



Written Testimony of Samuel Spital

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Liberties**

**“Oversight of the Voting Rights Act: Potential Legislative
Reforms”**

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Good morning, Chairman Cohen, Ranking Member Johnson, and members of the Committee. My name is Samuel Spital, and I am the Director of Litigation at the NAACP Legal Defense and Educational Fund, Inc. (“LDF”). Thank you for inviting me to testify on the Oversight of the Voting Rights Act and Potential Legislative Reforms.

Since its founding in 1940 by Thurgood Marshall, LDF has been a leader in the fight to secure, protect, and advance the voting rights of Black voters and other communities of color. LDF was launched at a time when the nation’s aspirations for equality and due process of law were stifled by widespread state-sponsored racial discrimination in every area of life. Through litigation, public policy, and public education, LDF’s mission has remained focused on seeking structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. In advancing that mission, protecting the right to vote for African Americans has been at the center of our work. Beginning with *Smith v. Allwright*,¹ LDF’s successful U.S. Supreme Court case challenging the use of whites-only primary elections in 1944, LDF has been fighting to overcome a myriad of obstacles to ensure the full, equal, and active participation of Black voters.

The importance of the right to vote to the integrity of our democracy cannot be overstated. Indeed, Thurgood Marshall—who litigated LDF’s watershed victory in *Brown v. Board of Education*,² which set in motion the end of legal segregation in this country and transformed the direction of American democracy—referred to *Smith v. Allwright* as his most consequential case. He held this view, he explained, because he believed that the vote, and the opportunity to access political power, are critical to fulfilling the guarantee of full citizenship promised to Black people in the Fourteenth Amendment to the Constitution. LDF has prioritized its work protecting the right of Black citizens to vote for over 80 years—representing Martin Luther King Jr. and marchers in Selma, Alabama in 1965, litigating seminal cases interpreting the scope of the Voting Rights Act, and working in communities in the South and elsewhere to strengthen and protect the ability of Black citizens to participate in the political process free from discrimination.

Despite the guarantees of the Fourteenth and Fifteenth Amendments, the Voting Rights Act, and other federal voting rights statutes, racial discrimination and suppression targeting Black voters persist today. Indeed, in the years since the

¹ 321 U.S. 629 (1994).

² 347 U.S. 483 (1954).

Supreme Court’s 2013 decision in *Shelby County v. Holder*,³ which effectively invalidated Section 5 of the Voting Rights Act, methods of voter suppression have metastasized in States formerly covered by that provision. LDF litigated the *Shelby County* case, including presenting argument in the Supreme Court in defense of the constitutionality of Section 5 of the Voting Rights Act of 1965 (“VRA”). In that decision, Chief Justice John Roberts invited Congress to update Section 5 coverage based on recent conditions. In 2019, this House did precisely that by passing the Voting Rights Advancement Act of 2019 (H.R.4), but the Senate refused even to consider that law. Until such critical legislation is enacted, voters of color—and our democracy—remain unprotected.

Today, Congress must also address a new Supreme Court decision undermining the VRA. In *Shelby County*, the majority stressed that its decision did not affect the VRA’s other key provision: the nationwide ban on racial discrimination in Section 2 of the Act.⁴ This summer, however, a divided Court decided *Brnovich v. Democratic National Committee*.⁵ By misinterpreting and weakening Section 2, *Brnovich* threatens to embolden States and localities in unleashing new voting restrictions that burden Black voters’ ability to participate equally in the political process. This latest decision underscores the urgent need for Congress to take action to restore the Voting Rights Act and to do so swiftly.

The Need for Congress to Legislate

Today, our nation is at a crucial juncture in the decades-long struggle to create and maintain equality of voting rights for all citizens. The proliferation of state anti-voting laws across the country⁶ demonstrates the urgent need for Congress to restore the VRA to its full strength, reinstate federal oversight over

³ 570 U.S. 529 (2013).

⁴ 570 U.S. at 557.

⁵ 594 U.S. ____ (2021).

⁶ According to the Brennan Center, as of May 14, state legislators in the most recent legislative cycle alone have introduced 389 bills with restrictive provisions in 48 States. Brennan Center for Justice, “Voting Laws Roundup: July 2021” (updated as of Jul. 22, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>. See also Theodore Johnson & Max Feldman, “The New Voter Suppression,” Brennan Center (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression>; Democracy Diverted: Polling Place Closures and the Right to Vote, The Leadership Conference Education Fund (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/DemocracyDiverted.pdf>; Wendy R. Weiser and Max Feldman, “The State of Voting 2014,” Brennan Center (June 17, 2014), <https://www.brennancenter.org/our-work/research-reports/state-voting-2014>; “Election 2016: Restrictive Voting Laws by the Numbers,” Brennan Center (Sep. 28, 2018), <https://www.brennancenter.org/our-work/research-reports/election-2016-restrictive-voting-laws-numbers>; Wendy R. Weiser and Max Feldman, “The State of Voting 2018,” Brennan Center for Justice, (June 5, 2018), <https://www.brennancenter.org/our-work/research-reports/state-voting-2018>.

discriminatory voting practices in States and localities where voting discrimination is concentrated, and protect voting rights wherever suppression occurs.

LDF continues to monitor how formerly covered States and localities respond to the *Shelby County* decision and has been keeping a detailed account of post-*Shelby County* voting changes in its regularly updated report “Democracy Diminished.”⁷ In “Democracy Diminished,” LDF attempts to capture a fraction of the thousands of voting changes that would have been scrutinized by the federal government for their harm to minority voters via preclearance.

