



WRITTEN STATEMENT OF
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For a Hearing on

Oversight of the Voting Rights Act: Potential Legislative
Reforms

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and Civil Liberties of the U.S. House Committee on the Judiciary

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Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Committee, thank you for the opportunity to testify before you on the critical issue of legislative reforms to restore and strengthen the Voting Rights Act.

The ACLU Voting Rights Project was established in 1965—the same year that the historic Voting Rights Act (VRA) was enacted—and has litigated more than 350 cases since that time. Its mission is to build and defend an accessible, inclusive, and equitable democracy free from racial discrimination. The Voting Rights Project’s recent docket has included more than 30 lawsuits last year alone to protect voters during the 2020 election; a pair of recent cases in the Supreme Court challenging the last administration’s discriminatory census policies: *Department of Commerce v. New York*¹ (successfully challenging an attempt to add a citizenship question to the 2020 Census), and *Trump v. New York*² (challenging the exclusion of undocumented immigrants from the population count used to apportion the House of Representatives); challenges to voter purges and documentary proof of citizenship laws; and challenges to other new omnibus legislation restricting voting rights in states like Georgia and Montana.

In my capacity as Deputy Director of the ACLU Voting Rights Project, I assist in the planning, strategy, and supervision of the ACLU’s voting rights litigation nationwide, which focuses on ensuring that all Americans have access to the franchise, and that everyone is equally represented in our political processes. I recently argued successfully before the U.S. Court of Appeals for the Seventh Circuit in *League of Women Voters of Indiana v. Sullivan*,³ a case that challenged an Indiana purge program that failed to follow the procedural safeguards mandated by the National Voter Registration Act. I am currently litigating or have litigated numerous cases challenging racially discriminatory laws under Section 2 of the Voting Rights Act, including *Sixth District of the African Methodist Episcopal Church v. Kemp*,⁴ a challenge to Georgia’s sweeping voter suppression law enacted in the wake of the 2020 elections; *Thomas v. Andino*,⁵ a challenge to South Carolina’s absentee ballot witness requirement and required “excuse” for absentee voting during the COVID-19 pandemic; *MOVE Texas v. Whitley*,⁶ a challenge to a discriminatory purge program in Texas; *Missouri State Conference of the NAACP v. Ferguson-Florissant School District*,⁷ a challenge to the discriminatory at-large method of electing school board members; *Frank v. Walker*,⁸ a challenge to Wisconsin’s voter ID law; and *North Carolina*

¹ 139 S. Ct. 2551 (2019).

² 141 S. Ct. 530 (2020).

³ Nos. 20-2815 & 20-2816, 2021 WL 3028816, --- F.4th ---, (7th Cir. July 19, 2021).

⁴ No. 1:21-cv-01284-JPB (N.D. Ga. filed Mar. 29, 2021).

⁵ No. 3:20-cv-01522-JMC (D.S.C. filed Apr. 22, 2020).

⁶ No. 5:19-cv-00171 (W.D. Tex. filed Feb. 4, 2019).

⁷ 894 F.3d 924 (8th Cir. 2018).

⁸ 768 F.3d 744 (7th Cir. 2014).

State Conference of the NAACP v. McCrory,⁹ a challenge to North Carolina’s monster voter suppression law passed in the immediate aftermath of *Shelby County v. Holder*.¹⁰

More than a century ago, the Supreme Court famously described the right to vote as the one right that is preservative of all others.¹¹ As Chief Justice John Roberts has explained, “[t]here is no right more basic in our democracy than the right to participate in electing our political leaders.”¹² We are not truly free without self-government, which requires a vibrant participatory democracy, in which everyone is treated fairly in the process and equally represented. Unfortunately, our nation has a long and well-documented record of fencing out certain voters—Black voters and other voters of color, in particular—and today that racial discrimination in voting remains a persistent and widespread problem.

The landmark Voting Rights Act (“VRA”), one of the signature achievements of the Civil Rights Movement, has been critical in the efforts to combat this enduring blight. Passed initially in 1965, and reauthorized and amended (with bipartisan support) in 1970, 1975, 1982, 1992, and 2006,¹³ it is one of the most effective pieces of federal civil rights legislation. But eight years ago, in *Shelby County v. Holder*,¹⁴ the Supreme Court struck down the formula used to determine which jurisdictions were covered by a federal preclearance regime. This meant that the heart of the VRA—the requirement that jurisdictions with a long record of voter suppression submit proposed changes to election laws to federal officials *before* they went into effect—functionally ended. After *Shelby County*, the main protection afforded by the VRA is Section 2, which imposes a nationwide ban on the use of any “voting qualification or prerequisite to voting ... which results in a denial of abridgment of the right of any citizen of the United States to vote on account of race or color.”¹⁵ Section 2 provides only post-enactment relief, *i.e.*, it authorizes challenges that can be brought only *after* a law has been passed or a policy implemented.

The inadequacy of Section 2 post-enactment relief as the principal means to protect against discrimination in voting cannot be overstated, and the ACLU and other civil rights organizations have discussed the need for the restoration of the prophylactic preclearance regime

⁹ 831 F.3d 204 (4th Cir. 2016) (“*North Carolina NAACP v. McCrory*”).

