Ds Increase Vote by 2 points	Strong Democratic Year — Seats in Play if Ds Increase Vote by 4 points	Democratic Wave — Seats in Play if Ds Increase Vote by 7 points	Democratic Tsunami — Seats in Play if Ds Increase Vote by 10 points
Arizona 46%	9 (5R, 4D)	1	1	1	1
California 63%	53 (14R, 39D)	2	4	5	10
Total	62 (19R, 43D)	3	5	6	11

Political Appointee Commission

State — Democratic Share of Vote In 2016	Congressional Seats and Split After 2016 Election	Modest Democratic Year — Seats in Play if Ds Increase Vote by 2 points	Strong Democratic Year — Seats in Play if Ds Increase Vote by 4 points	Democratic Wave — Seats in Play if Ds Increase Vote by 7 points	Democratic Tsunami — Seats in Play if Ds Increase Vote by 10 points
New Jersey 54%	12 (5R, 7D)	0	1	3	5
Washington 55%	10 (4R, 6D)	0	0	0	2-3
Total	22 (9R, 13D)	0	1	2	7-8

Court Modified

State — Democratic Share of Vote In 2016	Congressional Seats and Split After 2016 Election	Modest Democratic Year — Seats in Play if Ds Increase Vote by 2 points	Strong Democratic Year — Seats in Play if Ds Increase Vote by 4 points	Democratic Wave — Seats in Play if Ds Increase Vote by 7 points	Democratic Tsunami — Seats in Play if Ds Increase Vote by 10 points
Florida 47%	27 (16R, 11D)	1	1	5	8
Virginia 48%	11 (7R, 4D)	1	1	2	3
Texas 42%	36 (25R, 11D)	1	1	1	6
Total	74 (48R, 26D)	3	3	8	17

Court Imposed

State — Democratic Share of Vote In 2016	Congressional Seats and Split After 2016 Election	Modest Democratic Year — Seats in Play if Ds Increase Vote by 2 points	Strong Democratic Year — Seats in Play if Ds Increase Vote by 4 points	Democratic Wave — Seats in Play if Ds Increase Vote by 7 points	Democratic Tsunami — Seats in Play if Ds Increase Vote by 10 points
Colorado 50%	7 (4R, 3D)	0	1	1	2
Minnesota 52%	8 (3R, 5D)	1	1	2	3-4
New York 62%	27 (9R, 18D)	0	1	2	7
*Pennsylvania** 48%	18 (13R, 5D)	3	4	7	7
Total	60 (29R, 31D)	4	7	12	19-20

* We include Pennsylvania in this appendix as a court-imposed map because its 2011 congressional map, drawn under sole Republican control, has since been invalidated by the Pennsylvania Supreme Court and replaced by a map drawn by the court that substantially reconfigures most of the districts in the 2011 map.

ENDNOTES

1 "Are Democrats or Republicans Winning the Race for Congress?," *FiveThirtyEight,* last updated March 20, 2018, https://projects.fivethirtyeight.com/congress-generic-ballot-polls/.

2 Alan I. Abramowitz, "Generic Ballot Model Gives Democrats Early Advantage in Battle for Control of the House," *Larry Sabato's Crystal Ball*, July 6, 2017, http://www.centerforpolitics.org/crystalball/articles/generic-ballot-model-gives-democrats-early-advantage-in-battle-for-control-of-house/.

3 For purposes of our analysis, we count MI-13 as a Democratic district even though it is currently vacant due to the resignation of Rep. John Conyers. Because the district is heavily Democratic, we assume that it will continue to be held by Democrats. We similarly treat AZ-8 and OH-12 as Republican districts despite vacancies on the assumption that Republicans win special elections in April and August respectively. We also do not factor in the Democratic special election win in PA-18 since the November elections will take place using a wholly different map. See endnote 4.

4 The Pennsylvania Supreme Court struck down the state's 2011 congressional map as a partisan gerrymander on January 22, 2018 and ordered the map redrawn. When the legislature and governor could not agree on a new plan, the court adopted its own replacement plan and ordered it to be used for the 2018 election.

5 Laura Royden and Michael Li, *Extreme Maps*, Brennan Center for Justice, May 9, 2017, 1-5, https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf.

6 Ibid., 1

7 Ibid., 2

8 Gary King and Robert X. Browning, "Democratic Representation and Partisan Bias in Congressional Elections," *American Political Science Review* 81 no. 4 (1987): 1251, http://nrs.harvard.edu/urn-3:HUL.InstRepos:4455010.

9 The correlation between statewide and district specific vote share becomes less constant in districts that overwhelmingly favor one party or the other. But since those districts are unlikely to "flip" even in a tsunami-like wave election, we are less concerned with them. For example, in NY-15, Democrats have won between 93.8 and 96.7 percent of the presidential vote in recent years. Imagining a scenario where Republicans win the district at a congressional level is virtually impossible or at least would require imagining a very different kind of political universe.

10 Michael P. McDonald, "Seats to Votes Ratios in the United States," (unpublished paper, UC Irvine Jack W. Peltason Center for the Study of Democracy, 2009), https://www.democracy.uci.edu/files/docs/conferences/mcdonaldgmu.doc, and Nicholas O. Stephanopoulos and Eric M. McGhee, "Partisan Gerrymandering and the Efficiency Gap," *University of Chicago Law Review,* 82 (2015): 831, http://uchicagolawjournalsmshaytiubv.devcloud.acquia-sites.com/sites/lawreview.uchicago.edu/files/04%20Stephanopoulos_McGhee_ART.pdf.

11 Simon Jackman, "The Predictive Power of Uniform Swing," *PS: Political Science & Politics*, 47, no. 2 (2014): 317-321, doi:10.1017/S1049096514000109 and Simon Jackman, "Assessing the Current North Carolina Congressional Districting Plan," Rose Institute of State and Local Government, March 1, 2017, http://roseinstitute.org/wp-content/uploads/2016/05/Expert-Report-of-Simon-Jackman.pdf.

12 Richard E. Cohen and James A. Barnes, *The Almanac of American Politics 2018* (Washington, D.C.: Columbia Books, 2017), 1584-1585.

13 See discussion of California, *infra*.

14 The seats-to-votes curve in Figure 5 was generated using district specific data from PlanScore: "Partisan Gerrymandering Historical Data," accessed March 5, 2018, https://planscore.org.

15 *Almanac of American Politics 2018*, 868.

16 Benisek v. Lamone, No. 17-333 (U.S. filed Aug. 25, 2017).

17 *Almanac of American Politics 2018,* 866.

18 Ibid.

19 Ibid, 882.

20 Alison Mitchell, "Redistricting 2002 Produces No Great Shake Ups," *New York Times*, March 13, 2002, accessed March 5, 2018, http://www.nytimes.com/2002/03/13/us/redistricting-2002-produces-no-great-shake-ups.html.

21 Favors v. Cuomo, No. 1:11-cv-5632, 2012 WL 928216, (E.D.N.Y. March 12, 2012), (adopting report and recommendation).

22 Ibid., *12-*15.

23 Ibid., *16-*19.

24 "2018 House Race Ratings," *Cook Political Report*, February 27, 2018, https://www.cookpolitical.com/ratings/house-race-ratings.

25 *Favors*, 2012 WL 928216, *15.

26 Memorandum Opinion at 15, League of Women Voters of North Carolina v. Rucho, No. 1:16-cv-01026, (M.D.N.C. Jan. 9, 2018), ECF No. 118.

27 Todd J. Gillman. "2010 Census Results Give Texas Four Additional Seats in Congress," Dallas Morning News, December 22, 2010, https://www.dallasnews.com/news/local-politics/2010/12/22/2010-census-results-give-texas-four-additional-seats-in-congress.

28 Ross Ramsey, Matt Stiles, Julián Aguilar, and Ryan Murphy, "Minorities Drove Strong Texas Growth, Census Figures Show," *Texas Tribune*, February 18, 2011, accessed March 5, 2018, https://www.texastribune.org/2011/02/18/minorities-drove-texas-growth-census-figures-show/.

29 For example, TX-26 in the plan passed in 2011 by the Texas Legislature (Plan C185) would have joined heavily Latino portions of Fort Worth with suburban heavily white Denton County to the north. This was accomplished by a configuration that essentially had a taproot descend from Denton County through Forth Worth, picking up heavily Latino neighborhoods.

30 Plan C213 was proposed by Texas Latino Redistricting Task Force, one of the plaintiffs in litigation over the Texas maps. Other Latino plaintiffs offered additional alternative plans that would have had broadly similar effect in terms of remedying the cracking of urban Latino and African-American communities.

31 *Almanac of American Politics 2018,* 1944.

32 Ibid.

33 *A 50 State Guide to Redistricting,* Brennan Center for Justice, May 23, 2011, http://www.brennancenter.org/publication/50-state-guide-redistricting.

34 Memorandum Opinion at 15, League of Women Voters of North Carolina v. Rucho, No. 1:16-cv-01026, (M.D.N.C. Jan. 9, 2018), ECF No. 118.

35 Ibid., 16.

36 Ibid., 18.

37 Ibid., 18-19.

38 David Wasserman's spreadsheet of 2012 House results is available at http://bit.ly/2pUatCy, his spreadsheet of 2014 House results is available at http://bit.ly/2pETQKc, and his spreadsheet of 2016 House results is available at http://bit.ly/2p5ELy2.

39 David Nir, "Daily Kos Elections' Presidential Results by Congressional District for the 2016 and 2012 Elections," *Daily Kos*, November 19, 2012, accessed April 21, 2017, http://www.dailykos.com/story/2012/11/19/1163009/-Daily-Kos-Elections-presidential-results-by-congressional- district-for-the-2012-2008-elections.

40 Jackman, "The Predictive Power of Uniform Swing."

41 Jackman, "Assessing the Current North Carolina Congressional Districting Plan," 54-60 and Stephanopoulos and McGhee, "Partisan Gerrymandering and the Efficiency Gap," 863-865.

Endnotes for Table on Page 2

i The Pennsylvania Supreme Court struck down the state's 2011 congressional map as a partisan gerrymander on January 22, 2018 and ordered the map redrawn. When the legislature and governor could not agree on a new plan, the court adopted its own replacement plan and ordered it to be used for the 2018 election.

ii The historical model is based on regression analysis of mid-term election results from 1946-2014 performed by Alan Abramowitz. See note 2 above. Note that this regression includes one election cycle from the current decade, whose maps include some of the most aggressive gerrymandering in American history.

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By Jonathan Brater, Kevin Morris,
Myrna Pérez, and Christopher Deluzio

Brennan Center for Justice at *New York University School of Law*

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Introduction

On April 19, 2016, thousands of eligible Brooklyn voters dutifully showed up to cast their ballots in the presidential primary, only to find their names missing from the voter lists. An investigation by the New York state attorney general found that New York City's Board of Elections had improperly deleted more than 200,000 names from the voter rolls.

In June 2016, the Arkansas secretary of state provided a list to the state's 75 county clerks suggesting that more than 7,700 names be removed from the rolls because of supposed felony convictions. That roster was highly inaccurate; it included people who had never been convicted of a felony, as well as persons with past convictions whose voting rights had been restored.

And in Virginia in 2013, nearly 39,000 voters were removed from the rolls when the state relied on a faulty database to delete voters who allegedly had moved out of the commonwealth. Error rates in some counties ran as high as 17 percent.

These voters were victims of purges — the sometimes-flawed process by which election officials attempt to remove ineligible names from voter registration lists. When done correctly, purges ensure the voter rolls are accurate and up-to-date. When done incorrectly, purges disenfranchise legitimate voters (often when it is too close to an election to rectify the mistake), causing confusion and delay at the polls.

Ahead of upcoming midterm elections, a new Brennan Center investigation has examined data for more than 6,600 jurisdictions that report purge rates to the Election Assistance Commission and calculated purge rates for 49 states.[1]

We found that between 2014 and 2016, states removed almost 16 million voters from the rolls, and every state in the country can and should do more to protect voters from improper purges.[2]

Almost 4 million more names were purged from the rolls between 2014 and 2016 than between 2006 and 2008.[3] This growth in the number of removed voters represented an increase of 33 percent — far outstripping growth in both total registered voters (18 percent) and total population (6 percent).

Most disturbingly, our research suggests great cause for concern that the Supreme Court's 2013 decision in *Shelby County v. Holder* (which ended federal "preclearance," a Voting Rights Act provision that was enacted to apply extra scrutiny to jurisdictions with a history of racial discrimination) has had a profound and negative impact:

For the two election cycles between 2012 and 2016, jurisdictions no longer subject to federal preclearance had purge rates significantly higher than jurisdictions that did not have it in 2013. The Brennan Center calculates that *2 million fewer voters* would have been purged over those four years if jurisdictions previously subject to federal preclearance had purged at the same rate as those jurisdictions not subject to that provision in 2013.[4]

In Texas, for example, one of the states previously subject to federal preclearance, approximately 363,000 more voters were erased from the rolls in the first election cycle after *Shelby County* than in the comparable midterm election cycle immediately preceding it.[5] And Georgia purged twice as many voters — 1.5 million — between the 2012 and 2016 elections as it did between 2008 and 2012.

Meanwhile, the Justice Department has abdicated its assigned role in preventing overly aggressive purges. In fact, the Justice Department has sent letters to election officials inquiring about their purging practices — a move seen by many as laying the groundwork for claims that some jurisdictions are not sufficiently aggressive in clearing names off the rolls.

This new report follows an extensive analysis of this issue in a 2008 Brennan Center report entitled *Voter Purges*.[6] In that report, we uncovered evidence that election administrators were purging people based on error-ridden practices, that voters were purged secretly and without notice, and that there were limited protections against purges. In this year's report, we discovered that little about purge practices has improved and that a number of things have, in fact, gotten worse.

This study also found:

- **In the past five years, four states have engaged in illegal purges, and another four states have implemented unlawful purge rules.**
  Federal standards for purges were set in the 1993 National Voter Registration Act (NVRA). Since 2013, Florida, New York, North Carolina, and Virginia have conducted illegal purges. Moreover, Brennan Center research has uncovered that four states (Alabama, Arizona, Indiana, and Maine) have written policies that by their terms violate the NVRA and provide for illegal purges. Alabama, Indiana, and Maine have policies for using data from a database called the Interstate Voter

Registration Crosscheck Program (Crosscheck) to immediately purge voters without providing the notice and waiting period required by federal law (Indiana's practice has been put on hold by a federal court). Arizona regulations permit Crosscheck purges during the 90 days prior to an election, a period during which federal law prohibits large-scale purges. These eight states are home to more than a quarter of registered voters across the nation.

- **States use inaccurate information.**
  Although states have improved the way in which they use data to purge the voter rolls in some respects, several jurisdictions rely on faulty data to flag potentially ineligible voters. And some of the new sources of information that have come into widespread use since our 2008 report, such as Crosscheck, are especially problematic.

- **A new coterie of activist groups is pressing for aggressive purges.**
  Most purging litigation brought by private litigants before 2008 contended that voter removal efforts were overly aggressive. Today, a different group of plaintiffs is hauling election officials into court, claiming that purging practices in their jurisdictions are not sufficiently zealous.

This report makes the following recommendations:

- **Enforce the NVRA's protections.**
  The NVRA, one of the major federal laws governing how states and localities can conduct purges, permits voters and civic groups to sue election officials if they violate the law's provisions. Monitoring jurisdictions to ensure they are complying with the NVRA — and bringing litigation when necessary — is especially important in an era when election officials are under pressure to mount aggressive purges.

- **States should set purging standards that provide even more protections than the NVRA.**
  The NVRA sets out federal standards for purges and requires that voters removed from the rolls for certain reasons be given notification. But these are minimum guidelines. States can and should do more to protect against disenfranchisement caused by improper purges — for example, providing public and individual notice before purging names from the rolls.

- **Pass automatic voter registration.**
  Automatic voter registration is a popular reform that minimizes registration errors and allows for easy updates, making rolls more accurate and current.

Methodology

We analyzed purge statutes, regulations, and other guidance in 49 states.[7] We interviewed 21 state or local election administrators in 18 states and reviewed documents from 20 states in response to public records requests.[8]

We also calculated state and county purge rates using voter registration data from the Election Administration and Voting Survey (EAVS), which is administered biennially by the U.S. Election Assistance Commission.[9] Our analysis used EAVS data from the 2008, 2010, 2012, 2014, and 2016 reports. In each two-year period, we calculated a jurisdiction's voter removal rate by dividing the number of *removed voters* by the sum of *registered voters* (i.e., both active and inactive registered voters) and *removed voters*.[10]

The 2018 Purge Landscape

Between the 2014 and 2016 elections, roughly 16 million names nationwide were removed from voter rolls.[11] The federal law governing purges[12] allows a voter's name to be purged from the voter rolls on the following grounds: (1) disenfranchising criminal conviction; (2) mental incapacity; (3) death; and (4) change in residence. In addition to these criteria, individuals who were never eligible in the first place, such as someone under 18 or a noncitizen, may be removed. Voters may be removed at their own request (even if they remain eligible). While all 49 states with voter registration lists have affirmative policies to remove names from the rolls (typically for several or all of the four delineated categories), states vary in the manner in and frequency with which they conduct voter purges.[13]

- **Disenfranchising Conviction**
  Except in Maine and Vermont, states disenfranchise at least some voters convicted of a crime for some period of time, which means that there are states that purge voters because of a criminal conviction. States have different policies about what causes a voter to become ineligible and different procedures for removing those who have been disenfranchised.[14] They also draw upon different lists to identify individuals with felony convictions, which may in turn be maintained with different levels of regularity and precision by courts or law-enforcement officials at the state or federal levels.

- **Mental Incapacity**
  Though less ubiquitous than some other bases of removal, 28 states have specific rules requiring removal from the rolls of a person determined not to have mental capacity to vote.[15] Definitions vary, and reform attempts have had

some success limiting the instances in which those with alleged mental incapacity lose their right to vote.[16]

- **Death**
  Federal law mandates that states take steps to remove the deceased from the rolls. Yet there is no uniform standard among the various state laws detailing the sources of information to be consulted to determine which voters are deceased. Some jurisdictions use information from state agencies, some review obituaries, and some rely on the Social Security Administration's Death Master File.[17]

- **Residency Changes**
  States vary in how they perform list maintenance for changes of address. Some of that variation is in timing. Montana, for example, conducts address removals every odd-numbered year,[18] and Connecticut conducts address removals annually.[19] There is also variation in which source of information is used. Two common sources are drivers' license updates and the postal service's National Change of Address (NCOA) database, but states also utilize other sources, such as interstate databases, returned mailings, or voter inactivity.

- **Noncitizenship**
  While election officials generally remove names of persons when it is made known to them that a noncitizen has gotten on the rolls, at least six states also have laws that require state officials to use jury declinations, drivers' license information, and/or federal databases to actively identify noncitizens on the voter rolls, to remove names of noncitizens so identified, or both.[20]

CURRENT FINDINGS

Purge Rates Are Higher Than a Decade Ago

In the two-year period ending in 2008, the median jurisdiction purged 6.2 percent of its voters.[21] At one end of the spectrum in 2008, Salt Lake County, Utah, purged less than 0.1 percent of its voters, and at the other end of the spectrum, Milwaukee County, Wisconsin, purged more than 34 percent of its voters. Of the 2,534 counties that reported purge rates to the Election Assistance Commission in 2008, only 97 had purged more than 15 percent of its registered voters in a two-year period.

Between the federal elections of 2014 and 2016, almost 4 million more names were purged from the rolls than in 2006-08. In this same period, more than twice the number of counties — 205 — had purged more than 15 percent of their voters than between 2006 and 2008.

Although a higher removal rate is not inherently bad, more purging means increased potential for eligible voters to be removed, especially given that we identified no state with the desired level of voter protections against purges.

Purge Rates Increased More in Jurisdictions Previously Subject to Federal Preclearance

Prior to 2013, the Voting Rights Act required certain jurisdictions with a history of discriminatory election practices to obtain federal certification that any intended election change, including voter purge practices, would not harm minority voters and was not enacted with discriminatory intent. This monitoring process was known as "preclearance."[22] In 2013, however, the Supreme Court concluded in *Shelby County v. Holder*[23] that Congress had inappropriately determined which jurisdictions should be subject to preclearance. As a result, jurisdictions subject to (or "covered" by) preclearance requirements were freed from making the case that minority voters would not be harmed by a proposed election change.

Across the board, formerly covered jurisdictions increased their purge rates after 2012 more than noncovered jurisdictions. Before *Shelby County*, jurisdictions that were subject to preclearance requirements ("covered jurisdictions") had removal rates equal to other jurisdictions ("noncovered jurisdictions").[24] After 2013, the two groups

FALLOUT FROM *SHELBY COUNTY*

Increases in purge rates in previously covered jurisdictions weren't the only changes after *Shelby County*.[1] Following the decision, many states and jurisdictions proceeded to enact or implement laws that would have been subject to preclearance. In fact, states formerly under preclearance requirements were more likely to pass legislation restricting their voting and election practices than the nation as a whole. Of the nine states once fully covered by the Voting Rights Act, seven have passed restrictive legislation since 2010. Of the 41 states not fully covered, only 18 passed restrictive laws over the same period. Two of these states (Florida and North Carolina) each had several counties subject to the Voting Rights Act.[2]

1 Shelby County v. Holder, 570 U.S. 2 (2013).

2 See Brennan Center for Justice, *New Voting Restrictions in America*, May 2017, https://www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf. We include in this count legislation that was enacted and subsequently struck down by courts. *See, e.g.*, Applewhite v. Pennsylvania, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014) (striking down Pennsylvania voter ID law).

sharply diverged. For the 2012-14 and 2014-16 two-year election cycles, the removal rate for noncovered jurisdictions did not budge. The story was entirely different for covered jurisdictions, whose median removal rate was 2 percentage points higher after the *Shelby County* decision than the noncovered jurisdictions.[25] Though 2 percentage points may seem like a small number, more than 2 million fewer voters would have been removed if these counties had removal rates comparable to the rest of the country. Previously covered jurisdictions ended up removing more than 9 million voters between the presidential elections of 2012 and 2016. These increases were not concentrated in just a few small counties: 67 percent of residents in previously covered jurisdictions lived in areas where the removal rate increased, compared to just 46 percent of residents in non-covered jurisdictions. These calculations are restricted to jurisdictions that reported their data each year, but there is evidence that the same trend happened in counties that did not report each year, as our Texas analysis below shows.

The increase in removal rates in counties previously covered by the preclearance provision is not attributable to geographical or partisan factors (see footnote 25 for more information). We also conducted a difference-in-differences regression analysis[26] to see if population, minority presence, income, or other factors could explain the increase in removal rates in these counties. Even after controlling for these factors, a jurisdiction's former status under the Voting Rights Act was strongly associated with higher voter removal rates. Although this effect was larger in the two-year period coinciding with the lifting of the preclearance requirement, it continued even into the two-year period ending with the presidential election of 2016.

To be absolutely clear, our analysis cannot establish what percentage, if any, of these post-*Shelby County* purges were done erroneously. What we do know is that provisional ballots, which are given to voters who are missing from the voter rolls, had a statistically significant relationship to purge rates in previously covered jurisdictions.[27] This means that as the purge rates increased, so did the number of people who showed up to vote but were unable to do so, either because their names were not on the rolls or for some other reason.

Another factor is that between the presidential elections of 2012 and 2016, a handful of states implemented strict voter ID laws that required voters to cast provisional ballots if they did not have one of the limited number of accepted identifications. The implementation of these laws could, of course, have led to an increase in provisional ballot rates. (To isolate the impact of increased purge rates on provisional ballot rates, we performed a regression analysis in which we controlled for the implementation of strict voter ID laws and other sociodemographic factors. The regression specification and a closer look at a few counties with big increases in purge rates and provisional ballots can be found in Appendix C.)

The changes were particularly notable in three states: Georgia, Texas, and Virginia.

In **Georgia**, 750,000 more names were purged between 2012 and 2016 than between 2008 and 2012. Although Georgia did not report provisional ballot rates in 2012, their provisional ballot rates in the federal elections of 2010 and 2014 correspondingly increased as the removal rates increased. Of the state's 159 counties, 156 reported increases in removal rates post-*Shelby County*. This included the state's 86 most populous counties. The increased purge rate occurred during a period when Georgia was criticized for several controversial voter registration practices. For example, Georgia was sued for blocking registration applications between 2013 and 2016 because information (including hyphens in names) did not match state databases precisely. Georgia agreed to cease the matching rule as a result of the lawsuit but then enacted legislation reinstating a very similar practice the next year.[28]

Texas did not report removal rates for the two years ending in 2012 and is thus excluded from our high-level analysis of the previously covered jurisdictions. Nonetheless, the state exhibited a substantial increase in removal rates when we compare the two-year periods ending with the federal elections of 2010 and 2014. Between 2012 and 2014, approximately 363,000 more voters were removed than in 2008-10.[29] Unsurprisingly, the provisional ballot rate also increased between the midterm elections of 2010 and 2014. Consistent with the broader trend, these increases were not driven only by small counties: Fourteen of the 20 most populous counties increased their removal rates. Of the 183 Texas counties that reported their removal rates in both periods, 121 saw an increase after the *Shelby County* decision. Among the Texas counties that consistently reported their data and increased their removal rate after the *Shelby County* decision, the median increase was 3.5 percent. This increased purge rate did not occur in isolation but was joined by restrictive voting legislation. In 2014, a federal district court ruled that the strict photo ID law that Texas passed in 2011 was motivated in part by a discriminatory purpose of reducing minority political participation.[30] The Court of Appeals of the 5th Circuit did not decide whether the law was motivated by discriminatory animus but did conclude it had a discriminatory effect.[31] In 2017, Texas passed a new voter ID law. Litigation regarding the new law is ongoing.

In **Virginia**, previously covered counties removed 379,019 more voters between 2012 and 2016 than between 2008 and 2012. Once again, the increase in purge rates in these counties was not driven by small counties purging more voters. All the previously covered counties except one increased removal rates after *Shelby County*. The one previously covered county that showed a decrease — Highland County — is the least populous county in the state, home to just 2,230 people. More than 99 percent of Virginia's voters live in counties that increased their removal rates after *Shelby County*. As later discussed in more detail, a contributing factor may have been a highly problematic purge process that Virginia mounted in 2013.

States Continue to Conduct Flawed Purges

Broadly speaking, purges go wrong for one of two basic reasons: bad information about who should be removed from the rolls or a bad method for removing them. There are tools to catch and correct these mistakes, some of which are legally mandated. For example, federal law sets forth some important and relevant safeguards, such as requiring that systematic purges — those in which voter rolls are compared with lists of potentially ineligible individuals to remove groups of voters at the same time — occur well in advance of an election. Another is making sure certain categories of voters get a notice and waiting period before removal.[32] Yet as both a legal and practical matter, many states lack sufficient safeguards to detect and correct problems so that any harm can be repaired in advance of an election.

Two states' recent experiences illustrate the basic reasons purges go wrong — Arkansas used bad information, while Texas used a bad method.

In June 2016, the Arkansas secretary of state sent county officials a list of more than 7,700 records from the Arkansas Crime Information Center (ACIC) of persons who were supposedly ineligible to vote and should be removed from the rolls.[33] (Those convicted of felonies in Arkansas lose their right to vote until their sentence is complete or they are pardoned.[34]) But the list included a high percentage of voters who were indeed eligible,[35] yet appeared on the list because they had had some involvement with the court system, such as a misdemeanor conviction or a divorce.[36] Also included were names of those whose voting rights had been restored.[37] The error became public in July 2016, and despite the public outcry, the records of fewer than 5,000 of the more than 7,700 erroneously listed voters had been corrected by September 2016.[38] Pulaski County, the largest county in the state, explained that the problem was flagged by the counties, not the state, and not all counties were able to correct errors. Previously, the secretary of state had not been providing counties with regular updates of conviction data and, in the past, had been using the wrong source list for data on felony convictions. Once Arkansas switched to the list required by law, the secretary did an overly broad match and provided counties with inflated lists with bad matches. Pulaski County flagged the errors and was able to investigate the list, but some counties with insufficient resources simply sent purge notices to everyone on the list.[39]

Texas is an example of a bad purge caused by flawed data matching. In 2012, Texas officials conducted a purge of voters presumed to be dead. According to a representative from the Texas secretary of state's office, the purge was driven by a comparison of Texas voters' information to the Social Security Administration's Death Master File — the first time Texas had conducted such an exercise.[40] Matching to the Death Master File was required under a then-new Texas law (H.B. 174) mandating election officials to obtain such information about potentially deceased voters quarterly.[41]

While the 2008 Brennan Center report on voter purges showed that the Death Master File can contain errors,[42] the problem in Texas occurred because the state used what are called "weak" matches (meaning that the chances that the person identified was actually deceased were too low to be trusted) to target voters without conducting any further investigation.[43] For example, a voter whose date of birth and last four digits of their Social Security number matches a dead person's record would be a "weak" match.[44] On these grounds, a living Texas voter (and Air Force veteran) named James Harris, Jr., was flagged for removal because he shared information with an Arkansan, "James Harris," who had died in 1996.[45] According to one analysis, more than 68,000 of the 80,000 voters identified as possibly dead were weak matches.[46] This policy of flagging voters based on a weak match without further investigation was eventually changed when Texas settled litigation that had arisen on account of the bad purge.[47]

States south of the Mason-Dixon Line do not have a monopoly on bad purges. Before the April 2016 primary election, the New York City Board of Elections purged more than 200,000 voters, the majority of whom lived in Brooklyn. In 2014 and 2015, the Brooklyn Borough Office of the Board of Elections targeted for removal people who had not voted since the 2008 election.[48] New York City officials complied with the portion of federal law requiring them to *send* notice to affected voters but not with the part that required them to *wait* two federal elections before purging those who did not respond. Instead, the Board of Elections gave voters 14 days to respond, then

purged voters immediately. In the end, nearly 118,000 registrations were canceled when voters did not respond to these notices.[49] And through another process, an additional 100,000 voters were removed (also without the required waiting period) because New York City Board of Elections officials believed they had moved.[50] On Election Day, thousands of voters showed up at the polls only to learn their registrations had been erased. Moreover, these problems were not evenly distributed. One report found that 14 percent of voters in Hispanic-majority election districts were purged compared to 9 percent of voters in other districts.[51]

Federal Role in Voter Protection Diminished

The increased purge rates are a cause for concern because there are fewer federal protections against improper purges. The *Shelby County* decision has halted the preclearance provision, which had previously blocked election changes in certain jurisdictions unless it could be shown that the change would not make minority voters worse off and was not enacted with discriminatory intent.

And at least for now, voters have lost another important protector against improper purges: the Justice Department. Since 1993, the Justice Department has been charged with enforcing the National Voter Registration Act, the primary source of federal protection against inaccurate or overly broad purges.[52] While the Justice Department's purge history is mixed,[53]it brought pro-voter NVRA lawsuits during the Obama administration. Enforcement actions for violating the NVRA were undertaken against at least six states. In Florida and New York, the DOJ successfully challenged state purge practices.[54] In Florida, the Justice Department joined civic groups who successfully challenged the state's practice of conducting systematic purges just 90 days before an election.[55]

But the Trump administration has reversed course. For instance, in *Husted v. A. Philip Randolph Institute*, the Obama administration filed a brief in support of plaintiffs challenging an Ohio purging practice in which individuals who failed to vote in a single election received purge notices and were ultimately purged if they did not respond and did not vote in the next two federal elections. Failure to vote in a single election is poor evidence of ineligibility because not voting is common; for example, in the last midterm election, nearly 60 percent of Ohioans did not vote.[56] But when the case was pending before the U.S. Supreme Court in the summer of 2017, the Justice Department switched sides and supported Ohio.[57] On June 11, 2018, the Supreme Court ruled in favor of Ohio and the Justice Department's new position.[58]

Last summer, the Trump Justice Department also sent letters to 44 states demanding information about their voter purge practices.[59] Although the Justice Department has not taken further action so far, the suspicion is that the inquiries could be a precursor to enforcement actions to force states to purge more aggressively.[60]

New Flaws in Voter Purges

Three new risks have emerged in voter purges in recent years. One is the growth of interstate databases that purport to identify voters who have moved to a new state and are registered in both their current and former state. The two databases primarily used are the Interstate Voter Registration Crosscheck program (Crosscheck) and Electronic Registration Information Center (ERIC).

Launched in 2005 by the Kansas secretary of state, Crosscheck purports to identify voters who may have cast ballots in two different states in the same election. In 2017, 28 states participated in Crosscheck by sharing voter data with the system,[61] but not all of those states actively used, or use, Crosscheck to remove voters. The number of participating states in 2018 is still to be determined because a number of states are assessing their participation.

Another data-matching initiative, ERIC, began with assistance from the Pew Charitable Trusts in 2012. Twenty-four states and the District of Columbia are or will soon be members of ERIC.[62]

The second risky development is the increasing number of states scouring their rolls to identify alleged noncitizens registered to vote: The number of states with statutes specifically mandating searching for and removing noncitizens from the rolls has increased from two to six since 2008. Of course, noncitizens are not permitted to vote in federal and state elections, but the sources states rely upon to determine voter citizenship, such as driver's license lists, are not highly accurate. Moreover, the primary policy justification for aggressive purges aimed at removing noncitizens from the rolls — supposed widespread noncitizen voting — is not supported by the facts, a Brennan Center study of the 2016 election found. The study looked at 42 jurisdictions in 12 states, including eight of the 10 jurisdictions with the nation's largest noncitizen populations. Out of the 23.5 million votes cast in these jurisdictions, election officials referred only 30 instances of *suspected* noncitizen voting, or .0001 percent of the total.[63]

Finally, several conservative activist groups have sued state and local jurisdictions in recent years seeking to force them to purge their rolls more aggressively. For instance,

last September the Public Interest Legal Foundation noted that it had brought nine suits in six states in the past two years alleging lax vigilance of voter rolls. That tally was included in a press release announcing that the group had put 248 counties in 24 states "on notice" that they were risking litigation if they could not demonstrate "effective voter roll maintenance."[64]

Interstate Voter Registration Crosscheck Program (Crosscheck)

Purges based on a change of address have long been complicated and error prone. When the Brennan Center looked at purges a decade ago, it found that states primarily used the National Change of Address database compiled by the U.S. Postal Service to identify movers (as well as driver's license information).[65] But states have begun using other databases that go beyond the traditional sources of change-of-address information. Our research shows these new interstate databases have serious weaknesses that can lead to widespread and inaccurate purges.

When it began in 2005, the Kansas-based Crosscheck program had only four members.[66] In 2017, the most recent year data was shared, 28 states submitted data to the program.[67] Crosscheck's purpose is to identify possible "double voters" — an imprecise term that could be used to refer to people who have registrations in two states or who actually *voted* in an election in multiple states. While it is not uncommon for those who have recently moved to be registered in multiple places, actual double voting is rare. In 2017, Crosscheck examined the records of 98 million

CROSSCHECK IN THE CROSSHAIRS

Crosscheck's flaws put approximately 100 million voters in its database at potential risk, but some individuals are more vulnerable than others. Because of the loose matching criteria used by the program, parents and children with the same name are at greater risk of being confused with each other. Voters with common names are also more likely to match with different individuals for obvious reasons, but a less-obvious concern is the disproportionate effect this has on minority voters. African-American, Asian-American, and Latino voters are much more likely than Caucasians to have one of the most common 100 last names in the United States.[1]

Crosscheck creates matches based on first name, last name, and birthdate. Shared names and birthdates are fairly common. In fact, if you were to gather 23 or more people in the same place, there is a greater than 50 percent chance that two people would share a birthday (day and month).[2] Even adding in the year doesn't make an enormous difference: In a group of 180 people, it's more likely than not that two people will have been born on the exact same day.[3]

Of course, adding in first and last names substantially decreases the rate at which people look the same on paper. It doesn't, however, lower that rate sufficiently to make Crosscheck anywhere near accurate. When looking at records of millions of people, matching birthdates and names can still return thousands of inaccurate matches. This is true not only because of the so-called birthday problem but also because of the variation in the popularity of names. Jennifer, for instance, was the most common name for women born in the 1970s[4] but was the 191st most common name for women born between 2010 and 2017.[5] On average, 160 Jennifers were born every single day in the U.S. between 1970 and 1979. Among these, there were doubtless many who shared surnames common among Americans.

The program also hurts frequent movers such as college students and military personnel, who are more likely to be wrongly flagged by the database following a recent move. Because Crosscheck's date of registration data is unreliable, those who move more frequently are more likely to be wrongly identified as having moved out of the state that purges them.[6]

1 Non-white people are more likely to have common shared names. For instance, 16.3 percent of Hispanic people and 13 percent of black people have one of the 10 most common surnames, compared to 4.5 percent of white people. Joshua Comenetz, "Frequently Occurring Surnames in the 2010 Census," U.S. Census Bureau, October 2016, available at https://www2.census.gov/topics/genealogy/2010surnames/surnames.pdf.

2 Michael P. McDonald and Justin Levitt, "Seeing Double Voting: An Extension of the Birthday Problem," Election Law Journal 7, (2007): 111–122, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=997888.

3 Sharad Goel et al., "One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections" (working paper, Stanford University, 2017) 3, https://scholar.harvard.edu/files/morse/files/1p1v.pdf.

4 "Top names of the 1970s," Social Security Administration, accessed June 15, 2018. https://www.ssa.gov/oact/babynames/decades/names1970s.html.

5 "Top names of the period 2010 - 2017," Social Security Administration, accessed June 15, 2018. https://www.ssa.gov/oact/babynames/decades/names2010s.html.

6 Sharad Goel et al., "One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections" (working paper, Stanford University, 2017) appendix-22, https://scholar.harvard.edu/files/morse/files/1p1v.pdf.

voters[68] and produced 7.2 million "matches" representing 3.6 million voters supposedly registered in two states.[69]

Crosscheck compares the voter registration list of each participating state against the voter registration lists of the other participating states and flags all records that have the same first name, last name, and date of birth.[70] But in groups as large as statewide (or multistate) voter registration lists, the statistical odds of two registrants having the same name and birth date is sufficiently high as to be problematic.[71] A 2017 study led by Stanford professor Sharad Goel found that if applied nationwide, Crosscheck would "impede 300 legal votes for every double vote prevented."[72] Moreover, the study found that "there is almost no chance that double votes could affect the outcome of a national election."[73] One of Crosscheck's problems is that it does not have reliable registration dates, which means that an election official cannot competently determine which of the two places a voter is registered is more recent and therefore which state should remove the voter.

Virginia had a major problem with Crosscheck five years ago when it tried to purge nearly 39,000 voters. Crosscheck relies on little information before concluding that registration records in different states belong to the same person. Virginia sent counties the roster of voters for removal without checking its accuracy, and counties were not furnished with any guidance about the data or sufficient time to conduct a thorough review.[74] Eligible voters were wrongly flagged as having moved from Virginia to another state when they had in fact moved *from* another state *to* Virginia.[75] Error rates in some counties ran as high as 17 percent.[76] Counties did not begin spotting errors until some had begun removing voters. At the urging of civic groups, the state issued new guidance on the use of Crosscheck data but not until thousands of voters had been purged right before a statewide election.[77]

Especially troubling is that at least four states have policies or regulations on the books providing for the use of Crosscheck in an illegal manner. Alabama,[78] Indiana,[79] and Maine[80] regulations allow counties to use Crosscheck to immediately purge voters from the rolls, without providing these voters notice and a two-election waiting period before deleting them as required by the NVRA.[81] And Arizona regulations permit removing voters based on Crosscheck in some instances within 90 days of a federal election,[82] which is not allowed under the NVRA for systematic purges such as those using Crosscheck.

Not all participating states are actively using Crosscheck data to identify and remove potentially ineligible voters. In recent years, at least eight states have left the program altogether and no longer share data with or receive data from Crosscheck.[83] Additionally, seven other states have curtailed their use of Crosscheck data by not using it for the purposes of voter-list maintenance.[84] Instead, these states either do nothing with the data they receive or use it solely to identify people who appear to have *voted* (not merely registered) in multiple states.

In the midst of publicity around lax security protocols with Crosscheck[85] and news earlier this year that Crosscheck would review its security protocols and postpone uploading data,[86] Illinois announced that it would no longer transmit data to Crosscheck.[87] A state official was quoted as saying, "we will transmit no data to Crosscheck until security issues are addressed to our satisfaction."[88] A South Carolina official expressed a similar sentiment, explaining that the state stopped using data "due to issues with verification and concerns about cybersecurity."[89] According to an attorney representing the state of Indiana in litigation related to the state's use of Crosscheck, as of May 2 of this year, Crosscheck was not accepting data from participating states while a review of security processes remained in progress.[90]

Electronic Registration Information Center (ERIC)

The Electronic Registration Information Center is a program that uses voter registration data, motor vehicle licensing information, Social Security Administration data, and National Change of Address information to identify voters who may have moved. Begun six years ago, 24 states plus the District of Columbia are enrolled in the program (or soon will be).[91] To participate in ERIC, states must submit extensive voter data, including full address, driver's license or state ID number, last four digits of social security number, date of birth, voter registration activity dates, current record status, eligibility documentation, phone number, and email address.[92] Election officials in ERIC-participating states told us they provide notice and a two-election waiting period before removing voters.[93]

Election officials reported that ERIC also helps them identify potential voters who have moved into their jurisdictions but have not registered.[94] And one analysis of ERIC's first year of operation showed increases in registrations in ERIC states relative to non-ERIC states.[95]

Although most of the election administrators that we interviewed reported positive experiences with ERIC, the new data source has its limits. Administrators from Maryland and Illinois, for example, reported that it could be difficult to determine a voter's most recent address, which is a problem for frequent movers.[96] This absence of precise

information means that, even though ERIC is generally processed at the state level, it is local officials who must identify errors and determine which registration is more current — the one in the relevant jurisdiction or a registration in another state.[97] Wisconsin, meanwhile, reported that although ERIC was helpful in updating more than 25,000 registration addresses in 2017 and 2018, it also resulted in more than 1,300 voters signing "supplemental poll lists" at a spring 2018 election, indicating that they had not in fact moved and were wrongly flagged.[98]

Efforts to Purge Noncitizens Are More Frequent and Often Rely on Flawed Data

The Brennan Center's 2008 study found that attempts to purge noncitizens were rare. Back then only two states, Texas and Virginia, had laws mandating specific procedures for identifying noncitizens.[99] In the last decade, four more states — Georgia, Iowa, Minnesota, and Tennessee — have passed laws requiring removal of noncitizens.[100] More states are likely to pass such laws because of pressure to aggressively search for and delete noncitizen registrations.

As is true with other purges, the information relied upon to purge alleged noncitizens can be inaccurate. For example, at least 14 states have sought access to the federal Systematic Alien Verification for Entitlements (SAVE) program,[101] which checks several databases to ascertain the residence or citizenship status of people who have contacted benefit-granting agencies.[102] Some states, such as Virginia, were granted access. However, states found the database is useful only if an election administrator has someone's alien identification number, information election officials typically do not possess.[103]

Some states use driver's license data to purge noncitizens. Minnesota, Tennessee, and Virginia have statutes mandating this approach. Generally, driver's license data is deployed in one of two ways.[104] One involves review of documents the registrant provided to the driver's license office when obtaining a license. If a person showed a Permanent Resident Card, the presumption is that the registrant is a noncitizen and should be removed from the rolls. The problem, however, is that a person can lawfully not update their driver's license information for many years, in which time they may have become a citizen.[105]

States may also scour their voter lists for those who did not check the box indicating that they were a citizen on their driver's license application or renewal. Virginia has a specific statutory provision requiring this; Maryland does not but still engages in the practice.[106] Not surprisingly, election officials told us that sometimes citizens fail to check the citizenship box.[107]

In addition, at least three states (Georgia, Louisiana, and Texas) remove voters if they decline jury service on the grounds of noncitizenship.[108] But election officials told the Brennan Center in a 2017 report on noncitizen voting that eligible voters have been known to assert they are noncitizens solely for the purpose of evading jury duty. While illegal, these declarations are not necessarily indicative that a noncitizen has been registered to vote.[109]

Activist Groups Pressing for More Aggressive Purges

Another new dynamic is activist groups agitating for election officials to purge the rolls more aggressively. In the past, litigation was often used by groups seeking to protect voters *against* bad voter purges. For example, civic groups prevented voters from being illegally purged in Michigan in 2008,[110] Colorado in 2010,[111] and Florida in 2012.[112]

From 1998 through 2007, most of the litigation seeking purges was brought by the Justice Department — which made voter purges a priority in the midst of a failed nationwide voter fraud hunt[113] — whereas private plaintiffs typically brought suits because they were worried eligible people would be improperly purged. From 2008 to the present however, more than half of the 32 federal purge-related lawsuits brought by private parties have been filed by plaintiffs who believed that jurisdictions are not purging enough names from the rolls.[114]

In nine cases brought by private parties since 2012, election officials agreed to undertake more aggressive list maintenance.[115] One of the defendants in these cases was Noxubee County, a poor, rural, majority-Black county in eastern Mississippi that was sued by the American Civil Rights Union (ACRU, not to be confused with the American Civil Liberties Union).

"They went after minority counties who didn't have the financial resources to push back," said Willie M. Miller, the Election Commissioner for Noxubee County's fourth district.[116] As of this writing, the ACRU is suing Starr County and the State of Texas[117] for failing to purge aggressively enough, and the like-minded Judicial Watch has brought litigation in California.[118]

Unfortunately, this litigation has consequences. The ACRU lawsuit against Noxubee County resulted in about 1,500 (more than 12 percent) of its 9,000 voters being made inactive.[119] Being designated as inactive is the first stage of the removal process. The waiting period of two federal elections has yet to expire, so it's unclear at this juncture how many voters will ultimately be removed.[120] Similarly, Judicial Watch's 2012 suit against Indiana[121]

arguably led to the state undertaking more aggressive list maintenance. Before the suit was dismissed, Indiana announced that it had sent an "address confirmation mailing to all voters" and undertook other purging initiatives that led to more than 480,000 canceled registrations after the 2016 election.[122] Judicial Watch boasted that their lawsuit "forced" Indiana to undertake additional purge practices;[123] Indiana first sent out the required federal notices in 2014, then purged voters who did not respond and did not vote in 2014 or 2016.

Litigation is but one element of a broader strategy by these groups to force purges. In 2016, the Public Interest Legal Foundation published a report entitled "Alien Invasion in Virginia," complete with a flying saucer on the cover. Extrapolating from a small sample, the missive misleadingly suggested thousands of votes had been cast by noncitizens,[124] a claim election officials dispute.[125] The Foundation's pressure may have had an impact: Six hundred ninety-three alleged noncitizens were purged in the 2016 reporting period, but that number more than doubled to 1,686 in the 2017 period.[126] The purge has spawned yet more litigation, with several voters complaining that they were wrongly deleted, and the Public Interest Legal Foundation has been sued for defamation and illegal voter intimidation.[127] Election fraud vigilantes have also brought mass challenges to voters' registrations, including in North Carolina, where a judge blocked the practice.[128]

CHALLENGES CONTINUE

In at least 15 states, "challenge" laws permit challenges to the validity of a voter's registration prior to Election Day (additional states allow challenges to eligibility at the time of voting only).[1] These challenge laws, which are designed to allow for questioning the eligibility of registered voters on a case-by-case basis, have been used recently in several states to try to systematically remove voters from the rolls, functioning effectively as a purge that can operate outside the NVRA's protections. The use of challenge laws as back doors for purging is legally dubious and increases the risk of wrongful removals; precisely what has happened in some states.

Colorado's former secretary of state, Scott Gessler, matched the voter rolls against driver's license lists to produce a large (and inflated) list of potential noncitizens. He then attempted to use his state's challenger laws to remove voters en masse. After much public criticism, Gessler abandoned the effort.[2]

In Hancock County, Georgia, the majority-white Board of Elections used challenge procedures in the weeks leading up to a 2015 municipal election to challenge 174 voters — nearly 20 percent of the town of Sparta's electorate. The majority of the challenged voters were Black. Some of the challenges were based on as little evidence as a discrepancy between a voter registration address and an address record in a flawed driver's license database. Other challenges were based on second-hand claims that a voter had moved out of the county.[3] After being sued, the county agreed to reinstate wrongfully challenged voters who had been removed from registration lists.[4]

Iowa's former secretary of state, Matt Schultz, tried to use challenges to remove suspected noncitizens from the rolls, but he was blocked by a court.[5]

And in North Carolina, a federal court ruled in 2016 that local boards of elections likely violated the NVRA (52 U.S.C. § 20507(c)(2)(A)) when they systematically purged hundreds of voters through citizen-initiated challenge procedures fewer than 90 days before the general election. The judge based her ruling on the systematic purge occurring within the prohibited window, but she also remarked that the challenge process, which allows voters to be removed if they do not show up at a hearing upon being challenged based on second-hand evidence of a move, seemed "insane."[6] Nevertheless, state lawmakers expressly rejected legislation that would have made it more difficult to sustain a voter challenge on this basis.[7]

1 Nicholas Riley, *Voter Challengers* (New York: Brennan Center for Justice, August 2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf.
2 "Scott Gessler Decides Not To Proceed With Voter Purge After All," *HuffPost*, September 12, 2012, https://www.huffingtonpost.com/2012/09/10/scott-gessler-decides-not_n_1871524.html.
3 Complaint, Georgia NAACP et al v. Hancock County Bd. Of Elec. and Registration, No. 5:15-cv-00414 (M.D. Ga. Filed Nov. 3, 2015), https://lawyerscommittee.org/wp-content/
4 Kathleen Foody, "Georgia County Agrees to Restore Black Voters' Rights," *Associated Press*, March 8, 2017, https://www.usnews.com/news/best-states/georgia/articles/2017-03-08/georgia-county-to-restore-black-voters-rights-under-us-law. uploads/2016/01/Hancock-Co-Complaint.pdf.
5 Ruling, Am. Civ. Liberties Union v. Schultz, No. CV00931 (Iowa D. Polk March 5, 2014).
6 "North Carolina Voter Challenge Process Seems 'Insane,' Judge Says," *Associated Press*, November 2, 2016, https://www.cbsnews.com/news/north-carolina-voter-challenge-process-seems-insane-judge.
7 H. 303, Sess. 2017 (N.C. 2017), https://www2.ncleg.net/BillLookup/2017/H303.

Solutions

While no one disputes the rolls should be accurate, voters should be protected from wrongful purges. There are several ways to safeguard voters from overly aggressive list maintenance:

- **Enforce the National Voting Registration Act's Protections.**
  The NVRA permits an aggrieved voter to sue if a jurisdiction has been informed of a possible violation and does not correct it in a set period of time. Litigation to enforce the NVRA is especially crucial in a time when the Justice Department is unlikely to enforce voter protections and outside groups are agitating for more aggressive purges. Of course, most voters do not have the expertise or resources to bring such litigation. Therefore it is critically important that civil rights and other pro-voter organizations rigorously monitor purge activity and have the wherewithal to sue when necessary.

