

**TESTIMONY OF**

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**HEARING ON OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL  
LEGISLATIVE REFORMS**

**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL  
LIBERTIES  
IN THE UNITED STATES HOUSE OF REPRESENTATIVES**

**AUGUST 16, 2021**

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

The VRA is widely considered the most successful civil rights legislation in our nation’s history.<sup>2</sup> Unfortunately, the Supreme Court has seriously hampered its effectiveness. First, in *Shelby County v. Holder*,<sup>3</sup> the Court rendered inoperable the law’s preclearance provisions, which had stopped many discriminatory voting practices from ever going into effect in selected jurisdictions with a history of discrimination. More recently, in *Brnovich v. DNC*,<sup>4</sup> the Court sharply limited voters’ ability to challenge discriminatory practices under the nationwide protections against voting discrimination in Section 2 of the law. Although these decisions have seriously wounded the VRA, they also make clear that Congress has the power to restore and bolster the law.<sup>5</sup>

The need to strengthen the VRA is especially urgent now, as a decade’s worth of efforts

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<sup>1</sup> The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. I am the Vice President for Democracy and Director of the Brennan Center’s Democracy Program. I have authored numerous nationally recognized reports and articles on voting rights and elections. My work has been featured in academic journals and numerous media outlets across the country. I have served as counsel in many voting rights lawsuits, including lawsuits under Sections 2 and 5 of the Voting Rights Act. I have testified previously before Congress, and before several state legislatures, on a variety of issues relating to voting rights and elections, including the Voting Rights Act. My testimony does not purport to convey the views, if any, of the New York University School of Law.

<sup>2</sup> U.S. Department of Justice, “The Effect of the Voting Rights Act,” June 19, 2009,

<https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0>.

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

<sup>4</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

<sup>5</sup> *Shelby County*, 570 U.S. at 557 (“Congress may draft another formula based on current conditions.”); *see generally Brnovich*, 141 S. Ct. 2321 (holding premised on an interpretation of the current text of Section 2).

to restrict voting rights have reached a fever pitch. As I previously testified,<sup>6</sup> states across the country are rapidly passing new laws rolling back voting access—many of them targeting voters of color. These new laws are being implemented on top of a host of other discriminatory voting practices that have been put in place or attempted in recent years. We are also headed into a redistricting cycle, following last week’s release of Census data, that is expected to be characterized by racial discrimination and severe gerrymandering targeting communities of color.<sup>7</sup>

The VRAA is designed to address these current problems and meet current needs, while taking account of the concerns the Supreme Court identified with the 2006 reauthorization of the law. I submit this testimony to supplement the record of persistent race discrimination in voting that creates the need for the VRAA, and to explain how the VRAA is an appropriate, carefully tailored exercise of congressional authority to combat that discrimination.

## **I. New Evidence that Race Discrimination in Voting, and its Effects, Persist**

Despite the progress made in the decades following the VRA’s initial enactment, race discrimination in voting is still a very real—and in some places a growing—problem. The record this Committee has amassed in recent months, including evidence submitted by the Brennan Center, shows overwhelming evidence of contemporary voting discrimination.<sup>8</sup> While the evidence shows that race discrimination in voting is widespread, it also shows that it is especially powerful and persistent in certain geographic areas, including in a number of states that were previously covered by Section 5 of the VRA because of their past histories of discrimination in voting.

Our recent research provides even more evidence of the impact and persistence of discrimination in voting, underscoring the acute need for the VRAA.

### **A. Persistent Racial Turnout Gaps**

A recently published analysis by the Brennan Center’s Kevin Morris and Coryn Grange demonstrates that turnout among nonwhite voters remains significantly lower than that among white voters.<sup>9</sup> Even with record overall turnout in the 2020 election, there was a significant

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<sup>6</sup> See *Hearing on the Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. On Judiciary, Subcomm. On the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>; *Hearing on Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, Before the H. Comm. On House Administration, Subcomm. On Elections*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/2021-06-22%20Waldman%20-%20Testimony.pdf>.

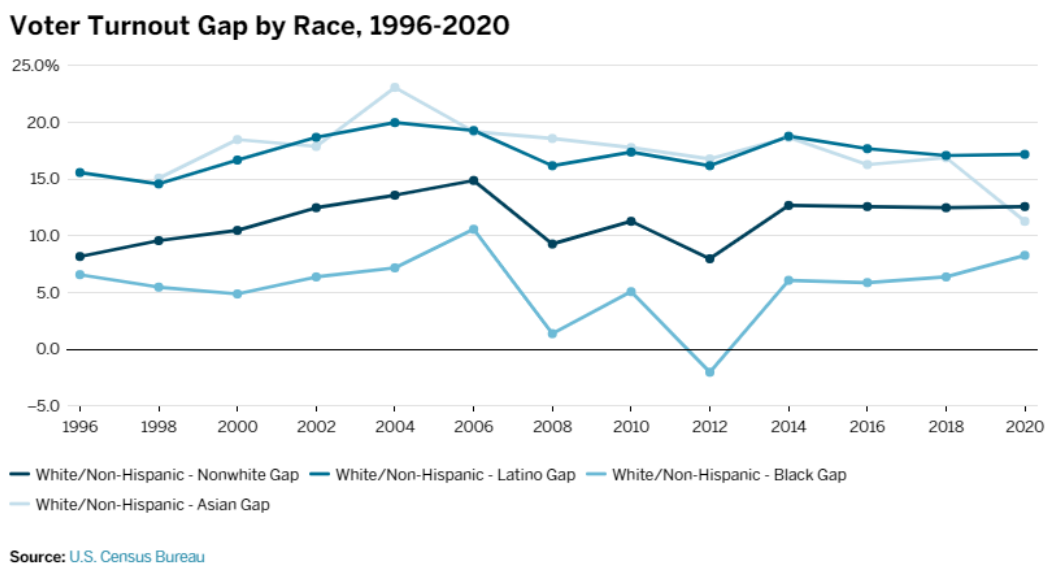
<sup>7</sup> Michael Li, *The Redistricting Landscape, 2021-22*, Brennan Center for Justice, 2021,

<https://www.brennancenter.org/our-work/research-reports/redistricting-landscape-2021-22>.

<sup>8</sup> See Michael Waldman, testimony on *Voting in America; Hearing on Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot, Before the Comm. on House Administration, Subcomm. on Elections*, 117th Cong. (2021) (testimony of Kevin Morris, Researcher, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/Morris%20-%20Written%20Testimony.pdf>; Wendy Weiser, testimony on *Oversight of the Voting Rights Act*.