¹⁰ 570 U.S. 529 (2013).

¹¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[The right to vote] is regarded as a fundamental political right, because [it is] preservative of all rights.”).

¹² *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 191 (2014); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

¹³ *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments, Pub. L. No. 97-205, 96 Stat. 131 (1982); Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, as amended, 52 U.S.C. § 10301 *et seq.*

¹⁴ 570 U.S. 529 (2013).

¹⁵ 52 U.S.C. § 10301.

innumerable times.¹⁶ Even if not sufficient on its own, however, Section 2 remains an important and necessary tool to protect voting rights, and its continuing vitality is critical. My written testimony¹⁷ will focus on three issues that have substantially weakened the force of post-enactment relief as a bulwark against discrimination: the standard for obtaining preliminary injunctive relief in voting rights cases, the use of the so-called *Purcell* principle as an additional barrier to relief, and the Supreme Court’s recent decision in *Brnovich v. Democratic National Committee*.¹⁸

The Supreme Court’s reasoning in *Shelby County* in dismantling preclearance was premised in part on the idea that plaintiffs could still challenge discriminatory voting laws under Section 2 and win relief, including preliminary relief, before an election occurs with a discriminatory practice in effect.¹⁹ Unfortunately, this premise was deeply mistaken. Section 2 cases are expensive, difficult to bring, and frequently take years to litigate to completion—to say nothing of the meritorious cases that are never brought at all due to these costs. Theoretically, plaintiffs can win preliminary relief while a case is being litigated—freezing the status quo, while the court determines whether an election practice violates federal law—but this too works better in theory. In practice, the standard for winning a preliminary injunction, which includes proving a substantial likelihood of success on the merits, poses a particularly high bar to relief in voting rights cases, due to their complexity and fact-intensive nature. This means that elections proceed under regimes ultimately found to be discriminatory, with no way to compensate voters for that harm, and with the victors of those tainted elections enacting policy and accruing the benefits of incumbency.

¹⁶ See, e.g., *The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-In Coverage, Election Observers, and Notice: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary*, 117th Cong. (2021) (statement of Sophia Lin Lakin, Deputy Director of the ACLU’s Voting Rights Project) (“June 2021 Lakin Testimony”); *Continuing Challenges to the Voting Rights Act Since Shelby County v. Holder: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary*, 116th Cong. (2019) (statement of Leah Aden, Deputy Director of Litigation of the NAACP Legal Defense and Education Fund, Inc.); *Discriminatory Barriers to Voting: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary*, 116th Cong. (2019) (statement of Jon Greenbaum, Chief Counsel, Lawyers’ Committee for Civil Rights Under Law); *Current Conditions: Evidence of Continued Discrimination in Voting and the Need for Preclearance, Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary*, 116th Cong. (2019) (statement of Myrna Pérez, Director, Voting Rights and Elections Program, Brennan Center for Justice at NYU School of Law); *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, Hearing Before the H. Subcomm. on Elections*, 116th Cong. (2019) (statement of Thomas A. Saenz, President and General Counsel, Mexican-American Legal Defense and Education Fund).

¹⁷ This written statement incorporates my prior oral and written testimony before this subcommittee on June 29, 2021. See June 2021 Lakin Testimony, *supra* note 16. I am also indebted to my ACLU Voting Rights Project colleagues who contributed to the preparation of this statement, in particular William Hughes, who provided invaluable support, as well as ACLU Voting Rights Project Director Dale Ho and Brett Schratz.

¹⁸ 141 S. Ct. 2321 (2021).

¹⁹ 570 U.S. at 537 (“Both the Federal Government and individuals have sued to enforce § 2, ... and injunctive relief is available in appropriate cases to block voting laws from going into effect.”).

Compounding the problem is the metastasization of the so-called *Purcell* principle. Named after a short, unsigned Supreme Court order from 2006,²⁰ which reminded courts to consider the potential confusion that may ensue if court orders, especially conflicting ones, issue close to an election, this restatement of common sense has grown into an almost *per se* bar used to deny relief in voting cases. Over the past decade, federal courts have applied *Purcell* ever more aggressively, even when the putative concerns of voter confusion or administrative burden on elections officials that originally animated the doctrine are wholly absent, and in a way that tends to work in one direction: against voters and voting rights. Compounding the issue is the frequent lack of explanation of a court’s reasoning: applications of *Purcell* often appear in the form of unsigned orders, leaving the parties and the voting public with little clarity. In short, the expansion of *Purcell* has made the already difficult task of halting a discriminatory regime *before* it can taint an election even harder, blocking relief even where voting rights plaintiffs are ultimately successful—and even when they have demonstrated as much early in their case.

