



**LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W**

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U.S. HOUSE COMMITTEE ON THE JUDICIARY

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HEARING ON

**“OVERSIGHT OF THE VOTING RIGHTS ACT:
POTENTIAL LEGISLATIVE REFORMS”**

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Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House of Representatives Committee on the Judiciary, my name is Jon Greenbaum and I serve as the Chief Counsel for the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on ways in which Congress can remedy the damage to racial equality in voting caused by the Supreme Court's decisions in *Shelby County v. Holder*,¹ and *Brnovich v. Democratic National Committee*.²

In 2013, the *Shelby County* decision effectively immobilized the preclearance provisions of Section 5 of the Voting Rights Act by finding its underlying coverage formula unconstitutional. The more recent *Brnovich* decision, while not gutting Section 2, makes it unnecessarily more difficult for plaintiffs to bring Section 2 vote denial "results" cases, running directly counter to Congress' intent in first enacting the Voting Rights Act in 1965, and then in broadening the scope of Section 2 of the Act in 1982. The weakening of Section 2 protections by the Court in *Brnovich* is particularly and sadly ironic, as the Court in *Shelby County* had pointed to the continued existence of Section 2's "permanent, nation-wide ban on racial discrimination" when it eviscerated the Section 5 protections.³

The harm caused by *Shelby County* has been well-documented. The effects of *Brnovich* remain to be seen. However, it is not too late for Congress to act. The full protections of the Voting Rights Act are desperately needed today, particularly given the steps already taken—or about to be taken—by legislatures in states such as Georgia, Florida, and Texas in the aftermath of the 2020 election to raise additional barriers to the vote that will impact voters of color more severely than white voters. Moreover, there is a legitimate concern that some state legislatures will be emboldened by their reading of *Brnovich*, as they were by the decision in *Shelby*, and view it as a signal from the Court to take even more suppressive action. Congress should immediately reassert its intention to fully protect the voting rights of voters of color in Sections 2 and 5 of the Voting Rights Act.

I come to this conclusion based on twenty-four years of working on voting rights issues nationally. From 1997 to 2003, I served as a Senior Trial Attorney in the Voting Section at the United States Department of Justice, where I enforced various provisions of the Voting Rights Act, including Section 5, on behalf of the United States. In the eighteen years since, I have continued to work on voting rights issues at the Lawyers' Committee for Civil Rights Under Law as Chief Counsel, where I oversee our Voting Rights Project, and prior to that, when I served as Director of the Voting Rights Project.

The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to pursue racial justice through mobilization of the private bar. Voting rights has been an organizational core area since the inception of the organization. During my time at the Lawyers' Committee, among other things, I was intimately involved in the constitutional defense of Section 5 and its coverage formula in *Shelby County* and its predecessor case *Northwest Austin Municipal Utility District No. 1 v. Holder*. I also staffed the National Commission on the Voting Rights Act, which issued a report entitled *The National Commission on*

¹ 570 U.S. 529 (2013).

² 2021 WL 2690267 (2021).

³ 570 U.S. at 556.

the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work 1982-2005 (2006). The report and record of the National Commission on the Voting Rights Act, which was submitted to the House Judiciary Committee at the Committee’s request, was the largest single piece of the record supporting the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (“2006 VRA Reauthorization”).

Our recommended responses to the *Shelby County* and *Brnovich* decisions stem from the different scope and rationales of the decisions themselves. The complete evisceration of Section 5 wrought by the *Shelby County* decision necessitates a comprehensive remedy, but one that is instructed by the reasoning of that decision and therefore considers both the unfortunate history of discrimination in voting in particular states and the current need for prophylactic measures to ensure that no state or sub-jurisdiction can implement a change in voting practices that discriminates against voters of color. The more limited impact of the *Brnovich* decision calls for a correspondingly focused response, one that zeroes in on the specific deviations of the Court from the clear intent of Congress in its 1982 amendments to Section 2.

Thus, our recommended response to the *Shelby County* decision starts with our support for provisions similar to those in the bill passed by the U.S. House of Representatives in the previous session of Congress: H.R. 4, 116th Congress, the John Lewis Voting Rights Advancement Act, i.e., a replacement coverage formula that would be applied to the preclearance provisions of Section 5 and the federal observer provisions of Section 8, and a transparency provision that requires all jurisdictions – irrespective of any coverage formula – to provide public notice of changes in voting practices. But, we have an additional recommendation, tied to the transparency provision: the creation of a “retrogression cause of action,” that allows the Attorney General or private parties an opportunity to stop changes in voting practices anywhere in the country before they diminish the voting rights of voters of color. As I will discuss more fully in my testimony, the retrogression cause of action would meet the current need to stop suppressive laws that discriminate against voters of color, using a tried and true standard, with limited interference with state sovereignty, and without implicating issues relating to differentiation among the states.

Our recommended congressional response to *Brnovich* is more limited, as Congress does not have to completely rewrite Section 2. It simply has to remove any ambiguity in the statute caused by the *Brnovich* opinion, which gave short shrift to a substantial legislative record and decades of jurisprudence which run counter to the *Brnovich* majority’s constricted view of this remedial statute. Congress originally enacted and later amended Section 2 to stymie not only blatant, explicit discrimination, but also facially neutral voting laws that, through ingenious, sophisticated methods, had a significant impact on minority citizens’ right to vote. Consistent with this purpose, prior to *Brnovich*, the Supreme Court and several of the Circuit Courts of Appeal had adopted a standard to ensure the effective implementation of those protections. That standard recognized not only that the Act applies broadly to all voting procedures and policies that abridge the right to vote—whether expressly or subtly—but also that a challenged law cannot be viewed in isolation, because a seemingly innocuous voting practice can interact with underlying social conditions to result in pernicious discrimination.⁴

⁴ *Gingles v. Thornburg*, 478 U.S. 30, 47 (1986); *accord League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); *Farrakhan v.*

Under that standard, Section 2 has worked for decades as a judicially manageable mechanism to stop voting discrimination. There has been no flood of questionable Section 2 vote denial “results” cases, and no widespread invalidation of voting regulations. Indeed, *Brnovich* marked the first time since the 1982 amendments to the Act that the Supreme Court reviewed a pure vote-denial claim. The reason is clear: The lower courts have taken seriously the Court’s guidance, and carefully assessed the effects of challenged voting policies or procedures within each specific jurisdiction, based on the totality of the circumstances.

Brnovich compels an immediate response from this Congress, before some state legislators – intent on creating obstacles that disproportionately result in a negative impact on the rights of voters of color – hear it as a dog whistle to do just that, and before lower courts apply the opinion in ways that elevate unsubstantiated and untrue justifications for new burdensome voting practices over genuine and proved claims of racially discriminatory results.

I. Why and How Congress Must Respond to *Shelby County*

A. The State of Affairs Prior to the *Shelby County* decision

Prior to the *Shelby County* decision, the combination of Section 2 and Section 5 of the Voting Rights Act provided an effective means of preventing and remedying minority voting discrimination. Section 2, which is discussed more fully below, remains as the general provision enabling the Department of Justice and private plaintiffs to challenge voting practices or procedures that have a discriminatory purpose or result. Section 2 is in effect nationwide.⁵ Section 5 required jurisdictions with a history of discrimination, based on a formula set forth in Section 4(b), to obtain preclearance of any voting changes from the Department of Justice or the District Court in the District of Columbia before implementing the voting change.⁶ From its inception, there was a sunset provision for the formula, and the sunset provision for the 2006 Reauthorization was 25 years.⁷

Section 5 covered jurisdictions had to show federal authorities that the voting change did not have a discriminatory purpose or effect. Discriminatory purpose under Section 5 was the same as the Fourteenth and Fifteenth Amendment prohibitions against intentional discrimination against minority voters.⁸ Effect was defined as a change which would have the effect of diminishing the ability of minority voters to vote or to elect their preferred candidates of choice.⁹ This was also known as retrogression, and in most instances was easy to measure and administer. For example, if a proposed redistricting plan maintained a majority black district that elected a black preferred candidate at the same black population percentage as the plan in effect, it would be highly unlikely to be found retrogressive. If, however, the proposed plan significantly diminished the black population percentage in the same district, it would invite serious questions that it was retrogressive.

Except in rare circumstances, covered jurisdictions would first submit their voting changes to the Department of Justice. DOJ had sixty days to make a determination on a change, and if DOJ

Washington, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

⁵ 52 U.S.C. § 10301.

⁶ 52 U.S.C. §§ 10303(b), 10304.

⁷ 52 U.S.C. § 10303(b).

⁸ 52 U.S.C. § 10304(c).