- **States Should Enact Laws That Provide Even More Protections than the National Voter Registration Act.**
  While the NVRA includes critical voter protections, states should do more. For example, the NVRA requires that voters suspected of moving from the jurisdiction receive notice of their possible removal. Not surprisingly, most states do not provide notice beyond what is federally required. For example, most states do not provide notice to voters purged based on death or a disenfranchising conviction, and many of those states that do provide notice in these circumstances do so only after the fact. States should surpass these minimal standards. No matter the reason, all voters should be informed in advance of their possible deletion and should be provided easy mechanisms for correcting errors on or before Election Day.

- **Enact Automatic Voter Registration.**
  Automatic voter registration is a popular reform that minimizes errors, saves money, and increases registration of eligible citizens. Automatic voter registration has two key features: (1) eligible citizens are registered unless they affirmatively decline; and (2) voter registration information is electronically transferred from a government office to election officials instead of relying on pen and paper. Currently, 12 states plus the District of Columbia have approved automatic voter registration.[129] In addition to adding more voters to the rolls, automatic voter registration also catches more address updates, reducing the need for change-of-address voter purges.

Endnotes

1 In the two-year election cycle ending in 2008, the Brennan Center found the median jurisdiction purged 6.2 percent of voters. For the two years ending in 2016, this study finds that the purge rate of the median jurisdiction had increased to 7.8 percent. We examined 49 states because North Dakota has no advance voter registration requirement and thus does not have required voter registration lists to purge. The state does keep records of individuals who vote, but it is not necessary to be on any registration list at the time of voting to cast ballots. Although there are other impediments to voting in North Dakota, including a strict photo ID law, voters do not face barriers related to voter registration in the state.

2 We assessed 49 states on the following criteria: First, whether the state used the Interstate Voter Registration Crosscheck program in a way that is problematic or not compliant with the NVRA. We found five states deficient in this category. Second, whether the state makes readily available lists of purged voters. We found 49 states deficient in this category (at least 10 states have statutory requirements for making some names of purged voters available, but all fail to do so in practice). Third, whether states provide prior notice to all voters purged on the basis of death, felony conviction, or noncitizenship. We found 49 states deficient in this category (21 states have statutory requirements whereby voters purged on the basis of death or felony conviction receive notice before or after the purge, but no state requires prior notice to voters purged for both categories). For additional recommendations to guard against unlawful or problematic voter purges and why they are important, see Myrna Pérez, *Voter Purges* (New York: Brennan Center for Justice, September 2008), 25-31, https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf.

3 Calculated from total numbers reported to the Elections Assistance Commission in 2008 and 2016. Compare U.S. Election Assistance Commission, 2008 Election Administration and Voting Survey, https://www.eac.gov/research-and-data/2008-election-administration-voting-survey/, and U.S. Election Assistance Commission, 2016 Election Administration and Voting Survey, https://www.eac.gov/research-and-data/2016-election-administration-voting-survey/.

4 These previously covered areas had median purge rates of 9.5 percent, while noncovered jurisdictions had median purge rates of 7.5 percent.

5 The median county purge rate in the 2008-10 election cycle was 8.4 percent. But in the election cycle including the *Shelby County* decision, 2012-14, the purge rate jumped 26 percent to a median county purge rate of 10.6 percent.

6 Myrna Pérez, *Voter Purges* (New York: Brennan Center for Justice, September 2008), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf.

7 Omitting North Dakota, as explained above.

8 We served public records requests on election officials and their offices at the state and local levels in 22 states and sought interviews with election officials in 45. The numbers referenced in the text refer to respondents.

9 U.S. Election Assistance Commission, *2016 Election Administration & Voting Survey*, June 2017, https://www.eac.gov/research-and-data/election-administration-voting-survey/.

10 Not all jurisdictions report their data consistently. Whenever we make comparisons across time periods, we restrict our sample to the counties reporting consistently. For instance, 2,394 jurisdictions report removal data for each of the two-year periods ending in 2010, 2012, 2014, and 2016. Our analysis exploring the impact of the end of the preclearance condition of the Voting Rights Act looks only at these counties to ensure an apples-to-apples comparison.

11 U.S. Election Assistance Commission, *2016 Election Administration & Voting Survey*, June 2017, https://www.eac.gov/research-and-data/election-administration-voting-survey/. Sixteen million is in fact a conservative estimate because it includes only voters removed from jurisdictions who reported their data to the EAC in 2016. It therefore does not include voters removed during some problematic purges such as that in Kings County (Brooklyn), NY (discussed above).

12 National Voter Registration Act of 1993, H.R. 2, 103rd Cong. (1993), 52 U.S.C. § 20507, is the main source of

federal requirements. For more information on federal law around purges, see Appendix A.

13 Some states are not required to follow the National Voter Registration Act. The NVRA exempts the following states from its purge protocols because those states had Election-Day registration or lacked voter-registration requirements on or after August 1, 1994: Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. National Voter Registration Act of 1993, H.R. 2, 103rd Cong. (1993) 52 U.S.C. § 20504(b). This reflects Congress's assessment that purge consequences are much less grave in a state that permits anyone eligible who is not on the registration rolls to register and vote on Election Day.

14 "Criminal Disenfranchisement Laws Across the United States," Brennan Center for Justice, last modified April 18, 2018, https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states.

15 Ala. Code § 17-4-3(a) (requiring removal "whenever…a person registered to vote in that county has…been declared mentally incompetent"); Ariz. Rev. Stat. Ann. § 16-165(C) (requiring removal "[w]hen proceedings…result in a person being declared incapable of taking care of himself and managing his property, and for whom a guardian of the person and estate is appointed, result in such person being committed as an insane person"); Del. Code Ann. tit. 15, §§ 1701(a), 1702 (requiring removal of "person adjudged mentally incompetent…[which] refers to a specific finding in a judicial guardianship or equivalent proceeding, based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment"); Fla. Stat. Ann. § 98.075(4) (requiring removal for "registered voters who have been adjudicated mentally incapacitated with respect to voting and who have not had their voting rights restored"); Ga. Code Ann. § 21-2-231(b) (requiring removal "[of those] who were declared mentally incompetent during the preceding calendar month in the county and whose voting rights were removed"); Haw. Rev. Stat. Ann. § 11-23(a) (requiring removal "[of person] adjudicate[ed] as an incapacitated person under the provisions of chapter 560…[if] after the investigation the clerk finds that the person…lacks sufficient understanding or capacity to make or communicate responsible decisions concerning voting"); Iowa Code Ann. § 48A.30(1)(e) (requiring removal "[if] [t]he clerk of the district court or the state registrar sends notice that the registered voter has been declared a person who is incompetent to vote under state law"); Ky. Rev. Stat. Ann. § 116.113(2) (requiring removal "[u]pon receipt of notification from the circuit clerk that a person has been declared incompetent"); La. Stat. Ann. § 18:172 (requiring removal "[after] judgment of full interdiction or a limited interdiction for mental incompetence which specifically suspends the right to register and vote and which has become definitive"); Code Me. R. tit. 29-250 Ch. 505, § 1(B) (requiring removal "[if] the municipality receives notice indicating that a registrant has been placed under guardianship due to mental illness"); Md. Code Ann., Elec. Law §§ 3-102(b)(2), 3-501 (requiring removal "[if person] is under guardianship for mental disability and a court of competent jurisdiction has specifically found by clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process"); Minn. Stat. Ann. § 201.145 (requiring removal "[of persons] under a guardianship in which a court order revokes the ward's right to vote or where the court has found the individual to be legally incompetent to vote"); Miss. Code. Ann. § 23-15-153(1) (requiring removal "[of voters who have] received an adjudication of non compos mentis"); Mo. Ann. Stat. § 115.199 (requiring removal "of voters…adjudged incapacitated"); Mont. Code Ann. § 13-2-402(3) (requiring removal "[if] the elector is of unsound mind as established by a court"); Neb. Rev. Stat. Ann. §§ 32-313(1), 32-326 (requiring removal "[of person] who is non compos mentis"); Nev. Rev. Stat. Ann. § 293.540(2)(b) (requiring removal "[if] the county clerk is provided a certified copy of a court order stating that the court specifically finds by clear and convincing evidence that the person lacks the mental capacity to vote because he or she cannot communicate, with or without accommodations, a specific desire to participate in the voting process"); N.M. Stat. Ann. § 1-4-26 (requiring removal "[w]hen in proceedings held pursuant to law, the district court determines that a mentally ill individual is insane as that term is used in the constitution of New Mexico"); N.Y. Elec. Law § 5-400(1)(c) (requiring removal "[of voter who] has been adjudicated an incompetent"); Ohio Rev. Code Ann. § 3503.18(B) (requiring removal of persons "who have been adjudicated incompetent for the purpose of voting, as provided in section 5122.301 of the Revised Code"); Okla. Stat. Ann. tit. 26, § 4-120.5 (requiring removal "of all persons who have been adjudged incapacitated"); S.C. Code Ann. § 7-5-340(1)(b) (requiring removal "if the elector is adjudicated mentally incompetent by a court of competent jurisdiction"); S.D. Codified Laws § 12-4-18 (requiring removal "of persons declared mentally incompetent"); Tex. Elec. Code Ann. § 16.031(a)(3) (requiring removal "on receipt of…an abstract of a final judgment of the voter's total mental incapacity, partial mental incapacity without the right to vote…or disqualification under Section 16.002"); Wash. Rev. Code Ann. § 29A.08.515 (requiring removal "[u]pon receiving official notice that a court has imposed a guardianship for an incapacitated person and has

determined that the person is incompetent for the purpose of rationally exercising the right to vote, under chapter 11.88 RCW"); W.Va. Code, § 3-2-23(3) (requiring removal "[u]pon receipt of a notice from the appropriate court of competent jurisdiction of a determination of a voter's mental incompetence"); Wis. Stat. Ann. §§ 6.03, 6.48, 6.935 (requiring removal "[through challenge] [of a]ny person who is incapable of understanding the objective of the elective process or who is under guardianship, unless the court has determined that the person is competent to exercise the right to vote"); W.S.1977 §§ 22-3-102(a)(iv), 22-3-115(a)(iv) (requiring removal "[of person] currently adjudicated mentally incompetent"). Additional states provide for loss of eligibility on these grounds but do not specifically describe the manner of removal. See Michelle Bishop, "Disability Is No Reason to Strip a Person's Voting Rights," *HuffPost*, May 12, 2018, https://www.huffingtonpost.com/entry/opinion-bishop-disability-voters_us_5af-5b085e4b0e57cd9f9042f.

16 See Doe v. Rowe, 156 F. Supp.2d 35 (D. Me. 2001); Minnesota Voters Alliance v. Ritchie, 890 F.S. 2d 1106 (August 17, 2012); in re Guardianship of Brian W. Erickson, 4th Judicial District, Dist. Ct., Probate/Mental Health Division (October 12, 2012); see also Matt Vasilogambros, "Thousands Lose Right to Vote Under 'Incompetence' Laws," *HuffPost*, March 21, 2018, https://www.huffingtonpost.com/entry/thousands-lose-right-to-vote-under-in-competence-laws_us_5ab25f7ce4b004fe24699810.

17 E.g., Alaska Stat. Ann. § 15.07.130(c) (requiring use of information from bureau of vital statistics); Wash. Rev. Code Ann. § 29A.08.510(2) (permitting use of obituaries); Tex. Elec. Code Ann. § 16.001 (requiring use of Social Security Administration information).

18 Montana Code Ann. § 13-2-220.

19 Conn. Gen. Stat. § 9-32.

20 Ga. Code Ann. § § 21-1-231(a.1)(b) (requiring clerk of superior court to forward noncitizen jury declinations and requiring election officials to remove names from voter list, La. Stat. Ann. § 18:178 (requiring clerk of the court to provide names of individuals who respond to jury notices saying they are noncitizens to Department of State); Minn Stat. Ann. § 201.145 (requiring county auditor to send to county attorney list of names of individuals who are registered to vote and not citizens); Tenn. Code Ann. § 2-2-141 (requiring coordinator of elections to compare registration list with Department of Safety database to ensure non-United States citizens are not registered to vote); Tex. Elec. Code Ann. § 16.0332 (requiring registrar to initiate voter removal process for voters for whom the registrar receives a notice of disqualification or excusal from jury service because of citizenship status); Va. Code Ann. § 24.2-404(A)(4) (requiring registrars to delete record of registered voters known not to be a citizen from reports of Department of Motor Vehicles or Systematic Alien Verification for Entitlements Program).

21 Throughout this document we report median removal rates. The median is the appropriate measure of central tendency because of how the removal rate data are distributed. Because some jurisdictions have very high removal rates, while most are clustered close to the lower bound of zero, using the mean would artificially bias reported numbers upward.

22 "About Section 5 of the Voting Rights Act," The United States Department of Justice, accessed May 24, 2018, https://www.justice.gov/crt/about-section-5-voting-rights-act.

23 Shelby County v. Holder, 570 U.S. 2 (2013).

24 Between the presidential elections of 2008 and 2012, the median two-year removal rate for both previously covered and noncovered jurisdictions was 7.5 percent. Throughout this section, we limit our analysis to jurisdictions that reported removal rates for each of the two-year periods ending 2010, 2012, 2014, and 2016. Kings County, New York, for instance, did not report removal rates for the two years ending 2016 and thus is excluded from the entire pre/post *Shelby* analysis. It is important to note that this does not meaningfully impact our analysis: The median removal rate in 2016 for counties that reported their data each year was 7.9 percent compared to 7.6 percent for jurisdictions that reported their data in 2016 but also failed to do so in at least one other year. To maintain consistency with discussions of two-year removal rates elsewhere in this report, we continue to use two-year removal rates here. For instance, Escambia County, Florida, removed 0.42 percent of its voters between 2008 and 2010, and 0.42 percent again between 2010 and 2012. Here we call their median *two-year* removal rate 0.42 percent. Their four-year removal rate would, of course, be higher. We group the data into four-year buckets because of the natural variation in removal rates between presidential and nonpresidential election cycles.

25 Formerly covered jurisdictions are disproportionately located in the southeastern part of the country. We considered the possibility that the increased purge rate is attributable to some regional factor or factors aside from the lifting of the preclearance requirements. To control for this, we repeated the above analysis but restricted our sample to just those states in the Southeast (AL, FL, GA, KY, MS, NC, SC, TN, VA, and WV). Among jurisdictions in the Southeast that consistently reported their data, 461 counties were covered under the Voting Rights Act and 388 were not. We found that even within the Southeast, formerly covered jurisdictions increased their purge rates more than their noncovered peers. In fact, noncovered jurisdictions in the Southeast did not increase their removal rates between the two periods. The increase in removal rates in previously covered jurisdictions in this region mirrored those of the group of covered jurisdictions as a whole:

	Federal Election 2008-12	Federal Election 2012-16
Previously Covered	7.2%	9.7%
Not Covered	6.6%	6.6%

Nor can the difference in purge rate be explained by differences in partisan tendency. Formerly covered counties are more Republican-leaning than the nation as a whole. Within counties that reported data consistently to the EAC, President Donald Trump received 51 percent of the ballots cast in counties that required preclearance prior to Shelby, but just 46 percent of the ballots cast in noncovered jurisdictions. To test the possibility that Republican-leaning counties were more likely to increase their removal rates regardless of their status under the Voting Rights Act, we compared the 409 previously covered jurisdictions that Trump received more votes than Hillary Clinton to the 1,594 noncovered jurisdictions in which he did so.

	Federal Election 2008-12	Federal Election 2012-16
Previously Covered	7.3%	9.4%
Not Covered	7.5%	7.4%

Removal rates in noncovered jurisdictions that Trump won did not increase their removal rates at all. Trump-supporting jurisdictions that were previously covered, however, increased their removal rates substantially. Clearly, the increase in removal rates among the jurisdictions that were covered under the VRA was not a function of an electorate likely to support Donald Trump. *Sources: Townhall.com,* https://townhall.com/election/2016/president; *and SouthEastern Division of the Association of American Geographers,* http://sedaag.org.

26 See Appendix B.

27 See Appendix C. While not a perfect predictor because there are many reasons why a voter might cast a provisional ballot, our finding that high provisional ballot numbers are probative as to the existence of a purge are corroborated by other experts in the field. See, for example, U.S. Commission on Civil Rights, *Briefing Report: Department of Justice Voting Rights Enforcement for the 2008 U.S. Presidential Election* (Washington: July 2009) (summarizing testimony of Dan Tokaji), http://www.usccr.gov/pubs/DOJVotingRights2008PresidentialElection.pdf.

28 Tim Reid and Grant Smith, "Missing Hyphens Will Make It Hard for Some People to Vote in U.S. Election," *Reuters*, April 11, 2018. https://www.reuters.com/article/us-usa-election-laws/missing-hyphens-will-make-it-hard-for-some-people-to-vote-in-u-s-election-idUSKBN1HI1PX. Georgia's practice of purging voters on the basis of not voting was also challenged. See Georgia State Conf. of the NAACP v. Kemp, No. 2:16-cv-219, filed Sept. 14, 2016 (N.D. Ga.); Common Cause v. Kemp, No. 1:16-cv-00452, filed Feb. 10, 2016 (N.D. Ga.). See also Tony Pugh, "Georgia Secretary of State Fighting Accusations of Disenfranchising Minority Voters," *McClatchy*, October 7, 2016, http://www.mcclatchydc.com/news/politics-government/article106692837.html; Regina Willis, "More Than 380,000 Georgia Voters Receive 'Purge Notice,'" *Rewire.News*, July 21, 2017, https://rewire.news/article/2017/07/21/more-380000-georgia-voters-received-purge-notice/.

29 Overall, 54% of voters lived in counties in which the removal rate increased. Numbers are drawn from counties that reported data in both 2010 and 2014, a set representing 94% of total Texas voters.

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

31 Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc) *cert. denied*, 137 S. Ct. 612 (2017).

32 National Voter Registration Act of 1993, H.R. 2, 103rd Cong. (1993), 52 U.S.C. § § 20507(b), (c)(2), (d)(2).

33 Holly Dickson (Legal Director, Arkansas Civil Liberties Union Foundation) to Hon. Mark Martin (Arkansas Secretary of State), October 31, 2016, 3, https://www.acluarkansas.org/sites/default/files/field_documents/369.pdf; John Lyon, "Hutchinson: Clerks Should Lean Toward Letting People Vote," *Arkansas News*, August 4, 2016, http://www.arkansasnews.com/news/20160804/hutchinson-clerks-should-lean-toward-letting-people-vote.

34 In Arkansas, those convicted of a felony are ineligible to vote "unless the person's sentence has been discharged or the person has been pardoned." Ark. Const. Amend. 51, § 9(a)(1).

35 More than 4,000 people were incorrectly included on the list. See John Lyon, "Hutchinson: Clerks Should Lean Toward Letting People Vote," *Arkansas News*, August 4, 2016, http://www.arkansasnews.com/news/20160804/hutchinson-clerks-should-lean-toward-letting-people-vote. Pulaski County found that at least 300 of the 1,800 Pulaski County residents on the list belonged to people who were "completely innocent." Matthew Mershon, "Pulaski Co. Clerk Says Sec. of State Needs to Take Responsibility in Possible Voter Purge," *KATV*, August 13, 2016, http://katv.com/news/local/pulaski-co-clerk-says-sec-of-state-needs-to-take-responsibility-in-possible-voter-purge.

36 See Benjamin Hardy, "Data Mix-Up from Ark. Secretary of State Purges Unknown Number of Eligible Voters," *Arkansas Blog*, *Arkansas Times*, July 25, 2016, https://www.arktimes.com/ArkansasBlog/archives/2016/07/25/data-mix-up-from-ark-secretary-of-state-purges-unknown-number-of-eligible-voters; Brenda Blagg, "Taking a Vote: State Botches Inmate Report to County Clerks," Between the Lines, *Northwest Arkansas Democrat-Gazette*, July 27, 2016.

37 See Benjamin Hardy, "Data Mix-Up from Ark. Secretary of State Purges Unknown Number of Eligible Voters," *Arkansas Blog*, *Arkansas Times*, July 25, 2016, https://www.arktimes.com/ArkansasBlog/archives/2016/07/25/data-mix-up-from-ark-secretary-of-state-purges-unknown-number-of-eligible-voters.

38 See Brian Fanney, "20,000 Cases Erroneously Listed Felonies," *Arkansas Democrat-Gazette*, Sep. 3, 2016, https://www.pressreader.com/usa/arkansas-democrat-gazette/20160903/281496455722563.

39 Jason Kennedy (Assistant Chief Deputy Clerk, Pulaski County, Arkansas), interview by Brennan Center for Justice, June 8, 2018.

40 See Julián Aguilar, "Voter Purge Bill Raises Concerns After Living Flagged as Possibly Dead," *The Texas Tribune*, September 12, 2012, https://www.texastribune.org/2012/09/12/concerns-raised-after-living-voters-flagged-dead/.

41 2011 Tex. Sess. Law Serv. Ch. 683 (H.B. 174), https://capitol.texas.gov/tlodocs/82R/billtext/pdf/HB00174F.pdf#navpanes=0.

42 See Myrna Pérez, *Voter Purges* (New York: Brennan Center for Justice, September 2008), 20 https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf.

43 See Defendant Andrade's Notice Of Withdrawal, Plea To The Jurisdiction, And Motion To Dissolve The Temporary Restraining Order, Moore v. Morton, No. D-1-GN-12-002923 (Dist. Ct. Travis Cnty. Tex. Sept. 21, 2012). See also Chuck Lindell, "State Settles Lawsuit on 'Dead' Voter Purge," *American-Statesman*, October 3, 2012, https://www.statesman.com/news/state--regional-govt--politics/state-settles-lawsuit-dead-voter-purge/n1zTG10Yiyobma3AlT7QSJ/.

44 Corrie MacLaggan, "Texas Voter Purge Lawsuit Ends with Clarification Memo on Process for Clearing Rolls," *Reuters*, October 3, 2012, https://www.huffingtonpost.com/2012/10/03/texas-voter-purge-lawsuit_n_1937564.html.

45 Lise Olsen, "Texas' voter purge made repeated errors," *Houston Chronicle*, November 2, 2012, https://www.chron.com/news/politics/article/Texas-voter-purge-made-repeated-errors-4001767.php.

46 Ibid.

47 See Notice to the Court of Rule 11 Agreement, Moore v. Morton, No. D-1-GN-12-002923 (Dist. Ct. Travis Cnty. Tex. Oct. 3, 2012); see also Chuck Lindell, "State Settles Lawsuit on 'Dead' Voter Purge," *American-Statesman*, October 3, 2012, https://www.statesman.com/news/state--regional-govt--politics/state-settles-lawsuit-dead-voter-purge/n1zTG10Yiyobma3AlT7QSJ/.

48 See Marjorie Landa, *Audit Report on the Board of Elections' Controls over the Maintenance of Voters' Records and Poll Access* (New York: City of New York Office of the Comptroller, November 2017), 9, https://comptroller.nyc.gov/reports/audit-report-on-the-board-of-elections-controls-over-the-maintenance-of-voters-records-and-poll-access/.

49 Ibid.

50 New York State Office of the Attorney General, "A.G. Schneiderman Moves to Intervene in Lawsuit Against NYC Board of Elections Regarding Voter Registration Purges," news release, January 27, 2017, https://ag.ny.gov/press-release/ag-schneiderman-moves-intervene-lawsuit-against-nyc-board-elections-regarding-voter.

51 Brigid Bergin, John Keefe, and Jenny Ye, "Brooklyn Voter Purge Hit Hispanics Hardest," *WNYC*, June 21, 2016, https://www.wnyc.org/story/brooklyn-voter-purge-hit-hispanics-hardest/.

52 The other major federal statute regulating voter purges is the Help America Vote Act of 2002 (HAVA) 52 U.S.C. § 21083(a). The law reaffirms requirements of the NVRA and contains additional regulations for the maintenance of voter lists, requires states to set up unique identifying numbers for registered voters, requires states to attempt to verify the validity of information submitted by voter registration applicants, and ensures certain voters, including those missing from the voter rolls, can cast provisional ballots.

53 Under the Bush Administration, the DOJ filed several suits against jurisdictions for failing to purge enough voters. Office of the Inspector General, U.S. Department of Justice, *A Review of the Operations of the Voting Section of the Civil Rights Division* (2013), 97, https://oig.justice.gov/reports/2013/s1303.pdf. See also Steven Rosenfeld, "Voter Purging: A Legal Way for Republicans to Swing Elections?" *AlterNet*, September 11, 2017, http://web.archive.org/web/20071118161151/http:/www.alternet.org/story/62133/. The Department also pressured a U.S. Attorney to sue Missouri, even though St. Louis had improperly purged 50,000 voters only 4 years earlier. After that U.S. Attorney refused, he was fired. Jonathan Brater, Brennan Center for Justice, "The Purge: Ten Years Later?" June 30, 2017, https://www.brennancenter.org/blog/purge-ten-years-later.

54 See, e.g., "Cases Raising Claims Under the National Voter Registration Act," U.S. Department of Justice, last modified October 16, 2015, https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act; U.S. Attorney's Office, Eastern District of New York, "United States Announces Settlement with New York City Board of Elections Resolving Improper Removal of Voters from Registration Rolls," news release, October 31, 2017, https://www.justice.gov/usao-edny/pr/united-states-announces-settlement-new-york-city-board-elections-resolving-improper; U.S. Department of Justice, Office of Public Affairs, "State of Connecticut Agrees to Resolve Claims of National Voter Registration Act Violations," news release, August 5, 2016, https://www.justice.gov/opa/pr/state-connecticut-agrees-resolve-claims-national-voter-registration-act-violations; U.S. Department of Justice, Office of Public Affairs, "State of Alabama Agrees to Resolve Claims of National Voter Registration Act Violations," news release, November 13, 2015, https://www.justice.gov/opa/pr/state-alabama-agrees-resolve-claims-national-voter-registration-act-violations; see also Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1343–48 (11th Cir. 2014) (finding Florida's purge violated the NVRA's prohibition on systematic purges within 90 days of a federal election).

55 Ibid.

56 Brief for the League of Women Voters et al as Amicus Curiae supporting Respondents 17, Husted v. A. Philip Randolph Institute, No. 16-980 (2017).

57 Brief for the United States as Amicus Curiae supporting Petitioner, Husted v. A. Philip Randolph Institute, No. 16-980 (2017).

58 See "Husted v. A. Philip Randolph Institute," Brennan Center for Justice, last modified June 11, 2018, https://www.brennancenter.org/legal-work/husted-v-philip-randolph-institute-0.

59 See Pam Fessler, "Advocates Worry Trump Administration Wants to Revamp Motor Voter Law," *NPR*, July 8, 2017, https://www.npr.org/2017/07/08/536006813/advocates-worry-trump-administration-wants-to-revamp-motor-voter-law; Jonathan Brater, Brennan Center for Justice, "The Purge: Ten Years Later?," June 30, 2017, https://www.brennancenter.org/blog/purge-ten-years-later. For an example of the letters, see https://assets.documentcloud.org/documents/3881818/SOS-Letter.pdf.

60 For example, Vanita Gupta (CEO of the Leadership Conference on Civil and Human Rights and former head of DOJ's civil rights division under President Barack Obama) said that, "[i]t is not normal for the Department of

Justice to ask for voting data from all states covered by the National Voter Registration Act. It's likely that this is instead the beginning of an effort to force unwarranted voter purges." Sam Levine, "This DOJ Letter May Be More Alarming Than Trump Commission's Request For Voter Data," *HuffPost*, July 5, 2017, https://www.huffingtonpost.com/entry/department-of-justice-voter-purge_us_595d22b1e4b0da2c7326c38b. See also Leon Neyfakh, "How Trump's DOJ Will Try to Purge Voter Rolls," *Slate*, July 11, 2017, http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/how_trump_s_doj_will_try_to_purge_voter_rolls.html (describing DOJ letters as "a first step toward bringing back a George W. Bush–era strategy of forcing states to aggressively purge their voter rolls under threat of litigation"). The Department did intervene in a lawsuit filed against Kentucky by a private plaintiff organization seeking more aggressive purging. Judicial Watch, Inc. v. Grimes, 3:17-cv-00094, filed November 14, 2017 (E.D. Ky.).

61 Kansas State Rep. Keith Esau, "Interstate Voter Registration Crosscheck Program" (PowerPoint presentation, National Conference of State Legislators, Williamsburg, VA, June 15, 2017), 5, http://www.ncsl.org/Portals/1/Documents/Elections/Kansas_VR_Crosscheck_Program.pdf.

62 "ERIC," Electronic Registration Information Center, accessed May 24, 2018, http://www.ericstates.org/.

63 Christopher Famighetti, Douglas Keith, and Myrna Pérez, *Noncitizen Voting: The Missing Millions* (New York: Brennan Center for Justice, May 2017), https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf.

64 Public Interest Legal Foundation, "248 Counties Have More Registered Voters Than Live Adults," news release, September 25, 2017, https://publicinterestlegal.org/blog/248-counties-registered-voters-live-adults/. The Brennan Center for Justice and other civil rights groups contacted the same jurisdictions to notify them that some information provided by the organization was misleading. Brennan Center for Justice, "Civil Rights Groups Launch National Effort to Combat Alarming Voter Purge Attempt," news release, November 22, 2017, https://www.brennancenter.org/press-release/civil-rights-groups-launch-national-effort-combat-alarming-voter-purge-attempt.

65 See Myrna Pérez, *Voter Purges* (New York: Brennan Center for Justice, September 2008), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf.

66 Missouri, Iowa, Nebraska, and Kansas. See Memorandum of Understanding Between the State of Iowa, Nebraska, and Kansas For the Improvement of Election Administration, December 2005 (on file with the Brennan Center for Justice).

67 These states were Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia. This information is derived from a spreadsheet obtained from officials in Idaho via public records request (on file with the Brennan Center for Justice).

68 Ibid.

69 Ibid. Some of these matches could also include individuals matched in more than 2 states, so the number of individuals could be lower than 3.6 million.

70 Interstate Voter Registration Crosscheck Program, *2017 Participation Guide*, January 2017, goo.gl/zbsygH.

71 See *infra* text box describing limitations of name and birthdate matching.

72 Sharad Goel et al., "One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections" (working paper, Stanford University et al., 2017), 3, 26, https://scholar.harvard.edu/files/morse/files/1p1v.pdf.

73 Ibid. 27.

74 See Jonathan Brater, Brennan Center for Justice, "Virginia Offers Lessons for Voter List Maintenance," November 25, 2013, https://www.brennancenter.org/analysis/virginia-offers-lessons-voter-list-maintenance.

75 See Jim Nolan, "Chesterfield Registrar Delays Purge of Voter Rolls," *Richmond Times-Dispatch*, October 9, 2013, http://www.richmond.com/news/local/chesterfield/chesterfield-registrar-delays-purge-of-voter-rolls/article_162e36b5-0be7-5dc8-af9f-48876a167b43.html.

76 Ibid.

77 See Matthew Barakat, "Va. Removes 40K From Voter Rolls Over Democrats' Objections," *Richmond Times-Dispatch*, October 17, 2013, http://www.richmond.com/news/state-regional/va-removes-k-from-voter-rolls-over-democrats-objections/article_2d111de4-49de-523b-bd9c-5d93b7c0a00e.html. Virginia subsequently began to release reports explaining, among other things, the way Crosscheck data was used. They found that only 10 percent of Crosscheck matches were usable for list maintenance. Virginia Department of Elections, *Annual List Maintenance Report*, 2017, 5, https://www.elections.virginia.gov/Files/maintenance-reports/2017SBEListMaintenancereport.pdf.

78 Alabama law exempts county boards from the requirement that they contact voters to verify suspected address changes when another state provides notice that "the elector registered to vote in another jurisdiction, within or without the State of Alabama, at a date subsequent to the date the elector registered to vote in the jurisdiction of the county board of registrars." Ibid. at § 17-4-38.1(c). An Election Handbook provided by the Alabama Secretary of State's office indicates that such notice is sufficient to disqualify and remove the voter when a "registration official from another state notifies registrars in writing that the voter has registered elsewhere." Alabama Law Institute, Alabama Election Handbook: Eighteenth Edition (2017), 262. But in a December 1, 2016 email obtained through a public records request, the Secretary of State's Supervisor of Voter Registration provided county registrars a list of voters that Crosscheck suggested had "registered to vote in another state more recently" than in Alabama and directed the registrars to review the list and "take the action you would normally take as if you received notice directly from another state." Clay Helms (Supervisor of Voter Registration, Office of Alabama Secretary of State), email to local registrars, December 1, 2016, on file with authors. In an interview, Alabama confirmed that the state has considered Crosscheck data as information provided directly from another state; although the state does filter the data to rule out some mismatches, it does not require a notice and waiting-period process. Alabama, which uses ERIC, has not determined whether it will use Crosscheck in future years. John Bennett (Deputy Chief of Staff/Communications Director, Alabama Secretary of State's Office), interview by Brennan Center for Justice, June 15, 2018.

79 Indiana Code § 3-7-38.2-5(d). The Brennan Center is suing Indiana over this matter. Indiana NAACP & League of Women Voters of Indiana v. Lawson, No. 1:17-cv-2897 (S.D. Ind.). Indiana's law does not provide notice as required by the NVRA. See Indiana Code § 3-7-38.2-5(d). On June 8, 2018, a federal judge issued a preliminary injunction against the law, meaning it is temporarily blocked. Order Granting Plaintiffs' Motion for Preliminary Injunction, Indiana NAACP & League of Women Voters of Indiana v. Lawson, No. 1:17-cv-2897 (S.D. Ind.). *Available at* https://www.brennancenter.org/sites/default/files/legal-work/2018-06-18_Order_Granting_Plaintiffs%27_Motion_for_Preliminary_Injunction.PDF.

80 "2017 Maine Crosscheck Data Review Plan" (providing, "If the matched data shows that the Maine voter record is older than the other state's voting record, then the Maine record will be cancelled. No notice to the voter is required"). Document produced in response to public records request issued by Brennan Center for Justice and on file with authors.

81 Idaho also removes voters immediately, but its practice permitting immediate removal of individuals flagged by Crosscheck without notice or a waiting period does not violate federal law because Idaho is exempt from the NVRA, and therefore does not have to abide by the NVRA notice and waiting period requirements.

82 State of Arizona, *Elections Procedures Manual*, 2018 Edition, 104, http://live-az-sos.pantheonsite.io/sites/default/files/2018%200330%20State%20of%20Arizona%20Elections%20Procedures%20Manual.pdf (allowing removal within 90 days in the case of a "true match," which could, but need not, involve direct confirmation from the voter). Arizona declined to be interviewed for this report but informed the Brennan Center that it no longer participates in Crosscheck. Eric Spencer (State Election Director), email to Brennan Center for Justice, June 14, 2018, on file with the Brennan Center. The state did participate in the last Crosscheck match in 2017, and its 2018 election manual provides for removal through Crosscheck.

83 These states are Alaska, Florida, Kentucky, Massachusetts, New York, Oregon, Pennsylvania, and Washington. See Jonathan Brater, Brennan Center for Justice, "The Purge: Ten Years Later?," June 30, 2017, https://www.brennancenter.org/blog/purge-ten-years-later. In addition to those states, Arizona informed the Brennan Center that it is no longer participating in Crosscheck. Eric Spencer (State Election Director, Arizona), email to Brennan Center for Justice, June 14, 2018, on file with the Brennan Center.

84 According to the Center for Investigative Reporting, those 7 states are: Colorado, Georgia, Louisiana, Nevada,

North Carolina, South Carolina, and West Virginia. See Aaron Sankin, "Crosscheck is ineffective and insecure. But states aren't withdrawing," *Reveal*, March 26, 2018, https://www.revealnews.org/blog/crosscheck-is-ineffective-and-insecure-but-states-arent-withdrawing/.

85 For a discussion of some of these security lapses, see, for example, Jonathan Brater, Brennan Center for Justice, "The Purge: Ten Years Later?," June 30, 2017, https://www.brennancenter.org/blog/purge-ten-years-later; Dell Cameron, "As Crosscheck Moves to Secure Voter Data, Hacking Fears Grow Among Experts and Politicians," *Gizmodo*, January 24, 2018, https://gizmodo.com/as-crosscheck-moves-to-secure-voter-data-hacking-fears-1822344007.

86 See *Testimony on the Interstate Crosscheck Program*, Kan. H. Comm. on Elections, January 17, 2018 (testimony of Bryan A. Caskey, Director of Elections), http://www.kslegislature.org/li/b2017_18/committees/ctte_h_electns_1/documents/testimony/20180117_01.pdf; Allison Kite, "Kobach's Office Will Delay Data Uploads for Crosscheck Voter System to Accommodate Security Review," *The Topeka Capital-Journal*, January 17, 2018, http://www.cjonline.com/news/20180117/kobachs-office-will-delay-data-uploads-for-crosscheck-voter-system-to-accommodate-security-review.

87 Sophia Tareen, "Illinois Delays Sending Voter Data to Multi-State Program," *Associated Press*, January 16, 2018, https://www.usnews.com/news/best-states/illinois/articles/2018-01-16/illinois-delays-sending-voter-data-to-multi-state-program.

88 Ibid.

89 Aaron Sankin, "Crosscheck Is Ineffective and Insecure. But States Aren't Withdrawing," *Reveal*, March 26, 2018, https://www.revealnews.org/blog/crosscheck-is-ineffective-and-insecure-but-states-arent-withdrawing/.

90 See Transcript of Oral Argument at 49:7-50:13, In. NAACP & League of Women Voters of In. v. Lawson, No. 1:17-cv-2897 (S.D. Ind., May 2, 2018).

91 "ERIC," Electronic Registration Information Center, accessed May 24, 2018, http://www.ericstates.org/.

92 Electronic Registration Information Center, Inc., *Bylaws*, December 2016, 21, http://www.ericstates.org/images/documents/ERIC_Bylaws_12-16-2016.pdf; Tim Harper, Bipartisan Policy Center, "Florida Joins the ERIC Club – and Brings 14 Million New Eligible Voters," March 20, 2018, https://bipartisanpolicy.org/blog/florida-joins-the-eric-club-and-brings-14-million-new-eligible-voters/. Kentucky informed the Brennan Center in June 2018 that the state would soon be joining ERIC, and agreed to use ERIC data for voter list maintenance in court settlement. Jared Dearing (Executive Director, State Board of Elections), interview by Brennan Center for Justice, June 14, 2018; Judicial Watch, Inc. v. Grimes, 3:17-cv-00094, filed November 14, 2017 (E.D. Ky).

93 See, e.g., Matt Dietrich (Public Information Officer, Illinois State Board of Elections), interview by Brennan Center for Justice, May 8, 2018; Wayne Thorley (Deputy Secretary of State for Elections, Nevada Secretary of State) and Justus Wendland (HAVA Administrator, Nevada Secretary of State), interview by Brennan Center for Justice, May 18, 2018; see also Colo. Rev. Stat. § 1-2-605(7).

94 For example, Alabama credited ERIC with helping to increase voter registration in the state. John Bennett (Deputy Chief of Staff/Communications Director, Alabama Secretary of State), interview by Brennan Center for Justice, June 15, 2018.

95 Gary Bland and Barry C. Burden, *Electronic Registration Information Center (ERIC) Stage 1 Evaluation* (RTI International, December 2013), 1, https://www.rti.org/sites/default/files/resources/eric_stage1report_pewfinal_12-3-13.pdf. In ERIC's first year of operation, "ERIC states showed a net improvement in new registration of 0.87 percentage points over non-ERIC states."

96 Roger Stitt (Voter Registration Manager of Operations, Maryland State Board of Elections), interview by Brennan Center for Justice, May 8, 2018; Kyle Thomas (Director, Voting and Registration Systems, Illinois State Board of Elections), interview by Brennan Center for Justice, May 10, 2018.

97 Kyle Thomas (Director, Voting and Registration Systems, Illinois State Board of Elections), interview by Brennan Center for Justice, May 10, 2018.

98 Memorandum from Meagan Wolfe, Interim Administrator (Prepared by Sarah Whitt, WisVote IT Lead, and Jodi Kitts, WisVote Specialist) to Wisconsin Election Commission Members, May 24, 2018, provided to Brennan Cen-

ter by Wisconsin Elections Commission (on file with Brennan Center). Wisconsin implemented the supplemental poll lists after some voters experienced problems at a February 2018 election. Through the use of the supplemental poll lists, these voters were able to reactivate their registrations at the polls and vote, rather than having to re-register. Sarah Whitt (WisVote Functional Lead, Wisconsin Elections Commission), interview by Brennan Center for Justice, June 4, 2018.

99 Act of May 18, 2006, 2006 Va. Laws Ch. 940 (S.B. 313), § 1 (codified as amended at Va. Code Ann. §§ 24.2-404 & 24.2-427); Act of June 11, 1997, 1997 Tex. Sess. Law. Serv. Ch. 640 (H.B. 1645), § 1 (codified as amended at Tex. Elec. Code Ann. § 16.0332).

100 Act of Apr. 30, 2009, 2009 Georgia Laws Act 86 (H.B. 549), § 1 (amending Ga. Code Ann. § 21-2-231, to require removal of registration of every person that declined jury duty based on noncitizenship); Act of May 5, 2017, Act 2017 (87 G.A.) ch. 110, H.F. 516, § 4 (amending Iowa Code Ann. § 48A.30 to require cancelation of voter registration of every person that submits documentation to prove noncitizenship for purpose of disqualifying themselves from jury duty); Act of Apr. 1, 2010, 2010 Minn. Sess. Law Serv. Ch. 201 (H.F. 3108), § 12 (adding Minn. Stat. Ann. § 201.158, which requires county auditors to challenge the registration of every registered voter who is identified as a noncitizen by the commissioner of public safety) (later repealed and re-codified as amended at Minn. Stat. Ann. § 201.145); Act of May 23, 2011, 2011 Tennessee Laws Pub. Ch. 235 (S.B. 352), § 1 (adding Tenn. Code. Ann. § 2-2-141, requiring coordinator of elections to begin removal proceedings for registered voters identified as noncitizens in the Department of Safety database).

101 Janelle Ross, "Voter Roll Purges Could Spread to At Least 12 States," *HuffPost*, July 31, 2012, https://www.huffingtonpost.com/2012/07/31/voter-roll-purge_n_1721192.html.

102 "About SAVE," U.S. Citizenship and Immigration Services, last modified September 8, 2016, https://www.uscis.gov/save/about-save.

103 "SAVE Verification Process," U.S. Citizenship and Immigration Services, last modified June 15, 2016, https://www.uscis.gov/save/about-save/verification-process; Edgardo Cortes and Liz Howard (Virginia State Board of Elections), interview by Brennan Center for Justice, August 9, 2017.

104 Minn Stat. Ann. § 201.145; Tenn. Code Ann. § 2-2-141; Va. Code Ann. § 24.2-427.

105 See Marc Levy, "State Disputes Claim 100K Noncitizens Registered to Vote," *AP News*, March 1, 2018, https://www.apnews.com/033c89a4d0d646d386a63117c0c72a11. Relatedly, a Wyoming official told us that when the state investigated a list of potential noncitizens produced from state Department of Transportation records, the state did not determine that there were any noncitizens on the rolls and found that many purported noncitizens had subsequently naturalized and were thus eligible to vote. Jennifer Trabing (Election Policy and Planning Analyst, Elections Division, Wyoming Secretary of State's Office), interview by Brennan Center for Justice, May 9, 2018.

106 Va. Code Ann. § 24.2-410.1; Roger Stitt (Voter Registration Manager of Operations, Maryland State Board of Elections), interview by Brennan Center for Justice, May 8, 2018.

107 Christopher Famighetti, Douglas Keith, and Myrna Pérez, *Noncitizen Voting: The Missing Millions* (New York: Brennan Center for Justice, May 2017), https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf ("Other times, noted one administrator, a citizen will forget to check the 'citizen' box when filling out a driver's license form and that will trigger a process which could end in a citizen's registration being canceled, and also artificially inflate the number of alleged noncitizens who are on the registration rolls.").

108 Ga. Code Ann. § 21-2-231; La. Stat. Ann. § 18:178; Tex. Elec. Code Ann. § 16.0332.

109 Christopher Famighetti, Douglas Keith, and Myrna Pérez, *Noncitizen Voting: The Missing Millions* (New York: Brennan Center for Justice, May 2017), https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf ("Several interviewees described how eligible Americans sometimes check a box on a jury service form claiming not to be citizens because they do not want to serve on the jury. 'One way for people to get out of jury duty is they can say they're a noncitizen and fill out a card saying they're not a citizen,' explained Jacquelyn Callanen, Elections Administrator in Bexar County, Texas.")

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113 Adam Gitlin and Wendy Wesier, *The Justice Department's Voter Fraud Scandal: Lessons* (New York: Brennan Center for Justice, January 2017), https://www.brennancenter.org/sites/default/files/publications/Justice_Department_Voter_Fraud_Scandal_Lessons.pdf.

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115 Judicial Watch, Inc. v. Grimes, 3:17-cv-00094, filed November 14, 2017 (E.D. Ky.); Voter Integrity Project NC, Inc. v. Wake County Board of Elections, 5:16-cv-00683, filed July 18, 2016 (E.D.N.C.); American Civil Rights Union v. Noxubee County, 3:15-cv-00815, filed November 12, 2015 (S.D. Miss.); American Civil Rights Union v. Clarke County, 2:15-cv-00101, filed July 27, 2015 (S.D. Miss.); American Civil Rights Union v. Martinez-Rivera, 2:14-cv-00026, filed March 27, 2014 (W.D. Tex.); American Civil Rights Union v. McDonald, 2:14-cv-00012, filed Jan. 27, 2014 (W.D. Tex.); American Civil Rights Union v. Jefferson Davis County, 2:13-cv-00087, filed April 26, 2013 (S.D. Miss.); American Civil Rights Union v. Walthall County, 2:13-cv-00086, filed April 26, 2013 (S.D. Miss.); Judicial Watch, Inc. v. Husted, 2:12-cv-00792, filed August 30, 2012 (S.D. Ohio).

116 Willie M. Miller (Noxubee County District 4 Election Commissioner), interview by Brennan Center for Justice, May 29, 2018.

117 American Civil Rights Union v. Rodriguez, 7:16-cv-00103, filed Mar. 4, 2016 (S.D. Tex.).

118 Judicial Watch, Inc. v. Logan, 2:17-cv-08948, filed December 13, 2017 (C.D. Cal.).

119 American Civil Rights Union v. Noxubee County, 3:15-cv-00815, filed November 12, 2015 (S.D. Miss.).

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125 Christopher Famighetti, Douglas Keith, and Myrna Pérez, *Noncitizen Voting: The Missing Millions* (New York: Brennan Center for Justice, May 2017), https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf.

126 These noncitizen removal figures are derived from Virginia's annual list maintenance reports. Virginia Department of Elections, *Annual List Maintenance Report*, 2015, https://www.elections.virginia.gov/Files/maintenance-reports/2015SBEListMaintenancereport.pdf; Virginia Department of Elections, *Annual List Maintenance Report*, 2016, https://www.elections.virginia.gov/Files/maintenance-reports/2016SBEListMaintenancereport.pdf; Virginia Department of Elections, *Annual List Maintenance Report*, 2017, https://www.elections.virginia.gov/Files/maintenance-reports/2017SBEListMaintenancereport.pdf.

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128 See *supra* text box on challenges.

129 Alaska, California, Colorado, District of Columbia, Georgia, Illinois, Maryland, New Jersey, Oregon, Rhode Island, Vermont, Washington, West Virginia. For a detailed description of the status of implementation of automatic voter registration in these states see "Automatic Voter Registration," Brennan Center for Justice, last modified April 17, 2018, https://www.brennancenter.org/analysis/automatic-voter-registration.

Appendix A: Federal Statutory Regulation of Voter Purge Practices

Purge practices are regulated by a combination of federal and state law. Below is a summary of federal statutes:

VOTING RIGHTS ACT

As a general matter, the Voting Rights Act (VRA), 52 U.S.C. § 10301 et seq, prohibits discrimination in voting. The Supreme Court has held that this prohibition applies to purges.[1] Prior to 2013, certain jurisdictions were required to seek federal preclearance of purge practices before they were implemented.[2] However, the formula by which these jurisdictions were covered was invalidated in *Shelby County v. Holder*,[3] effectively ending preclearance until Congress issues a new formula. Purge practices must still comply with Section 2 of the VRA, which bans discriminatory voting practices.[4]

NATIONAL VOTER REGISTRATION ACT

The National Voter Registration Act (NVRA) is the most comprehensive federal law regulating voter purges and applies to 44 states. Six states (Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming) are exempt because they had election day registration or no voter registration as of the date provided by the NVRA. These exemptions make sense because purge consequences are much less grave in a state that permits anyone eligible who is not on the registration rolls to register and to vote on Election Day (or does not require them to register in order to vote).

The law discusses five categories of removal from voter rolls: (1) request of the registrant; (2) disenfranchising criminal conviction; (3) mental incapacity; (4) death; and (5) change in residence.[5] The NVRA sets forth a series of specific requirements that apply to purges of registrants believed to have changed residence.[6]

The law also contains a series of additional proscriptions on state practices. For example, it provides that list maintenance must be uniform, nondiscriminatory, and in accordance with the Voting Rights Act.[7] It also prohibits *systematic* voter purges (those programs that remove groups of voters at once) within 90 days of a federal election.[8] The Act also has provisions that apply on Election Day if a voter has changed address. Voters who have moved within a jurisdiction are permitted to vote at either their new or old polling place (states get to choose), while purged voters — mistakenly believed to have moved — who show up on Election Day have the right to correct the error and cast a ballot that will count.[9]

HELP AMERICA VOTE ACT

The Help America Vote Act of 2002 (HAVA) reaffirms the requirements of the NVRA and contains additional regulations for voter list maintenance.[10] For example, HAVA requires states to create statewide voter registration databases with unique identifiers for registered voters.[11] The law also requires states to attempt to verify the validity of information submitted by voter registration applicants.[12] HAVA also ensures that certain voters, including those who do not appear on poll books, are permitted to vote provisional ballots at minimum.[13]

1 Young v. Fordice, 520 U.S. 273 (1997).
2 52 U.S.C. § 10304.
3 570 U.S.C. 2 (2013).
4 52 U.S.C. § 10301(a).
5 52 U.S.C. § 20507(a).
6 See 52 U.S.C. § 20507(d)(1).
7 52 U.S.C. § 20507(b)(1).
8 52 U.S.C. § 20507(c)(2)(A).
9 52 U.S.C. § 20507(e).
10 52 U.S.C. § 21083(a).
11 52 U.S.C. § 21083(a)(5)(A).
12 52 U.S.C. § 21083(a)(5)(B).
13 52 U.S.C. § 21082.

Appendix B: What Explains a Jurisdiction's Purge Rate?