Finally, the Supreme Court’s recent decision in *Brnovich v. Democratic National Committee*²¹ will make it significantly more difficult for voters to bring successful lawsuits to block discriminatory voting laws under Section 2. Under the guise of interpreting the statute, the Supreme Court articulated five “guideposts” that will inevitably make showing a discriminatory burden more difficult for Plaintiffs, while putting a thumb on the scale for government defendants by allowing for the mere specter of voter fraud—without any evidence—to justify discriminatory practices.²²

Fortunately, for all three of these issues, Congress has the power to act to protect voting rights. It has the clear authority to set standards for the issuance of preliminary relief and injunctions in voting rights cases, and the clear ability to correct the misinterpretation of the VRA contained within *Brnovich*. Not only does Congress have the power to do so, it also has the responsibility. Under both the Fourteenth and Fifteenth Amendments, which promise equal protection under the law and the right to vote free of racial discrimination, respectively, Congress is expressly authorized—and given the duty—to make these guarantees real.²³ The John Lewis Voting Rights Advancement Act (“JLVRAA”),²⁴ which passed the House of Representatives in the 116th Congress, with additions to address the explosive growth of *Purcell* in the 2020

²⁰ See *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

²¹ 141 S. Ct. at 2321.

²² *Id.* at 2336 (“[W]e think it sufficient for present purposes to identify certain guideposts that lead us to our decision.”).

²³ U.S. Const. amends. XIV, XV; see also *Tennessee v. Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) (“Broad interpretation [of Congress’ power] [i]s particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed,”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (“Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.”).

²⁴ John Lewis Voting Rights Advancement Act, S.4263, 116th Cong. (2020).

election cycle and repair the damage to Section 2 wrought by the recent *Brnovich* decision, would fight the serious threats to voting rights that we see today.

I. The Standard for Obtaining Preliminary Injunctive Relief

Following *Shelby County*, Section 2 of the VRA is the heart of federal protections for the right to vote. Unlike the VRA’s preclearance regime, which applies *before* a law goes into effect, a Section 2 claim can only be brought *after* a law is already enacted or a policy announced. In the paradigm course of civil litigation, plaintiffs will file a lawsuit, and then after a trial on the merits, a court will impose money damages or issue an injunction, *i.e.*, an order to take or forebear from taking some action. Commonly in civil rights litigation, these injunctions bar a government actor from enforcing a law found to violate civil rights law or the U.S. Constitution. Thus, under Section 2 plaintiffs must go to court and litigate their claims—a process that costs hundreds of thousands, if not millions, of dollars and often takes years—before a judge will strike down the law or order the practice stopped. In the interim, the law or practice remains in effect. In the context of voting rights litigation, this means multiple elections involving hundreds of elected officials may be irrevocably tainted by taking place under a discriminatory regime.

In some circumstances, however, plaintiffs can move for a preliminary injunction, which is an order that preserves the status quo while the lawsuit plays out. But these are particularly difficult to win in voting rights cases. One prong of the standard for the issuance of a preliminary injunction is a showing of substantial likelihood of success on the merits.²⁵ This standard makes sense in many contexts: before a court acts, prior to a full hearing of the evidence at trial or a settlement, it should be confident that it has a good basis to do so. But the difficulties in obtaining preliminary relief under this standard in the voting rights context have imperiled the ability to protect voters from being irrevocably harmed by discriminatory electoral regimes.

Voting rights cases are extremely complex and fact intensive, which is reflected in the significant expense in money and time required to litigate these cases successfully.²⁶ And courts have required voting rights plaintiffs to make a substantial showing of this full panoply of proof in order to meet the likelihood of success on the merits standard before it will grant preliminary relief. This is incredibly difficult to do in a truncated time period, not least because voting rights cases frequently involve extensive statistical analysis of voting patterns and practices and plaintiffs have limited access to the information necessary to meet this showing.²⁷ As a result, regimes that are ultimately found to be discriminatory can irrevocably taint an election even where plaintiffs do whatever they can to prevent that from happening.

²⁵ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).

²⁶ See June 2021 Lakin Testimony, *supra* note 16, at 5–9 (detailing the time and resource intensive nature of Section 2 cases).

²⁷ See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143, 2155–56 (2015) (describing the forms of evidence required in VRA cases).

My prior written testimony before this subcommittee identifies 15 Section 2 cases, brought after the *Shelby County* decision, where plaintiffs sought a preliminary injunction unsuccessfully—only to go on to win at trial or reach a favorable settlement.²⁸ On average, those cases took 27 months to litigate to the grant of relief (to say nothing of unsuccessful appeals and disputes over attorneys’ fees).²⁹ In the interim, multiple elections took place, millions of voters cast ballots, and hundreds of elected officials took office, under regimes courts ultimately found were discriminatory or that were abandoned.³⁰ For example, in a case the ACLU and partners brought challenging an omnibus voter suppression bill, *North Carolina NAACP v. McCrory*, despite plaintiffs moving as quickly as possible and seeking a preliminary injunction, voters in North Carolina chose 188 federal and state elected officials under election rules that would be subsequently struck down.³¹

The deficiencies of litigation, with the difficulty of securing preliminary relief, are particularly acute in the voting rights context because voting is different than other civil rights litigation. In cases of employment or housing discrimination based on membership in a protected class, at least in theory, going through the legal process can restore that person’s job or apartment, or make them whole through backpay or money damages. Elections are different: once an election transpires under a discriminatory regime, it is impossible to compensate the victims of voting discrimination. Their voting rights have been compromised irrevocably because the election has already happened and cannot be re-run. While those voters may be able to freely vote in future elections, winners of the elections conducted under unlawful practices gain the benefits of incumbency, making it harder to dislodge them from office. Those elected officials will make policy while in office, and courts cannot (and should not) dislodge those decisions, even if the mechanism under which they took office is later found to be unconstitutional or to violate the VRA.

