

Testimony of

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Hearing on Oversight of the Voting Rights Act: A Continuing Record of Discrimination

Before the Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights and Civil Liberties
In the United States House of Representatives

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Thank you for the opportunity to testify in support of strengthening the Voting Rights Act (“VRA”), a law that has played a critical role in safeguarding American democracy against pernicious, persistent threats of discrimination in the election system. The Brennan Center for Justice at NYU School of Law strongly supports this Committee’s efforts to restore and revitalize the VRA, through the John Lewis Voting Rights Advancement Act (“VRAA”).

The VRA is widely considered the most effective civil rights legislation in our nation’s history.² Not only did it dismantle discriminatory voting practices prevalent during the Jim Crow era, but it also served as a bulwark against new discriminatory voting measures in the decades that followed. Unfortunately, in its 2013 decision in *Shelby County v. Holder*,³ the Supreme Court neutered the VRA’s most powerful provisions. Since then, voters in many of the jurisdictions that had previously been protected by the law’s preclearance regime have been battered by a barrage of new voting laws and practices that target and disproportionately harm voters of color, and these pernicious practices have spread elsewhere.⁴

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² *The Effect of the Voting Rights Act*, U.S. Dep’t of Justice (June 19, 2009), <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0>.

³ *Shelby County v. Holder*, 570 U.S. 529, 556-57 (2013).

⁴ See, e.g., *Voting Laws Roundup: March 2021*, Brennan Center for Justice (Apr. 1, 2021),

I submit this testimony to present and highlight evidence of widespread discrimination in the voting process in recent years—evidence that warrants a swift and powerful congressional response. As we previously testified in the 116th Congress, state and local jurisdictions have implemented a staggering number of discriminatory voting practices over the past decade, including targeted purges of the voter rolls, biased redistricting schemes, and laws restricting access to voting. Sadly, without strong national legal protections, the problem is only getting worse.

This year, in states across the country, we see a fierce new assault on the right to vote fueled by the “Big Lie” about widespread voter fraud. Legislators are rushing to enact yet another wave of discriminatory voting restrictions, in what would be the most significant cutback of the right to vote since the Jim Crow era. As in the Jim Crow era, laws that may look neutral on their face are too often designed and applied to target voters of color.⁵ As of the Brennan Center’s March 31, 2021 count, state lawmakers had introduced more than 360 bills in 47 states to curb the vote.⁶ That number is still growing, according to our soon-to-be-published new count,⁷ and is more than four times the number of restrictive bills introduced just two years ago. Already, at least 14 states have enacted new laws with provisions that restrict access to voting.⁸ This amounts to a real time attack on our democracy. Additional threats loom, as states prepare to start their once-in-a-decade redistricting processes for the first time in over a half a century without the full protections of the Voting Rights Act.⁹

These forceful threats to the franchise demand an equally forceful response. Congress has the power to stop this attack on right to vote and protect Americans against further attacks. The Constitution’s Fourteenth and Fifteenth Amendments give Congress the power to remedy and deter discrimination in the voting process. The extraordinary amount of evidence of voting discrimination in recent years, which I highlight below, is more than enough to justify strong congressional action pursuant to this power, including passage of the VRAA. Moreover, the Congress has extremely strong powers under the Elections Clause to set the “times, places and manner” of federal elections—powers the Supreme Court has said include “authority to provide a complete code for congressional elections.”¹⁰ That power should also be used to stop vote suppression and strengthen voting access.

<https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>; Wendy Weiser & Max Feldman, *The State of Voting 2018*, Brennan Center for Justice (2018),

https://www.brennancenter.org/sites/default/files/2019-08/Report_State_of_Voting_2018.pdf; *New Voting Restrictions in America*, Brennan Center for Justice (Nov. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america>; *Voting Laws Roundup 2019*, Brennan Center for Justice (July 10, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2019>.

⁵ See discussion *infra* Part I, Sections A-E.

⁶ *Voting Laws Roundup: March 2021*, Brennan Center for Justice (April 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>.

⁷ *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 26, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> (forthcoming).

⁸ *Id.*

⁹ See Michael C. Li, *The Redistricting Landscape, 2021-22*, Brennan Center for Justice, 20 (2021),

https://www.brennancenter.org/sites/default/files/2021-02/2021_2_11_State%20of%20Redistricting.pdf.

¹⁰ *Smiley v. Holm*, 285 U.S. 355, 366 (1932). See also *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

The 2020 presidential contest featured historic levels of voter turnout — the highest in over a century, even in the face of a deadly pandemic.¹¹ But there were also unprecedented efforts to thwart the electoral process and disenfranchise voters, primarily in Black, Latino, and Asian communities, efforts that, as discussed, continue today through an aggressive push to enact restrictive voting laws across the country. The VRAA is a critical tool in combatting this discrimination. We urge the Committee to act expeditiously to pass the VRAA, along with the For the People Act, to root out this discrimination and to protect every American’s freedom to vote.

I. Evidence of Discrimination in Restrictive Voting Policies and Practices

Over the last decade, states have enacted and implemented voting restrictions that target and disproportionately harm racial and ethnic minorities and undermine our democracy. Often legislators have piled restriction on restriction in a manner that maximizes their suppressive impact. A growing body of research shows that many of these restrictions measurably reduce access and participation, especially among voters of color. This section presents and reviews evidence of discriminatory practices and the ways in which they both target and impact voters of color. The Brennan Center has extensively documented new, direct burdens on the right to vote over the past decade.¹² (I attach as Appendix B prior testimony the Brennan Center submitted to Congress on this topic. A compendium of our documentation can be found in Appendices A and C).

A. Voter Purges

First, there is strong evidence of discrimination in state and local practices for purging the voter rolls since the *Shelby County* decision.

Voter purges are the often error-laden process by which election officials try to clean voter rolls by removing the names of people who are not eligible to vote.¹³ Prior to the Supreme Court’s decision in *Shelby County*, jurisdictions that were covered by the VRA’s preclearance provisions were required to get federal approval for changes to their purge practices before

¹¹ Kevin Schaul, et al., 2020 Turnout Is the Highest in Over a Century, November 5, 2020 <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/>.

¹² See, e.g., *Voting Laws Roundup: March 2021*, Brennan Center for Justice (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>; Wendy Weiser & Max Feldman, *The State of Voting 2018*, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_State_of_Voting_2018.pdf; *New Voting Restrictions in America*, Brennan Center for Justice (Nov. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america>; *Voting Laws Roundup 2019*, Brennan Center for Justice (July 10, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2019>. See also, e.g., Wendy Weiser & Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice (2011), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_2012.pdf; *Voting Laws Roundup 2015*, Brennan Center for Justice (June 3, 2015), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2015>; Wendy Weiser & Nhu-Y Ngo, *Voting Rights in 2011: A Legislative Round-Up*, Brennan Center for Justice (July 15, 2011), <https://www.brennancenter.org/our-work/research-reports/voting-rights-2011-legislative-round>.

¹³ Myrna Pérez, *Voter Purges*, Brennan Center for Justice, 1-3 (2008), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voter-Purges-2008.pdf.

implementing them.¹⁴ This requirement protected voters from ill-conceived, discriminatory purges. That protection is now gone, and voter purges are on the rise. The Brennan Center’s research suggests that race has played a critical role in increased purge rates.

A peer-reviewed study the Brennan Center conducted in 2018, using data from the federal Election Assistance Commission (“EAC”), found that for the two election cycles between 2012 and 2016, jurisdictions that were previously subject to preclearance under the VRA because of their racially discriminatory voting practices had purge rates that were significantly higher than those in other jurisdictions.¹⁵ In other words, the *Shelby County* decision has had a direct, negative impact on purges in precisely the parts of the country with the worst records on voting discrimination against racial and ethnic minorities. Overall, our study found that, between 2014 and 2016, states removed almost 16 million voters from the rolls—nearly 4 million more than they removed between 2006 and 2008.¹⁶ This 33 percent growth far outstripped the growth in the voter population.¹⁷ If those counties had purged at the same rate as other counties, as many as 1.1 million fewer individuals would have been removed from rolls between 2016 and 2018, and 2 million fewer between 2014 and 2016.¹⁸ (I attach a copy of this study in Appendix C.)

The Brennan Center conducted a subsequent analysis in 2019 showing that this elevated purge rate in formerly covered jurisdictions continued through the 2018 election cycle.¹⁹ Assessing 2019 EAC data, we found that between 2016 and 2018 the median purge rates in counties that were previously covered by the VRA was 40 percent higher than in other counties.²⁰ Nationwide at least 17 million voters were purged between 2016 and 2018, a number that is considerably higher than past purge rates. (I attach a copy of this analysis in Appendix C.)

A chart from this 2019 study, previously submitted before the Committee on House Administration, vividly illustrates the apparent impact of the *Shelby County* decision on purge rates in jurisdictions that were formerly covered by Section 5 of the VRA:

¹⁴ See *Curtis v. Smith*, 121 F. Supp. 2d 1054, 1060 (E.D. Tex. 2000); Letter from John Tanner, Chief, Voting Section, Civ. Rts. Div., U.S. Dep’t of Justice, to Charlie Crist, Att’y Gen. of Fla. (Sept. 6, 2005); Letter from John R. Dunne, Asst. Att’y Gen., Civ. Rts. Div., U.S. Dep’t of Justice, to Debbie Barnes, Chairperson, Dallas Cnty. (Ala.) Bd. of Registrars (June 22, 1990) (interposing Section 5 objection to implementation of new purge practices).

¹⁵ 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.

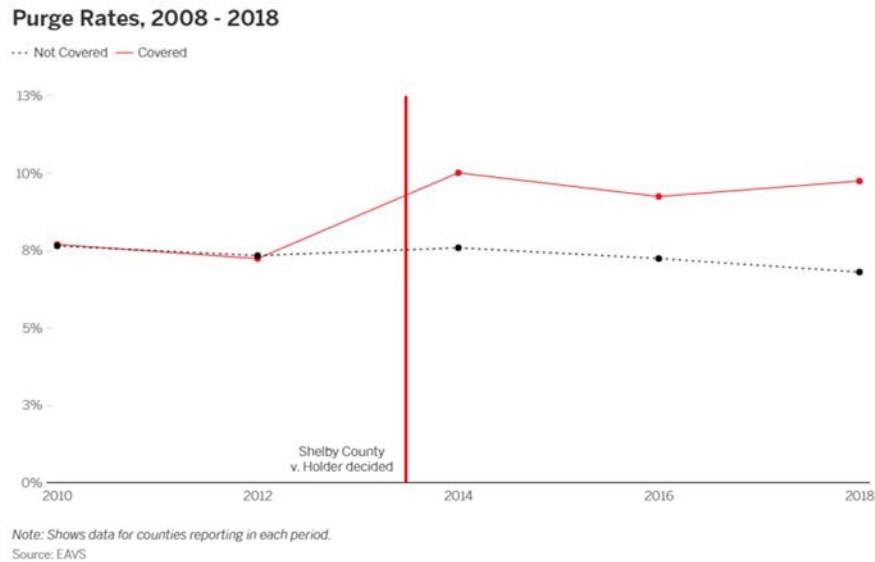
¹⁶ Brater et al., *Purges*.

