
CONGRESSIONAL TESTIMONY

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

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Subcommittee on the Constitution, Civil Rights, and Civil Liberties

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Introduction

My name is Hans A. von Spakovsky.¹ I appreciate the invitation to be here today. The views I express in this testimony are my own, and should not be construed as representing any official position of the Heritage Foundation or any other organization.

I am a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Center for Legal and Judicial Studies at The Heritage Foundation. Prior to joining The Heritage Foundation, I was a Commissioner on the U.S. Federal Election Commission for two years. Before that I spent

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four years at the U.S. Department of Justice as a career civil service lawyer in the Civil Rights Division, where I received three Meritorious Service Awards (2003, 2004, and 2005). I began my tenure at the Justice Department as a trial attorney in 2001 and was promoted to be Counsel to the Assistant Attorney General for Civil Rights (2002-2005), where I helped coordinate the enforcement of federal voting rights laws, including the Voting Rights Act, the National Voter Registration Act, the Help America Vote Act, and the Uniformed and Overseas Citizens Absentee Voting Act.²

There Is No Need for Legislative Reforms

The answer to the question of whether there is a need for legislative reforms to the Voting Rights Act of 1965 (“VRA”) is a straightforward “no.” The VRA is one of the most important – and most successful – statutes ever passed by Congress to guarantee the right to vote free of discrimination. After the U.S. Supreme Court’s correct decision in *Shelby County v. Holder*,³ the VRA through its various provisions, including Section 2, remains a powerful statute whose remedies are more than sufficient to protect all Americans.

With the latest guidance by the U.S. Supreme Court on the proper application of Section 2 to discriminatory practices in *Brnovich v. DNC*,⁴ both the U.S. Justice Department and private parties have the legal means at their disposal to stop those increasingly rare instances of voting discrimination when they occur.

There Is No Wave of “Voter Suppression” Occurring

The claim that there is a wave of voter suppression going on across the country that requires expansion of the VRA is simply false. Efforts to enhance the integrity of the election process through reforms such as voter identification requirements and improvements in the accuracy of statewide voter registration lists are not voter suppression. This is evidenced by steady increases in registration and turnout in states that have implemented such reforms, as well as the enforcement record of the Justice Department, which has seen a steady decrease in the number of enforcement cases due to a decreasing number of violations of federal law, even after the 2013 *Shelby County* decision.

I explained this in greater detail in a recent law review article, “The Myth of Voter Suppression and the Enforcement Record of the Obama Administration,” which is attached to, and

² I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia. In Virginia, I served for three years as the Vice Chairman of the Fairfax County Electoral Board, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981. I am the coauthor of *Who’s Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk* (2012) and *Obama’s Enforcer – Eric Holder’s Justice Department* (2014).

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

⁴ *Brnovich v. Democratic National Committee*, 594 U.S. ____ (2021).

incorporated into, this testimony.⁵ For example, during the entire eight years of the Obama administration, the Civil Rights Division of the Justice Department filed only four cases to enforce Section 2 of the VRA. The Trump Administration filed two Section 2 enforcement actions.

Thus, there was no upsurge in Section 2 cases after the *Shelby County* decision; in fact, the Obama Administration filed far *fewer* Section 2 enforcement actions than the Bush Administration, which filed 16 such cases. That record over the past two decades, and particularly in the last ten years, provides no evidence to support the claim that there are widespread, unlawful, voter suppression actions being taken against minority voters by state and local jurisdictions, as has been falsely claimed since at least 2013.

The Census Bureau's recent release of its 2020 election survey of voter turnout also clearly demonstrates that there is no wave of "voter suppression" keeping American voters from registering and voting or that requires amending the VRA and expanding the power of the Justice Department.⁶

Instead, the Census Bureau reports that the turnout in last year's election was 66.8 percent – just short of the record turnout of 67.7 percent of voting-age citizens for the 1992 election. This was higher than the turnout in President Barack Obama's first election, which was reported as 63.6 percent by the Census Bureau.