	Removal Rate	Removal Rate
D (Preclearance Condition Lifted)	0.0150*** (0.00166)	
D (Preclearance Condition Lifted) * D (2014)		0.0240*** (0.00207)
D (Preclearance Condition Lifted) * D (2016)		0.00605*** (0.00193)
Median Age	-0.000600*** (0.000168)	-0.000601*** (0.000169)
Percent of Residents Who Moved in Past Year	0.0582*** (0.0124)	0.0578*** (0.0124)
Log (Median Income)	0.00639** (0.00283)	0.00625** (0.00283)
Log (Voting Age Population)	-0.000184*** (0.000608)	-0.000182*** (0.000608)
Log (Percent Black)	-0.00124*** (0.000362)	-0.00125*** (0.000362)
D (Secretary of State Appointed by Governor)	0.00634*** (0.00187)	0.00636*** (0.00187)
D (Secretary of State Appointed by Legislature)	0.0168*** (0.00202)	0.0168*** (0.00202)
D (State Legislature Controlled by Republicans)	0.0138*** (0.00122)	0.0138*** (0.00122)
Constant	0.0339 (0.0293)	0.0353 (0.0293)
Observations R-squared	9,057 0.069	9,057 0.073
Robust standard errors in parentheses, clustered by county. Year dummies not shown. *** p<0.01, ** p<0.05, * p<0.1 Notes: Data are from the 2010, 2012, 2014, and 2016 reporting periods. Includes jurisdictions that reported in each time period. Sources: U.S. Election Assistance Commission, U.S. Census Bureau: American Community Survey 5-Year Estimates, National Conference of State Legislatures		

Appendix C: Relationship Between Purge Rates and Provisional Ballot Rates

	Provisional Ballot Rate
Removal Rate	0.0177** (0.00697)
Turnout Rate	-0.00553*** (0.00164)
Log (Median Income)	0.00189*** (0.000504)
Log (Percent Black)	-0.000554* (0.000308)
Log (Percent White)	-0.00453*** (0.00132)
D (Implemented Strict Voter ID Requirement)	-0.00314 (0.000406)
Constant	-0.0185*** (0.00523)
Observations R-squared	1,854 0.741
Robust standard errors in parentheses, clustered by county. Year and state-level dummies not shown. *** p<0.01, ** p<0.05, * p<0.1 Notes: Data are from the 2010, 2012, 2014, and 2016 reporting periods. Includes jurisdictions covered under Section V of the Voting Rights Act at the time of the *Shelby County* decision in 2013 that reported in each time period. Sources: U.S. Election Assistance Commission, U.S. Census Bureau: American Community Survey 5-Year Estimates, National Conference of State Legislatures.	

Regression analysis shows that the higher a covered county's purge rate the higher their provisional ballot rate. Each 1 percent increase in removal rates was associated with an additional 1.8 provisional ballots for every 10,000 ballots cast. Although this number is small, the median for these jurisdictions in the 2012 presidential election was fewer than 1 provisional ballot per 10,000 cast. Importantly, this statistically significant relationship holds even after controlling for other sociodemographic factors such as population, turnout rate, racial composition, political orientation, and implementation of strict voter ID requirements.

As with any statistical study of this sort, it is impossible to determine whether the increase in purge rates in any particular county is responsible for an increase in provisional ballots. However, a closer look at the numbers in a few jurisdictions suggests how this relationship might work.

Shelby County, Alabama, the jurisdiction at issue in *Shelby County v. Holder,* is illustrative. After preclearance ended in 2013, the county's removal rate more than doubled, from 5.0 percent to 10.4 percent. In 2014, more than 18 percent of the county's voters were purged. In 2012, the provisional ballot rate was 0.15 percent, virtually identical to the national average of 0.16 percent. Following years in which the county purged an average of 10 percent of voters, the provisional ballot rate tripled to 0.45 percent.

Montgomery County, Alabama, also had to seek federal preclearance for purges in the past. From 2009 to 2012, when preclearance was required, the average two-year removal rate was 4.7 percent, well below the national average. But after

Shelby County effectively ended preclearance, the removal rates increased dramatically, nearly tripling to 12.0 percent. Montgomery County's numbers are similar to Shelby County's. In the two years ending in 2014, a period covering the cessation of preclearance, Montgomery County had a massive purge in which 21 percent of voters were removed. Subsequently, the provisional ballot rate shot up from 0.31 percent in the 2012 presidential election to more than 1 percent in the 2016 election.

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ANALYSIS

Florida, Georgia, North Carolina Still Purging Voters at High Rates



Voter purges increased significantly in the 2016 election cycle. New numbers from three states offer cause for alarm about 2018, too.

 Kevin Morris  Myrna Pérez

October 1, 2018

Earlier this summer, when the Brennan Center released a **report** examining voter purge data through 2016, we found that four million more people were purged from the rolls between the federal elections of 2014 and 2016 than between 2006 and 2008. Much of that increase came from states that were previously required under the Voting Rights Act (VRA) to get election changes cleared in advance, before that part of the law was eviscerated by the Supreme Court in 2013.

Although comparable data for the two years ending in 2018 won't be available until early next year, we were able to use different data sources to figure out how many voters have been purged over the past two years in three states we had studied — Florida, Georgia, and North Carolina. A preliminary analysis supports our initial alarm over the purge processes in these three states, showing that they continued to have high purge rates.

Purges in and of themselves aren't bad. They're commonly used to clean up voter lists when someone has moved, passed away, and more. But too often, names identified for removal are determined by faulty criteria that wrongly

suggests a voter be deleted from the rolls. When flawed, the process threatens to silence eligible voters on Election Day — especially in states where purge rates are high.

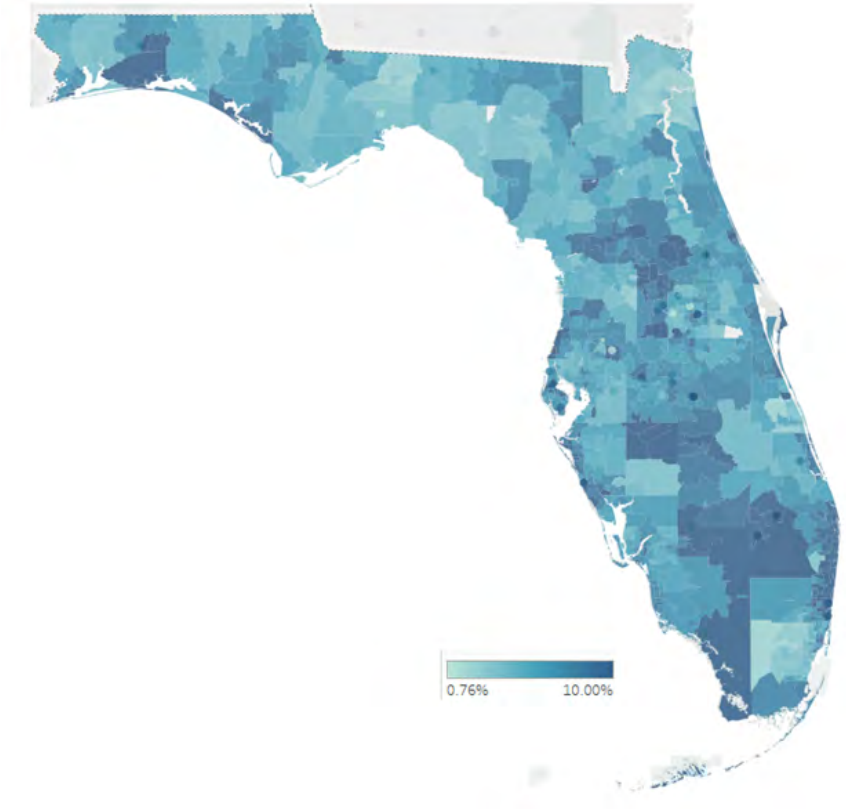
Florida

From November 2008 to November 2010, the median purge rate in the Sunshine State was 0.2 percent. That number jumped to 3.6 percent from 2012 to 2014. And new data show it's jumped again: **Between December 2016 and September 2018, Florida has purged more than 7 percent of its voters**.

Not only can we tell that purges have increased — we also know where the biggest purges are happening. Hardee, Hendry, Palm Beach, and Okaloosa counties have each purged more than 10 percent of their voters in the last two years.

Dade and Broward counties also have a number of zip codes that purged at higher rates. Some of those zip codes, however, include military bases or college campuses, which one would expect to have higher purge rates because of the transient nature of the population and the established processes for removing voters who have moved.

Purge Rates in Florida



**Purge rates from December 2016 through September 2018. Source: Florida Board of Elections.*

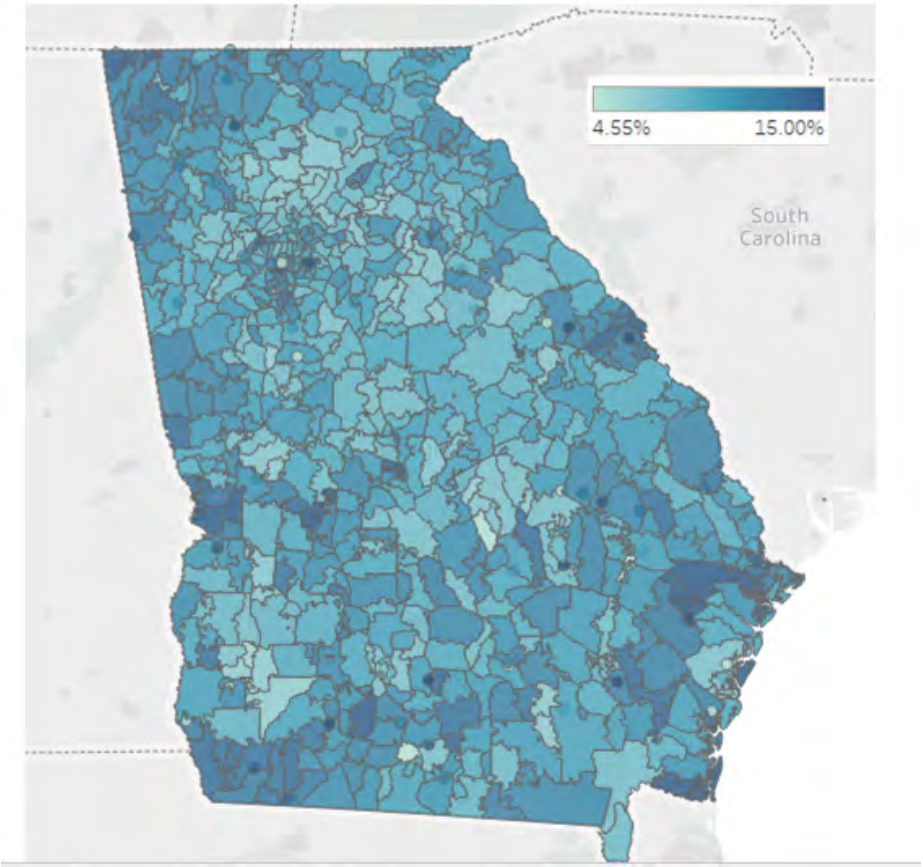
Georgia

Between 2010 and 2014 — a period of time that covers before and after the Supreme Court's decision on the Voting Rights Act — Georgia's median purge rate increased from 6.7 percent to 10.7 percent. Our analysis of the

data shows that the state continues to have a high purge rate: **Over the past two years, the state has purged 10.6 percent of voters**. Nonwhite voters were slightly overrepresented among those purged when compared to the total population breakdown.

Ninety-seven of the state's 159 counties purged more than 10 percent of their voters in the last two years. Four counties (Chattahoochee, Liberty, Dade, and Camden) are particular outliers, each purging at least 15 percent of their voters. At a more granular level, 430 of the 781 zip codes have purged more than 10 percent of their voters since 2016. This rebuts any speculation that the VRA's preclearance provision may have blocked reasonable list maintenance practices. "Catching up" might have seemed like an excusable reason for increased rates in the first purge cycle without pre-clearance (2014-2016), but Georgia's purge rates have not returned to pre-2013 levels in the five years since the decision was handed down.

Purge Rates in Georgia



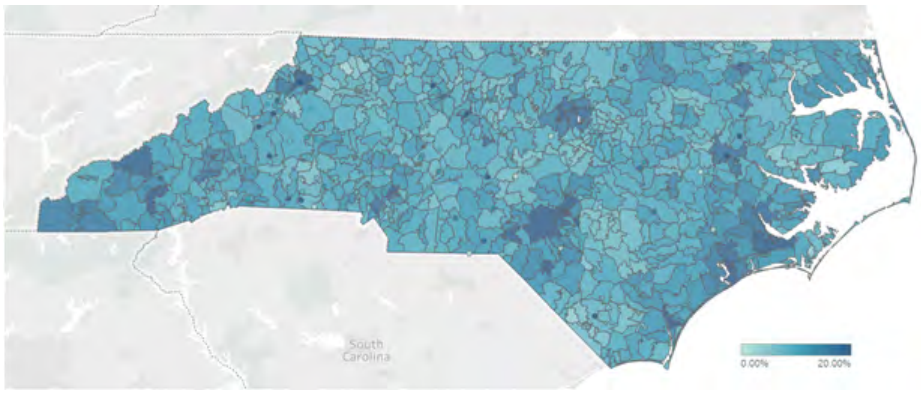
**Purge rates from September 7, 2016 through September 14, 2018. Source: Georgia Board of Elections.*

North Carolina

North Carolina's purge rates fall in between Florida and Georgia. Forty of its one hundred counties were covered under Section V of the Voting Rights Act at the time of the *Shelby County v. Holder* decision in 2013. The average purge rate in the state increased modestly between 2010 to 2014, from 8.0 to 8.8 percent. Like in Georgia and Florida, however, this didn't represent a temporary increase, but rather has been sustained over the past few

years. **Between September of 2016 and May of 2018 (the latest date data is available), the state purged 11.7 percent of its voter rolls**. Just 19 of its counties purged fewer than 10 percent of their voters, and no county purged fewer than 8 percent. These purges have been especially troubling for voters of color – in 90 out of 100 counties, voters of color were over-represented among the purged group.

Purge Rates in North Carolina



**Purge rates from September 7, 2016 through September 14, 2018. Source: Georgia Board of Elections.*

To voters living in these three states – and to voters around the country: Check your registration status to make sure that you're still on the rolls. If you are not registered, and think you should be, call your local election official and find out why. There is still time to register in many states if you have a problem.

***Correction**: This post originally said Harris County, Florida was one of the counties that had purged more than ten percent of its voters. In fact, it was Hardee County. There is no Harris County in Florida.*

Photo: Joe Skipper/Getty Images

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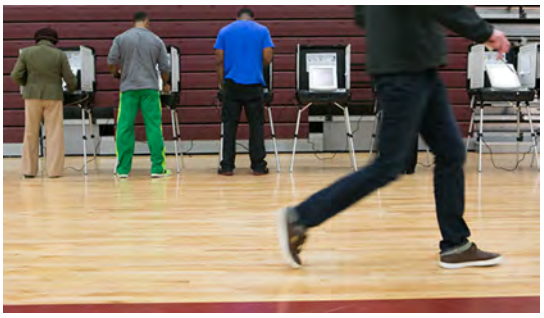
Vote Suppression

APPENDIX C

ANALYSIS

What's the Matter with Georgia?

With early voting starting Monday, a range of efforts to restrict voting in the Peach State could cause big problems at the polls. We explain what's going on.





Rebecca Ayala Jonathan Brater

October 12, 2018

Reports that Georgia is keeping 53,000 voter registrations on hold because of minor discrepancies have received widespread attention since Monday. But in fact, the state has recently adopted a range of controversial voting practices. The combined effect is to put voters — especially racial minorities — at risk of disenfranchisement as the state's hotly contested governor's race approaches. Early voting begins Monday.

Below is a summary of the four major voting issues that have contributed to problems in the Peach State.

"Exact Match" Policy: In 2017, Georgia passed **legislation** requiring that information on voter registration forms match exactly with existing state records. Even a single digit or a misplaced hyphen could be enough to prevent registration and instead put the application on "pending" status. Georgia previously had a different version of this exact match process but **agreed in 2017** to discontinue the practice after civil rights groups brought suit — only to reinstate a different version of exact match later that year.

Reports **indicate** that approximately 53,000 people are now on pending status — and a vastly disproportionate number of them are African-American: seventy percent of the pending list, compared to 32 percent of the

population. Civil rights groups **filed a lawsuit** against the policy Thursday.

What does being on pending status mean for voters? If they do not provide the additional information needed to resolve the discrepancies within 26 months, their pending registrations will be canceled. Importantly, voters who show up on Election Day *should be allowed to vote a regular ballot* by providing ID at the polls and thus should not give up on voting just because their status is pending; however, the requirement could cause confusion on Election Day if voters are wrongly given provisional ballots or given other misinformation. The ID requirement could also cause problems for voters trying to vote by absentee ballot. For those voters who do not cast ballots in 2018, they are at risk of removal prior to 2020 if they do not get off pending status within 26 months of registering.

Aggressive Voter Purges: A recent Brennan Center **report** on purges nationwide found Georgia to be one of the most aggressive purgers. Between the 2012 and 2016 elections, it purged 1.5 million voters — twice as many as in the 2008 and 2012 cycles. All but three of the state's 159 counties saw purge rates increase. And we **recently released new data** showing that the trend has continued over the past two years, during which the state has purged 10.6 percent of its voters.

Purge rates do not prove voters are being removed erroneously. But we also found that provisional ballots went up as the purge rate increased in Georgia, as well as in other jurisdictions that used to get extra scrutiny under the Voting Rights Act. This suggests more voters are showing up to the polls after having been purged because voters in those situations often get provisional ballots.

Voter Registration Drives Restricted: The governor's race — which pits Secretary of State Brian Kemp against former state legislator Stacey Abrams — also recalls a controversial episode involving the secretary of state's office and the New Georgia Project (NGP), a civic group founded by Abrams in 2013. Prior to the 2014 election, Kemp's office **launched an investigation** into voter registration forms submitted by NGP. After investigating approximately 87,000 forms, NGP was eventually cleared of wrongdoing — but not until after the group's voter registration drive was disrupted. The group **filed a lawsuit** against Kemp for failing to process approximately 40,000 voter registration forms submitted by the group. The lawsuit was dismissed in part because Kemp promised to ensure registration applications would be sent to counties.

Kemp, a Republican, was also criticized for political statements about voter registration drives. "[Y]ou know the Democrats are working hard, and all these stories about them, you know, registering all these minority voters that are out there and others that are sitting on the sidelines," **he said** at the time. "If they can do that, they can win these elections in November."

Polling Place Closures: Majority-black Randolph County, Georgia was sued for **attempting** to close seven of its nine polling sites. The county claimed a consultant had recommended the closures because of disability compliance issues. After a lawsuit, the county reversed course and kept the sites open.

The proposed polling place closures in a minority county were particularly concerning because in the past, similar tactics have been used to suppress minority votes. Prior to 2013, polling place changes in Georgia (and other areas with a history of discrimination) had to be precleared by the Department of Justice or a federal court to make sure they did not result in a rollback of minority voting rights. But after the Supreme Courts' 2013 *Shelby County* decision, that protection no longer exists.

* * *

The competitive governor's race will strain Georgia's election system. Election officials should be transparent about what voters need to do to ensure their votes are counted – particularly those voters who are on pending status. If voters encounter problems, they can call 866-OUR-VOTE or go to 866OURVOTE.ORG to get help from Election Protection, a nonpartisan voter hotline.

(Image: Jessica McGowan/Getty)

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ANALYSIS

Voting Problems 2018

From purges to voter intimidation to machine snafus, voting issues have proliferated this cycle. A Brennan Center roundup.





Rebecca Ayala

November 5, 2018

As Election Day approaches, obstacles continue to make it difficult for eligible voters to cast a ballot. This year, voters in **24 states** will have to navigate recently adopted laws that restrict voting access; in nine of those states, it will be harder to vote than it was in 2016. In addition to tracking these laws (and litigation and legislation affecting voting access), the Brennan Center has been tracking the full array of efforts nationwide to restrict access to voting. These efforts have been **more widespread and intense** than in any other election in recent memory. Below is a non-exhaustive list of recent efforts to restrict voting rights over the past three months, including actual and possible incidents of voter suppression. For a full summary of the new legal restrictions voters face this year, look **here**.

Voter Purges

In the lead-up to this election, there has been a dramatic spike in voter purges, the often-flawed practice of cleaning up the voter rolls by deleting names of voters who may have moved or otherwise become ineligible. Done badly, purges can disenfranchise large numbers of eligible citizens. A Brennan Center **report** issued this summer found a 33 percent increase in purges nationwide over the past decade. In a number of states, purge practices were especially troubling:

Increased purge rates in states previously covered by the pre-clearance provision of the Voting Rights Act: Since 2012, states that had previously been subject to extra scrutiny under the federal Voting Rights Act because of a history of voting discrimination had much **higher purge rates** than other states; had they purged at the same rate as the rest of the country, 2 million fewer voters would have been purged between 2012 and 2016.

Especially high purge rates in Southern States: Between 2016 and 2018, the Brennan Center found Georgia, North Carolina, and Florida **removed** an unusually high number of names from their voter rolls. Both Georgia and North Carolina removed over 10 percent of registrations from their voter lists, and Florida removed more than 7 percent. Since 2015, Alabama election officials **purged** 658,000 voters, according to the state's chief election official; this number is dramatic given that the state had only 3.3 million **registered** voters in 2016.

Indiana's problematic purge law: After the 2016 election, Indiana passed a law that would require election officials to purge voters using the notoriously error-prone Crosscheck program developed by Kansas Secretary of State Kris Kobach, without offering voters the notice and waiting period required by federal law.
One **study** found Crosscheck would block 300 legal votes for every double vote prevented. The Brennan Center, on behalf of the NAACP and the League of Women Voters, challenged this practice in a **lawsuit** filed last year. Although not yet used, the law was in effect up through this summer, when the court blocked it. An appeal is currently pending.

Other states have a history of problematic Crosscheck rules: In the past, Maine and Alabama election officials had rules that allowed using Crosscheck to immediately **purge** voters without providing notice or a waiting period. The Brennan Center and partners **sent** letters to both states, and both said that they do not have plans to use the database at this time.

Ohio law allows voter purges: Ohio is enforcing a law that requires election officials to begin a purge process for voters who missed one election. The Supreme Court **upheld** the law against a legal challenge earlier this year. After plaintiffs filed an appeal on a narrower issue in the case, a court **ordered** Ohio election officials **to count** 2018 ballots from some of the voters who had been purged.

New Yorkers continue to experience impact of 2016 purge: During the September **primary**, some registered voters reported that they were **not found** on the voter rolls, had registrations wrongly transferred to new election districts, or were not given the right primary **ballots** for their party affiliation. This follows the notorious Brooklyn purge of the 2016 presidential election, during which 200,000 voters were improperly **purged** from the voter rolls.

West Virginia voter list maintenance may have removed eligible voters: Last month, Secretary of State Mac Warner reported election officials had removed more than **100,000** registrations from the voter rolls in the last two years. Some individuals reported **issues** confirming their registration status. After contacting counties throughout the state, we discovered election officials may have inconsistent methods of restoring the registrations of voters wrongly removed. It is unclear how this large removal will impact voters on Election Day.

Georgia

Voters in the **state** have continuously been subject to laws, policies, and legal action aimed at suppressing an individual's ability to cast a ballot. Secretary of State Brian Kemp has come under extensive criticism for his controversial actions contributing to voter suppression leading up to the 2018 election while running for governor. Here is a summary of recent suppressive actions in Georgia:

"Exact match" problem: Georgia is enforcing an unusual policy of holding up registrations of voters if their application information does not exactly match the information on other government records. Under this flawed policy, about **53,000** registrations are still "pending." Seventy percent of those applications being held are from African Americans. While those applicants can vote, they will experience additional obstacles. As a result of

a **lawsuit** filed by civil rights groups, those in "pending" status because the state was unable to verify their citizenship through this match process will be able to **vote** a regular ballot on Election Day by providing proof of citizenship at the polls.

Threat to polling locations: Earlier this year, a consultant recommended Randolph County, a majority black, rural county in South Georgia, **close** seven of the nine voting locations due to ADA compliance issues. In response, several organizations filed a **lawsuit** against the state and Secretary of State Brian Kemp. After significant public outcry, election officials rejected the proposal and fired the consultant.

Absentee ballot rejections in Gwinnett County: Election officials **rejected** an unusually high number of absentee ballots in Gwinnett County, 465 of which were for reasons including "mismatched" signatures, missing addresses, and incorrect birth years. In Georgia, the law requires county election officials to reject absentee ballots that have signatures that do not match the signature on file. As a result of a current **lawsuit**, county officials must now **treat** absentee ballots with mismatched signatures as provisional ballots and contact voters whose ballots have been flagged.

Preventing access to the polls: In Jefferson County, a senior centerdirector, at the request of county clerks, **ordered** about 40 African American senior citizens off a bus that was transporting them to the polls during the early voting period. Despite being **planned** by a nonpartisan organization, county clerks claimed the event was "political activity," which is not allowed during a county-sponsored event (the senior center is operated by Jefferson County). Those voters were unable to vote that day.

State election official exposes partisanship: Secretary of State Brian Kemp stated at a public **event** that his gubernatorial opponent's voter registration effort "continues to concern us, especially if everybody uses and exercises their right to vote." This is an example of the impact Kemp believes widespread turnout will have on his campaign and provides evidence for how his perspective may influence his actions as secretary of state during the general election.

Missing vote-by-mail applications: Party officials reported **4,700** missing vote-by-mail applications in Dekalb County. Some officials involved stated that county officials would explain the situation to the thousands of voters, although this course of action has not been confirmed by the county elections board.

Publicized security breach: On November 3, **reports** of a failed cyberattack on the registration system in Georgia surfaced. Rather than try to fix the situation, Secretary Kemp announced he would launch an **investigation** into the Democratic Party of Georgia and contacted the FBI. The political party has strongly **denied** these allegations, and Kemp provided no evidence to substantiate his claim.

North Carolina

Voters in North Carolina continue to experience challenges this election season. Reports of misleading information, voter intimidation, controversial policies, and legal action have all made it more difficult to cast a ballot that counts.

Restrictive and misleading constitutional amendments: The state Legislature placed six constitutional **amendments** on the November ballot, including an amendment that would require voters to present photo ID at the polls and one that would give the state General Assembly the ability to appoint members of the election board. In writing these amendments, GOP lawmakers took over this responsibility from other state officials, some say with the intent to **mislead** voters.

Decrease in early voting sites: A North Carolina **law** created uniform early voting hours on weekdays. This new policy is expected to **reduce** the number of early voting sites by 20 percent when compared to the number open in 2014. For **example**, two of the five early voting sites in Gaston County have been closed, and Iredell County has cut half of its early voting sites.

Election officials attempted to remove voters: Prior to this election season, county officials were able to process challenges made by voters in large batches that caused purge-like results. A judge permanently blocked this provision, and now election officials **must** give challenged voters a notice and waiting period, and must complete removals at least 90 days before federal elections.

Release of misleading information: Lt. Governor Dan Forest **released** a video funded by the NC Republic Council of State Committee titled *Voter Fraud 101* that gives instructions on how to commit voter fraud. This advertisement, originally released on Facebook, has since been determined to have targeted "North Carolinians interested in Donald Trump." Forest and others are clearly continuing to promote the **myth** of widespread voter fraud.

Poll worker incident in Franklin County: A poll worker was **removed** from an early voting site for allegedly intimidating black voters. This individual repeatedly asked several black voters to spell their names.

Voter intimidation results in arrest: In Mecklenburg County, three white individuals aggressively **confronted** a black polling place volunteer at a Steele Creek poll and made racial slurs toward him, as well as exposed a BB gun in a holster. The individual who exposed the BB gun is currently in custody and was charged with ethnic intimidation. In response, the local **police** department plans to devote more resources to monitoring polling places in Charlotte.

Federal subpoenas burden election officials: In August, counties in North Carolina were served with **subpoenas** issued by the U.S. Attorney's Office requesting voter records and ballots be turned over to U.S. Immigration and Customs Enforcement by September 25. The state officials determined that the response would be over **20 million pages** and place a significant burden on county election officials in the months leading up to the election. On **September 6**, federal authorities decided to give counties until January to respond to this records request.

Students

Election officials in some states have made it difficult for a young voter to cast a ballot. Particularly, student voters in New Hampshire, Texas, Florida, and Michigan have been subject to suppressive policies leading up to the general election.

Change to residency requirements impact voter registration: New Hampshire enacted a law last year that makes it more onerous for voters to establish that they are "domiciled" in the state for purposes of registering to vote. A judge briefly **blocked** the state from implementing this law prior to the upcoming election. But the state Supreme Court **ordered** the **law** to stay in effect until after the November 6 election.

Registration confusion and few early voting sites: At Prairie View A&M University, a historically black university in Texas, students were instructed to use one of two university building addresses for their registration applications in the absence of individual mailboxes. In **October**, **reports** emerged that some students would have to fill out change-of-address forms on Election Day. After public opposition, state officials **announced** students would not need to fill out the form on Election Day. Despite this victory, state officials continue to make it difficult for Texas students to vote. County election officials failed to provide an early voting location on campus or in Prairie View City for part of the early voting period. As a result, civil rights organizations filed a **lawsuit** against Waller County and claim this lack of resources disenfranchises African American voters. County commissioners **decided** to extend early voting hours and dates shortly after the lawsuit was filed.

Limited early voting site operation prevents students from voting: In San Marcos, Texas State University's temporary early voting **site** was only open for three days, as opposed to the two weeks before Election Day that most polling places in the state are open. Long lines prevented some from casting a ballot, and with the only other polling site miles away, students decided to contact county stakeholders and request the polling location

be reopened. On October 26, **reports** surfaced that a local GOP president sent an email to groups urging them to contact county commissioners and request they not extendvoting times for students at this location because extensions would "favor the Democrats."

Early voting sites not allowed on campus in Florida: Prior to this year, Secretary of State Ken Detzner **stated** local election officials could not hold early voting on public college campuses. In July 2018, however, a federal judge in Florida **blocked** the state's "blanket ban" and ordered the state to allow local officials to site early voting locations on campuses.

First-time voter election policies impact Michigan voters: Students at the University of Michigan and Michigan State University **filed** a **lawsuit** claiming a 20-year-old state voting law that requires some first-time voters to cast a ballot in person and mandates a voter's registration address match the one on their driver's license, violates the First and 26th Amendment. The **case** is currently pending.

Online Vote Suppression

This election cycle has seen an increase in the use of online social media platforms to suppress the vote. In recent weeks, we have heard reports of both foreign and domestic entities involved in this form of voter suppression.

Russian organization used social media to incite conflict: In **Virginia**, Elena Khusyaynova, has been **charged** with conspiracy to defraud the United States by interfering in the 2018 election through "Project Lakhta," which published misinformation online on political issues and created fake social media profiles on multiple social media platforms. The accounts incited conflict on several political issues, and at times promoted opposing viewpoints. These social media accounts reached over one million people. Yevgeniy Prigozhin, associate of President Vladimir Putin, funded Khusyaynova. The U.S. attorney's office in the Eastern District of Virginia and the Justice Department are prosecuting the case.

Fake Tweets spread false information about voting sites: Twitter **suspended** 1,500 accounts associated with a right-wing internet trolling campaign. The accounts posed as liberal activists and spread false information about the midterms, such as tweeting the incorrect date of the upcoming election: "Get out and vote Nov 7th! #BlueTsunami2018…."

Facebook political ads are spreading misinformation: According to this news outlet, a partisan organization has placed political **ads** on Facebook with misleading information on candidates. The organization behind the ads has a purposefully nonpartisan sounding name.

Misleading Information

Another form of voter suppression includes the communication of false information to voters. Registered voters in Pennsylvania, Illinois, New Jersey, and Texas have been subjected to information that may prevent them from casting a ballot on Election Day.

Incorrect polling address information sent to voters in Pennsylvania: Following the change of 33 polling places in Allegheny County, the county election officials sent **letters** to voters with polling location address errors. The officials have since sent corrected letters.

Mailer includes inaccurate information regarding voter ID in Illinois: Kendall County Clerk Debbie Gillette **sent** out a mailer to voters that indicated they would have to "present identification to the election judge" at the polls. In response, the ACLU of Illinois sent a letter to the county clerk indicating the need to correct the misleading voter ID instructions, and county officials **removed** the misleading information from the county's website. Voters do not have to present ID to cast a ballot in November.

In New Jersey, misleading mail-in ballot information sent to voters: County clerks sent **letters** to voters with inaccurate information regarding mail-in ballot protocol. The governor later corrected the information and the Department of State sent a memo to officials to clarify the law.

Voters sent false ballot information in Missouri: Ten thousand voters received incorrect absentee ballot due date information from the Missouri Republican Party. The **postcards** claim absentee ballots were due one week before the true deadline. Voters who received these mailers have been directed to the Secretary of State's website and webpage by the RNC.

— In addition, a **state court** in Missouri ordered the state to stop disseminating misleading information suggesting that voters without photo ID would not be able to vote.

— Similarly, state courts in **Iowa** prohibited the state from advertising that voters would need certain ID to vote in this year's election.

Montana voters received incorrect absentee ballot information: A political party sent **mailers** to voters that contained incorrect absentee ballot return date information. Party members later admitted the mistake and are contacting voters by phone and mail to clarify.

In New York, a candidate sent a mailer with inaccurate information: According to this **news source**, the mailer contained the wrong absentee ballot deadline. The campaign later admitted the mistake and sent mailers with the correct information.

Ohio voters received mailers with false information: A political party **sent** voters mailers that incorrectly stated a voter's ability to return a completed absentee ballot at the polls on Election Day. A party representative stated they will encourage voters to return completed absentee ballots ahead of the election because voters will have to cast a provisional ballot if they bring a completed absentee ballot to the polls.

Language Access

Voters should have **access** to voting materials and translators in their preferred language to ensure they are able to cast a ballot. However, counties in Texas and Florida did make adequate materials accessible to, in this case, Spanish speakers in the months leading up to the 2018 election.

Inadequate online Spanish translations in Texas: After determining 36 county websites lacked sufficient Spanish language resources, the ACLU **sent** notice letters to county officials. Many counties responded positively and are working toward making their websites more accessible to Spanish speakers.

Lack of Spanish language materials in Florida: In the aftermath of Hurricane Maria, thousands of Puerto Ricans who moved to Florida may not have been able to exercise their right to vote without Spanish-language voting materials. To ensure these potential voters had all necessary resources, voting rights groups **filed** a **lawsuit** against state officials in order to compel the state to provide Spanish-language materials. A court **ruled** the counties must print and provide the Spanish-language voting materials in time for the November election. The case is ongoing on other claims.

Registration and Identification Issues

In several states, state and election officials have implemented restrictive registration and identification policies or did not approve applications. These policies and actions effectively disenfranchise voters and may prevent thousands from casting a ballot this November.

Voter ID law impacts Native Americans in North Dakota: In 2017, North Dakota enacted a new voter ID law. Among other things, the law requires voters to present an ID that includes a residential street address to vote. This law would **disproportionately** impact Native American communities within the state because many members of these communities do not have street addresses. The Native American Rights Fund filed a lawsuit seeking to block the law, and a federal district court blocked the residential street address requirement. A Court of Appeals panel halted the district court's order, and the U.S. Supreme Court **upheld** that ruling. In a final effort to relieve voters from this requirement, the Spirit Lake Tribe **filed** a lawsuit in district court, seeking to block the application of the residential street address requirement to Native Americans living on reservations, but a judge denied the request. It is estimated that **5,000** Native American voters will need to obtain qualifying ID before Election Day.

Kris Kobach enforced law that disenfranchised thousands of voters: Kansas Secretary of State Kris Kobach's enforcement of a proof-of-citizenship law denied more than 35,000 potential voters from registering and casting a ballot in the lead up to the 2016 election. The law was **struck down** this past June after a judge found the law violated the National Voter Registration Act and the U.S. Constitution.

State officials reject online registrations in Texas: Days before the registration deadline, officials **rejected** 2,400 online registrations submitted by Vote.org due to online signature issues, according to Vote.org. The organization quickly changed their online registration process. Although state officials have determined these registrations invalid, county officials in Travis decided to **accept** about 800 registration applications from the organization.

State official in Arizona failed to contact voters to confirm address: Civil rights organizations filed a **lawsuit** after learning Secretary of State Michele Reagan failed to update addresses of over 500,000 registrations. U.S. District Judge James Teilborg **rejected** a request to send address update mailers to voters.

Voter ID law challenged in Missouri: Priorities USA filed a **lawsuit** in June 2018 against the state that challenged a voter ID law. The **judge struck down** part of the law that required voters without ID to sign a confusing affidavit and prohibited state officials from disseminating misleading identification information about the ID law.

In Arkansas, voter ID law in effect during the 2018 election: In 2017, Arkansas passed a new voter ID law. A voter filed a lawsuit claiming the law violated the state constitution, but the state Supreme Court allowed the law to go into place. Voters will have to **comply** with the identification **requirement** during the general election.

High voter registration form rejection rate in Tennessee: This October, the Tennessee Black Voter Project filed a **lawsuit** after 55 percent of registration applications from the organization's voter drive were identified as invalid. The organization believed the Shelby County Election Commission identified applications as incomplete for a variety of fairly minor reasons. An **initial** court ruling required county election officials give voters the opportunity to update any deficiencies in their application on Election Day. Following an appeal, the Tennessee Court of Appeals **ordered** voters whose applications were rejected must vote a provisional ballot and will not get the opportunity to update any deficiencies in their application on Election Day.

Computer glitch in Maryland impacted thousands of voters: The Maryland Motor Vehicle Administration **failed** to send changes voters made in their address and party affiliation to the state elections board due to a computer error. As a result, an estimated 80,000 voters were impacted by the computer glitch and had to cast provisional ballots in the June primary election. In response, state officials sent emails to a majority of those affected to ensure their registration was up-to-date.

Voter Challenges/Intimidation

Another form of voter suppression are voter challenges, which occur when an individual challenges another's registration status. In addition to this suppressive tactic, voters are at times subject to outright intimidation that can prevent them from safely casting their vote.

Reports of intimidating flyers in Wisconsin: Individuals in Milwaukee **reported** receiving flyers that stated Immigration and Customs Enforcement would be at polling locations. ICE proved these flyers contained **false information**: "ICE does not patrol or conduct enforcement at polling locations. Any flyers or advertisements claiming otherwise are false."

Challenges to registrations in Texas result in suspensions: County Tax Assessor-Collector Ann Harris Bennett prematurely **placed** 1,735 voters on a suspension list as a result of a challenge of 4,000 registrations in July. According to this **statement**, the Republican Party ballot security committee chairman "involved using Republicans he appoints to the Ballot Board to review provisional ballots resulting from suspended voting statuses." HarrisBennett claimed that the premature suspensions resulted from a computer glitch and that the problem has been fixed.

Extreme levels of voter intimidation in Texas: In Dallas County, voters have reported incidents of voter **intimidation**. At three polling sites, voters have been subjected to electioneering, **harassment**, and intimidation from individuals outside the polls. One election official stated this level of voter intimidation is rather extreme: "I've been here for 30 years, and this harassment that's going on, I haven't ever seen the likes of this."

Voter challenges leave some 'fearful' in Colorado: Earlier this year, voters subjected to **challenges** reported intense investigation efforts that left many in the community fearful. Although Secretary of State Suzanne Staiert has declared four individuals' registrations valid, she has **asked** the U.S. Attorney's office to investigate.

Candidate accused of voter intimidation in Hawaii: Voters in House District 30 filed a **lawsuit** in Hawaii Supreme Court against State Rep. Romy Cachola, who they claimed engaged in voter fraud, coercion, and intimidation during the primary election. On August 31, the Hawaii Supreme Court **dismissed** the case.

Polling Places

For in-person voting, it is essential that registered voters be able to access polling locations. However, poll closures and natural disasters at times make it difficult for voters to cast a ballot on Election Day.

Single polling place moved for a city in Kansas: In **Dodge City**, part of Ford County, Kansas, election officials have moved the one polling site in a city of 27,000 residents, a majority of whom are Hispanic, to outside the city limits and one mile away from the nearest bus stop. Civil rights organizations filed a **lawsuit** against the county in order to open another polling site in the city. This follows months of contact and letters between civil rights organizations and county officials. Ford County Clerk Debbie Cox forwarded one such message to Bryan Caskey, the Kansas Director of Elections, with a dismissive **message**, "This is what I got in the mail from ACLU. LOL." This lawsuit is currently pending. However, a **monitor** from the U.S. Attorney's office will observe the election. Recent **reports** from newly registered voters indicate county officials are sending official certificates that contain the incorrect polling address.

(Image: Craig Mitchelldyer/Getty)

RELATED ISSUES:

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Vote Suppression

ANALYSIS

When It Comes to Voter Suppression, Don't Forget About Alabama



A state with a long and troubling voting rights history deserves scrutiny.



Peter Dunphy

November 5, 2018

Georgia and **North Dakota** have gotten a lot of attention for vote suppression this season. But Alabama, a state with a long and troubling voting rights history, deserves scrutiny of its own.

Alabama was where African American citizens marching across the Edmund Pettus Bridge were brutalized, providing the final spark for the Voting Rights Act. It's also the home of Shelby County, which in 2013 brought down the landmark civil rights law's core provision in a lawsuit that made it to the Supreme Court.

That provision required Alabama to seek federal approval before instituting any voting-related change to make sure it was not discriminatory. While the law was in effect, the U.S. Department of Justice **blocked** more than 80 proposed voting changes in the state of Alabama.

It should not be surprising then that Alabama continues to be a hotbed of voting restrictions. Here are six ways that the state has erected voting barriers:

Strict voter ID law: Alabama passed a strict voter ID requirement in 2011, but it did not go into effect until 2014. In 2011, the state was still required under the Voting Rights Act to get federal approval before implementing any changes to its voting rules. State officials did not even submit the new ID law for federal review at that time, likely because the Department of Justice had previously blocked similar requirements five separate times, finding them discriminatory. Alabama officials only put the law into effect in 2013, right after the Supreme Court gutted the Voting Rights Act provision that was holding it up.

Under Alabama's new law, voters need to show one of a limited number of state-issued photo IDs to vote either at the polls or absentee. (The only exception is if two election officials at the polls positively identify you.) More than **100,000** Alabamians do not have IDs acceptable under this law, according to a lawsuit filed by the NAACP Legal Defense Fund.

For low-income and rural voters, it is especially difficult to overcome this obstacle. A 2012 Brennan Center for Justice **report** found that close to a quarter of eligible voters *both* live 10 miles from an ID-issuing office and do not own a car. Making matters worse, Alabama invests no public money in transportation and ranks 48th nationwide in intercity transit for rural residents.

The problem intensified in October 2015 when officials announced a plan to close 31 ID-issuing offices to save costs. **Research** by the Brennan Center at the time found that the move would have a strong disparate impact on the black community: ID-issuing offices would be closed in all six counties in which African Americans compose over 70 percent of the population, while 40 offices would remain open in the 55 Alabama counties in which whites compose over half the population. Facing mountain

public condemnation and an **intervention** by the U.S. Department of Transportation, Alabama scrapped the plan.

Documentary proof of citizenship: Alabama is one of only four states that has passed a law requiring individuals to produce documentary proof of citizenship when registering to vote. (In the rest of the country, a sworn statement suffices.) The law is currently not in effect because of an ongoing federal lawsuit that has partially **blocked** its implementation. But if the state is allowed to proceed with the requirement, it will burden tens of thousands of Alabama voters. In Kansas, which has implemented a similar requirement, tens of thousands of attempted registrants had their applications **denied**, totaling between 8 and 14 percent of all new registration applications, within the first year of its operation. (Almost all those applicants turned out to be eligible citizens.) Nationally, at least **7 percent** of the citizen voting-age population, around 13 million people, does not have ready access to citizenship documents.

Gerrymandering: Just 3 years ago, Alabama was **found** by the U.S. Supreme Court to have engaged in unacceptable racial gerrymandering when drawing its state legislative maps. Those discriminatory maps will not be in effect for this election, but it took almost the whole decade to change them. The groups who had challenged the maps complained that the state had packed African American voters into a small number of districts so as to dilute their voting power. (One way Alabama managed to so effectively gerrymander was through its innovative use of computer software to map racial communities to a tee; indeed, the state made **history** by becoming the first state to use the online mapping software GIS to gerrymander with extreme precision.)

Antiquated voter registration: According to the U.S. **Census Bureau**, Alabama is in the bottom third of states in voter registration rates, with only 69 percent of voting-age citizens registered to vote. Secretary of State John Merrill has **boasted** on multiple occasions that Alabama has record-breaking registration rates — even at one point **suggesting** a 99 percent registration rate — but that is not supported by the facts.

One reason for these low rates is that Alabama has lagged in modernizing its voter registration system. Unlike many other states, the state **lacks** automatic voter registration or even electronic voter registration at DMV offices, Election Day registration, or preregistration for 16- and 17-year-olds. (Alabama is also one of the shrinking number of states that still does not offer early voting, which is extremely popular in neighboring states Georgia, Tennessee, and Florida.) At the same time, the state has aggressively **purged** voters from its rolls, removing as many as 658,000 voters from registration lists since 2015, according to the secretary of state.

To be fair, the state has started moving into the digital age. In February 2016, Secretary of State John Merrill **made** Alabama the 32nd state to launch online voter registration. In the nine months between the launch and the November 2016 election, the state **received** 184,230 new voter registration applications through the online portal. Alabama also uses the Electronic Registration Information Center ("ERIC") to send mailings to eligible-but-unregistered voters, which the secretary of state's office credited with boosting registration.

Polling place closures: A 2016 **report** found that in a sampling of 18 Alabama counties, 12 had closed a combined 66 polling places since the *Shelby County* ruling. The alarming rate of poll closures often occur without notice or transparency.

Polling place closures are often clumped in communities of color. For example, In 2016, the city council of Daphne, a suburb of Mobile, **decided** to shrink the number of polling places in the town from five to two. The three polling places slated to be closed had historically been used by the African American residents of Daphne, while the sites predominantly used by the city's white residents remained unaffected.

Voting rights for those with former felony convictions: In 2017, Governor Kay Ivey signed a law that restored voting rights to many with previous felony convictions, affecting close to 60,000 Alabamians. Despite the gravity of the change, Secretary of State John Merrill reportedly **refused** to publicize the new policy or inform people who had been re-enfranchised, telling reporters, "I'm not going to spend state resources dedicated to notifying a small percentage of individuals." Merrill also said incorrectly that eligibility to register was dependent on paying off all outstanding fees and fines, though he later **clarified**. This combination of a lack of public education alongside misinformation contributed to the **faulty rollout** of the re-enfranchisement policy.

Despite these challenges, voters should not be deterred. Advocates, public officials, and campaigns have mobilized to protect the vote. If voters encounter problems, they can call 866-OUR-VOTE or go to 866OURVOTE.ORG to get help from Election Protection, a nonpartisan voter hotline. If you are an eligible citizen, you have the right to vote!

(Image: Mario Tama/Getty)

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Thwarting Amendment 4

New analysis shows that Florida legislation will disproportionately affect African Americans

By Kevin Morris PUBLISHED MAY 9 2019

Summary

Just months after Floridians approved an amendment to their state's constitution to restore voting rights to 1.4 million people with felony convictions, the Legislature has passed a bill that weakens the impact of the ballot measure by limiting who is eligible to vote. Amendment Four was approved by 65 percent of voters in November and enjoyed broad bipartisan support. And it was working. The analysis below demonstrates that:

- Nearly 100 times more formerly incarcerated Floridians registered in the first three months of 2019 than in previous odd years.
- Of the formerly incarcerated Floridians who registered to vote between January and March of this year, more than 44 percent identified themselves in their voter registration forms as Black, whereas Black voters comprise 13 percent of Florida's overall voter population.
- The average income of the formerly incarcerated Floridians who registered to vote between January and March is nearly $15,000 below that of the average Florida voter.

There can be no mistaking the racial and class implications of this regressive new legislation.

Background

Florida's longstanding policy of permanent disenfranchisement had enormous implications for racial and economic justice in one of the largest states in the country. More than four in ten individuals released from prison over the past few years were Black, and people who live in minority and low-income communities are vastly overrepresented among those caught up in the criminal justice system. Amendment 4 promised to address this.

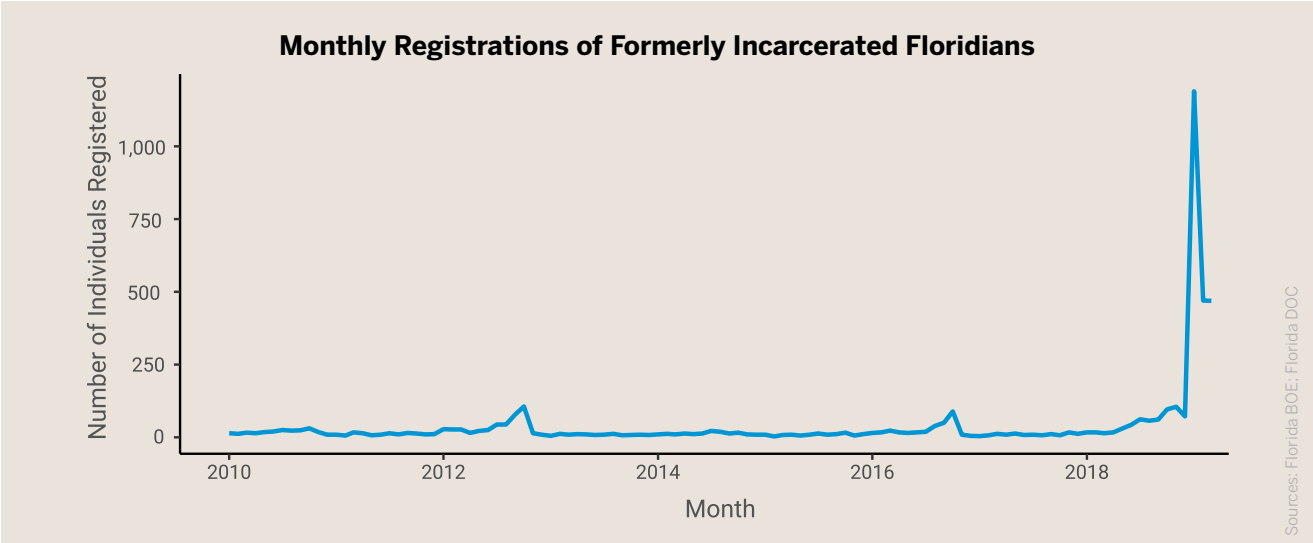
But on May 3, lawmakers passed a bill requiring Floridians to pay back all fees, fines, and restitution imposed as part of a sentence for a felony conviction – even those that a judge has converted to civil obligations – before they can register to vote. For some, these outstanding balances run to tens of thousands of dollars, thus making it virtually impossible for these individuals to register.