¹⁷ Brater et al., *Purges*.

¹⁸ Brater et al., *Purges*.

¹⁹ Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

²⁰ Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, Brennan Center for Justice (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.



As the chart makes clear, despite the fact that formerly covered jurisdictions had comparable purge rates with the rest of the country prior to *Shelby County*, once the preclearance condition was lifted, purge rates in these jurisdictions surged relative to the rest of the country. Comparable data for the 2020 election cycle is not yet available.

Data from Georgia, Texas, Florida, and North Carolina during this period provide further evidence of this troublesome phenomenon. Our research found that Texas purged 363,000 more voters between 2012 and 2014 than it did between 2008 and 2010, while Georgia purged twice as many voters — 1.5 million voters — between the 2012 and 2016 elections as it did between 2008 and 2012.²¹

According to another Brennan Center analysis, the state also saw most of its counties purge more than 10 percent of their voters between 2016 and 2018.²² Between December 2016 and September 2018, Florida purged more than 7 percent of its voters. And between September of 2016 and May 2018, North Carolina purged 11.7 percent of its voter rolls. A disproportionate impact was on voters of color: in 90 out of 100 counties in North Carolina, voters of color were over-represented among the purged group.²³ (I attach a copy of this analysis in Appendix C.)

B. Wait Times to Vote

There is ample evidence that voters of color face significantly longer wait times at the polls than white voters and that discriminatory state and local practices are at least partially responsible for these disparities.

²¹ Brater et al., *Purges*.

²² 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/our-work/analysis-opinion/florida-georgia-north-carolina-still-purging-voters-high-rates>.

²³ Morris & Pérez, “Florida, Georgia, North Carolina Still Purging Voters.”

A Brennan Center study of wait times during the 2018 midterm elections found that Latino voters waited on average 46 percent longer, and Black voters 45 percent longer, than white voters to cast their ballots.²⁴ Moreover, 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.²⁵ Multiple additional studies have found similar and persistent racial disparities in wait times over the past decade.²⁶

Some of these disparities can be explained by polling place closures in jurisdictions with high minority populations. A study by the Leadership Conference on Civil and Human Rights uncovered nearly 1,700 polling place closures in jurisdictions formerly covered by Section 5 of the VRA, despite a significant increase in voter turnout in those jurisdictions during the same period.²⁷ A survey of Native Americans in South Dakota by the Native American Voting Rights Coalition found that 32 percent of respondents said that the distance needed to travel to the polls affected their decision to cast a ballot.²⁸

Polling place closures often disproportionately harm voters of color. During the 2020 presidential primary election in Wisconsin, for example, Milwaukee closed all but five of its 182 polling places. A peer-reviewed academic journal article by the Brennan Center's Kevin Morris and Peter Miller found that this closure depressed turnout by more than 8 percentage points overall—and by about 10 percentage points among Black voters.²⁹ This corroborates other academic research showing that polling place closures decrease turnout, and that these effects can fall disproportionately on voters of color.³⁰

²⁴ Hannah Klain et al., *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.

²⁵ Klain et al., *Waiting to Vote*.

²⁶ See Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 *Pol. Sci. Q.* 527 (2017); M. Keith Chen et al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data*, *Rev. of Econ. & Stat.* (2020); David Cottrell et al., *Voting Lines, Equal Treatment, and Early Voting Check-In Times in Florida*, *State Pol. & Pol'y Q.* (2020).

²⁷ *Democracy Diverted: Polling Place Closures and the Right to Vote*, The Leadership Conference Education Fund (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>. Another example of discriminatory polling place closures can be seen in Georgia's new prohibition on mobile voting sites. Mobile voting (polling sites on wheels that travel to different set locations) — a practice that has only been used in Fulton County, which has the largest Black population in the state — was outlawed by the Georgia legislature this year. See Michael Waldman, *Georgia's Voter Suppression Law*, Brennan Center for Justice (Mar. 31, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/georgias-voter-suppression-law>.

²⁸ Native American Voting Rights Coalition, *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota: Survey Research Report Executive Summary and Policy Reform Recommendations*, Native American Rights Fund (Jan. 2018), <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf>. See also Peter Dunphy, *The State of Native American Voting Rights*, Brennan Center for Justice (Mar. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/state-native-american-voting-rights>.

²⁹ Kevin Morris & Peter Miller, *Voting in a Pandemic: COVID-19 and Primary Turnout in Milwaukee, Wisconsin*, *Urb. Aff. Rev.* (Apr. 2021); Kevin Morris, *Did Consolidating Polling Places in Milwaukee Depress Turnout?*, Brennan Center for Justice (June 24, 2020), <https://www.brennancenter.org/our-work/research-reports/did-consolidating-polling-places-milwaukee-depress-turnout>.

³⁰ See, e.g., Enrico Cantoni, *A Precinct Too Far: Turnout and Voting Costs*, 12 *Am. Econ. J.: Appl. Econ.* 61 (2020); Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 *Am. Pol. Sci. Rev.* 115 (2011).

A number of recently passed voting laws and pending bills are likely to exacerbate these disparities. The recently passed Georgia law notoriously makes it a crime to provide food or water to voters waiting in line to vote (though it allows election workers to provide self-service water).³¹ Reporting from last year indicated that Black Georgians faced far longer waits than white Georgians in the June primary,³² and a report from ProPublica and Georgia Public Broadcasting indicated that this was largely due to closed polling places.³³ A new law in Florida may similarly restrict the ability to provide snacks and water.³⁴ According to our recently published Voting Laws Roundup, new laws in Iowa and Montana reduce polling place availability: the Iowa law requires polls to close earlier on Election Day, while the Montana law allows more polling places to qualify for reduced hours.³⁵ A bill pending in Michigan, which has already passed in one chamber, would almost double the number of voters that can be assigned to one precinct, likely meaning much longer lines to vote on Election Day.³⁶ This will likely be felt most acutely in minority-rich cities, which experienced especially long lines last year.³⁷ Bills advancing in Nevada, Texas, South Carolina could likewise result in polling place closures.³⁸

C. New Voting Restrictions Before This Year

Shortly before the *Shelby County* decision, the Brennan Center documented a new trend of state legislation seeking to make it harder to vote in advance of the 2012 election.³⁹ Fortunately, many of the restrictive voting laws passed at that time never went into effect because they were blocked by Section 5 of the VRA; many others were repealed, invalidated or blunted

³¹S.B. 202, 156th Gen. Assemb., Reg. Sess., § 33 (Ga. 2021).

³² Mark Niesse & Nick Thieme, *Extreme Voting Lines Expose where Georgia Primary Failed*, Atlanta Journal-Constitution (July 28, 2020), <https://www.ajc.com/politics/extreme-voting-lines-expose-where-georgia-primary-failed/YQUMSTEBVFAY7CR7UQQQEHSVLI/>.

³³ Stephen Fowler, *Why Do Nonwhite Georgia Voters Have to Wait in Line for Hours? Their Numbers Have Soared, and Their Polling Places Have Dwindled*, ProPublica (October 17, 2020) <https://www.propublica.org/article/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-their-numbers-have-soared-and-their-polling-places-have-dwindled>.

³⁴ S.B. 90, 2021 Leg., Reg. Sess., § 29 (Fla. 2021); *See also*, Eliza Sweren-Becker, *Florida Enacts Sweeping Voter Suppression Law*, Brennan Center for Justice (May 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/florida-enacts-sweeping-voter-suppression-law>.

³⁵Iowa S.F. 413, 89th Gen. Assemb., Reg. Sess., § 36 (Iowa 2021); MT S.B. 196, 2021 Leg., Reg. Sess., § 1 (Mont. 2021).

³⁶ MI H.B. 4134, 101st Leg., Reg. Sess., § 658 (Mich. 2021).

³⁷ *See, e.g.*, Kevin Quealy & Alicia Parlapiano, *Election Day Voting in 2020 Took Longer in America's Poorest Neighborhoods*, N.Y. Times (Jan. 4, 2021), <https://www.nytimes.com/interactive/2021/01/04/upshot/voting-wait-times.html>; Beth LeBlanc et al., *Long Lines, Hour-Long Waits Prompt Criticism at Michigan Polls*, The Detroit News (Mar. 10, 2020), <https://www.detroitnews.com/story/news/politics/2020/03/10/michigan-localities-juggling-rise-same-day-voter-registration/5004002002/>.

³⁸ S.B. 84, 81st Leg., Reg. Sess., § 1 (Nev. 2021); S.B. 236, 124th Gen. Assemb., Reg. Sess., § 1 (S.C. 2021); S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021). The Senate version of S.B. 7 in Texas includes a provision (Section 3.06) that would require counties with populations of one million to distribute polling places according to the share of registered voters in each state House district relative to the total number of eligible voters. For more information on the impact of this provision on polling place closures, *see* Alexa Ura et al., *Polling Places for Urban Voters of Color Would Be Cut under Texas Senate's Version of Voting Bill Being Negotiated with House*, Tex. Tribune (May 23, 2021), <https://www.texastribune.org/2021/05/23/texas-voting-polling-restrictions/>.

³⁹ Wendy R. Weiser & Lawrence Nordon, *Voting Law Changes in 2012*, Brennan Center for Justice (2011), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_2012.pdf.

by courts.⁴⁰ After the *Shelby County* decision, we documented a new spike in voting restrictions, as multiple previously covered states seized upon the lack of federal oversight to put in place discriminatory laws and policies.⁴¹ This push to pass restrictive voting laws has continued unabated ever since.⁴² Many of these new laws have targeted and disproportionately impacted voters of color, as we have continuously documented.⁴³ The problem goes beyond legislation; we have also documented a range of other new discriminatory voting practices in recent years.⁴⁴

The number of discriminatory voting practices over the past decade is too voluminous to detail in this testimony. Instead, I highlight a few recent examples:

a. Strict Voter ID Laws

New strict voter ID laws implemented over the last decade have further targeted voters of color and restricted their ability to exercise their right to vote. Federal courts in at least four states have found that strict voter ID laws were racially discriminatory, and in some cases, that such laws were intentionally discriminatory.