Also, as part of our annual Prepared to Vote initiative, LDF has been on the ground for major primary and general elections to conduct non-partisan poll monitoring and to assist voters primarily in certain States formerly covered by Section 5 of the VRA. On election day, LDF staff and volunteers visit polling sites to educate voters about their State’s voting requirements and engage in rapid response actions when problems arise to ensure eligible voters are able to cast a ballot. During the 2020 election, LDF virtually monitored polling sites in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, New York, South Carolina, Texas, Virginia and Wisconsin, and published an account of the issues voters faced in its report “Democracy Defended.”⁸ The 2020 election did not, as numerous news reports suggested, “go smoothly.”⁹ What we saw on November 3, 2020, and in the weeks before and after, confirmed what we already knew: Discrimination against Black voters is an overwhelming and growing problem that demands immediate legislative action.

The celebrated turnout and registration rates among Black voters in November 2020 occurred despite a litany of obstacles, and only because of the Herculean efforts by civil-rights groups, organizers, and activists—and because of the sheer determination and resilience of Black voters.¹⁰ This model is not sustainable. Nor is it lawful. Black voters’ ability to overcome unequal burdens does not diminish the fact that those burdens exist. Nor does our Constitution countenance two systems of voting in this country—one in which Black and other

⁷ “Democracy Diminished: State and Local Threats to Voting Post-*Shelby County v. Holder*,” NAACP Legal Defense and Educational Fund, Inc. (Jun. 22, 2021), https://tminstituteldf.org/wp-content/uploads/2017/08/LDF_01192021_DemocracyDiminished-4b_06.24.21v2.pdf.

⁸ “Democracy Defended: Executive Summary,” NAACP Legal Defense Fund Thurgood Marshall Institute (Feb. 10, 2021), https://www.naacpldf.org/wpcontent/uploads/LDF_02102021_DemocracyDefendedPreview11.pdf?_ga=2.209659025.2082701624.1617629692-217316157.1616678028.

⁹ Sherrilyn Ifill, “No, This Election Did Not Go ‘Smoothly,’” *Slate* (Nov. 9, 2020), <https://slate.com/newsandpolitics/2020/11/2020-election-voting-did-not-go-smoothly.html>.

¹⁰ *Id.*

marginalized voters require an independent, non-governmental apparatus to exercise the fundamental right to vote while white voters do not. To be clear, even with these extraordinary efforts, participation rates for Black, Asian American, and Latino voters remained well below those of white voters in the 2020 election.¹¹

Moreover, in 2020, efforts at voter suppression continued beyond Election Day. A number of States witnessed unprecedented attempts to discount ballots cast in areas with large numbers of Black voters.¹² The 2020 election—and the wave of racially targeted voter suppression measures enacted and proposed by States since then—highlight the need for new federal legislation to prevent voter suppression at all stages of the electoral process: from registration, to turnout, to the counting and canvassing of ballots.

The extensive record of discriminatory voting practices enacted since *Shelby County* demands that Congress fulfill its constitutional obligation to protect voters from new and “ingenious methods”¹³ of voter discrimination by restoring the Voting Rights Act to its full strength after both *Shelby County* and the recent decision in *Brnovich*.

Grassroots Movements in Support of Voting Rights

The passage of the VRA was spurred by the grassroots activism of thousands across the country, and especially in the South, who faced down billy clubs, police dogs and vitriol from white mobs to secure the unencumbered right to vote. It was the result of the tremendous sacrifice of those beaten on the Edmund Pettus Bridge, including the late Congressman John Lewis, the martyrdom of Medgar Evers, Jimmie Lee Jackson, Viola Gregg Liuzzo, Andrew Goodman, James Cheney,

¹¹ William H. Frey, “Turnout in 2020 election spiked among both Democratic and Republican voting groups, new census data shows,” Brookings Institute (May 5, 2021), <https://www.brookings.edu/research/turnout-in-2020-spiked-among-both-democratic-and-republican-voting-groups-new-census-data-shows/>

¹² Jeff Amy, Darlene Superville, & Jonathan Lemire, “GA election officials reject Trump call to ‘find’ more votes,” Associated Press (Jan. 4, 2021), <https://apnews.com/article/trump-raffensperger-phone-call-georgia-d503c8b4e58f7cd648fbf9a746131ec9>; Bill Bostock, “Videos show Trump protesters chanting ‘count those votes’ and ‘stop the count’ outside separate ballot-counting sites in Arizona and Michigan,” Business Insider (Nov. 5, 2020), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11>; Jake Lahut, “Dozens of pro-Trump protesters chant ‘Fox News sucks’ outside major election HQ in Arizona, with several reportedly trying to get inside as votes are being counted,” Business Insider (Nov. 4, 2020), <https://www.businessinsider.com/video-fox-news-sucks-chant-crowd-outside-maricopa-election-arizona-2020-11?r=US&IR=T>; Maura Ewing et al., “Two charged with carrying weapons near Philadelphia vote-counting site amid election tensions”, Washington Post (Nov. 6, 2020), <https://www.washingtonpost.com/nation/2020/11/06/philadelphiaattack-plot-vote-count-election/>.

¹³ U.S. Congress, House, Committee on the Judiciary Voting Rights, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25, 20- Apr. 1, 1965.

Michael Schwerner, and so many others,¹⁴ which proved crucial in ensuring the federal government take seriously its duty to enforce the right to the franchise. In short, the right to vote that we enjoy today was forged by courageous people who demanded the protection and expansion of the franchise. Congress saw the tumult and desire for change across the nation and ultimately responded with the Voting Rights Act of 1965.

It is that same heroism of the average American to speak out, protest and demand change when faced with injustice, that we see again today in the calls for federal legislation to protect the right to vote. It is the obligation of this generation of lawmakers to respond to these calls and ensure that the hard-won gains of the past are not lost. People and institutions across the country have decried the onslaught of voting restrictions, from grassroots organizers and activists,¹⁵ to influential Black executives in corporate America, corporations like Coca Cola and Delta Airlines,¹⁶ sports associations like Major League Baseball,¹⁷ film industry icons,¹⁸ religious leaders,¹⁹ and more.