<sup>9</sup> Kevin Morris and Coryn Grange, “Large Racial Turnout Gap Persisted in 2020,” Brennan Center, August 6, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election>.

turnout gap between white and nonwhite voters.<sup>10</sup> Overall, 70.9 percent of eligible white voters cast ballots in the 2020 election, compared to only 58.4 percent of nonwhite voters.<sup>11</sup> In fact, as the graph below—reproduced from the Brennan Center’s published analysis—demonstrates, the turnout gap between white and nonwhite voters has gone virtually unchanged since 2014, and it has grown since its modern-era lows in 2008 and 2012.<sup>12</sup> And even when the gap between Black and white voters was closing—a trend that has sadly reversed course in recent years—Latino and Asian American voters lagged far behind their white counterparts in participation.<sup>13</sup> (This is true of Native American voters as well, though their numbers are too small for inclusion in the census data.)



While our research does not examine whether or the extent to which voter suppression efforts caused this gap to persist—and at some points, widen—it does demonstrate that the temporary closure of the Black-white voting gap in 2008 and 2012 was anomalous. This is particularly significant in light of the *Shelby County Court*’s reliance on evidence that this gap had supposedly closed by 2013 to question Congress’s justification for preclearance.<sup>14</sup>

## B. Larger Turnout Gaps in Previously Covered Jurisdictions

According to more recent census data, described in a new Brennan Center analysis by Coryn Grange, Peter Miller, and Kevin Morris,<sup>15</sup> the growth in the racial turnout gaps since 2012 is even starker in the states likely to be subject to preclearance under the VRAA. In recent years,

<sup>10</sup> Morris and Grange, “Large Racial Turnout Gap Persisted.”

<sup>11</sup> Morris and Grange, “Large Racial Turnout Gap Persisted.”

<sup>12</sup> Morris and Grange, “Large Racial Turnout Gap Persisted.” The white-nonwhite turnout gap in 2020 was 12.5 percent in 2020, an increase from a recent low of 8 percent in 2012.

<sup>13</sup> Morris and Grange, “Large Racial Turnout Gap Persisted.”

<sup>14</sup> 570 U.S. at 536, 547-49.

<sup>15</sup> Coryn Grange, Kevin Morris, and Peter Miller, “Turnout Gaps in Jurisdictions Previously Covered by Section 5 of the Voting Rights Act,” Brennan Center for Justice, Aug. 20, 2021, <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights>(hereinafter “Turnout Gaps”).

white voter turnout has vastly exceeded nonwhite turnout in virtually every state previously subject to preclearance, and in some areas, the progress made in the decades leading up to *Shelby County* has all but vanished.

Our analysis finds that, after hitting historic lows immediately before *Shelby County* in 2012, the white-Black turnout gap has significantly grown in almost every state previously covered by the VRA.<sup>16</sup> In South Carolina, for example, the white-Black turnout gap has grown by 21 percentage points since 2012, to 15 percent.<sup>17</sup> In Texas and Virginia, the gap has grown by 13 percentage points, to 11 percent and 13 percent, respectively.<sup>18</sup> In Louisiana, the gap has grown by 11 percentage points, to 7 percent.<sup>19</sup> And in North Carolina, which was not covered in its entirety but had a number of covered political subdivisions, the gap has grown by 17 percentage points, to 3 percent.<sup>20</sup> These are dramatic shifts in only eight years. In most of the states mentioned here, the turnout gap between Black and white voters grew from a slight gap *in favor* of Black voters to a significant gap in favor of white voters.

The data also indicates that the post-*Shelby County* racial turnout gaps are more than a Black and white issue.<sup>21</sup> The total white-nonwhite turnout gap has grown since 2012 in all of the eight states likely to be covered under the VRAA.<sup>22</sup> And the racial turnout gap is especially large for Hispanics. In Georgia and Virginia, for example, the non-Hispanic white-Hispanic turnout gap was 26 percentage points in 2020.<sup>23</sup> In Texas, it was 19 percentage points.<sup>24</sup>

### C. Discriminatory Voting Barriers in 2020

In addition to a growing turnout gap among white and nonwhite voters, the 2020 election saw a proliferation of discriminatory voting barriers. A new report by the Brennan Center's Will Wilder catalogs the wide range of barriers, disparate burdens, and discrimination voters of color faced during the 2020 election cycle.<sup>25</sup> These included new restrictive voting laws, racially discriminatory voter roll purges, disparities in mail delivery and in mail ballot processing times that were exacerbated by the Covid-19 pandemic, long lines and closed polling places, racially-targeted voter intimidation, and targeted misinformation campaigns.<sup>26</sup>

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<sup>16</sup> The white-Black turnout gap has grown in six states likely to be covered by the VRAA: Alabama, Georgia, Louisiana, South Carolina, Texas, and Virginia. In Florida and Mississippi, the white-Black turnout gap has remained somewhat steady. *See* Grange et al, "Turnout Gaps."

<sup>17</sup> Grange et al, "Turnout Gaps."

<sup>18</sup> Grange et al, "Turnout Gaps."

<sup>19</sup> Grange et al, "Turnout Gaps."

<sup>20</sup> Grange et al, "Turnout Gaps."

<sup>21</sup> Grange et al, "Turnout Gaps."

<sup>22</sup> Grange et al, "Turnout Gaps." There is sufficient data to conclude that the gap has increased for Blacks, Hispanics, and Asians in Florida, Georgia, North Carolina, South Carolina, and Texas. In Alabama, Louisiana, and Mississippi, the sample sizes in the available census data are too small for Hispanic and Asian voters to make an overall white-nonwhite turnout gap estimation that is distinct from the white-Black turnout gap in those states.

<sup>23</sup> Grange et al, "Turnout Gaps."

<sup>24</sup> Grange et al, "Turnout Gaps." In California, which is close to meeting the coverage requirements in the VRAA, the turnout gap was 20 percentage points.

<sup>25</sup> Will Wilder, *Voter Suppression in 2020*, Brennan Center for Justice, Aug. 20, 2021, Parts II – III, <https://www.brennancenter.org/our-work/research-reports/voter-suppression-2020>.

<sup>26</sup> *See generally* Wilder, *Voter Suppression in 2020*.