In 2011, bills were introduced in 34 states to implement stricter voter ID requirements; nine of those passed, but most were blocked by Section 5 or judicial decisions.⁴⁵ Pennsylvania enacted a

⁴⁰ Wendy R. Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, Brennan Center for Justice (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_Election_Update.pdf

⁴¹ Tomas Lopez, 'Shelby County': One Year Later, Brennan Center for Justice (June 24, 2014), <https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>; *Voting Laws Roundup 2013*, Brennan Center for Justice (December 19, 2013), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2013>; *Voting Laws Roundup 2014*, Brennan Center for Justice (Dec. 18, 2014), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2014>.

⁴² Wendy Weiser & Erik Opsal, *The State of Voting in 2014*, Brennan Center for Justice (June 17, 2014), <https://www.brennancenter.org/our-work/research-reports/state-voting-2014>; *Voting Laws Roundup 2015*, Brennan Center for Justice (June 3, 2015), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2015>; *Voting Laws Roundup 2016*, Brennan Center for Justice (April 18, 2016), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2016>; *Voting Laws Roundup 2017*, Brennan Center for Justice (May 10, 2017), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2017>; *Voting Laws Roundup 2018*, Brennan Center for Justice (April 2, 2018), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2018>; *Voting Laws Roundup 2019*, Brennan Center for Justice (July 10, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2019>; *Voting Laws Roundup 2020*, Brennan Center for Justice (February 4, 2020), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2020>; *Voting Laws Roundup 2021*, Brennan Center for Justice (Jan. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-january-2021>. See also Wendy Weiser & Max Feldman, *The State of Voting 2018*, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_State_of_Voting_2018.pdf.

⁴³ See articles cited *supra* notes 38-40.

⁴⁴ See, e.g., Rebecca Ayala, *Voting Problems 2018*, Brennan Center for Justice (Nov. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/voting-problems-2018>; Peter Dunphy, *When It Comes to Voter Suppression, Don't Forget About Alabama*, Brennan Center for Justice (Nov. 5, 2018), Rebecca Ayala & 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>; Wendy R. Weiser & Margaret Chen, *Voter Suppression Incidents*, Brennan Center for Justice (Nov. 3, 2008), <https://www.brennancenter.org/our-work/research-reports/voter-suppression-incidents-2008>.

⁴⁵ Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012*, Brennan Center for Justice, (2011), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_2012.pdf; Wendy R. Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, Brennan Center for Justice (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_Election_Update.pdf.

strict photo ID law in 2012, only to have it struck down as unconstitutional by a state court in 2014.⁴⁶

Efforts to tighten voter ID requirements rose after the *Shelby County* decision and have continued since.⁴⁷ In 2013, at least five states—Alabama, Mississippi, North Carolina, North Dakota, Virginia and Texas—implemented or began to enforce strict photo ID laws, most of which had previously been blocked by the Department of Justice due to their discriminatory impact. The Texas and North Carolina laws were both struck down by federal courts as discriminatory. The Fourth Circuit Court of Appeals famously said that North Carolina’s voter ID law disenfranchised Black voters “with almost surgical precision.”⁴⁸

The Texas’ law disenfranchised all voters who lacked one of scant few forms of ID—notably including firearms permits, which are disproportionately held by white Texans, while excluding student IDs and IDs issued by state agencies. A federal district court found that more than 600,000 registered Texas voters—and many more unregistered but eligible voters—lacked an accepted form of ID, and that “a disproportionate number of African-Americans and Hispanics populate that group of potentially disenfranchised voters.”⁴⁹ The court further held that, not only did the law have the effect of discriminating against African-American and Hispanic voters, but it was intentionally enacted for that very purpose. The Fifth Circuit Court of Appeals *en banc* ultimately affirmed that the law had the result of discriminating on the basis of race.⁵⁰

North Dakota has passed new voter ID restrictions three times in the past eight years. In 2013, the state strictly limited voters to one of four acceptable forms of ID, all of which were required to contain the voter’s street address, notwithstanding that 19 percent of Native Americans—many of whom lived on reservations without street addresses—lacked qualifying IDs.⁵¹ The law was amended in 2015 to exclude college identification certificates that had long been used by student voters. In 2016, finding that the law discriminated against Native American voters, a federal district court enjoined the law, requiring North Dakota to provide a “fail safe” alternative for voters who could not obtain a qualifying ID without reasonable effort.⁵² In 2017, North Dakota again amended its law, but retained the residential address requirement. A federal court enjoined the new law in 2018, concluding that it had a “discriminatory and burdensome impact on Native Americans,”⁵³ although the injunction was stayed on appeal.⁵⁴ Finally, in 2020, the parties to the litigation reached a settlement allowing Native American voters who do not have a residential street address to vote.⁵⁵

Wisconsin’s strict photo ID law, passed in 2011, has been repeatedly blocked as

⁴⁶ *Applewhite v. Commonwealth of Pennsylvania*, 330 M.D. 2012 (Pa. Commw. Ct. 2014).

⁴⁷ See, e.g., *Election 2016: Restrictive Voting Laws by the Numbers*, Brennan Center for Justice (Sept. 28, 2016), <https://www.brennancenter.org/our-work/research-reports/election-2016-restrictive-voting-laws-numbers#legalchallengestorestrictivephotoidlaws>.

⁴⁸ *N.C. State Conf. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

⁴⁹ *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014).

⁵⁰ *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

⁵¹ *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. 2018).

⁵² *Brakebill v. Jaeger*, 2016 WL 7118548 (D.N.D. 2016).

⁵³ *Brakebill v. Jaeger*, 2018 WL 1612190 (D.N.D. 2018).

⁵⁴ *Brakebill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019).

⁵⁵ *Brakebill v. Jaeger*, No. 1:16-cv-008 (D.N.D. 2020).

discriminatory and reinstated by both state and federal courts over an 8-year period. Likewise, a voter ID law passed in North Carolina after the prior version was struck down in 2016 was initially blocked as racially discriminatory by both state and federal courts, though the Fourth Circuit Court of Appeals vacated the injunction shortly after the November 2020 election.⁵⁶

Efforts to suppress the vote through strict voter ID laws continue unabated to the present day. As of April 1, 2020, new voter ID requirements accounted for nearly a quarter of the 361 restrictive voting bills proposed by state legislatures in 2021. There is little question why state legislatures have so doggedly focused on imposing and tightening voter ID requirements: research has shown time and again that such laws operate to disproportionately exclude voters of color.⁵⁷ For instance, a recent study conducted at the University of California San Diego concluded that voter ID laws “disproportionately reduce voter turnout in more racially diverse areas.”⁵⁸

b. Restrictions on Voter Registration

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.⁵⁹ The state enacted the law, even though only months earlier, the Secretary of State agreed in a court settlement to stop a similar procedure, which had blocked tens of thousands of registration applications.⁶⁰ A Brennan Center analysis of the policy found that, in the months leading up to the 2018 election, roughly 70 percent of Georgia voters whose registrations were blocked by the policy were people of color.⁶¹ The state subsequently enacted a law that largely ended the policy because of litigation challenging the matching program.⁶²

In recent years, some states have imposed new restrictions on the voter registration process which take aim at organizing efforts to boost participation by voters of color and low-income voters. After the Tennessee Black Voter Project collected more than 90,000 new voter registration forms in the leadup to the 2018 election, Tennessee enacted a law inflicting civil penalties on groups that employed paid canvassers if they submitted incomplete or inaccurate voter registration forms.⁶³

⁵⁶ *N.C. State Conf. NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020).

⁵⁷ See, e.g., *Research on Voter ID*, Brennan Center for Justice (Apr. 11, 2017), <https://www.brennancenter.org/our-work/research-reports/research-voter-id>; Dan Hopkins,

What We Know About Voter ID Laws, FiveThirtyEight (Aug. 21, 2018, 7:07 AM),

<https://fivethirtyeight.com/features/what-we-know-about-voter-id-laws/>; *Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification*, Brennan Center for Justice (Nov. 2006), https://www.brennancenter.org/sites/default/files/2020-09/download_file_39242.pdf.

⁵⁸ Christine Clark, *Skewing the Vote: Voter ID Laws Discriminate Against Racial and Ethnic Minorities, New Study Reveals*, UC San Diego News Center, (Jun. 25, 2020), <https://ucsdnews.ucsd.edu/feature/skewing-the-vote>.

⁵⁹ Jonathan Brater & Rebecca Ayala, *What’s the Matter with Georgia?*, Brennan Center for Justice, (Oct. 12, 2018), <https://www.brennancenter.org/blog/whats-matter-georgia>.

⁶⁰ 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/>.

⁶¹ Jonathan Brater & Rebecca Ayala, *What’s the Matter with Georgia?*, Brennan Center for Justice, (Oct. 12, 2018), <https://www.brennancenter.org/blog/whats-matter-georgia>.]

⁶² *Georgia Largely Abandons Its Broken ‘Exact Match’ Voter Registration Process*, Lawyers’ Committee for Civil Rights Under Law, (Apr. 5, 2019), <https://lawyerscommittee.org/georgia-largely-abandons-its-broken-exact-match-voter-registration-process/>.

⁶³ Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, Brennan Center for Justice (January 16 2020),

c. Cutbacks to Early Voting

Over the past decade, multiple states have reduced early voting days or sites used disproportionately by voters of color. In Ohio and Florida, for example, legislatures eliminated early voting on the Sundays leading up to Election Day after African American and Latino voters conducted successful “souls to the polls” voter turnout drives on those days.⁶⁴ Federal courts have struck down early voting cutbacks in North Carolina, Florida, and Wisconsin because they were intentionally discriminatory.⁶⁵ In Florida, after a federal court mitigated but did not fully block a law rolling back early voting days, voters of color experienced disproportionate harms.⁶⁶ A study by Professors Daniel Smith and Michael Herron found that voters who had previously cast their ballot on the Sunday before Election Day in 2008—a day that Black voters relied on at three times the rate as white voters—were disproportionately less likely to cast a valid ballot on any day in the 2012 general election, when voting was no longer available on that day.⁶⁷ Similar efforts continue today.

d. Disenfranchisement of Individuals With Past Criminal Convictions in Florida

In 2019, Florida lawmakers passed a bill that made the right to vote for people with felony convictions contingent on the repayment of all legal financial obligations, including fines, fees, and restitution.⁶⁸ The bill was a clear attempt to undermine a constitutional amendment passed by voters in 2018 that finally put an end to a 150-year-old policy of permanent disenfranchisement initially intended to evade mandate of the Fifteenth Amendment.⁶⁹ Given the systemic racial inequality built into Florida’s criminal justice system, as well as the racial wealth and wage gaps in the state, it was plain that the bill would produce discriminatory results.