The people have called on Congress once again to use the power enshrined in the Constitution, and entrusted to this body, to ensure the franchise for all citizens

¹⁴ Marty Roney, "Remembering the Martyrs of Bloody Sunday," USA Today (Mar. 7, 2015), <https://www.usatoday.com/story/news/nation/2015/03/03/bloody-sunday-martyrs/24344043/>; Deborah Barfield Berry, "Bloody Sunday' pilgrimage to move through Miss.," USA Today (Feb. 10, 2014), <https://www.usatoday.com/story/news/nation/2014/02/10/civil-rights-pilgrimage/5376225/>.

¹⁵ Jane C. Timm, "Progressive groups unite to oppose Texas GOP's voting restrictions," NBC News (Jun. 28, 2021), <https://www.nbcnews.com/politics/elections/progressive-groups-unite-oppose-texas-gop-s-voting-restrictions-n1272459>; "Georgia-Based Disability Rights Groups Join Fight Against Georgia's Anti-Voter Law S.B. 202," The Arc (May 2, 2021), <https://thearc.org/georgia-disability-groups-join-fight-voter-law/>.

¹⁶ Andrew Ross Sorkin & David Gelles, "Black Executives Call on Corporations to Fight Restrictive Voting Laws," New York Times (March 31, 2021), <https://www.nytimes.com/2021/03/31/business/voting-rightsgeorgiacorporations.html>; David Gelles, "Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating 'Crystal Clear' Opposition," New York Times (March 31, 2021), <https://www.nytimes.com/2021/03/31/business/delta-coca-colageorgia-voting-law.html>; Andrew Ross Sorkin & David Gelles, "Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain," New York Times (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/business/ceoscorporate-america-votingrights.html?smtyp=cur&smid=tw-nytimes>.

¹⁷ Kevin Draper et. al., "M.L.B. Pulls All-Star Game From Georgia in Response to Voting Law," New York Times (Apr. 6, 2021), <https://www.nytimes.com/2021/04/02/us/politics/mlb-all-star-game-moved-atlanta-georgia.html>.

¹⁸ Kimberly Chin, "Will Smith Movie Pulls Production Out of Georgia Over GOP Voting Law," Wall Street Journal (Apr. 12, 2021), <https://www.wsj.com/articles/will-smith-movie-emancipation-pulls-production-out-of-georgiaovergop-voting-law-11618257076>.

¹⁹ Lakisha Lemons, "Faith leaders fight back against what they call voter suppression bills," Spectrum News 1 (Apr. 14, 2021), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/04/14/faith-leaders-fight-backagainst-voter-suppression-laws>.

and to build a 21st century democracy that is representative of, and responsive to, our growing, and diverse nation. Congress must seize this moment to take action. It is the obligation of this body to continue to uphold the principles of democracy—and to continue the great tradition of perfecting our union by protecting the right to vote.

Congress’s Constitutional Authority to Enact Voting Rights Laws

It was not until after the end of the Civil War that the United States undertook efforts to amend our Constitution to provide Congress with affirmative power to enforce the fundamental principles that *all* are created equal, and that access to the franchise is the cornerstone of citizenship and democracy. The Fourteenth and Fifteenth Amendments, ratified in 1868 and 1870 respectively, are clear. The Fourteenth Amendment forbids States from discriminating on the basis of race:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty of property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.²⁰

The Fifteenth Amendment, even more specifically, prohibits the denial or abridgement of the “right of citizens of the United States to vote . . . by any State on account of race, color, or previous condition of servitude.”²¹ And importantly, both Amendments provided new authority for Congress to defend equal rights, stating that: “Congress *shall* have power to enforce this article by appropriate legislation [emphasis added].”²² There is no question, and there can be no question, that these amendments give Congress the power to enforce the guarantee of equal protection and the constitutional protection against voting discrimination based on race.²³

²⁰ U.S. Const. amend. XIV.

²¹ U.S. Const. amend. XV.

²² *Id.*

²³ As the Supreme Court has recognized, “the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Fifteenth Amendment].” *South Carolina v. Katzenbach*, 383 U.S. at 326. The Constitution “empowers ‘Congress,’ not the Court, to determine in the first instance what legislation is needed to enforce it.” *Northwest Austin Mun. Utility Dist. v. Holder*, 557 U.S. 193, 205 (2009); *see also Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (where “Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments”).

Yet the collective promise of equality for Black Americans was blatantly obstructed for nearly 100 years after the ratification of those Amendments. Undermined by the courts²⁴ and ignored by Congress, Black voters were left susceptible to State-sanctioned campaigns of racial terrorism. With the Supreme Court's refusal to intervene, white people in the South terrorized Black voters, disenfranchised them and enacted State laws to codify their place at the bottom of a racial hierarchy.²⁵ While Black people were systematically disenfranchised by poll taxes,²⁶ literacy tests,²⁷ threats,²⁸ and lynching,²⁹ Congress likewise abdicated its duty to use its enforcement powers to protect the right to vote.

Almost a century after the Civil Rights Amendments were ratified, Congress finally took its constitutional duty seriously by passing the Voting Rights Act of 1965 ("VRA"). The VRA fulfilled the promise of the Fifteenth Amendment that the right to vote must not be denied because of race, color or previous condition of servitude, as well as the Fourteenth Amendment's guarantee of equal protection under the law. It enshrined our most fundamental values by guaranteeing to all citizens the right to vote, which the Supreme Court has called "preservative of all rights."³⁰ The VRA was intentionally responsive to the scourge and proliferation of voter suppression that had long existed in many States. It afforded the Department of Justice new authority to prohibit suppressive laws *before* they went into effect. Previously, when the Department of Justice obtained favorable decisions striking down suppressive voting practices, States and localities often enacted new discriminatory schemes to restrict Black people from voting. In establishing the preclearance framework of the VRA, Congress, therefore, "had reason to suppose that these States might try similar maneuvers in the future in order to evade the

²⁴ See *Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903); *Williams v. Mississippi*, 170 U.S. 213 (1889); *United States v. Cruikshank*, 92 U.S. 542 (1876); and *United States v. Reese*, 92 U.S. 214 (1875).