The Census survey shows that there was higher turnout among all races in 2020 when compared to the 2016 election. Black Americans turned out at 63 percent, compared to only 60 percent in 2016. Fifty-nine percent of Asian Americans voted in 2020, a 10-percentage point increase from 2016 when 49 percent turned out to vote.

The Census Bureau reports that voter registration in 2020 reached 72.7 percent, which is higher than the 70.3 percent who registered in 2016 after eight years of the Obama-Biden administration. Not only that, but voter registration in 2020 was higher than in the 2000, 2004, 2008 and 2012 elections.

Fifty-four percent of Hispanics reported turning out to vote in 2020 according to the Census Bureau, compared to only 50 percent of Hispanics who voted in 2008 when Barack Obama was elected. Hispanics made up 11 percent of the total turnout in the 2020 election, up from only nine percent in 2016. The Hispanic share of the vote was just behind that of Black Americans, who had 12 percent of the total vote in 2020 – the same percentage of the total vote by Black Americans in the 2016 election at the end of the Obama-Biden administration.

⁵ Hans A. von Spakovsky, "The Myth of Voter Suppression and the Enforcement Record of the Obama Administration," 49 U. Mem. L. Rev. 1447 (2018-2019).

⁶ "2020 Presidential Election Voting and Registration Tables Now Available," U.S. Census Bureau, Press Release (April 29, 2021).

The bottom line of the Census Bureau’s survey is that Americans are easily registering – when they want to – and they are turning out to vote when they are interested in the candidates who are running for office. In fact, in an election year in which we were dealing with an unprecedented shutdown of the country due to a pandemic, we had, according to the Census Bureau, “the highest voter turnout of the 21st century.”

The Proposed Amendments to the VRA Are Unnecessary and Unconstitutional

The amendments to the VRA that have been proposed in prior sessions are contained in H.R. 4, The John Lewis Voting Rights Advancement Act. I explain the problems with this bill in-depth in a recent *Heritage Foundation* analysis, “Enabling Partisan Federal Bureaucrats to Control State Election Laws: The Unnecessary and Unconstitutional John Lewis Voting Rights Advancement Act. (H.R. 4),” which is also attached to, and incorporated into, this testimony.⁷

There is no need for new legislation reimposing and actually expanding the onerous preclearance requirements of Section 5 of the VRA, and no evidence that the permanent provisions of the VRA such as Section 2 are not adequate to protect voters’ rights. The proposed amendments are also almost certainly unconstitutional because they do not satisfy what is required by the Supreme Court’s *Shelby County* decision to justify continuing, much less expanding, the preclearance requirement. As the Court made clear in that decision, the 1965 standards were obsolete, and any requirement that states obtain federal pre-approval of any proposed election changes before they can be implemented could be imposed only if Congress found “blatantly discriminatory evasions of federal decrees;” lack of minority office holding; voting tests and devices; “voting discrimination ‘on a pervasive scale;” or “flagrant” or “rampant” voting discrimination. These conditions are nowhere to be found in any state in 2021.

Additionally, Section 3 of the VRA already allows a federal court to impose a preclearance requirement in a particular jurisdiction for as long as necessary where the court determines that there is intentional misconduct and preclearance is required to ensure compliance with the voting guarantees of the Fourteenth and Fifteenth Amendments.”⁸ With the availability of the customized preclearance requirement of Section 3 that can be imposed on a recalcitrant jurisdiction based on the specific evidence of wrongdoing uncovered in a specific enforcement action, there is no need for a broad, general, and expanded preclearance requirement as proposed in H.R. 4.

If H.R. 4 is enacted, the lawyers inside the Voting Section of the Civil Rights Division would be given veto authority over state election laws and regulations; when it comes to exercising that powerful discretion and initiating unbiased enforcement actions, the attorneys in that section have a very checkered record. This was perhaps best captured in 1994 in *Johnson v. Miller*, where a federal court issued a scathing opinion in a preclearance case charging that “the considerable

⁷ Issue Brief No. 6082 (May 24, 2021).