These results were made clear in litigation challenging the law. Expert testimony demonstrated that a staggering 774,000 Floridians were disenfranchised by the pay-to-vote

<https://www.brennancenter.org/our-work/analysis-opinion/whats-matter-georgia>; Amy Gardner, *How a Large-Scale Effort to Register Black Voters Led to a Crackdown in Tennessee*, Washington Post (May 24, 2019), https://www.washingtonpost.com/politics/how-a-large-scale-effort-to-register-black-voters-led-to-a-crackdown-in-tennessee/2019/05/24/9f6cee1e-7284-11e9-8be0-ca575670e91c_story.html.

⁶⁴ See David G. Savage, *Federal Judge Orders Ohio to Keep Its Early Balloting in Place*, L.A. Times, Aug. 31, 2021, <https://www.latimes.com/politics/la-xpm-2012-aug-31-la-pn-ohio-early-voting-judge-20120831-story.html>; Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 Election L. J. 331, <https://www.liebertpub.com/doi/pdf/10.1089/elj.2012.0157>.

⁶⁵ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016); *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016); *Federal Court Blocks Discriminatory Early Voting Changes in Florida*, Brennan Center for Justice (Aug. 21, 2012), <https://www.brennancenter.org/our-work/analysis-opinion/federal-court-blocks-discriminatory-early-voting-changes-florida>.

⁶⁶ *Florida v. United States*, 885 F. Supp. 2d. 299 (D.D.C. 2012); Wendy Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, Brennan Center for Justice (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_Election_Update.pdf.

⁶⁷ Michael C. Herron & Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, 67(3) Pol. Rsch. Q. 646, <https://www.jstor.org/stable/24371899>; see also Wendy Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, Brennan Center for Justice (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Voting_Law_Changes_Election_Update.pdf.

⁶⁸ 2019 Fla. Sess. Law Serv. Ch. 2019-162 (C.S.S.B. 7066).

⁶⁹ See Erika Wood, *Florida: An Outlier in Denying Voting Rights*, Brennan Center for Justice, 4–7 (Dec. 16, 2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Florida_Voting_Rights_Outlier.pdf.

requirement, but that Black Floridians were both more likely to owe money and more likely to owe more money than their white counterparts.⁷⁰ In fact, more than 334,000 of those disenfranchised—or roughly 43 percent—were Black,⁷¹ even though less than 17 percent of all Floridians are Black.⁷² Despite these plainly discriminatory results, a federal court ultimately held that the plaintiffs had not met the high burden of proving that the law was enacted with a racially discriminatory purpose, but said “the issue [was] close and could reasonably be decided either way.”⁷³

While a number of courts have held that felony disenfranchisement laws cannot be challenged under the Voting Rights Act because Congress did not intend to reach these laws,⁷⁴ this latest example of the race discrimination produced by Florida’s disenfranchisement law shows why Congress should take them into account this time. Many criminal disenfranchisement laws, including Florida’s, are rooted in deeply prejudiced 19th-century efforts to prevent the Fifteenth Amendment from taking full effect.⁷⁵ These laws also continue to disproportionately harm voters of color: According to data from the Sentencing Project, African Americans are disenfranchised at 3.7 times the rate of the rest of the population.⁷⁶

D. Restrictive Voting Laws Enacted This Year

As the Brennan Center has documented extensively, state legislators across the country have recently escalated efforts to enact new voting restrictions.⁷⁷ In many cases, the racially discriminatory causes and effects of seemingly race-neutral laws are hard to miss.

⁷⁰ Second Supplemental Report of Daniel A. Smith, Ph.D., *Jones v. DeSantis*, No. 4:19-cv-300 (N.D. Fl. 2020), ECF No. 334-1, 15–16, <https://www.brennancenter.org/sites/default/files/2020-05/Smith%20Second%20Supplemental%20Report.pdf>.

⁷¹ *Id.* at 16–17.

⁷² *Census QuickFacts: Florida*, U.S. Census Bureau (2019), <https://www.census.gov/quickfacts/FL>.

⁷³ *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1235 (N.D. Fl. 2020), *rev’d on other grounds sub nom. Jones v. Gov. of Florida*, 975 F.3d 1016 (2020). A number of courts have held that felony disenfranchisement laws cannot be challenged under the Voting Rights Act on the basis of discriminatory results because Congress did not intend to reach these laws with the original law or subsequent renewals. *See Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (collecting cases). Thus, Plaintiffs must prove intentional discrimination by the state legislature in order to challenge felony disenfranchisement laws. *Id.*; *see also Johnson v. Gov. of State of Florida*, 405 F.3d 1214, 1218, 1234 (11th Cir. 2005).

⁷⁴ *See Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (collecting cases). As a result, Plaintiffs must prove intentional discrimination by the state legislature in order to challenge felony disenfranchisement laws. *Id.*; *see also Johnson v. Gov. of State of Florida*, 405 F.3d 1214, 1218, 1234 (11th Cir. 2005). Congress has previously recognized how “inordinately difficult” it is to prove that laws have a discriminatory purpose. *See Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (quoting S. Rep. 97-417, 36, 1982 U.S.C.C.A.N. 177, 214). It is for this reason that Congress designed the VRA to protect against discriminatory policies even without proof of discriminatory intent. *Id.*

⁷⁵ Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, Brennan Center for Justice, 2 (May 9, 2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Disenfranchisement_History.pdf.

⁷⁶ Christopher Uggen, et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, Sentencing Project, 4 (Oct. 30, 2020) <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

⁷⁷ *Voting Laws Roundup: January 2021*, Brennan Center for Justice (Jan. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-january-2021>; *Voting Laws Roundup: February 2021*, Brennan Center for Justice (Feb. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2021>; *Voting Laws Roundup: March 2021*, Brennan Center for Justice (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>.

For example, Georgia recently passed legislation that restricts voting access in multiple ways, including by reducing access to mail voting.⁷⁸ According to a recent Brennan Center analysis, this law was put in effect immediately after Black voters dramatically increased their use of mail voting and it will disproportionately harm Black voters.⁷⁹ Specifically, our study found that, although white voters still made up most of all mail voters in 2020, 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.⁸⁰ Nearly 30 percent of Georgia’s Black voters cast their ballot by mail in 2020, but just 24 percent of white voters did so.⁸¹ In other words, Georgia’s new law reducing absentee voting access appears to be tied to Black voters’ increased use of absentee voting. Measures making it harder to vote by mail have similarly been enacted in thirteen other states, including Florida and Iowa, and are moving through legislatures in at least 18 other states.⁸²

Even when voters of color can equally access and cast absentee ballots, states like Arizona, Georgia, Florida, Idaho, Kansas, and Montana have enacted policies that mean their votes are less likely to be counted—such as signature matching requirements, vote-by-mail ID mandates, and postage costs.⁸³ Several studies have found that absentee ballots cast by voters of color have in recent years been rejected at much higher rates than those cast by their white counterparts.⁸⁴ One study, published in the *Election Law Journal* (a leading legal resource on election issues), found that in Florida, in both the 2018 and 2016 federal elections, absentee ballots returned by African American and Latino voters were twice as likely to be rejected as those cast by white voters.⁸⁵ A similar phenomenon has been documented in a study of Florida’s 2020 presidential primary conducted by the ACLU of Florida,⁸⁶ and in a Brennan Center study of Georgia’s 2020 primaries.⁸⁷

⁷⁸ Michael Waldman, *Georgia’s Voter Suppression Law*, Brennan Center for Justice (Mar. 31, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/georgias-voter-suppression-law>. Ga. S.B. 202 (2021).

⁷⁹ Kevin Morris, *Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most*, Brennan Center for Justice (Mar. 6, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>. Also, in Arizona, Governor Doug Ducey recently signed SB 1485, a bill that makes it harder to vote by mail. Under the new law, any voters who did not cast an early voting ballot in two consecutive election cycles will be removed from the state’s Permanent Early Voting List. Voters cut from the list will no longer automatically receive their mail ballots and will have to request them. Jane C. Timm, *Arizona Gov. Ducey Signs New Law That Will Purge Infrequent Mail Voters From State’s Ballot List*, NBC News (May 11, 2021), <https://www.nbcnews.com/politics/elections/arizona-legislature-passes-law-purge-infrequent-mail-voters-n1267025>.

⁸⁰ Kevin Morris, *Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most*, Brennan Center for Justice (Mar. 6, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>.

⁸¹ Kevin Morris, *Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most*, Brennan Center for Justice (Mar. 6, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>.

⁸² *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 26, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

⁸³ *Voting Laws Roundup: March 2021*, Brennan Center for Justice (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021#rbe>.

⁸⁴ See, e.g., Sophie Chou & Tyler Dukes, *In North Carolina, Black Voters’ Mail-In Ballots Much More Likely to Be Rejected Than Those From Any Other Race*, ProPublica (Sept. 23, 2020), <https://www.propublica.org/article/in-north-carolina-black-voters-mail-in-ballots-much-more-likely-to-be-rejected-than-those-from-any-other-race>.

⁸⁵ Anna Baringer et al., *Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus*, *Election Law Journal: Rules, Politics, and Policy*, Vol. 19, No. 3 (Sept. 17, 2020), <https://www.liebertpub.com/doi/full/10.1089/elj.2020.0658>.

⁸⁶ Daniel A. Smith, *Vote-By-Mail Ballots Cast in Florida*, ACLU of Florida (Sept. 19, 2018), <https://www.aclufl.org/en/publications/vote-mail-ballots-cast-florida>.