²⁵ Referring to a white mob that murdered more than 100 Black voters: "It does not appear that it was their intent to interfere with any right granted or secured by the constitution." *United States v. Cruikshank*, at 556 (1876).

²⁶ Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement*: (Chicago: University of Chicago Press, 2004).

²⁷ Jason Morgan Ward, *Hanging Bridge: Racial Violence and America's Civil Rights Century* (New York: Oxford University Press, 2016).

²⁸ Michael Fellman, *In the Name of God and Country: Reconsidering Terrorism in American History* (New Haven, CT: Yale University Press, 2010); U.S. Commission on Civil Rights, "Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume VII: The Mississippi Delta Report: Chapter 3, Voting Rights and Political Representation in the Mississippi Delta" (last accessed Aug. 12, 2021), <https://www.usccr.gov/pubs/msdelta/ch3.htm>.

²⁹ Brad Epperly, et. al., "Rule by Violence, Rule by Law: The Evolution of Voter Suppression and Lynching in the U.S. South," (Mar. 1, 2016), <https://ssrn.com/abstract=3224412>.

³⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

remedies for voting discrimination contained in the [Voting Rights Act] itself.”³¹ Section 5 of the VRA was designed to remedy not only then-existing discriminatory voting schemes but also to address the “ingenious methods”³² that might be devised and used in the future to suppress the full voting strength of African Americans. In many ways, the VRA and its preclearance provisions made the promise of the Civil Rights Amendments a reality and made our country a true democracy for the first time in our history.³³

The Supreme Court’s *Shelby County* Decision and Invitation for Congress to Act

For nearly 50 years, Section 5 of the VRA required jurisdictions with a record of chronic racial discrimination in voting to submit proposed voting changes to the U.S. Department of Justice or a federal court in Washington, D.C. for pre-approval. These provisions of the VRA were considered by Congress—and the courts—to be an efficient and essential mechanism for detecting and redressing the many forms of discrimination before elections take place. When Congress reauthorized the VRA in 2006, it legislated against the backdrop of an unbroken line of Supreme Court authority upholding the constitutionality of Congress’s informed judgement that the VRA and its preclearance requirement were a necessary and appropriate way of halting discriminatory voting changes before they were implemented, thus safeguarding the right to vote.³⁴

Congress reauthorized the VRA on four separate occasions since 1965, each time with overwhelming bipartisan support.³⁵ The Supreme Court upheld the first three reauthorizations, including Congress’s decision in 1982 to reauthorize Section

³¹ “Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures.” *South Carolina*, at 309.

³² U.S. Congress, House, Committee on the Judiciary Voting Rights, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25, 20- Apr. 1, 1965.

³³ Nikole Hannah Jones, “Our democracy’s founding ideals were false when they were written. Black Americans have fought to make them true,” *New York Times Magazine* (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>.

³⁴ See *Lopez v. Monterey County*, 525 U.S. 266, 282-285 (1999); *City of Rome v. United States*, 446 U.S. 156, 177-178 (1980); *Georgia v. United States*, 411 U.S. 526, 534-535 (1973); *South Carolina v. Katzenbach*.

³⁵ The VRA was reauthorized by Congress and signed into law by Republican Presidents in 1970, 1975, 1982, and most recently in 2006. “History of Federal Voting Rights,” United States Department of Justice (last accessed Aug. 12, 2021), <https://www.justice.gov/crt/history-federal-voting-rights-laws>.

5 for 25 years.³⁶ In 2006, the VRA reauthorization passed by a unanimous vote in the Senate of 98-0 and by 390-33 in the House.³⁷

In the 2013 *Shelby County* decision, the Supreme Court nonetheless held that the 2006 reauthorization was unconstitutional. The Court reasoned that Section 4(a)'s formula for identifying jurisdictions subject to coverage, which on its face was based on data from the 1964, 1968, and 1972 presidential elections, no longer responded to current conditions.³⁸ In reaching this conclusion, the Court failed to meaningfully engage with the 10,000-plus page record accumulated by Congress in 2006,³⁹ which demonstrated that Section 4(a) continued to identify the jurisdictions where voting discrimination was concentrated, and that preclearance was still necessary to ensure full political participation for minority voters. Predictably, days⁴⁰—and in one case hours⁴¹—after the Supreme Court invalidated the VRA's preclearance provisions, jurisdictions announced their intention to implement aggressive and restrictive voting laws previously blocked by Section 5. Since the *Shelby County* decision, federal courts have struck down voting changes as violative of the Constitution, and the Voting Rights Act. Indeed, there have been at least eight judicial decisions finding that States or localities *intentionally* discriminated

³⁶ “We upheld each of these reauthorizations against constitutional challenges, finding that circumstances continued to justify the provision.” *Northwest Austin Mun. Utility Dist. v. Holder*, 557 U.S. 193, 205 (2009).

³⁷ H.R. 9 - Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 109th Congress (2005-2006), <https://www.congress.gov/bill/109th-congress/house-bill/9/actions>.

³⁸ *Shelby Cnty*, at 557.

³⁹ H. R. Rep. No. 109-478, at 21 (2006), <https://www.congress.gov/109/crpt/hrpt478/CRPT-109hrpt478.pdf>.