⁹ 52 U.S.C. § 10304(b), (d).

precleared the change or did not act in 60 days, the covered jurisdiction could implement the change.¹⁰ The submission of additional information by the jurisdiction, which often happened because DOJ requested such information orally, would extend the 60 day period if the submitted information materially supplemented the submission.¹¹ DOJ could extend the 60 day period once by sending a written request for information to the jurisdiction.¹² This often signaled to the jurisdiction that DOJ had serious concerns that the change violated Section 5. If DOJ objected to a change, it was blocked, but jurisdictions had various options, including requesting reconsideration from DOJ using Section 5 Procedures,¹³ seeking preclearance from the federal court,¹⁴ and modifying the change and resubmitting it.

In the nearly seven years I worked at DOJ, I witnessed first-hand how effective Section 5 was at preventing voting discrimination and how efficiently DOJ administered the process to minimize the burdens to its own staff of attorneys and analysts, and to the covered jurisdictions. The Section 5 Procedures cited above provided transparency as to DOJ's procedures and gave covered jurisdictions guidance on how to proceed through the Section 5 process. Internal procedures enabled DOJ staff to preclear unobjectionable voting changes with minimal effort and to devote the bulk of their time to those changes that required close scrutiny.

The benefits of Section 5 were numerous and tangible. The 2014 National Commission Report provided the following statistics and information regarding DOJ objections:

By any measure, Section 5 was responsible for preventing a very large amount of voting discrimination. From 1965 to 2013, DOJ issued approximately 1,000 determination letters denying preclearance for over 3,000 voting changes. This included objections to over 500 redistricting plans and nearly 800 election method changes (such as the adoption of at-large election systems and the addition of majority-vote and numbered-post requirements to existing at-large systems). Much of this activity occurred between 1982 (when Congress enacted the penultimate reauthorization of Section 5) and 2006 (when the last reauthorization occurred); in that time period approximately 700 separate objections were interposed involving over 2,000 voting changes, including objections to approximately 400 redistricting plans and another 400 election method changes.

Each objection, by itself, typically benefited thousands of minority voters, and many objections affected tens of thousands, hundreds of thousands, or even (for objections to statewide changes) millions of minority voters. It would have required an immense investment of public and private resources to have accomplished this through the filing of individual lawsuits.¹⁵

In addition to the changes that were formally blocked, Section 5's effect on deterring

¹⁰ 52 U.S.C. § 10304(a).

¹¹ *Id.* Procedures for the Administration of Section 5 of the Voting Rights Act ("Section 5 Procedures"), 28 C.F.R. § 51.37.

¹² Section 5 Procedures, 28 C.F.R. § 51.37.

¹³ 28 C.F.R. § 51.45

¹⁴ 52 U.S.C. § 10304(a)

¹⁵ 2014 National Commission Report at 56.

discrimination cannot be understated. Covered jurisdictions knew that their voting changes would be reviewed by an independent body and they had the burden of demonstrating that they were non-discriminatory. By the time I began working at DOJ, Section 5 had been in effect for several decades and most jurisdictions knew better than to enact changes which would raise obvious concerns that they were discriminatory – like moving a polling place in a majority black precinct to a sheriff’s office. In the post-*Shelby County* world, a jurisdiction is likely to get away with implementing a discriminatory change for one election (or more) before a plaintiff receives relief from a court, as the Hancock County, Georgia voter purge and Texas voter identification cases detailed later illustrate.

The Section 5 process also brought notice and transparency to voting changes. Most voting changes are made without public awareness. DOJ would produce a weekly list of voting changes that had been submitted, which individuals and groups could subscribe to in order to receive this weekly list from DOJ.¹⁶ For submissions of particular interest, DOJ would provide public notice of the change if it believed the jurisdiction had not provided adequate notice of the change.¹⁷ But even more important, the Section 5 process incentivized jurisdictions to involve the minority community in voting changes. DOJ’s Section 5 Procedures requested that jurisdictions with a significant minority population provide the names of minority community members who could speak to the change,¹⁸ and DOJ’s routine practice was to call at least one local minority contact and to ask the individual whether she or he was aware of the voting change and had an opinion on it. Moreover, involved members of the community could affirmatively contact DOJ and provide relevant information and data.¹⁹

B. The *Shelby County* Decision

In the *Shelby County* case, the Supreme Court decided in a 5-4 vote that the Section 4(b) coverage formula was unconstitutional. The majority held that because the Voting Rights Act “impose[d] current burdens,” it “must be justified by current needs.”²⁰ The majority went on to rule that because the formula was comprised of data from the 1960s and 1970s, it could not be rationally related to determining what jurisdictions, if any, should be covered under Section 5 decades later.²¹ The four dissenting justices found that Congress had demonstrated that regardless of what data was used to determine the formula, voting discrimination had persisted in the covered jurisdictions.²² The majority made clear that “[w]e issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions.”²³

The effect of the *Shelby County* decision is that Section 5 is effectively immobilized as, for now, preclearance is limited only to those jurisdictions where it is imposed by a court after a court previously made a finding of intentional voting discrimination. This special preclearance coverage is authorized by Section 3(c) of the Act. Courts have rarely ordered Section 3(c) coverage, and when they do, it is typically quite limited. Indeed, the only jurisdictions I am aware of that have been

¹⁶ Section 5 Procedures, 28 C.F.R. § 51.32-51.33.

¹⁷ *Id.* at 28 C.F.R. § 51.38(b).

¹⁸ *Id.* at 28 C.F.R. § 51.28(h).

¹⁹ *Id.* at 28 C.F.R. § 51.29.

²⁰ *Shelby County*, 570 U.S. at 536 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 at 203) 2009.

²¹ *Shelby County*, 557 U.S. at 545-54.

²² *Id.* at 560 (Ginsberg, J. dissenting).

²³ *Id.* at 556.

subject to Section 3(c) coverage since the *Shelby County* decision are Pasadena, Texas and Evergreen, Alabama.²⁴ In the case of Pasadena, the only changes subject to preclearance relate to the method of election and redistricting.²⁵

As a result, Section 5 is essentially dead until Congress takes up the Supreme Court's invitation to craft another coverage formula. There are compelling reasons for Congress to do so because voting discrimination has increased in the absence of Section 5, and Section 2 cannot adequately substitute for Section 5.

C. The Effect of the *Shelby County* Decision

The year after the *Shelby County* decision was issued, the Executive Summary and Chapter 3 of the 2014 National Commission Report discussed what was lost in the *Shelby County* decision. We identified the following impacts:

- Voting rights discrimination would proliferate, particularly in the areas formerly covered by Section 5;
- Section 2 would not serve as an adequate substitute for Section 5 for numerous reasons:
 - The statutes are not identical but were instead intended to complement one another;
 - Section 5 prevents a discriminatory voting change from ever going into effect whereas discrimination can affect voters in a Section 2 case prior to a court decision or a settlement;
 - Section 2 litigation is time-consuming and expensive compared to Section 5 which is efficient and less-resource intensive;
 - Section 2 is less likely to prevent discrimination than Section 5 because:
 - Under Section 2 plaintiffs have the burden whereas under Section 5, jurisdictions have the burden of proof;
 - Section 2 has a complicated multi-factor test that provides numerous defenses for jurisdictions, whereas Section 5 has a simple retrogression test.
- The *Shelby County* decision, and DOJ's interpretation that it also bars use of the coverage formula for sending federal observers, has left voting processes vulnerable to discrimination.²⁶

The subsequent years have demonstrated that all of the negative impacts we anticipated have come to pass.

²⁴ See *Patino v. City of Pasadena*, 230 F. Supp. 667, 729 (S.D. Tex. 2017).

²⁵ *Id.*

²⁶ 2014 National Commission Report at 12, 55-64.

D. Voting Rights Discrimination has Proliferated Since *Shelby County*, Particularly in the Areas Formerly Covered by Section 5

The Lawyers' Committee's Voting Rights Project has never been busier than in the post-*Shelby County* years, where we have participated as a counsel to a party or as amici in more than 100 voting rights cases. Because the Lawyers' Committee has a specific racial justice mission, all of the cases we have participated in implicate race in some fashion in our view, even if there are no race claims in the case.