Perhaps more than in any other year in recent history, elected officials and political operatives were direct about their intentions to shrink the electorate in 2020, at times with explicit or thinly-veiled references to race.<sup>27</sup> These statements of discriminatory intent are important context for the range of discriminatory results seen in 2020.

As we have previously testified, the push to disenfranchise voters of color continued after the election, as the Trump campaign and others filed frivolous lawsuits aimed at tossing out the votes of Black voters in urban centers and other voters of color.<sup>28</sup> This litigation and the lies used to justify it helped spur on violent attacks on the Capitol.<sup>29</sup> The same lies laid the rhetorical groundwork for a new wave of restrictive voting legislation this year unlike anything we have seen since the VRA's enactment in 1965. Our most up-to-date research shows that 18 states enacted 30 new laws restricting access to voting between January 1 and July 14, 2021.<sup>30</sup>

#### **D. Discriminatory Plans to Reduce Representation**

The Brennan Center's recent report, "Representation for Some," authored by Yuriy Rudensky et al., offers additional evidence of the growing risk of race discrimination in voting.<sup>31</sup> This study analyzes the impact of a voting change that is being pushed in a number of states—namely, the exclusion of non-citizens and children under 18 from the population base used to draw electoral districts. Using data from Texas, Georgia, and Missouri, the report finds that adopting an adult citizen redistricting base would have a substantial and disparate effect on communities of color, particular Latino communities.

While to date no state has adopted an adult citizen redistricting base, these findings are relevant to Congress's inquiry because there is an ongoing effort to adopt such a change, including in states that were previously subject to preclearance and would likely be covered under the VRAA. This change is being pursued with the express knowledge that its principal impact would be to disadvantage communities and voters of color. For example, Thomas Hofeller, a prominent conservative redistricting strategist who helped draw maps after the 2010 census in Alabama, Florida, North Carolina, and Texas that were later struck down by courts as discriminatory, indicated in a memo shared with conservative strategists that changing the apportionment base would be "advantageous to Republicans and non-Hispanic Whites."<sup>32</sup> The substantial risk that states and localities will adopt a discriminatory adult citizen redistricting base further underscores the need for robust protections under the Voting Rights Act.

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<sup>27</sup> Wilder, Voter Suppression in 2020, Part II.

<sup>28</sup> Wilder, Voter Suppression in 2020, Part VII.

<sup>29</sup> Michael Waldman, "Trump's Big Lie Led to Insurrection," Brennan Center for Justice, January 12, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/trumps-big-lie-led-insurrection>.

<sup>30</sup> Brennan Center for Justice, "Voting Laws Roundup: July 2021," July 22, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021>.

<sup>31</sup> Yuriy Rudensky et al., "Representation for Some," Brennan Center, July 29, 2021, <https://www.brennancenter.org/our-work/research-reports/representation-some>.

<sup>32</sup> See Rudensky et al., Representation for Some.

## **II. The VRAA's Preclearance Provisions Effectively Target the Problem of Voting Discrimination**

The VRAA's preclearance provisions are well designed to target the persistent problem of voting discrimination in a manner consistent with constitutional requirements. The bill includes a coverage formula that will effectively remedy and deter illegal discrimination without casting the net so widely that it imposes burdens on jurisdictions where ordinary litigation is sufficient to stop discrimination.<sup>33</sup> It does so by carefully targeting coverage to jurisdictions and conduct where discrimination is most prevalent, reflecting current conditions and recent historical experience, as the original formula did in 1965.<sup>34</sup> It introduces a geographic coverage formula that triggers only in jurisdictions with recent histories of verifiable voting discrimination. It also establishes limited nationwide preclearance for certain practices that have been used frequently to discriminate against voters of color.

### **A. The VRA's Preclearance Provisions Are Necessary and Warranted**

These preclearance provisions are well justified by the extensive record before Congress.

First, the record before Congress makes clear that preclearance is, unfortunately, still necessary to root out persistent discrimination. As we have previously testified (and as the Supreme Court previously recognized), litigation is emphatically not enough to prevent discrimination where it is repeated; preclearance is necessary. Litigation is costly, slow, and often allows discriminatory rules to govern pending a decision. In some cases, like our recently completed lawsuit challenging Texas's strict voter ID law, multiple elections occur under discriminatory practices before a judicial resolution alters or eliminates them.<sup>35</sup> A favorable decision in such a case cannot un-suppress lost votes, reallocate spent resources, or restore confidence in citizens whose efforts to register and vote were wrongfully denied. Preclearance, by comparison, is a fast process that prevents certain discriminatory measures from taking effect in the first place. The pre-*Shelby* regime showed the effectiveness of cutting off discriminatory laws and practices at the pass rather than leaving citizens to pick up the burden of challenging them.<sup>36</sup> The last eight years have shown the harm that can be done without the specter of

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<sup>33</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ 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.’” (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976))).

<sup>34</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (“The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”).

<sup>35</sup> See, e.g., Brennan Center for Justice, “Texas NAACP V. Steen (consolidated with Veasey v. Abbott),” last modified Sept. 21, 2018, <https://www.brennancenter.org/our-work/court-cases/texas-naacp-v-steen-consolidated-veasey-v-abbott>. In this case, a voter ID law that went into effect in 2013 governed until a temporary remedy was enacted before the November 2016 election and the legislature altered it in 2017. In the meantime, every court that considered the law found it to be discriminatory.

<sup>36</sup> Between 1998 and 2013, Section 5 preclearance blocked 86 discriminatory changes from going into effect, including 13 in the 18 months before *Shelby County*. Wendy Weiser and Alicia Bannon, *An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice (2018), <https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20Solutions%202018.%20Democracy%20Agenda.pdf>. For state-by-state chronological listings of Section 5 objections, see U.S. Department of Justice, “Section 5 Objection Letters,” accessed August 13, 2021, [http://www.justice.gov/crt/records/vot/obj\\_letters/index.php](http://www.justice.gov/crt/records/vot/obj_letters/index.php).

preclearance deterring and blocking harmful laws.<sup>37</sup> Indeed, in many jurisdictions, as soon as a discriminatory law or practice was successfully challenged, the legislature or other public officials took steps to put another voting restriction in its place. As voting barriers have proliferated, so have voting rights lawsuits, reaching unprecedented highs in recent years.<sup>38</sup> Without congressional action, this trend shows no signs of abating.