⁴⁰ Kim Changler, “Alabama photo voter ID law to be used in 2014, state officials say,” *Alabama Media Group* (June 25, 2013), https://www.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html; Lizette Alvarez, Florida Defends New Effort to Clean Up Voter Rolls, *N.Y. TIMES*, Oct. 9, 2013, http://www.nytimes.com/2013/10/10/us/florida-defends-new-effort-to-clean-up-voter-rolls.html?_r=0; Steve Bousquet & Michael Van Sickler, “Renewed ‘scrub’ of Florida voter list has elections officials on edge,” *Tampa Bay Times* (Aug. 3, 2013), <https://www.tampabay.com/news/publicsafety/crime/renewed-scrub-of-florida-voter-list-has-elections-officials-on-edge/2134695/>; Mark Joseph Stern, “North Carolina’s ‘Monster’ Voter-Suppression Law Is Dead,” *Slate* (May 15, 2017), <https://slate.com/news-and-politics/2017/05/north-carolinas-voter-suppression-law-was-apparently-tooracist-for-the-supreme-court.html>; David A. Graham, “North Carolina’s Deliberate Disenfranchisement of Black Voters,” *The Atlantic* (July 29, 2016), <https://www.theatlantic.com/politics/archive/2016/07/north-carolina-voting-rights-law/493649/>.

⁴¹ Ed Pilkington, “Texas rushes ahead with voter ID law after supreme court decision,” *The Guardian* (June 25, 2013), <https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-courtdecision>.

against Black voters and other voters of color in States formerly covered by Section 5.⁴²

Despite the devastating effects of the *Shelby County* decision, the Court’s opinion does not prevent Congress from enacting a new preclearance provision. Instead, the Court in *Shelby County* held that the VRA’s preclearance coverage formula was unconstitutional because it had not been updated since 1972 and was not based on “current conditions.”⁴³ Indeed, as noted above, Chief Justice Roberts expressly invited Congress to establish a new framework for preclearance: “Congress may draft another formula based on current conditions.”⁴⁴

Restoring Preclearance

Our experience litigating against discriminatory practices at every stage of the voting process since *Shelby County* demonstrates the need for Congress to take up the Court’s invitation with a new preclearance mechanism grounded in current conditions. Voting discrimination has proliferated since *Shelby County*. While LDF and other civil rights organizations have successfully responded to some of these new discriminatory measures with litigation, litigation is a blunt instrument. The parties often spend millions litigating these cases.⁴⁵ The cases take up significant judicial resources.⁴⁶ And the average length of Section 2 cases is two to five years.⁴⁷ But, in the years during a case’s pendency, thousands—and, in some cases, millions—of voters have their right to vote abridged or denied.

It is therefore essential that Congress restore Section 5, which the Supreme Court recognized is at the “heart”⁴⁸ of the Act, by identifying those jurisdictions where voting discrimination remains the most prevalent, thereby requiring

⁴² See *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); *Holmes v. Moore*, 840 S.E.2d 244 (N.C. App. 2020); *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-CV-01821-MHH, 2019 WL 7500528 (N.D. Ala. Dec. 16, 2019); *Veasey v. Abbott*, 249 F. Supp. 3d 868 (S.D. Tex. 2017); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 730 (S.D. Tex. 2017); *Perez v. Abbott*, 250 F.Supp.3d 123 (S.D. Tex. 2017); *Perez v. Abbott*, 253 F. Supp. 3d 864 (S.D. Tex. 2017); *Allen v. Evergreen*, No. 13-107, 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014).

⁴³ *Shelby Cnty.*, at 557.

⁴⁴ *Id.*

⁴⁵ “The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation,” NAACP Legal Defense and Educ. Fund, Inc. (Feb. 14, 2019), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs02.14.19.pdf>.

⁴⁶ Federal Judicial Center, “2003-2004 District Court Case-Weighting Study,” Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed).

⁴⁷ Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) (“Two to five years is a rough average” for the length of Section 2 lawsuits).

⁴⁸ *South Carolina*, at 315.

preclearance to block discriminatory voting schemes before they are implemented. The approach to geographic coverage in H.R.4 as passed by the House during the 116th Congress would do that, by identifying those States and localities where recent conditions show a pattern of continued discrimination against voters of color.

This geographic-coverage based approach is also supported by Supreme Court precedent. As eight Justices explained in *Northwest Austin*, “[t]he doctrine of equality of States does not bar remedies for local evils which have subsequently appeared.”⁴⁹ A statute’s disparate geographic coverage will be upheld so long as it is “sufficiently related to the problem that it targets.”⁵⁰ H.R. 4 easily satisfies this standard. By limiting geographic preclearance to those States and localities with recent patterns of discrimination in voting, the statute ensures that the preclearance remedy is implemented in places where the evil of voting discrimination is most prevalent.

Moreover, by focusing on evidence of voting discrimination within the past 25 years on a rolling basis—and by limiting coverage to 10 years absent new discriminatory voting measures—H.B. 4 properly considers “current conditions” within the meaning of *Shelby County*. Indeed, this look-back window is clearly consistent with Supreme Court precedent about the time period Congress, and courts, may consider in evaluating the propriety of enforcement legislation under the Fourteenth and Fifteenth Amendments.

In 1999, the Supreme Court in *Lopez v. Monterey County* upheld the constitutionality of Section 5 at that time, and rejected a challenge brought by a jurisdiction that was covered based on conditions in the jurisdiction in 1968.⁵¹ *Lopez* thereby recognizes that evidence of voting discrimination from 30 years ago may justify preclearance, and that Congress, in 1982, acted properly in subjecting jurisdictions to preclearance for 25 additional years based on evidence of voting discrimination from 1968. Similarly, in *Tennessee v. Lane*, the Court upheld Title II of the Americans with Disabilities Act (“ADA”) as applied to court access by looking to evidence of discrimination dating back to 1972—32 years before the Court’s decision in *Lane*, and 18 years before Congress enacted the ADA in 1990.⁵² By contrast, in *City of Boerne v. Flores* (1997), the Court held that Congress had exceeded its enforcement authority under the Fourteenth Amendment in enacting part of the Religious Freedom Restoration Act of 1990 when “the history of persecution in this country detailed in [congressional] hearings mentions no

⁴⁹ *Northwest Austin*, at 205.