Analysis

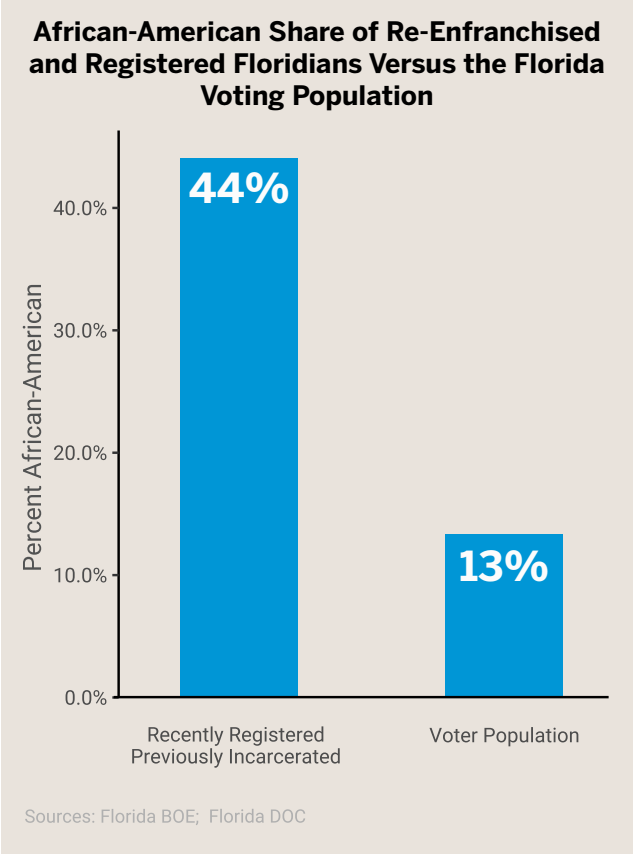
By looking at voter registration data since Amendment 4 went into effect, we can see that Black and low-income returning citizens are dramatically impacted by this new legislation. Using data from Florida's Department of Corrections and the Board of Elections, we are able to identify Floridians who have come home from prison and registered to vote. To be clear, this analysis includes only a slice of the population enfranchised by Amendment 4: those individuals released from prison since 1992. Our analysis does not include individuals who were sentenced to felony probation (because Florida does not maintain statewide data for this population), though many Floridians sentenced to probation likely also registered to vote during the first quarter of 2019. Nonetheless, this data provides an early indication as to the racial and income-level impact that Florida's new legislation will have.

Before this year, Floridians convicted of felonies had to receive individual pardons from the government in order to register to vote. Very few of these pardons were granted. Between January 2011 and April 2018, just 3,000 individuals received them. Unsurprisingly, very few formerly incarcerated Floridians registered to vote between 2010 and 2018 — on average, fewer than 250 per year during that nine-year period.

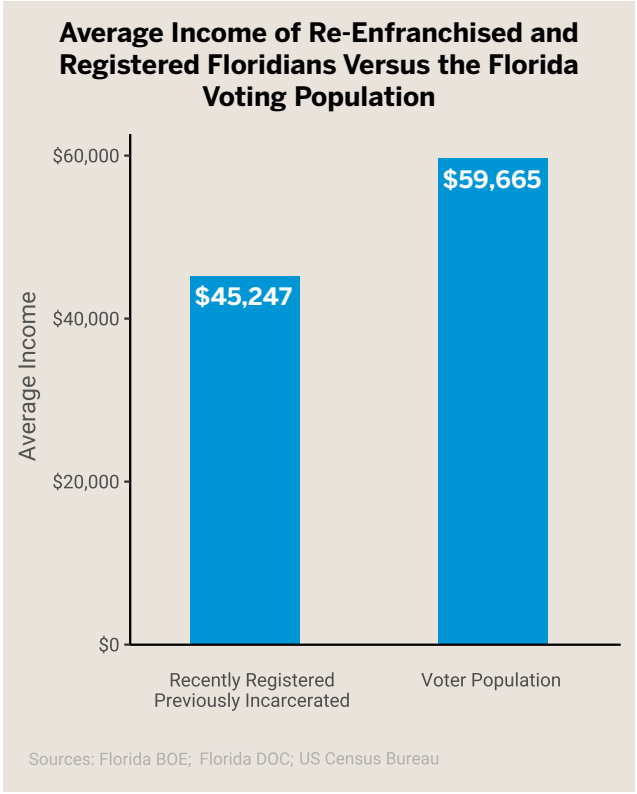
Amendment 4 went into effect on January 8, 2019, re-enfranchising most Floridians who had completed all the terms of their sentence. Many re-entry groups in Florida took advantage of the policy change and immediately launched voter registration drives. As the chart below makes clear, these drives were tremendously successful: In January, February, and March – months in which voter registrations are usually very low – more than 2,000 formerly incarcerated Floridians registered to vote. That's roughly ten times the *annual* average number of registrations for returning citizens in the preceding nine years and 99 times the average for the first three months in 2017 and 2015 (recent years without a general election).



Using information in the state voter file, we know not just how many individuals registered but also some of their demographics. Of the formerly incarcerated Floridians who registered to vote between January and March, more than 44 percent self-identified as Black. By contrast, just 13 percent of all Floridians registered to vote are Black.



Using census data, we can also estimate the socioeconomic characteristics of the electorate.[1] We found that formerly incarcerated Floridians who registered to vote in the first quarter of 2019 tended to be much lower income, have less college education, and come from neighborhoods with higher unemployment than the rest of the state's voters. In fact, the average income for a formerly incarcerated, newly registered Floridian is nearly $15,000 below the statewide average.



The impacts of the criminal justice system fall heavily on lower-income and minority communities. Felony disenfranchisement policies, by extension, disproportionally strip these communities of their political power.

1 We used census block group data as a proxy for individual-level data, a common method in the social sciences when individual-level data is unavailable. In this analysis, we assume that each registrant's income is equal to the median income of their census block group. It is important to note that this likely *understates* the income discrepancy between recently re-enfranchised individuals and the rest of the electorate. Individuals who have been to prison likely have lower incomes than those of their neighbors, which means that median block group numbers systematically overestimate income for returning citizens.

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ANALYSIS

Voter Purge Rates Remain High, Analysis Finds

New data reveal that counties with a history of voter discrimination have continued purging people from the rolls at elevated rates.





Kevin Morris

LAST UPDATED: August 21, 2019
PUBLISHED: August 1, 2019

Using data released by the federal Election Assistance Commission (EAC) in June, a new Brennan Center analysis has found that between 2016 and 2018, counties with a history of voter discrimination have continued purging people from the rolls at much higher rates than other counties.

This phenomenon began after the Supreme Court's 2013 ruling in *Shelby County v. Holder*, a decision that severely weakened the protections of the Voting Rights Act of 1965. The Brennan Center first identified this troubling voter purge trend in a **major report** released in July 2018.

Before the *Shelby County* decision, Section 5 of the Voting Rights Act required jurisdictions with a history of discrimination to submit proposed changes in voting procedures to the Department of Justice or a federal court for approval, a process known as "preclearance."

After analyzing the 2019 EAC data, we found:

- At least 17 million voters were purged nationwide between 2016 and 2018, similar to the number we saw between 2014 and 2016, but considerably higher than we saw between 2006 and 2008;
- The median purge rate over the 2016–2018 period in jurisdictions previously subject to preclearance was 40 percent higher than the purge rate in jurisdictions that were not covered by Section 5 of the Voting Rights Act;
- If purge rates in the counties that were covered by Section 5 were the same as the rates in non-Section 5 counties, as many as 1.1 million fewer individuals would have been removed from voter rolls between 2016 and 2018

To be clear, we report the total numbers of voters removed by a county for any reason. Election officials purge voters they believe are ineligible for a variety of reasons, including death and moving outside the jurisdiction. This analysis does not assess how many voters were improperly purged.

Methodology

Every two years, the EAC administers a survey to election officials around the country known as the Election Administration and Voting Survey (EAVS). The survey includes a host of questions about the state of voter registration in the jurisdiction and the experience of the most recent federal election. Jurisdictions are requested to report on information including how many new registrations occurred between the federal elections, the number of ballots cast on election day, and the number of polling sites that were open on election day. The jurisdictions are also asked to report how many voters were removed from the registration rolls — or "purged" — over the two-year period that preceded the most recent federal election. These data formed the backbone of our statistical analysis in last year's report, and we use them again here.

All election jurisdictions in the country are asked to respond to the EAVS survey every two years, but in 2018, some in Alabama and Texas did not report their purge numbers. Although this makes the data less than ideal, the EAC survey remains the best source for nationwide information on voter purges.

We calculate purge rates as the number of voters removed between 2016 and 2018 divided by the sum of total voters registered as of the 2018 election and the number removed. In other words,

$$Purge\ Rate = \frac{Number\ Purged}{Number\ Purged + Total\ Number\ Registered\ in\ 2018}$$

As with our report last year, we report the median purge rate when discussing aggregate purge rates. We use the median because of the nature of the data: using the *mean* purge rate would leave our analysis more susceptible to outliers.

Why Purges Can Be Problematic

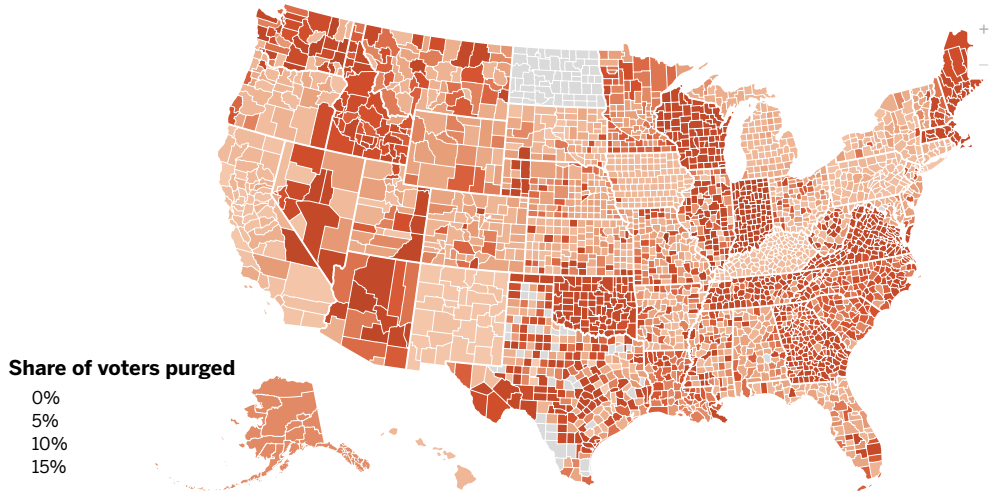
To be sure, there are many good reasons for a voter to be purged. For instance, if a voter moves from Georgia to New York, they are no longer eligible to cast a ballot in the Peach State. As such, they should be removed from Georgia's voter rolls. Similarly, voters who have passed away should be removed from the rolls. Reasonable voter list maintenance ensures voter rolls remain up to date.

Problems arise when states remove voters who are still eligible to vote. States rely on faulty data that purport to show that a voter has moved to another state. Oftentimes, these data get people mixed up. In big states like California and Texas, multiple individuals can have the same name and date of birth, making it hard to be sure that the right voter is being purged when perfect data are unavailable. Troublingly, minority voters are more likely to share names than white voters, potentially exposing them to a greater risk of being purged. Voters often do not realize they have been purged until they try to cast a ballot on Election Day — after it's already too late. If those voters live in a state without election day registration, they are often prevented from participating in that election.

Approximately 17 Million Purged Between 2016 and 2018

The map below shows the purge rates for the counties that reported their information to the EAC. Some counties did not report their information. Because North Dakota does not have voter registration, it does not have a voter purge rate. Therefore, the state is grayed out below to mirror the non-reporting jurisdictions in Texas and Alabama.

Purge Rate, 2016–18



Notes:
Data in the following states are aggregated here to the county-level but are reported at the sub-county level: CT, MA, ME, NH, RI, VT, and WI
North Dakota does not have voter registration.

Source: EAVS

In our report last year, we noted that 16 million voters were purged between the federal elections of 2014 and 2016, and that this was almost 4 million more names purged from the rolls than between 2006 and 2008.

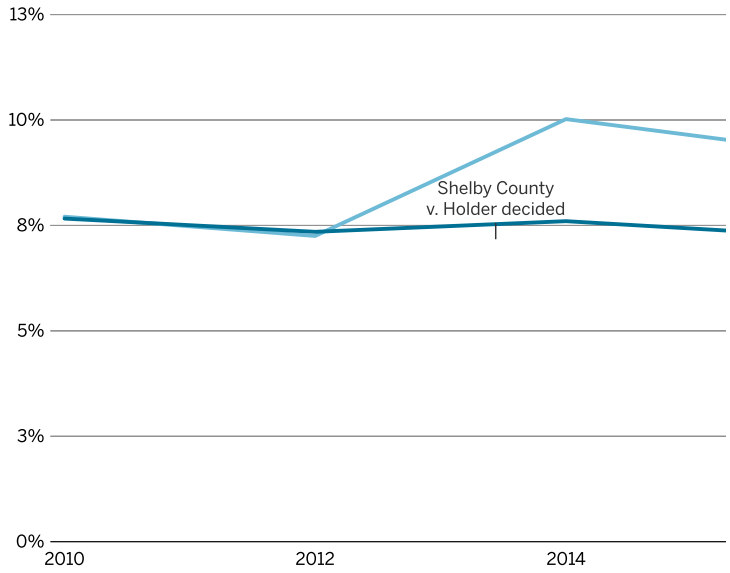
The latest data from the EAC shows that between the presidential election in 2016 and the 2018 midterms, more than 17 million voters were purged. While this number is higher than what we reported last year, it is likely due to the fact that more jurisdictions reported their data in 2018, pushing the reported total higher. As the figure below demonstrates, the median purge rate among counties that consistently report their data has remained largely the same.

Purge Rates in Section 5 Jurisdictions Continue to Be Higher

Prior to *Shelby County,* jurisdictions covered under Section 5 of the Voting Rights Act collectively had purge rates right in line with the rest of the country. A major finding in last year's report was that jurisdictions that used to have federal oversight over their election practices began to purge more voters after they no longer had to pre-clear proposed election changes. The 2016–2018 EAC data shows a slightly wider gap in purge rates between the formerly covered jurisdictions and the rest of the country than existed between 2014 and 2016.

This is of particular interest because this continued — and even widening — gap debunks possible claims that certain states would experience a one-time jump when free of federal oversight, but then return to rates in line with the rest of the country. They haven't.

Purge Rates, 2008–18



Note: Shows data for counties reporting in each period.

Source: EAVS

The median purge rate across the country in counties that were never covered by Section 5 of the Voting Rights Act decreased slightly between 2016 and 2018. In contrast, the purge rates ticked up in parts of the country that were covered at the time of the *Shelby County* decision. We found sustained higher purge rates in parts of the country that have a demonstrated history of discrimination in voting. If these formerly covered jurisdictions that reported their data each year had purged voters at rates consistent with the rest of the country — which they did before the *Shelby County* decision — they would have purged 1.1 million fewer voters between 2016 and 2018. In our report last year, we noted that *Shelby County* was likely responsible for the purge of 2 million voters over four years in these counties. The effect of the Supreme Court's 2013 decision has not abated.

Next Steps

As the country prepares for the 2020 election, election administrators should take steps to ensure that every eligible American can cast a ballot next November. Election administrators must be transparent about how they are deciding what names to remove from the rolls. They must be diligent in their efforts to avoid erroneously purging voters. And they should push for reforms like automatic voter registration and election day registration, which keep voters' registration records up to date.

Election day is often too late to discover that a person has been wrongfully purged.

Editor's note: *An earlier version of this analysis reported aggregated statewide purge rates. We have since learned that at least one state self-reported the data in a way that complicates a statewide aggregation. As such, we are no longer reporting any statewide numbers. That does not change the number of people the counties self-reported as removing.*

(Image: Alex Wong/Getty)

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Lawmakers Are Targeting the Courts that Could Shoot Down Voter Suppression Laws

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New Voting Restrictions in America

After the 2010 election, state lawmakers nationwide started introducing hundreds of harsh measures making it harder to vote. The new laws range from strict photo ID requirements to early voting cutbacks to registration restrictions.

Overall, 25 states have put in place new restrictions since then — 15 states have more restrictive voter ID laws in place (including six states with strict photo ID requirements), 12 have laws making it harder for citizens to register (and stay registered), ten made it more difficult to vote early or absentee, and three took action to make it harder to restore voting rights for people with past criminal convictions.

In 2016, 14 states had new voting restrictions in place for the first time in a presidential election. Those 14 states were: Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.

In 2017, legislatures in Arkansas and in North Dakota passed voter ID bills, which governors in each state signed, and Missouri implemented a restrictive law that was passed by ballot initiative in 2016. (Texas also passed a new voter ID law, though its earlier strict voter ID law was partially in effect in 2016.) Georgia, Iowa, Indiana, and New Hampshire also enacted restrictions last year, in addition to laws that were on the books for previous elections

In 2018, Arkansas, Indiana, Montana, New Hampshire, North Carolina, and Wisconsin enacted new restrictions.

In 2019, Arizona, Florida, Indiana, Tennessee, and Texas have enacted new restrictions.

This page details the new restrictive voting requirements put in place over the last several years.

Click here for an interactive version of this page.

Updated as of November 18, 2019.

Alabama

New restriction(s) in place in the first time in 2016: Photo ID required to vote.

Click here to see the types of ID required under Alabama's law.

Background: Passed in 2011 by a Republican-controlled legislature and signed by a GOP governor, the photo ID law initially required pre-clearance under Section 5 of the Voting Rights Act. But the measure was allowed to go into effect after the U.S. Supreme Court gutted that provision in 2013.

Alabama also passed a law in 2011 requiring voters to provide documentary proof of citizenship when registering to vote. That requirement had been on hold, but in January 2016, the Election Assistance Commission's Executive Director announced that documentary proof of citizenship would be added to the national voter registration form instructions for Alabama. A federal appeals court blocked the registration requirement on September 9, 2016. It is subject to ongoing litigation.

Arizona

New restrictions enacted in 2019: Restrictions on access to emergency early and absentee voting and extension of voter ID requirements to early voting.

New restriction(s) in place for the first time in 2016: Limitations on mail-in ballot collection.

Background: In 2016, a Republican-controlled legislature passed a bill limiting collection of mail-in ballots and making it a felony to knowingly collect and turn in another voter's completed ballot, even with that voter's permission (the law has exceptions for direct family members, caregivers, and postal-service employees). Gov. Doug Ducey (R) signed the bill, which went into effect in the summer of 2016.

Other restrictions in play: In 2004, voters approved a referendum requiring documentary proof of citizenship to register to vote. In June 2013, the U.S. Supreme Court invalidated this measure as it applied to the federal voter registration form. And in 2018, as part of the settlement of a lawsuit, the state agreed to register applicants to vote in federal elections, without documentary proof of citizenship, regardless of whether the state or federal form was used.

Arkansas

New restriction enacted in 2018: Arkansas voters enacted a constitutional amendment, via ballot initiative, that enshrined a photo ID requirement for voting in the state constitution.

New restriction(s) in place in 2018: Requires that voters show one of a limited set of IDs.

Click here to see the types of ID required under Arkansas's law.

Background: Passed in 2017 by a GOP-controlled state legislature.

Florida

New restrictions enacted in 2019: Cut back on the expansive changes made by Amendment 4 – a constitutional amendment that restores voting rights to many Floridians with a felony conviction and that was passed overwhelmingly by Florida voters in November 2018. A federal

district court, however, has issued a partial preliminary injunction against the cutback, ruling that it is unconstitutional for Florida to condition the restoration of voting rights on legal financial obligations that a returning citizen cannot afford to pay. (For additional information, click here.)

Restriction(s) in place for the first time in 2012: Cut early voting, curbed voter registration drives, and made it harder to restore voting rights to people with past criminal convictions.

Original effective date: 2011

Background: In 2011, Florida's Republican-controlled legislature passed a series of laws, signed by Gov. Rick Scott (R), making it harder to vote. First, lawmakers reduced the early voting period, which contributed to long lines in the 2012 election. The legislature responded in 2013 by restoring some of the early voting days, but there are still fewer early balloting opportunities today than before the 2011 cutbacks. Second, Florida passed new restrictions on voter registration drives. With the help of the Brennan Center, the most onerous aspects of this law were enjoined by a federal court in August 2012. Finally, Gov. Scott reversed a prior executive action that had made it easier to restore voting rights to people with past criminal convictions.

Georgia

New restriction(s) in place for the first time in 2018: The state legislature passed and the governor signed a bill that would make voter registration more difficult. It imposes a requirement that voter registration forms match exactly with other state records — a burdensome process known as "no match, no vote." In 2019, however, Georgia enacted HB 316, which largely ended the "no match, no vote" policy.

Restriction(s) in place for the first time in 2012: Reduced early voting period from 45 to 21 days and cut early voting the weekend before Election Day.

Background: In 2009, a Republican-controlled legislature passed a law requiring voters to provide documentary proof of citizenship when registering to vote. That requirement had been on hold, but in January 2016, the Election Assistance Commission's Executive Director announced that that documentary proof of citizenship would be added to the national voter registration form instructions. A federal appeals court blocked the registration requirement on September 9, 2016. It is subject to ongoing litigation. In 2011, a Republican-controlled legislature also reduced early voting. Both laws were signed by a GOP governor.

Illinois

Restriction(s) in place for the first time in 2012: Curbed voter registration drives.

Original effective date: 2011

Background: Passed in 2011 by a Democratic-controlled legislature and signed by a Democratic governor, the measure changed the allotted time for returning voter registration forms. The previous law allowed seven days to return the forms. The amended law requires completed registration materials to be returned by first-class mail within two business days, or by personal delivery within seven days. This rule is not nearly as harmful as others, like one in Texas, because the reduction does not apply to groups only using the national mail-in voter registration form.

Indiana

New restrictions enacted in 2019: Cut deadline for submitting an absentee ballot application for most voters from eight days to 12 days prior to the election and restricted state court lawsuits to extend polling place hours.

New restriction enacted in 2017 and 2018: In 2017, the state enacted a law to implement a flawed voter purge process. The law provides for use of the error-prone Crosscheck Program to remove voters without the notice and waiting period required by the National Voter Registration Act. (The law was amended in 2018, but the state failed to fix the law's failure to require notice to voters prior to purging them as mandated by federal law.) Civil rights groups sued the Secretary of State over the law in August 2017, and a court entered a preliminary injunction against the state in June 2018, meaning the law is currently not in effect. In 2019, the Seventh Circuit affirmed the preliminary injunction.

New restriction(s) in place for the first time in 2016: Allows additional party-nominated election officers to demand voters provide proof of identification.*

Background: Passed in 2013 by a Republican-controlled state legislature and signed by a GOP governor.

* This law subjects voters to an additional and duplicative voter identification requirement that did not exist before the law was enacted. If, however, precinct election officials always enforce the voter ID requirement in a uniform manner, this law may not have a restrictive effect.

Iowa

New restrictions (partially) in place in 2018: Iowa's governor signed a broad-based law that will require voter ID (starting after the 2018 election), restrict voter registration efforts, and impose new burdens on Election Day registration and early and absentee voting. Although not as restrictive as a North Carolina law that passed in 2013 (and was blocked by a federal court), Iowa's law similarly restricts voting in a number of different ways.

In 2019, following a trial, an Iowa state court largely upheld the law, but struck down its absentee ballot signature-matching provisions and modified other provisions related to voter ID and absentee voting. (For additional information, click here.)

Restriction(s) in place for the first time in 2012: Made it harder to restore voting rights to people with past criminal convictions.

Original effective date: 2011

Background: In 2011, Gov. Terry Branstad (R) reversed a prior executive action that had made it easier to restore voting rights to people with past criminal convictions. In effect, the state now permanently disenfranchises most citizens with past felony convictions.

Kansas

Update since 2016: In 2018, a federal district court struck down the state's documentary proof of citizenship law. That decision is on appeal.

New restriction(s) in place for the first time in 2016: Documentary proof of citizenship required to register using the state registration form. But, by court order, certain individuals who registered without showing documentary proof must be permitted to vote.

Restriction(s) in place for the first time in 2012: Photo ID required to vote.

Click here to see the types of ID required under Kansas's law.

Background: The documentary proof of citizenship requirement has been the subject of multiple lawsuits. A 2014 federal court ruling had found the requirement unenforceable on the federal mail-in voter registration form. But in January 2016, the Election Assistance Commission's Executive Director announced that documentary proof of citizenship would be added to the national voter registration form instructions for Kansas, as well as Alabama and Georgia. A federal appeals court blocked the registration requirement for the national from on September 9, 2016. That action is the subject of an ongoing lawsuit.

A Republican-controlled legislature passed both the photo ID and documentary proof of citizenship requirements in 2011, and they were signed by a GOP governor.

Mississippi

New restriction(s) in place for the first time in 2016: Photo ID required to vote.

Click here to see the types of ID required under Mississippi's law.

Background: Passed in 2011 by a voter referendum, the ID law initially required preclearance under Section 5 of the Voting Rights Act. But the measure was allowed to go into effect after the U.S. Supreme Court gutted that provision in 2013.

Missouri

New restriction (partially) in place in 2018: Missouri passed a new law that requires photo ID in order to vote, but permits voters to vote a regular ballot by presenting non-photo ID and signing an affidavit indicating that they do not possess photo ID. The voter ID requirement was challenged in federal court and was altered in part in October 2018: the court prohibited the state from requiring otherwise-qualified voters that lacked photo ID to execute the affidavit required by statute in order to vote.

Background: Passed by ballot initiative in 2016

Montana

New restriction enacted in 2018: Montana voters enacted a new law, via ballot initiative, that will prevent civic groups and individuals (with certain exceptions) from helping others vote absentee by collecting and delivering their voted ballots.

Nebraska

New restriction(s) in place for the first time in 2016: Reduced early voting period.

Background: In 2013, state lawmakers reduced the early voting period from a minimum of 35 days to no more than 30 days. Nebraska's unicameral legislature is technically nonpartisan, but generally is controlled by Republicans. The measure was signed by a GOP governor.

New Hampshire

New restriction (partially) in place in 2018: In 2017, the state enacted a law that would make it more difficult for students and others to register to vote, but that law was partially enjoined prior to the 2018 election. In 2018, the state enacted another law that would make it more difficult for students and others to vote, but it takes effect in 2019.

New restriction(s) in place for the first time in 2016: Photo ID requested to vote. The law requires voters without acceptable ID to get photographed at the polls, and the photograph will be affixed to an affidavit.

Click here to see the types of ID requested under New Hampshire's law.

Background: Passed in 2012, a Republican-controlled legislature overrode a veto from Gov. John Lynch (D) to enact the voter ID law. The state previously required no form of ID to vote. Prior to September 2015, the law included an affidavit alternative.

North Carolina

New restriction enacted in 2018: North Carolina voters enacted a constitutional amendment, via ballot initiative, that enshrined a photo ID requirement for voting in the state constitution. The state legislature subsequently enacted implementing legislation, over the governor's veto.

New restriction (partially) in place in 2018: In 2018, the state enacted a law that requires uniform hours at early voting sites. The law has had the effect of reducing the number of early voting locations available to voters. (The law also cut the last Saturday of early voting before the election, but that provision was not in effect for the 2018 election and, in 2019, the state reinstated the last Saturday of early voting.)

North Dakota

New restriction (partially) in place in 2018: The state's governor signed a bill on April 25, 2017 that would restore a strict voter ID requirement in the state. That law was challenged in federal court, and it will be altered in part for the 2018 election. Specifically, the federal district court required the state to accept certain tribal identification not included in the law as voting ID.

Click here to see the types of ID required under North Dakota's law.

Background: Passed in 2017 by a Republican-controlled state legislature and signed by a GOP governor.

In 2016, a federal court partially blocked a previous ID law that accepted a narrow range of identification documents and did not provide any meaningful voting opportunities for voters without the accepted ID. The new law slightly expands options to use for ID, but eliminates the process the court imposed, which allowed voters without IDs to cast a ballot that counts on Election Day, and instead included a more burdensome process.

Ohio

New restriction(s) in place for the first time in 2016: Cut early voting and changed absentee and provisional ballot rules.

Background: In 2014, lawmakers cut six days of early voting — eliminating "Golden Week," during which voters could register and cast a ballot all in one trip — and changed absentee and provisional ballot rules.

In 2014, Secretary of State Jon Husted (R) also issued a directive reducing early voting on weekday evenings and weekends. In 2015, state officials and voting rights advocates settled a separate ongoing lawsuit over the early voting hours, which restored one day of Sunday voting and added early voting hours on weekday evenings. The settlement is in place through 2018.

A Republican-controlled state legislature passed the series of voting restrictions, which were signed by a GOP governor.

Rhode Island

New restriction(s) in place for the first time in 2016: Photo ID requested to vote. There is an affidavit alternative for voters without a photo ID.

Click here to see the types of ID requested under Rhode Island's law.

Background: Passed through a Democratic-controlled legislature and signed by an independent governor in 2011, the measure is significantly less restrictive than other ID laws because it accepts a broad range of IDs with a voter's name and photograph. A previous version of the law allowed non-photo IDs.

South Carolina

New restriction(s) in place for the first time in 2016: Photo ID required if a voter has one, but an alternative is available for those who have a reasonable impediment to obtaining ID.

Click here to see the types of ID required under South Carolina's law.

Background: The law was passed in 2011 by a Republican-controlled state legislature and signed by a GOP governor, but it was put on hold by a federal court until after the 2012 election. During the course of that litigation, the state interpreted the law in a way that makes it less restrictive than other ID requirements. A voter with a reasonable impediment or obstacle to obtaining one of the accepted photo IDs can sign an affidavit at the polls and then vote a provisional ballot.

South Dakota

Restriction(s) in place for the first time in 2012: Made it harder to restore voting rights to people with past criminal convictions.

Background: Passed in 2012 by a Republican-controlled legislature and signed by a GOP governor.

Tennessee

New restrictions enacted in 2019: Restrictions on third-party voter registration. A federal court, however, has temporarily halted those restrictions from going into place, pending a trial.

New restriction(s) in place for the first time in 2016: Photo ID required to vote.

Click here to see the types of ID required under Tennessee's law.

Restriction(s) in place for the first time in 2012 : Reduced early voting period and proof of citizenship required to register.

Background: In 2011, a Republican-controlled legislature passed the three voting restrictions, which were signed by a GOP governor. Tennessee's proof of citizenship requirement applies only to individuals flagged by state officials as potential non-citizens based on a database check. In 2013, lawmakers made the photo ID law, which was in place for the 2012 election, even more restrictive by limiting acceptable IDs to those issued by the state or federal government.

Texas

New restriction enacted in 2019: Cut back use of mobile early voting sites.

New restriction in place since 2016 election: Photo ID required if a voter has one, but an alternative will be available for those who present a non-photo ID from a preset list and execute an affidavit claiming to have certain, enumerated reasonable impediments to obtaining photo ID. Reasonable impediment alternative is more restrictive than the alternative in place in 2016.

Click here to see the types of ID required under Texas's law.

New restriction(s) in place for the first time in 2016: Photo ID required if a voter has one, but an alternative will be available for those who have a reasonable impediment to obtaining ID.

Restriction(s) in place for the first time in 2012: Curbed voter registration drives.

Background: In 2012, a federal court blocked the 2011 photo ID law under Section 5 of the Voting Rights Act. The state then implemented the requirement after the U.S. Supreme Court gutted Section 5 in 2013, and a photo ID was required to vote for the first time in a federal election in 2014.

In July 2016, the full Fifth Circuit Court of Appeals ruled that the strict photo ID law discriminates against minority voters, and therefore cannot be enforced against those who lack ID. In August 2016, a federal court approved an agreement that will allow voters with an obstacle to obtaining photo ID to cast a regular ballot in November 2016 after showing one of a much larger number of IDs and signing a declaration. In June 2017, in response to the litigation, Texas enacted a new voter ID law that is currently in place.

A Republican-controlled legislature passed the restriction on voter registration drives and the strict photo ID law in 2011, and both were signed by a GOP governor.

Virginia

New restriction(s) in place for the first time in 2016: Photo ID required to vote and limits on third-party voter registration.

Click here to see the types of ID required under Virginia's law.

Background: The restriction on third-party voter registration requires groups receiving 25 or more registration forms to register with the state and reduces the amount of time from 15 to 10 days to deliver the applications. The state Senate was evenly divided among Democrats and Republicans when the photo ID law was enacted, but the GOP lieutenant governor cast the tie-

breaking vote on the photo ID law. The state House was controlled by Republicans. Both measures were signed by a GOP governor in 2013.

In 2015, a Republican-controlled legislature passed a bill to amend the photo ID law to add student IDs issued by private schools to the list of acceptable IDs (the law currently allows public school IDs). The bill was signed by a Democratic governor and takes effect in 2016.

West Virginia

Restriction(s) in place for the first time in 2012: Reduced early voting period from 17 to 10 days.

Original effective date: 2011

Background: Passed in 2011 by a Democratic-controlled state legislature and signed by a Democratic governor.

Wisconsin

New restrictions enacted in 2018: In 2018, the state passed a law limiting the early voting period and codifying certain administrative practices related to voter IDs—despite a Court order halting the state's 2011 and 2014 attempts to limit early voting. A federal district court has blocked these new provisions, however.

New restriction(s) in place for the first time in 2016: Photo ID required to vote.

Click here to see the types of ID required under Wisconsin's law.

Background: In 2011, state lawmakers passed a restriction on individual voter registration and a law requiring photo ID to vote.

In 2014, the legislature also reduced early voting hours on weekdays and eliminated them entirely on weekends. These cuts were in effect for the first time in 2014. They are currently on hold after a July 2016 trial court decision finding the restrictions were intentionally racially discriminatory. That decision also ruled voters could obtain a free photo ID by showing up at a state DMV office.

Read more on the ongoing litigation over the photo ID and early voting restrictions, which were passed by a Republican-controlled legislature in 2011 and 2014, and signed by a GOP governor a restriction on individual voter registration and a law requiring photo ID to vote.

Other Notable Voting Law Changes

- **Arkansas** – A Republican-controlled legislature passed a photo ID law in 2013, overriding a veto from Gov. Mike Beebe (D). On October 15, 2014, the Arkansas Supreme Court unanimously struck down the photo ID requirement, ruling it violated the state constitution by imposing an additional "qualification" to voting.

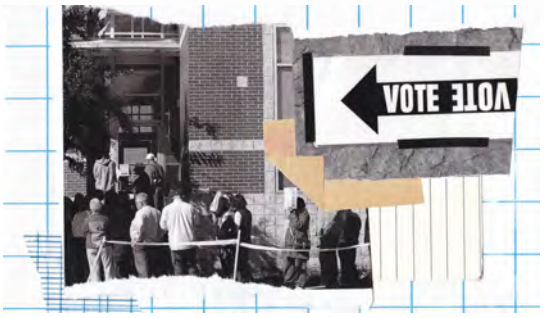
- **Montana** – A Republican-controlled legislature approved a referendum measure to repeal Election Day registration, which voters rejected in November 2014. Gov. Steve Bullock (D) had vetoed a previous effort to repeal Election Day registration.

- **North Carolina** – A Republican-controlled state legislature passed a series of voting restrictions in 2013, which were signed by a GOP governor. Lawmakers eliminated same-day registration, reduced the early voting period, ended pre-registration for 16- and 17-year-olds, and instituted a strict photo ID requirement, among a number of other restrictive changes. The measures were in effect for the first time in 2014 (except for the ID requirement, which was slated to go into effect in 2016). In June 2015, lawmakers softened the photo ID requirement, creating an option for voters to attest to a reasonable impediment to obtaining an ID, and vote a provisional ballot that will be counted unless there is a problem with the attestation. In July 2016, the Fourth Circuit Court of Appeals struck down the state's voting restrictions, ruling that they were passed with racially discriminatory intent. It also ruled that the "reasonable impediment" exception was not a sufficient remedy for the ID law's harm.

EXPERT BRIEF

The New Voter Suppression

Over the last decade, states have enacted voter restrictions that disproportionately disenfranchise racial minorities and distort our democracy.



Emily Haasch



Theodore R. Johnson Max Feldman

PUBLISHED: January 16, 2020



Ensure Every American Can Vote

Vote Suppression

On Election Day in 1960, four unanswerable questions awaited Clarence Gaskins, a Black voter in Georgia looking to cast his ballot for president. Upon arrival at his designated polling place, he was ushered into a room that held a jar of corn, a cucumber, a watermelon, and a bar of soap. He was informed that in order to vote, he first had to answer the following correctly:

"How many kernels of corn are in the jar? How many bumps on the cucumber? How many seeds in the watermelon? And how many bubbles in the bar of soap?"

Clarence didn't bother guessing once the polling official admitted there were no right answers. His vote was neither cast nor counted.

The connection between race and voter suppression did not end in the 1960s. While the overtly racist voter suppression tactics of the Jim Crow past are no longer with us, voter suppression remains a mainstay of electoral politics in the United States today.

Erecting New Barriers to the Ballot Box

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.

Take strict voter ID.

These laws require voters to present a government-issued photo ID in order to vote, and they offer no meaningful fallback options for people who do not possess one of these IDs. Like their Jim Crow predecessors, strict voter ID laws are often defended by reference to a racially neutral need to defend the "integrity" of elections. Specifically, defenders claim that voter ID laws are needed to combat voter impersonation fraud. But **study** after **study** has shown that voter impersonation fraud is vanishingly rare.

Many also claim that these laws impose little burden because everyone has the requisite ID — but the reality is that millions of Americans don't, and they are disproportionately people of color.

Voting-Age Citizens in U.S. Without Current Government-Issued Photo ID



Look at North Dakota: a federal district court found that, when the state enacted its current ID law in 2017, 19 percent of Native Americans lacked qualifying ID compared to less than 12 percent of other potential voters.

North Dakota Voters Without a Qualifying Voter ID



Source: Brakebill v. Jaeger

Likewise, Texas permits voters to use a handgun license to vote, but not a student ID from a state university. More than 80 percent of handgun licenses **issued** to Texans in 2018 went to white Texans, while **more than half** of the students in the University of Texas system are racial or ethnic minorities.

Strict voter ID is just one of a number of racially charged voting restrictions that states have adopted this decade. For example, following the election and reelection of President Obama — and the **concomitant surge in turnout** by Black voters — states like North Carolina imposed new restrictions on early voting, which was disproportionately used by people of color.

Percentage of Early Voters in 2012 North Carolina Elections



Source: N. Carolina State Conference of the NAACP v. McCrory

Other states imposed new restrictions on the voter registration process. In 2019, for example, Tennessee imposed new hurdles for third-party voter registration drives in response to a "**large-scale effort to register black voters**" ahead of the 2018 election.

In 2017, Georgia enacted an "exact match" law mandating that voters' names on registration records must **perfectly match** their names on approved forms of identification. In the leadup to the 2018 election, approximately 80 percent of Georgia voters whose registrations were blocked by this law were people of color. (A **lawsuit** forced the state to largely end the policy in 2019.)

FACT

80%

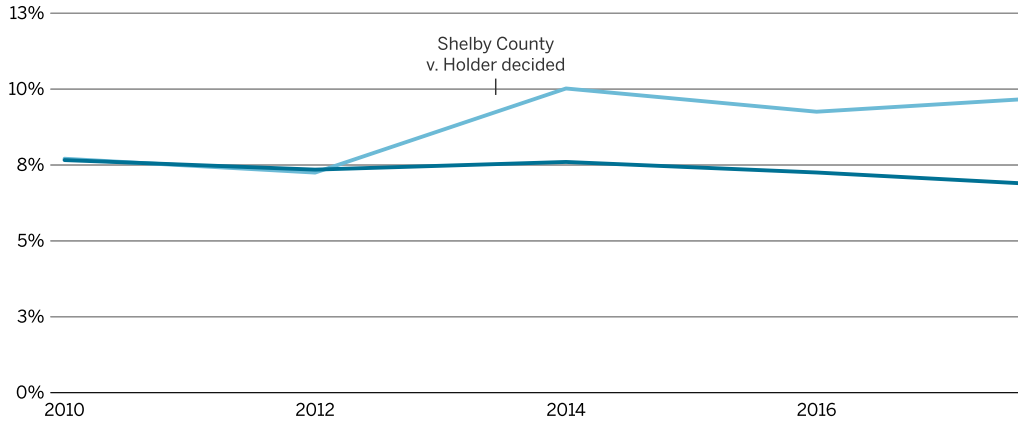
of Georgia voters blocked by the state's "exact match" voter registration law were people of color in 2018.

Complaint, Georgia Coalition for the People's Agenda, Inc. v. Kemp ¶ 68 (Oct. 11, 2018)

Furthermore, the Brennan Center has **documented** a surge in voter purges — the sometimes error-prone process by which election officials remove allegedly ineligible voters from the rolls — in jurisdictions with a history of racial discrimination in voting.

The Supreme Court's 2013 Voting Rights Act decision ended the requirement for those places to get permission (or "preclearance") from the federal government before changing their voting rules. Afterwards, the median purge rate in counties previously covered by the law was 40 percent higher than the purge rate in other jurisdictions.

Purge Rates, 2008–18



Note: Shows data for counties reporting in each period.

Source: EAVS

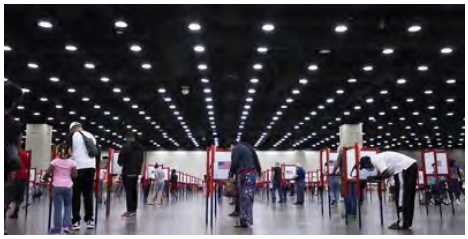
Unsurprisingly, in the past decade, federal courts have repeatedly found that voting restrictions and other voting measures were passed with a racially discriminatory purpose.

"Meet James Crow, Esquire"

As these examples make clear, race continues to play a key role in the voting process. The racial components of new voting restrictions are still here, but they are more subtle. Commenting on this change, civil rights activist Rev. William Barber II has said, "Jim Crow did not retire: he went to law school and launched a second career. Meet James Crow, Esquire."

As voter suppression continues to evolve — with communities of color still bearing the brunt — protecting the right to vote remains as important today as it has ever been.

Related Analysis & Opinion



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ANALYSIS

Lawmakers Are Targeting the Courts that Could Shoot Down Voter Suppression Laws

They want to make voting harder — and make it harder for voters to fight back

Alicia Bannon, **Patrick Berry** May 20, 2021



Credit Hill Street Studios

ANALYSIS

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research report

BRENNAN CENTER FOR JUSTICE

Waiting to Vote

Racial Disparities in Election Day Experiences

By Hannah Klain, Kevin Morris, Max Feldman, and Rebecca Ayala
With a foreword by Myrna Pérez PUBLISHED JUNE 3, 2020

Brennan Center for Justice at New York University School of Law

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Foreword

The pictures of Milwaukeeans waiting in line to vote on April 7 with homemade personal protective equipment were both beautiful and horrifying. It was beautiful — inspiring even — that with a deadly pandemic on their doorsteps, so many people still cared so much about their right to vote that they went to the polls. And it was horrifying that they had to risk their health in order to do so.

News reports indicated that Milwaukee, the most diverse city in a largely white state, had reduced its usual 180 polling sites to just five. Covid-19 has exposed serious problems in our election systems, and it has made the need for reform urgent. Voters of color and demographically changing communities all across the country already knew this, though. As this report details, Black and Latino Americans face longer wait times on Election Day than white voters. In the past, long wait times were disruptive and disenfranchising. In the middle of a pandemic, they could also be deadly.

Though completed before the eruption of the coronavirus, this report is even more critical now because it provides information regarding community needs as well as mistakes commonly made in planning for and staffing in-person voting. While the risk of Covid-19 will no doubt move more voters to cast their ballots by mail, some communities — more typically communities of color — rely on polling places. We must make sure that there are in-person options, and that they have enough of the right kinds of resources.

The period leading up to the November general election will be marked by extreme disruption and hardship in all facets of American life. At the time of publication, the pandemic has killed more than 100,000 Americans. It has also caused schools to close, people to lose their jobs, and Americans to distance themselves from one another. Our fundamental right to vote and our democratic processes are more important than ever: The officials we elect will make high-stakes decisions that will impact our health, safety, and welfare.

In these dire times, our country will not benefit from the judgment and experiences of all its citizens unless all Americans can vote freely and safely.

Myrna Pérez
Director, Voting Rights and Elections Program
Brennan Center for Justice at NYU School of Law

Introduction

The 2018 general election saw the highest turnout in a midterm in decades.[1] While many voters were able to cast a ballot quickly and easily in that election, others faced hours-long lines, malfunctioning voting equipment, and unexpectedly closed polling places.[2] We estimate that some 3 million voters waited 30 minutes or more to cast their ballot.[3] Many of these voters were concentrated in the southeastern United States, home to large shares of nonwhite voters.

Long lines and wait times have plagued several elections over the past decade.[4] The consequences can be far reaching. For example, the Bipartisan Policy Center estimates that more than half a million eligible voters failed to vote in 2016 because of problems associated with the management of polling places, including long waits.[5]

For this report, we analyzed data from two nationwide election surveys regarding the 2018 election: the Cooperative Congressional Election Study, a 60,000-person survey on Election Day experiences, and the U.S. Election Assistance Commission's Election Administration and Voting Survey, which asks administrators detailed questions about how they conduct elections. We also interviewed nearly three dozen state and local election administrators.[6] Further, we examined the electoral statutes on the books in every state in the nation to understand the sources of disparate wait times in 2018 and develop policy recommendations for lawmakers and election officials ahead of 2020.[7] Some previous research has investigated the relationship between wait times and electoral resources — specifically polling places, voting machines, and poll workers.[8] But no prior study has examined the relationship on a nationwide scale. We find:

- **Latino and Black voters were more likely than white voters to report particularly long wait times, and they waited longer generally.**[9] Latino and Black voters were more likely than white voters to wait in the longest of lines on Election Day: some 6.6 percent of Latino voters and 7.0 percent of Black voters reported waiting 30 minutes or longer to vote, surpassing the acceptable threshold for wait times set by the Presidential Commission on Election Administration, compared with only 4.1 percent of white voters.[10] More generally, Latino voters waited on average 46 percent longer than white voters, and Black voters waited on average 45 percent longer than white voters.

- **Voters in counties with fewer electoral resources per voter, relative to other counties, reported longer wait times in 2018.** In this report, we offer the first national-level statistical evidence that counties with fewer polling places, voting machines, and poll workers (referred to hereafter as "electoral resources") per Election Day voter than other counties had longer wait times in 2018.[11] By "Election Day voters," we mean voters who cast in-person ballots on Election Day (referred to hereafter as "voters"). Voters in counties with the fewest electoral resources per voter reported waiting two to three times as long to cast a ballot on Election Day as voters in the best-resourced counties.

Given those two statistical findings, some might conclude that voters of color wait longer because they tend to live in counties with fewer electoral resources. Our analyses do not support this hypothesis; on average, we find, counties with higher minority shares of the population did not have fewer resources per voter than whiter counties did in 2018. Our statistical models do, however, establish that with fewer resources, the racial wait gap would have been even larger.

- **Counties that became less white over the past decade had fewer electoral resources per voter in 2018 than counties that grew whiter.** The average county where the population became whiter had 63 voters per worker and about 390 voters per polling place. In comparison, the average county that became less white had 80 voters per worker and 550 voters per polling place.[12]

- **Similarly, counties where incomes shrank over the past decade had fewer electoral resources per voter in 2018 than counties where incomes grew over the same period.** The average county where real incomes grew had 74 voters per worker and 470 voters per polling place, while counties where real incomes declined averaged 82 voters per worker and 590 voters per polling place.

Our findings suggest that allocating equal resources among counties and precincts is not sufficient to produce equal wait times for voters, particularly those of color and of lower incomes. Instead, election administrators must

target those counties and precincts with a history of long wait times and allocate enough resources to these locations to equalize the wait times for all voters. The goal for election administrators should be to distribute resources in a manner that produces a similar Election Day experience for all voters.

Given these findings, we make the following recommendations to election administrators:

- **Provide resources sufficient to minimize voter wait times.** Election officials in counties that have encountered long waits in recent elections should increase the quantity and quality of resources allocated, and state lawmakers should ensure that resources are allocated sensibly between and within counties to prevent disparate wait times.

- **Plan for an above-trend spike in voter turnout.** Between the 2014 and 2018 midterm elections, voter turnout spiked from the lowest it had been in 72 years to the highest in decades.[13] This created problems where election administrators had relied too heavily on past turnout trends to allocate resources.[14] Voter turnout is poised to increase dramatically in 2020 over past presidential elections, and election administrators should not be misled by past trends when making resource allocation decisions.[15]

- **Account for policy changes that may impact turnout.** State election policies can change from election to election, and these changes may impact the number of individuals who vote on Election Day, early in person, absentee, or by mail. Administrators must take these new policies into account when estimating turnout levels and allocating resources.

- **Increase compliance with resource mandates.** State officials should review their standards for resource allocation to ensure that counties are in compliance and standards are appropriate given resource levels and wait times. Advocates should hold states to those standards in 2020.

- **Limit polling place closures.** Administrators should examine voter turnout data and early voting usage when making decisions about eliminating polling places, and they should not do so without a firm analytical justification.

- **Develop comprehensive vote center transition plans.** Administrators should act carefully when transitioning to vote centers. Vote centers should be piloted in lower-turnout elections, and administrators should not close or combine voting locations until they fully understand how vote centers will affect turnout.

- **Expand language assistance.** Jurisdictions that narrowly missed the legal mandate to provide non-English-language assistance under the Voting Rights Act should nonetheless offer language assistance in the 2020 election.

Overview of Methodology

This report draws on both quantitative and qualitative research methods, which we summarize below. To read more about our data sources and our econometric modeling, see the Quantitative Technical Appendix.

Quantitative Methodology

The Brennan Center leveraged national survey data to interrogate the relationships among racial and economic demographics, county-level election resources, and wait times faced by voters. In particular, we incorporated data from three sources: the Cooperative Congressional Election Study (CCES), the Election Administration and Voting Survey (EAVS), and the U.S. Census Bureau's five-year American Community Survey (ACS) estimates.

The data on how long voters waited to cast a ballot comes from the CCES.[16] This 60,000-person survey is conducted after each federal election.[17] It is weighted to be nationally representative and asks voters a host of questions about their sociodemographic characteristics and their experience on Election Day that year. Much of the existing academic research on voters' wait times relies on this survey data.[18]

We also use data from the biennial EAVS, which is administered by the U.S. Election Assistance Commission after every federal election.[19] The EAVS asks local election administrators to report the number of registered voters in their jurisdiction, the number of ballots cast on Election Day, and other information pertaining to election administration. Election administrators are also asked to report the number of polling places they had open on Election Day and the number of Election Day poll workers and voting machines they had in place within a jurisdiction. We merged the data garnered from the EAVS and the CCES to explore the relationship between county-level resources and wait times.[20]

Looking for disparities between counties could mask disparities *within* counties. In other words, it is possible that certain towns or neighborhoods within counties get more resources per voter than other parts of the county — something we would miss by looking only at how many resources a county deployed in aggregate. To test the possibility of uneven resource distribution within counties, we analyzed precinct-level data from dozens of counties around the country. These included counties where reports of racial disparities in wait times were prevalent. Our within-county analyses pointed in the same direction as the between-county analyses; we found no evidence that racial and ethnic minorities systematically receive fewer resources than white voters.