Second, the record before Congress shows the importance of applying preclearance to elections at the federal, state, and local levels. Discriminatory laws and practices do not just plague federal elections. They also exist in school board, county commission, and state house elections, as the extensive testimony compiled by Professor Peyton McCrary shows.<sup>39</sup> These elections have significant consequences; they can determine issues ranging from the educational resources provided to minority voters' children to whether representatives of minority communities are present at the redistricting table. Unless all eligible voters are able to participate in all elections free from discrimination, our society is not achieving the promise of equal justice for all.

Third, as discussed below, the record before Congress supports the application of a geographic coverage formula to target jurisdictions where voting discrimination is most rampant. And while I do not cover this in my testimony, I believe that the record also supports a practice-based trigger to target practices that are frequently applied to discriminate against minority voters. Requiring preclearance for certain voting practices that are known to be inherently discriminatory is an effective way to target the VRAA as efficiently as possible at the worst forms of discrimination.<sup>40</sup>

## **B. The VRAA's Geographic Coverage Formula Is Well Designed to Target and Root Out Rampant Discrimination**

While discrimination in voting is widespread overall, the record before this Committee shows that certain jurisdictions tend to perpetrate voting discrimination much more than others. It is therefore appropriate for Congress to include a geographic-based trigger for preclearance so as to focus remedial attention on the places where discrimination is persistent and pervasive.

The VRAA's geographic coverage formula is effectively designed to target places where discrimination is recent, widespread, and persistent.

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<sup>37</sup> Michael Waldman, testimony on *Voting in America*.

<sup>38</sup> The Brennan Center maintains a tracker of recent voting rights lawsuits. See Brennan Center for Justice, "Voting Rights Litigation Tracker 2020," <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020>; Brennan Center for Justice, "Voting Rights Litigation Tracker 2021," <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021>. Professor Richard Hasen has long tracked the growth in voting rights and election-related lawsuits. See, e.g., Richard Hasen, "The Democracy Canon," 62 Stan. L. Rev. 69 (2009).

<sup>39</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

<sup>40</sup> See, e.g., Terry Ao Minnis *et al*, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities' Votes*, AAJC, MALDEF, & NALEO Educational Fund, November 2019, <https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf>; *Hearing on the Need to Enhance the Voting Rights Act: Practice-Based Coverage, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Thomas Saenz, President and General Counsel, MALDEF), <https://www.maldef.org/2021/07/hearing-on-the-need-to-enhance-the-voting-rights-act-practice-based-coverage/>.

*i. The formula relies on the best evidence of discrimination.* The formula identifies those jurisdictions where the problem of discrimination is the greatest by focusing on the best evidence for determining where there is a problem to remedy: a jurisdiction’s recent violations of laws prohibiting race discrimination. Specifically, the VRAA looks to law violations reflected in court orders, DOJ objection letters, or settlements that were either entered by a court or contained an admission of liability and lead to a change in voting practices. The volume of litigation in and of itself is a probative way to identify where persistent discrimination is taking place; where a jurisdiction is repeatedly discriminating against its citizens, one would expect those citizens to file repeated lawsuits.

But the mere filing of a lawsuit is not enough to trigger coverage under the VRAA; there must also be formal findings that a violation occurred. In other words, the bill looks to objective indicia that discrimination actually occurred. Not surprisingly, legal findings of voting discrimination are more common in jurisdictions that were previously covered under the VRA’s preclearance regime. As Professors Morgan Kousser and William Kenan testified, more than five out of every six successful voting rights lawsuits between 1957 and 2019 occurred in places that were previously covered, even though for most of that time preclearance prevented the implementation of discriminatory laws in those jurisdictions.<sup>41</sup>

*ii. The formula’s high numeric threshold for violations over a 25-year review period identifies persistent patterns of discrimination.* The VRAA sets numeric thresholds to capture only those states with an established pattern of discriminatory conduct. Specifically, as previously introduced, the bill would capture only those states with 10 violations, at least one of which was statewide, or 15 total violations, over the prior 25 years. These high numeric thresholds mean that the VRAA’s geographic coverage for preclearance will apply only to those jurisdictions that continue to exhibit discrimination despite successful litigation. In other words, the preclearance coverage formula is specifically tailored to remedy race discrimination where case-by-case litigation has proven ineffective or inefficient.<sup>42</sup> (While the bill’s requirement of 10 separate, independent findings of discrimination is helpful to identify the states where the problem has been most difficult to root out, it also means that some states with quite a bit of discrimination will not be covered unless the discrimination continues over time.<sup>43</sup> In those states, voters will have to rely on the other remedies in the VRA.)

The geographic coverage formula’s 25-year review period is necessary to assess which of those jurisdictions with current records of discrimination also exhibit a persistent, longstanding

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<sup>41</sup> *Legislative Proposals to Strengthen the Voting Rights Act, Before the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties*, 116th Cong. 8 (2019) (statement of J. Morgan Kousser, William R. Kenan, Jr. Professor of History and Social Science, California Institute of Technology), <https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf>.

<sup>42</sup> *Katzenbach*, 383 U.S. at 328 (holding that preclearance “was clearly a legitimate response” by Congress to the fact that “case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits”).

<sup>43</sup> See *Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms*, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties, 117th Cong. (2021) (testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School). Peyton McCrary’s testimony, discussed further *infra*, demonstrates that states with reasonable records of discrimination such as Montana (five violations) and Virginia (eight violations) are still unlikely to be covered.



pattern of discrimination justifying preclearance. This time period encompasses two redistricting cycles and a sufficient number of electoral cycles to identify patterns of discrimination. The length of the review period justifies the high numeric threshold for violations, and vice versa.

*iii. The formula limits coverage to states with recent discrimination.* The geographic coverage formula is also designed to ensure that only those states with a continuing, current problem of discrimination are covered. As discussed further below, the 25-year review period works in tandem with other provisions of the bill to ensure that jurisdictions will only be covered if they have committed violations recently. First, states that meet the coverage threshold are only subject to preclearance for 10 years, after which older violations will no longer be considered. Second, as also discussed below, states that do not have any violations within the past 10 years can easily bail out of preclearance, and Congress can streamline the bail-out process even further.

As a factual matter, the formula will not cover jurisdictions that only committed violations a long time ago, nor will it cover jurisdictions that only committed a small number of violations over a short period of time.