In my 2019 testimony before this Subcommittee, I did a deeper dive into the 41 post-*Shelby County* voting rights cases the Lawyers' Committee had filed up to that time. My testimony reflected that voting discrimination remains alive and well, particularly in the states formerly covered by Section 5. The findings included the following:

- In the thirty-seven cases where we sued state or local governments, twenty-nine (78.3%) involved jurisdictions that were covered by Section 5, even though far less than half the country was covered by Section 5. Moreover, we sued seven of the nine states that were covered by Section 5 (Alabama, Arizona, Georgia, Louisiana, Mississippi, Texas, Virginia), as well as the two states that had were not covered but had a substantial percentage of the population covered locally (North Carolina and New York).
- We achieved substantial success. Of the thirty-three cases where there had been some result at the time, we achieved a positive result in 26 of 33 (78.8%). In most of the seven cases where we were not successful, we had filed emergent litigation – either on Election Day or shortly before – where achieving success is most difficult.

This data tells us that voting discrimination remains substantial, especially considering that the Lawyers' Committee is but one organization, and particularly in the areas previously covered by Section 5.

In 2019, the Lawyers' Committee did a 25 year look back on the number of times that an official entity made a finding of voter discrimination.²⁷ This analysis of administrative actions and court proceedings identified 340 instances between 1994 and 2019 where the U.S. Attorney General or a court made a finding of voting discrimination or where a jurisdiction changed its laws or practices based on litigation alleging voting discrimination. We found that the successful court cases occurred in disproportionately greater numbers in jurisdictions that were previously covered under Section 5.

E. Why Section 2 is an inadequate substitute for Section 5

Prior to the *Shelby County* decision, critics of Section 5 frequently minimized the negative impact its absence would have by pointing out that DOJ and private parties could still stop

²⁷ Preliminary Report on Voting Discrimination Against Racial and Ethnic Minorities 1994-2019, https://lawyerscommittee.org/wp-content/uploads/2019/11/LC_VOTER_DISCRIM_RPT_H.pdf

discriminatory voting changes by bringing affirmative cases under Section 2 of the Voting Rights Act. Indeed, in the same paragraph of *Shelby County* where the Supreme Court majority states that Congress could adopt a new formula for Section 5, it also notes that its “decision in no way affects the permanent, nation-wide ban on racial discrimination in voting found in §2.”²⁸

During the *Shelby County* litigation and the reauthorization process preceding it, defenders of Section 5 repeatedly pointed out why Section 2 was an inadequate substitute. Eight years of experience demonstrate this.

This is hardly a surprise given that Section 5 and Section 2 were designed by Congress to complement one another as part of a comprehensive set of tools to combat voting discrimination. Section 5 was designed to prevent a specific problem – to prevent jurisdictions with a history of discrimination from enacting new measures that would undermine the gains minority voters were able to secure through other voting protections, including Section 2. The Section 5 preclearance process was potent, but also efficient and surgical in its limited geographic focus and sunset provisions. It was also relatively easy to evaluate because the retrogressive effect standard – whether minority voters are made worse off by the proposed change – is simple to determine in all but the closest cases. Section 5 is designed to protect against discriminatory changes to the status quo.

Section 2 is quite different. It evaluates whether the status quo is discriminatory and thus must be changed. The test for liability should be, and is, rigorous because it is a court-ordered change. Although Section 2 (results) and Section 5 (retrogression) both have discriminatory impact tests, they are distinct. As discussed above, the Section 5 retrogression test is quite straightforward in determining whether a jurisdictional-generated change should be blocked — will minority voters be worse off because of the change?

In contrast, the Section 2 results inquiry is complex and resource intensive to litigate. As will be discussed in greater detail below in the context of the *Brnovich* decision, the “totality of circumstances” test set forth in the statute is fact-intensive by its own definition. The Senate Report supporting the 1982 amendment to Section 2 lists factors that courts have used as a starting point in applying the totality of circumstances test to include seven such factors (along with two factors plaintiffs have the option to raise).²⁹ On top of the Senate factors, courts have introduced additional requirements. For example, in vote dilution cases, which typically involve challenges to redistricting plans or to a method of election, the plaintiff must first satisfy the three preconditions set forth by the Supreme Court in *Thornburg v. Gingles*,³⁰ before even getting to the Senate factors. These *Gingles* preconditions require plaintiffs to show that a minority group is compact and numerous enough to constitute a majority of eligible voters in an illustrative redistricting plan and whether there is racially polarized voting (minority voters are cohered in large number to support certain candidates and those candidates are usually defeated because of white bloc voting) and are necessarily proven by expert testimony. In vote denial cases, which involve challenges to practices such as voter identification laws, courts have also added an additional test, with the developing majority view requiring that plaintiffs demonstrate that the challenged law imposes a discriminatory burden on members of a protected class and that this “burden must be in part caused by or linked to social conditions that have

²⁸ *Shelby County*, 570 U.S. at 556.

²⁹ See e.g., *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

³⁰ *Id.* at 50-51.

or currently produce discrimination against members of the protected class.”³¹

The result is that Section 2 cases are extremely time-consuming and resource-intensive, particularly when defendants mount a vigorous defense. For example, *United States v. Charleston County*,³² which I litigated at the Department of Justice, was a successful challenge to the at-large method of electing the Charleston (South Carolina) County Council. The litigation took four years, and it involved more than seventy witness depositions and a four-week trial, even though we had prevailed on the *Gingles* preconditions on summary judgment,³³ and needed to litigate only the totality of circumstances in the district court.

Four specific examples from the Lawyers’ Committee’s litigation record illustrate why Section 2 is an inadequate substitute for Section 5. The first and most prominent example is the Texas voter identification law, which illustrates the time and expense of litigating a voting change under Section 2 that both DOJ and the federal district court found violated Section 5 prior to the *Shelby County* decision.³⁴ The afternoon that *Shelby County* was decided, then-Texas Attorney General Greg Abbott announced that the State would immediately implement the ID law.³⁵ Several civil rights groups, including the Lawyers’ Committee, filed suit in Texas federal court, challenging SB 14 under several theories, including Section 2, and DOJ filed its own suit under Section 2, and ultimately all of the cases were consolidated. The parties then embarked on months of discovery, leading to a two-week trial in September 2014, where dozens of witnesses, including 16 experts — half of whom were paid for by the civil rights groups — testified. Prior to the November 2014 election, the District Court ruled that SB 14 violated the “results” prong of Section 2 of the Voting Rights Act, because it had a discriminatory result in that Black and Hispanic voters were two to three times less likely to possess the SB 14 IDs and that it would be two to three times more burdensome for them to get the IDs than for white voters. The District Court’s injunction against SB 14, however, was stayed pending appeal by the Fifth Circuit, so the law — now deemed to be discriminatory — remained in effect.³⁶ Subsequently, a three-judge panel and later an *en banc* panel of the Fifth Circuit Court of Appeals, affirmed the District Court’s finding.³⁷ As a result, elections that took place from June 25, 2013 until the Fifth Circuit *en banc* opinion on July 20, 2016 took place under the discriminatory voter ID law. Had Section 5 been enforceable, enormous expense and effort would have been spared. The district court awarded private plaintiffs \$5,851,388.28 in attorneys’ fees and \$938,945.03 in expenses, for a total of \$6,790,333.31. The fee award is currently on appeal. As of June 2016, Texas had spent \$3.5 million in defending the case.³⁸ Even with no published information from DOJ, more than \$10 million in time and expenses were expended in that one case.

Second, in *Gallardo v. State*,³⁹ the Arizona legislature passed a law that applied only to the

³¹ *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015)); see also, *Ohio State Conference for the NAACP v. Husted*, 786 F.3d 524, 554 (6th Cir. 2014).

³² 316 F. Supp. 2d 268 (D.S.C. 2003), *aff’d*, 365 F.3d 341 (4th Cir.), *cert denied*, 543 U.S. 999 (2004).

³³ *United States v. Charleston County*, 318 F. Supp. 2d 302 (D.S.C. 2002).

³⁴ *Veasey*, 830 F.3d at 227 n.7.

³⁵ *Id.* at 227.

³⁶ *Id.* at 227-29, 250.

³⁷ *Id.* at 224-25.

³⁸ Jim Malewitz & Lindsay Carbonell, Texas’ Voter ID Defense Has Cost \$3.5 Million, *The Texas Tribune* (June 17, 2016), <https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/>.

³⁹ 236 Ariz. 84, 336 P.3d 717 (2014).

Maricopa County Community College District and added two at-large members to what was previously a five-member single district board. The legislature had submitted the change for Section 5 preclearance. The Department of Justice issued a more information letter based on concerns that the addition of two at-large members, in light of racially polarized voting in Maricopa County, would weaken the electoral power of minority voters on the board. After receiving the more information letter, Arizona officials did not seek to implement the change. Only after the *Shelby County* decision did they move forward, precipitating the lawsuit brought by the Lawyers' Committee and its partners. We could not challenge the change under Section 2, especially because we would not have been able to meet the first *Gingles* precondition. Instead we made a claim in state court alleging that the new law violated Arizona's constitutional prohibition against special laws because the board composition of less populous counties was not changed. Reversing the intermediate court of appeal, the Arizona Supreme Court rejected our argument, holding that the special laws provision of the state constitution was not violated. Unsurprisingly, the Latino candidate who ran for the at-large seat in the first election lost and the two at-large members are white.