⁵⁰ *Id.*

⁵¹ 525 U.S. 266, 282-285 (1999).

⁵² *Tennessee v. Lane*, 541 U.S. 509, 525 & nn. 12, 14 (2004).

episodes occurring in the past 40 years.”⁵³ Similarly, in *Shelby County* itself, the Court held that Congress in 2006 failed to consider “current conditions”⁵⁴ by implementing preclearance for 25 additional years based on a coverage formula tied to evidence of voting discrimination from 34 to 42 years earlier.

H.R. 4, which considers evidence of voting discrimination over the last 25 years on a rolling basis for a 10-year preclearance period, is similar to the look-back windows that the Court recognized as probative of current conditions in *Lopez* and *Lane* and is not comparable to the longer look-back windows at issue in *City of Boerne* and *Shelby County*. It is therefore well within Congress’s authority to consider such evidence.

The 25-year look-back proposed by H.R. 4 is also essential to determine whether States and political subdivisions are engaged in a pattern of voting discrimination that warrants preclearance. Voting discrimination is often concentrated during redistricting, and a 25-year look-back allows consideration of two redistricting cycles—including the post-redistricting litigation that may span several years before a court adjudication that a redistricting plan illegally discriminated against voters of color.

In addition, in its *Shelby County* Supreme Court brief, LDF identified numerous jurisdictions that had a pattern of discrimination that was fully visible only if one looked back approximately 25 years, including:

- The City of Calera in *Shelby County*, which, in 2008, attempted to circumvent a consent decree from 1990 that prohibited discriminatory methods-of-election against Black voters;⁵⁵
- The City of Alabaster in *Shelby County*, which had attempted discriminatory annexations in 2000 after having been blocked by Section 5 from doing so in 1975 and 1977;⁵⁶
- Dallas County, Alabama, which repeatedly attempted various measures to discriminate against Black voters through methods of election, voter purges, and discriminatory redistricting in the 1980s and early 1990s, after the notorious and violent discrimination that gave rise to the VRA in Selma—the county seat—in 1965;⁵⁷

⁵³ 521 U.S. 507, 530 (1997).

⁵⁴ *Shelby Cnty*, at 557.

⁵⁵ Brief for Respondent-Intervenors Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines and William Walker, at 19-20 *Shelby v. Holder*, 570 U.S. 529 (2013). <https://www.naacpldf.org/wp-content/uploads/12-96-bs-Earl-Cunningham-et-al.pdf>.

⁵⁶ *See id.* at 20; *see also Voting Determination Letters for Alabama*, U.S. Dept. of Justice, *available at* <https://www.justice.gov/crt/voting-determination-letters-alabama>.

⁵⁷ Brief for Respondent-Intervenors at 20-21.

- The State of Texas, which attempted to enact racially discriminatory redistricting plans after the 1980 census, 1990 census, 2000 census, and 2010 census;⁵⁸
- The City of Seguin, Texas, which was forced to abandon discriminatory methods of election in response to three lawsuits between 1978 and 1993, but then proposed a new discriminatory districting plan and manipulated a candidate filing period to prevent any Latino candidate from competing after the 2000 census;⁵⁹
- The State of Louisiana, which sought to implement discriminatory redistricting plans for its State House after every census between 1970 and 2000;⁶⁰
- The City of Augusta, Georgia, which had a history of discriminatory voting-related measures from 1987 to 2012—the most recent involving the State of Georgia’s pretextual rationale for rescheduling an election to a date when low Black turnout was anticipated.⁶¹

These examples highlight the importance of a 25-year look back for geographic coverage in identifying those jurisdictions where voting discrimination is most prevalent, and therefore geographic preclearance most necessary.

H.R. 4 as passed by the House in the 116th Congress contains another important measure to remedy and deter discrimination against racial and language minority voters nationwide: practice-based preclearance. This provision would require federal preclearance of “known discriminatory practices,” such as the creation of at-large districts, inadequate multilingual voting materials and cuts to polling place. Practice-based preclearance is also a reasonable, flexible response to the standards articulated by the Supreme Court. It is responsive to, and necessitated by, the “current conditions” of voting discrimination in the nation.

Moreover, practice-based preclearance is supported by a long line of Supreme Court precedent recognizing Congress’s authority to outlaw practices that are not *per se* unconstitutional but are known to perpetuate racial discrimination. In *South Carolina v. Katzenbach*,⁶² for example, the Court upheld Congress’s decision to suspend the use of literacy tests in the VRA of 1965 even though such tests were not

⁵⁸ See *id.* at 23-24.

⁵⁹ See *id.* at 25.

⁶⁰ See *id.* at 28.

⁶¹ See *id.* at 31-32; see also *Voting Determination Letters for Georgia*, U.S. Dept. of Justice, available at <https://www.justice.gov/crt/voting-determination-letters-georgia>.

⁶² 383 U.S. 301 (1966).

categorically unconstitutional. The Court recognized that such tests had frequently been used to discriminate against Black voters, and it was therefore reasonable for Congress to suspend them entirely, as Congress “may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”⁶³ In 1975, Congress amended the VRA to make the suspension on literacy tests a permanent ban.

Similarly, in *City of Rome v. United States*,⁶⁴ the Court found it permissible for Congress to prohibit changes to voting processes that have racially discriminatory effects even absent proof of intentional discrimination that would itself violate the Fifteenth Amendment. The Court explained that “even if [Section 1 of the Fifteenth Amendment] prohibits only purposeful discrimination,” its prior decisions “foreclosed any argument that Congress may not, pursuant to [its enforcement authority under Section 2 of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect.” Since *City of Rome*, the Court has continued to reaffirm the proposition that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.”⁶⁵ Because it identifies practices known to be especially susceptible to discrimination in voting, practice-based preclearance represents an exercise of congressional authority supported by this well-established line of precedent.