Based on Peyton McCrary's testimony submitted for this hearing, the VRAA will likely cover eight states, all of which were covered under the VRA pre-*Shelby County*: Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas.<sup>44</sup> Assuming Congress also authorizes coverage of political subdivisions with at least three of their own violations, the following local jurisdictions would also be covered, only one of which was previously covered (because it was within a covered state): Los Angeles County, California, Cook County, Illinois, Westchester County, New York, Cuyahoga County, Ohio, and Northampton County, Virginia.<sup>45</sup> Each of these states and political subdivisions has large minority populations. (Mr. McCrary's testimony also concludes that California, New York, and Virginia are close to coverage.<sup>46</sup> Were California or New York to have one statewide violation, it would bring either state into coverage. While Virginia only has eight violations by Mr. McCrary's count, two statewide, that number could rise to 10 if Congress drafts the bill to count independent findings of violations within one case or objection letter as independent violations.)

Each of the covered states has at least one violation within the past decade, and most have multiple violations. In addition, each covered state has seen violations spread over a long time period; in no state are the violations concentrated in a time period shorter than 14 years.<sup>47</sup> Each state is treated equally,<sup>48</sup> and each has an equal opportunity to roll out of preclearance if it stops engaging in a pattern of discrimination.

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<sup>44</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*. Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Texas were covered in their entirety. Florida and North Carolina were not covered in their entirety, but contained numerous political subdivisions that were covered.

<sup>45</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

<sup>46</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

<sup>47</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

<sup>48</sup> It would be helpful for the legislation to correct for a difference that arises in states that have areas without any organized local government or local election administration units but rather administer nearly all elections at the state level—currently only Alaska. These states would fare differently than other states under the current VRAA coverage formula with respect to certain violations. Specifically, if multiple unorganized Census areas in Alaska fail to provide adequate language materials or assistance in the same election, that would count as only one violation against Alaska, whereas in other states it would constitute multiple independent violations—one against each local

*iv. The formula appropriately targets local jurisdictions where discrimination is prevalent.* The VRAA’s geographic coverage formula is designed to cover states with consistent patterns of discrimination. Some have argued that subjecting political subdivisions within states to preclearance based on violations committed by the state itself and by other subdivisions is not fair. However, as I explain here, doing so is both reasonable on principle and consistent with past practice.

Local jurisdictions do not exist in isolation. They are embedded within larger communities and larger jurisdictions, including states. From a legal standpoint, as I discuss further below, political subdivisions are “mere creatures of the State”; as one court noted, “no legal distinction exists between State and local officials” for the purpose of preclearance.<sup>49</sup> Our electoral system distributes election administration responsibility between local and state election officials. When a person votes, their selections for local, state, and federal offices are often recorded on the same ballot, and they are subject to the same policies and burdens when casting each of these votes. Perhaps more importantly, when a voter casts their ballot, they are participating in and affected by a political culture that does not necessarily stop at their town or county’s borders. When this political culture has a demonstrated record of discrimination, it is not unreasonable to presume that all jurisdictions within it should be subject to preclearance.<sup>50</sup> Indeed, state officeholders that engage in discriminatory practices are elected by people within each of the state’s political subdivisions.

Past practice under the VRA demonstrates that state coverage is a reasonable way to identify local jurisdictions where discrimination is prevalent. The VRA previously subjected states and all their political subdivisions to preclearance based on statewide turnout figures and the use of tests and devices, regardless of the specific figures and practices within each subdivision. In practice, this successfully identified those jurisdictions where discrimination was most likely to occur. A quick review of the Justice Department’s objections to voting policies demonstrates that the vast majority of objections were to local-level policies in covered states.<sup>51</sup> For example, the Department of Justice objected to at least 104 voting changes in Alabama while preclearance was in effect in that state; all but 18 of these objections were to local- and county-level policies spread across a wide variety of political subdivisions.<sup>52</sup>

Peyton McCrary’s analysis of the states likely to be covered under the VRAA shows that it is fair to conclude that discrimination pervades the local jurisdictions in those states as well. According to his testimony, every jurisdiction likely to be covered by the VRAA has at least one statewide violation, violations across at least five local jurisdictions in a broad geographic area, and violations distributed across the entire 25-year period.<sup>53</sup> Take Georgia for example. Professor

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jurisdiction. To ensure that each state is treated similarly, we propose correcting for that difference, perhaps via a provision that provides, in states that administer nearly all local elections at the state level, that independent violations in each subdivision will count as independent violations.

<sup>49</sup> *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990).

<sup>50</sup> I use the word “presumptively” because, as I discuss further *infra*, jurisdictions with no actual record of recent discrimination will be able to avoid preclearance through the VRAA’s bailout process.

<sup>51</sup> U.S. Department of Justice, “Section 5 Objection Letters,” accessed August 14, 2021, <https://www.justice.gov/crt/section-5-objection-letters>.

<sup>52</sup> Department of Justice, “Section 5 Objection Letters.”

<sup>53</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

McCrary estimates that Georgia has 25 total violations over the 25-year period. These include four statewide violations and violations involving 19 different cities, counties, and school boards.<sup>54</sup> In other words, the formula captures geographic areas where discrimination is widespread, persistent, and continues to the present day, regardless of the political subdivisions.

**v. The VRA's bail-out provisions prevent over-inclusion.** The bail-out provisions in Section 4(a) of the VRA ensure that local jurisdictions where discrimination is not prevalent will not be unfairly subject to coverage. Political subdivisions that have not engaged in discriminatory conduct for ten years can petition for relief from the preclearance process even if the state as a whole and its other subdivisions are still covered.

The VRA's bail-out process is easy and efficient. Since 1997, 50 jurisdictions across seven states have successfully bailed out of preclearance, according to the Department of Justice.<sup>55</sup> All but one of these jurisdictions (the Northwest Austin Municipal Water District No. 1) did so via a consent decree with the Department of Justice, without contested litigation.<sup>56</sup> Since the 1982 amendments to the VRA, every jurisdiction that requested bailout succeeded.<sup>57</sup> According to election law expert Gerry Hebert, who represented the majority of jurisdictions that bailed out between the implementation of the 1982 amendments and *Shelby County*, the bailout process became more efficient over time as more jurisdictions used it.<sup>58</sup>

Congress has an opportunity to make the bailout process even more efficient by creating an administrative bailout process that largely circumvents judicial review. We recommend that Congress create an administrative process for jurisdictions to seek bailout without having to file an action in court. Political subdivisions without recent violations could file requests directly with the Department of Justice. If the Department of Justice agrees that the jurisdiction qualifies for bailout under the VRA's criteria, the Attorney General could publish a Federal Register Notice that the jurisdiction is eligible for administrative bailout. If there are no objections within a specified time period, the jurisdiction could be bailed out automatically via a second Federal Register Notice, without any judicial action. Jurisdictions that are denied or face local opposition to bailout would still be able to use the existing bailout mechanism by filing an action in the District Court for the District of Columbia. Because the objective bailout criteria from the 1982 amendments closely mirror the preclearance criteria in the VRAA, Congress could also automatically "grandfather in" all jurisdictions that bailed out under the 1982 amendments pre-*Shelby County* out of coverage, unless they commit the requisite number of new violations to subject them to future coverage.