⁸ 52 U.S.C. § 10302.

influence of ACLU advocacy on the voting rights decisions of the United States attorney general is an embarrassment” and that the “dynamics” between the DOJ and American Civil Liberties Union lawyers “were that of peers working together, not of an advocate submitting proposals to higher authorities.” The judge was “surprised” that DOJ “was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote.”⁹ The judge also found the “professed amnesia” of the DOJ lawyers about their relationship with ACLU attorneys “less than credible.”

In another case involving preclearance, a federal court ruled against DOJ, holding that it “had arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies.”¹⁰ In fact, using its power under the VRA, DOJ “impermissibly encouraged – nay, mandated – racial gerrymandering.”¹¹ The public was forced to pay the state of Louisiana over \$1.1 million in attorneys’ fees and costs due to DOJ’s wrongdoing in that case.

As the Judiciary Committee should be aware from a letter sent to it in 2006 by the Justice Department, these were just two of 11 cases involving the Civil Rights Division from 1993 to 2000 in which courts admonished the Division for its misbehavior and awarded over \$4.1 million in attorneys’ fees and costs to defendants abusively targeted by the Division.¹²

In 2013, the Inspector General of the Justice Department issued a critical report on the operations of the Voting Section of the Civil Rights Division that cited numerous examples of inappropriate and biased behavior by its staff.¹³ No one who reads that report could possibly think that giving the partisans who work in the Voting Section the regal power to decide what the election rules are for each state could possibly be a good idea.

The VRA is race-neutral – it protects *all* voters from discrimination. But that is decidedly not the view of the Voting Section staff. The Inspector General found “relevant evidence” demonstrating the staff “disfavored” cases where victims of discrimination were white.¹⁴ This resulted in their ignoring discrimination against white voters even in the most egregious of circumstances.

For example, the Voting Section failed to take action against a Guam law that used a blood ancestry test – the same kind used in the South during the Jim Crow era to exclude blacks – to prevent white and Asian residents of Guam from being able to register and take part in a plebiscite. It took an expensive private lawsuit to end Guam’s bigoted treatment of its residents, which the

⁹ Johnson v. Miller, 864 F.Supp. 1354 (S.D. Ga. 1994).

¹⁰ Hays v. State of Louisiana, 839 F. Supp. 1188 (W.D. La. 1993).

¹¹ 936 F.Supp. 360 (W.D. La. 1996).

¹² Letter of April 12, 2006, from William E. Moschella, Assistant Attorney General for Legislative Affairs, U.S. Department of Justice, to Hon. F. James Sensenbrenner, Chairman, Committee on the Judiciary, U.S. House of Representatives.

¹³ “A Review of the Operations of the Voting Section of the Civil Right Division,” Office of the Inspector General, U.S. Department of Justice (March 2013) (hereinafter “OIG Report”).

¹⁴ OIG Report, p. 179.

Ninth Circuit U.S. Court of Appeals found violated the Fifteenth Amendment in *Davis v. Guam* in 2019.¹⁵

In 2006, according to the Inspector General, staff members assigned to file a lawsuit under the VRA against black officials in Noxubee County, Mississippi, for discriminating against white voters were subjected to written and verbal abuse from peers. The team leader was called a “Klansman” in official email correspondence. A black intern who requested to join the team was repeatedly taunted as a “token” and when the intern’s mother paid a visit to the office, career employees complained that her son was acting as a racial “turncoat.”¹⁶

A federal court in 2007 found that the defendants in Noxubee County had engaged in “blatant” racial discrimination in a case that the majority of career staff not only did not want to bring, but in which they attempted to intimidate and harass those involved in working on the case.¹⁷

The Inspector General also found that career employees, identifying themselves as DOJ employees, published “highly offensive and potentially threatening statements” about colleagues on prominent liberal-leaning news websites, including posting comments about one person’s “Yellow Fever” – a demeaning reference to that person’s presumed sexual attraction to a person who “look[s] Asian.”¹⁸

Another staff employee confessed to being the organizer of a three-person “cyber-gang” that published comments falsely asserting that a supervisor was a racist after hanging a noose in the supervisor’s office (p. 128-129). This employee, who adopted an online avatar of a black literary character who becomes a killer, made further online comments, including stating his desire to “choke” colleagues with whom he disagreed (p. 130).