The JLVRAA appropriately addresses these particular challenges by creating a standard for the issuance of preliminary relief in voting rights cases. First, plaintiffs must “raise[] a serious question” as to whether the challenged practice violates the VRA or the U.S. Constitution.³² This standard appropriately seeks to balance the needed prophylactic measures to protect the right to vote without inviting frivolous litigation. Then, the court must find that the hardship imposed on the defendant (generally a government actor) is less than the hardship imposed on the plaintiff (the voter), giving “due weight to the fundamental right to cast an effective ballot.”³³ This further ensures that courts are not compelled to issue injunctions at the drop of the hat: they must keep in mind, in addition to whether the claims are meritorious, whether the relief would be burdensome on the defendant.

²⁸ See June 2021 Lakin Testimony, *supra* note 16, at 10–12 (listing these cases).

²⁹ *Id.* at 12.

³⁰ *Id.*

³¹ *Id.* (citing *NC SBE Contest Results*, North Carolina State Board of Elections, <https://er.ncsbe.gov> (giving 2014 election results)).

³² JLVRAA, *supra* note 24, § 8(b)(4).

³³ *Id.*

Congress has the clear power to act here. The general standard for issuing preliminary injunctions is a judicial creation, which over time has developed from equitable principles into a four-pronged test familiar to lawyers and judges.³⁴ However, the Supreme Court has made it clear—repeatedly and unequivocally—that Congress has the authority to alter the considerations for granting equitable relief, which includes the issuance of injunctions.³⁵ The Court has further explicitly recognized that this reasoning covers preliminary relief,³⁶ and that Congress can even make the issuance of certain injunctions automatic—an extreme measure compared to the much more modest one contained in the JLVRAA.³⁷ In other words, “Congress may intervene and guide or control the exercise of the courts’ discretion”—as long as it does so clearly.³⁸ This reasoning has been applied in federal court cases acknowledging—and upholding—the legislatively modified standard for the issuance of preliminary injunctions. These cases interpret federal laws such as the Petroleum Marketing Practices Act,³⁹ Endangered Species Act,⁴⁰ National Labor Relations Act,⁴¹ Federal Trade Commission Act,⁴² and the Securities Exchange Acts of 1933 and 1934.⁴³ All of which is to say: there is a long-running history and unambiguous precedent blessing Congress’ ability to specify the conditions under which a preliminary injunction issues.

II. The *Purcell* Principle

The current standard for obtaining a preliminary injunction makes it difficult enough for plaintiffs to ensure that discriminatory regimes are blocked before they can taint an election. But the problem has worsened due to the expansion of the so-called “*Purcell* principle.”⁴⁴ As described in more detail in my prior testimony, the *Purcell* principle stood at one point for the commonsense idea that courts should be cautious in issuing orders which change election rules in

³⁴ See Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2948 (3d ed. 2021) (describing “[a] formulation that has become popular in all kinds of cases”); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (setting out the standard).

³⁵ See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (“Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is ... for the courts to enforce them when enforcement is sought.”); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

³⁶ *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

³⁷ See *Tenn. Valley Auth.*, 437 U.S. at 153 (holding that Congress required in the Endangered Species Act that a final injunction automatically issues once a merits violation is shown).

³⁸ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

³⁹ See 15 U.S.C. § 2805(b); *Mac’s Shell Serv., Inc. v. Shell Oil Products Co. LLC*, 559 U.S. 175 (2010).

⁴⁰ See 16 U.S.C. § 1536; *Tenn. Valley Auth.*, 437 U.S. 153; see also *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782 (9th Cir. 2005); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987), *abrogated on other grounds as recognized in Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088-91 (9th Cir. 2015).

⁴¹ See 29 U.S.C. § 160 (j); *Chester ex rel. N.L.R.B. v. Grane Healthcare Co.*, 666 F.3d 87 (3d Cir. 2011).

⁴² See 15 U.S.C. 53(b); *F.T.C. v. Inc. 21com Corp.*, 688 F. Supp. 2d 927 (N.D. Cal 2010).

⁴³ See 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d); *SEC v. Bravata*, 763 F.Supp.2d 891 (E.D. Mich. 2011); *SEC v. Homestead Props, L.P.*, 2009 WL 5173685 (C.D. Cal. Dec. 18, 2009); *SEC v. Schooler*, 902 F. Supp. 2d 1341 (S.D. Cal. 2012).