Third, in 2015, the Board of Elections and Registration, in Hancock County, Georgia, changed its process so as to initiate a series of "challenge proceedings" to voters, all but two of whom were African American. This resulted in the removal of 53 voters from the register. Later that year, the Lawyers' Committee, representing the Georgia State Conference of the NAACP and the Georgia Coalition for the Peoples' Agenda and individual voters, challenged this conduct as violating the Voting Rights Act and the National Voter Registration Act, and obtained relief which resulted in the placement of unlawfully-removed voters back on the register.⁴⁰ Ultimately, plaintiffs and the Hancock County Board agreed to the terms of a Consent Decree that would remedy the violations, and required the county's policies to be monitored for five years. But after the purge and prior to the court order, Sparta, a predominantly black city in Hancock County, elected its first white mayor in four decades. And before the case was settled, and the wrongly-purged voters placed back on the rolls, at least one of them had died.

The fourth matter is ongoing and reflects the significant present-day impact of the *Shelby County* decision and the loss of Section 5. It involves a law that Georgia, a previously covered jurisdiction, enacted this year, SB 202, a 53 section, 98-page law that changes many aspects of Georgia elections. It has spawned several federal lawsuits, most of which include voting discrimination claims. The Lawyers' Committee is counsel in the one of these suits.

The litigation will unquestionably be resource intensive even if the various cases are fully or partially consolidated and the Plaintiffs engage in substantial coordination. It will require numerous experts and extensive fact discovery. There will be elections – and possibly multiple cycles of elections -- that will occur before Plaintiffs will have the evidence needed to establish a constitutional or Section 2 violation and the court will set aside the time to hear and decide the claims. If Plaintiffs prevail, Georgia will undoubtedly appeal and even more time will pass.

But for the *Shelby County* decision, there would be no SB 202, at least not in its current form, because at least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place. This is perhaps most clearly demonstrated by Georgia

⁴⁰ *Georgia State Conference of the NAACP v. Hancock County*, Case No. 15-cv-414 (M.D. Ga. 2015).

introducing several restrictions focused on voting by mail:

- The new absentee ballot ID requirements mandate that voters include a Georgia Driver's license number or Georgia State ID number on their absentee ballot application. If they have neither, voters are required to copy another form of acceptable voter ID and attach the copies of ID documents along with other identifying information to both their absentee ballot applications and inside the absentee ballot envelope when returning the voted ballot.
- The bill also prohibits public employees and agencies from sending unsolicited absentee ballot applications to voters, yet threatens private individuals and organizations who are not so prohibited with a substantial risk of incurring hefty fines for every application they send to an individual who has not yet registered to vote or who has already requested a ballot or voted absentee.
- SB 202 significantly limits the accessibility of absentee ballot drop boxes to voters. While all counties would be required to have at least one, the placement of drop boxes is limited to early voting locations and drop boxes are available only to voters who can enter the early voting location during early voting hours to deposit their ballot inside the box. Thus, drop boxes are essentially useless to voters who can vote early in-person or who cannot access early voting hours at all due to work or other commitments during early voting hours.
- The bill also mandates an earlier deadline of 11 days before an election to request an absentee ballot, leaving some voters who become ill or have to travel out of the area in the lurch if they cannot vote during early voting and are unable to meet the earlier deadline to apply for a ballot.⁴¹

These restrictions were adopted right after the November 2020 election, where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4%) and Asian (40.3%) voters, at higher rates than white (25.3%) voters.⁴² Given this seemingly disproportionate impact on voters of color, I believe that if Georgia were subject to Section 5, these provisions would have been found retrogressive, and never would have been in effect. Instead, these provisions will be contested through time and resource intensive litigation under complex legal standards.

F. The Impact of *Shelby County* on the Loss of Observer Coverage

A less discussed impact of the *Shelby County* decision is on the loss of federal observer coverage. Under Section 8 of the Voting Rights Act,⁴³ the federal government had the authority to send federal observers to monitor any component of the election process in any Section 4(b) jurisdiction provided that the Attorney General determined that the appointment of observers was necessary to enforce the guarantees of the 14th and 15th Amendments.⁴⁴ A federal district court can

⁴¹ *Georgia State Conference of the NAACP, et al. v. Raffensperger, et al.*, N.D. GA, no. 1:21-cv-1250-JPB, First Amended Complaint, Doc. 35, ¶¶ 134-158.

⁴² *Id.*, ¶¶ 92-100.

⁴³ 52 U.S.C. § 10305.

⁴⁴ 52 U.S.C. § 10305(a)(2).

also authorize the use of observers when the court deems it necessary to enforce the guarantees of the 14th or 15th Amendments as part of a proceeding challenging a voting law or practice under any statute to enforce the voting guarantees under the 14th or 15th Amendment.⁴⁵

In the 2014 National Commission report, we determined that the Attorney General had certified 153 jurisdictions in eleven states for observer coverage and that the Department of Justice had sent several thousand observers to observe several hundred elections from 1995 to 2012.⁴⁶

While officially not stating this, the practice of the Department of Justice has been to apply the Supreme Court’s finding that the Section 4(b) coverage formula is unconstitutional not just to preclearance, but to observer coverage. The *Shelby County* decision has reduced observer coverage to a trickle. The Department of Justice has instead employed what it calls “monitors.”⁴⁷

The difference between federal observers and monitors is dramatic. Under the Voting Rights Act, “Observers shall be authorized to- (1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.” Monitors have no such rights: a jurisdiction does not need to provide any access to the voting process to any monitor.

It is not difficult to see the difference in how this plays out in practice. In a year where legislatures in formerly covered states like Arizona⁴⁸ and Texas⁴⁹ are conducting audits of election results or considering restricting the ability of election officials to limit the conduct of partisan poll watchers, it becomes vitally important for the federal government to have discretion to send observers to places with a history of voting discrimination for the purpose of ensuring that processes are fair and that voters of color are not disenfranchised.

G. Proposed Congressional Response to *Shelby County*

In 2019, the House passed H.R. 4, also known as the John Lewis Voting Rights Advancement Act, named after one of the true giants of our lifetimes, a person who literally put his life on the line so that others could vote free of discrimination on the basis of the color of their skin. Now is the time for Congress to honor his memory with passage of a bill that resuscitates Section 5.

H.R. 4 contains many beneficial provisions. It creates a new formula that determines which states would be subject to the preclearance provisions of Section 5, based on clearly defined incidents of voting rights violations; it creates a practice-based preclearance process applicable nationwide, based on clearly defined covered practices that have been shown to be particularly susceptible to use in a discriminatory fashion; it clarifies the authority of the Attorney General to assign observers to enforce constitutional and statutory protections of the right to vote; and it creates a “transparency”

⁴⁵ 52 U.S.C. §§ 10302(a), 10305(a)(2).

⁴⁶ 2014 National Commission Report at 180-82.

⁴⁷ See e.g., Press Release, U.S. Dep’t. of Justice, “*Justice Department Again to Monitor Compliance with the Federal Voting Rights Laws on Election Day*,” (Nov. 2, 2020), <https://www.justice.gov/opa/pr/justice-department-again-monitor-compliance-federal-voting-rights-laws-election-day>.

⁴⁸ Arizona Rev. Stat. § 16-602.

⁴⁹ Texas Senate Bill 7 (online at <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00007E.pdf#navpanes=0>).

requirement for all states and political subdivisions to provide public notice of any change in voting practices or procedures.