⁸⁷ Kevin Morris, *Digging Into the Georgia Primary*, Brennan Center for Justice (Sept. 10, 2020),

A report, based on data collected by Professor Michael Bitzer, of absentee ballots cast in the North Carolina 2020 primary found that ballots cast by Black voters were rejected at three times the rate as those cast by white voters.⁸⁸

Georgia’s new law, Senate Bill 202, also prohibits voters from casting a ballot at the wrong precinct — including votes for the contests that the voter is actually eligible to participate in — unless it is after 5:00 p.m., thus barring out-of-precinct voting for most of Election Day.⁸⁹ A Brennan Center analysis of the legislation found that the proposed policy change would disproportionately affect minority voters, where residents tend to move more frequently.⁹⁰ The case of Fulton County in 2020 illustrates this: Fulton County’s population is 44% Black and roughly 67% of provisional ballots cast in Fulton County were cast out of precinct. By contrast, Georgia’s population as a whole is 31% Black, and statewide just 44% of provisional ballots were cast out of precinct. Because Black voters live in neighborhoods with much higher rates of in-county moves, they are likely to be hit especially hard by the near-total elimination of out-of-precinct voting. This policy change could impact thousands of voters across the state.⁹¹

* * *

Lawmakers have typically justified new voting restrictions by the purported need to safeguard against voter fraud. But occasionally politicians reveal more troubling—and discriminatory—motives. At a May 2016 trial on Wisconsin’s voting restrictions, for example, former Republican legislative staffer Todd Allbaugh testified that some Wisconsin legislative leaders were “giddy” that the state’s new strict voter ID law could keep minority and young voters from the polls. Similarly, in 2012, in response to a state-level battle over early voting hours, Doug Puisse, chairman of Franklin County, Ohio’s Republican Party, told the Columbus Dispatch, “I guess I really actually feel we shouldn’t contort the voting process to accommodate the urban — read African-American — voter turnout machine.”

Those pushing these discriminatory vote suppression measures are increasingly saying the quiet part out loud, openly acknowledging that the goal of the measures is to subtract voters — particularly voters of color — from the electorate. In one instance a few months ago, an Arizona legislator made headlines when he said that he did not think everyone should vote.⁹² “Quantity is important but we have to look at quality as well,” said Rep. John Kavanaugh.⁹³ Meanwhile, Texas bill SB7 (poised to pass in the coming days) originally included language that it was meant to

<https://www.brennancenter.org/our-work/research-reports/digging-georgia-primary>.

⁸⁸ Sam Levine, *Black Voters’ Mail-In Ballots Being Rejected at Higher Rate*, *Guardian* (Oct. 17, 2020),

<https://www.theguardian.com/us-news/2020/oct/17/black-voters-mail-in-ballots-rejected-higher-rate-north-carolina>.

⁸⁹ Ga. Code Ann. § 21-2-418(a) (2021); *see also* Ga. S.B. 202 § 34 (2021).

⁹⁰ Kevin Morris, *Georgia’s Attempt to Limit out-of-Precinct Voting Will Hurt Black Neighborhoods*, Brennan Center for Justice (Mar. 16, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-attempt-limit-out-precinct-voting-will-hurt-black-neighborhoods>.

⁹¹ *See generally* Mark Niesse, *How Georgia’s Voting Law Works*, *Atlanta Journal-Constitution* (May 6, 2021), <https://www.ajc.com/politics/how-georgias-new-voting-law-works/GF6PLR44PNESPKR5FXCBE7VEOY/>.

⁹² Timothy Bella, *A GOP Lawmaker Says the ‘Quality’ of a Vote Matters. Critics Say That’s ‘Straight out of Jim Crow.’*, *Washington Post* (Mar. 13, 2021), <https://www.washingtonpost.com/politics/2021/03/13/arizona-quality-votes-kavanaugh/>.

⁹³ Timothy Bella, *A GOP Lawmaker Says the ‘Quality’ of a Vote Matters. Critics Say That’s ‘Straight out of Jim Crow.’*, *Washington Post* (Mar. 13, 2021), <https://www.washingtonpost.com/politics/2021/03/13/arizona-quality-votes-kavanaugh/>.

protect the “purity of the ballot box,” a phrase from the state’s constitution used to justify all-white primaries in the Jim Crow era. It was removed only after it was called out during a contentious March 9 hearing on the bill.⁹⁴

E. Racial Discrimination in Redistricting

Racial discrimination in redistricting is widespread and well-documented. During the 2010 redistricting cycle, discriminatory conduct occurred not only in 2011-2012, when most states and localities drew their new districts, but also after the *Shelby County* decision.

a. Statewide Redistricting

Early in the decade, a three-judge federal court denied preclearance of Texas’ congressional redistricting plan after finding not only that the plan resulted in “retrogression,” making it demonstrably harder for minority voters to effectively participate in elections, but also that the record contained “more evidence of discriminatory intent than we have space, or need, to address.”⁹⁵ For example, in one district, lawmakers “consciously replaced many of the district’s active Hispanic voters with low-turnout Hispanic voters in an effort to strengthen the voting power of [the district’s] Anglo citizens.”⁹⁶

In a number of other states, maps were passed after *Shelby County* only later to be invalidated as discriminatory racial gerrymanders. Specifically, over the past five years, federal courts found that Alabama,⁹⁷ Virginia,⁹⁸ North Carolina,⁹⁹ and Texas¹⁰⁰ had engaged in illegal racial gerrymandering in violation of the Fourteenth Amendment in congressional or legislative redistricting. In North Carolina, for example, a federal court found that the redrawing of the state’s congressional map in 2011 was “a textbook example of racial predominance” that resulted in the

⁹⁴ Hannah Knowles, *A Texas Bill Drew Ire for Saying It Would Preserve ‘Purity of the Ballot Box.’ Here’s the Phrase’s History.*, Washington Post (May 9, 2021), <https://www.washingtonpost.com/history/2021/05/09/texas-purity-ballot-box-black/>.

⁹⁵ *Texas v. United States*, 887 F. Supp. 2d 133, 161 n.32 (D.D.C. 2012) (denying preclearance of both Texas’ 2011 state house and congressional plans under Section 5).

⁹⁶ *Id.* at 155. Because Texas did not obtain preclearance in time for the 2012 elections, a federal court in San Antonio ordered changes to Texas’ congressional plan that included creation of an additional minority coalition district in the Dallas-Fort Worth region and changes to other districts to address the deliberate retrogression of the electoral power of communities of color. *Perez v. Abbott*, 253 F. Supp. 3d 864(W.D. Tex. 2017).

⁹⁷ *Alabama Legis. Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017) (finding that the use of race predominated in the drawing of 12 state legislative districts without sufficient justification).

⁹⁸ *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 180 (E.D. Va. 2018) (finding that the legislature failed to satisfy its burden to prove that the “predominant use of race was narrowly tailored to achieve a compelling state interest” in drawing 11 legislative districts); *Page v. Virginia State Bd. of Elections*, No. 13cv678, 2015 WL 3604029, at *16 (E.D. Virginia 2015) (finding that defendants failed to show that the congressional plan was narrowly tailored to further Virginia’s interest in complying with the Voting Rights Act).

⁹⁹ *Covington v. North Carolina*, 316 F.R.D. 117, 165, 176 (M.D.N.C. 2016) *aff’d*, 137 S. Ct. 2211 (2017) (finding that “race was the predominant factor motivating the drawing of all challenged districts”); *Harris v. McRory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) *aff’d sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017) (finding that “race predominated in CD 1 and CD 12” and “defendants have failed to establish that this race-based redistricting satisfies strict scrutiny”).

¹⁰⁰ *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (holding that “HD90 is an impermissible racial gerrymander”).

unconstitutional packing of Black voters into two districts.¹⁰¹

This discrimination has often been difficult to root out. In North Carolina, for example, a Brennan Center study found that the new congressional plan adopted by the state after the district court's racial gerrymandering ruling had virtually the same electoral effects as the original map.¹⁰²

In several of the above-referenced states, racial discrimination in redistricting was also used by states as a tool for partisan gerrymandering. For instance, one Brennan Center study showed that North Carolina and Virginia's schemes to pack Black voters into congressional districts, which were later found to be racial gerrymanders, also functioned to maximize overall Republican seats.¹⁰³ Another Brennan Center study found that Texas's enacted 2011 congressional map would have given Republicans a four-seat advantage in the state's congressional delegation by failing to create any new electoral opportunities for fast-growing communities of color who had accounted for 90 percent of Texas' population gain between 2000 and 2010.¹⁰⁴

The targeting of communities of color for partisan advantage is nothing new. Historically, both Democrats and Republicans have minimized the electoral power of communities of color in order to gain partisan advantages in map-drawing, particularly in the South, where there is continued residential segregation and a high correlation between race and political preference.¹⁰⁵ This discriminatory targeting is likely to continue—and be exacerbated—in the upcoming redistricting cycle in light of the Supreme Court's 2019 ruling that partisan gerrymandering claims are non-justiciable in federal court.¹⁰⁶

b. Local redistricting

Racial discrimination in redistricting is also well-documented at the local level, both as it relates to the drawing of district lines as well as in the use of at-large elections. Since *Shelby County* was decided, courts have found numerous instances where Section 2 of the Voting Rights Act was violated in connection with county and municipal redistricting—including in Kern County,

¹⁰¹ *Harris v. McRory*, 159 F. Supp. 3d 600, 611, 627 (M.D.N.C. 2016) *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017).

¹⁰² Laura Royden, Michael Li, Yuriy Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice, 25 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Extreme_Gerrymandering_Midterm_2018.pdf.

¹⁰³ Laura Royden, Michael Li, Yuriy Rudensky, *Extreme Gerrymandering & the 2018 Midterm*, Brennan Center for Justice, 23-25 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Extreme_Gerrymandering_Midterm_2018.pdf.

¹⁰⁴ Michael Li & Laura Royden, *Minority Representation: No Conflict with Fair Maps*, Brennan Center for Justice, 15-16 (2017), https://www.brennancenter.org/sites/default/files/2019-09/Minority-Representation-Analysis_0.pdf.

¹⁰⁵ Michael Li & Laura Royden, *Minority Representation: No Conflict with Fair Maps*, Brennan Center for Justice, 3 (2017), https://www.brennancenter.org/sites/default/files/2019-09/Minority-Representation-Analysis_0.pdf. Prior to the 1990s, Democrats in the South strategically divided Black communities among districts in order to protect white Democratic incumbents and prevent election of Republicans. *Id.*

¹⁰⁶ *Rucho v. Common Cause*, 139 S. Ct. 2484(2019).