⁴⁴ See Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427, 428 (2017).

the period right before an election.⁴⁵ In recent years, however, the use of *Purcell* to block relief has skyrocketed⁴⁶ and the doctrine has become something much broader, bearing little resemblance to the guidance given in the brief, unsigned order that is its namesake.⁴⁷ The *Purcell* of today displaces the case-specific analysis required for injunctions and operates as an almost *per se* bar on granting relief in voting rights cases, in some (nebulously defined) period before an election. This has real effects: as outlined in my prior testimony, injunctions are frequently blocked by *Purcell*, even in cases where plaintiffs ultimately to go on—after the lengthy process of litigation—to win relief.⁴⁸ The use of *Purcell* is only expanding, and left unchecked, it threatens to kneecap voting rights litigation nationwide.

First, *Purcell* today is invoked even when there is no risk of voter confusion, zero or minimal administrative burden, and where plaintiffs have acted quickly. An illustrative example is *Republican National Committee v. Democratic National Committee*.⁴⁹ As the COVID-19 pandemic spread, Wisconsin saw a last-minute deluge of absentee ballot applications for primary elections held April 7, 2020, and elections officials struggled to process them quickly. Finding that the requirement for a witness signature as applied to a subset of voters and the absentee ballot receipt deadline were likely unconstitutional under the circumstances, the court preliminarily enjoined the witness requirement for those voters and extended the absentee ballot receipt deadline by six days, requiring the state to count ballots so long as they were received by April 13th (even if postmarked after Election Day).⁵⁰ Although elections officials did not contest the injunction, private intervenors won partial stays of the injunction at the Seventh Circuit (as to the witness signature) and the Supreme Court (as to the postmark requirement), with both courts relying on *Purcell*.⁵¹ There was, however, no risk of voter confusion: voters were merely waiting to receive their ballot, and the district court's order would merely allow it to be counted. Nor was there risk of administrative burden: instead, elections officials had a few extra days to process an unprecedented number of absentee ballot applications. Indeed, the two applications of *Purcell* themselves imposed additional burdens on elections officials—during the first weeks of an unprecedented, deadly pandemic—and created the chaotic, confusing dynamic that *Purcell* theoretically counsels against. My prior written testimony includes several other examples that, taken together, show how the *Purcell* principle has been used to block relief frequently in cases where the stated concerns of the *Purcell* decision itself—the need to avoid

⁴⁵See June 2021 Lakin Testimony, *supra* note 16, at 13-29.

⁴⁶ In presidential election years, courts used *Purcell* to deny or stay injunctive relief only six times in the 2012 elections – and 58 times in 2020. 2020 was an exceptional year for many reasons, but the pattern holds for midterm election years: in 2014, courts applied *Purcell* to deny or stay injunctive relief five times, while in 2018, this grew to ten instances.

⁴⁷ See *id.* at 13-14 (discussing original order in *Purcell*).

⁴⁸ See *id.* 16 at 14-19 (listing such cases).

⁴⁹ *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952 (W.D. Wis. 2020), *rev'd sub nom. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam).

⁵⁰ See *id.* at 972, 976, 980.

⁵¹ See *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538 & 20-1546, 20-1539 & 20-1545, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).

confusing voters and imposing burdens on election officials and the election system—are not present.⁵²

Second, the use of the *Purcell* principle appears to apply primarily in one direction only: to bar efforts to expand access to the ballot. Here, the cases in which *Purcell* does not apply can be just as revealing as the situations in which it does. For example, in Minnesota in the lead-up to the 2020 general election, voting rights plaintiffs and state officials entered into a consent decree in state court that allowed all ballots postmarked on or before Election Day, and received within seven days after, to be counted.⁵³ In *Carson v. Simon*, a new set of plaintiffs sued, seeking a preliminary injunction blocking implementation of the consent decree on September 24—almost eight weeks after the decree was entered—which was denied on October 12.⁵⁴ On appeal, the Eighth Circuit reversed, enjoining the state court order and therefore moving up the absentee ballot deadline, in an opinion issued *five days* before the general election.⁵⁵ It is hard to imagine a situation where *Purcell* is more applicable: here, the requested order came at the eleventh hour, risked a great deal of voter confusion, and imposed serious administrative burdens as state officials subsequently struggled to comply with the new ballot receipt deadline. Nevertheless, the court declined to apply *Purcell*.⁵⁶ Other examples demonstrating this one-directional application are described in my prior written testimony.⁵⁷

Third, in some instances, too, appeals courts invoking *Purcell* to stay relief granted by a district court (and the increasing regularity of such stays) create the very voter confusion and administrative burdens that the *Purcell* principle in theory aims to avoid. For example, in *Frank v. Walker*,⁵⁸ the district court issued a preliminary injunction against Wisconsin’s voter ID law, and nearly 12,000 absentee ballots were mailed to voters without instructions on providing identification, hundreds of which were cast without the required documents. The Seventh Circuit stayed this order, without any mention of the voters who were merely following instructions given to them by the state; fortunately, the Supreme Court lifted the stay.⁵⁹ But as elections have become increasingly litigated, and *Purcell* has become an increasingly prominent doctrine, these situations will reoccur. Most concerning, in a 2020 challenge to South Carolina’s absentee ballot witness requirement, the Supreme Court stayed an

⁵² See June 2021 Lakin Testimony, *supra* note 16, at 20-23 (giving examples of cases where the requested relief was explicitly supported by elections officials and where the requested relief would meaningfully reduce confusion caused by last-minute changes by government actors).