The Inspector General found other conduct by staff in the Voting Section to be “disturbing,” including posting messages on liberal news sites disparaging administration officials and Section managers, and using extremely bigoted, racial language towards anyone they believed did not share their liberal views. When confronted with the Internet postings about conservative co-workers, one member of the “cyber bullying” group initially lied under oath to the Inspector General’s staff about her participation.¹⁹

Lying to an Inspector General employee conducting an investigation is federal crime, just as it is to lie to an FBI agent. Yet no adverse actions of any kind were taken against this Section staffer. In fact, a source inside the Voting Section told me she was treated as a “hero” by other employees.

¹⁵ *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019).

¹⁶ OIG Report, p. 121-123.

¹⁷ *U.S. v. Brown*, 494 F.Supp.2d 440 (S.D. Miss. 2007), affirmed 561 F.3d 420 (5th Cir. 2009).

¹⁸ OIR Report, p. 127.

¹⁹ OIG Report, p. 127-129.

Relevant to the finding by a federal court in the *Miller* case, the Inspector General also criticized Voting Section management for specifically reaching out only to progressive organizations, such as the ACLU, the Mexican American Legal Defense and Education Fund, the NAACP Legal Defense and Education Fund, and the Lawyers' Committee for Civil Rights under Law, to fill job openings, while ignoring the resumes of other qualified professionals.²⁰ As a result, only applicants whose views were slanted dramatically to the left on the ideological spectrum, many of whom endorsed questionable views of the law, were given serious consideration.²¹

One can already see this bias and abuse of authority in some of the latest actions taken by the Civil Rights Division. DOJ threatened Arizona over the forensic post-election audit it is conducting in a May 5 letter and issued "guidance" on July 28 purporting to outline "Federal Law Constraints on Post-Election Audits."²²

This "guidance" wrongly exaggerates the reach of 52 U.S.C. §§ 20701-20706. The purpose of these federal statutes, which require the preservation of federal election records, is investigatory in nature. They exist to help the Attorney General in determining the advisability of commencing possible investigations of federal election offenses. But if there is no underlying potential voting rights violation, any exercise of this power is not authorized and is a brazen abuse of power.

Contrary to the assertions made by DOJ, conducting an audit of a past election does not violate the VRA or any other federal election law. In fact, the Justice Department has never – in the entire history of the existence of the Civil Rights Division – interfered with or investigated an election audit, because its past leadership has understood it has no legal authority to do so. There is also no basis for DOJ to assert, as it does in the guidance, a possible violation of Section 11b of the VRA, which prohibits the direct intimidation, threat or coercion of individuals "for the purpose of interfering" with the ability to vote given that Arizona voters have already voted! The Justice Department's assertion that an audit could violate Section 11b is a highly implausible, if not outright absurd, interpretation of the law.

The same is true of the Justice Department's July 28 "Guidance Concerning Federal Statutes Affecting Methods of Voting."²³ In this "guidance," DOJ says that it does not "consider a jurisdiction's re-adoption of prior voting laws or procedures to be presumptively lawful," and instead will review the changes "for compliance with" federal law. In other words, DOJ will use the emergency procedures as the new baseline for reviewing a state's election laws under the VRA.

Not only is such a standard not contemplated by the text and legislative history of Section 2 of the VRA, which defines the Department's authority to assert violations of the law, it certainly is not in accord with the clear guidance provided by the U.S. Supreme Court on the application of Section 2 in the *Brnovich v. Democratic National Committee* decision. It is another example of the

²⁰ OIG Report, p. 198.

²¹ OIG Report, p. 219-222.

²² "Federal Law Constraints on Post-Election 'Audits'," U.S. Department of Justice (July 28, 2021).

²³ "Guidance Concerning Federal Statutes Affecting Methods of Voting," U.S. Department of Justice (July 28, 2021).

Division's abuse of its authority. Instead, the Department is trying to intimidate states to prevent them from returning to their election rules that were in place prior to the health emergency caused by the COVID-19 pandemic.