Together, geographic preclearance and practice-based preclearance hold the promise of both addressing the discriminatory voting schemes we see proliferating today, and also preventing “ingenious methods” that might be devised to suppress votes in the future.⁶⁶ The genius of preclearance, and the VRA, was creating a mechanism to prevent such mutations in voting discrimination and suppression. The late-Justice Ginsburg, in her *Shelby County* dissent, compared this mission to “battling the Hydra.”⁶⁷ According to Greek mythology, for every head cut off the Hydra, a mythical and monstrous creature, two more would grow in its place.⁶⁸ Preclearance was designed to address the Hydra problem—to eliminate

⁶³ *South Carolina*, at 324.

⁶⁴ 446 US 156 (1980).

⁶⁵ See *City of Boerne*, at 518; see also *Tennessee v. Lane* and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

⁶⁶ U.S. Congress, House, Committee on the Judiciary Voting Rights, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25 (Apr. 1, 1965)

⁶⁷ *Shelby Cnty*, at 590 (Ginsburg, J., dissenting).

⁶⁸ “Hydra: Greek Mythology,” Britannica.com (last accessed May 24, 2021), <https://www.britannica.com/topic/Hydra-Greek-mythology>.

discriminatory voting practices that have proven to be as adaptive as they are unrelenting. Indeed, the Hydra problem is what we see unfolding in many States today, with a resurgence of new laws and policies restricting equal access to the ballot for Black, Latino, Asian American and Pacific Islander, and Native American communities.

During the House debate to reauthorize the VRA in 2006, the late Congressman John Lewis commented on the continued need for a preclearance framework: “Yes, we have made some progress. We have come a distance. We are no longer met with bullwhips, fire hoses, and violence when we attempt to register and vote. But the sad fact is, the sad truth is discrimination still exists, and that is why we still need the Voting Rights Act.”⁶⁹ Congressman Lewis’s observation remains equally true today.

LDF and others have long warned that increased voter suppression would be the consequence of the *Shelby County* decision. Despite our vigorous litigation and advocacy efforts to fend off voter suppression, the current VRA can only get us so far. Faced with an extensive record of racial discrimination in voting practices, Congress must act swiftly, deliberately, and boldly to restore the now-defunct preclearance provision.

Amending Section 2 to Address *Brnovich*

Just eight years ago in *Shelby County*, the Supreme Court stated that its decision “in no way affect[ed] the permanent, nationwide ban on racial discrimination in voting found in [Section] 2.”⁷⁰ Indeed, the Court emphasized in the *Shelby County* decision that “Section 2 is permanent, applies nationwide,” and broadly “forbids any ‘standard, practice, or procedure’ that ‘results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.’”⁷¹ Yet, this Summer, six Supreme Court justices dealt a substantial blow to Section 2 and the democratic ideals it was designed to protect. By weakening Section 2 of the Voting Rights Act based on its own views of how much discrimination is acceptable, a majority of the Supreme Court has once again diminished our democracy.

In *Brnovich*, the Court’s majority created five new factors—or “guideposts,” in Justice Alito’s terminology—to uphold a pair of Arizona laws that the *en banc* Ninth

⁶⁹ 152 Cong. Rec. H5164 (daily ed. July 13, 2006) (statement of Rep. Lewis).

⁷⁰ *Shelby Cnty*, at 557.

⁷¹ *Id.* at 536–37 (quoting 52 U.S.C. § 10301(a)).

Circuit had found discriminatory in violation of Section 2.⁷² The decision disregards the plain text of Section 2, ignores settled precedent, and severely curtails the broad application of Section 2 that Congress intended, thus making it more difficult to ensure that every eligible citizen is able to freely exercise their right to vote.

By design, Section 2's language is sweeping in scope—as Justice Kagan explained in her *Brnovich* dissent, “to read it fairly . . . is to read it broadly. And to read it broadly is to do much that the majority is determined to avoid.”⁷³ As Justice Kagan further explained:

The Court always says that it must interpret a statute according to its text—that it has no warrant to override congressional choices. But the majority today flouts those choices with abandon. The language of Section 2 is as broad as broad can be. It applies to any policy that “results in” disparate voting opportunities for minority citizens. It prohibits, without any need to show bad motive, even facially neutral laws that make voting harder for members of one race than of another, given their differing life circumstances. That is the expansive statute Congress wrote, and that our prior decisions have recognized. But the majority today lessens the law—cuts Section 2 down to its own preferred size. The majority creates a set of extra-textual exceptions and considerations to sap the Act's strength, and to save laws like Arizona's. No matter what Congress wanted, the majority has other ideas. This Court has no right to remake Section 2.⁷⁴

Justice Kagan further explained that the majority opinion's guideposts “all cut in one direction—toward limiting liability for race-based voting inequalities” and shielding discriminatory laws from Section 2 challenges.⁷⁵ One of the majority's newly-created guideposts in *Brnovich* instructs courts to compare a challenged voting restriction to the burdens of voting as they existed in 1982, when Section 2 was amended by Congress. This “guidepost” contravenes the text and purpose of Section 2, which is to prohibit racial discrimination in voting, not to impose 1982 as a reference point for evaluating whether today's laws are discriminatory. As Justice Kagan observes, “Section 2 was meant to disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber.”⁷⁶ The

⁷² *Brnovich*, at 13 (opinion of the Court).

⁷³ *Id.* at 41 (Kagan, J., dissenting).

⁷⁴ *Id.* at 40–41.

⁷⁵ *Id.* at 21–22 (Kagan, J., dissenting).