⁵³ See *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct. 2020).

⁵⁴ *Carson v. Simon*, 494 F.Supp.3d 589 (D. Minn. 2020).

⁵⁵ 978 F.3d 1051 (8th Cir. 2020).

⁵⁶ *Id.* at 1061 (“[T]he *Purcell* principle does not preclude an injunction under the present facts.”).

⁵⁷ See June 2021 Lakin Testimony, *supra* note 16, at 24-26. In another egregious example, the Eighth Circuit stayed an injunction blocking a voter ID law in North Dakota (an injunction which had been in place for months) less than a week before voting began. *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018). The court then explicitly stated “the courthouse doors remain open” to those affected by the change, *id.* at 561, such as Native American voters with tribal IDs or IDs listing a P.O. box as an address—both invalid under the law—only for the subsequent case to be blocked by *Purcell*. *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-222, 2018 WL 5722665 (D.N.D. Nov. 1, 2018).

⁵⁸ 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd* 768 F.3d 744 (7th Cir. 2014).

⁵⁹ See *Frank v. Walker*, 574 U.S. 929 (2014) (mem.).

injunction that had been affirmed by the en banc Fourth Circuit, with three members of the Supreme Court expressing the view that any votes that had already been cast in reliance on the injunction should not be counted.⁶⁰ It should be beyond debate that voters who merely relied in good faith on instructions from elections officials in casting their ballots should not be disenfranchised due to *Purcell*.

Finally, all these problems are exacerbated by the fact that in *Purcell*-based orders, courts have frequently failed to explain their decisions;⁶¹ instead, the parties and the public are made to guess at basic parameters of the doctrine, such as how long the relevant period is, what counts as an election rule, and how to factor in voters' reliance interests. Typically, orders in federal courts follow full briefing, oral argument (as need be), and judicial research and drafting, a process which can often take months. The product of this is a reasoned opinion that assures the parties that their arguments got a fair hearing and provides guidance as to the rules of the road going forward. *Purcell* departs sharply from this practice, and in fact, the development of the principle occurred almost entirely in a series of four unsigned orders in the 2014 election.⁶² These brief orders provide little guidance to voters or litigations—and feed speculation that decisions are based on political concerns. While the exigent nature of election cases may sometimes leave courts with little time to craft a lengthy opinion, courts can always issue an order and follow up with an opinion explaining their reasoning. Instead, the lack of written opinions means there is no way to ensure the *Purcell* principle is being applied consistently—or even define what the *Purcell* principle is.

As with the preliminary injunction standard, Congress' ability to act here is clear. The manner under which injunctions issue, the concerns courts should take into consideration (and those they should not), and the way to weigh competing interests are all matters within Congress' power to define. In the context of *Purcell*, this could look like defining a specific, measurable period in which changes are disfavored, for legitimate reasons—to avoid the *Purcell* window growing ever larger and even more unmoored from its foundations. Congress could also clearly state the public's interest in ensuring free and fair access to the ballot, and how that interest should be weighed against administrative concerns. It could specify exactly what forms of voter confusion courts should keep in mind and how to best minimize that confusion. Finally, it could provide guidance to courts reflecting the reality that sometimes, unforeseen events—whether an unprecedented pandemic or the actions of elections officials—occur and that this is no reason to abdicate their responsibility to safeguard the constitutional right to vote.

⁶⁰ *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (mem.) (noting that Justices Thomas, Alito, and Gorsuch would grant the application for a stay of the injunction in full, rather than just prospectively).

⁶¹ See, e.g., *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (mem.); *Clarno v. People Not Politicians Or.*, 141 S. Ct. 206 (2020) (mem.); *Republican Nat'l Comm. v. Common Cause RI*, 141 S. Ct. 206 (2020) (mem.); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.); *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (mem.); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (mem.); *Thompson v. DeWine*, No. 19A1054, 2020 WL 3456705, --- S. Ct. --- (June 25, 2020) (mem.); *Moore v. Circosta*, 141 S. Ct. 46 (2020) (mem.); *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28 (2020) (mem.).

⁶² See *Frank v. Walker*, 574 U.S. 929 (2014) (mem.); *Veasey v. Perry*, 135 S. Ct. 9 (2014) (mem.); *Husted v. Ohio State Conf. of the NAACP*, 573 U.S. 988 (2014) (mem.); *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (mem.).