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<sup>54</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

<sup>55</sup> U.S. Department of Justice, "Section 4 of the Voting Rights Act," accessed August 13, 2021, <https://www.justice.gov/crt/section-4-voting-rights-act>.

<sup>56</sup> *Id.* The exception was a utility district in Texas, which was ultimately bailed out after a Supreme Court ruling in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>57</sup> Brief for Jurisdictions That Have Been Bailed Out as Amici Curiae Supporting Respondents at 14, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

<sup>58</sup> J. Gerald Hebert, "An Assessment of the Bailout Provisions of the Voting Rights Act," in *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power*, ed. Ana Henderson (Berkeley: Berkeley Public Policy Press, 2007), [https://www.law.berkeley.edu/files/ch\\_10\\_herbert\\_3-9-07.pdf](https://www.law.berkeley.edu/files/ch_10_herbert_3-9-07.pdf).

### **III. The VRAA’s Geographic Coverage Formula Is a Constitutional Exercise of Congress’s Powers**

The VRAA’s geographic coverage formula, updating Section 4(b) of the VRA, is constitutional under Supreme Court precedent. As an initial matter, the Supreme Court has repeatedly held that the preclearance regime in Section 5 of the VRA is constitutional<sup>59</sup>—and it remains constitutional today. The Court has upheld preclearance under the Fourteenth and Fifteenth amendments, which give Congress significant leeway to craft broad remedial legislation to protect against racial discrimination in voting. These amendments permit Congress to remedy and to deter voting rights violations by prohibiting conduct that is not itself strictly unconstitutional.<sup>60</sup> Although the Court has recognized that preclearance is an extraordinary legislative approach that stretches ordinary principles of federalism,<sup>61</sup> it has also affirmed that such “strong medicine”<sup>62</sup> is necessary and constitutionally justified to address pervasive and persistent race discrimination in voting.<sup>63</sup>

As I discuss above and as the record before Congress makes clear, such discrimination remains pervasive today, especially in the jurisdictions that would likely be covered under the VRAA. In expressing doubt about the continued need for preclearance roughly a decade ago, the Supreme Court observed that “[v]oter turnout and registration rates now approach parity,” “[b]latantly discriminatory evasions of federal decrees are rare,” and “minority candidates hold office at unprecedented levels.”<sup>64</sup> Simply put, these observations no longer hold true. Today, the registration and turnout gaps between white voters and voters of color are substantial and persistent, especially in jurisdictions likely to be covered.<sup>65</sup> Indeed, the gaps between Hispanic and Non-Hispanic white voters rivals the registration and turnout gaps between Black and white voters from 1965.<sup>66</sup> It is not rare to see states pile voting restriction after voting restriction, even as earlier restrictions are struck down by the courts in what amounts to judicial whack-a-mole.<sup>67</sup> And while there are more minority candidates than ever before, minorities are still dramatically underrepresented relative to their population in the halls of congress, state legislatures, and state courts, with some states trending toward less, not more, minority representation.<sup>68</sup> In short, the justification for preclearance remains powerful.

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<sup>59</sup> *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the constitutionality of the 1965 preclearance regime); *Georgia v. United States*, 411 U.S. 526 (1973) (upholding the constitutionality of the 1970 preclearance regime); *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding the constitutionality of the 1975 preclearance regime); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999) (upholding the constitutionality of the 1982 preclearance regime).

<sup>60</sup> See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 223–224 (2009).

<sup>61</sup> *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 211.

<sup>62</sup> *Shelby County*, 570 U.S. at 535.

<sup>63</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

<sup>64</sup> See *Nw. Austin Municipal Util. Dist. No. One*, 557 U.S. at 202; see also *Shelby County*, 570 U.S. at 535.

<sup>65</sup> Morris and Grange, “Large Racial Turnout Gap Persisted.”

<sup>66</sup> Morris and Grange, “Large Racial Turnout Gap Persisted.”

<sup>67</sup> See, e.g., Brennan Center, “Voting Laws Roundup.”

<sup>68</sup> See Katherine Schaeffer, “The Changing Face of Congress in 7 Charts,” Pew Research Center, March 10, 2021, <https://www.pewresearch.org/fact-tank/2021/03/10/the-changing-face-of-congress/>; Renuka Rayasam et al., “Why State Legislatures Are Still Very White — and Very Male,” Politico, Feb. 22, 2021, <https://www.politico.com/interactives/2021/state-legislature-demographics/>; Janna Adelstein and Alicia Bannon, “State Supreme Court Diversity — April 2021 Update,” Brennan Center, April 20, 2021, <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-april-2021-update>.

The VRAA’s primary mode of imposing preclearance—its geographic coverage formula—is likewise constitutional. In *Shelby County*, the Supreme Court explained that there are constraints on when and how Congress can adopt preclearance. Most significantly, the Court said that any attempt to target states for preclearance coverage “must be justified by current needs”<sup>69</sup> and the formula rationally related to the problem it is trying to address.<sup>70</sup> Relying on this principle, the *Shelby County* Court struck down the prior geographic coverage formula, finding that it was improper for Congress to rely on obsolete practices, such as literacy tests, along with outdated information, such as 1960s- and 1970s-era voter registration rates, rather than current conditions and voting rights violations.<sup>71</sup> The old coverage formula, the Court observed, bore no “no logical relation to the present day.”<sup>72</sup> And the record of voting discrimination before Congress, according to the Court, “played no role in shaping” the coverage formula.<sup>73</sup> But even as the Court struck down the prior coverage formula, it invited Congress to craft an updated coverage formula responding to these concerns.<sup>74</sup> Under the Court’s recent precedents, therefore, a formula that is justified by current needs and is sufficiently related to the problem it targets should pass constitutional muster.