California;¹⁰⁷ Virginia Beach, Virginia;¹⁰⁸ East Ramapo Central School District, New York;¹⁰⁹ Sumter County, Georgia;¹¹⁰ Ferguson-Florissant School District, Missouri;¹¹¹ Albany County, New York;¹¹² and Yakima, Washington.¹¹³

Similarly, a review by the Brennan Center of preclearance letters issued by the Department of Justice from 2010 onward identified at least 13 instances where the Department denied preclearance to a proposed redistricting plan at the county or municipal level.¹¹⁴ For example, Green County, Georgia enacted a redistricting plan for its Board of Commissioners and Board of Education that eliminated both of the county's Black ability-to-elect districts, which the Department of Justice concluded was "unnecessary and avoidable."¹¹⁵

More recently, in the aftermath of *Shelby County*, both Galveston County, Texas and Pasadena, Texas revived redistricting plans that had previously been blocked by the Department of Justice.¹¹⁶ In Pasadena, a federal court later found that the adoption of this plan, which changed how members of the city council were elected, had been motivated by discriminatory animus.¹¹⁷

c. Attempts to Manipulate Who Counts in Redistricting

In recent years, there has also been a concerted effort, led by prominent conservative activists and donors, to persuade states and local governments to exclude children and non-citizens from the population base used to draw electoral districts, drawing on a 2016 Supreme Court decision that left open the question of whether drawing districts based on something other than total population would be constitutionally permitted.¹¹⁸ There is strong evidence that the goals of this effort are explicitly discriminatory. Thomas Hofeller, a leading Republican redistricting strategist who helped draw maps after the 2010 census in Alabama, Florida, North Carolina, and Texas that were later struck down by courts as discriminatory, wrote in a memo made public after his death

¹⁰⁷ *Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1144 (E.D. Cal. 2018) (concluding that "Latino voters in Kern County have been deprived of an equal opportunity to elect representatives of their choice, in violation of § 2 of the Voting Rights Act").

¹⁰⁸ *Holloway v. City of Va. Beach*, 2021 WL 1226554 (E.D. Va. 2021) (finding that at-large election scheme violated Section 2 of the Voting Rights Act).

¹⁰⁹ *Clerveaux v. East Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021) (affirming lower court's finding that school board's use of an at-large system violated Section 2 of the Voting Rights Act).

¹¹⁰ *Wright v. Sumter Cnty. Bd. of Elections and Registration*, 979 F.3d 1282 (11th Cir. 2020) (affirming lower court's finding that district map violated Section 2 of the Voting Rights Act).

¹¹¹ *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018) (affirming lower court's finding that the school board election system violated Section 2 of the Voting Rights Act).

¹¹² *Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302 (N.D.N.Y. 2015) (finding that the county legislature's districts violated Section 2 of the Voting Rights Act).

¹¹³ *Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014) (finding that the at-large city council election system violated Section 2 of the Voting Rights Act).

¹¹⁴ *Instances Where DOJ Preclearance Was Denied to Proposed Redistricting Plans*, Brennan Center for Justice (May 24, 2021), <https://www.brennancenter.org/our-work/research-reports/instances-where-doj-preclearance-was-denied-proposed-redistricting-plans>.

¹¹⁵ Objection Letter from Thomas E. Perez, Assistant Att'y Gener, to Greene Cnty., Ga., at 2 (Apr. 13, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120413.pdf.

¹¹⁶ Tomas Lopez, *Shelby County: One Year Later*, Brennan Center for Justice (June 24, 2014), https://www.brennancenter.org/sites/default/files/analysis/Shelby_County_One_Year_Later.pdf.

¹¹⁷ *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

¹¹⁸ *Evenwel v. Abbott*, 577 U.S. 937 (2016).

that drawing districts on the basis of adult citizens would be “advantageous to Republicans and non-Hispanic Whites [sic].”¹¹⁹

The most advanced of these efforts to change the population basis used to draw districts has been in Missouri. Lawmakers behind a recently adopted constitutional amendment contend that the amendment would allow the state to draw legislative districts based only on the adult citizen population.¹²⁰ Lawmakers and political consultants in Texas, Arizona, Florida, and Tennessee have also reportedly explored drawing legislative districts on the basis of adult citizens in the upcoming redistricting cycle.¹²¹

Even if the Supreme Court holds that drawing districts based on a subset of the population rather than total population is permitted under the U.S. Constitution, courts have long recognized that these alternative schemes often have an impermissible discriminatory impact on communities of color.¹²² What was true in the 1970s and 1980s is only truer now as the country has become more diverse, with a majority of children under 1 years old now non-white.¹²³

Indeed, a recent Brennan Center study found that communities of color would bear the brunt of a change in Missouri, if effectuated.¹²⁴ Our analysis found that 28 percent of Missouri’s Black population, 54 percent of its Asian population, and 54 percent of its Latino population would go uncounted if only adult citizens were considered in redistricting. This is in comparison to only 21 percent of Missouri’s white population that would be excluded. The result would be that whiter, rural areas would gain representation, while districts with large Black and sizeable Latino population in the Kansas City and St. Louis areas would need to be significantly reconfigured. Specifically, three of the four majority-Black senate districts in Missouri would be underpopulated under adult citizen apportionment.¹²⁵ The impact in other more diverse and demographically younger states, like Texas, would be even more extreme.

II. The Need for a New Voting Rights Act

The passage of the VRA in 1965 was a major step in addressing and remedying our country’s long history of racialized vote suppression. It delivered on the promise made at the

¹¹⁹ Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. Times, May 30, 2019, <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>.

¹²⁰ David Daley, *The Coming Redistricting Showdown in Missouri Will Be Huge*, The Hill, Nov. 10, 2020, <https://thehill.com/opinion/campaign/525007-the-coming-redistricting-showdown-in-missouri-will-be-huge>.

¹²¹ See Ari Berman, *Trump’s Stealth Plan to Preserve White Electoral Power*, Mother Jones, Jan/Feb 2020, <https://www.motherjones.com/politics/2020/01/citizenship-trump-census-voting-rights-texas/>; see also Justin Miller, *Republicans Come to Texas to Prepare for the 2021 Redistricting Battle*, Texas Observer, Aug. 20, 2019, <https://www.texasobserver.org/republicans-come-to-texas-to-prepare-for-the-2021-redistricting-battle/>.

¹²² See e.g. *Kilgarlin v. Martin*, 252 F.Supp.404, 411 (S.D. Tex. 1966) (finding that apportionment based on qualified electors was unconstitutional and a violation of the Voting Rights Act); *Terrazas v. Clements*, 581 F. Supp. 1319, 1328 (N.D. Tex. 1983) (finding in court-approved settlement that apportionment under the Texas Constitution based on “qualified electors rather than population dilutes the voting strength of racial and ethnic minorities”).

¹²³ William H. Frey, *Less Than Half of US Children Under 15 Are White, Census Shows*, Brookings Institute (June 24, 2019), <https://www.brookings.edu/research/less-than-half-of-us-children-under-15-are-white-census-shows/>.

¹²⁴ Yuriy Rudensky & Gabriella Limón, *Gerrymandering Away Missouri’s Future*, Brennan Center for Justice (Sept. 18, 2020), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-away-missouris-future>.

¹²⁵ Yuriy Rudensky & Gabriella Limón, *Gerrymandering Away Missouri’s Future*, Brennan Center for Justice (Sept. 18, 2020), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-away-missouris-future>.

passage of the 15th Amendment that Americans should be free from racial discrimination when voting. It provided safeguards to block new and mutating forms of vote suppression and the teeth to enforce those protections. Without these mechanisms over the last 8 years, discriminatory voting laws have proliferated. The VRAA would restore and modernize the protections against race discrimination that existed pre-*Shelby*, and move us closer to voting equality.

A. Preclearance Was an Effective Tool Against Discrimination in the Voting Process

The VRA's pre-*Shelby* preclearance requirement was highly successful in stopping voting discrimination in covered jurisdictions. It prevented discriminatory laws and practices from going into effect and deterred states from adopting new ones. Between 1998 and 2013, Section 5 blocked 86 discriminatory changes, including 13 in the 18 months before *Shelby County*.¹²⁶ It prompted jurisdictions to withdraw hundreds of potential discriminatory changes, and it dissuaded them from offering even more such changes in the first place.¹²⁷ The Supreme Court acknowledged in *Shelby County* that the VRA, when fully in force between 1965 and 2006, "proved immensely successful at redressing racial discrimination and integrating the voting process."¹²⁸

Without Section 5 preclearance, there is no longer an adequate check against discriminatory laws and practices. The policies implemented in the immediate aftermath of the *Shelby County* decision make clear that Section 5 was holding back discriminatory measures. Within hours of the Court's decision, Texas moved forward with implementing what was then the nation's strictest voter identification law, a law that had been previously denied preclearance because of its discriminatory impact.¹²⁹ Mississippi announced that it would move to implement its voter ID law—which had been held up in preclearance review—the same day the Court's decision was handed down.¹³⁰ The state had also previously submitted the policy for preclearance but had not obtained approval to implement it.¹³¹ The day after the *Shelby County* decision, Alabama moved forward with its strict voter ID law, after having postponed submitting it for preclearance for almost two years.¹³² And 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 registration. The state legislature had initially been considering a narrower voter ID bill, but after the decision, a state senator admitted publicly, "now we can go with the full bill," rather than less a restrictive version.¹³³

¹²⁶ Wendy Weiser & Alicia Bannon, *An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice (2018),

<https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20Solutions%202018.%20Democracy%20Agenda.pdf>; Tomas Lopez, '*Shelby County*': *One Year Later*, Brennan Center for Justice (June 24, 2014),

<https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>.

¹²⁷ *Id.*; Tomas Lopez, '*Shelby County*': *One Year Later*, Brennan Center for Justice (June 24, 2014),

<https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>.

¹²⁸ *Shelby County v. Holder*, 570 U.S. 529, 548 (2013).

¹²⁹ Tomas Lopez, '*Shelby County*': *One Year Later*, Brennan Center for Justice (June 24, 2014),

<https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>.

¹³⁰ 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>.

¹³¹ Tomas Lopez, '*Shelby County*': *One Year Later*, Brennan Center for Justice (June 24, 2014),

<https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>.

¹³² *Id.*

¹³³ *Id.*

The experience of Pasadena, Texas, where the Latino population increased from 19 percent in 1990 to more than 48 percent in 2010, is illustrative. Prior to *Shelby County*, the City of Pasadena had an eight-member city council, all elected from single-member districts.¹³⁴ Only days after *Shelby County*, the City began a process to change the composition of the council so that two members would be elected from at large districts. When asked why he was pushing the change, the City’s mayor told reporters “because the Justice Department can no longer tell us what to do.”¹³⁵ A federal judge later found that adoption of the arrangement had been motivated by discriminatory animus toward the city’s fast-growing and increasingly politically effective Latino community.¹³⁶

The implication is clear: Section 5 shielded voters from retrogressive laws designed to limit voting rights. Since *Shelby County*, voters of color have disproportionately suffered under the laws implemented. With discriminatory voting practices proliferating in many states, this strong tool is again needed.