III. *Brnovich v. Democratic National Committee and Potential Fixes*

On July 1, 2021, the Supreme Court released its decision in *Brnovich v. Democratic National Committee*,⁶³ and in doing so, weakened federal protections for voting rights even further. The case concerned two Arizona restrictions that had a disproportionate impact on Native American and other communities of color, and which the plaintiffs challenged as violating Section 2: a ban on the collection of early ballots and a rule mandating that ballots cast in person at the wrong precinct be discarded entirely, rather than counted for the offices for which that voter is eligible to vote.⁶⁴ In the decision, reversing an en banc panel of the Ninth Circuit striking down the two requirements under Section 2, the Supreme Court set out five so-called “guideposts”—untethered to the actual text of the statute—in assessing Section 2 claims.⁶⁵ The decision and these guideposts will make it harder to bring successful Section 2 claims.

The Court’s decision in *Brnovich* undermines the purpose of Section 2 to provide a powerful tool to root out discrimination in voting—no matter how blunt or subtle—in numerous ways.⁶⁶ But broadly speaking, the Court’s decision did two things to make it harder to bring successful Section 2 claims.

First, the Court ratcheted up the bar for plaintiffs to establish a discriminatory burden on the right to vote. Section 2 calls for an inquiry based on “the totality of the circumstances,” into whether “political processes ... are not equally open” to people of color⁶⁷—or, in other words, whether a practice imposes a burden on voters of color. *Brnovich* introduced into this inquiry whether the burden imposed by a challenged practice is, in a court’s view, akin to the “usual burdens of voting,” finding those to be essentially per se permissible under Section 2.⁶⁸ Absent from the analysis is a discussion of whether the so-called “usual” burdens of voting are equally burdensome to all voters, particularly to voters of different racial groups. Though the decision refers to “mere inconvenience,” the difficulty of, say, driving to a mail box is very different on a

⁶³ 141 S. Ct. 2321 (2021).

⁶⁴ *Id.* at 2330.

⁶⁵ *See id.* at 2338-40.

⁶⁶ *See, e.g., Hearing on the Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong. 2 (2021) (statement of Sean Morales-Doyle, Acting Director, Voting Rights and Elections Program) (“In its opinion in *Brnovich*, the Court’s majority ignores the clear intention of Congress in crafting Section 2: to provide a powerful tool to root out race discrimination in voting and representation.”); *id.* (statement of Ezra Rosenberg, Co-Director, Voting Rights Project, Lawyers Committee for Civil Rights Under Law) (“[*Brnovich*] unnecessarily and unreasonably makes it more difficult for civil rights plaintiffs to win Section 2 actions 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.”); *Hearing on Restoring the Voting Rights Act after Brnovich and Shelby County, Hearing Before the Subcomm. on the Constitution of the S. Committee on the Judiciary*, 117th Cong. (2021) (statement of Janai Nelson, Associate Director Counsel, NAACP Legal Defense and Educational Fund, Inc.) (“The [*Brnovich*] decision improperly and illogically departs from the plain text of Section 2, ignores settled precedent, and curtails the broad application of Section 2 that Congress intended, thus making it more difficult and burdensome to ensure that every eligible citizen is able to freely exercise their right to vote.”).

⁶⁷ 52 U.S.C. § 10301(b).

⁶⁸ 141 S. Ct. at 2338 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008)).

remote Native American reservation where residents do not receive postal service at their doors, and are also much less likely to have access to cars than it is for other voters.⁶⁹ The Court also found relevant “the degree to which a voting rule departs from what was standard practice ... in 1982.”⁷⁰ But this ignores that the reauthorization of the VRA in 1982, just as in 1965, was motivated by a desire to *change* state election rules and eradicate the racially discriminatory measures that remained—not grandfather them into law.⁷¹ By introducing these irrelevant considerations into the Section 2 analysis, *Brnovich* will make it more difficult for plaintiffs to prove their cases.

Second, the Court also ratcheted down the bar for jurisdictions to defend restrictions on voting with a disparate impact. In particular, *Brnovich* imports into this inquiry—without any grounding in text or history—a state’s asserted interest in preventing election fraud, even when wholly unsubstantiated with actual evidence, which it gratuitously referred to as “strong and entirely legitimate,” before concluding that rules justified with reference to these interests are “less likely to violate § 2.”⁷² The lower court in *Brnovich* found the offered justification of voter fraud for the ban on ballot collection—particularly important to Native American communities, who often lack adequate transportation or regular postal service—to be tenuous, due to the utter absence of voter fraud in Arizona.⁷³ On this point, the Supreme Court again disagreed, and went further: holding that states are under no obligation to provide any evidence of an actual history or risk of fraud within their borders, or to show how a challenged rule actually would prevent election fraud.⁷⁴

Fortunately, *Brnovich* was a decision based on a statutory interpretation, rather than a constitutional holding. This means Congress can correct the Court’s misinterpretation of Section 2 and restore the VRA’s full protections against discrimination in voting. We urge Congress to add such a legislative response to the JLVRAA.