Because this report focuses on how Election Day resources impacted voter experience in 2018, we have excluded the estimated wait times of respondents who reported voting early (whether in person or by mail) and of those who live in counties that vote primarily by mail.[21]

Qualitative Methodology

To identify specific factors that contribute to long voter wait times and electoral resource challenges, we interviewed state and local election officials. A variety of methodologies were used to select interviewees: We scoured news reports after the 2018 election to determine where the longest lines formed. We tracked parts of the country where Twitter and Facebook users posted about facing long lines on Election Day. We also used survey data to identify counties where there were reported racial disparities in wait times. On the basis of these findings, we spoke with state and local election administrators in 32 jurisdictions across the country, including some of the most populous counties in the nation, such as Harris County, Texas, and Maricopa County, Arizona.[22]

Limitations

It is important to recognize the limitations of this study, as is the case with any empirical research of this nature. The first set of limitations regards the quantitative data available. There is not, for instance, perfect reporting to the EAVS about the number of resources in each county; we must assume, therefore, that trends identified using counties that do report to the EAVS hold even in the counties that do not. Moreover, the EAVS data can assess the quantity of resources but not their quality. The same number of voters per machine, for instance, in two counties might produce vastly different wait times if the machines in one county are much older than those in the other. The same holds true for poll workers: we can measure the number of workers but not the quality of available training, the extent to which they reflect their community, or whether their language skills match the needs of voters.

Our qualitative methodology represents our best effort to combat the limitations imposed by the quantitative approach. We developed our interview instrument with an eye toward identifying factors that could not be captured in the quantitative data. We asked election administrators how hard it was to find poll workers and whether they emphasized hiring poll workers who reflect their counties' demographics. We also asked them about their contingency plans for handling unexpected events,

like broken machines. Since we could not speak with administrators from every county in the country, we sought to speak with a diverse array of them.

These limitations, we hope, chart the path for future research on the relationship between resources and wait times. There are certainly nuances that our research design fails to reveal, and there may be material ways, not captured by the models presented herein, in which nonwhite populations receive fewer resources than white ones.

Latino and Black Voters Were More Likely to Report the Longest Wait Times in 2018

Most voters waited far less than 30 minutes to cast a ballot in 2018: according to our analysis of the CCES, more than 47 percent of voters reported waiting in no line on Election Day, and the average wait time was just seven minutes.[23] Still, far too many voters were forced to wait a long time to vote. According to our analysis of the CCES, roughly 3 million people — or between 4 and 5 percent of all in-person Election Day voters — waited 30 minutes or longer to vote on Election Day in 2018.[24] A disproportionate number of them were Black or Latino.

The Racial Wait Gap in 2018

A large body of recent scholarship has established that throughout the country Latino and Black voters wait longer to cast their ballots than white voters. Indeed, a quantifiable racial disparity in voting wait times has been identified consistently over the past decade.[25]

According to our analysis of the CCES, voters of color were also more likely than white voters to report waiting a very long time to vote in 2018. Specifically, 4.1 percent of white voters reported waiting in line 30 minutes or longer, while more than 6.6 percent of Latino voters and 7.0 percent of Black voters reported facing such delays. In addition, Latino and Black voters who cast a ballot in person on Election Day in 2018 reported, on average, substantially longer wait times than white voters. Latino voters waited almost 46 percent longer than white voters, and Black voters waited 45 percent longer, on average. According to our analysis, in 2018 on average, Latino voters waited 9.5 minutes to vote and Black voters waited 9.4 minutes, while white voters waited only 6.5 minutes to cast a ballot.

These findings are consistent with a study of the 2012 election conducted by the Brennan Center.[26] They are also consistent with other research in the field.[27] This racial wait gap has been established in the literature using multiple methods, including analyses of self-reported wait times and cell phone data.[28]

Long wait times are more than an inconvenience. They can disenfranchise people who are unable to stay in line to cast a ballot. Moreover, long waits reduce voter participation in subsequent elections.[29]

Factors Contributing to the Racial Wait Gap

Over the past decade, studies have explored the factors contributing to this racial wait gap. Researchers have established that some of the gap is driven by demographic factors. For example, multiple studies have shown that voters of all races are more likely to wait longer in counties with higher population density, and Latino and Black voters disproportionately live in these areas.[30]

At least one study finds that county-level demographics cannot entirely explain the wait gap. Voters of color report waiting longer than white voters at the polls even after researchers control for the different types of counties in which they live.[31] Nor can partisan bias, restrictive voting laws, income inequality, or racial segregation fully account for the wait gap.[32]

The Brennan Center previously established a relationship between racial disparities in electoral resources and the wait gap in the 2012 election. In the report *Election Day Long Lines: Resource Allocation*, the Brennan Center studied resource allocation on Election Day in Florida, Maryland, and South Carolina.[33] We found that fewer electoral resources were a significant contributor to long waits and that voters in precincts with higher percentages of minority voters experienced long waits at the polls. We also found that voters in precincts with higher percentages of minority voters had fewer voting machines.[34]

In the 2018 election, we found that some of the racial wait gap can be explained by demographic factors, a finding consistent with prior research by others.[35] For example, the gap between white and Black voters can be attributed in part to the fact that Black voters are more concentrated in states — particularly in the Southeast — where all voters wait longer to cast a ballot. Similarly, both Latino and Black voters are more likely to live in dense, urban counties, where voters of all races face longer wait times. Latino and Black voters also tended to be younger than white voters in 2018, and young people reported long wait times regardless of race. These findings hold even after controlling for demographic factors such as income, education, and age.

Our statistical analyses show that the 2018 racial wait gap cannot be explained by the level of resources per voter in counties populated largely by racial and ethnic minorities. In fact, whiter counties tended to have fewer resources per voter than less-white counties. This is not, however, an argument for reducing the levels of resources in the less-white counties; had minority voters received fewer resources, the racial wait gap would have been even larger.

Electoral Resource Parity Is Not Enough

>> **Racial gaps** in Election Day wait times demonstrate that certain communities may require additional resources to reach equitable outcomes — a finding that has roots in an array of fields.[36] These communities often face social, economic, or environmental disadvantages that adversely impact individuals; therefore they may need expanded or different supports to achieve desired outcomes. Research on education in low-income communities is illustrative of this phenomenon. For example, one report found that "students in poverty are likely to need additional supports in order to succeed academically. In other words, simply offering equal [education] funding isn't enough" to equalize outcomes among students of diverse backgrounds.[37] Similar findings exist in the health-care field, where studies have shown that the U.S. health disparities gap cannot be solved simply by providing an equal number of resources to all patients. "In order to reduce the health disparities gap, the underlying issues and individual needs of underserved and vulnerable populations must be effectively addressed."[38] This report suggests this phenomenon is also at play in the relationship between wait times and electoral resources.

Our interviews with election administrators indicate that resource gaps that do not appear in raw counts of polling places, voting machines, and poll workers may exacerbate the racial wait gap. Insufficient non-English-language assistance may be one contributing factor. Our interview set revealed that while some election officials are aware of a growing number of voters who need election materials in non-English languages, few counties that are not mandated to provide such materials proactively do so.[39]

Commentators have long noted that voting can be daunting for individuals whose first language is not English. Inadequate assistance provided to these voters can result in confusion and delays at the polls.[40] Simply adding more poll workers in a Spanish-preferred neighborhood, for instance, is likely to have little effect on voter wait times if the bottlenecks in these polling places arise from language-based confusion and the additional poll workers do not speak Spanish.

Section 203 of the Voting Rights Act (VRA) requires certain jurisdictions to provide multilingual voting materials and language assistance at polling places.[41] Roughly one-third of the counties whose officials were interviewed for this report fall into that category.[42] Many of the election administrators we spoke to are taking steps to comply with their legal obligations.[43] However, some county election officials told us they face challenges in providing adequate language assistance resources despite the mandate to do so.[44]

Furthermore, while Section 203 provides a critical safety net, it should not be the only measure of a jurisdiction's language assistance needs. Many jurisdictions that are not yet required to meet the VRA's language assistance mandates have significant and growing numbers of voters who do not speak English as their first language.[45] Nevertheless, we found that among the counties whose officials we interviewed, most offer few to no services to voters with limited English proficiency.[46] In Manassas City, Virginia, for example, Latinos make up nearly 40 percent of the overall population.[47] Although the county does recruit Spanish-speaking poll workers, it has had difficulty recruiting an adequate number for Election Day and does not provide ballots or other materials in Spanish.[48]

Voters with Fewer Electoral Resources Wait Longer to Vote

Many factors influence how long voters wait in line on Election Day, and long waits can arise both from decisions made by election administrators and from voter behavior. For example, the time of day when a person shows up to vote, the physical layout of a polling place, and the type of voting machine used all influence the amount of time it takes to cast a ballot.[49]

Some research has attempted to understand the relationship between wait times and electoral resources.[50] However, no previous study has examined the relationship on a nationwide scale. We present here the first national-level statistical evidence that counties with fewer electoral resources relative to other counties had longer wait times in 2018.

Analyzing data from the EAVS and the CCES, we found that voters in counties with fewer electoral resources per voter than other counties reported longer wait times, on average, in 2018. This was true for each of the three primary ways of measuring electoral resources: votes cast per polling place, votes cast per poll worker, and votes cast per machine. The more voters per electoral resource allocated, the longer the delay. Voters in counties with the most voters per polling place, poll worker, and machine were also the most likely to wait in lines of 30 minutes or more.

- In 2018, voters in counties with the most voters per polling place waited more than twice as long as voters in counties with the fewest voters per polling place.
- Inadequate numbers of poll workers were an especially important contributor to long waits. In counties with the fewest voters per poll worker, voters waited less than 5 minutes; where poll workers were spread among the most voters, the average wait time was nearly 15 minutes.
- Counties with the most machines available for voters saw average waits of around 5 minutes, while the average wait time in counties with the fewest machines per voter was more than 13.5 minutes.

These findings hold true even after controlling for socio-demographic characteristics of individuals and their counties.

Factors Contributing to Inadequate Resource Allocation

Resource allocation decisions are made largely at the local level, with some state guidance. In our interviews, we found that county election administrators look to four main factors when determining how to allocate resources: funding, statutory requirements or guidelines, the quality of available resources, and unique community needs, as shown by such indicators as voting trends and demographic shifts.[51]

As a result of this decentralized approach to resource allocation, resourcing varied substantially — both between and within states — in the 2018 election. In places like North Carolina, there were tremendous disparities in the level of resources available to voters on Election Day from one county to the next. In several North Carolina counties, there were more than 500 voters per voting machine in 2018, while in others there were as few as 51.[52]

More broadly, the discrepancy between the best and the worst was significant: the 10 percent of counties with the fewest voters per polling place averaged fewer than 185 voters per site, while the 10 percent of counties with the most voters per polling place averaged over 1,060 voters per site.

Counties That Became Less White and Counties with Declining Incomes Had Fewer Resources Per Voter in 2018 than Other Counties

We found an alarming correlation between demographic and economic change over the past decade and electoral resources in 2018.[53] Counties where the white share of the population shrank over the past 10 years had fewer resources per voter relative to other counties. Additionally, counties where real (that is, inflation-adjusted) incomes declined or grew slowly had fewer resources per voter — even after accounting for other factors — than those where real incomes grew quickly.[54]

- The average county where the population became whiter had 63 voters per poll worker and about 390 voters per polling place. In comparison, the average county that became less white had 80 voters per worker and 550 voters per polling place.[55]
- Similarly, counties where the median income grew quickly over this same period had greater numbers of polling places and poll workers per vote cast in 2018 than those counties where the median real income

declined or grew slowly. The average county where real incomes grew had 74 voters per worker and 470 voters per polling place, while the average county where real incomes declined had 82 voters per worker and 590 voters per polling place.[56]

An example is useful to understand these findings. If two counties were equally white in 2017, but one had seen its white share of the population decline over the preceding 10 years while the other had seen its white share remain constant, the county where the white population had declined would likely have had fewer electoral resources per voter in 2018, according to our models.

In the analysis above, we divided counties into discrete groups: places that became less white or more white over the past decade, and places where incomes went down or up over the same period. Regression analysis shows that what matters is not just *whether* these counties became less white or saw incomes decline, but also the *extent* to which these changes occurred. Not only did counties that became less white have fewer resources per voter than counties that became whiter; counties where the white share of the population declined dramatically had fewer resources per voter than counties where there was only a modest decline of the white share of the population. Likewise, counties where median incomes declined most dramatically had fewer resources per voter than those where the decline was less pronounced.

Our findings align closely with related social science research. Multiple studies have found that jurisdictions undergoing demographic change often struggle to fund and provide public goods.[57] As one paper examining demographic change and residents' willingness to increase taxes explains, it is "communities that have undergone sudden demographic changes, not communities that have long been diverse, where diversity's effects are pronounced."[58] Counties where incomes have decreased have a diminishing tax base and, consequently, are likely to cut back on public expenditures more quickly than counties with more stable tax receipts. While a county's demographic profile matters for resource allocation, so too do *changes* in these demographics — and counties that are getting whiter and where incomes are growing may be investing more in critical electoral resources.

Noncompliance with Statewide Minimum Requirements

One way to address the risk of significant resource disparities within states is to set and enforce robust statewide minimum requirements for electoral resources. At least 25 states have laws setting a floor for the number of polling places.[59] At least 15 states have laws pertaining to minimum numbers of voting machines or poll workers per voter.[60]

These statutes are of little value, however, if they are not enforced. We analyzed statutory compliance nationwide and found that noncompliance was common in the 2018 election in several states. For example:

- In Illinois, 42 percent of precincts had more than 800 voters, the maximum allowed by law, and roughly 20 percent of counties had countywide averages exceeding the state maximum of 400 voters per machine.[61]
- In Michigan, nearly a quarter of all precincts had more than the legally mandated 2,999 registered voters, and nearly 50 percent of counties had more than 600 registered voters per machine, the maximum allowed.[62]
- In South Carolina, 31 of 46 counties exceeded the maximum of 250 voters per machine allowed by the state, for a 67 percent noncompliance rate.[63] More than 2.5 million South Carolinians are active registered voters in counties that have statutorily inadequate numbers of machines.

Furthermore, countywide averages can cover up variations within counties where some precincts are well resourced and others struggle. Hall County, Georgia, provides an example of how this plays out on the ground. Although the *average* number of voters per machine in the county did not exceed state maximums, one-third of polling places in the county had more registered voters per machine than the state allowed.[64] Accordingly, depending on where they lived, voters in Hall County were assigned to polling places with different resources on Election Day, leading to divergent voting experiences.

Inadequate Planning Practices

Our interviews with election administrators suggest that some counties' election planning practices may be inadequate in the face of growing turnout and uncertainty over moves to early voting. Election administrators in several states across the country reported that they relied on turnout in comparable prior elections in their planning processes for the 2018 election.[65] (That is, while planning for the federal midterm election, administrators looked to turnout in previous federal midterms.) Overreliance on past turnout as a predictor of resource needs, however, can lead to significant problems when turnout surges, as it did in 2018. It is likely to do so again in 2020.[66]

Prince George's County, Maryland, for example, used a formula that relied on historical turnout to determine the number of ballots supplied on Election Day.[67] According to one election administrator, this formula had "always worked up until the 2018 general Election Day,"[68] when voters turned out at extraordinary rates.[69] Officials had overestimated the number of early voters and underestimated the number of Election Day voters.[70] Thirteen precincts ran out of ballots on Election Day.[71] Hundreds of voters reportedly waited hours to vote, some past 10 p.m.[72] Prince George's County has since decided it will no longer use this method of resource allocation.[73]

New Laws Threaten Access to Early Voting

>> **Existing challenges** related to inadequate planning and resources during early voting could be exacerbated by new laws that reduce the number of early voting locations and disenfranchise voters in smaller communities. For example:

- North Carolina's Senate Bill 325 — passed in 2018 — mandates uniform hours of operation at all temporary early voting sites.[74] An administrator in North Carolina explained that some counties had difficulty funding early voting sites because of the uniform hours requirement and thus had to close locations. In Forsyth County, election officials were forced to use a contingency fund to comply with the new law.[75]
- Prior to the 2019 election, Texas implemented House Bill 1888, which requires early voting sites to remain open for the entire early voting period, eliminating mobile early voting sites.[76] In Travis County, an official explained that the law placed significant financial burden on the county and most directly targeted both rural voters and young voters on college campuses, many of whom lived in areas whose populations do not justify a permanent early voting site.[77]

This approach to planning can cause special problems in connection with early voting. Opportunities to cast a ballot before Election Day are increasingly popular, and administrators are struggling to predict turnout levels at early voting locations.[78] This contributes to delays at the polls.[79] In fact, according to our analysis of CCES data, early in-person voters were slightly more likely to face long waits than in-person Election Day voters.

Polling Place Closures

Another well-documented phenomenon is the steady increase in polling place closures.[80] These closures might not be a problem if they simply reflected voters shifting to early, mail, or absentee voting. The U.S. Election Assistance Commission claims that a decrease in Election Day polling places can likely be explained by rising rates of early and absentee voting in some states and a shift to Election Day vote centers in others.[81] We found, however, that several states with troubling voting rights records have seen the number of Election Day ballots cast per polling place swell in the past five years, suggesting that these closures are outpacing changes in voter behavior.[82]

Using the EAVS, we tested the early voting hypothesis in Georgia and Louisiana, which have robust early voting programs and have been closing polling places over the past several years. We found that the increasing use of early voting fails to fully account for the increase in polling place closures. According to our analysis of EAVS data, the average polling place in Georgia had 530 in-person Election Day ballots cast in 2014. In 2018, the average polling place saw 770 in-person Election Day voters, an increase of nearly 50 percent. In Georgia and Louisiana, polling places are being closed faster than voters are switching to early voting.

The shift to vote centers raises a related concern.[83] Vote centers replace the precinct-based system, instead allowing voters to cast a ballot at any location within their county.[84] This approach can be efficient and voter-friendly by giving voters access to a greater number of polling locations. The transition to this system, however, can be fraught.

Officials report that it can be difficult to accurately determine turnout at newly implemented vote centers, which results in inadequate resources and long lines.[85] Are voters more likely to cast a ballot near their home before work? At their children's school? Or at a location near work on their lunch break? The difficulty of predicting the answers to these questions leads to some polling places being overresourced and others underresourced.

Polling Place Statutes: A Potential Bulwark Against Closures

>> **Thirty-two states** have laws specifically pertaining to the closure of polling places.[86] These provisions set a procedural backstop that localities must follow when attempting to consolidate voting locations. Some states establish a time frame — ranging from several months to one week before an election — after which polling places cannot be moved, closed, or altered in any way.[87] Several polling place laws impose a "good cause" requirement, mandating that alterations to previously selected polling places may only occur when there is "an . . . unavoidable event," or in even more extreme circumstances, where there is "an emergency caused by an act of God."[88] Many statutes even describe steps officials must take to notify voters when closing polling places.[89]

>> **Although noncompliance** may currently be common, polling place laws can provide a statutory avenue for judicial intervention to regulate the closure of voting locations, particularly in vulnerable communities.[90] Additionally, in counties impacted by polling place closures, transparency and advance warnings regarding reductions — which in turn create opportunities for advocacy and activism — can effectively stave off closures.

For example, Clark County, Nevada, moved to vote centers for the 2018 election.[91] According to a county election official, this move made it harder to forecast critical elements of voter behavior.[92] The unpredictability of citizens' responses to the new vote center model, coupled with record turnout in Nevada, created long lines throughout the county.[93]

Looking ahead to the 2020 election, more than 60 counties in Texas, including several of the state's largest, are expected to use vote centers.[94] Under Texas law, counties moving to vote centers are permitted to reduce the number of polling locations by 35 percent in the first election in which the model is used and by 50 percent in subsequent elections.[95] Some major counties have committed to maintaining past voting locations during the transition to vote centers.[96] Others already plan to shutter polling places.[97]

Electoral Resource Challenges in 2020 and Beyond: Policy Recommendations

The 2020 election will challenge election administrators even more than the 2018 election did.[98] Some project even higher turnout, given the hotly contested presidential race.[99] And many voters will continue to have the option to cast a ballot at times other than Election Day, increasing uncertainty in election planning.[100]

Our analysis of the survey data, electoral resource statutes, and interviews with election administrators suggests several worrisome trends that could lead to long — and uneven — wait times. However, with careful and proactive planning, our election system can be prepared to handle an uncommonly busy Election Day.

We make the following specific recommendations to election administrators:

- **Provide resources sufficient to minimize voter wait times.** Election officials in counties that have encountered long waits in recent elections should increase the quantity and quality of allocated resources — namely, polling places, poll workers, and voting machines — and state lawmakers should ensure that resources are allocated sensibly among and within counties to prevent disparate wait times.

- **Plan for an above-trend spike in turnout.** Voter turnout is poised to increase dramatically in 2020,[101] and election administrators must avoid being misled by past turnout trends in presidential elections when making resource allocation decisions. As part of a conservative approach to resource allocation, counties should take into account their total number of registered voters. Consulting with community groups and experts in the field can help with allocation decision-making, as can exploring innovative technology. For example, the Rhode Island Board of Elections partnered with the University of Rhode Island to develop resource allocation algorithms.[102] According to the board, decisions derived from these algorithms have "helped eliminate most lines."[103]

- **Account for policy changes that may impact turnout.** State election policies can change from election to election, and these changes can impact the number of individuals who vote on Election Day. Nevada, for example, will have automatic voter registration and same-day voter registration for the first time in 2020.[104] These pro-voter reforms expand access to the ballot box and improve election administration but can throw off election administrators' turnout predictions. Election administrators must take new policies such as Nevada's into account when estimating turnout levels and allocating resources.

- **Increase compliance with resource mandates.** State officials should review their standards for resource allocation and ensure counties' compliance. Statutes mandating minimum levels of electoral resources also enable advocacy organizations, state attorneys general, and members of the public to monitor electoral resource allocation. Advocates should hold states to those standards in 2020.

- **Limit polling place closures.** In recent years, election officials have closed numerous polling locations.[105] As we have stated in this report, increased early voting does not fully account for these closures. Administrators should examine voter turnout data and early voting usage and avoid closing polling places without firm analytical evidence that doing so will not overburden remaining polling places. Further, election officials should consider opening additional polling places in areas where voter turnout levels are expected to be particularly high and long lines have developed in past elections.

- **Develop comprehensive vote center transition plans.** Administrators should act carefully when transitioning to vote centers. These should be piloted in lower-turnout elections so that administrators can better predict voter distribution trends. Administrators should also not close or combine voting locations until they fully understand how voters plan to use vote centers.[106] In addition, election officials should consider employing technological solutions to smooth the transition and maximize the effectiveness of the vote center model. In Williamson County, Texas, for example, voters can access a smartphone app that shows the nearest voting location in their county and the location with the shortest wait.[107]

- **Expand language assistance.** Jurisdictions that narrowly missed the numerical threshold that would require them to provide non-English-language voting assistance under the Voting Rights Act should nonetheless aim to provide such assistance in the 2020 election.[108] In addition, lawmakers should follow the lead of cities and states that have gone beyond the VRA's requirements. For example, California has a lower

threshold for language assistance coverage than is federally mandated and has continued to expand access to non-English-language voting materials to communities throughout the state.[109] Proactive language assistance policies will help ensure that all voters are able to cast a ballot and minimize confusion and delay at polling places.

Quantitative Technical Appendix

In this technical appendix, we present a fuller discussion of the quantitative data sources used in this report and the statistical models used to arrive at our results.

Data Sources

Much of the existing literature on long lines on Election Day has drawn from two national survey instruments: the Survey of the Performance of American Elections (SPAE) and the Cooperative Congressional Election Study (CCES).[110] Both survey instruments have historically asked voters about their experiences on Election Day, including how long they had to wait in line to cast a ballot. Unfortunately, the SPAE was not fielded after the 2018 election. This report, therefore, contains only estimates from the CCES on how long individuals waited in line to cast a ballot in the 2018 election.

Respondents to the CCES are asked approximately how long they had to wait to vote. Voters can pick from different buckets, such as "less than 10 minutes" or "10–30 minutes." Respondents' wait times are assumed to be the middle of each bucket; therefore, if someone reports waiting between 10 and 30 minutes, we assume the wait time to be 20 minutes. Voters who report waiting longer than 60 minutes are asked to approximate the number of minutes they spent in line in a free-text box; these responses have been manually coded by the Brennan Center research team.

To estimate county-level electoral resources, we incorporate data from the U.S. Election Assistance Commission's biennial Election Administration and Voting Survey (EAVS). The EAVS asks election administrators many questions about how elections are conducted in their jurisdictions. The Brennan Center previously used the EAVS to research voter purges.[111] Other academic researchers have used the survey to investigate different aspects of election administration.[112] Here we use the information regarding the resources each jurisdiction reported deploying on Election Day. We specifically examine the number of polling places, poll workers, and voting machines deployed in each county.[113]

Not all jurisdictions respond to the EAVS each year. Although a larger share of election administrators responded to the EAVS in 2018 than in prior years, we still do not know the resources in place on Election Day for every voter in the country. When we merge the CCES and EAVS data, however, we can calculate the number of voters per polling place, the number of voters per worker, and the number of voters per machine for at least four out of every five voters in the country.[114]

A further issue with the EAVS is that, even when election administrators do respond to the survey, the data is sometimes clearly incorrect. Iowa, for instance, reported in 2018 that there were nearly 800,000 polling places. To avoid biasing our results, we have removed Iowa polling place data. To guard against the possibility of other erroneous data, we also exclude the 1 percent of counties reporting the most voters per polling place, voters per poll worker, and voters per machine. While it is not perfect, the EAVS data remains the best option available for researchers investigating national patterns in the distribution of Election Day resources.

Regression Specifications

The results discussed in the body of the report show that voters of color waited longer to vote and that voters in counties with fewer electoral resources per voter waited longer. We also show that counties where the white share of the population and real incomes declined had fewer electoral resources per voter on Election Day in 2018. These results are based on regression analysis, a common technique used among political scientists to understand the relationships among different variables.

Racial Wait Gap

We begin by presenting the regression model that interrogates wait times on Election Day, by race. As table 1 makes clear, nonwhite voters wait significantly longer: Black voters waited 2.8 minutes longer than white voters, and Latino voters waited 3.0 minutes longer than white voters, on average. Even after we add state fixed effects in model 2 (that is, after we control for the fact that some states have higher wait times than others), we see that voters of color waited in longer lines. This means that in any given state, these voters were more likely to wait in long lines, and that they were not simply more likely to live in states with longer wait times for everyone.

In model 3, we introduce county-level characteristics. These data sets are all derived from the Census Bureau's five-year American Community Survey estimates that end in 2017, and information about machine types comes from Verified Voting. After including these county-level factors, the Latino coefficient remains statistically significant. This means that, on average, Latino voters wait longer than white voters even after we account for important differences in the types of counties in which they live. Model 3 also makes clear that less-dense counties and those with older voters had shorter wait times on Election Day in 2018.

In model 3, the Black voter coefficient is no longer statistically significant. This means that much of the increased wait times faced by Black voters in 2018 could be explained by county-level factors. Black voters are more likely to live in denser counties with younger voters, where *all* voters faced longer waits.

Finally, model 4 adds individual characteristics to model 3. These include the respondent's family income, age, partisan affiliation, education, and marital status. We find that younger voters report waiting longer, but little else about an individual's characteristics explains wait time after we have accounted for the type of county in which the voter lives.

In model 4, the gaps between Black and white voters, and between Latino and white voters, are statistically nonsignificant at the 95 percent confidence level, but they are significant and negative for Asian and other voters. This means that racial minorities did not wait longer to vote in 2018 than white voters who lived in similar counties and had similar individual characteristics. Racial minorities, rather, are overrepresented among populations that wait longer across the board. In each model, robust standard errors are clustered by county.

Electoral Resources and Wait Times

To test the relationship between the number of voters per electoral resource in a county and voter wait times, we begin with the final model from the previous section; that is, we start with a statistical model that accounts for voters' individual, county, and state characteristics to explain wait times. We add to this model additional variables calculated using the EAVS data: the number of votes cast per polling place, per poll worker, and per voting machine. Table 2 presents the results of these models.

We find that voters who lived in counties with more votes cast per polling place on Election Day in 2018 waited longer to vote. This is true even after controlling for the other sociodemographic characteristics discussed in the previous section. Figure 1 presents the marginal effects plot demonstrating the relationship between votes per polling place and reported wait times. A marginal effects plot allows us to see the relationship between an independent variable of interest (the number of votes per polling place) and the dependent variable (reported wait times) after controlling for other variables. Figure 1 demonstrates that, after controlling for other characteristics, voters in counties with few voters per polling place waited in short lines. Counties with the fewest voters per polling place waited an average of only around 4 minutes, while voters in counties with the most voters per polling place had average waits of more than 10 minutes. In each of the charts below, the 95 percent confidence band is included.

The theoretical relationship between the number of voters per poll worker and wait times is straightforward: workers must be available to check voters in, distribute ballots, and help address any confusion voters might have. Unsurprisingly, we find that as the number of voters per poll worker goes up, so too does the average wait time (again, after controlling for all other variables). Figure 2 shows that the average wait time in counties with the fewest voters per worker was less than 5 minutes; where poll workers were spread among the most voters, that average wait time exceeded 12 minutes.

The same pattern holds true when we examine the relationship between the average number of votes cast per machine at the county level. As figure 3 shows, holding all other factors constant, fewer machines per vote cast might cause bottlenecks that lead to longer lines. The most highly resourced counties saw average waits of around 5 minutes, while the average wait time in counties with the most voters per machine averaged more than 13.5 minutes.

Table 3 makes clear that, in addition to waiting longer overall, voters in the least-resourced counties were also more likely to wait in line for 30 minutes or more. These models use a logistic specification — the dependent variable takes the value "1" if a voter reported waiting 30 minutes or more, and a "0" otherwise. Once again, robust standard errors are clustered by state.

The marginal effects plots of these regressions, shown in figures 4, 5, and 6, make the relationship between electoral resources and long waits more apparent. These plots demonstrate that, after controlling for other sociodemographic county characteristics, fewer electoral resources per voter are associated with an increased likelihood of waiting more than 30 minutes. The 95 percent confidence interval is included.

County Characteristics and Resourcing Levels

Finally, we investigate which types of counties were the most likely to be inadequately resourced on Election Day in 2018. As discussed in the body of the report, counties that became whiter in the past decade had more resources in 2018 than counties that became less white. Similarly, counties where the median income grew (after accounting for inflation, estimated by the Bureau of Labor Statistics) had more resources than places where real incomes shrank. Table 4 demonstrates that these phenomena hold even after controlling for other relevant county and state characteristics.

Whiter and higher-income counties consistently had fewer resources on Election Day in 2018 than less white and less affluent counties. At the same time, counties in flux — those that saw their incomes decline or grow slowly, and those where the white share of the popula-

tion decreased the most quickly, over the past decade — had fewer resources than those that had remained more stable.

While the coefficients on change in percent non-Hispanic white and change in median income are quite large, this is driven in part by the relatively small range into which counties fall. Figures 7–11 present the marginal effects plots for these models.

TABLE 1

Socioeconomics and Wait Times, 2018

Dependent Variable: Wait Time	(1)	(2)	(3)	(4)
Asian	−0.239	0.384	−0.613	−1.777***
	(0.72)	(0.651)	(0.552)	(0.588)
Black	2.846***	1.732**	0.503	0.183
	(0.796)	(0.784)	(0.857)	(0.983)
Latino	2.979***	2.923***	1.744**	1.474*
	(0.741)	(0.701)	(0.883)	(0.858)
Other Race	−0.17	−0.369	−0.800*	−1.460***
	(0.547)	(0.48)	(0.483)	(0.433)
County Population Density (100 people/square mile)			0.013***	0.012***
			(0.001)	(0.001)
County Share Non-Hispanic White			−3.786*	−4.067*
			(2.294)	(2.429)
County Share over 64 Years Old			−21.239**	−17.633**
			(9.035)	(8.945)
Voter's Age				−0.051***
				(0.009)
Family Income ($10,000)				0.036*
				(0.021)
Constant	6.544***	7.211***	14.888***	16.374***
	(0.522)	(0.229)	(1.82)	(2.164)
State Fixed Effects		X	X	X
DRE Machine Type Fixed Effects			X	X
Marital Status Fixed Effects				X
Education Status Fixed Effects				X
Political Party Fixed Effects				X
Observations	17,281	17,281	17,230	15,546
R^2	0.007	0.064	0.076	0.085
Adjusted R^2	0.006	0.061	0.073	0.081

*p <.1 **p <.05 ***p <.01

TABLE 2

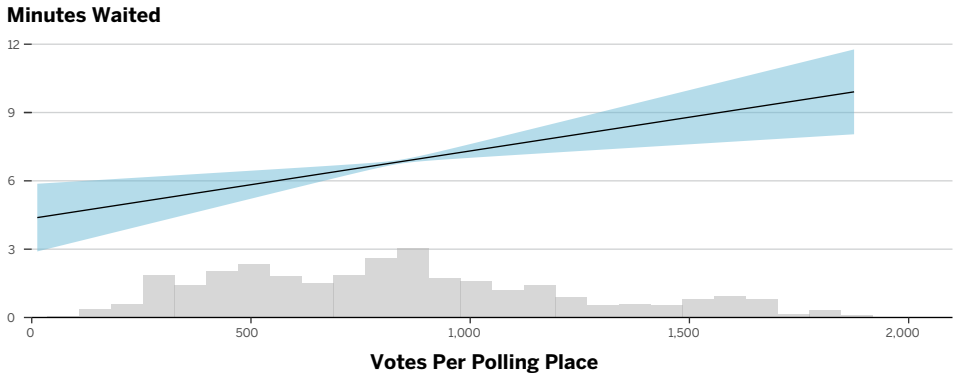
County-Level Resources and Wait Times, 2018

Dependent Variable: Wait Time	(1)	(2)	(3)
Votes Per Polling Place	0.003***		
	(0.001)		
Votes Per Worker		0.034***	
		(0.012)	
Votes Per Machine			0.006***
			(0.001)
County Population Density (100 people/square mile)	0.010***	0.013***	0.013***
	(0.001)	(0.002)	(0.001)
County Share Non-Hispanic White	−3.211*	−8.476***	−3.858**
	(1.861)	(2.458)	(1.932)
County Share over 64 Years Old	−6.56	−3.878	−9.817
	(8.343)	(10.206)	(7.999)
Voter's Age	−0.044***	−0.052***	−0.046***
	(0.01)	(0.009)	(0.009)
Family Income ($10,000)	0.022	0.045	0.028*
	(0.017)	(0.028)	(0.017)
Constant	9.398***	13.371***	13.761***
	(2.753)	(3.714)	(2.336)
State Fixed Effects	X	X	X
DRE Machine Type Fixed Effects	X	X	X
Marital Status Fixed Effects	X	X	X
Education Status Fixed Effects	X	X	X
Political Party Fixed Effects	X	X	X
Race/Ethnicity Fixed Effects	X	X	X
Observations	14,101	11,810	13,533
R^2	0.095	0.104	0.095
Adjusted R^2	0.09	0.099	0.09

*p <.1 **p <.05 ***p <.01

FIGURE 1

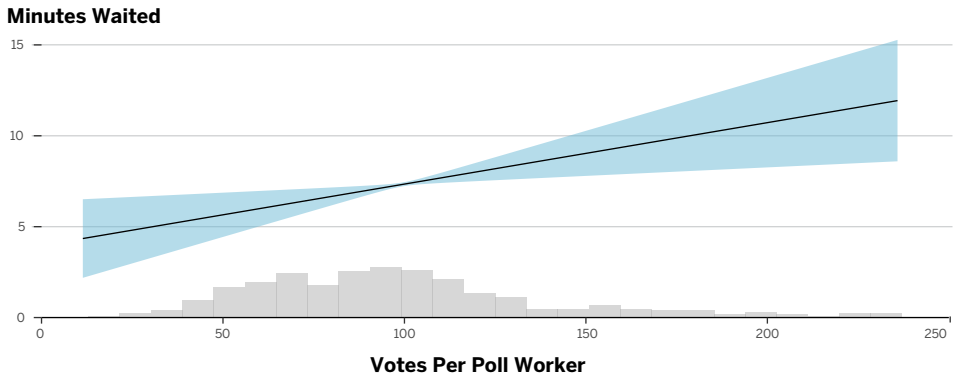
Marginal Effect of Votes Per Polling Place on Wait Times



Note: Distribution of number of votes per polling place shown at bottom.

FIGURE 2

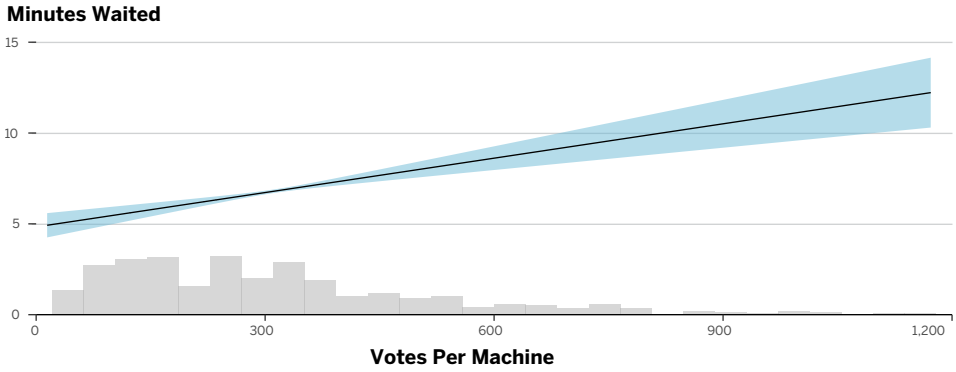
Marginal Effect of Votes Per Poll Worker on Wait Times



Note: Distribution of number of votes per worker shown at bottom.

FIGURE 3

Marginal Effect of Votes Per Machine on Wait Times



Note: Distribution of number of votes per machine shown at bottom.

TABLE 3

County-Level Resources and the Likelihood of Waiting in a Long Line, 2018

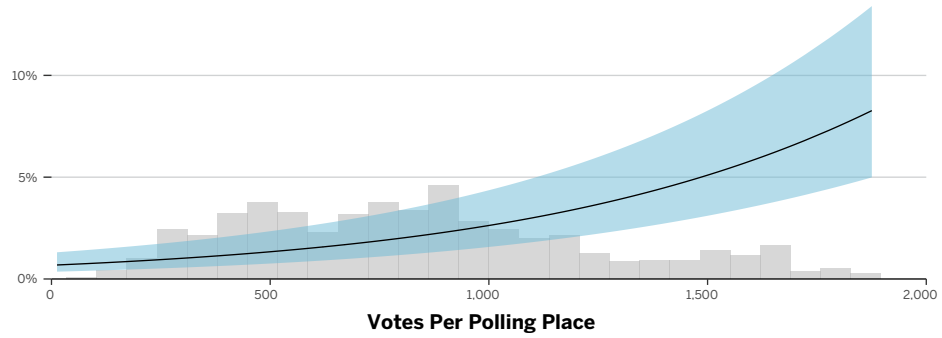
Dependent Variable: Waited in Long Line	(1)	(2)	(3)
Votes Per Polling Place	0.001***		
	(0.0002)		
Votes Per Worker		0.006**	
		(0.003)	
Votes Per Machine			0.001***
			(0.0004)
County Population Density (100 people/square mile)	0.002***	0.003***	0.003***
	(0.0003)	(0.0003)	(0.0002)
County Share Non-Hispanic White	–1.370**	–2.229***	–1.350**
	(0.637)	(0.787)	(0.591)
County Share over 64 Years Old	–1.796	–3.502	–3.281
	(3.225)	(4.115)	(2.913)
Voter's Age	–0.010***	–0.012***	–0.011**
	(0.003)	(0.004)	(0.004)
Family Income ($10,000)	0.012	0.021	0.019*
	(0.01)	(0.013)	(0.011)
Constant	–2.650***	–1.231	–1.116
	(0.842)	(1.132)	(0.7)
State Fixed Effects	X	X	X
DRE Machine Type Fixed Effects	X	X	X
Marital Status Fixed Effects	X	X	X
Education Status Fixed Effects	X	X	X
Political Party Fixed Effects	X	X	X
Race/Ethnicity Fixed Effects	X	X	X
Observations	14,101	11,810	13,533
Log Likelihood	–2239.038	–2027.823	–2129.303

*p <.1 **p <.05 ***p <.01

FIGURE 4

Marginal Effect of Votes Per Polling Place on Long Waits

Predicted Probability of Waiting 30 or More Minutes

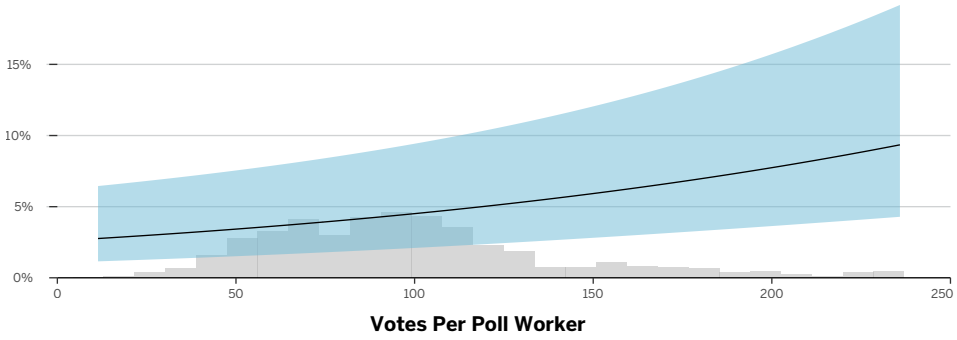


Note: Distribution of number of votes per polling place shown at bottom.

FIGURE 5

Marginal Effect of Votes Per Poll Worker on Long Waits

Predicted Probability of Waiting 30 or More Minutes

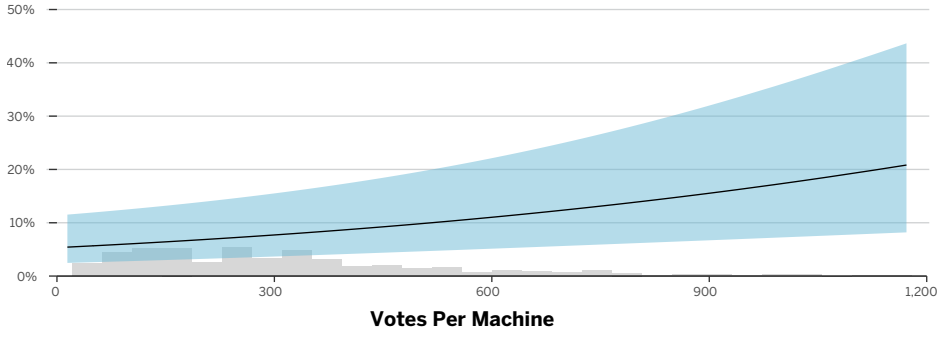


Note: Distribution of number of votes per poll worker shown at bottom.

FIGURE 6

Marginal Effect of Votes Per Machine on Long Waits

Predicted Probability of Waiting 30 or More Minutes



Note: Distribution of number of votes per machine shown at bottom.

TABLE 4

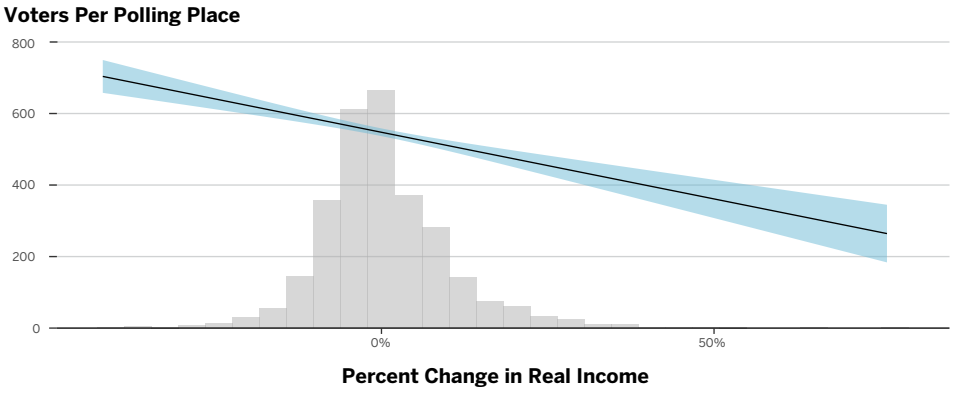
County Demographics and Resources, 2018

DEPENDENT VARIABLE:	VOTERS PER POLLING PLACE		VOTERS PER WORKER		VOTERS PER MACHINE	
	(1)	(2)	(3)	(4)	(5)	(6)
Change in Percent Non-Hispanic White	−1,096.394***		−78.200**		−50.202	
	(245.787)		(33.658)		(112.2)	
Change in Median Income		−372.753***		−51.640***		−64.489**
		(53.855)		(6.839)		(30.738)
Percent White	134.690***	91.466**	36.985***	33.454***	94.871***	93.262***
	(40.09)	(39.454)	(5.538)	(5.38)	(21.77)	(21.342)
Election Day Turnout	−37.63	−70.592	12.074	8.072	128.316***	123.324***
	(94.508)	(96.163)	(12.612)	(12.696)	(44.933)	(45.011)
Median Age	−13.151***	−13.530***	−1.847***	−1.832***	−6.481***	−6.452***
	(1.207)	(1.217)	(0.165)	(0.163)	(0.707)	(0.702)
Population (10,000s)	0.512**	0.463*	0.051***	0.042***	0.113	0.096
	(0.248)	(0.245)	(0.018)	(0.016)	(0.087)	(0.086)
Population Change (percent)	201.535**	277.607***	39.095***	44.494***	101.198**	106.857**
	(83.246)	(81.813)	(11.609)	(11.575)	(43.113)	(42.54)
Median Income	0.010***	0.011***	0.001***	0.001***	0.003***	0.003***
	(0.001)	(0.001)	(0.0001)	(0.0001)	(0.0003)	(0.0003)
Population Density	0.013***	0.013***	−0.001***	−0.001***	−0.0001	−0.00005
	(0.003)	(0.004)	(0.0002)	(0.0002)	(0.001)	(0.001)
Constant	639.722***	680.204***	107.393***	106.599***	194.285***	191.596***
	(67.577)	(65.924)	(8.677)	(8.33)	(36.962)	(35.639)
State Fixed Effects	X	X	X	X	X	X
DRE Machine Type Fixed Effects	X	X	X	X	X	X
Observations	2,594	2,594	2,428	2,428	2,588	2,588
R^2	0.561	0.565	0.475	0.487	0.569	0.57
Adjusted R^2	0.552	0.556	0.464	0.476	0.56	0.561

*p <.1 **p <.05 ***p <.01

FIGURE 7

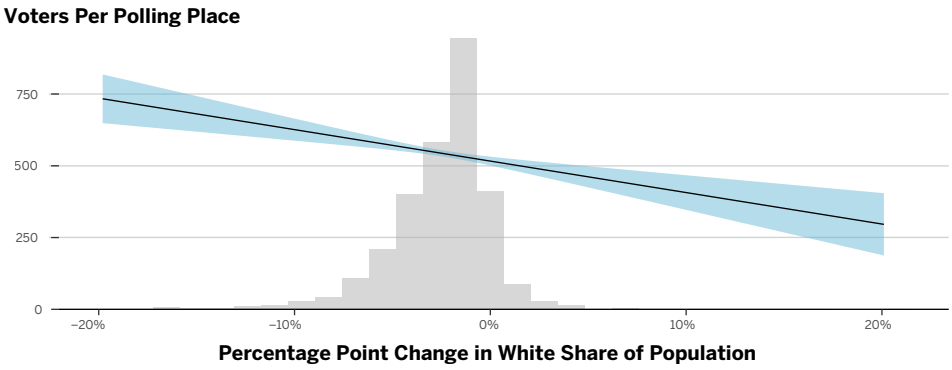
Marginal E ect of Change in Incomes and Voters Per Polling Place



Note: Distribution of change in income shown at bottom.

FIGURE 8

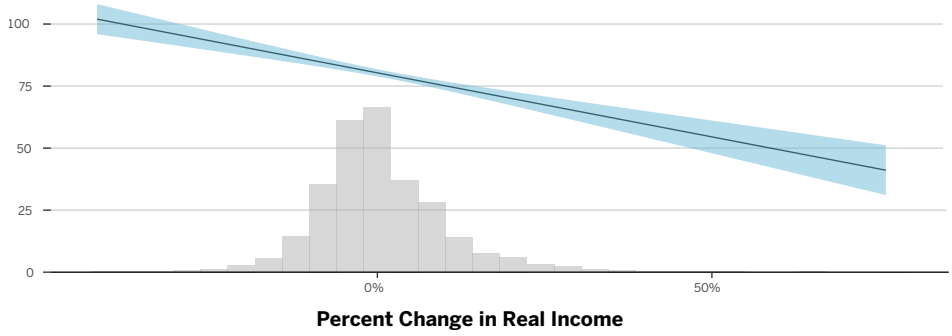
Marginal Effect of Change in White Share of Population and Voters Per Polling Place



Note: Distribution of change in percent white shown at bottom.

FIGURE 9

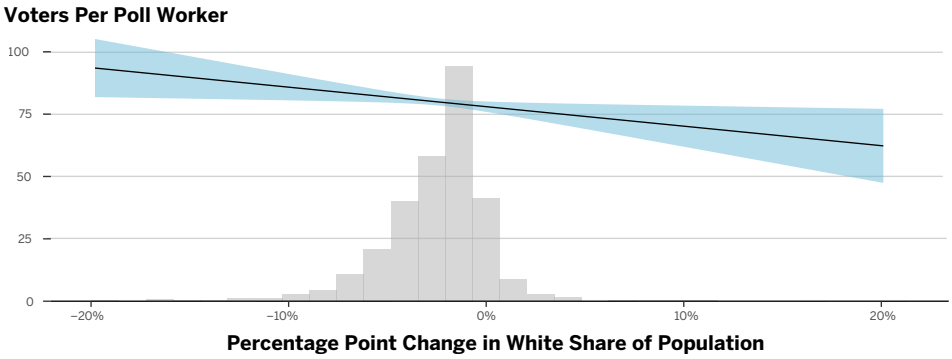
Marginal Effect of Change in Incomes and Voters Per Poll Worker



Note: Distribution of change in income shown at bottom.

FIGURE 10

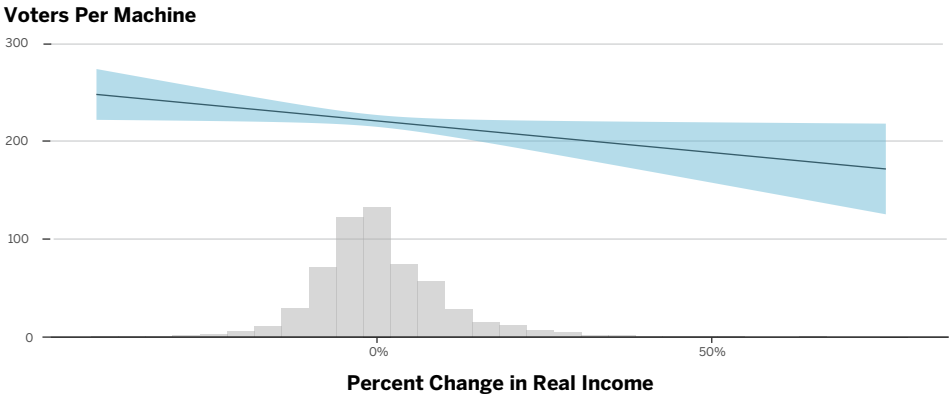
Marginal Effect of Change in White Share of Population and Voters Per Poll Worker



Note: Distribution of change in percent white shown at bottom.