B. Preclearance Is a More Effective Tool Than After-the-Fact Litigation

Section 2 of the VRA, which allows private parties and the Justice Department to challenge discriminatory voting practices in court, remains in effect after *Shelby*, but it is no substitute for preclearance.

First, litigation is a far lengthier and more expensive process than preclearance, and lawsuits often do not yield results for voters until after an election is over.¹³⁷ Too often, this means that elections are conducted under a discriminatory law. The votes lost in those tainted elections cannot be reclaimed.

Our longstanding lawsuit against Texas’ voter ID law, discussed above, illustrates this point.¹³⁸ After the state passed the law, the Department of Justice objected to it,¹³⁹ and a three-judge federal court prevented the state from implementing it.¹⁴⁰ That decision, however, was vacated after *Shelby County*, leading to years of litigation. Every court that considered the law found it to be discriminatory¹⁴¹ (and a federal district court found that it was intentionally discriminatory),¹⁴² but the law remained in effect until a temporary remedy was put in place for the

¹³⁴ *Patino v. City of Pasadena*, 230 F.Supp.3d 667, 681 (S.D. Tex. 2017).

¹³⁵ *Id.* at 722.

¹³⁶ *Id.* at 724.

¹³⁷ Objection Letter from Thomas E. Perez, Assistant Att’y Gen, to Keith Ingram, Dir. of Elections at Off. of the Tex. Sec’y of State (March 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_120312.pdf.

¹³⁸ 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.

¹³⁹ Objection Letter from Thomas E. Perez, Assistant Att’y Gen, to Keith Ingram, Dir. of Elections at Off. of the Tex. Sec’y of State (March 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_120312.pdf.

¹⁴⁰ *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012).

¹⁴¹ See *Texas NAACP V. Steen (consolidated with Veasey v. Abbott)*, Brennan Center for Justice (Sept. 21, 2018), <https://www.brennancenter.org/our-work/court-cases/texas-naacp-v-steen-consolidated-veasey-v-abbott>.

¹⁴² *Veasey v. Perry*, 71 F. Supp. 3d 627, 698-704 (S.D. Tex. 2014). The Court determined that the law had a discriminatory purpose under Section 2 of the VRA and the 14th and 15th Amendments because “racial discrimination was a motivating factor” in its passage. It reached this determination by looking at several factors. First, in six years of debate, no impact study or analysis was conducted to determine whether it would impair minority voting rights, despite legislative opponents’ demands for one. Second, proponents of the law also departed from normal legislative procedure

November 2016 election.¹⁴³ In the meantime, Texans were forced to vote in several hundred federal, statewide, and local elections under discriminatory voting rules.¹⁴⁴ There are other examples of litigation victories well after voters suffered injury; for example, a challenge to the Alabama voter ID law mentioned above was filed on December 15, 2015.¹⁴⁵ The law was upheld by the Eleventh Circuit, which granted summary judgement to the state of Alabama, in July 2021.¹⁴⁶

Litigation is also inferior to preclearance because courts have used the Supreme Court’s so-called *Purcell* doctrine to deny relief when it is most needed—right before an election.¹⁴⁷ The *Purcell* doctrine provides that courts should avoid changing election rules in the period right before to an election because of the possibility of voter confusion and administrative difficulty. Under the doctrine, dozens of court rulings that removed barriers to voting during the pandemic were reversed in 2020, creating a perverse incentive for wrongdoers to adopt discriminatory changes close to an election to avoid judicial oversight. Preclearance would negate the opportunity to abuse this doctrine.

Moreover, the effectiveness of voting rights litigation can be seriously undermined in the future because of new and growing efforts within states to make it harder to challenge discriminatory voting laws in courts. A recent Brennan Center study found that state lawmakers in 26 states have introduced legislation targeting courts and threatening judicial independence; in 8 of those states, legislators have specifically targeted election cases.¹⁴⁸

C. The VRAA Will Thwart or Mitigate Future Discriminatory Voting Laws, Policies and Practices

The VRAA is designed to respond to the discriminatory practices I have described today, in a way that is responsive to the Supreme Court’s concerns. Notably, through its “geographic coverage” provisions, it modernizes the formula used to determine which jurisdictions will be subject to preclearance, drawing on a recent history of discrimination in voting. This updated formula targets discrimination as it exists in 2021.

to pass it, instead saying there was an “emergency” that required immediate resolution. Third, the law did not actually directly address the problems it claimed to address. For example, to fight non-citizen voting, the law approved the use of a small number of IDs, including some legally issued to non-citizens. Fourth and fifth, legislative history and contemporaneous statements showed that the bill’s proponents understood the impact the law would have on minority voters. Additionally, the Court found that the law produced a discriminatory result in violation of Section 2 of the VRA and constituted an unconstitutional poll tax.

¹⁴³ Michael Wines, *Texas Agrees to Soften Voter ID Law After Court Order*, N.Y. Times, Aug. 3, 2016, <https://www.nytimes.com/2016/08/04/us/texas-agrees-to-soften-voter-id-law-after-court-order.html>.

¹⁴⁴ Adam Liptak, *Supreme Court Allows Texas to Use Strict Voter ID Law in Coming Election*, N.Y. Times, Oct. 18, 2014, <https://www.nytimes.com/2014/10/19/us/supreme-court-upholds-texas-voter-id-law.html>.

¹⁴⁵ *Greater Birmingham Ministries v. Alabama*, 161 F. Supp. 3d 1104, 1107 (N.D. Ala. 2016).

¹⁴⁶ *Greater Birmingham Ministries v. Alabama*, 992 F.3d 1299 (11th Cir. 2021).

¹⁴⁷ See, e.g., *Veasey v. Perry*, 769 F.3d 890, 893-96 (5th Cir. 2014) (issuing stay and collecting cases).

¹⁴⁸ Patrick Berry et al., *Legislative Assaults on State Courts — 2021*, Brennan Center for Justice (May 19, 2021), <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2021>. See also, Patrick Berry and Alicia Bannon, *Lawmakers Are Targeting the Courts That Could Shoot Down Voter Suppression Laws*, Wash. Post (May 19, 2021), <https://www.washingtonpost.com/outlook/2021/05/19/voter-suppression-laws-states/>.

In addition, the VRAA introduces limits on measures that have historically been used to discriminate against voters of color.¹⁴⁹ This “known practices” provision uses the wealth of evidence accrued since passage of the original VRA to identify categories of changes that will be always subject to preclearance when made in jurisdictions that meet minority population thresholds. A report by the Mexican American Legal Defense and Educational Fund, Asian Americans Advancing Justice, and NALEO Educational Fund found that nearly two-thirds of preclearance denials between 1990 and 2013 related to changes in methods of election, redistricting, annexations, polling place relocations, and interference with language assistance.¹⁵⁰ Each of these types of laws, and several others, would be covered under the VRAA.

The VRAA also provides for notice to be given to the public when certain election changes are made in close proximity to federal elections, restores the federal observer program, and makes it easier for those challenging discriminatory voting laws in court to obtain relief.

These provisions are more than justified and well-tailored to the record of discrimination before Congress. In requiring preclearance in the places with greatest record of discrimination and for the measures most likely to be discriminatory, the VRAA “link[s] coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement,” as the Supreme Court in *Shelby County* said the Voting Rights Act must.¹⁵¹ The bill is well equipped to attack the kinds of discriminatory practices we have seen implemented over the last few years.

For more than fifty years, the VRA has been a principal engine of voting equality in our country. Congress has repeatedly recognized its importance and effectiveness, as well the ongoing need for its protections. Since its initial passage in 1965, Congress reauthorized, updated, and expanded the VRA four times.¹⁵² The law has always enjoyed broad bipartisan support. In 2006, Congress reauthorized the law’s preclearance provisions with unanimous support in the Senate and overwhelming bipartisan support in the House.¹⁵³ It should do so again. The American public, across all demographic groups, strongly supports the VRA; according to a 2014 poll, 81 percent of voters support the Act, and 69 percent support restoring it.¹⁵⁴ The VRAA is the best vehicle for accomplishing this.

D. Nationwide Preclearance Is Not a Viable Approach

Some have suggested that the VRAA should be replaced with a bill that institutes

¹⁴⁹ Voting Rights Advancement Act, H.R. 4, 116th Cong. §4(b) (2019).

¹⁵⁰ Erin Hastings, et al., *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Voters*, 14 (Nov. 2019), <https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf>.

¹⁵¹ *Shelby Cty. v. Holder*, 570 U.S. 529, 546 (2013).

¹⁵² *History of Federal Voting Rights Laws*, U.S. Dep’t of Just. (last updated July 28, 2017), <https://www.justice.gov/crt/history-federal-voting-rights-laws>.

¹⁵³ The 2006 reauthorization of the Voting Rights Act passed the U.S. House of Representatives 390-33, and the U.S. Senate 98-0. *Actions Overview: H.R. 9 – 109th Congress (2005-2006)*, U.S. Congress, <https://www.congress.gov/bill/109th-congress/house-bill/9/actions>; Press Release, White House, *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>.

¹⁵⁴ Press Release, Leadership Conf. on Civ. and Hum. Rts., *New Voting Rights Act Polling Shows Strong Bipartisan Support Nationwide* (Sept. 30, 2014), <https://civilrights.org/2014/09/30/new-voting-rights-act-polling-shows-strong-bipartisan-support-nationwide/>.

nationwide preclearance for all voting changes. That novel proposal contemplates a powerful tool against voting discrimination across the country; unfortunately, it is not viable. The current approach—a modern geographic coverage formula for preclearance coupled with coverage of designated practices known to be discriminatory—is better tailored to address modern threats to voting, consistent with the Supreme Court’s guidance. Any gaps can and should be addressed through other legislative tools.

First, as discussed above, the current approach in the VRAA has been carefully designed to meet the conditions the Supreme Court articulated for congressional legislation enforcing the 14th and 15th Amendments. It is closely tailored to a wealth of evidence of modern discrimination in the voting process—including evidence presented before this Committee. As a result, I am confident that it is an appropriate exercise of Congress’s enforcement clause powers and will survive constitutional attacks.