We respectfully suggest that more is needed, and that the “transparency” requirement provides the appropriate vehicle for our recommendation. The “transparency” provision in the prior H.R. 4, requires that any State or political subdivision that makes any change in a voting practice or procedure in any election for Federal office that results in a difference with that which has been in place 180 days before the date of the Federal election must provide reasonable and detailed public notice of the change within 48 hours. Additional, specific requirements for notice are provided as for polling place changes for Federal elections and for the changes in the constituency that will participate in any election through redistricting or reapportionment.⁵⁰

We agree that notice by any state or political subdivision of changes in voting practices or procedures and to any prerequisite to voting is essential to any effective response to the *Shelby County* decision, but we see no reason to limit the notice requirement to changes affecting Federal elections.⁵¹

Second, while notice is of overarching importance, more is needed. There must be an opportunity for voters, and those statutorily charged with protecting the civil rights of voters, to analyze the proposed change, and, if necessary, seek judicial relief if it appears that the change will be discriminatory. Thus, we propose a relatively modest waiting period of 30 days after notice is given before the change may be implemented. This leads to our third, and most important, recommendation. As is implicit in the creation of a waiting period before a change in voting practices may take effect, there must be the concomitant creation of a cause of action that allows for a determination as to whether the change may be implemented. For that, we recommend consideration of a standard that has been time-tested in the context of the pre-*Shelby County* Section 5 litigation: the retrogression standard. We recommend that the United States or an aggrieved party be granted the right to bring an action if the voting change would have the effect of diminishing the ability to vote of any citizens of the United States on account of race or color on in contravention of the guarantees set forth in the language minority provisions of the Voting Rights Act. It has long been settled that “the purpose of §5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral [process].”⁵² However, compared with Section 5, which requires the state to prove a lack of discriminatory purpose or effect, the cause of action we recommend would require the Attorney General or an aggrieved party to prove retrogression.

The “retrogression cause of action” provides an additional, reasonable, and necessary weapon in the fight against suppressive and discriminatory voting practices. First, and most important, it responds to current needs, which are not limited to those states and political sub-divisions that may be subject to geographic coverage or which attempt to implement practices known to be susceptible to discriminatory applications. As of July 14, 2021, at least 18 states had enacted laws this year that made it harder to vote.⁵³ These laws were passed not only in states like Georgia and Arizona, that were previously covered by Section 4 of the Voting Rights Act, but also by states not previously

⁵⁰ See H.R. 4, 116th Congress, Sec. 6.

⁵¹ See, e.g., *Katzenbach*, 383 U.S. at 310–15.

⁵² *City of Rome v. United States*, 446 U.S. 156, 185 (1980), quoting *Beer v. United States*, 425 U.S. 130, 141 (1976).

⁵³ “Voting Laws Roundup: July 2021,” www.brennancenter.org, Aug. 12, 2021.

covered, such as Indiana, Idaho, Kansas, Montana, Nevada, Oklahoma, Utah, and Wyoming,⁵⁴ and included provisions not captured in the “known practices” category, including those that make mail voting and early voting more difficult.⁵⁵

We believe that these amendments, individually and collectively, are constitutional under the current constitutional framework under the Fourteenth and Fifteenth Amendments. These amendments would respond to the current problems of jurisdictions enacting retrogressive voting changes that may be difficult to challenge under other provisions. In comparison to the needs addressed under this proposal, the burdens created under this proposal are relatively modest. The requirement of providing notice of changes provides almost no burden, as it would take little effort to provide notice. The concept of a stand-still period before a jurisdiction can implement a change is not unknown in our laws, and is required when interests that have less or no constitutional protection as compared with the right to vote, are at stake.⁵⁶ Given that most voting changes are not instituted – and should not be instituted – too close to an election, the 30-day stand-still would have limited adverse impact on states and political subdivisions, but would provide the substantial benefit of allowing voters time to assess the potential effect of the change.

Furthermore, the burden of creating a cause of action prohibiting retrogressive voting changes is constitutionally acceptable under the circumstances. The Supreme Court has stated that Congress has the enforcement authority to address voting changes that have a discriminatory effect.⁵⁷ In addition, because numerous other civil rights laws allow for discriminatory effect causes of action, including Title VII of the Civil Rights Act of 1964,⁵⁸ involving employment discrimination, and the Fair Housing Act of 1968,⁵⁹ permitting such a cause of action is hardly unusual.

Finally, creating a cause of action for retrogression nationally does not implicate the concerns about the equal sovereignty of the States, expressed by the majority in the *Shelby County* decision.⁶⁰ The retrogression cause of action should not be a threat to those jurisdictions whose proposed voting practices changes are intended to make it easier for voters to vote, because a party would have to successfully bring suit in order to stop the change, which seems implausible under the circumstances. The burden is placed on the party challenging the change. Proving retrogression is not as complicated as proving discriminatory results under Section 2, but it is a high standard, and history has taught us that it is perfectly suitable to assess the discriminatory effects of proposed changes in voting practices.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See, e.g.*, 42 C.F.R. §431.408 (implementing regulations for Medicaid and CHIP demonstration projects under the Social Security Act require that a state must provide at least a 30-day public notice and comment period regarding applications for a demonstration project or an extension of an existing demonstration project that the State intends to submit to the Centers for Medicare & Medicaid Services); 29 U.S.C. §2100 *et seq* (the Worker Adjustment and Retraining Notification Act requires that certain employers provide notification 60 calendar days in advance of plant closings and mass layoffs). 16 C.F.R. 803.10; 11 U.S.C. §363(b)(2) (the Hart-Scott-Rodino Act contains pre-merger notification requirement and a waiting period of 15 days for reportable acquisitions of a cash tender offer, and 30 days for all other types of reportable transaction); SEC Financial Reporting Manual, Section 14100.3 (requirement that tender offers remain open for 20 business days while SEC staff has the opportunity to review them).

⁵⁷ *City of Rome*, 446 U.S. at 173-79.

⁵⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)

⁵⁹ *Texas Dept., of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. 519 (2015).

⁶⁰ *Shelby County*, 570 U.S. at 544-45.

II. Why and How Congress Must Respond to *Brnovich*

A. Section 2 of the Voting Rights Act

From the ratification of the Fifteenth Amendment in 1870 through the 1960s, the federal government tried—and failed—to defeat the “insidious and pervasive evil” of “racial discrimination in voting,” which had been “perpetuated . . . through unremitting and ingenious defiance of the Constitution.”⁶¹ Although Justice Frankfurter wrote long ago that the Fifteenth Amendment targeted “contrivances by a state to thwart equality in the enjoyment of the right to vote” and “nullifie[d] sophisticated as well as simple-minded modes of discrimination[,]”⁶² prior to the VRA’s passage, this language proved largely aspirational.⁶³

Responding to the states’ tenacious “ability . . . to stay one step ahead of federal law,” Congress passed the VRA to provide a “new weapon[] against discrimination.”⁶⁴ The Act “reflect[ed] Congress’ firm intention to rid the country of racial discrimination in voting.”⁶⁵ The essence of the VRA’s protections was exemplified in Section 2, which provided: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”⁶⁶

Notwithstanding Section 2’s broad language, jurisdictions sought to evade its reach by placing “heavy emphasis on facially neutral techniques.”⁶⁷ These “techniques” included everything from “setting elections at inconvenient times” to “causing . . . election day irregularities” to “moving polling places or establishing them in inconvenient . . . locations.”⁶⁸ In one Mississippi county, voters were forced to “travel 100 miles roundtrip to register to vote.”⁶⁹ In one Alabama county, “the only registration office in the county [was] closed weekends, evenings and lunch hours.”⁷⁰ These regulations ostensibly governed the time, place, and manner of voting in a neutral way, but they “particularly handicap[ped] minorities.”⁷¹

Against this backdrop, and responding to this Court’s plurality decision in *City of Mobile v. Bolden*, which had read into Section 2 a “discriminatory purpose” element,⁷² Congress expressly expanded Section 2, now codified at 52 U.S.C. § 10301. As amended, Section 2 prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race

⁶¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966).

⁶² *Lane v. Wilson*, 307 U.S. 268, 275 (1939)

⁶³ See, e.g., *Katzenbach*, 310–15 (describing pre-VRA efforts to enforce the Fifteenth Amendment).

⁶⁴ Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523, 524–25, 550 (1973) (hereinafter *Right to Vote*).

⁶⁵ *Katzenbach*, 383 U.S. at 315.

⁶⁶ Voting Rights Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437, 437.

⁶⁷ *Right to Vote*, *supra* at 552.

⁶⁸ *Id.* at 557–58.

⁶⁹ Steven L. Lapidus, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 Ford. L. Rev. 93, 93 (1983).

⁷⁰ *Id.* at 93–94.

⁷¹ *Id.* at 96.