The VRAA’s updated coverage formula clearly meets that test. It is “rational in both practice and theory,” as the *Shelby County* Court explained was required, and its remedies are “aimed at areas where voting discrimination has been most flagrant.”<sup>75</sup> The VRAA’s preclearance regime draws on *recent* history of racial discrimination in voting. The updated formula looks to voting discrimination over the past 25 years, and it ensures that only states that have violations in the past 10 years will be covered. This 25-year time period, which covers two redistricting cycles and up to five presidential elections, is tailored to identify those jurisdictions with a persistent record of discrimination—precisely what the Court requires to justify disparate geographic coverage. A shorter period of review would not be long enough to identify a sustained pattern of misconduct and could risk subjecting to preclearance states and jurisdictions with only sporadic violations. Indeed, as discussed above, all the potentially covered jurisdictions have a steady and consistent stream of violations, showing that the formula is in fact well-tailored.<sup>76</sup>

Critical features of the coverage formula, moreover, ensure that the VRAA captures only current violators, not just jurisdictions that had problems 25 years ago. Two particular features of the VRAA make that so. First, the VRAA covers jurisdictions for only ten years at a time. After ten years of coverage, jurisdictions are automatically freed from preclearance, unless their continuing violations merit renewed coverage. So, jurisdictions that improve their recent records of discrimination will systematically drop out of coverage, while jurisdictions that have increased instances of discrimination will enter it. Thus, the VRAA has an implicit sunset

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<sup>69</sup> *Shelby County*, 570 U.S. at 536; *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203.

<sup>70</sup> *Shelby County*, 570 U.S. at 546 (citing *South Carolina v. Katzenbach*, 383 U.S. at 330 (concluding that original geographic coverage formula was “rational in both practice and theory” in 1966)).

<sup>71</sup> *Shelby County*, 570 U.S. at 531.

<sup>72</sup> *Shelby County*, 570 U.S. at 554.

<sup>73</sup> *Shelby County*, 570 U.S. at 554.

<sup>74</sup> *Shelby County*, 570 U.S. at 557 (“Congress may draft another formula based on current conditions.”).

<sup>75</sup> *Shelby County*, 570 U.S. at 546.

<sup>76</sup> This 25-year window is also shorter than that previously upheld by the Supreme Court. For example, the Supreme Court upheld the 1982 coverage formula that subjected jurisdictions to 25 years of preclearance based on data from 1972, meaning that certain jurisdictions were covered in 2007 based on conditions that existed more than 35 years earlier, no matter what happened in the interim. See *Lopez v. Monterey Cty.*, 525 U.S. 266, 284-85 (1999).

provision: when a jurisdiction no longer engages in a pattern of discrimination in voting, it will no longer be subject to coverage. And should the day come when voting discrimination no longer plagues our country, the VRAA will become dead letter, no longer subjecting any states or localities to preclearance. In addition to the ten-year coverage period, the VRAA's bail-out regime ensures that any jurisdiction without violations over the past decade will be able to quickly and efficiently escape preclearance. And the proposed modifications to the bail-out regime that I discuss above would further ensure that the coverage formula is laser-focused on present-day discrimination. This responsive focus on current conditions is exactly what the Court asked for in *Shelby County*.

The VRAA modernizes the coverage formula and, as the *Shelby* Court requested, uses a “narrowed scope” to reflect both current problems and progress made to date.<sup>77</sup> While the states that are likely to be covered under the VRAA's updated formula were all previously covered, some states that were previously covered—Alaska, for example—will likely not be covered.<sup>78</sup> And it is not surprising that the list of states with a past history of discrimination overlaps substantially with the list of states with current problems of persistent discrimination. On the other hand, the local jurisdictions that will be captured by this formula are largely jurisdictions that were not previously covered. They are all jurisdictions with large and growing minority populations. This shows that Congress has indeed updated the law to be dynamic and responsive to modern conditions. Clearly, the record before this Congress is playing a substantial “role in shaping the statutory formula” that will be included in the VRAA.<sup>79</sup>

The VRAA also tracks discrimination more directly than the coverage formula struck down in *Shelby County*. The VRAA's coverage formula “limit[s] its attention to the geographic areas where immediate action seem[s] necessary”—specifically, areas where there is actual “evidence of actual voting discrimination,” that are “characterized by voting discrimination ‘on a pervasive scale.’”<sup>80</sup> To that end, the VRAA's touchstone is not registration and turnout numbers—it is actual, proven acts of discrimination. Such acts are self-evidently “relevant to voting discrimination.”<sup>81</sup> By linking coverage to objective findings of discrimination, the VRAA targets only those places where proven discrimination against voters of color persists. In this regard, the VRAA's coverage formula is similar to the uncontroversial bail-in provision found in Section 4 of the VRA: covering those states and localities where there are, in the words of the 1965 House Report, “pockets of discrimination.”<sup>82</sup>

Concerns regarding the coverage formula's potential overbreadth are misplaced. As noted above, the coverage formula effectively targets geographic areas where discrimination is prevalent, and the bail-out regime would enable any political subdivision without discrimination to escape preclearance. The prior geographic coverage formula that the Supreme Court repeatedly upheld subjected all political subdivisions to preclearance based on a statewide inquiry. In any event, the Supreme Court has made clear time and again that the benefits of state

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<sup>77</sup> *Shelby County*, 570 U.S. at 546.

<sup>78</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

<sup>79</sup> *Shelby County*, 570 U.S. at 554.

<sup>80</sup> *Shelby County*, 570 U.S. at 546 (quoting *Katzenbach*, 383 U.S. at 328).

<sup>81</sup> *Shelby County*, 570 U.S. at 546.

<sup>82</sup> H.R. Rep. No. 89-439, at 13 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2444.

sovereignty do not extend to its political subdivisions.<sup>83</sup> This is because “the law ordinarily treats municipalities as creatures of the State.”<sup>84</sup> On this basis, one district court held it reasonable to bring all subdivisions and a state itself into preclearance based on a pattern of violations by some of its subdivisions.<sup>85</sup> In reviewing a request to bail the state of Arkansas and all its subdivisions into coverage for certain electoral processes, that court found that because “[c]ities, counties, and other local subdivisions are mere creatures of the State” that the State may “create or abolish . . . at will,” “no legal distinction exists between State and local officials” for the purpose of preclearance.<sup>86</sup> The court also found that because the use of the relevant voting practice was clearly a “pattern” and a “systematic and deliberate attempt to reduce black political opportunity,” it was reasonable to hold all other jurisdictions in the state to the preclearance requirement.<sup>87</sup> The Supreme Court has never questioned this approach to sub-state preclearance.