⁷⁶ *Id.* at 25 (Kagan, J., dissenting).

majority's guidepost, has no basis in the text or purpose of Section 2.⁷⁷ Consider, for example, a State that expands access to voting by mail after 1982, but does so in a way that favors white voters by making drop boxes more available in predominately white communities. Notwithstanding this new *Brnovich* guidepost, the State's approach would violate both the letter and spirit of Section 2.

Another "guidepost" the *Brnovich* decision created is to consider the size of the discriminatory burden established by a voting restriction in absolute terms. Applying this guidepost, the majority asserted that "[a] policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open."⁷⁸ This guidepost, too, is inconsistent with the spirit and letter of Section 2. If a voting restriction abridges the rights of 0.5 percent of white voters and 1.5 percent of Black voters, it can mean thousands of Black voters have their voting rights abridged because of a discriminatory restriction. Such an action cannot be dismissed because 98.5 percent of Black voters are able to vote. Congress has an interest and responsibility to rid the country of racial discrimination in voting, not only to reduce it. In her dissent, Justice Kagan explained that a voting law may violate Section 2 if it results in racially discriminatory outcomes, regardless of the size of the burden it imposes in absolute terms.

Yet another "guidepost" enumerated in the *Brnovich* decision suggests that States may erect roadblocks to voting that disproportionately harm historically disenfranchised racial groups and engage in voter suppression so long as that State has raised a theoretically legitimate—albeit unsubstantiated—interest, such as abstract concerns about potential for fraud. This guidepost threatens to restore our nation to the time before the Voting Rights Act's enactment, when States adopted facially neutral voting laws under the pretense of "purity of the ballot" but with the intent of excluding Black voters from the political process. This guidepost, too, finds no support in the VRA's text and lacked any basis in the factual record before the Court in *Brnovich*. Indeed, the majority decision repeatedly refers to a supposed risk of voter fraud, even though Arizona could not point to any fraud to justify its

⁷⁷ Nicholas Stephanopoulos, "The Supreme Court showcased its 'textualist' double standard on voting rights," *The Washington Post* (July 1, 2021), <https://www.washingtonpost.com/opinions/2021/07/01/supreme-court-alito-voting-rights-act/>; David Gans, "Selective originalism and selective textualism: How the Roberts court decimated the Voting Rights Act," *SCOTUSBlog* (July 7, 2021), <https://www.scotusblog.com/2021/07/selective-originalism-and-selective-textualism-how-the-roberts-court-decimated-the-voting-rights-act/>.

⁷⁸ *Brnovich*, at 28 (opinion of the Court).

challenged laws.⁷⁹ This guidepost, thus, rests on phantom fears about voter fraud, a phenomenon that is almost nonexistent. A study of the 834 million ballots cast in the elections between 2000 and 2014 found only 35 credible allegations of in-person voter fraud.⁸⁰ By contrast, there are voluminous examples of persistent and proliferating racial discrimination in voting during the same time period.⁸¹ While the Fifteenth Amendment and the Voting Rights Act clearly demand the eradication of racial discrimination in voting as a national imperative,⁸² the *Brnovich* opinion sends a false message that voter fraud, not racial discrimination, is the real threat to our democracy.

In short, the *Brnovich* decision is antithetical to the core constitutional principles of equality and anti-discrimination and is a major departure from nearly four decades of judicial interpretation of Section 2. Just as Congress in 1982 overrode the Court's cramped interpretation of Section 2 in *City of Mobile v. Bolden*,⁸³ today Congress must override the *Brnovich* and restore the full power of one of our nation's most important and successful civil rights laws: the Voting Rights Act of 1965.

⁷⁹ Richard Hansen, "The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems," *Slate* (July 8, 2021), <https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html?via=rss>.

⁸⁰ German Lopez, "The case against voter ID laws, in one chart," *Vox.com* (August 6, 2015), <https://www.vox.com/2015/8/6/9107927/voter-id-election-fraud>; *See also*, Quinn Scanlan, "We've never found systemic fraud, not enough to overturn the election': Georgia Secretary of State Raffensperger says," *ABC News* (Dec. 6, 2020), <https://abcnews.go.com/Politics/weve-found-systemic-fraud-overturn-election-georgia-secretary/story?id=74560956>; "Debunking the Voter Fraud Myth," Brennan Center for Justice (Jan. 31, 2017), https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf.

⁸¹ J. Morgan Kousser, "Facts of Voting Rights 3" (cataloguing currently 4,173 "voting rights events" after 1982, including many after 200); H. R. Rep. No. 109-478, at 40–43 (2006) (reciting numerous Department of Justice objections to proposed voting laws under Section 5 in the relevant time period, as well as several voting laws that were withdrawn or amended voting changes were withdrawn or amended after the DOJ requested more information); U.S. Commission on Civil Rights, "An Assessment of Minority Voting Rights Access in the United States" (Sept. 12, 2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf (identifying successful Section 2 litigation between the 2006 reauthorization and the *Shelby* decision in 2013); *see generally* Ellen D. Katz et al, "Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982," 39 *U. Mich. J. L. Reform* 643 (2006).

⁸² U.S. Const. amend. XV; 52 U.S.C. § 10301; *South Carolina*, at 308 ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century").

⁸³ 446 U.S. 55 (1980).

Conclusion

Congress's power to legislate remains undiminished. Congress maintains the constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race today just as it did in 1965. The Supreme Court's *Shelby County* decision rendered preclearance inoperative, making Section 5 of the VRA unenforceable only until Congress enacts a new, modern preclearance provision to identify covered jurisdictions. The *Brnovich* decision threatens the efficacy of the other core provision of the Voting Rights Act, Section 2, at a moment when its protections could not be more critical. This Congress should not retreat from establishing a new preclearance framework that reflects the current conditions of the nation, and from restoring Section 2's prohibition on all forms of voting discrimination that result in unequal opportunities to participate in the political process based on race.