FIGURE 11

Marginal E ect of Change in Incomes and Voters Per Machine



Note: Distribution of change in income shown at bottom.

Endnotes

1 Jens Manuel Krogstand, Luis Noe-Bustamante, and Antonio Flores, "Historic Highs in 2018 Voter Turnout Extended Across Racial and Ethnic Groups," Pew Research Center, May 1, 2019, https://www.pewresearch.org/fact-tank/2019/05/01/historic-highs-in-2018-voter-turnout-extended-across-racial-and-ethnic-groups; Emily Stewart, "2018's Record-Setting Voter Turnout, in One Chart," *Vox*, November 19, 2019, https://www.vox.com/policy-and-politics/2018/11/19/18103110/2018-midterm-elections-turnout; Ella Nilsen, "The 2018 Midterms Had the Highest Turnout Since Before World War I," *Vox*, December 10, 2018, https://www.vox.com/policy-and-politics/2018/12/10/18130492/2018-voter-turnout-political-engagement-trump; Jordan Misra, "Voter Turnout Rates Among All Voting Age and Major Racial and Ethnic Groups Were Higher Than in 2014," U.S. Census Bureau, April 23, 2019, https://www.census.gov/library/stories/2019/04/behind-2018-united-states-midterm-election-turnout.html; Grace Sparks, "There Was Historic Voter Turnout in the 2018 Midterms — Especially Among Young Voters," CNN, April 23, 2019, https://www.cnn.com/2019/04/23/politics/voter-turnout-2018-census/index.html; and Renae Reints, "2018 Midterm Election Sets Record as the First to Exceed Voter Turnout of 100 Million People," *Fortune*, November 7, 2018, https://fortune.com/2018/11/07/voter-turnout-2018-midterms.

2 Rebecca Ayala, "Voting Problems 2018," Brennan Center for Justice, November 5, 2018, https://www.brennancenter.org/our-work/analysis-opinion/voting-problems-2018; "Election Day 2018: A Brennan Center Live Blog," Brennan Center for Justice, November 6, 2018, https://www.brennancenter.org/our-work/analysis-opinion/election-day-2018-brennan-center-live-blog; Amy Gardner and Beth Reinhard, "Broken Machines, Rejected Ballots and Long Lines: Voting Problems Emerge as Americans Go to the Polls," *Washington Post*, November 6, 2018, https://www.washingtonpost.com/politics/broken-machines-rejected-ballots-and-long-lines-voting-problems-emerge-as-americans-go-to-the-polls/2018/11/06/ffd11e52-dfa8-11e8-b3f0-62607289efee_story.html; and Erik Ortiz et al., "Midterms 2018: Voters Face Malfunctioning Machines and Long Lines at Polls Across Country on Election Day," NBC News, November 6, 2018, https://www.nbcnews.com/politics/elections/midterms-2018-voters-face-malfunctioning-machines-long-lines-polls-across-n932156.

3 This statistic is calculated by multiplying the share of Election Day voters who waited longer than 30 minutes by the share of all voters who cast a ballot on Election Day, using data from the Cooperative Congressional Election Study (CCES). Brian Schaffner, Stephen Ansolabehere, and Sam Luks, *CCES Common Content, 2018*, Harvard Dataverse, 2019, https://doi.org/10.7910/DVN/ZSBZ7K. This determines the total share of the electorate that waited 30 minutes or longer on Election Day, according to the CCES. This share is multiplied by the total number of ballots cast, estimated by the United States Elections Project. "2018 November General Election Turnout Rates," last modified December, 14, 2018, http://www.electproject.org/2018g.

4 Matthew Weil et al., *The 2018 Voting Experience: Polling Place Lines,* Bipartisan Policy Center, 2019, 6, https://bipartisanpolicy.org/report/the-2018-voting-experience.

5 Weil et al., *The 2018 Voting Experience*, 3–4.

6 Election administrators in the following counties and states were interviewed for this report: Shelby County, Alabama; Maricopa County, Arizona; Forsyth County, Georgia; Fulton County, Georgia; Gwinnett County, Georgia; Peoria County, Illinois; Prince George's County, Maryland; Detroit, Michigan; Macomb County, Michigan; Jackson County, Missouri; Clark County, Nevada; Washoe County, Nevada; State of New York; Durham County, North Carolina; Forsyth County, North Carolina; Guilford County, North Carolina; Butler County, Ohio; Franklin County, Ohio; Licking County, Ohio; Marion County, Ohio; State of Rhode Island; Charleston County, South Carolina; State of South Carolina; Davidson County, Tennessee; Denton County, Texas; Fort Bend County, Texas; Harris County, Texas; Hays County, Texas; Tarrant County, Texas; Travis County, Texas; Williamson County, Texas; and Manassas County, Virginia. All interview transcripts are on file with the Brennan Center.

7 This report incorporates data from three sources: the Cooperative Congressional Election Study, the Election Administration and Voting Survey, and the five-year American Community Survey. See Schaffner, Ansolabehere, and Luks, *CCES Common Content*; U.S. Election Assistance Commission, *Election Administration and Voting Survey: 2018 Comprehensive Report*, 2019, https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf; and Census Bureau, "American Community Survey 5-Year Data (2009–2018)," December 19, 2019, https://www.census.gov/data/developers/data-sets/acs-5year.html.

8 For instance, Michael Herron and Daniel Smith, "Precinct Resources and Voter Wait Times," *Electoral Studies* 42 (June 2016): 249, https://www.researchgate.net/publication/299503594_Precinct_resources_and_voter_wait_times.

9 Throughout this report, "white" corresponds to the census designation "non-Hispanic white." Following the CCES, we use it as a category exclusive of Latinos. "Voters of color" refers specifically to Black and Latino voters.

10 Brennan Center for Justice, "Bipartisan Presidential Commission Endorses Modernizing Voter Registration," December 1, 2014, https://www.brennancenter.org/our-work/research-reports/bipartisan-presidential-commission-endorses-modernizing-voter.

11 We define "resources" throughout this report as the number of in-person Election Day votes per Election Day polling place, poll workers, and machines available.

12 These differences are significant at the 95 percent confidence level.

13 For turnout in 2014, see David Becker, "2014 Midterms Defined by Low Voter Turnout," Pew Research Center, 2014, https://www.pewtrusts.org/en/research-and-analysis/articles/2014/11/13/2014-midterms-defined-by-low-voter-turnout. For turnout in 2018, see Krogstand, Noe-Bustamante, and Flores, "Historic Highs in 2018 Voter Turnout."

14 See "Inadequate Planning Practices" on pp. 11–12.

15 Susan Milligan, "Preparing for a Voter Surge," *US News & World Report*, September 20, 2019, https://www.usnews.com/news/elections/articles/2019-09-20/experts-predict-huge-turnout-in-2020.

16 Calculated from responses to Schaffner, Ansolabehere, and Luks, *CCES Common Content*.

17 The CCES also has a preelection wave in even years and a much smaller sample in odd years.

18 Charles Stewart III and Stephen Ansolabehere, *Waiting in Line to Vote*, U.S. Election Assistance Commission, July 18, 2013, https://www.eac.gov/documents/2017/02/24/waiting-in-line-to-vote-white-paper-stewart-ansolabehere; Charles Stewart III, *Managing Polling Place Resources*, Caltech/MIT Voting Technology Project, 2015, http://web.mit.edu/vtp/Managing%20Polling%20Place%20Resources.pdf; and Stephen Pettigrew, "The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials," *Political Science Quarterly* 132, 3 (2017): 528.

19 U.S. Election Assistance Commission, *Election Administration and Voting Survey: 2018*.

20 To test whether counties were inequitable in distributing resources within their jurisdictions, we analyzed precinct-level data from counties around the country. We focused in particular on

counties where reports of racial disparities were loudest. We found that counties did not allocate fewer resources to polling places in low-income or minority neighborhoods; in fact, in the counties where we found disparities, polling places in higher-income and whiter neighborhoods tended to have the fewest resources.

21 These include every county in Oregon, Washington, and Colorado, most counties in Utah and North Dakota, and a number of counties in California and Nebraska. Although some voters in states like Colorado vote in person on Election Day, the experience of an in-person voter in a primarily vote-by-mail state provides little insight into the relationship between wait times and resources.

22 The full set of interviews appears in note 6.

23 Throughout this report, we use the vote-verified postelection weights from the CCES.

24 This statistic is calculated by multiplying the share of Election Day voters who waited 30 minutes or longer by the share of all voters who cast a ballot on Election Day. This determines the total share of the electorate that waited 30 minutes or longer on Election Day, according to the CCES. This share is multiplied by the total number of ballots cast, estimated by the United States Elections Project. United States Elections Project, "2018 November General Election Turnout Rates."

25 For example, for the 2008 and 2012 elections, see Pettigrew, "The Racial Gap in Wait Times," 527–528. For the 2016 election, see M. Keith Chen et al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data*, Cornell University, 2019, 1, https://arxiv.org/pdf/1909.00024.pdf.

26 Christopher Famighetti, Amanda Melillo, and Myrna Pérez, *Election Day Long Lines: Resource Allocation*, Brennan Center for Justice, 2014, 1–2,12, https://www.brennancenter.org/sites/default/files/2019-08/Report_ElectionDayLongLines-ResourceAllocation.pdf. The Brennan Center also published a brief analysis of long voting lines and their causes in advance of the 2016 presidential election. The analysis focused on Maricopa County, Arizona. Christopher Famighetti, *Long Voting Lines: Explained*, Brennan Center for Justice, 2016, 1–2, https://www.brennancenter.org/sites/default/files/analysis/Long_Voting_Lines_Explained.pdf.

27 For example, for the 2008 and 2012 elections, see Pettigrew, "The Racial Gap in Wait Times," 527–547.

28 For example, Weil et al., *The 2018 Voting Experience*, 4. Also, Chen et al., *Racial Disparities in Voting Wait Times*, 3–10.

29 Stephen Pettigrew, "Long Lines and Voter Purges: The Logistics of Running Elections in America" (PhD diss., Harvard University, 2017), https://dash.harvard.edu/bitstream/handle/1/40046499/PETTIGREW-DISSERTATION-2017.pdf?sequence=4.

30 David Kimball, "Why Are Voting Lines Longer for Urban Voters?" (presented at the Southwestern Social Science Association annual conference, New Orleans, March 29, 2013); Pettigrew, "The Racial Gap in Wait Times"; and Charles Stewart III, "Waiting to Vote in 2012," *Journal of Law and Politics*, 28 (2012): 439, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243630.

31 Pettigrew, "The Racial Gap in Wait Times," 535.

32 Chen et al., *Racial Disparities in Voting Wait Times*, 24–27.

33 Famighetti, Melillo, and Pérez, *Election Day Long Lines*, 1.

34 For instance, Famighetti, Melillo, and Pérez, *Election Day Long Lines*, 1–20; also, Herron and Smith, "Precinct Resources," 249.

35 For example, Weil et al., *The 2018 Voting Experience*. Also, Chen et al., *Racial Disparities in Voting Wait Times*, 1–18.

36 Sarah Diem et al., "Racial Diversity in the Suburbs: How Race-Neutral Responses to Demographic Change Perpetuate Inequity in Suburban School Districts," *Race Ethnicity and Education* 19, 4 (2014), 731–762, https://www.tandfonline.com/doi/full/10.1080/13613324.2014.946485?scroll=top&needAccess=true; Ning Hsieh and Matt Ruther, "Despite Increased Insurance Coverage, Nonwhite Sexual Minorities Still Experience Disparities in Access to Care," *Health Affairs* 36, 10 (2017), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2017.0455; and Altaf Saadi et al., "Racial Disparities in Neurologic Health Care Access and Utilization in the United States," *Neurology* 88, 24 (June 13, 2017): 2272–2273, https://n.neurology.org/content/88/24/2268.short.

37 Ivy Morgan and Ary Amerikaner, *Funding Gaps 2018*, Education Trust, February 2018, https://edtrust.org/wp-content/uploads/2014/09/FundingGapReport_2018_FINAL.pdf.

38 George Washington University, Public Health Online, "What's the Difference Between Equity and Equality?" April 5, 2018, https://publichealthonline.gwu.edu/blog/equity-vs-equality.

39 Only a handful of jurisdictions whose administrators we interviewed provided language assistance even though they were not legally required to do so. For example, election administrator, New York, interview by Brennan Center for Justice, November 13, 2019; election administrator, Forsyth County, North Carolina, interview by Brennan Center for Justice, October 22, 2019; and election administrator, Washoe County, Nevada, interview by Brennan Center for Justice, October 15, 2019.

40 Chris Fuchs, "Federal Law Allows Nearly Anyone to Translate for Voters. At Polls, It Can Be a Different Story," NBC News, December 19, 2018, https://www.nbcnews.com/news/asian-america/federal-law-allows-nearly-anyone-translate-voters-polls-it-can-n949056.

41 Voting Rights Act of 1965, 52 U.S.C. § 10503 (1965); U.S. Census Bureau, "How the Law Prescribes the Determination of Covered Areas under the Language Minority Provisions of Section 203 of the Voting Rights Act," accessed January 21, 2020, https://www2.census.gov/programs-surveys/decennial/rdo/about/voting-rights-determination/2_PrescribedFlowFor203Determinations.pdf.

42 The jurisdictions covered under VRA Section 203 whose election officials were interviewed for this report are Maricopa County, Arizona; Clark County, Nevada; Gwinnett County, Georgia; Williamson County, Texas; Hays County, Texas; Tarrant County, Texas; Fort Bend County, Texas; Harris County, Texas; Travis County, Texas; and Denton County, Texas. U.S. Census Bureau, "Section 203 of the Voting Rights Act: Covered Areas for Voting Rights Bilingual Election Materials," accessed March 2, 2020, https://www.census.gov/content/dam/Census/newsroom/press-kits/2017/esri/esri_uc2017_voting_rights_act.pdf.

43 In the months leading up to the 2018 election, the American Civil Liberties Union (ACLU) determined that 36 county websites in Texas lacked sufficient Spanish-language resources and sent notice letters to county officials. Many counties responded positively and took steps to ensure that their websites were accessible to Spanish speakers. ACLU of Texas, "ACLU of Texas Puts Counties on Notice for Possible Violations of Voting Rights Act," September 24, 2018, https://www.aclutx.org/en/press-releases/aclu-texas-puts-counties-notice-possible-violations-voting-rights-act.

44 Election administrator, Clark County, Nevada, interview by Brennan Center for Justice, October 21, 2019; election administrator, Prince George's County, Maryland, interview by Brennan Center for Justice, October 24, 2019; election administrator, Tarrant County, Texas, interview by Brennan Center for Justice, November 13, 2019; election administrator, Travis County, Texas, interview by Brennan Center for Justice, November 22, 2019; and election administrator, Williamson County, Texas, interview by Brennan Center for Justice, October 16, 2019.

45 One study estimated that nearly 6 million voters with limited English proficiency would fail to receive federal language accommodations during the 2018 midterm election. Richard Salame, "Vote Aquí? Limited-English-Proficiency Voters Could Help Determine Congress," *The Nation*, November 5, 2018, https://www.thenation.com/article/limited-english-voters-investigation-election.

46 Election administrator, Butler County, Ohio, interview by Brennan Center for Justice, October 29, 2019; election administrators, Licking County, Ohio, interview by Brennan Center for Justice, November 12, 2019; election administrators, Marion County, Ohio,

interview by Brennan Center for Justice, November 15, 2019; election administrator, Charleston County, South Carolina, interview by Brennan Center for Justice, October 14, 2019; election administrator, Davidson County, Tennessee, interview by Brennan Center for Justice, November 4, 2019; election administrator, Fulton County, Georgia, interview by Brennan Center for Justice, October 24, 2019; election administrator, Durham County, North Carolina, interview by Brennan Center for Justice, November 18, 2019; election administrators, Jackson County, Missouri, interview by Brennan Center for Justice, October 16, 2019; election administrator, Peoria County, Illinois, interview by Brennan Center for Justice, October 29, 2019; election administrators, Shelby County, Alabama, interview by Brennan Center for Justice, November 15, 2019; and election administrator, Manassas County, Virginia, interview by Brennan Center for Justice, October 28, 2019.

47 U.S. Census Bureau, "QuickFacts: Manassas City, Virginia (County)," accessed January 21, 2020, https://www.census.gov/quickfacts/fact/table/manassascityvirginiacounty/PST120218.

48 Similarly, Peoria County, Illinois, has experienced demographic shifts since 2010. The county's white population has decreased and its Hispanic and Asian populations have both increased over the past decade. The county does not fall under the federal mandate, and election officials do not proactively recruit poll workers with translation skills or provide ballots in languages other than English. Election administrator, Peoria County, Illinois, interview by Brennan Center for Justice, October 29, 2019; and U.S. Census Bureau, "QuickFacts: Peoria County, Illinois," accessed January 21, 2020, https://www.census.gov/quickfacts/peoriacountyillinois.

49 Weil et al., *The 2018 Voting Experience*, 15–24; Herron and Smith, *Precinct Resources*, 253–262; William A. Edelstein and Arthur D. Edelstein, "Touchscreen Voting Machines Cause Long Lines and Disenfranchise Voters" (arXiv preprint arXiv:0810.5577, Cornell University, 2008), 1–5.

50 See, for instance, Herron and Smith, *Precinct Resources*, 249–252.

51 Counties that look to funding when allocating resources: election administrators, Maricopa County, Arizona, interview by Brennan Center for Justice, November 22, 2019; election administrator, Forsyth County, Georgia, interview by Brennan Center for Justice, October 31, 2019; election administrator, Fulton County, Georgia, interview by Brennan Center for Justice, October 24, 2019; election administrator, Peoria County, Illinois, interview by Brennan Center for Justice, October 29, 2019; election administrator, Prince George's County, Maryland, interview by Brennan Center for Justice, October 24, 2019; election administrator, Detroit, Michigan, interview by Brennan Center for Justice, December 6, 2019; election administrator, Macomb County, Michigan, interview by Brennan Center for Justice, October 21, 2019; election administrators, Jackson County, Missouri, interview by Brennan Center for Justice, October 16, 2019; election administrator, Clark County, Nevada, interview by Brennan Center for Justice, October 21, 2019; election administrator, Washoe County, Nevada, interview by Brennan Center for Justice, October 15, 2019; election administrator, New York, interview by Brennan Center for Justice, November 13, 2019; election administrator, Durham County, North Carolina, interview by Brennan Center for Justice, November 18, 2019; election administrator, Forsyth County, North Carolina, interview by Brennan Center for Justice, October 22, 2019; election administrator, Guilford County, North Carolina, interview by Brennan Center for Justice, October 18, 2019; election administrator, Butler County, Ohio, interview by Brennan Center for Justice, October 29, 2019; election administrator, Franklin County, Ohio, interview by Brennan Center for Justice, November 13, 2019; election administrators, Licking County, Ohio, interview by Brennan Center for Justice, November 12, 2019; election administrators, Marion County, Ohio, interview by Brennan Center for Justice, November 15, 2019; election administrators, Rhode Island, interview by Brennan Center for Justice, October 23, 2019; election administrator, Charleston County, South Carolina, interview by Brennan Center for Justice, October 14, 2019; election administrator, South Carolina, interview by Brennan Center for Justice, November 12, 2019; election administrator, Denton County, Texas, interview by Brennan Center for Justice, November 19, 2019; election administrator, Fort Bend County, Texas, interview by Brennan Center for Justice, November 12, 2019; election administrator, Harris County, Texas, interview by Brennan Center for Justice, November 14, 2019; election administrator, Hays County, Texas, interview by Brennan Center for Justice, October 29, 2019; election administrator, Tarrant County, Texas, interview by Brennan Center for Justice, November 13, 2019; election administrator, Travis County, Texas, interview by Brennan Center for Justice, November 22, 2019; election administrator, Williamson County, Texas, interview by Brennan Center for Justice, October 16, 2019; and election administrator, Manassas City, Virginia, interview by Brennan Center for Justice, October 28, 2019. Counties that look to statutory requirements and guidelines when allocating resources: election administrators, Maricopa County, Arizona, interview by Brennan Center for Justice, November 22, 2019; election administrator, Forsyth County, Georgia, interview by Brennan Center for Justice, October 31, 2019; election administrator, Fulton County, Georgia, interview by Brennan Center for Justice, October 24, 2019; election administrator, Gwinnett County, Georgia, email to Brennan Center for Justice, October 25, 2019; election administrator, Peoria County, Illinois, interview by Brennan Center for Justice, October 29, 2019; election administrator, Prince George's County, Maryland, interview by Brennan Center for Justice, October 24, 2019; election administrator, Detroit, Michigan, interview by Brennan Center for Justice, December 6, 2019; election administrator, Macomb County, Michigan, interview by Brennan Center for Justice, October 21, 2019; election administrator, Clark County, Nevada, interview by Brennan Center for Justice, October 21, 2019; election administrator, Washoe County, Nevada, interview by Brennan Center for Justice, October 15, 2019; election administrator, New York, interview by Brennan Center for Justice, November 13, 2019; election administrator, Durham County, North Carolina, interview by Brennan Center for Justice, November 18, 2019; election administrator, Forsyth County, North Carolina, interview by Brennan Center for Justice, October 22, 2019; election administrator, Guilford County, North Carolina, interview by Brennan Center for Justice, October 18, 2019; election administrator, Butler County, Ohio, interview by Brennan Center for Justice, October 29, 2019; election administrator, Franklin County, Ohio, interview by Brennan Center for Justice, November 13, 2019; election administrators, Licking County, Ohio, interview by Brennan Center for Justice, November 12, 2019; election administrators, Marion County, Ohio, interview by Brennan Center for Justice, November 15, 2019; election administrators, Rhode Island, interview by Brennan Center for Justice, October 23, 2019; election administrator, Charleston County, South Carolina, interview by Brennan Center for Justice, October 14, 2019; election administrator, South Carolina, interview by Brennan Center for Justice, November 12, 2019; election administrator, Davidson County, Tennessee, interview by Brennan Center for Justice, November 4, 2019; election administrator, Denton County, Texas, interview by Brennan Center for Justice, November 19, 2019; election administrator, Hays County, Texas, interview by Brennan Center for Justice, October 29, 2019; election administrator, Williamson County, Texas, interview by Brennan Center for Justice, October 16, 2019; and election administrator, Manassas City, Virginia, interview by Brennan Center for Justice, October 28, 2019. Counties that look to the quality of available resources when allocating resources: election administrators, Maricopa County, Arizona, interview by Brennan Center for Justice, November 22, 2019; election administrator, Forsyth County, Georgia, interview by Brennan Center for Justice, October 31, 2019; election administrator, Fulton County, Georgia, interview by Brennan Center for Justice, October 24, 2019; election administrator, Peoria County, Illinois, interview by Brennan Center for Justice, October 29, 2019; election administrator, Macomb County, Michigan, interview by Brennan Center for Justice, October 21, 2019; election administrators, Jackson County, Missouri, interview by Brennan Center for Justice, October 16, 2019; election administrator, Clark County, Nevada, interview by Brennan Center for

Justice, October 21, 2019; election administrator, Washoe County, Nevada, interview by Brennan Center for Justice, October 15, 2019; election administrator, New York, interview by Brennan Center for Justice, November 13, 2019; election administrator, Durham County, North Carolina, interview by Brennan Center for Justice, November 18, 2019; election administrator, Forsyth County, North Carolina, interview by Brennan Center for Justice, October 22, 2019; election administrator, Guilford County, North Carolina, interview by Brennan Center for Justice, October 18, 2019; election administrator, Butler County, Ohio, interview by Brennan Center for Justice, October 29, 2019; election administrator, Franklin County, Ohio, interview by Brennan Center for Justice, November 13, 2019; election administrators, Licking County, Ohio, interview by Brennan Center for Justice, November 12, 2019; election administrators, Rhode Island, interview by Brennan Center for Justice, October 23, 2019; election administrator, Charleston County, South Carolina, interview by Brennan Center for Justice, October 14, 2019; election administrator, South Carolina, interview by Brennan Center for Justice, November 12, 2019; election administrator, Davidson County, Tennessee, interview by Brennan Center for Justice, November 4, 2019; election administrator, Denton County, Texas, interview by Brennan Center for Justice, November 19, 2019; election administrator, Fort Bend County, Texas, interview by Brennan Center for Justice, November 12, 2019; election administrator, Harris County, Texas, interview by Brennan Center for Justice, November 14, 2019; election administrator, Hays County, Texas, interview by Brennan Center for Justice, October 29, 2019; election administrator, Tarrant County, Texas, interview by Brennan Center for Justice, November 13, 2019; election administrator, Travis County, Texas, interview by Brennan Center for Justice, November 22, 2019; election administrator, Williamson County, Texas, interview by Brennan Center for Justice, October 16, 2019; and election administrator, Manassas City, Virginia, interview by Brennan Center for Justice, October 28, 2019. Counties that look to unique community needs, such as voting trends and demographic shifts, when allocating resources: election administrators, Maricopa County, Arizona, interview by Brennan Center for Justice, November 22, 2019; election administrator, Forsyth County, Georgia, interview by Brennan Center for Justice, October 31, 2019; election administrator, Fulton County, Georgia, interview by Brennan Center for Justice, October 24, 2019; election administrator, Peoria County, Illinois, interview by Brennan Center for Justice, October 29, 2019; election administrator, Prince George's County, Maryland, interview by Brennan Center for Justice, October 24, 2019; election administrator, Macomb County, Michigan, interview by Brennan Center for Justice, October 21, 2019; election administrators, Jackson County, Missouri, interview by Brennan Center for Justice, October 16, 2019; election administrator, Clark County, Nevada, interview by Brennan Center for Justice, October 21, 2019; election administrator, Washoe County, Nevada, interview by Brennan Center for Justice, October 15, 2019; election administrator, New York, interview by Brennan Center for Justice, November 13, 2019; election administrator, Durham County, North Carolina, interview by Brennan Center for Justice, November 18, 2019; election administrator, Forsyth County, North Carolina, interview by Brennan Center for Justice, October 22, 2019; election administrator, Guilford County, North Carolina, interview by Brennan Center for Justice, October 18, 2019; election administrator, Butler County, Ohio, interview by Brennan Center for Justice, October 29, 2019; election administrator, Franklin County, Ohio, interview by Brennan Center for Justice, November 13, 2019; election administrators, Licking County, Ohio, interview by Brennan Center for Justice, November 12, 2019; election administrators, Rhode Island, interview by Brennan Center for Justice, October 23, 2019; election administrator, Charleston County, South Carolina, interview by Brennan Center for Justice, October 14, 2019; election administrator, South Carolina, interview by Brennan Center for Justice, November 12, 2019; election administrator, Davidson County, Tennessee, interview by Brennan Center for Justice, November 4, 2019; election administrator, Denton County, Texas, interview by Brennan Center for Justice, November 19, 2019; election administrator, Fort Bend County, Texas, interview by Brennan Center for Justice, November 12, 2019; election administrator, Harris County, Texas, interview by Brennan Center for Justice, November 14, 2019; election administrator, Hays County, Texas, interview by Brennan Center for Justice, October 29, 2019; election administrator, Tarrant County, Texas, interview by Brennan Center for Justice, November 13, 2019; election administrator, Travis County, Texas, interview by Brennan Center for Justice, November 22, 2019; election administrator, Williamson County, Texas, interview by Brennan Center for Justice, October 16, 2019; and election administrator, Manassas City, Virginia, interview by Brennan Center for Justice, October 28, 2019.

52 According to our analysis of the EAVS data.

53 The relationship between these demographic changes and the resource levels of counties are statistically significant in each case except for the change in white population relative to number of votes cast per machine. (The full regression tables can be found in the appendix.)

54 In an ideal world, we would be able to construct a panel data set that examined how resources and demographics change together. However, the EAVS prevents us from doing so: in years prior to 2018, too few jurisdictions consistently reported their resource levels to the EAVS. Given this, we interrogate the relationship between demographic change over a 10-year period and resource levels at the end of the period. We are therefore unable to say whether resources *decline* as populations change, but rather only that there were fewer resources at the end of the period in those places where incomes or white shares declined the most.

55 These differences are significant at the 95 percent confidence level.

56 These differences are significant at the 95 percent confidence level.

57 E.g., Jacob Rugh and Jessica Trounstine, "The Provision of Local Public Goods in Diverse Communities: Analyzing Municipal Bond Elections," *Journal of Politics* 73, 4 (2011), https://www.doi.org/10.1017/S0022381611000776; James Habyarimana et al., "Why Does Ethnic Diversity Undermine Public Goods Provision?" *American Political Science Review* 8, 4 (2007), https://doi.org/10.1017/S0003055407070499; and Erzo Luttmer, "Group Loyalty and the Taste for Redistribution," *Journal of Political Economy* 109, 3 (2001), https://doi.org/10.1086/321019.

58 Daniel J. Hopkins, "The Diversity Discount: When Increasing Ethnic and Racial Diversity Prevents Tax Increases," *Journal of Politics* 71, 1 (2006), https://doi.org/10.1017/S0022381608090105.

59 Ala. Code § 17-6-4; Ark. Code Ann. § 7-5-101 (West); Cal. Elec. Code § 12223 (West); Colo. Rev. Stat. Ann. § 1-5-101 (West); Del. Code Ann. tit. 15, § 4105 (West); Ga. Code Ann. § 21-2-263 (West); Idaho Code Ann. § 34-301 (West); 10 Ill. Comp. Stat. Ann. 5/11-2; Ind. Code Ann. § 3-11-1.5-3 (West); Iowa Code Ann. § 49.3 (West); La. Stat. Ann. § 18:532; Mich. Comp. Laws Ann. § 168.661 (West); Neb. Rev. Stat. Ann. § 32-903 (West); Nev. Rev. Stat. Ann. § 293.207 (West); N.J. Stat. Ann. § 19:4-12 (West); N.M. Stat. Ann. § 1-3-1 (West); Ohio Rev. Code Ann. § 3501.18 (West); Or. Rev. Stat. Ann. § 246.410 (West); 25 Pa. Stat. Ann. § 2702 (West); 17 R.I. Gen. Laws Ann. § 17-11-1 (West); S.C. Code Ann. § 7-7-730; Utah Code Ann. § 20A-5-303 (West); Wash. Rev. Code Ann. § 29A.16.040 (West); W. Va. Code Ann. § 3-4A-30 (West); and Wis. Stat. Ann. § 5.15 (West).

60 Ala. Code § 17-6-3; Del. Code Ann. tit. 15, § 5004A (West); Ga. Code Ann. § 21-2-323 (West); 10 Ill. Comp. Stat. Ann. 5/24-1; La. Stat. Ann. § 18:1363; Me. Rev. Stat. tit. 21-A, § 811; Mich. Comp. Laws Ann. § 168.661 (West); Miss. Code. Ann. § 23-15-531.6 (West); N.C. Gen. Stat. Ann. § 163-42; N.Y. Elec. Law App 6210.19 (McKinney); 25 Pa. Stat. Ann. § 2730 (West); S.C. Code Ann. § 7-13-1680; Tenn. Code Ann. § 2-3-104 (West); Va. Code Ann. § 24.2-115 (West); and W. Va. Code Ann. § 3-4A-10a (West).

61 "The County Board in each county, except in counties having a population of 3,000,000 inhabitants or over, shall, at its regular meeting in June, divide its election precincts which contain more than 800 voters, into election districts so that each district shall

contain, as near as may be practicable, 500 voters, and not more in any case than 800." 10 Ill. Comp. Stat. Ann. 5/11-2; 10. "A voting machine or machines sufficient in number to provide a machine for each 400 voters or fraction thereof shall be supplied for use at all elections." 10 Ill. Comp. Stat. Ann. 5/24-1.

62 "When the voter registration in a precinct using voting machines exceeds 2,999, the precinct shall be divided or rearranged. When the voter registration in a precinct using voting machines is 1,000 or less, there shall be not less than 1 voting machine for each 500 active registered electors." And "when the voter registration in a precinct using voting machines is more than 1,000 and less than 3,000, there shall be at least 1 voting machine for each 600 active registered electors." Mich. Comp. Laws Ann. § 168.661 (West).

63 "The governing body of any county or municipality providing voting machines at polling places for use at elections shall provide for each polling place at least one voting machine for each two hundred fifty registered voters or portion thereof or as near thereto as may be practicable. The machines shall be of the type approved as provided for in this title and shall be kept in complete and accurate working order and in proper repair. The machines may be used in such election districts or precincts in the county or municipality as the officials holding the election or conducting the primary may determine. The governing body of the county or municipality owning the machines shall have custody of such machines and other furniture or equipment of the polling places when not in use at an election." S.C. Code Ann. § 7-13-1680.

64 "In each precinct in which voting machines are used, the municipal governing authority shall provide at least one voting machine for each 500 electors, or major fraction thereof, except that at least one voting machine shall be provided in each such precinct in any case." Ga. Code Ann. § 21-2-323 (West). Georgia plans to adopt new voting machines for the 2020 election, and Georgia law now requires that "[i]n each precinct in which optical scanning voting systems are used, the county or municipal governing authority, as appropriate, shall provide at least one voting booth or enclosure for each 250 electors therein, or fraction thereof." Ga. Code Ann. § 21-2-367(b) (West). In addition, Georgia has proposed a new rule that "when calculating the number of voting booths or enclosures required to be available to electors of a precinct pursuant to O.C.G.A. 21-2-367(b), the calculation shall take into account the number of voting booths or enclosures available for electors of a precinct on Election Day and on the last day of advance voting." Ga. Comp. R. & Regs. 183-1-14.01. "Brennan Center Submits Follow-Up Comment to Georgia State Board of Elections on Proposed Election Rules," Brennan Center for Justice, accessed March 2, 2020, https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-follow-comment-georgia-state-board-elections.

65 Election administrator, Durham County, North Carolina, interview by Brennan Center for Justice, November 18, 2019; election administrator, Prince George's County, Maryland, interview by Brennan Center for Justice, October 24, 2019; election administrator, Licking County, Ohio, interview by Brennan Center for Justice, November 12, 2019.

66 For example, Durham County, North Carolina, experienced a major population boom over the past decade, growing by roughly 20 percent. However, election administrators in Durham told the Brennan Center that their resource allocation estimates are based heavily on turnout levels of past elections. Voter turnout in Durham in 2018 grew by more than 10 percent from the previous midterm election in 2014. Individuals in Durham also reported long wait times at some polling places in the county during early and Election Day voting. U.S. Census Bureau, "QuickFacts: Durham County, North Carolina," accessed January 21, 2020, https://www.census.gov/quickfacts/fact/table/durhamcountynorthcarolina/PST045219; election administrator, Durham County, North Carolina, interview by Brennan Center for Justice, November 18, 2019; Democracy North Carolina, *Report: Democracy NC Analyzes 2018 Turnout, Reveals Youth Enthusiasm, Demographic Shifts,* 2018, https://democracync.org/news/2018-turnout-demonstrates-youth-enthusiasm-demographic-shifts; Kirsten Rewritten, Twitter post, November 6, 2018, 9:40 a.m., https://twitter.com/rewriteables/status/1059817800871694337; and Battle for the Ballot, Twitter post, November 3, 2018, 12:14 p.m., https://twitter.com/BallotBattle/status/1058754374439198720.

67 Election administrator, Prince George's County, Maryland, interview by Brennan Center for Justice, October 24, 2019.

68 Election administrator, Prince George's County, Maryland, interview by Brennan Center for Justice, October 24, 2019.

69 In the 2014 general midterm election, 230,599 ballots were cast in Prince George's County, a turnout rate of 42.34 percent. The turnout rate jumped to 55.57 percent in the 2018 general midterm election. Prince George's County Board of Elections, "Election Summary Report: Gubernatorial General Election," 2014, http://electionresults.princegeorgescountymd.gov/ElectionResults/2014/general/Documents/1_DP_summary-1.htm; and Prince George's County Board of Elections, "Summary by Canvass: Gubernatorial General Election," 2018, https://www.princegeorgescountymd.gov/DocumentCenter/View/23819/Official-Summary-2018GG.

70 In 2014, roughly 46,236 voters in Prince George's County cast a ballot during the early voting period, compared with 158,912 votes cast during the same period in 2016. In the 2016 presidential election, 198,116 voters cast ballots on Election Day. In 2018, 102,863 votes were cast during the early voting period, and 196,338 were cast on Election Day. Maryland State Board of Elections, "Unofficial Early Voting Turnout: 2014 Gubernatorial General Election," 2014, https://elections.maryland.gov/press_room/2014_stats/GG14_EarlyVoting_ByCounty.pdf; Maryland State Board of Elections, "2016 Presidential General Election: Total Voter Turnout," 2016, https://elections.maryland.gov/elections/2016/turnout/general/Official%20Turnout.pdf; and Maryland State Board of Elections, "2018 Gubernatorial General Election," 2018, https://elections.maryland.gov/elections/2018/turnout/general/Official%20Turnout.pdf.

71 Arelis R. Hernández and Marissa J. Lang, "'Totally Unacceptable': Polling Problems in Maryland Leave Voters Waiting for Hours," *Washington Post*, November 7, 2018, https://www.washingtonpost.com/local/md-politics/totally-unacceptable-polling-problems-in-maryland-leave-voters-waiting-for-hours/2018/11/06/d01cad6c-e227-11e8-8f5f-a55347f48762_story.html.

72 Victoria Sanchez, "Some Voters Wait in Line for Hours to Cast Ballots in Maryland," WJLA, November 6, 2018, https://wjla.com/news/election/maryland-election-day-long-lines.

73 Election administrator, Prince George's County, Maryland, interview by Brennan Center for Justice, October 24, 2019.

74 The Senate bill is codified as N.C. Gen. Stat. Ann. § 163-227.6.

75 Election administrator, Forsyth County, North Carolina, interview by Brennan Center for Justice, October 22, 2019.

76 Alexa Ura, "Texas Ended Temporary Voting Locations to Curb Abuse. Now Rural and Young Voters Are Losing Access," *Texas Tribune*, October 10, 2019, https://www.texastribune.org/2019/10/10/texas-temporary-voting-access-young-rural-voters.

77 Election administrator, Travis County, Texas, interview by Brennan Center for Justice, November 22, 2019.

78 The following county officials expressed concerns about adequate resources during early voting: election administrator, Butler County, Ohio, interview by Brennan Center for Justice, October 29, 2019; election administrator, Fort Bend County, Texas, interview by Brennan Center for Justice, November 12, 2019; election administrator, Guilford County, North Carolina, interview by Brennan Center for Justice, October 18, 2019; election administrators, Harris County, Texas, interview by Brennan Center for Justice, November 14, 2019; and election administrator, Williamson County, Texas, interview by Brennan Center for Justice, October 16, 2019.

79 Election administrator, Butler County, Ohio, interview by Brennan Center for Justice, October 29, 2019; election administrator,

Clark County, Nevada, interview by Brennan Center for Justice, October 21, 2019; election administrator, Denton County, Texas, interview by Brennan Center for Justice, November 19, 2019; election administrator, Durham County, North Carolina, interview by Brennan Center for Justice, November 18, 2019; election administrator, Forsyth County, Georgia, interview by Brennan Center for Justice, October 31, 2019; election administrator, Forsyth County, North Carolina, interview by Brennan Center for Justice, October 22, 2019; election administrator, Fort Bend County, Texas, interview by Brennan Center for Justice, November 12, 2019; election administrator, Guilford County, North Carolina, interview by Brennan Center for Justice, October 18, 2019; election administrator, Gwinnett County, Georgia, email to Brennan Center for Justice, October 25, 2019; election administrators, Harris County, Texas, interview by Brennan Center for Justice, November 14, 2019; election administrator, Hays County, Texas, interview by Brennan Center for Justice, October 29, 2019; election administrators, Jackson County, Missouri, interview by Brennan Center for Justice, October 16, 2019; election administrators, Licking County, Ohio, interview by Brennan Center for Justice, November 12, 2019; election administrator, Manassas County, Virginia, interview by Brennan Center for Justice, October 28, 2019; election administrator, Peoria County, Illinois, interview by Brennan Center for Justice, October 29, 2019; election administrator, Prince George's County, Maryland, interview by Brennan Center for Justice, October 24, 2019; election administrator, Tarrant County, Texas, interview by Brennan Center for Justice, November 13, 2019; election administrator, Travis County, Texas, interview by Brennan Center for Justice, November 22, 2019; election administrator, Washoe County, Nevada, interview by Brennan Center for Justice, October 15, 2019; and election administrator, Williamson County, Texas, interview by Brennan Center for Justice, October 16, 2019.

80 Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote*, 2019, 12–14, http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf; Rob Arthur and Allison McCann, "How the Gutting of the Voting Rights Act Led to Hundreds of Closed Polls," *Vice News*, October 16, 2018, https://news.vice.com/en_us/article/kz58qx/how-the-gutting-of-the-voting-rights-act-led-to-closed-polls; Matt Vasilogambros, "Polling Places Remain a Target Ahead of November Elections," *Stateline*, September 4, 2018, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/09/04/polling-places-remain-a-target-ahead-of-november-elections; and Marc Nichols, "Closed Voting Sites Hit Minority Counties Harder for Busy Midterm Elections," *USA Today*, October 30, 2018, https://www.usatoday.com/story/news/2018/10/30/midterm-elections-closed-voting-sites-impact-minority-voter-turnout/1774221002.

81 "EAVS Deep Dive: Poll Workers and Polling Places," U.S. Election Assistance Commission, November 15, 2017, https://www.eac.gov/documents/2017/11/15/eavs-deep-dive-poll-workers-and-polling-places.

82 According to our analysis of the EAVS, the number of registered voters per polling place has increased over the past several years in Georgia, Louisiana, Mississippi, and South Carolina.

83 "Sixteen states allow jurisdictions to use vote centers on Election Day: Arizona, Arkansas, California, Colorado, Hawaii, Indiana, Iowa (for some elections), Kansas, Nevada, New Mexico, North Dakota, South Dakota, Tennessee, Texas, Utah and Wyoming." National Conference of State Legislatures, "Vote Centers," accessed February 28, 2020, http://www.ncsl.org/research/elections-and-campaigns/vote-centers.aspx.

84 For example, some counties in Texas, Nevada, Arizona, and California use vote centers. Texas Secretary of State Ruth R. Hughs, "Counties Approved to Use the Countywide Polling Place Program (CWPP)," accessed February 28, 2020, https://www.sos.texas.gov/elections/laws/countywide-polling-place-program.shtml; Clark County, Nevada, "Election Department: Election Day Voting," accessed February 28, 2020, https://www.clarkcountynv.gov/election/Pages/EDVoting.aspx; Citizens Clean Elections Commission, "Vote Center," accessed February 28, 2020, https://www.azcleanelections.gov/how-to-vote/election-day/vote-center; and Alex Padilla, California Secretary of State, "Find Your Vote Center and Dropbox Locations," accessed February 28, 2020, https://www.sos.ca.gov/elections/voters-choice-act/vca-voting-locations.

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111 Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice, 2018, https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote.

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114 The EAVS covers the number of polling places for 93 percent of voters, the number of machines for 87 percent of voters, and the number of poll workers for 80 percent of voters.

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RESOURCE

Did Consolidating Polling Places in Milwaukee Depress Turnout?



Morry Gash/AP

Despite a surge of absentee voting, consolidating polling locations in the city of Milwaukee reduced turnout by nearly 9 percentage points, disproportionately affecting Black voters.



Kevin Morris

PUBLISHED: June 24, 2020



Ensure Every American Can Vote

Voting Reform

The weeks leading up to the Wisconsin primary election on April 7 were tumultuous. On **March 27**, Democratic Gov. Tony Evers called for every voter in the state to be sent an absentee ballot, but the Republican-controlled legislature rejected the idea. **The weekend** before the election, Evers called an emergency session of the legislature, hoping to postpone the election; once again, his efforts were stymied. Evers was also blocked in the courts; the day before the election was to take place, he issued an executive order moving it to June 9, but the **state supreme court struck it down**.

These maneuvers occurred against the backdrop of shortages of electoral resources. On March 31, the *Milwaukee Journal Sentinel* described a **dire poll worker shortage**: Wisconsin was short some 7,000 poll workers, a situation that led to the consolidation of polling places around the state. The cuts were particularly drastic in Milwaukee

City, where the number of polling places dropped from 182 in November 2016, to just five for this year's primary. In the rest of Wisconsin, the number of polling places dropped by 11 percent. [1]

As the nation prepares for the November general election, we wanted to test whether fewer polling places decreased turnout in Milwaukee, or if voters simply shifted to the vote-by-mail alternative. Our answer is no. To be clear, **a surge in absentee voting** may have offset at least a portion of any depressive turnout effects of consolidated polling places: while just 170,614 ballots were cast by mail in the 2016 presidential primary, 964,443mail ballots were submitted this year. However, despite this surge in absentee voting, we find that

polling place consolidation reduced turnout by 8.6 percentage points, and
Black turnout was especially depressed from these closures.

Methodology

In order to estimate what turnout out would have been in Milwaukee City if not for the polling place closures, we used a matching model to pair voters in the city with voters outside the city. [2] This ensured that the "treated" voters (individuals living in Milwaukee City) and "control" voters (those living outside the city) had similar socioeconomic characteristics and voting histories. Controlling for these characteristics is important, because they are highly correlated with whether someone casts a ballot. For instance, 50 percent of *all* suburban voters voted in the 2016 primary, while just 27 percent of Milwaukee voters did so. After our matching procedure, 27 percent of the suburban voters who were used as controls cast a ballot in that contest. Without controlling for these characteristics, we might only be picking up on a lower propensity to vote in Milwaukee City — *not* the effect of the polling place closures.

In addition to the matching methodology, we only kept pairs of treated and control voters who live within a half mile of one another. Although the paired individuals live in different cities, they live so close to one another that they likely shop at the same grocery stores and eat at the same restaurants. In other words, despite living in different cities, they are probably similarly exposed to Covid-19. [3]

We then ran an ordinary least squares regression to see if the voters who live just inside Milwaukee City voted at lower rates than their counterparts just outside the city. We also tested whether turnout was depressed by a different amount for Black voters than other voters in Milwaukee City.

For a fuller discussion of our data, methods, and results, please **see our working paper**.

Results

	TURNOUT			
	MODEL 1	MODEL 2	MODEL 3	MODEL 4
Lives in Milwaukee	-0.086***	-0.087***	-0.085***	-0.085***
	-0.002	-0.002	-0.002	-0.002
	---	---	---	---
Black		-0.038***	-0.025***	-0.030***
		-0.004	-0.006	-0.006
	---	---	---	---
Black × Lives in Milwaukee			-0.017**	-0.016**
			-0.008	-0.008
	---	---	---	---
Constant	0.261***	0.057***	0.263***	0.056***
	-0.001	-0.004	-0.001	-0.001
	---	---	---	---
Includes Other Matched Covariates		X		X
Includes County Fixed Effects	X	X	X	X
	---	---	---	---
Observations	165,910	165,910	165,910	165,910
R2	0.011	0.348	0.012	0.348
Adjusted R2	0.011	0.348	0.012	0.348

Note: *p<0.1; **p<0.05; ***p<0.01

Polling place closures *did* reduce turnout in the 2020 primary election. The table above indicates that turnout in Milwaukee City was depressed by roughly 8.6 percentage points. Considering that 26 percent of our control voters cast a ballot, this implies that polling place closures in the city reduced turnout by a third.

Of particular note, we found that this effect was larger for Black voters. Although polling place consolidation decreased turnout among non-Black voters by around 8.5 percentage points, it reduced turnout among Black voters by 10.2 percentage points.

Looking Ahead

The serious depressive effects uncovered in Milwaukee — and the racial disparities within them — are cause for concern. Clearly, not all voters who prefer voting in person will seamlessly transition to vote by mail. We cannot know whether Milwaukee residents cast fewer ballots because they were unfamiliar with the mail voting process did not trust it, or were prevented from voting in person because of the **long lines**. It is also possible that Black voters cast mail ballots at similar rates as other voters, but had them **rejected at higher rates**, thereby reducing

their effective turnout. However, given the magnitude of the effect, it is unlikely that this accounts for the full difference.

The case of Milwaukee is important for election administrators to keep in mind as they prepare for this fall's election. If it can be generalized to the rest of the country, polling place closures will come at the expense of voter turnout — and particularly the turnout of Black Americans. Moreover, a recently released **Brennan Center report** shows that fewer polling places lead to longer lines to vote, meaning that widespread closures might make casting a ballot harder for in-person voters. If we care about the representation of nonwhite voters and voters wary of casting mail ballots, we must ensure that there are safe in-person options this fall.

Endnotes

1. See https://elections.wi.gov/elections-voting/2016/fall and https://elections.wi.gov/node/6524.

2. Potential controls came from Milwaukee, Racine, Ozaukee, Washington, and Waukesha Counties. We matched each treated voter to two control voters based on whether they voted in the 2016 and 2018 primaries; their gender, race, partisan affiliation, and ethnicity; their latitude and longitude; and estimates of their household income and education level. The data all come from L2 Political.

3. Our methodology closely follows that of this published paper. Like this analysis, that paper combined a matching model with a geographic restriction around the city border to estimate the effect of ballot initiatives on turnout in Milwaukee City.

APPENDIX C

RESOURCE

Digging into the Georgia Primary

Brennan Center analysis of Georgia's primary finds that nonwhite voters' mail ballots were rejected at much higher rates than white voters' mail ballots.



Kevin Morris

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PUBLISHED: August 24, 2020

On June 9, voters in Georgia cast their ballots in the presidential local primary contests as well as two seats for the state supreme court. In the lead-up to the contest, **we analyzed** discrepancies in who was requesting mail absentee ballots. **Past research** had indicated that racial minorities were less likely to request mail ballots than other voters in Georgia. We showed that, at least in Georgia, those trends held true even during a pandemic when all voters were sent absentee ballot request forms.