Conclusion

Existing federal voting laws, including the VRA and other statutes such as the National Voter Registration Act and the Help America Vote Act, are more than sufficient to protect voters and ensure that they can easily and securely practice their franchise without discrimination, fear, or intimidation. Americans today have an easier time registering and voting securely than at any time in our nation's history. Voter registration and turnout data, as well as the enforcement record of the U.S. Justice Department, show that there is no widespread, systematic discrimination by state or local election officials to prevent citizens from registering and voting. The permanent, nationwide provisions of the VRA such as Section 2 and Section 3 that apply across the country – not just to formerly covered jurisdiction under Section 5 – are powerful tools and are more than adequate to protect voting rights in those increasingly rare instances where discrimination does occur.

There is simply no need to resuscitate the outdated and obsolete preclearance provisions of Section 5 of the VRA and certainly no need to implement a new, vastly expanded Section 5, which in addition to bringing back preclearance for covered jurisdictions, would add a "practice-based" preclearance requirement that applies to every city, county, and state in the country.

It is not 1965 and there is no longer any justification for giving the federal government the ability to veto the election laws and regulations that citizens and their elected representatives choose to implement in their respective states.

Enabling Partisan Federal Bureaucrats to Control State Election Laws: The Unnecessary and Unconstitutional John Lewis Voting Rights Advancement Act (H.R. 4)

Hans A. von Spakovsky

KEY TAKEAWAYS

It is easier today than ever before in our nation's history for eligible Americans to participate in the electoral process.

The permanent, nationwide provisions of the Voting Rights Act are more than adequate to protect voting rights in the rare instances where discrimination occurs.

H.R. 4 is a politically motivated federal power grab designed to thwart necessary election reform and manipulate redistricting decisions made by the states.

H.R. 4, the John Lewis Voting Rights Advancement Act, would give liberal bureaucrats in the Department of Justice (DOJ) the power to veto changes of polling place locations, voter ID and registration requirements, and the boundary lines in redistricting in *every single state*. It would also change legal standards to make it almost impossible for states to defend themselves against meritless litigation.

Supreme Court Ruling in *Shelby County v. Holder*

H.R. 4 is intended to overturn the decision by the Supreme Court of the United States in *Shelby County v. Holder* (2013),¹ which struck down the coverage formula for Section 5 of the Voting Rights

This paper, in its entirety, can be found at <http://report.heritage.org/ib6082>

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Act (VRA). Section 5 was intended to be a temporary provision that required covered jurisdictions to get approval (preclearance) from the DOJ or a federal court in Washington, DC, before making any changes in their voting laws.

The 1965 coverage formula was based on low voter registration and turnout in presidential elections, which the Court found to be unconstitutional because the 2006 renewal of Section 5, which would have extended that provision for another 25 years, was based on 40-year-old data that did not reflect contemporary conditions. Census Bureau data show that black voter turnout today is on par with or exceeds that of white voters in many of the formerly covered states and that there are no disparities traceable to discriminatory behavior by states.

This decision did not affect other provisions of the VRA that protect voters, such as Section 2. There is no need for new legislation reimposing (and expanding) the onerous preclearance requirement and no evidence that the permanent provisions of the VRA are not adequate to protect voter rights.

The proposed legislation is almost certainly unconstitutional because it does not satisfy what the Supreme Court said was required for coverage: The 1965 standards were obsolete, and any requirement that states obtain federal approval of election changes could be imposed only if Congress found “blatantly discriminatory evasions of federal decrees;” lack of minority office holding; voting tests and devices; “voting discrimination ‘on a pervasive scale;’” or “flagrant” or “rampant” voting discrimination. Those conditions are nowhere to be found in 2021.

In the entire eight years of the Obama Administration, the Justice Department filed only four enforcement cases under Section 2 of the VRA, and there was no rise in enforcement actions by the department after the *Shelby County* decision.² According to a recent study, the decision “did not widen the Black–White turnout gap in states subject to the ruling.”³ In fact, the U.S. Census Bureau survey of the 2020 election reports “the highest voter turnout of the 21st century.”⁴

What the VRA Already Provides

Section 2 is a permanent, nationwide ban on discrimination in voting based on race, color, or membership in a language minority group.⁵ It prohibits intentional discrimination as well as discriminatory “results” based on a court’s review of the “totality of the circumstances” under which it occurred.