At a minimum, any efforts to respond to *Brnovich* should make clear that any voting practice that interacts with historical and socioeconomic factors to result in discrimination against voters of color runs afoul of Section 2. This is the case whether or not the practice existed or was widespread in 1982, or any other year. Further, whether or not a court finds a burden to be one of the so-called “usual” burdens of voting should not factor into the analysis. A voting practice could well be a mere inconvenience for some voters, but a serious burden for others, to the point where they cannot meet it and are thus disenfranchised.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ S. Rep. No. 97-417, 54 & n.184 (1982) (describing the widespread use of practices such as “restrictive registration, multi-member and at-large districts with majority vote-runoff requirements, prohibitions on single-shot voting and others” in covered jurisdictions and characterizing them as “tend[ing] to [be] discriminatory in the particular circumstances”).

⁷² *Brnovich*, 141 S. Ct. at 2340.

⁷³ See *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1035 (9th Cir. 2020) (en banc) (“No one has ever found a case of voter fraud connected to third-party ballot collection in Arizona. This has not been for want of trying.”).

⁷⁴ *Brnovich*, 141 S. Ct. at 2348.

Any statutory language addressing *Brnovich* should also directly give courts guidance on how to weigh racially discriminatory burdens against state arguments that a measure is necessary to protect election integrity. Congress must establish that jurisdictions must do more than simply articulate unsubstantiated fears to justify discriminatory restrictions on voting. If a law imposes a discriminatory burden on voters of color, jurisdictions should, at a minimum, be required to submit evidence that the restriction actually advances a particular and important governmental interest. But the analysis should not end there: voters should also be allowed to prove how the challenged measure is pretextual or how there are alternative means to get at the same goal—without imposing the same racially discriminatory burden.

There are different ways Congress can do this. Congress could, for example, adopt an approach that codifies the relevant factors (*e.g.*, the practice’s interaction with historical and socioeconomic factors), and non-relevant factors (*e.g.*, whether the practice existed in 1982). It could also adopt a burden-shifting approach modeled on the frameworks for addressing employment discrimination in Title VII of the Civil Rights Act of 1965⁷⁵ or housing discrimination in the Fair Housing Act,⁷⁶ which could give guidance to courts as to what evidence a state needs to support an asserted interest, and how to weigh that interest against evidence of a discriminatory result. But Congress should act to restore Section 2 to the powerful weapon to combat discrimination that it was intended to be.

Conclusion

For each of these three issues—the difficulty winning preliminary relief, the aggressive expansion of *Purcell*, and the misinterpretation of Section 2 in *Brnovich*—there is a common thread: Congress has the power to act. Congress has clear authority to set the standards for the issuance of preliminary relief and has repeatedly done so in numerous federal statutes to address different contexts. The JLVRAA would make preliminary injunctions available if plaintiffs raise “a serious question” as to the merits, which would act as a prophylactic to safeguard the right to vote, and is appropriate given the impossibility of remedying voting discrimination after the fact.⁷⁷ Congress further has the power to define the public interest to include the public’s interest in representative government, elected by the broadest swath of eligible voters possible, and to provide guidance to federal courts on the period in which election-related injunctions can be issued. And finally, Congress has the unquestioned authority to clarify its intent and fix erroneous interpretations of its laws, such as the recent *Brnovich* decision. In fact, the current version of Section 2 was enacted by Congress in 1982 to respond directly to a Supreme Court case that similarly misgauged Congress’ meaning.⁷⁸ The 1982 amendments to Section 2 thus

⁷⁵ See 42 U.S.C. § 2000e-2(k).

⁷⁶ See 42 U.S.C. § 3601 *et seq.*; 24 C.F.R. § 100.500.

⁷⁷ JLVRAA, *supra* note 24, § 8(a)(4).

⁷⁸ Compare Voting Rights Act Amendments, Pub. L. No. 97-205, 96 Stat. 131 (1982), with *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality); see also S. Rep. No. 97-417, 2 (1982) (clarifying purpose of the amendments was to restore the legal test in effect for Section 2 claims from the interpretation given by the Supreme Court in *Bolden*).

provides a model for Congress to act again to ensure that voting rights are subject to robust protections consistent with this body's intent.

These amendments to the VRA are not merely within Congress' power—they are its responsibility. The Fourteenth and Fifteenth Amendments, which respectively guarantee the right to due process and equal protection under the law and the right to vote without discrimination based on race, expressly give Congress the power to enforce their guarantees.⁷⁹ This is no accident: the Reconstruction Amendments were passed in the wake of a Civil War which was in part precipitated by a Supreme Court decision. The drafters of the amendments were well aware that the responsibility to protect voting rights could not be left entirely with the court system, and therefore purposely gave this duty to Congress.⁸⁰ Although this country has made incredible progress since the enactment of those amendments, this obligation is ongoing. When other institutions tasked with protecting constitutional rights, such as courts and state governments, fail to do so, this body has the responsibility to intervene.

I thank you again for the opportunity to testify in front of this subcommittee on these issues.

⁷⁹ U.S. Const. amends. XIV § 5, XV § 2.

⁸⁰ See Eric Foner, *The Second Founding* xx (2019) (“All three [Reconstruction] amendments end with a clause empowering Congress to enforce their provisions, guaranteeing that Reconstruction would be an ongoing process, not a single moment in time. ... The Bill of Rights said nothing about how the liberties it enumerated would be implemented and protected”).