⁷² 446 U.S. 55, 62 (1980).

or color.”⁷³ Congress further specified that, under Section 2, a violation is established if, “based on the totality of [the] circumstances,” the political processes leading to an election are not “equally open to participation” by minority voters so that they have less opportunity than white voters “to participate in the political process and to elect representatives of their choice.”⁷⁴ By adopting this “results test,” Congress captured the “complex and subtle” practices which “may seem part of the everyday rough-and-tumble of American politics” but are “clearly the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination.”⁷⁵

Section 2 provides relief for both *vote dilution*—schemes that reduce the weight of minority votes—and *vote denial*—standards, practices, or procedures that impede minority citizens from casting votes or having their votes counted. Vote-denial cases were the paradigmatic, “first generation” cases brought under Section 2. Only later did the Supreme Court “determine[] that the Act applies to ‘vote dilution’ as well.”⁷⁶

Thirty-five years ago, in *Gingles v. Thornburg*,⁷⁷ the Court recognized that Congress inserted the words “results in” to frame the Section 2 inquiry. Instead of asking whether, in a vacuum, a voting practice facially sounds as if it denies or abridges the rights of minority voters, the question is: in context, does the practice “interact” with pre-existing social and historical conditions to *result in* that burden? Answering this question requires courts to examine the challenged practice not as a theoretical postulate, but as a law or regulation that interacts with real-world conditions and must be evaluated through a fact-heavy, “intensely local appraisal,”⁷⁸ that accounts for the “totality of [the] circumstances.”⁷⁹

In *Gingles*, the Court explained the “essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the [voting] opportunities enjoyed by black and white voters.”⁸⁰ Recognizing Section 2’s command that courts consider the “totality of circumstances,” the *Gingles* Court looked to the Senate Report

⁷³ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. at 131, 134 (emphasis added).

⁷⁴ *Id.* A claim for violation of Section 2 (and the Fourteenth Amendment) can still be based on a finding of intentional discrimination, by application of the settled standards for proving intentional discrimination as set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which includes (1) the historical background; (2) the sequence of events leading to the challenged practice, including procedural and substantive deviations from normal process; (3) relevant legislative history; and (4) whether there is a disparate impact on any group. See, e.g., *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 220-21 (4th Cir. 2016).

⁷⁵ S. Rep. No. 97-417, at 12 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 189 (“Senate Report”).

⁷⁶ See Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 Colum. L. Rev. 418, 423 (1995). The congressional record accompanying the 1982 Amendments is replete with examples of the discriminatory practices that concerned Congress. The House Judiciary Committee noted that counties in Virginia and Texas had instituted “inconvenient location and hours of registration” and other restrictive practices that acted as “continued barriers” to racial minorities. H.R. Rep. No. 97-227, at 14, 17 (1981) (“House Report”). The Senate Judiciary Committee similarly identified states’ “efforts to bar minority participation” through “registration requirements and purging of voters, changing the location of polling places[,] and insistence on retaining inconvenient voting and registration hours.” Senate Report at 10 n.22. For example, a Georgia county “adopted a policy that it would no longer approve community groups’ requests to conduct voter registration drives, even though only 24 percent of black eligible voters were registered, compared to 81 percent of whites.” *Id.* at 11.

⁷⁷ 478 U.S. 30, 47 (1986).

⁷⁸ *Id.* at 79 (quotation marks omitted).

⁷⁹ 52 U.S.C. § 10301(b).

⁸⁰ 478 U.S. at 47.

accompanying the 1982 amendments to compile a list of relevant “circumstances.”⁸¹ These nine social and historical conditions—the “Senate Factors”—include considerations such as the history of official discrimination in the jurisdiction (Factor One); the extent of discrimination in the jurisdiction’s education, employment, and health systems (Factor Five); and whether the challenged practice has a tenuous justification (Factor Nine).⁸²

Since *Gingles*, four different Circuits addressing vote-denial cases have used the foundation laid in *Gingles* to analyze these matters. This formulation distills Section 2 liability into a two-part test: (1) there must be a disparate *burden* on the voting rights of minority voters (“an inequality in the opportunities enjoyed”); and (2) that burden must be *caused* by the challenged voting practice (“a certain electoral law, practice, or structure . . . cause[s] an inequality”) because the practice “interacts with social and historical conditions” of racial discrimination.⁸³ No other Circuit has put forth an alternative formulation.

B. The Facts of *Brnovich*

That was the situation until *Brnovich*. In *Brnovich*, the Supreme Court reviewed two Arizona voting practices: one mandated that votes cast out of the voter’s precinct (“OOP”) not be counted; the other prohibited the collection of mail-in ballots by anyone other than an election official, a mail carrier, or a voter’s family member, household member or caregiver. Plaintiffs had claimed that these practices violated Section 2 of the Voting Rights Act.

The United States District Court for the District of Arizona had ruled against the plaintiffs on both claims, but, applying the settled standards described above, the United States Court of Appeals for the Ninth Circuit had reversed, en banc, finding that the out-of-precinct policy violated the “results” prong of Section 2 and that the limitations on collections of absentee ballots violated both the “results” and “intent” prongs of Section 2.

As to the out-of-precinct policy, the Ninth Circuit identified several factors, acknowledged by the district court, leading to a higher rate of OOP voting by voters of color than by white voters: frequent changes in polling locations (polling places of voters of color experienced stability at a rate 30 percent lower than the rate for whites);⁸⁴ confusing placement of polling locations (indigenous populations in particular lived farther from their assigned polling places than did white voters,⁸⁵); and high rates of residential mobility.⁸⁶ As a result, 1 in every 100 Black voters, 1 in every 100 Latinx voter, and 1 in every 100 indigenous peoples voter cast an OOP ballot, compared to 1 in every 200

⁸¹ 478 U.S. at 36.

⁸² *Id.* at 36–37 (citing Senate Report at 28–29).

⁸³ *Gingles*, 478 U.S. at 47; *accord League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

⁸⁴ *Brnovich v. Democratic National Committee*, Joint Appendix, at 590 (online at https://www.supremecourt.gov/DocketPDF/19/19-1257/162052/20201130133300128_19-1257%20-1258%20Joint%20Appendix.pdf).

⁸⁵ *Id.* at 592.

⁸⁶ *Id.* at 594.

white voters.⁸⁷

As to the absentee-ballot collection limitation, the Ninth Circuit relied on the district court's finding that voters of color were more likely than white voters to return their early ballots with the assistance of third parties.⁸⁸ The disparity was the result of the special challenges experienced by communities that lack easy access to outgoing mail services, socioeconomically disadvantaged voters who lacked reliable transportation, and voters who had trouble finding time to return mail because they worked multiple jobs or lacked childcare services, all burdens that disproportionately fall on Arizona's minority voters.⁸⁹

Applying the "totality of circumstances" test, with primary reliance on the Senate factors that demonstrated a history of discrimination in Arizona that persists to this day, the Ninth Circuit found that both the OOP policy and the absentee-ballot collection law violated the "results" prong of Section 2 of the VRA. The court also found that the absentee ballot law had been enacted with discriminatory intent, based on statements of the sponsor and a racist video used to promote passage of the law.⁹⁰

C. The *Brnovich* Decision: Its Meaning, and Its Consequences

In *Brnovich*, a 6-3 Court reversed the Ninth Circuit's decision. Had it done so by applying the settled standards, we may not be here today. But, in writing for the Court's majority, Justice Alito provided guidelines for future treatment of Section 2 vote denial "results" cases that were not only new, but also contrary – or at least dilutive of – the decades-long accepted standards.

I emphasize *Brnovich* does not spell the end of Section 2 cases. Rather, it unnecessarily and unreasonably makes it more difficult for civil rights plaintiffs to win Section 2 actions, when they already were difficult to prevail. And it does so in a way that flies in the face of congressional intent. Further, it raises too many ambiguities in too many important areas to leave it to the courts to fill in the blanks. The greater difficulty and ambiguity threaten to undermine the core purpose of the Voting Rights Act.

1. *Brnovich* is a solution in search of a problem

First, *Brnovich* purports to cure a non-existent problem. One of the premises of *Brnovich* is that "[i]n recent years, [Section 2 vote denial claims] have proliferated in the lower courts."⁹¹ In support of this statement, the Court relies on the amicus curiae briefs of Sen. Ted Cruz, the State of Ohio, and the Liberty Justice Center.⁹² However, those briefs describe a total of perhaps 16 cases, dating back over 7 years, and only 3 of them led to a finding of Section 2 liability.

The fact is that since Congress amended Section 2 in 1982 and since the Supreme Court supplied its test for adjudicating Section 2 violations, the Supreme Court has never deemed it necessary to review a single Section 2 vote-denial case. At the same time, there was absolutely no

⁸⁷ *Id.* at 595-96.

⁸⁸ *Id.* at 597.

⁸⁹ *Id.* at 598.

⁹⁰ *Id.* at 681.

⁹¹ *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *8 (2021).

⁹² *Id.* at n. 6.

evidence that courts were being overwhelmed by Section 2 vote denial cases. And when such cases are brought, courts have had no trouble applying the standard to separate discriminatory voting practices from benign election regulations. In short, the pre-existing standard had worked well.