There is strong reason to fear, on the other hand, that a nationwide preclearance approach would not survive a constitutional challenge before the current Supreme Court. Although the 14th and 15th Amendments were intended to give Congress broad powers to craft legislation to remedy and prevent discrimination in the voting process, the Supreme Court has interpreted that power more narrowly with respect to preclearance. Specifically, it has made clear that there needs to be a strong justification for Congress either to require states to submit proposed legislation for preclearance, or to treat states differently from one another.¹⁵⁵ To justify preclearance, the Court has further required Congress to develop a detailed record that provides strong evidence that the requirement targets real and current threats of unconstitutional discrimination in the voting process. Congress has done so with respect to jurisdictions and practices with a recent history of discrimination. Unfortunately, it would be extremely difficult for Congress to make a similar showing with respect to every voting jurisdiction and every voting practice nationwide. As Harvard Law School Professors Guy Uriel Charles and Lawrence Lessig wrote in a recent essay, a nationwide preclearance approach would therefore “certainly fail the Supreme Court’s test,” at least under the current Court.¹⁵⁶

Second, it would be difficult to administer a nationwide preclearance program, at least without a substantial expansion of capacity in the Department of Justice and the federal courts. What is more, the VRAA already includes new provisions that apply nationwide: the “known practices” provisions that require all jurisdictions that meet certain population thresholds to submit for preclearance any voting changes that fall within a list of practices Congress determined to be discriminatory. This provision has been closely tailored to address the strong evidence of discrimination before Congress.

To be clear, even if it were feasible, nationwide preclearance would not obviate the need for further congressional legislation to combat recent attacks on Americans’ freedom to vote. As explained below, the preclearance requirement is extremely powerful, but standing alone, it will not address the full range of the vote suppression problem facing the country. More would still be needed.

¹⁵⁵ See *Shelby County v. Holder*, 570 U.S. 529 (2013); *NAMUDNO v. Holder*, 557 US __ (2009).

¹⁵⁶ Guy-Uriel Charles & Lawrence Lessig, *The Democrats are Walking Right Into a Trap on Voting Rights*, Slate (May 24, 2021, 2:19 PM), <https://slate.com/news-and-politics/2021/05/democrats-joe-manchin-voting-rights-trap.html>.

III. The VRAA and the For the People Act

Although passing the VRAA is critical to protecting American voters, it is not enough. To fully protect voters and stop the current wave of voter suppression in the states, Congress must also pass and send to President Biden for his signature the For the People Act, comprehensive democracy reform legislation designated as H.R. 1 in the House and S. 1 in the Senate.

Division A of the For the People Act—which derives from the federal Voter Empowerment Act written and long championed by Rep. John Lewis¹⁵⁷—would set a basic federal foundation for voting access to fill critical gaps the VRAA cannot fully address. It would require states to modernize voter registration, including instituting same-day and automatic voter registration, along with strong protections to keep eligible voters from being purged from the rolls. It would also require states to allow two weeks of early voting (including on weekends) and no excuse voting by mail. And it would restore voting rights to formerly incarcerated citizens once they complete their sentences, increase legal protections against voter intimidation and deceptive practices intended to suppress the vote, and take a variety of other steps to protect the freedom to vote. Finally, it would ban partisan gerrymandering and take other steps to protect racial and language minorities in the congressional redistricting process. All of these provisions and many others are summarized in the Brennan Center’s online annotated guide to the bill.¹⁵⁸ (Divisions B and C of the For the People Act contain much needed campaign finance and ethics reforms, which the Brennan Center also strongly supports.¹⁵⁹)

The VRAA and the For the People Act address different facets of the problem of voter suppression. The VRAA focuses on race discrimination in voting and would restore and update the federal preclearance process. Its protections are largely prospective; they mostly cover *changes* in voting rules. Thus, a restrictive bill passed before the VRAA’s enactment would not be covered. The For the People Act would, on the other hand, override previously-enacted state laws and previously-adopted practices to the extent that they conflict with its provisions.

Moreover, the VRAA’s preclearance process is by its nature targeted, and it would not apply to every voting change in every jurisdiction. Its geographic coverage depends on statutory triggers that turn on the existence of documentary evidence of voting discrimination, such as successful lawsuits or consent decrees.¹⁶⁰ This means that places without a significant recent history of trying to restrict access to the ballot will not be covered until the violations add up.¹⁶¹

¹⁵⁷ See Voter Empowerment Act, H.R. 1275, 116th Congress (2019), <https://www.congress.gov/bill/116th-congress/house-bill/1275>.

¹⁵⁸ See *Annotated Guide to the For the People Act of 2021*, Tit. I, subtit. A, D, E, H, I, Tit. II, subtit. F, Brennan Center for Justice (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>.

¹⁵⁹ *Hearing on S. 1, The For the People Act, Before the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), https://www.rules.senate.gov/imo/media/doc/Testimony_Waldman.pdf.

¹⁶⁰ The Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. § 3 (2019), <https://www.congress.gov/bill/116th-congress/house-bill/4>.

¹⁶¹ For instance, in Iowa and Montana, both states that have long sought to making voting accessible, legislators have

Some jurisdictions that have in recent years restricted access to voting, like Wisconsin and Ohio, have never previously been subject to preclearance.¹⁶² Unfortunately, attacks on voting rights are becoming increasingly common even in places that do not have a history of discrimination. The For the People Act fills those gaps since all of its provisions apply nationwide.

Finally, preclearance does not cover all discriminatory practices—including those that discriminate on bases other than race, such as laws targeting student voters. It also has not been effective at combatting increasingly common partisan and racial gerrymandering that targets communities of color based on their real or perceived voting patterns, at least when those gerrymanders did not reduce the number of districts where communities of color could elect their preferred candidates.¹⁶³ By banning partisan gerrymandering by statute, the For the People Act would help ensure that communities of color are not used as a tool for partisan advantage. Preclearance also depends on the willingness and ability of the Department of Justice to fully enforce the Voting Rights Act. While that has historically been a priority in both Democratic and Republican administrations, there have been instances where even blatantly discriminatory laws were precleared.¹⁶⁴

The For the People Act's safeguards provide another critical backstop against vote suppression. According to the Brennan Center's analysis, it would preempt many of the worst restrictive voting bills being proposed and enacted in states across the country this year.¹⁶⁵ Its protections would make it easier for everyone to vote, and virtually all of them address barriers that disproportionately affect Black, Latino, and Asian voters.

recently enacted a number of new restrictions, including tighter identification requirements in both states, limits on early voting in Iowa, and elimination of same-day voter registration in Montana. Stephen Gruber-Miller, *Gov. Kim Reynolds Signs Law Shortening Iowa's Early and Election Day Voting*, Des Moines Reg. (Mar. 9, 2021), <https://www.desmoinesregister.com/story/news/politics/2021/03/08/iowa-governor-kim-reynolds-signs-law-shortening-early-voting-closing-polls-earlier-election-day/6869317002/>; Amy Beth Hanson, *Montana Governor Approves Ending Same-Day Voter Registration*, Associated Press (Apr. 19, 2021), <https://apnews.com/article/elections-montana-voter-registration-voting-5ee83eb24b3339610cface3570a16e4f>; Brianne Pfannenstiel, *Branstad Signs Controversial Voter ID Bill into Law*, Des Moines Reg. (May 5, 2017), <https://www.desmoinesregister.com/story/news/politics/2017/05/05/branstad-signs-controversial-voter-id-bill-into-law/311568001/>.

¹⁶² In the 2010 cycle of redistricting, for example, the Department of Justice precleared legislative and/or congressional redistricting plans in Alabama, Florida, North Carolina, and Virginia that courts later found to be racial or partisan gerrymanders. See *Status of Statewide Redistricting Plans*, U.S. Department of Justice (2020), <https://www.justice.gov/crt/status-statewide-redistricting-plans>. See also *Jurisdictions Previously Covered by Section 5*, U.S. Dep't of Justice (Sept. 11, 2020), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>; Michael Powell & Peter Slevin, *Several Factors Contributed to 'Lost' Voters in Ohio*, Washington Post (Dec. 15, 2004), <https://www.washingtonpost.com/archive/politics/2004/12/15/several-factors-contributed-to-lost-voters-in-ohio/73aefa72-c8e5-4657-9e85-5ec8b2451202/>; Claire Campbell & Laura Schultz, *Wisconsin GOP's Voting Restrictions Impact Black Residents*, Wis. State J. (Oct. 26, 2020), https://madison.com/wsj/news/local/govt-and-politics/wisconsin-gops-voting-restrictions-impact-black-residents/article_1b3af4d2-d5a7-594b-87be-7a368001c32d.html.

¹⁶³ See *Annotated Guide to the For the People Act of 2021*, Tit. II, subtit. E, Brennan Center for Justice (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>.

¹⁶⁴ For instance, in 2005 political appointees at the Justice Department overruled career staff in the Civil Rights Division and precleared Georgia's new voter identification requirements, despite abundant evidence that they would disparately harm voters of color. See Dan Eggen, *Criticism of Voting Law Was Overruled*, Washington Post (Nov. 17, 2005) https://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504_pf.html.

¹⁶⁵ Gareth Fowler et al., *Congress Could Change Everything*, Brennan Center for Justice (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/congress-could-change-everything>.

None of this is to deny the critical importance of the Voting Rights Act—a necessary and proven tool to combat persistent discrimination in voting. (The For the People Act itself contains findings reaffirming Congress’s commitment to restore the Voting Rights Act by passing the VRAA.¹⁶⁶) Indeed, no single bill—not even a bill as comprehensive as the For the People Act—could envision and preempt every discriminatory voting restriction a state or locality might seek to pass. The VRAA ensures that Americans will still be protected from discriminatory voting changes that Congress did not foresee or include in the For the People Act. Both laws are necessary to guarantee all Americans a baseline level of voting access, free from discriminatory efforts to block their path to the voting booth or dilute or nullify their votes.

IV. Conclusion

Recent federal elections make clear that discriminatory voter suppression is an ongoing problem—a problem that will not subside without congressional action. The John Lewis Voting Rights Advancement Act will provide a powerful tool to combat discriminatory measures that inhibit voting rights for individuals across the country. And the For the People Act will establish baseline national rules for voting access for all Americans—rules that cannot be manipulated for discriminatory reasons or partisan gain. We urge Congress to act quickly and enact these historic pieces of legislation.

¹⁶⁶ *Annotated Guide to the For the People Act of 2021*, Tit. II, subtit. A, Brennan Center for Justice (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021>.