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Although not the focus of my testimony, there are two other points relevant to the VRAA’s constitutionality. First, in addition to the geographic coverage formula, the VRAA also features a practice-based preclearance regime with nationwide application. This practice-based preclearance regime singles out often discriminatory practices—such as changes in methods of election, annexations, polling place relocations, and interference with language assistance—for federal oversight. Because it has no specific geographic scope and does not impose continuing coverage, it does not implicate, much less offend, the principle of equal sovereignty articulated in the *Shelby County* opinion.

Second, separate and apart from the Fourteenth and Fifteenth Amendments, Congress has extremely strong powers under the Elections Clause to set the “times, places and manner” of federal elections—powers the Supreme Court has said include “authority to provide a complete code for congressional elections.”<sup>88</sup> Congress has invoked those powers to enact voting legislation like the National Voter Registration Act, which the Supreme Court has determined permissibly overlays a “superstructure of federal regulation atop state voter-registration systems.”<sup>89</sup> And just a few years ago, the Supreme Court approvingly discussed how Congress has used the Elections Clause to “enact[] a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections.”<sup>90</sup> The Elections Clause, therefore, independently justifies the VRAA to the extent that it regulates federal elections. The Supreme Court’s concerns in *Shelby County*—which were based on Court’s interpretation of the Fourteenth and Fifteenth Amendments—have no bearing on the constitutionality of the VRAA as it pertains to federal elections.

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<sup>83</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (holding that state sovereign immunity does not extend to political subdivisions).

<sup>84</sup> *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 365 (2009) (Breyer, J., concurring in part and dissenting in part).

<sup>85</sup> *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990).

<sup>86</sup> *Jeffers*, 740 F. Supp. at 591.

<sup>87</sup> *Jeffers*, 740 F. Supp. at 594-95.

<sup>88</sup> *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

<sup>89</sup> *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 4 (2013).

<sup>90</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019).

#### **IV. Congress Should Restore and Strengthen Section 2 of the VRA in the Wake of the Supreme Court’s Recent *Brnovich* Decision**

As my colleague Sean Morales-Doyle recently testified at length,<sup>91</sup> we also strongly urge Congress to use this opportunity to restore Section 2 of the Voting Rights Act in the wake of the Supreme Court’s recent decision in *Brnovich v. Democratic National Committee*.<sup>92</sup> Section 2 is critical for fighting voting discrimination in jurisdictions not subject to preclearance (and for fighting certain forms of voting discrimination in covered jurisdictions as well). The *Brnovich* decision seriously diminished Section 2’s strength, making it much less effective a tool for rooting out modern discriminatory voting laws and practices.<sup>93</sup> In doing so, it undermined Congress’s clear intent in 1982 to create a powerful remedy to attack electoral laws and practices that interact with the ongoing effects of discrimination to produce discriminatory results in the voting process.<sup>94</sup>

There are a number of approaches to restoring Section 2 to its full strength, but they all share two basic features. First, they would codify the so-called “Senate Factors” that courts have long used to assess whether a voting law or practice results in unlawful discrimination under Section 2, and make clear that courts should consider those factors in both vote dilution (redistricting) and vote denial (vote suppression) cases.<sup>95</sup> Second, they would disclaim the artificial limitations the *Brnovich* opinion placed on courts considering Section 2 claims—such as the suggestion that voting practices that were in place in 1982 should be treated as presumptively valid under Section 2, and the suggestion that unequal access to one method of voting can be excused if other methods of voting are freely available. These two fixes would ensure that Section 2 comports with both Congress’s original intent in amending Section 2 in 1982 and with prior practice in federal courts. The Supreme Court was clear in *Brnovich* that its ruling was based in statutory interpretation.<sup>96</sup> Congress can therefore easily correct the Court’s misinterpretation and restore Section 2 to its intended strength.

While the *Brnovich* decision applies only to “vote denial” claims, it is important that any statutory fix address “vote dilution” or redistricting claims as well. Section 2 has long been a vital tool for ensuring fair electoral maps. According to a recent Brennan Center analysis, Section 2 has played a critical role in addressing discrimination in redistricting, as evidenced by the more than 20 successful redistricting cases since the 2006 reauthorization of the VRA.<sup>97</sup>

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<sup>91</sup> *Hearing on the Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Sean Morales-Doyle, Acting Director, Voting Right and Elections Program, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-07/2021-07-15%20Morales-Doyle%20-%20Testimony.pdf>

<sup>92</sup> 141 S. Ct. 2321 (2021).

<sup>93</sup> See Morales-Doyle testimony.

<sup>94</sup> See Morales-Doyle testimony.

<sup>95</sup> S. Rep. No. 97-417, at 28–29; see also *Thornburg v. Gingles*, 478 U.S. 30, 44–45 (1986)

<sup>96</sup> *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. \_\_\_, slip. op. at 14 (2021) (“Today, our statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise here.”).

<sup>97</sup> *The Use of Section 2 to Secure Fair Representation*, Brennan Center for Justice (Aug. 13, 2021), <https://www.brennancenter.org/our-work/research-reports/use-section-2-secure-fair-representation>.



The VRAA would work in tandem with another piece of legislation, the For the People Act (H.R.1). H.R.1 sets national standards for fair, secure, and accessible elections; the VRAA targets jurisdictions and practices with a history of discrimination. H.R.1 would override existing discriminatory state laws and practices and replace them with a fair alternative; the VRAA would establish preclearance for future such laws and practices. Both are vitally needed to strengthen our democracy.

## **V. Conclusion**

As the record before this Committee shows, the scourge of voting discrimination has exploded across the country, and it is especially acute and pervasive in selected jurisdictions. The John Lewis Voting Rights Advancement Act is carefully crafted to target and root out that discrimination where it is most persistent. The VRAA's preclearance provisions are not only eminently reasonable, justified, and consistent with the Constitution; they are also necessary to stem the relentless rise of discriminatory voting changes. Those preclearance provisions, coupled with new provisions to strengthen Section 2 of the VRA, would restore the VRA to its full strength before the Supreme Court dramatically weakened the law in *Shelby County* and *Brnovich*. That strength is badly needed now. We strongly urge Congress to enact the VRAA, as well as the For the People Act, into law.