2. **Brnovich reads a remedial statute narrowly**

One of the most important canons of statutory construction – and one that gives the greatest deference to congressional intent – is that remedial statutes are to be broadly construed,⁹³ and there are few statutes in this Nation’s history more remedial than the Voting Rights Act of 1965. Yet, rather than read the Act expansively, the Court created new stringent “guideposts,” most prominently suggesting higher standards for both the size of the burden and the size of the disparity, and a lower standard for the State to meet to justify the burdens it is placing on the right to vote.

The purported touchstone of the *Brnovich* opinion is the Court’s construction of the requirement in Section 2(b) that the political process be “equally open” as the “core” requirement of the law.⁹⁴ The concept of equal “opportunity” as used in the same statute, the Court acknowledged somewhat grudgingly, “may stretch that concept to some degree to include consideration of a person’s ability to *use* the means that are equally open.”⁹⁵ In that context, the Court turned to the “totality of the circumstances” test, and said that “any circumstance that has a logical bearing on whether voting is ‘equally open’ and afford equal ‘opportunity’ may be considered,” and proceeded to list five “important circumstances” that were relevant.⁹⁶

Some of these “important circumstances” seem fairly innocuous on their face: e.g., the size of the burden, the size of the disparity. Others not so much: e.g., the degree of departure of the challenged practice from practices standard when Section 2 was amended in 1982 or which are widespread today, and the opportunities provided by the electoral process as a whole. Another has never been deemed relevant to Section 2 analysis: the strength of the state’s justification for the practice – except in connection with assessment of the tenuousness of that justification. Overall, however, the devil is in the details, and in the ambiguities created by the Court’s specific choice of language that may pave the way for state legislatures to enact additional discriminatory laws and for lower courts to apply Section 2 parsimoniously in vote denial “results” cases.

3. **The size of the burden should include factors specific to the affected community resulting from discrimination**

The first factor that Justice Alito highlighted was the “size of the burden,” emphasizing that voters “must tolerate the usual burden of voting.”⁹⁷ The application of this “guidepost” by legislatures and lower courts might be colored by a footnote at the end of the paragraph on burden, where Justice Alito expounded on what “openness” and “opportunity” might mean (as, say, with museums or school courses that are open to all) as compared to the “absence of inconvenience” (such as lack of

⁹³ See *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (broadly construing the VRA as “aimed at the subtle, as well as the devious, state regulations which have the effect of denying citizens their right to vote”); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (stating general rule of statutory construction).

⁹⁴ *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *12; 52 U.S.C. § 10301.

⁹⁵ *Brnovich*, 2021 WL 2690267, at *12 (emphasis in original).

⁹⁶ *Id.*

⁹⁷ *Id.*

adequate transportation or conflicting obligations).⁹⁸ The vagueness with which the Court left this issue, and its relegation to a footnote, may limit its precedential impact, but its practical impact may be substantial.

What Justice Alito does not acknowledge is that some of these indicia of what he calls “inconvenience” are themselves not simply subjective to an individual, but, are reflective of a group’s socio-economic circumstances, that are themselves the product of a history of discrimination. In the Texas Photo ID case, for example, we were able to demonstrate that not only were Black and Latinx voters more likely than white voters not to possess the required photo ID, but that they were more likely than white voters not to be able to get the ID because of, among other reasons, lack of access to transportation.⁹⁹

The same logic might apply to polling place location and closure decisions that might make it just that much more burdensome for voters of color than for white voters to vote. Or, as in the new Georgia statute, SB 202, prohibiting line relief - the provision of food and water to those waiting in line to vote - particularly when voters of color are much more often confronted with long wait-times than are white voters.¹⁰⁰

Mandating additional voter ID requirements in order to submit an application for an absentee ballot or to return a voted absentee ballot is another new hurdle voters will now face in Georgia under its new omnibus bill. Under this provision, voters requesting an absentee ballot must submit with their application their driver’s license number, their personal identification number on a state-issued personal identification card, or a photocopy of other specified forms of identification. For voters who do not have a Georgia’s driver license or state ID card number, voting absentee will now require access to photocopy technology. Voters without such access to technology will face a higher burden in complying with these ID requirements. Recent data shows that Black Georgians are 58% more likely and Latinx Georgians are 74% more likely to lack computer access in their homes as compared to their white counterparts.¹⁰¹ Thus, we can expect voters of color to face a significantly higher burden than white voters in complying with the ID requirements for requesting and returning absentee ballots.

If *Brnovich* is construed by state legislatures as permitting them to impose barriers that affect different racial or ethnic groups differently because of their relative wealth – particularly when those differences are themselves the product of historic discriminatory practices – it will have a serious impact on the voting rights of persons of color.

4. 1982 Standards and Widespread Practice Are Not Important

Second, Justice Alito said that other relevant factors included the degree of departure of the challenged practice from the “standard practice when §2 was amended in 1982,” a choice which is

⁹⁸ *Id.*

⁹⁹ *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc).

¹⁰⁰ Georgia Senate Bill 202 (online at <https://www.legis.ga.gov/api/legislation/document/20212022/201498>); *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 36; Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places*, Georgia Public Broadcasting, Oct. 17, 2020, accessible at <https://www.npr.org/2020/10/17/924527679/why-do-nonwhitegeorgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl>.

¹⁰¹ *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 44.

largely left unexplained, other than in rebuttal to Justice Kagan’s dissent, in which he writes, somewhat tautologically, that “rules that were and are commonplace are useful comparators when considering the totality of the circumstances.”¹⁰² Although the Court acknowledges that this would not apply to practices that themselves were discriminatory in 1982, the fact is that such benchmarks are neither necessary nor productive. If the history of voter discrimination in this country has taught us anything, it is that those who want to stop voters of color from voting change their methods with the times, and with the change in the ways voters of color are voting.

Again, Georgia is illustrative. In Georgia, state legislators responded to the record-shattering turnout of 2020 by passing omnibus legislation that restricts the right to vote at nearly every step of the process and disproportionately affects voters of color. Among its provisions, the law requires voter identification in order to request an absentee ballot and vote absentee; severely limits access to absentee ballot drop boxes; and significantly shortens the period in which voters can apply for and cast absentee ballots. These restrictions were adopted right after the November 2020 election where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4%) and Asian (40.3%) voters, at higher rates than white (25.3%) voters.¹⁰³ But, Justice Alito’s reasoning may be construed as supporting the proposition that, if in 1982, Georgia did not make absentee ballots universally available, that could be a “highly important” consideration, even if voters of color are more heavily impacted than white voters by these changes. State legislatures should not be led to believe that they can get away with erecting new barriers to vote based on what they did 40 years ago.

Further, Justice Alito also observed that the “widespread” present day acceptance of the voting practice could justify its use. But it was precisely because certain discriminatory practices were “widespread” that the Voting Rights Act was necessary. It seems incongruous, if not irrational, to justify discrimination by the majority population against minority populations on the basis of “widespread” acceptance.

5. So-called “small differences” can be important.

Third, in explaining the importance of the size of the disparities, Justice Alito indicates that “small differences should not be artificially magnified,”¹⁰⁴ again dealing obliquely with the consequences of the differences being caused by differences in wealth – which may themselves be the result of historic racial discrimination. Specifically, the Court criticized the Ninth Circuit for finding disproportionate impact based on a relative comparison of the percentage of voters whose votes were rejected because they were cast out of precinct. In the case of Indigenous, Black, and Latinx voters, the percentage was 1% for each group; in the case of white voters, the percentage was .05.¹⁰⁵

The Court neglected to note that the discriminatory out of precinct practice meant that almost 4,000 votes cast by voters of color had been rejected – and that if their circumstances were equivalent to those of white voters, 2,000 of their votes would have counted.

¹⁰² 2021 WL 2690267, at n.15.

¹⁰³ *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 47.

¹⁰⁴ 2021 WL 2690267, at *13.

¹⁰⁵ *Id.* at *4.

The Texas Photo ID case is illustrative. There, the court found that, even though over 90% of all groups had the required ID, Black voters were twice as likely as white voters not to have the ID, and Latinx voters were about three times as likely. In fact, the court found that 608,470 Texas voters lacked the ID.¹⁰⁶ Obviously, the Texas numbers are meaningful no matter how viewed. But the point is that smaller numbers may be too. Legislatures and lower courts should not be led to believe that they can chip away at electoral margins by reducing the likelihood of voters of color being able to cast their votes, no matter how small the effect. We need not dwell on the closeness of the 2020 presidential election in Arizona, Georgia, and Wisconsin to underscore the importance of even small differentials in impact.