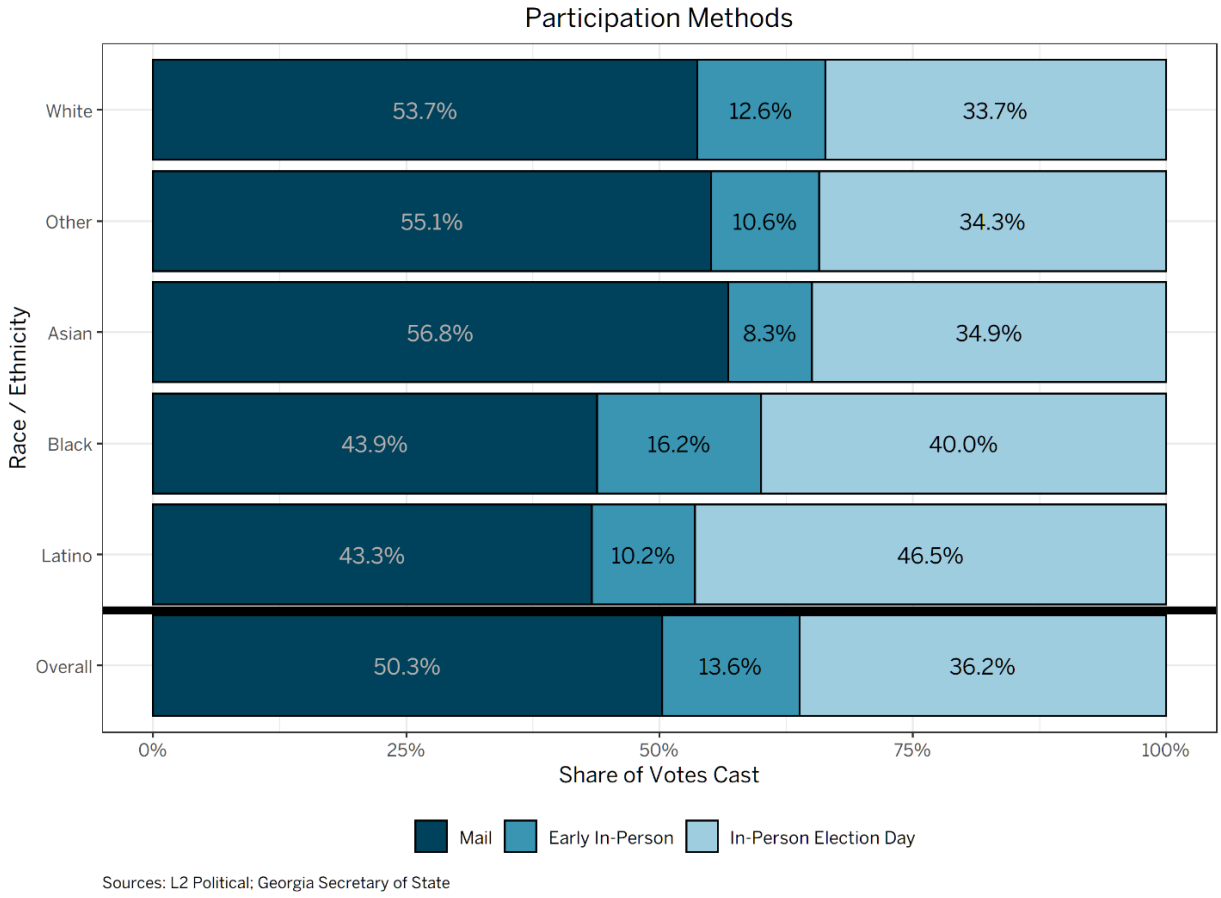
In this analysis, we examined data from the Georgia primary, covering 129 of 159 counties, to discover why — and whose — mail ballots are rejected as well as which voters took advantage of early in-person options. We found that:

1. A much smaller share of white voters had their mail ballots rejected than nonwhite voters.
2. For all racial groups, most rejected ballots were rejected because they were received after the deadline.
3. Black voters were more likely to vote early and in person than white voters.
4. More than 8 percent of voters who requested mail ballots voted in person. This was especially common among Black voters.

During our analysis, we discovered that the state misreported some absentee ballot rejections. As such, the findings presented below exclude counties we have reason to believe had erroneous data. A discussion of these limitations and how we dealt with them can be found at this bottom of this piece.

How Did Voters Participate? [1]

In the figure below, we break out how participants of different racial and ethnic groups cast their ballots in the 2020 presidential primary. More than half of all ballots were cast by mail — an enormous increase over the 2016 general election, **when just** 5.2 percent of voters voted by mail.

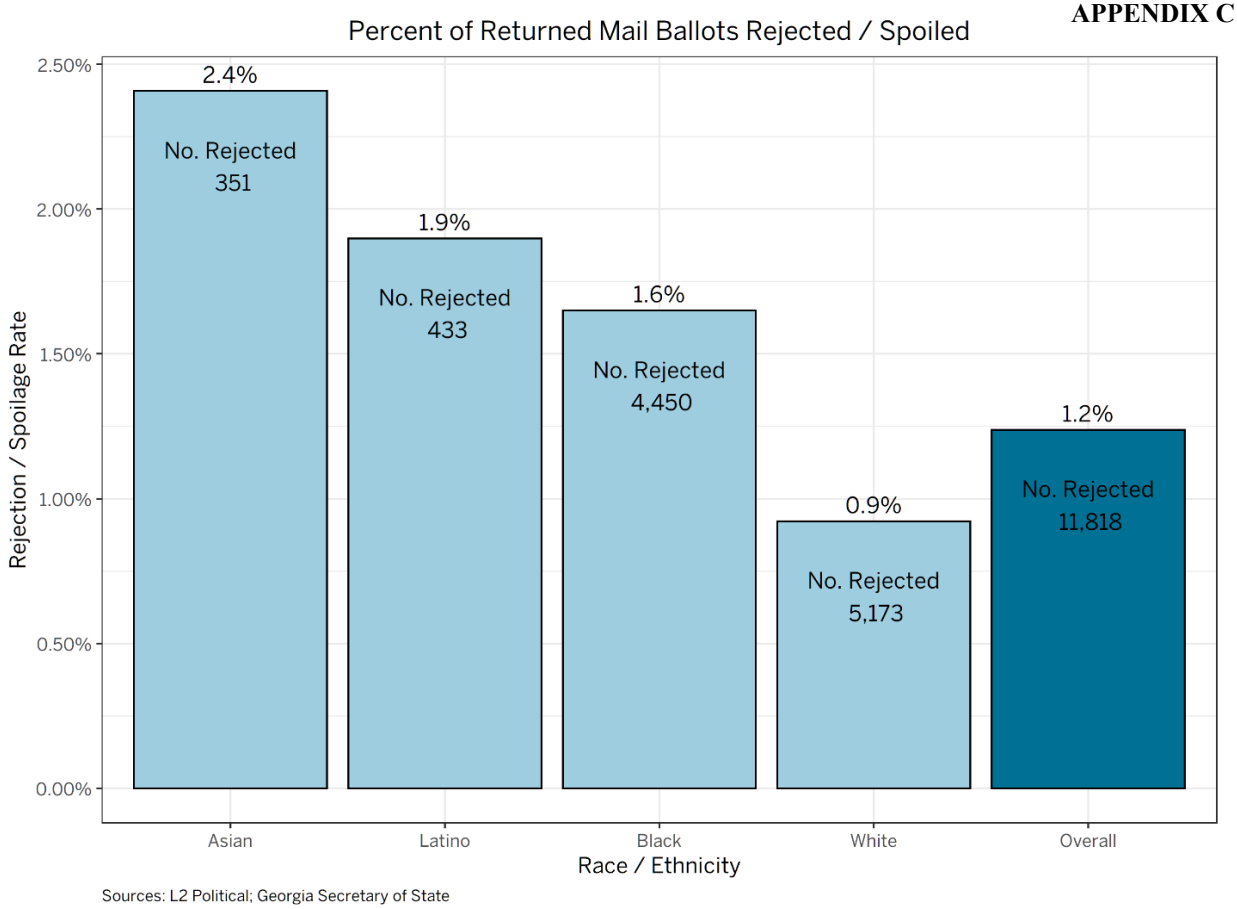


Sources: L2 Political; Georgia Secretary of State

Although considerably fewer Black voters voted by mail than white voters, a larger share of them took advantage of early in-person voting. This increase, however, was not enough to offset the lower mail ballot usage: although just 33.7 percent of white voters cast their ballots in person on election day, 40 percent of Black voters did so.

Mail Ballot Rejection Rates

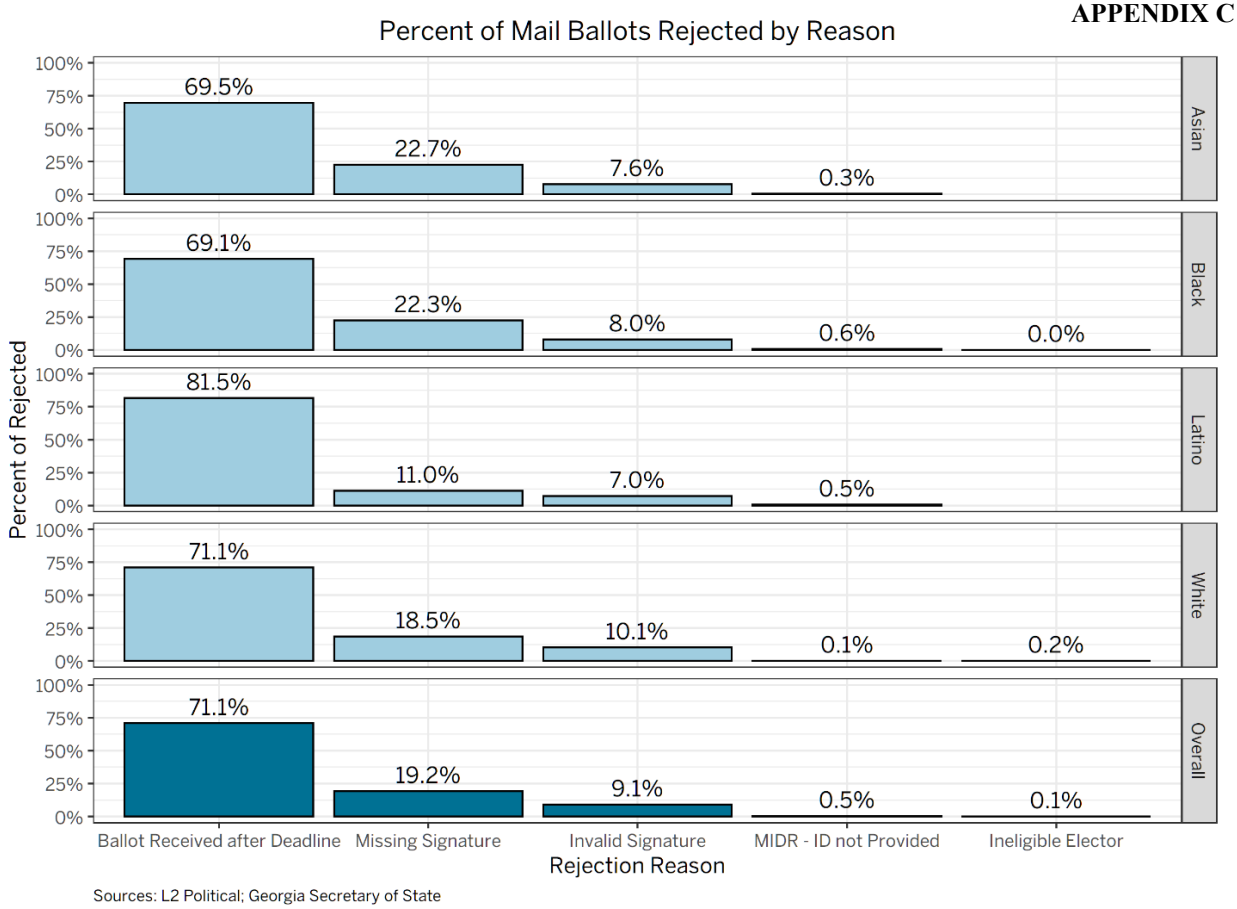
The figure below shows the share of returned mail ballots that were either rejected or marked as spoiled.



Although 1.2 percent of mail ballots overall were rejected, there are substantial differences by race. Just 0.9 percent of mail ballots cast by white voters were rejected, but mail ballots cast by Black, Latino, and Asian voters saw rejection rates of 1.6, 1.9, and 2.4 percent. These discrepancies are troubling, and election administrators should work to understand what is driving them.

As the figure below shows, mail ballots were rejected for different reasons for voters among different racial and ethnic groups. One thing, however, stands out clearly: more than 70 percent of all ballots rejected were rejected because they were returned late. After late returns, missing signatures were the most common rejection reason for each group.

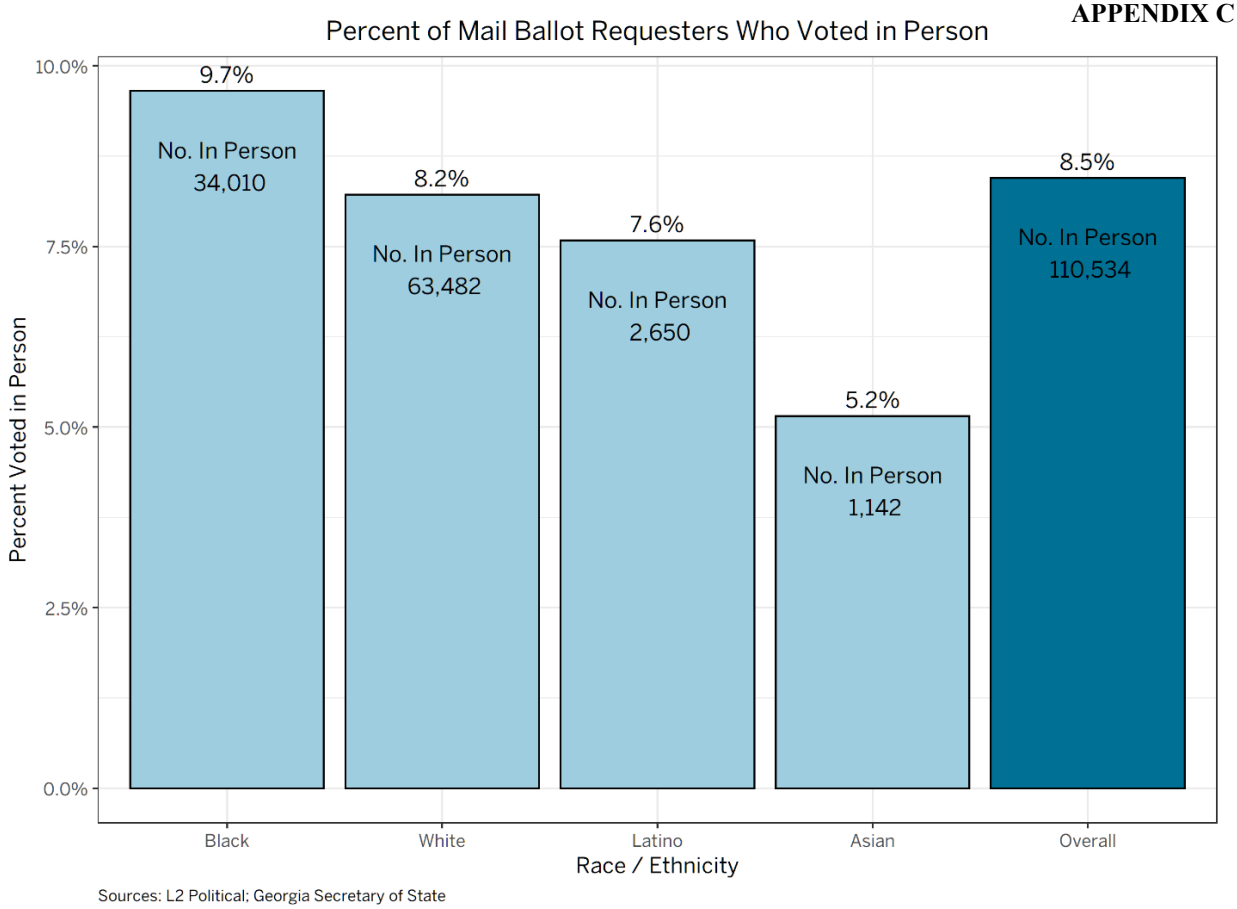
This points to the need for better advocacy about when mail ballots need to be returned. There were **also stories** before the election about major backlogs in parts of the state like Fulton County, potentially delaying when voters received their ballots. Election administrators must make sure that ballots are sent out early enough that voters have a chance to fill them out, mail them, and have them received by administrators in time to be counted.



Sources: L2 Political; Georgia Secretary of State

Who Voted in Person?

The figure below demonstrates that more than 110,000 voters who requested mail ballots eventually voted in person. This was especially common among Black voters. It is unclear why so many people who requested mail ballots chose to vote in another way. They may have been nervous about receiving their mail ballot in time to cast it; they may have never received their ballot at all; or they may have simply chosen to vote a different way. Advocates should consider reaching out to some of these voters to understand why they made their decision. If there were racial disparities in who never received a mail ballot, this needs to be addressed.



Sources: L2 Political; Georgia Secretary of State

Conclusion

Past research indicates that voters of color are more likely to have their mail ballots rejected. It was unclear if those historical trends would continue in the context of a pandemic, when so many more voters cast mail ballots. Evidence from Georgia indicates that these disparities are in fact continuing. Black voters' mail ballot rejection rate was almost double those of white voters.

Across the board, nearly three-quarters of rejected ballots were rejected because they were returned late. As the United States Postal Service grapples with severe funding shortages, the threat of mail delays and late-returned ballots is only likely to grow this November. Election administrators must deliver ballots to voters early enough that the can be returned in time, and the federal government must adequately fund the USPS so that it can deliver ballots (both to and from voters) in a timely manner.

Finally, administrators cannot simply focus on vote by mail while ignoring the importance on in-person options. A smaller share of nonwhite voters used vote by mail in the primary, indicating that these voters would be disproportionately harmed by shifting resources away from in-person options. A larger share of racial minorities used early in-person options than white voters, indicating that there are safe alternatives to election-day voting for these voters. Election administrators should be sure to provide them in **safe and healthy options**.

Data Issues

This analysis was originally published using the data available from the Georgia secretary of state's website. Analyzing that data, we concluded that nonwhite voters had their mail ballots rejected at a higher rate than white voters; that most ballots were rejected because they were received after the deadline; that Black voters were more likely to vote early and in person than white voters; and that 9 percent of voters who requested mail ballots ended up voting in person, and this was more common among Black voters.

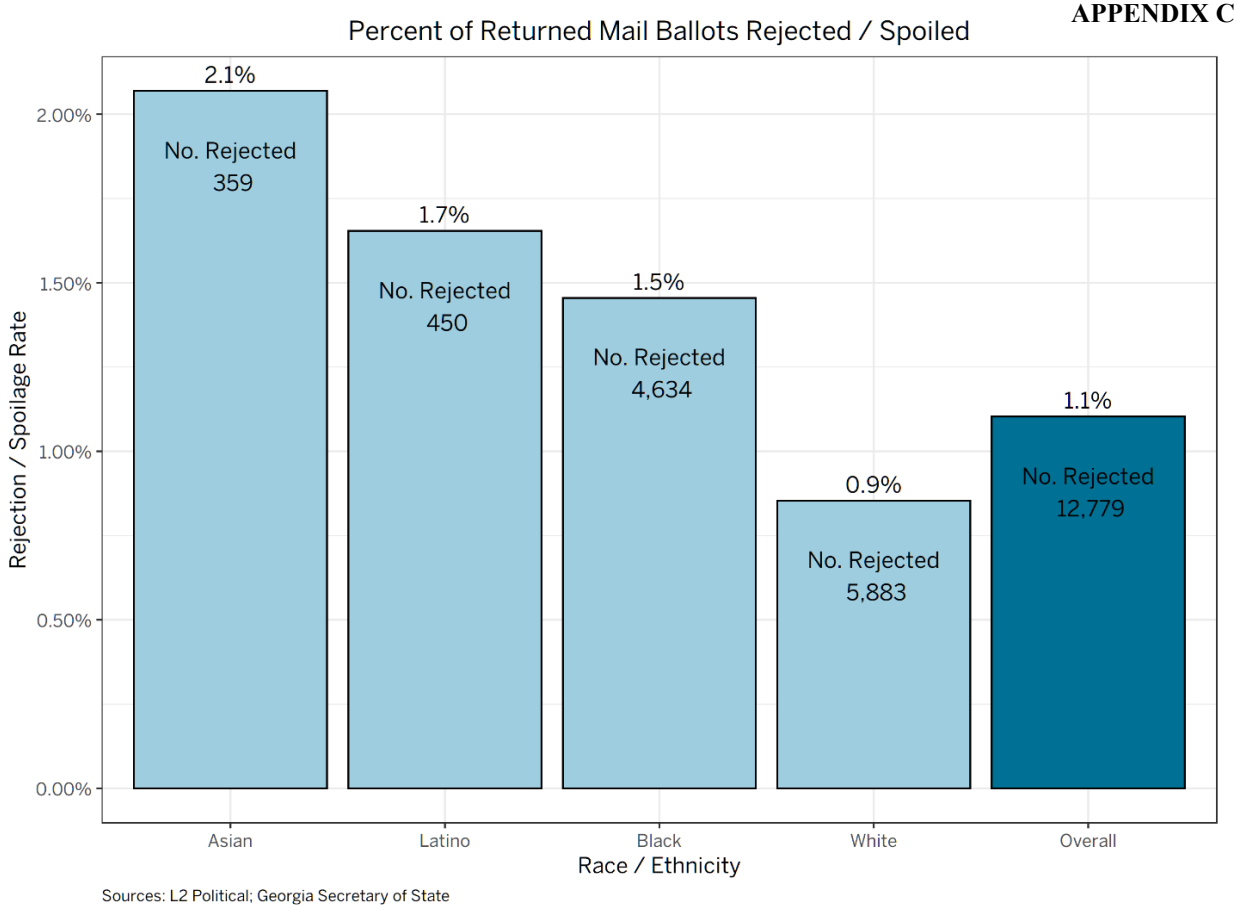
Our original analysis has been updated because there were **reports** that the data on the state website was not entirely reliable. Our revised findings, after adjusting for errors in the state's data, look essentially the same as the original.

There were 50 counties that reported rejecting no absentee ballots because they arrived late. Because Fulton County acknowledged that the ballots that were rejected because they arrived late are not noted in the data provided by the secretary of state, we decided to dig into this issue. We called each of the counties where the state's data indicates that no ballots were rejected because they arrived late.

We were able to speak with representatives from 38 of the 50 counties. Of these 38 counties, 17 told us that some rejected ballots were *not* included in the state's data — indicating that the data from the state should not be accepted as is. Twenty-one of these counties, however, told us that the data was correct and that they had received no ballots after the deadline.

This modified analysis excludes the counties that confirmed their data was incorrect. To avoid accidentally including erroneous data, we also exclude the counties we were unable to contact. We also remove Polk County, which identified all absentee ballots that were not returned as "rejected." Overall, this analysis includes counties that are home to more than 80 percent of Georgia's voters.

Again, the exclusion of these counties does not appear to have a meaningful impact on the racial rejection gap. Below, we present the rejection rates when we accept the state's data "as-is," even though we know it has some errors. The racial rejection gap narrows very slightly. The rejection rate for white voters was 0.9 percent under both scenarios, but the rejection rate for Black voters increased from 1.5 percent to 1.6 percent when we excluded these counties. This is probably because we excluded Fulton County, which undercounted absentee rejections and is home to many Black voters.



It is also unlikely that the exclusion of these counties is artificially creating a racial rejection gap. If we assume that the mail ballot rejection rate was 1.6 percent for Black voters in these counties (the same as the rest of the state), they would have needed to reject more than 4.8 percent of white voters' mail ballots — more than *five times* the rate at which the rest of the state rejected these ballots — in order for the rejection rate gap to disappear.

Endnotes

1. As in our last analysis, we rely here on data from L2 Political and the Secretary of State's office. By linking these two data sources, we can identify the racial characteristics of voters who requested and cast mail absentee ballots.

RESOURCE

Voting Rights Restoration Efforts in Florida

A summary of current felony disenfranchisement policies and legislative advocacy in Florida.

LAST UPDATED: September 11, 2020
PUBLISHED: May 31, 2019

Ensure Every American Can Vote
Voting Reform

Disenfranchisement in Florida

In 2018, nearly 65 percent of Florida voters approved **Amendment 4**, which automatically restored voting rights to as many as 1.4 million Floridians, except those convicted of murder or a felony sexual offense, who had completed the terms of their sentence, including parole or probation.

On June 28, 2019, Gov. Ron DeSantis signed **Senate Bill 7066**, prohibiting returning citizens from voting unless they pay off all legal financial obligations (LFOs) imposed by a court pursuant to a felony conviction, including LFOs converted to civil obligations, even if they cannot afford to pay.

The Brennan Center and other civil rights groups **filed** a lawsuit in federal court challenging the law, and our suit was consolidated with similar cases filed by others. An expert **report** submitted to the court showed that the law's requirements would prevent at least 770,000 people from voting — and it would hit Black Floridians the hardest. The court found that the overwhelming majority of those impacted are unable to afford to pay what they owe. Moreover, the State does not reliably or consistently track data on what people owe, so it is often impossible to make eligibility determinations.

On May 24, 2020, the federal court issued a ruling finding Florida's "pay-to-vote" system unconstitutional in part. The State appealed, and the Eleventh Circuit agreed to hear the case and it stayed the district court's order until it rules. Arguments were heard in the appeal on August 18, 2020. On September 11, 2020, the en banc Eleventh Circuit issued an order reversing and vacating the district court's ruling. *More information about this ongoing litigation can be found* ***here***.

The History of Amendment 4

Prior to Amendment 4, Florida's constitution permanently disenfranchised all citizens who had been convicted of any felony offense unless the Clemency Board restored their voting rights – a process that will now apply to those who have not had their rights restored by Amendment 4, including anyone convicted of murder or felony sexual offenses. Between **2010** and **2016**, the number of disenfranchised Floridians grew by nearly 150,000 to an estimated total of 1,686,000. In 2016, **more than one in five** of Florida's Black voting-age population was disenfranchised.

After years of advocating for change with the courts and governors' offices, the Brennan Center joined with the Florida Rights Restoration Coalition and others to draft Amendment 4 and push for its inclusion on the 2018 ballot.

On January 23, 2018, **Floridians for a Fair Democracy** announced that their campaign, Florida Second Chances, had surpassed the 766,200 signature threshold to get **Amendment 4** on the 2018 ballot. For the next 10 months, the campaign worked to build a massive groundswell of bipartisan support that culminated in the Amendment's passage on November 6, 2018. Amendment 4 went into effect on January 8, 2019.

For more information about applying for clemency, the Clemency Board's website can be accessed **here**.

Rights Restoration Developments Before Amendment 4

Litigation

In **2000**, the Brennan Center and co-counsel, representing more than 600,000 citizens, filed a lawsuit – ***Johnson v. Bush*** – challenging Florida's permanent disenfranchisement constitutional provision under the Fourteenth and Fifteenth Amendments of the U.S. Constitution and the Voting Rights Act of 1965. In **2005**, despite evidence that Florida's constitutional provision was rooted in 19th-century efforts to evade the mandate of the Fifteenth Amendment and deny Black men the right to vote, the Eleventh Circuit Court of Appeals allowed the law to stand.

Executive Actions

In **April 2007**, then-Gov. Charlie Crist took an incremental step towards reform when he issued **revised rules of executive clemency**. Notably, this change created automatic rights restoration for people completing sentences for certain felony convictions. A year later, in **2008**, Gov. Crist's office **announced** that over 115,000 Floridians had regained voting rights since the new rules were implemented.

In **March 2011**, then-Gov. Rick Scott **eliminated Gov. Crist's reforms** and created additional barriers for people seeking to have their voting rights restored. The Brennan Center and other national civil rights organizations

strongly opposed the plan in a **joint letter** to the Clemency Board. The American Probation and Parole Association also submitted **its own letter** encouraging the Board to maintain Gov. Crist's clemency reforms. The Governor's regressive move set the stage for the effort to ultimately pass Amendment 4 years later.

Brennan Center Materials

Restoring the Right to Vote, Erika Wood (2009) The Brennan Center's policy proposal for restoring voting rights for citizens with past criminal convictions.

My First Vote (2009) Testimonials of individuals who regained their voting rights after being disenfranchised because of past criminal convictions.

De Facto Disenfranchisement, Erika Wood & Rachel Bloom (2008) A report on how complex laws, poorly informed officials, and misinformation lead to the de facto disenfranchisement of citizens with past criminal convictions who are eligible to vote.

Racism & Felony Disenfranchisement: An Intertwined History, Erin Kelley (2017) A piece examining the historical roots of criminal disenfranchisement laws that today strip voting rights from millions of U.S. citizens.

For more information about the Brennan Center's work on Restoring Voting Rights in Florida, please contact Stuart Baum, at **stuart.baum@nyu.edu**.

BRENNAN CENTER FOR JUSTICE

Gerrymandering Away Missouri's Future

Excluding children and noncitizens from redistricting calculations would exacerbate racial inequality.

By Yurij Rudensky and Gabriella Limón PUBLISHED SEPTEMBER 18, 2020

Introduction

In November 2018, Missouri voters passed a ballot initiative designed to bring independence and racial and partisan fairness to a redistricting process often waylaid by incumbent protection, political interests, and partisan deadlock. The success of these reforms at the ballot box demonstrated the broad desire in Missouri for fairer redistricting and was the product of years of advocacy and coalition-building.

However, just two years later, lawmakers are seeking to dismantle these reforms. Amendment 3, which will be on the ballot in November 2020, would roll back voter-approved protections, resurrecting some of the worst parts of the old, abuse-prone system. Troublingly, Amendment 3 would go even further, also opening the door to changing who will count when districts are drawn.

Every ten years, political districts around the country are redrawn, or redistricted, to make sure that they are roughly equal in population, as required by the U.S. Constitution. Currently, all 50 states use total population when doing this, which ensures that everyone is considered when drawing district boundaries. Amendment 3 would replace the Missouri Constitution's current total-population language with new language that, according to its proponents at least, would allow map drawers to consider only the number of U.S. citizens over the age of 18 (that is, adult citizens) when sizing districts, effectively cutting out children and noncitizens from representation.

Should Amendment 3 pass and its proponents convince map drawers to make Missouri the first state in the nation to exclude children and noncitizens from apportionment, the resulting districts would have starkly different populations.

Given Missouri's current population, each state senate and house district should have roughly 179,000 and 37,500 people, respectively, when lines are redrawn in 2021. But under a switch to adult citizen apportionment, each senate and house seat would need to have 135,000 and 28,000 *adult citizens*, with no regard for the number of children or noncitizens residing within each district.[1] Because children and noncitizens are not evenly distributed across the state, districts drawn on the basis of adult citizens would have wildly differing total populations. And this, in turn, means that Missourians who live in communities with many children or noncitizens would get less representation than others.

Such a change would be a radical departure from current practice and historical norms. Indeed, the text of the Missouri Constitution has required the use of total population as the relevant basis for districts since 1875.[2] Amendment 3 appears to be the vanguard of a broader conservative strategy to exclude children and noncitizens from being counted.[3] The politicians and lobbyists behind the measure have close ties to national conservative operatives including Thomas Hofeller,[4] whose posthumously released memos revealed a scheme among high-ranking Republican donors and operatives to encourage states to make a "radical departure" from total population to adult citizen apportionment, arguing that it would be "advantageous to Republicans and non-Hispanic whites."[5]

This analysis looks at what the distribution of representation would be under adult citizen–based districts. To be sure, Amendment 3 does not *require* Missouri to depart from its long-standing practice of total population–based apportionment. And any attempt to draw maps based on adult citizens would leave Missouri vulnerable to a host of lawsuits. But should those behind Amendment 3 succeed in transforming who counts when districts are drawn, the effects on the state, and on Black, Latino, and Asian communities in particular, would be profound:

- More than a quarter of all Missourians would be left uncounted. Among the uncounted, more than 90 percent would be citizen children.

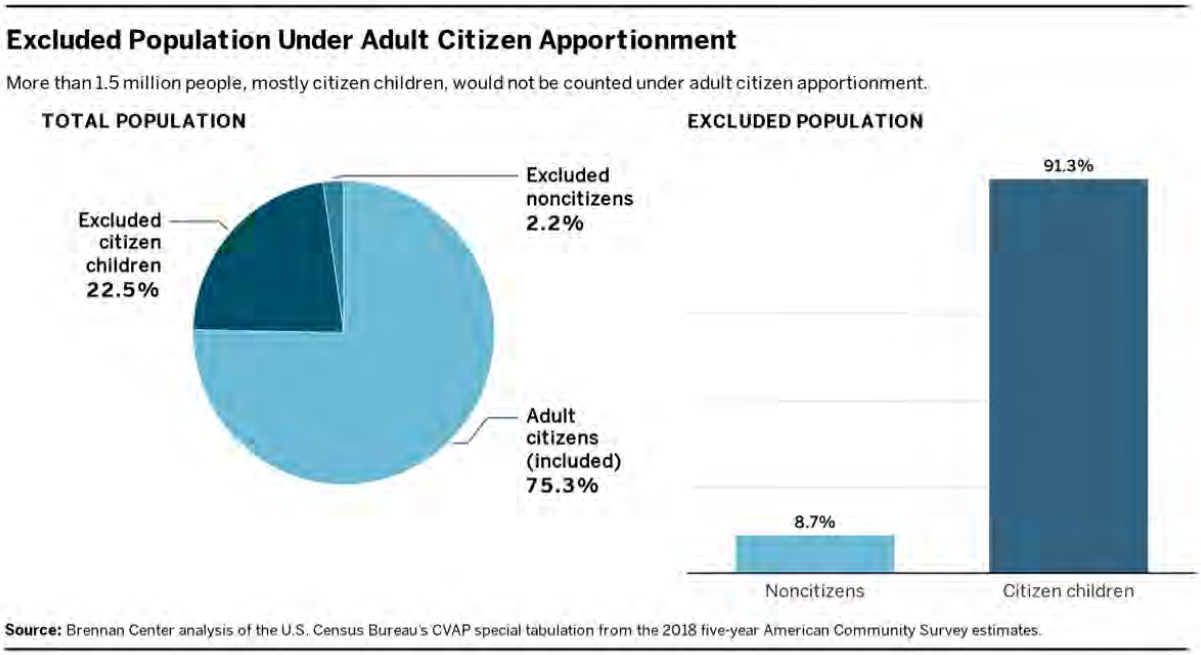
- There are stark racial disparities in who would get excluded. Only 21 percent of Missouri's white population would go uncounted. By contrast, 28 percent of Missouri's Black population, 54 percent of its Asian population, and 54 percent of its Latino population would be erased when district lines are drawn.

- The two large metropolitan areas in Missouri — greater Kansas City and the St. Louis suburbs — would be hit especially hard, losing the most representation.

- Three of the four majority-Black senate districts in Missouri would need additional adult citizens, making it harder for communities of color to maintain their current level of political influence in these and surrounding districts.

Who Would Be Excluded from the Count?

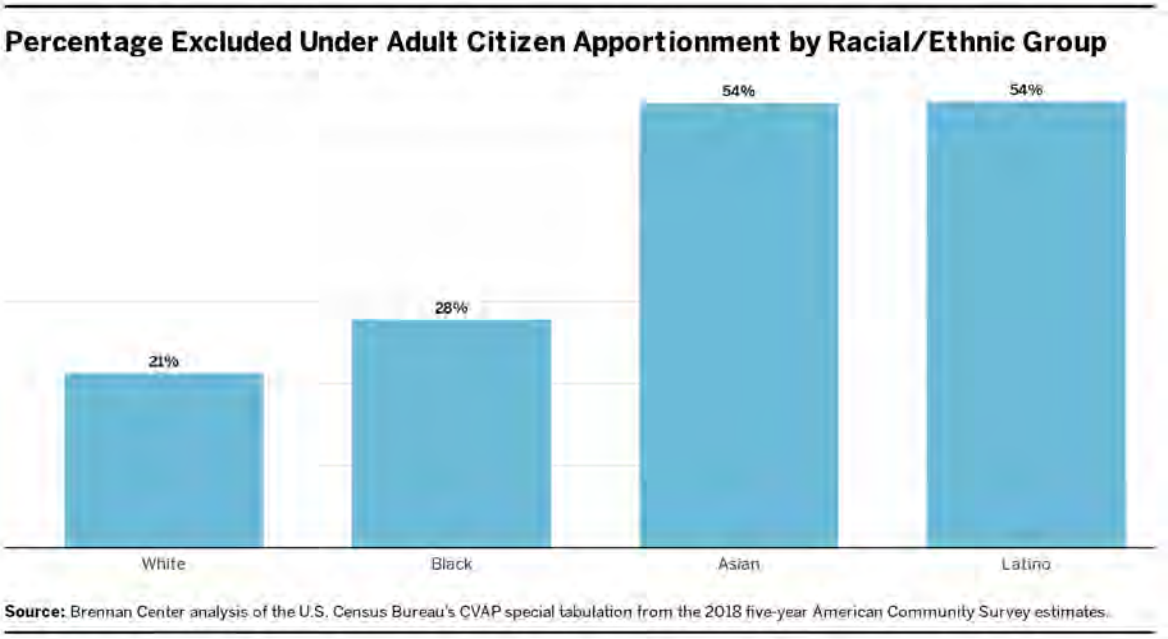
A shift to adult citizen apportionment would mean excluding a substantial portion of the population when drawing districts — specifically, children under 18 and noncitizens. Roughly 1.5 million people in Missouri — nearly a quarter of the population — would be erased from the count under such a shift. Households with children would bear the brunt of the change; more than 91 percent of the excluded population would be citizen children.



Notably, many of the excluded children will turn 18 and become eligible to vote at some point during the decade that the district maps are in effect.[6] Nonetheless, under adult citizen apportionment, even these future eligible voters would not be counted.

Worse yet, the shift to an adult citizen apportionment base would yield sharp racial disparities. Only 21 percent of Missouri's white population would be excluded under this shift, as compared to 28 percent of the state's Black population, 54 percent of its Asian population, and 54 percent of its Latino population.

The white population makes up roughly 79.5 percent of all Missourians but more than 83 percent of adult citizens. Thus, under adult citizen apportionment, the white population would account for a larger percentage of those counted for representation than it does under total population apportionment.



These disparities are largely driven by differences in the proportion of children among Missouri's racial and ethnic communities. This is because 26 percent of Black and 37 percent of Latino communities are minors, meaning that these groups would be especially hard-hit by a measure that principally functions to exclude children from the count.

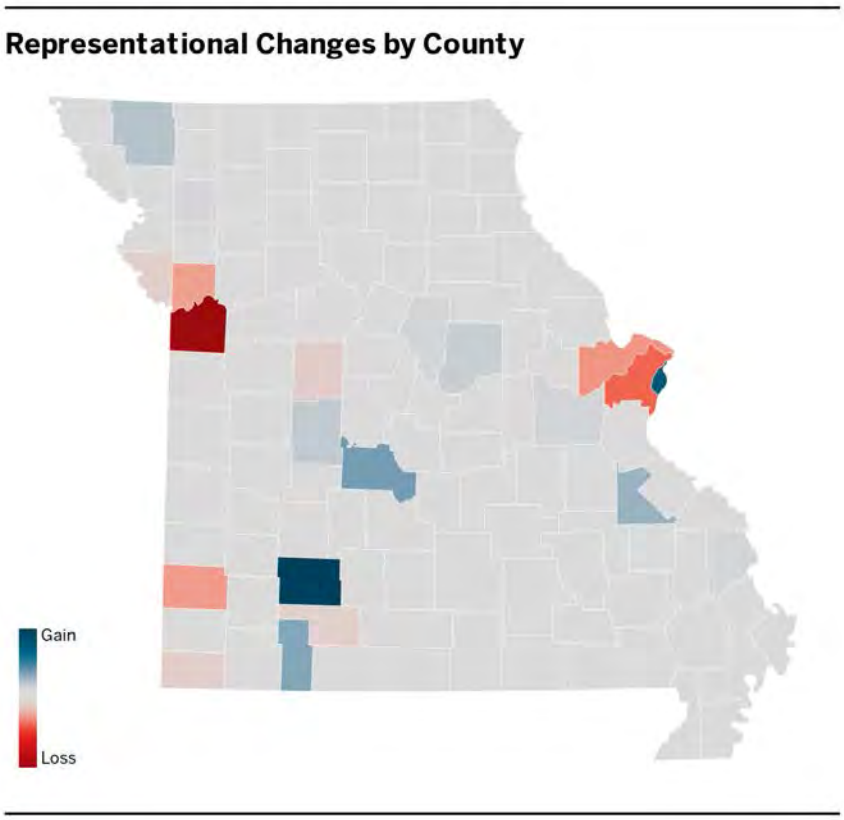
Which Communities Would Lose Representation?

In order to fully understand the ultimate representational impact of a shift to adult citizen apportionment, it is also necessary to assess the geographic distribution of Missouri's population. If children and noncitizens were evenly distributed across Missouri, no communities would lose representation with a shift to adult citizen apportionment. In other words, all areas of the state and all of its communities would see the same proportional population reductions and therefore receive the same number of representatives as before.

But, if impacted households are instead clustered within a particular region or county, then certain communities will suffer representational loss — that is, receive fewer districts (or a smaller share of a district) than they would if their entire population was counted. Meanwhile, communities with a smaller share of children and noncitizens will receive a windfall, gaining that representation.

Based on the distribution of the excluded population, the two large metropolitan areas in Missouri — greater Kansas City and the St. Louis suburbs — stand to lose the most representation under adult citizen apportionment. The impact would be most felt by Jackson and Clay Counties in western Missouri, St. Louis and St. Charles Counties in eastern Missouri, and Joplin County in southwestern Missouri.

When this analysis is applied to the current state senate map, the discriminatory impacts become more concrete.



Under adult citizen apportionment, each senate district would need to have close to 134,882 adult citizens to be perfectly apportioned. In practice, states are allowed to deviate, so the acceptable range for each seat would be from approximately 128,138 to 141,626 adult citizens.[7] Districts below this range would need to be redrawn to raise their adult citizen population and those above the threshold redrawn to lower it. Communities that end up in underpopulated districts would suffer at least some harm, because additional constituents would be added without any additional representation.[8]

The table below lists the six senate districts that would need to bring in additional adult citizens, thus raising their overall population.

Missouri Senate Districts Underpopulated Under Adult Citizen Apportionment

DISTRICT NUMBER	ADULT CITIZENS NEEDED	REPRESENTATIVE	REGION	BLACK-MAJORITY DISTRICT
9	10,008	Vacant, formerly S. Kiki Curls (D)	Kansas City	Yes
11	6,418	John Rizzo (D)	Kansas City	No
14	4,368	Brian Williams (D)	St. Louis County	Yes
13	4,308	Gina Walsh (D)	St. Louis County	Yes
25	3,213	Doug Libla (R)	Southeast	No
8	2,938	Mike Cierpiot (R)	Kansas City	No

Source: Brennan Center analysis of the U.S. Census Bureau's CVAP special tabulation from the 2018 five-year American Community Survey estimates.

Senate districts 9, 13, and 14 would be three of the four most underpopulated districts under adult citizen apportionment. They are also three of the four majority-Black districts in Missouri, each of which has sent Black representatives to the state capital. Collectively, these districts currently represent 42 percent of the state's Black population.[9] Likewise, Districts 9 and 11 have the two highest Latino populaStions among the state's senate districts.[10]

All of these underpopulated districts would have to be redrawn to bring in thousands of extra adult citizens, which would significantly change the demographic makeup of either these or surrounding districts. The outcome would potentially dilute the political power of Black communities in the very districts designed to empower them, or it could reduce the number of Black constituents in neighboring districts. Either way, the political power of Black communities would likely be diminished under adult citizen apportionment.

Importantly, the senate districts most affected by a shift to adult citizen apportionment also contain neighborhoods that have been the target of state-sponsored segregation and racist disinvestment. For example, District 9, which would bear the most severe underpopulation, runs directly along the east side of Troost Avenue, a street infamous for its function as a de jure border of racial segregation in Kansas City during Jim Crow.[11] Today, Troost Avenue still operates as a "dividing line"[12] between majority-Black and historically disinvested neighborhoods to the east and mostly white and wealthier neighborhoods to the west.[13]

Likewise, underpopulated districts in the St. Louis area map onto geographic racial divides. Districts 13 and 14 cover much of the area north of the "Delmar Divide."[14] The street, synonymous with redlining and racially restrictive covenants, separates predominantly white neighborhoods to the south from predominantly Black ones to the north. Indeed, Districts 13 and 14 together cover Ferguson and Florissant, where in the context of a voting rights lawsuit a federal court recently identified that "once-formalized policies of racial segregation" are still "inscribed on the regional landscape" and a "racialized gap in wealth" "persists to the present day."[15]

That the districts most vulnerable to representational loss under adult citizen apportionment map neatly onto areas still struggling against the legacy of racism reveals that such a shift would, at least in effect, perpetuate an ugly history of discrimination against communities of color in Missouri.

Conclusion

A shift to adult citizen apportionment in Missouri would cut nearly a quarter of the state's population — overwhelmingly children — out of being counted when districts are reconfigured. In a state whose constitution has contemplated all of its inhabitants as counting since 1875, such a change would not only be a stark departure from historical norms but also a serious obstacle to communities of color receiving fair representation. Missouri's Black communities have endured a long and unbroken legacy of discrimination and face disparities in income, education, housing, health, and other key equity indicators when compared to their white counterparts.[16] Limiting representation to adult citizens would likely compound and exacerbate these inequalities, deepening existing divisions.

This analysis is adapted from a forthcoming report by the Brennan Center for Justice studying the impact of adult citizen apportionment in three states. Yurij Rudensky, Ethan Herenstein, Annie Lo, and Peter Miller are the authors of that report, and their work is reflected here as well.

Endnotes

[1] These numbers are derived from the American Community Survey (ACS) 5-Year Estimates and Citizen Voting Age Population Special Tabulation, which provide the most recent count of Missouri's total population and adult citizen population. By dividing those totals by the number of state house and senate districts, we can predict the size of Missouri legislative districts under each apportionment basis. U.S. Census Bureau, "2014–2018 5-Year American Community Survey," https://www.census.gov/data/developers/data-sets/acs-5year.html; and U.S. Census Bureau, "Citizen Voting Age Population (CVAP) Special Tabulation from the 2014–2018 5-Year American Community Survey," https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap/2014-2018-CVAP.html.

[2] See Mo. Const. of 1875, art. IV, § 2, 5, 7, 9; and Mo. Const. art. III, § 3(c)(1) (amended 2018).

[3] Indeed, litigation around the addition a citizenship question to the 2020 Census revealed the interest on the part of prominent conservative strategists to exclude noncitizens and children from the apportionment count for political gain. See Letter Motion to Compel Defendants to Show Cause at Exhibit D, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (S.D.N.Y. 2018). Further, the *Guardian* reported connections between Amendment 3's backers and national conservative operatives that indicate this state effort is in coordination with and a precursor to a larger national Republican strategy: "Some activists believe national Republicans are involved. . . . Dale Oldham, a top Republican redistricting consultant and [Thomas] Hofeller's longtime business partner, and Adam Kincaid, who leads the National Republican Redistricting Trust, met with the Missouri senate president in April 2019, according to a calendar invitation obtained by Clean Missouri and provided to the Guardian." Sam Levine, "Missouri Republicans on the Verge of Gutting Gerrymandering Reform," *Guardian*, May 11, 2020, https://www.theguardian.com/us-news/2020/may/11/missouri-republicans-gutting-gerrymandering-reform.

[4] The law firm that drafted Amendment 3 previously represented the National Republican Redistricting Trust in gerrymandering litigation. Graves Garrett LLC, "Supreme Court Adopts Position of Graves Garrett Client in Gerrymandering Case; Greim, Luetkemeyer Author Op-Ed on Rulings for USA Today," July 16, 2019, https://www.gravesgarrett.com/supreme-court-adopts-position-of-graves-garrett-client-in-gerrymandering-case-greim-luetkemeyer-author-op-ed-on-rulings-for-usa-today/. Graves Garrett also directly represented Thomas Hofeller when he was the only defense witness in a 2012 challenge to Missouri's maps. Brief of Intervenor Respondents, February 13, 2012, *Pearson v. Koster*, No. SC92317 (Mo. 2012).

[5] See Letter Motion to Compel Defendants to Show Cause at Exhibit D, *New York v. U.S. Dep't of Commerce*.

[6] Because maps are drawn every ten years, any child over the age of eight when the census is taken will be eligible to vote in at least one election before the next redistricting cycle.

[7] States are permitted to have districts that deviate up to 10 percent. See *Gaffney v. Cummings*, 412 U.S. 735 (1973). Accordingly, we took the total adult citizen population in Missouri and divided it by the number of state senate districts to derive the "ideal" adult citizen population (134,882) for each seat. We then calculated the lower threshold (128,138), which is 5 percent below the ideal, and the upper threshold (141,626), which is 5 percent above.

[8] If an area has enough underpopulated districts, one of two things could happen during the redistricting process. The map drawer could collapse the existing underpopulated districts into one another, reducing the number of districts that the area would receive and ensuring that each resident of the area would end up in larger districts. Or, in less extreme cases, the map drawer could simply expand the borders of the underpopulated districts to bring in additional adult citizens from nearby overpopulated districts. This would mean that most residents in underpopulated districts would end up in larger districts while those in overpopulated districts would mostly end up in smaller ones. Even these seemingly small changes, repeated again and again across a state, could dramatically transform the makeup of a legislature, shifting power from areas of the state that lose representation and toward areas that gain it. In either case, areas that lose representation and communities that end up in underpopulated districts stand to receive less representation during the next redistricting cycle.

[9] ACS 2018 5-Year Estimates show these are the three senate districts with the highest percentage of Black people. There are 295,830 Black people currently residing in these districts, making up 42 percent of Missouri's entire Black population (701,990). U.S. Census Bureau, "2014–2018 5-Year American Community Survey."

[10] Districts 9 and 11 have 18,284 and 21,491 Latinos, respectively. Latinos make up 10.9 percent and 12.8 percent of their respective populations. U.S. Census Bureau, "2014–2018 5-Year American Community Survey."

[11] "Under Jim Crow laws, Troost Avenue was used to legally enforce segregation prior to the civil rights movements of the 1960s. It also was used by Kansas City Public Schools as a dividing line to keep schools segregated." Nick Starling, "Pray on Troost Highlights Need for Justice in KCMO on Juneteenth," KSHB News, June 19, 2020, https://www.kshb.com/news/local-news/pray-on-troost-highlights-need-for-justice-in-kcmo-on-juneteenth.

[12] Eric Salzman, "For Decades a Dividing Line, Troost Avenue in Kansas City, Mo., Sees New Hope," NBC News, October 11, 2018, https://www.nbcnews.com/news/us-news/decades-dividing-line-troost-avenue-kansas-city-mo-sees-new-n918851.

[13] Briana O'Higgins, "How Troost Became a Major Divide in Kansas City," KCUR, March 27, 2014, https://www.kcur.org/community/2014-03-27/how-troost-became-a-major-divide-in-kansas-city.

[14] Oscar Perry Abello, "Breaking Through and Breaking Down the Delmar Divide in St. Louis," *Next City*, August 19, 2019, https://nextcity.org/features/view/breaking-through-and-breaking-down-the-delmar-divide-in-st.-louis.

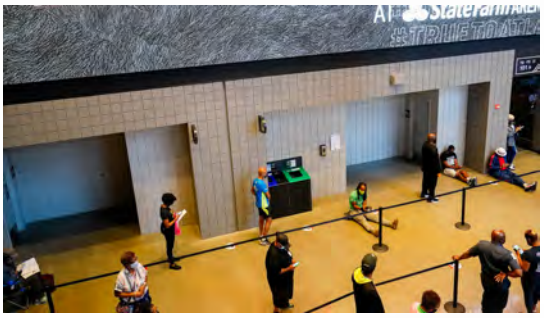
[15] See *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1068–69 (E.D. Mo. 2016) (citations and quotations omitted), aff'd, 894 F.3d 924 (8th Cir. 2018).