6. Other opportunities to vote do not necessarily ameliorate discrimination in particular methods of voting

Fourth, Justice Alito explained that the opportunities provided by the entire electoral system should be factored into the equation, implying that, for example, access to absentee ballots may be curtailed, as long as the voter can still vote in person.¹⁰⁷ But, if an advantageous means of voting is curtailed as to one group more than it is to another, what difference does it make that there may be other methods of voting? If all methods of voting made voting equally accessible, there would have to be only one method. Obviously, expanding methods of voting makes it more likely that people will vote. And, equally obviously, contracting them makes it less likely that people will vote. Contracting them in a way that affects some racial or ethnic groups more than others is inconsistent with the language and Congressional intent of Section 2. States should not be led to believe that they have carte blanche to target specific voting practices, when the effect is discriminatory, and try to justify it by the availability of other means of voting.

7. Justification for discriminatory practices must be based on reality

And, fifth, in explaining the state justification factor, the Court seemed to open the door to a state's justifying virtually any discriminatory action simply by parroting the words "fraud prevention."¹⁰⁸ Again, while the Court did not say so explicitly, the fear is that lower courts – and, worse, state legislatures – may so interpret the Court's opinion.

The incongruity of the Court's approach is seen in comparing the hundreds of thousands of voters who were potentially deprived from voting under Texas's prior Photo ID law, with the infinitesimally small number of persons even accused of fraudulently voting. A state's choice to prevent non-existent fraud at the expense of thousands of votes, disproportionately of person of color, is not legitimate. Again, permitting such choice, is inconsistent with the language of Section 2 and Congressional intent.

8. The Senate Factors are relevant

The *Brnovich* majority went on to raise questions as to whether the Senate Factors are relevant to a Section 2 vote denial case, implying they are not, but leaving ambiguous precisely what the Court means as to how the few Factors the Court deems potentially relevant fit in, other than

¹⁰⁶ *Veasey v. Perry*, 71 F.Supp.3d 627, 659 (S.D. Tex. 2014).

¹⁰⁷ 2021 WL 2690267, at *13.

¹⁰⁸ *Id.*

superficially.¹⁰⁹

Although *Gingles* involved vote dilution, the decision addressed Section 2 writ large, recognizing that “Section 2 prohibits *all* forms of voting discrimination, not just vote dilution.”¹¹⁰ Further, *Gingles* recognized the applicability of the various Senate Factors would naturally turn on the type of Section 2 claim at issue.¹¹¹ The *Gingles* Court’s statement that the Senate Factors will “often be pertinent to *certain types* of § 2 violations,” such as dilution,¹¹² cannot be reconciled with a conclusion that the Factors “*only*” inform one specific type of Section 2 claim.

D. The Growing Present Need

As with the need for the resuscitation of Section 5, recent events reflect the significant present-day need for an immediate response to *Brnovich*. As detailed throughout this testimony, for example, the recently enacted Georgia voter suppression law, SB 202 increases the burdens for virtually every aspect of voting from voting by mail through voting in person. At least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place were it not for the decision in *Shelby County*. The effect of the *Brnovich* decision on the challenge to SB 202 remains to be seen, but already defendants have moved to dismiss the complaints on the basis of *Brnovich*. Although, we strongly believe that the complaints as drafted fully and adequately plead a “results” claim under Section 2 even post-*Brnovich*, the very making of these arguments demonstrates how those who support the erection of barriers to vote intend on using that opinion.

Georgia, of course, is not the only state that is considering or has passed laws with new barriers to voting that disproportionately affect voters of color. Florida did so with SB 90, a law that – similar to Georgia’s – imposes new and unnecessary restrictions on absentee ballots, the use of drop-boxes, and line-warming. And Texas appears poised at this writing to pass an omnibus voting bill that would, among other things, empower partisan poll watchers with virtually unfettered access in polling places, while at the same time tying the hands of election officials to stop the poll watchers from engaging in intimidating conduct. Texas has a well-documented history of voter intimidation by poll watchers that has disproportionately affected voters of color. The courts have acknowledged this pattern before—in 2014, a federal district court described this very issue: “Minorities continue to have to overcome fear and intimidation when they vote. . . . [T]here are still Anglos at the polls who demand that minority voters identify themselves, telling them that if they have ever gone to jail, they will go to prison if they vote. Additionally, there are poll watchers who dress in law enforcement-style clothing for an intimidating effect to which voters of color are often the target.”¹¹³

As with Georgia’s SB 202, some of these provisions might have been stopped by an effective Section 5 and challenges to some of them may be hampered by the effect of the *Brnovich* decision.

¹⁰⁹ *Id.*

¹¹⁰ 478 U.S. at 45 n.10 (emphasis added); see Senate Report at 30 (confirming that Section 2 “prohibits practices, which . . . result in the denial of equal access to any phase of the electoral process for minority group members”) (emphasis added).

¹¹¹ *See id.* at 45.

¹¹² *Id.* (emphasis added).

¹¹³ *Veasey v. Perry*, 71 F. Supp. 3d 627, 636–37 (S.D. Tex. 2014), *aff’d and reversed on other grounds*, *Veasey v. Abbott*, 830 F. 3d 216 (5th Cir. 2016) (en banc).

The bottom line, however, is that recent events have only underscored the need for a robust Voting Rights Act.¹¹⁴

E. The Appropriate Congressional Response

The impact of *Brnovich* has yet to be measured, but common sense and history instruct us that those who wish to target voters of color will undoubtedly feel emboldened by a decision that can be read as making it more difficult for plaintiffs to prove a Section 2 violation, giving state legislatures a “Get Out of Jail” card to pass voter suppressive legislation and justify it simply by claiming “voter fraud.” Although we firmly believe that the courts should not apply *Brnovich* in such a manner, the threat is there. Continued commitment to the core purpose of the Voting Rights Act should not be left in the uncertainty created by the ambiguous and problematic language of *Brnovich*. We identify here a number of issues for consideration and would be pleased to work with the Committee on legislative text.:

- Clarify that the “totality of the circumstances” to support a Section 2 violation entails an intensely local appraisal.
- Clarify that “totality of the circumstances” may include any or all of the factors deemed relevant by *Gingles*, including the Senate Factors, and that no factors are exclusively pertinent to “results” claims or “dilution” claims. These include Factors 1 and 5, which are important, not for the back-of-the-hand reading given them by Justice Alito, but because they go to the core issue of the interaction between historic socio-economic discrimination and the voting practice in question.
- Clarify that, in determining the extent to which a challenged voting rule burdens minority voters, the absolute number or the percent of voters affected or the presence of non-minority voters in the affected area will not be dispositive.
- Clarify that in determining whether the policy underlying the use of a voting rule is tenuous – one of the Senate factors – the court should consider whether the voting rule in question was actually designed to advance and in fact materially advances a valid and substantiated state interest. That preventing voter fraud may be a valid state interest should not lead to a determination that any voting practice alleged to have been enacted to protect fraud is valid, particularly if the instances of voter fraud are rare, if not virtually non-existent, and the means chosen to combat the alleged fraud scarcely further that aim, and, further, do so at the expense of preventing eligible voters from voting.
- Clarify that a discriminatory law cannot be justified on the basis that it was a standard practice at a particular date, such as 1982, or is widespread today, but must be judged

¹¹⁴ See, e.g., *Shelby Cnty.*, 570 U.S. at 536 (“[V]oting discrimination still exists; no one doubts that.”); *Nomination of the Hon. Amy Coney Barrett to the Supreme Court: Hearing Before S. Comm. on the Judiciary* (Oct. 14, 2020) (“[R]acial discrimination still exists in the United States and I think we’ve seen evidence of that this summer.”) (statement of Amy Coney Barrett).

solely on the totality of the circumstances in the particular jurisdiction, as viewed at the time the action under Section 2 is brought.

- Clarify that the availability of other methods of voting not impacted by the voting rule at issue cannot weigh against finding a violation.
- Put an end to any doubt, as raised by the concurring opinion of Justices Gorsuch and Thomas in *Brnovich*, that there is a private cause of action for a Section 2 violation, as every Circuit Court of Appeals has held.

I am not in favor of employing a burden-shifting approach because I believe that Section 2 vote denial claims should be restored to their pre-*Brnovich* state and burden-shifting has not been part of the Section 2 inquiry. In addition, burden-shifting places the state's interest at the center of the inquiry in the second and third prongs in the three-prong analysis, whereas the focus should be on the impact on voters.

III. Conclusion

The eight years since the Supreme Court's decision in *Shelby County v. Holder* have left voters of color the most vulnerable to voting discrimination they have been in decades. The record since the *Shelby County* decision demonstrates what voting rights advocates feared – that without Section 5, voting discrimination would increase substantially. The *Brnovich* decision – by creating new hurdles for Section 2 claimants to overcome – raises the stakes appreciably. Congress must act.