[16] Jacob Barker, "Racial Disparities in Income and Poverty Remain Stark, and in Some Cases, Are Getting Worse," *St. Louis Post-Dispatch,* August 7, 2019, https://www.stltoday.com/news/local/metro/racial-disparities-in-income-and-poverty-remain-stark-and-in-some-cases-are-getting-worse/article_9e604fc3-c47d-581e-95a2-5a2166011a17.html.

APPENDIX C

RESOURCE

Georgia's Proposed Voting Restrictions Will Harm Black Voters Most



ASSOCIATED PRESS

State legislators are pushing regressive bills to end no-excuse mail voting for younger voters and to eliminate early in-person voting on Sundays.



Kevin Morris

PUBLISHED: March 6, 2021

In November 2020, President Joe Biden won the state of Georgia by a narrow margin, edging out Donald Trump by fewer than 13,000 votes. While the margin was small, it was the first time a Democratic presidential candidate had won the state since Bill Clinton did in 1992. Two months later, the two Democratic candidates for U.S. senator both won their elections in the Peach State, the first time a Democratic senator had been elected since 1996. [1]

We have seen a **rush of anti-voter bills** introduced in the wake of the 2020 presidential election all around the country. Georgia Republicans have introduced regressive legislation that would eliminate automatic voter registration in the state (**a policy that has boosted registrations enormously**) and are seeking to make voting by mail far more difficult. Given the dynamics of the 2020 election, the restrictions to voting by mail seem especially likely to hurt Black voters, who used mail ballots at far higher rates last year than ever before.

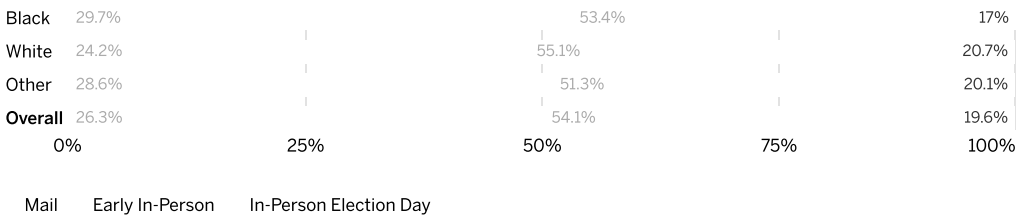
As **we wrote last year**, there was little evidence before 2020 that Democratic-leaning constituencies used vote-by-mail at higher rates than other voters. These patterns **continued through Georgia's June 2020 primary**, when 54 percent of white voters cast a ballot by mail, compared with just 44 percent of Black voters. [2]

This all changed in the 2020 general election.

Racial Composition of Vote-by-Mail Electorate in Georgia [3]

Following the **intense politicization of mail voting** by then-President Trump, the partisan composition of the vote-by-mail electorate shifted drastically. Although vote-by-mail usage exploded for all racial groups, it increased less for white voters than for others. Although white voters still made up a majority of mail voters, their share of the vote-by-mail electorate dropped from 67 percent in 2016 to 54 percent in 2020; the Black share, meanwhile, surged from 23 percent to 31 percent. As the figure below shows, [4] nearly 30 percent of Black voters cast their ballot by mail in 2020, but just 24 percent of white voters did so.

Participation Methods



Electronic voters (who accounted for 0.3% of voters) excluded for legibility concerns

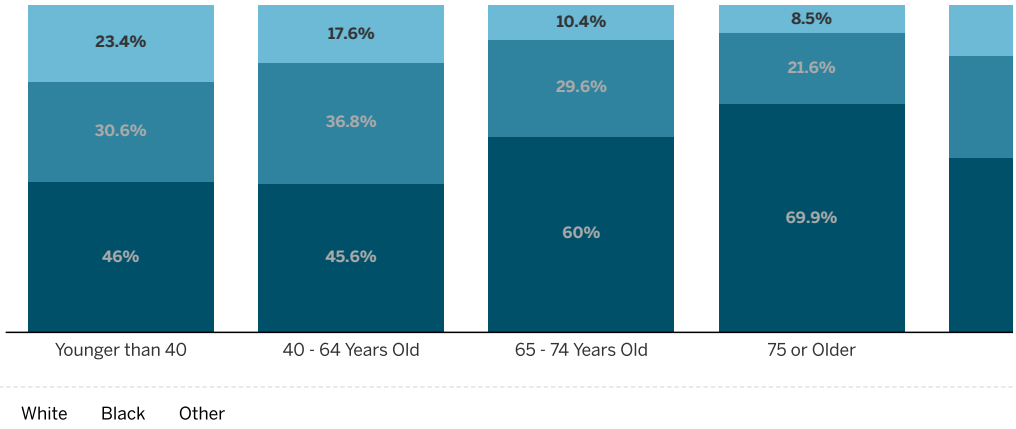
Source: Georgia Secretary of State

The Racial Composition Is Different for Older Voters

There are currently multiple live bills in the Georgia Legislature that would end no-excuse mail voting. These bills, however, include carve outs for older voters. Senate Bill 241 — which advanced out of the Senate Ethics Committee this week — includes being 65 or older as a valid excuse; Senate Bill 71, which has also seen movement in the Senate this week, would make being 75 or older a valid excuse.

In other words, under these proposals, older voters — who **according to CNN exit polls** supported Republicans at higher rates in 2020 — would continue to have unrestricted access to vote-by-mail. As the figure below shows, fewer than half of vote-by-mail participants under 65 years old were white, but 60 percent of the mail voters between 65 and 74, and 70 percent of the mail voters 75 and older were white. Because older Georgians are whiter than younger Georgians, the legislation restricting mail voting for younger voters disproportionately benefits white voters.

Vote-By-Mail Demographics



Source: Georgia Secretary of State

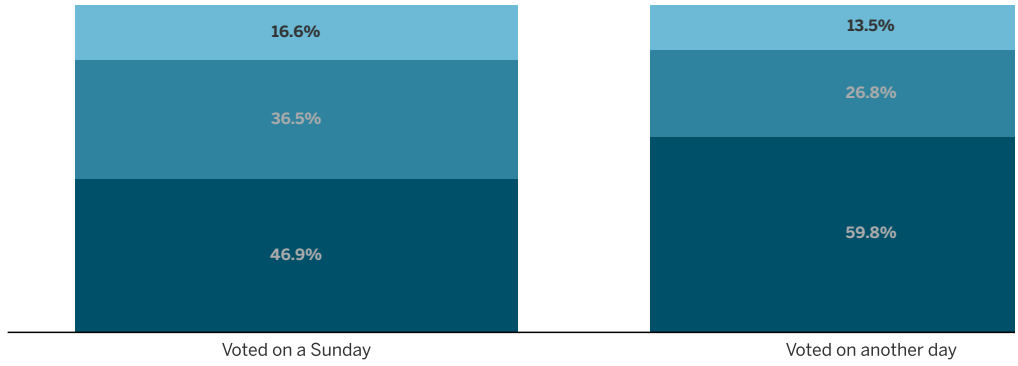
Ending Sunday Voting Further Harms Black Voters

Curtailing mail voting isn't the only regressive change being considered by Georgia Republicans. House Bill 531 — which passed in the Georgia House on Monday — contains many restrictive provisions, such as shrinking the absentee ballot application window and limiting the hours during which mail ballot drop boxes can be open. It also eliminates early in-person voting on Sundays in the weeks leading up to an election.

Sundays have historically been important turnout days for Black Americans, as Black churches organize "Souls to the Polls" drives. To understand the racial implications of this proposed change, we looked at who voted early on what days in the 2020 general election.

Although Sunday was not a particularly popular day for voting in 2020 (just 2.7 percent of early in-person ballots were cast on a Sunday), there are clear racial divisions. Black voters (who make up 30 percent of the registered electorate) accounted for 36.5 percent of Sunday voters, but just 26.8 percent of early in-person voters on other days. On the other hand, 60 percent of the voters who voted early on other days were white, though that was true of just 47 percent of Sunday voters (53 percent of registered voters in Georgia are white). Barring counties from holding early in-person voting on Sundays would disproportionately impact Black Georgians.

Demographics of Early In-Person Voters



Source: Georgia Secretary of State

Conclusion

Around the country, we are seeing legislators **push to make voting harder**. In the case of Georgia, these changes will disproportionately hurt Black voters. The state is considering restricting mail voting in response to a shift in the racial demographics of the voters who use it, but *wants* to keep mail voting available for older, whiter mail voters. The same is true for early in-person voting: Republicans in the Peach State want to end Sunday voting, a day disproportionately popular among Black voters. Voter suppression is always unacceptable, and the razor thin political margins in Georgia may mean that suppression efforts like these will change political outcomes. Rather than imposing barriers, Georgia should be looking at ways to improve voter access.

Endnotes

1. Zell Miller, a Democrat, was appointed to finish the late Paul Coverdell's term in 2000, but Miller was never elected to the Senate.

2. Younger and nonwhite voters – voters less likely to support Republican candidates, in other words – have also historically had higher mail ballot rejection rates.

3. All our figures are calculated by merging the voter history files made publicly available with a snapshot of the registered voter file from November 2, 2020.

4. Approximately 0.3 percent ballots were cast electronically by unformed and overseas voters; we exclude them to make the figure easier to read. Their exclusion does not alter our conclusions.



Credit ANGELA WEISS/Contributor

FELLOWS

Police Reform Must Go Deep, and It Must Last

One year after George Floyd's murder, the test for success isn't about intentions and pronouncements — it's about actions.

Theodore R. Johnson May 25, 2021



Credit Bob Chamberlin / Getty

ANALYSIS

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APPENDIX C

ANALYSIS

Georgia's Voter Suppression Law

Gov. Brian Kemp signed a wide-ranging bill that targets Black voters with uncanny accuracy.



Justin Sullivan/Getty



Michael Waldman

March 31, 2021

During the Jim Crow era, laws that looked neutral on their face were specifically designed to target Black voters. Today, legislators across the country are considering bills that will have the same effect. Nowhere is this more obvious than in Georgia, where last week, Gov. Brian Kemp signed into law an omnibus bill that targets Black voters with uncanny accuracy.

It's now a crime in Georgia to give a bottle of water or a snack to people waiting in line to vote. We know that in Georgia and across the country, hours-long lines to vote are more often in Black and brown communities. Mobile voting (polling sites on wheels that travel to different set locations) is also now illegal in Georgia — a practice that has only been used in Fulton County, which has the largest Black population in the state. Ballot drop boxes must now be located inside early voting sites instead of other convenient locations, and many voters who plan to vote by mail must provide a driver's license or state ID number.

These laws will disproportionately harm Black, brown, and Native American voters. Legislators tried to pass even more onerous laws — like canceling vote by mail but preserving it for the segment of the electorate that tilts white and more conservative — but faced a sustained and effective outcry.

"It's sick," said President Biden about the Georgia law and the over 253 bills proposed across the country that would make voting harder.

As I said on NPR's ***All Things Considered*** over the weekend, it's a great political clash: a wave of proposed voter suppression in the states, and, with the For the People Act, a wave of proposed voting rights expansion at the federal level. If it becomes law, the For the People Act will stop this new wave of voter suppression cold. Congress has the power to stop these modern-day Jim Crow bills before they start.

Kemp signed his voter suppression bill in front of a painting of a plantation where more than 100 Black people had been enslaved. The symbolism, unnerving and ghastly, is almost too fitting.

When **I testified** before the Senate Committee on Rules and Administration in support of the For the People Act last week, I asked this: Will we live up to our best ideals, or our worst? Will we build a multiracial democracy that really represents all people, or will we allow a drive to take place to turn the clock back to cut back on voting rights?

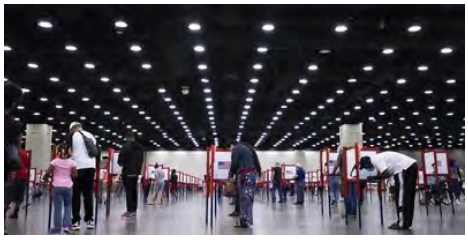
These are questions Congress must answer — and soon.

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Ensure Every American Can Vote

Vote Suppression



Credit Brett Carlsen/Stringer

ANALYSIS

Lawmakers Are Targeting the Courts that Could Shoot Down Voter Suppression Laws

They want to make voting harder — and make it harder for voters to fight back

Alicia Bannon, **Patrick Berry** May 20, 2021



Credit Hill Street Studios

ANALYSIS

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RESOURCE

Legislative Assaults on State Courts — 2021

State lawmakers across the country are considering bills that would diminish the role or independence of state courts. And some bills appear to be targeting courts for their role in election-related cases.



ftwitty/Getty

 Patrick Berry

 Alicia Bannon

 Douglas Keith

PUBLISHED: May 19, 2021

Strengthen Our Courts

- Promote Fair Courts

It is difficult to overstate the importance of state courts. They are where 95 percent of all cases in the country are filed and their high courts usually have the final word on questions of state law. They have considerable power over matters as important as the death penalty, funding for public schools, the environment, voting rights, and reproductive justice. And over the coming year, many state courts will also play a major role as states redraw their maps for state legislative and congressional offices.

Courts play a unique role in our democracy — a role that requires them to be independent of the two political branches and to make politically unpopular decisions on occasion. In recent years, however, this critical role has been under threat. State legislatures and governors across the country have regularly targeted state courts, often in retaliation for decisions they disagree with, in an effort to weaken courts' power or gain more political influence over the judiciary. In 2020, for example, even with Covid-19 raging throughout the country, the Brennan Center **documented** at least 42 bills in 17 states that would have made state courts less independent or politicized judicial selection.

A Brennan Center review of bills already considered in state legislatures in 2021 shows that, as of **May 14**, legislators in at least 26 states introduced at least 93 bills that would politicize or undermine the independence of state courts.* At least ten of these bills have already been signed into law. An additional 50 bills have advanced in a significant way, either passing favorably out of a committee or subcommittee, receiving a hearing, passing through one house of the legislature, or receiving approval by the legislature to go on the ballot.

While state legislatures have considered similar legislation in the past, several troubling new trends are emerging in 2021. First, state courts are being targeted for their role in protecting voting rights during the 2020 election. In at least eight states, lawmakers considered bills that would either weaken courts' power in election-related cases, create new tribunals to hear such cases, or target individual judges for their decisions in election cases. And in 21 states, legislation aimed broadly at the courts would impact election cases (and other types of litigation) by changing how judges get selected, which courts hear cases involving the state, or how judicial decisions get enforced.

In another trend, lawmakers in several states considered bills that would gerrymander existing courts or create new courts in the hopes of obtaining more favorable outcomes.

Take Texas, for example. Republican lawmakers there introduced six bills that would prohibit courts from modifying or suspending election-related deadlines or procedures, change the judges that hear election-related disputes, create a new "state elections tribunal" to hear certain election-related cases, consolidate appellate court districts in a way that would create a gerrymander, and establish a new statewide intermediate appellate court to hear certain cases involving the government so as to avoid jurisdiction in Democratic-leaning parts of the state.

And while the legislative sessions of 22 states have come to an end, many states are expected to have special sessions this fall for redistricting. In some states, this could open the door to further efforts to manipulate or retaliate against state courts.

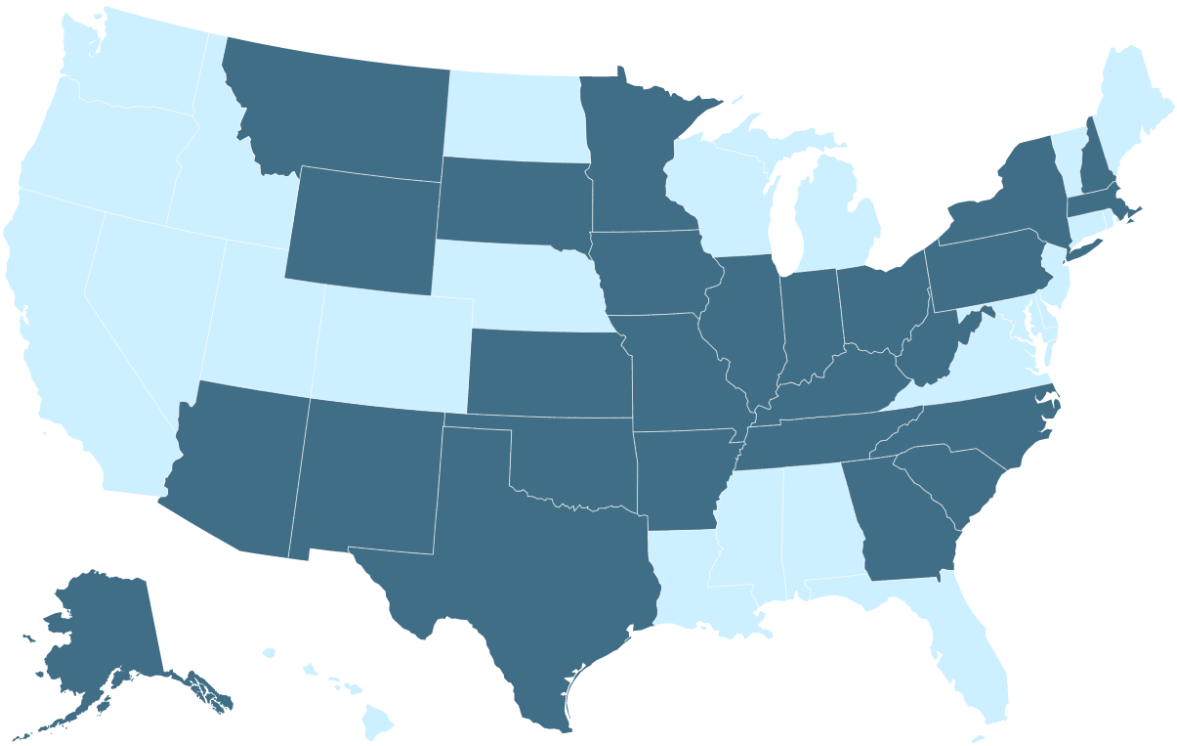
As of May 14, legislators in at least 26 states are considering at least 93 bills targeting state courts.

- 31 bills in 14 states would put pressure or restrictions on judicial decision-making, target individual judges for unpopular rulings, or take away courts' authority to manage their own rules or resources.
- 6 bills in 5 states would either gerrymander existing courts or create new courts, in an effort to obtain more favorable outcomes.
- 3 bills in 2 states would change the judges or courts that hear high-profile cases against the government.
- 18 bills in 10 states would either enable the override of court decisions or prohibit state officials, including judges, from enforcing particular laws or court decisions.
- 23 bills in 12 states would inject more politics into how judges are selected.

- 2 bills in 1 state would subject judges to more frequent political pressures by shortening term lengths.
- 10 bills in 6 states would allow more guns in courthouses, even if courts themselves wanted to prohibit weapons.

Legislative Assaults on State Courts — 2021

States with bills targeting the courts



The following is an overview of bills recently introduced at the state level (as of May 14, 2021), broken down by how they might weaken the independence or power of the judiciary.

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- **Interfering with Judicial Decision-Making**
- **Gerrymandering or Creating New Courts**
- **Judge-Shopping for Partisan Advantage**
- **Limits to the Enforcement of Court Rulings**
- **Changes to Judicial Selection**
- **Altering Judicial Term Lengths and Limits**
- **Allowing Firearms in Court**

These bills were identified by the Brennan Center through CQ FiscalNote and CQ StateTrack (provided by the Piper Fund), as well as media reports. Unlike previous years, the Brennan Center did not use the National Center for State Courts' Gavel to Gavel **database for identifying bills because it was unavailable.*

Interfering with Judicial Decision-Making

Fourteen states are considering legislation that would limit judges' decision-making powers, make it easier to target judges for unpopular decisions, limit judges' control over procedural rules, or seek to remove individual judges for their rulings. In a new trend in 2021, many of these bills specifically target courts in connection with election-related cases. Legislators introduced these bills following the many election-related **lawsuits** filed last year, some of which resulted in changes to voting procedures or policies for the 2020 election because of the pandemic. Still more bills, which we did not include in our tally, prohibit alteration of state election laws and could arguably be interpreted to limit a court's authority to rule on those laws.

Bills Limiting Judicial Review of State Election Laws or Targeting Judges in Election Cases

- A bill in **Arizona** (**H.B. 2794**) would prohibit any state governmental entity, including the courts, from modifying or agreeing to modify "any deadline, filing date, submittal date or other election-related date that is provided for in statute." H.B. 2794 passed the Arizona House with a narrowly passed amendment removing the limitation on judicial review and was approved by the Arizona Senate Rules Committee.
- In **Georgia**, a state where voters of color are **more likely** than white voters to wait in hours-long lines to vote, the Republican-controlled legislature passed an omnibus voter suppression bill (**S.B. 202**) limiting the ability of some courts to expand polling place hours. S.B. 202 was signed into law by the state's Republican governor.
- A bill in **Kansas** (**H.B. 2332**), which was passed by the state's Republican-controlled legislature and enacted over the Democratic governor's veto, explicitly provides that "neither the executive branch nor the judicial branch of state government shall have any authority to alter the state election laws." Another bill (**H.B. 2319**) would have prohibited courts from changing the deadline for returning advance voting ballots. H.B. 2319 received a hearing in the Kansas House Committee on Elections but otherwise failed to move before the end of the legislative session.
- In **Kentucky**, an omnibus elections bill (**H.B. 574**), which was passed by the state's Republican-controlled legislature with bipartisan support and signed into law by the Democratic governor, includes a provision that "no government official other than the General Assembly may suspend or revise any statute pertaining to elections." Another bill (**H.B. 162**) would have given the legislature "sole and absolute discretion" to "accept, modify, or disregard the findings" of a trial court regarding the results of a recount. H.B. 162 failed to move before the end of the legislative session.
- A bill in **Missouri** (**H.B. 1301**) would have provided that "[d]etailed rules and procedures for counting votes, election deadlines, and other election procedures shall not be modified, waived, or altered in any fashion by state constitutional law, executive order, administrative rules, or any other type of rule or order except if a statute is held unconstitutional under the Constitution of the United States by any court of competent jurisdiction." H.B. 1301 failed to move before the end of the legislative session.
- In **Texas**, a bill (**H.B. 6**, **S.B. 7**) would provide that a "public official may not knowingly issue an order altering or suspending an election standard, practice, or procedure mandated by law or rule unless the alteration or suspension is expressly authorized" under the state's election code. Another bill (**S.B. 1215**) would require the secretary of state to create a "state elections tribunal" to hear certain election administration disputes. A third

bill (**S.B. 1589**) would prohibit district or county court judges "with jurisdiction over any geographic area served by an election official who is a party in a proceeding for injunctive relief" from presiding over certain election-related proceedings "unless the election official serves statewide." H.B. 6 was approved by the House Elections Committee. S.B. 7 passed the state Senate and was substituted with language from H.B. 6 in the state House. The substitute version of S.B. 7 passed the state House. S.B. 1589 passed the state Senate.

- In **Minnesota**, a resolution (**H.R. 3**) was introduced by Republican legislators calling for the impeachment of a county judge for "violating the plain language of the United States Constitution and Minnesota election law" in **response** to the judge's approval of a consent decree that waived the postmark and witness requirements for absentee ballots during the 2020 election because of the pandemic.
- A similar resolution in **Tennessee** (**H.R. 23**/**S.R. 21**), cosponsored by 64 out of 73 Republicans in the state House, would have formed a legislative committee to consider the removal of a county judge over a **decision** she issued last year expanding access to absentee voting because of the pandemic. H.R. 23 was voted down by a subcommittee of the Tennessee House Civil Justice Committee.

Bills Targeting Judicial Powers

- In **Arkansas**, a proposed constitutional amendment (**H.J.R. 1015**/**S.J.R. 7**/**S.J.R. 9**) would have allowed the legislature, by a three-fifths vote of each house, to prescribe rules of pleading, practice, procedure, and evidence for all courts. Arkansas's legislature has **introduced** similar proposals since at least 2013 in response to state supreme court decisions striking down various provisions of a 2003 "civil justice reform" law as violating the state's constitutional grant of procedural rulemaking power to the judiciary. H.J.R. 1015/S.J.R. 7/S.J.R. 9 failed to move before the end of the legislative session.
- A bill in **Iowa** (**H.F. 173**) would prohibit state courts from applying foreign law if its application would result in the violation of a right guaranteed by the state or federal constitution. Similar bills, which are part of a **national trend** of "anti-Sharia laws" meant to provoke fears about Islam and Islamic law, were introduced in **New Jersey**, **South Carolina**, and **West Virginia** last year.
- Another bill in **Iowa** (**H.F. 109**) would have required a supermajority of justices (five of seven) on the state's supreme court in order to invalidate a state law or issue a decision with the "effect of creating a new law." If such a decision were issued, the court's ruling would have no effect for one year, during which time lawmakers could "compel the attendance of specified justices to a public hearing to discuss and debate the justification for the decision" with legislators. Iowa's supreme court has faced regular attacks from conservative lawmakers over the years in response to decisions related to **marriage equality** and **reproductive rights**. H.F. 109 was recommended for indefinite postponement by a subcommittee of the Iowa House Judiciary Committee.
- In **Missouri**, a bill (**H.B. 850**) would have prohibited state courts from rewriting false or misleading ballot language written by the legislature. Another bill (**S.B. 399**) would have barred courts from hearing challenges to ballot language written by the legislature. These bills were introduced by Republican lawmakers after two courts **rewrote** the ballot language for a legislatively proposed constitutional amendment to undo voter-approved redistricting reforms. H.B. 850 passed the state House and was substituted in the state Senate to include provisions that would have prohibited donations to election officials among other election-related changes. The substitute version of H.B. 850 passed the state Senate but failed to pass the state House before the end of the legislative session. S.B. 399 was approved by the Missouri Senate Local Government and Elections Committee but otherwise failed to move before the end of the legislative session.
- A bill in **Montana** (**H.B. 141**) would have provided that state courts "may only review the constitutionality of a law, not change or alter the law." S.B. 141 failed to move before the end of the legislative session.
- In **New York**, a proposed constitutional amendment (**A. 04446**/**S. 4541**) would divide the state into three separate autonomous regions, with significant repercussions for the courts. In addition to each region having a

separate court system, this amendment would require at least three-quarters of the judges on the state's highest court, which would expand from 7 to 11 judges to include new judges appointed by each regional governor, to agree to reverse a regional superior court ruling or a lower court ruling that a regional superior court let stand. It would also remove all sitting members of the state's judicial nominating commission, replacing them with commissioners chosen by each regional governor and leadership of each regional legislature. Currently, the 12-member commission is made up of 4 members chosen by the governor, 4 chosen by the state's chief justice, and 1 each chosen by the majority and minority leaders in the legislature.

- A bill in **Tennessee** (**H.B. 1072**/**S.B. 915**) would have allowed a contested state law to take effect, even if it was blocked by a lower court for being unconstitutional, unless the state's supreme court rules otherwise. Currently, judges have discretion as to whether a court's decision should be stayed pending an appeal. The bill is reportedly a **response** to a court decision expanding access to absentee voting last year because of the pandemic. H.B. 1072 passed the state's Republican-controlled legislature with an amendment removing the provision that provided for an automatic stay and awaits the Republican governor's signature.
- In **West Virginia**, the legislature voted to put a proposed constitutional amendment (**H.J.R. 2**) on the ballot in 2022 that would prohibit state courts from intervening in impeachment proceedings and exempt from judicial review any judgment rendered by the state Senate after an impeachment trial. Another proposed amendment (**S.J.R. 8**) would have provided that state courts have no authority to interfere with any legislative proceedings. These measures were introduced in response to a 2018 **decision** by West Virginia's supreme court that halted the legislature's impeachment of three justices for their alleged abuse of state funds as being constitutionally and procedurally flawed. S.J.R. 8 failed to move before the end of the legislative session.

Bills Politicizing Judicial Discipline

- In **Alaska**, a bill (**H.B. 207**) would add "exercising legislative power" as a basis for impeaching a judge and exempt such a finding by the legislature from judicial review. A similar bill was introduced in Alaska in **2019** and **2018** and in Kansas in **2016** but failed to advance through the legislature.
- In **Arkansas**, a proposed constitutional amendment (**H.J.R. 1006**) would have created a procedure for the recall of state supreme court justices, court of appeals judges, circuit judges, or district judges. Judicial recall provisions are unusual and pose a substantial threat to judicial independence because they enable a judge to be targeted for an unpopular decision. Arkansas judges are already subject to regular judicial elections, and state supreme court races have attracted substantial money and attention over the years. In 2018, two conservative advocacy groups unsuccessfully spent **$2.9 million** to defeat an incumbent state supreme court justice that one of them **attacked** as a "liberal judicial activist." A similar bill (**H.B. 1925**) would have created a procedure for the recall of county court judges. H.J.R. 1006 and H.B. 1925 both failed to move before the end of the legislative session.
- In **Montana**, a series of bills targeted the state's judicial standards commission, which is responsible for investigating complaints against judges and recommending disciplinary action to the state's supreme court. **H.B. 380**, which was passed by the state's Republican-controlled legislature and signed into law by the Republican governor, requires every member of the commission to be confirmed by the state Senate. A proposed constitutional amendment (**H.B. 685**) would have restructured the commission so that a majority of its members are nonlawyers appointed by the governor and transferred direct authority over judicial discipline from the state's supreme court to the commission. Another bill (**S.B. 252**, **S.B. 318**) would have allowed a judge to be impeached for not following the legislature's preferred method of statutory interpretation. Another bill (**S.B. 366**) would have allowed citizens of the state to initiate an investigation of a judge with the commission for "violating the oath of office by continuously issuing unlawful and unconstitutional orders or decisions." H.B. 685 was approved by the Montana House Judiciary Committee but otherwise failed to move before the end of the

legislative session. S.B. 252 was approved by the Montana Senate Judiciary Committee but was indefinitely postponed on second reading. S.B. 318 passed the state Senate and was approved by the Montana House Judiciary Committee but was voted down on second reading. S.B. 366 received a hearing in the Montana Senate Judiciary Committee but was tabled in committee.

Gerrymandering or Creating New Courts

Proposals in five states would either gerrymander existing courts or create new ones, in response to the perception that current courts are insufficiently supportive of outcomes favored by the legislature. These kinds of structural changes, driven not by reasons of judicial efficiency or access to justice but rather perceived partisan advantage, threaten the judiciary's independence from the political branches of government and risk its politicization.

- In **Montana**, the Republican-controlled legislature voted to put a legislatively referred state statute (**H.B. 325**) on the ballot in 2022 that would require state supreme court justices to be elected by district, rather than statewide. Districted elections aren't always bad policy, but they can open the door to judicial gerrymandering and other forms of partisan gamesmanship, especially in states like Montana where lawmakers have **accused** the state's courts of being "too liberal." H.B. 325 was introduced by a Republican legislator with **ties to a conservative group** that has spent substantial sums in recent state supreme court elections. The proposal is also similar to a **referendum** that was **struck down** as unconstitutional by the state's supreme court in 2012 due to a requirement that judicial candidates live in their district (H.B. 325 omits the residency requirement).
- In **New Mexico**, a proposed constitutional amendment (**S.J.R. 21**), introduced by a Republican lawmaker, would have likewise moved from statewide to districted elections for state supreme court justices. Currently, all five justices on New Mexico's supreme court are Democrats, and the amendment would have required, beginning in 2024, all newly elected or appointed justices to be a resident of the district from which they were appointed or elected. S.J.R. 21 failed to move before the end of the legislative session.
- A similar proposed amendment in **Pennsylvania** (**H.B. 38**) would require appellate court judges, who currently run in statewide elections, to run in districts drawn by the legislature. The amendment would require sitting judges to run for reelection in one of the seven new judicial districts created by the legislature, and it does not include any restrictions on the legislature's ability to draw (or redraw) these districts. The amendment would also give the legislature a say in the timing of the state's transition to district-based elections, meaning the legislature could game the state's move to districted elections to **oust judges** they dislike by drawing unfavorable district lines. H.B. 38 was first introduced by a Republican lawmaker in **2017** after Democrats gained a 5–2 majority on the state's supreme court and **gained momentum** after a slew of election-related lawsuits in 2020, including a decision by the state's supreme court that extended the deadline for returning mail ballots and allowed voters to use drop boxes, which was **condemned** by state Republicans as the product of an "activist

court" that was "allowing one party to steal this election." H.B. 38 was approved by the Pennsylvania House Judiciary Committee. If passed by the legislature again this year, it will go on the ballot in November 2021.

- A bill in **Texas** (**S.B. 11**) would have consolidated the state's intermediate appellate courts by cutting the number of districts in half, amounting to a **judicial gerrymander** that would impact rural voters and voters of color. Democrats have won majorities on 7 of the state's 14 appellate courts since 2018, and the **redrawn districts** would result in 5 appellate courts with Republican majorities and 2 with Democratic majorities. Introduced by a Republican state senator, S.B. 11 is reportedly based on **recommendations** by Texans for Lawsuit Reform, a tort reform group that has **spent** well over $4 million to support Republican judicial candidates over the years. The bill is opposed by appellate judges across the state, including one who **said** the new map would "make it such that, and virtually guarantee, that the number of justices of color that are on the bench right now would lose in the next election." S.B. 11 was approved by the Texas Senate Committee on Jurisprudence, though the vote was later reconsidered and the bill was left pending in committee.
- Another bill in **Texas** (**S.B. 1529**), which shares the same sponsor as S.B. 11, would create a statewide intermediate appellate court comprised of six justices elected statewide to hear high-profile lawsuits involving the state. Such lawsuits are usually filed in Travis County, where the Third Court of Appeals, comprised of a majority of Democratic judges, has jurisdiction. No Democrats have won a statewide race in Texas since 1994, and all sitting justices on the state's two high courts are Republican. S.B. 1529 has been **described** by a former Republican chief justice of the Fifth Court of Appeals as flying "in the face of a fair, impartial, and independent judiciary." S.B. 1529 passed the state Senate with an amendment reducing the number of justices from six to five and providing the new court would not have jurisdiction over cases in which a party is challenging the constitutionality of a state law.
- A similar bill in **Tennessee** (**H.B. 1130**/**S.B. 868**) would have created a statewide elected trial court made up of three judges from each of the state's grand divisions to hear high-profile cases involving the state. But the bill was **amended** to create a "court of special appeals" composed of the judge before whom the case was first filed and two judges chosen by the state's chief justice from the two other grand divisions of the state. Currently, cases related to redistricting and the constitutionality of state actions are typically heard by judges in Davidson County. The bill's primary sponsor, a Republican state senator, **justified** his proposal by saying, "Why should judges who are elected by the most liberal constituency in the state . . . be the ones deciding cases that affect the state in general?" H.B. 1130 passed the state's Republican-controlled legislature and awaits the Republican governor's signature.

Judge-Shopping for Partisan Advantage

In two states, bills would change courts' jurisdiction or alter methods for assigning cases, in an apparent effort to obtain a more favorable venue for challenges to state law or the redistricting process. This kind of gamesmanship undermines the separation of powers between the courts and the political branches of government.

- Bills in **Kentucky** (**H.B. 3**) and **Tennessee** (**H.B. 1196**/**S.B. 454**) would require lawsuits challenging the constitutionality of state laws to be filed in the county where the plaintiff resides, as opposed to those states' capitals. Republicans in Kentucky have **complained** that the judges in Franklin County (home to Frankfort, the state's capital) are too liberal, and Republican legislators in Tennessee have **said** the same of the judges in Davidson County (home to Nashville, the state's capital). H.B. 3 was signed into law by Kentucky's Republican-controlled legislature over the state's Democratic governor's veto. H.B. 1196 passed the state House but otherwise failed to move before the end of the legislative session.
- Another bill in **Tennessee** (**H.B. 1436**/**S.B. 1363**) would have required redistricting lawsuits to be heard by a three-judge panel made up of court of appeals judges chosen by the state's chief justice from each of the state's three grand divisions. H.B. 1436 passed the state House but otherwise failed to move before the end of the legislative session.

Limits to the Enforcement of Court Rulings

Proposals in ten states would either enable the override of court decisions or prohibit state officials, including judges, from enforcing particular laws or court decisions.

- Bills in **Arizona** (**H.B. 2111**) and **Texas** (**S.B. 513**) would prohibit state courts from enforcing federal acts, laws, treaties, orders, rules, or regulations that are inconsistent with the laws of those states regarding the regulation of firearms. H.B. 2111 was signed into law by Arizona's governor. S.B. 513 passed the Texas Senate.
- Similar bills in **Arkansas** (**H.B. 1957**, **H.B. 1435**/**S.B. 298**/**S.B. 716**) and **Missouri** (**H.B. 85**) would prohibit state courts from enforcing or assisting federal agencies or officers in enforcing any federal law, executive order, or agency directive that conflicts with the state constitution's right to bear arms. Arkansas's governor vetoed S.B. 298 but signed H.B. 1957, which was amended to provide exceptions for certain federal bans, into law. H.B. 85 passed both chambers of Missouri's legislature and awaits the governor's signature.
- Bills in **North Carolina** (**H.B. 189**) and **Wyoming** (**H.B. 124**/**S.F. 81**) would deem all federal acts, laws, executive orders, administrative orders, court orders, rules, and regulations whether past, present, or future that "infringe on the people's right to keep and bear arms" as "null, void, and of no effect" in the state. Similar bills were introduced in **Mississippi** and **Oklahoma** last year. S.F. 81 passed the Wyoming Senate but otherwise failed to move before the end of the legislative session.
- Bills in **Arizona** (**H.B. 2650**) and **Texas** (**H.B. 3326**) would criminalize abortion and provide that any federal law, regulation, executive order, or court decision that purports to supersede, stay, or overrule the law is unconstitutional under both the state and federal constitution and is therefore void.
- A similar bill in **Indiana** (**H.B. 1539**) would have also criminalized abortion and deemed any court decision enjoining the law as "nonauthoritative, void, and of no force." It would have also subjected federal officials attempting to enforce contrary court orders in the state to arrest by Indiana law enforcement. Similar bills were introduced in **Indiana** and **Missouri** last year. H.B 1539 failed to move before the end of Indiana's legislative session.

- In **Texas**, a similar bill (**H.B. 3641**/**S.B. 1671**) would declare and treat the U.S. Supreme Court's decision in *Roe v. Wade* as "void" and require all political divisions of the state, including courts, to enforce prohibitions and other restrictions on abortion without regard to *Roe*.
- In **Indiana**, a bill (**S.B. 75**) would have deemed any "order, rule, or edict of any kind" from the executive or judicial branch that "invades the constitutional or lawful authority of the legislative branch" as "null and void" until approved by the legislature. Another bill (**S.B. 379**) would have prohibited state courts from adopting administrative orders that suspend, toll, modify, amend, or prohibit the enforcement of a statute enacted by the legislature unless the court was specifically authorized by the legislature to issue such an order. S.B. 75 and S.B. 379 both failed to move before the end of the legislative session.
- A similar bill in **Iowa** (**H.F. 752**) would provide that "no law, statute, edict, mandate, ruling, regulation, executive order, court opinion, directive, or other usurpation that is unconstitutional shall have any legal or binding force" in the state.
- In **New Hampshire**, a proposed constitutional amendment (**C.A.C.R. 11**) would have allowed the legislature, with a simple majority vote, to present a ballot question to voters on whether a court decision interpreting the state's constitution should be overturned. C.A.C.R. 11 received a hearing in the New Hampshire House Legislative Administration Committee but later died in committee.
- Bills in **South Dakota** (**S.B. 122**), **Texas** (**H.B. 1215**/**H.B. 2930**), and **Wyoming** (**H.B. 256**) would establish joint legislative committees to determine the constitutionality of federal actions, including court decisions. If the legislature declared such an action unconstitutional, state courts would be prohibited from enforcing that action. The three bills have near identical language, suggesting they may share an author. Similar bills have been introduced over the years in **Idaho** and **Oklahoma**. S.B. 122 received a hearing in the South Dakota Senate State Affairs Committee but was deferred. H.B. 256 died in the Wyoming House Corporations, Elections & Political Subdivisions Committee.

Changes to Judicial Selection

Twelve states are considering bills that would change how judges are selected, making the process more partisan or political. States use **several different methods** to select judges. Many utilize independent judicial nominating commissions to vet and recommend judicial candidates as a way to help insulate judges from political and partisan pressures during the selection process. But a majority of bills under consideration this session would either weaken states' judicial nominating commissions by giving the governor or other political actors more control over the commissions or eliminate them altogether. Others would give political actors more control over judicial selection in other ways or alter the selection process for a perceived partisan advantage.

- In **Alaska**, a bill (**S.B. 14**) would prohibit the state's judicial council from recommending a judicial candidate to the governor for appointment unless the council determined that the candidate would follow "strict constitutional interpretation of statutes and regulations and adhering to legislative intent" — in other words, the legislature's preferred methods of legal interpretation. The bill would also require a majority of the members of

the legislature in joint session to confirm the governor's nominees. S.B. 14 was approved by the Alaska Senate Judiciary Committee.

- In **Indiana**, the Republican-controlled legislature passed a bill (**H.B. 1453**) giving the state's Republican governor more control over the judicial nominating commissions used by Lake County and St. Joseph County for recommending trial court judges. The bill replaces the commissioners chosen by the local bar and local elected officials with three members chosen by the governor and three members chosen by county commissioners. Previously, both commissions were made up of an equal number of lawyers chosen by the local bar and nonlawyers chosen by local elected officials. H.B. 1453 also eliminates restrictions on the total number of commissioners from the same political party. Lake County and St. Joseph County are two of the four counties in Indiana with the largest populations of Democrats, and one of the H.B. 1453's coauthors, a Republican lawmaker, **said** the bill was introduced at the governor's request (a claim the governor's office later denied). H.B. 1453 was signed into law by the governor.
- A similar proposed constitutional amendment in **Indiana** (**S.J.R. 16**) would have given partisan legislators more influence over the seven-member nominating commission the state uses to nominate appellate court judges by replacing two of the three lawyers chosen by the state bar with nonlawyers chosen by the House speaker and Senate president. Currently, the commission is equally divided between lawyers chosen by the state bar and nonlawyers chosen by the governor, and it is chaired by the state's chief justice or their designee. S.J.R. 16 would have also subjected the governor's appellate court nominees to Senate confirmation. S.J.R. 16 failed to move before the end of the legislative session.
- A bill in **Iowa** (**S.F. 399**) would require Senate confirmation of the state bar-appointed lawyer members on the state's judicial nominating commission, giving legislators the power to reject the bar's appointees. Iowa's Republican-controlled legislature passed a **bill** in 2019 giving the state's Republican governor authority to appoint a majority of the commission.
- In **Missouri**, proposed constitutional amendments (**S.J.R. 24**, **S.J.R. 14**) would have eliminated the state's judicial nominating commission, giving the governor the power to directly appoint appellate courts judges, subject to approval by the state Senate. Republicans currently hold a two-thirds supermajority in the legislature and have accused the state's supreme court of going "**rogue**" and the state's nominating commission of being "**too liberal**." H.J.R. 24 was approved by two committees in the state House but otherwise failed to move before the end of the legislative session. S.J.R. 14 received a hearing in Missouri Senate Governmental Accountability and Fiscal Oversight Committee but otherwise failed to move before the end of the legislative session.
- In **Montana**, the Republican-controlled legislature passed a similar bill (**S.B. 140**) giving the state's Republican governor the power to directly fill interim vacancies on the state's supreme court and district courts without vetting by the state's judicial nominating commission. S.B. 140 was signed into law by the governor, prompting an immediate **lawsuit** by a bipartisan group of former state officials, as well as a **standoff** between Republicans in the state legislature and the state's supreme court over legislative subpoenas seeking internal court records.
- Another bill in **Montana** (**S.B. 402**), which was passed by the state's Republican-controlled legislature and would only go into effect if S.B. 140 is struck down by the state's supreme court, would increase the size of the state's judicial nominating commission from 7 members to 15, allowing the governor to appoint 12 nonlawyers, up from 4. The intent of this bill, **according** to its Republican sponsor, is to "give the governor a wider range of ability to make selections he would prefer to have appointed to these judicial positions," as opposed to "judges that a lot of us would have considered to be too liberal." S.B. 402 was signed into law by the state's Republican governor.
- Proposals in **Missouri** (**S.J.R. 1**), **Oklahoma** (**S.J.R. 2**), and **South Carolina** (**H. 3448**/**H. 4007**, **S. 192**) would limit the role of those states' nominating commissions by requiring them to submit to the governor, or the legislature in the case of South Carolina, a list of "all qualified nominees" to choose from for appointment, limiting the commission's ability to put forth a shortlist of only the most qualified candidates. S.J.R. 1 failed to

move before the end of Missouri's legislative session. H. 3448/H. 4007 and S. 192 failed to move before the end of South Carolina's legislative session.

- In **North Carolina**, a proposed constitutional amendment (**H.B. 759**) would require the governor to fill vacancies on the state's appellate courts with one of three nominees recommended by the state executive committee of the same political party as the vacating judge or justice.
- A bill in **Ohio** (**H.B. 149**/**S.B. 80**), sponsored only by Republicans, would require party labels during the general election for appellate court races but not lower court races. Currently, all judicial candidates are chosen in partisan primaries but appear on the general election ballot without party labels. There are advantages and disadvantages to listing party labels, but making such a change for a perceived partisan advantage threatens to further politicize the selection process. Republicans have lost three seats on Ohio's supreme court in the last **two election cycles** despite winning other statewide races on the ballot, and Democrats have a chance to flip the court majority next year. Both bills are **opposed** by the state judiciary, and the state's Republican chief justice has advocated for the removal of party labels from the ballot for judicial primaries. Similar measures to make select judicial elections partisan have been introduced in **Kentucky** (**H.B. 437**, **H.B. 517**, **H.B. 536**) and **Montana** (**H.B. 342**, **H.B. 355**). Proposals to make all judicial elections partisan have been introduced in **Arkansas** (**H.J.R. 1019**), **Kentucky** (**H.B. 474**), **Oklahoma** (**H.J.R. 1009**), and **West Virginia** (**S.B. 639**). S.B. 80 passed the Ohio Senate. H.B. 437, H.B. 517, H.B. 536, and H.B. 474 failed to move before the end of Kentucky's legislative session. H.B. 342 and H.B. 355 were both approved by the Montana House Judiciary Committee but were voted down on second reading. H.J.R. 1019 failed to move before the end of Arkansas's legislative session. S.B. 639 failed to move before the end of West Virginia's legislative session.

Altering Judicial Term Lengths and Limits

Proposals in Massachusetts would alter judicial term lengths in ways that would make state supreme court justices and lower court judges more dependent on political actors for their job security. The shorter a judge's term, the greater the pressure that judge may feel to rule with electoral or political considerations in mind. In fact, studies have shown that **reselection pressures** can affect decision-making in troubling ways, including by leading judges to rule more harshly in criminal cases towards the end of their terms. Term limits can be desirable in many instances, but judges must be allowed sufficient time to serve, and judges' tenure should not be manipulated for partisan reasons.

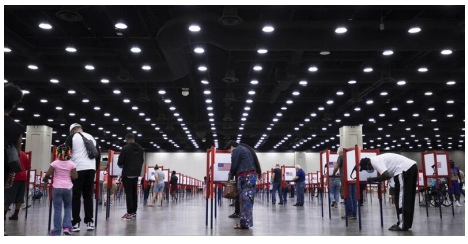
- In **Massachusetts**, where judges are appointed by the governor with approval by the state's governor's council and serve until the state's mandatory retirement age of 70, a proposed constitutional amendment (**H. 81**/**S. 1070**) would instead provide for an initial term of seven years and require those wishing to serve for additional seven-year terms to be approved by a majority vote of the council after "due notice" and a public hearing. Another proposed amendment (**S. 19**) would provide for 10-year terms for appointed judges and require those wishing to serve for additional terms to be reappointed by the governor, subject to approval by the council. H. 81 was introduced by a Democratic lawmaker, and S. 1070 and S. 19 were introduced by Democratic lawmakers "by

request" of their constituents, a practice common in Massachusetts. Currently, all of the justices on Massachusetts's supreme court were appointed by Republican governors. H. 81/S. 1070 and S. 19 received a hearing in the Massachusetts Joint Committee on the Judiciary but were voted down in committee.

Allowing Firearms in Court

Courts continue to be pulled into broader efforts to empower gun owners to carry weapons in public spaces.

- Bills in **Georgia** (S.B. 277), **Illinois** (H.B. 784, H.B. 3353), **North Carolina** (H.B. 194), **South Carolina** (H. 3039/S. 32/S. 155 and H. 3287), **Texas** (H.B. 1587/H.B. 1911, H.B. 2900, S.B. 2224), and **West Virginia** (H.B. 3000) would require courts to allow judges, retired judges, court employees not tasked with security, attorneys general and assistant attorneys general, or others to carry a firearm into a courthouse even if that court had a rule prohibiting weapons. S.B. 277 failed to move before the end of Georgia's legislative session. H.B. 784 and H.B. 3353 both received hearings in the Illinois House Judiciary Committee but were voted down in committee. H.B. 194 passed the North Carolina House. H. 3039/S. 32/S. 155 and H. 3287 failed to move before the end of South Carolina's legislative session. H.B. 1911 was approved by the Texas House Committee on Homeland Security & Public Safety. H.B. 2900 received a hearing in the Texas House Committee on Homeland Security & Public Safety but was left pending in committee. H.B. 3000 failed to move before the end of West Virginia's legislative session.



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Lawmakers Are Targeting the Courts



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A review by the Brennan Center of preclearance letters issued by the Department of Justice from 2010 onward identified 13 instances where the Department of Justice denied preclearance to a proposed redistricting plan at the county or municipal level.

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Gerrymandering & Fair Representation

Redistricting

Objection Letter from Thomas E. Perez, Assistant Attorney General, to Greene County, GA (Apr. 13, 2012)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to Long County, GA (Aug. 27, 2012)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to East Feliciana Parish, LA (Oct. 3, 2011)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to Amite County, MS (Oct. 4, 2011)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to City of Natchez (Adams Cty.), MS (Apr. 30, 2012)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to City of Clinton (Hinds Cty.), MS (Dec. 3, 2012)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to Pitt County School District, NC (Apr. 30, 2012)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to Fairfield County School District, SC (Aug. 16, 2010)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to Galveston (Galveston Cty.), TX (Oct. 3, 2011)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to Nueces County, TX (Feb. 7, 2012)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to Galveston County, TX (Mar. 5, 2012)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to Beaumont Independent School District (Jefferson Cty.), TX (Dec. 21, 2012)

Objection Letter from Thomas E. Perez, Assistant Attorney General, to Beaumont Independent School District (Jefferson Cty.), TX (Apr. 8, 2013)

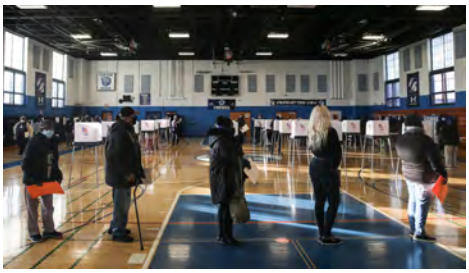


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