Section 3 allows a court to impose a preclearance requirement in a particular jurisdiction for as long as necessary where the court determines that there is intentional misconduct and preclearance is required to ensure compliance with the voting guarantees of the Fourteenth and Fifteenth Amendments.⁶

What the Proposed Act Would Do

H.R. 4's stated purpose is to prevent racial discrimination, but it would force racial gerrymandering, make race the predominant factor in the election process, advance the partisan interests of one political party, and prevent common-sense election reforms like voter ID.

It would change Section 3 from requiring a showing of intentional discrimination to allowing other violations of the VRA—most of which require only a showing of “disparate impact” (i.e., a statistical disparity)—to count toward triggering preclearance coverage.

New Coverage Formula for Section 4 of the VRA

Under a new coverage formula, a state government and all of its political subdivisions would be placed under Section 5 preclearance for 10 years if the DOJ determines that 15 “voting rights violations” by local jurisdictions occurred during the “previous 25 calendar years,” even though there were no violations by the state or by the majority of local governments.

Alternatively, entire states would be placed under Section 5 preclearance for 10 years if the DOJ determines that 10 “voting rights violations” occurred during the “previous 25 calendar years” if one of those violations was by the state government.

A political subdivision within a state would be placed under preclearance coverage if it has just three “voting rights violations” during the “previous 25 calendar years.” That trigger is so low that it could end up covering almost any city, county, or town in the country.

“Voting rights violations” include not just final court judgments that a jurisdiction has violated the VRA or the Fourteenth and Fifteenth Amendments, but also settlement agreements, consent decrees, and any preclearance objections made by the Attorney General. Such objections do not require *any* finding of intentional discrimination; a discriminatory effect based on statistical disparity is sufficient. Such “disparate impact” liability has been misused in many different areas besides voting.

This is especially troubling given the DOJ's history of filing unwarranted objections under Section 5 based on its bias in favor of liberal advocacy

groups. In 2012, a federal court overturned the DOJ's objection to South Carolina's voter ID law—but it cost the state millions of dollars to win.⁷ In 1994, in a Georgia redistricting case, a federal court ruled against the DOJ and wrote a scathing opinion charging that “the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment” and expressing the court’s “surprise[]” that the DOJ was “so blind to this impropriety.”⁸

This bias has not changed. A 2013 report from the DOJ Inspector General criticized the Voting Section of the Civil Rights Division for hiring a majority of its lawyers from only five advocacy organizations: the American Civil Liberties Union (ACLU); National Council of La Raza; NAACP; the Lawyers' Committee for Civil Rights Under Law (LCCR); and Mexican American Legal Defense and Education Fund (MALDEF).⁹

Most jurisdictions do not have the resources to fight the DOJ even when its objections are meritless.

Because tallying up court rulings against a jurisdiction, including settlement agreements and consent decrees, will trigger coverage, the DOJ and outside groups will have an incentive to file as many objections as possible and to manufacture litigation. Even settlements of meritless litigation that a state enters into to avoid the cost of litigation would count as “voting rights violations” for purposes of triggering preclearance coverage.

Practice-Based Preclearance Coverage

H.R. 4 also has a new, unprecedented provision that did not exist in the VRA before the *Shelby County* decision that would vastly expand the DOJ's power and reach. It creates a “practice-based preclearance” requirement that would apply to *every single political jurisdiction in the country*, regardless of whether that jurisdiction is covered under the new 10-year coverage formula or ever had a history of discrimination.

Specifically, *all* state legislatures and local governments would have to get preclearance from the DOJ for any new “law, regulation, or policy” that:

- Adds “elected at-large” seats where two or more racial/language minority groups represent 20 percent of the voting age population (VAP);
- Adds “elected at-large” seats where a single language minority group represents 20 percent of the VAP on Indian lands within the political subdivision;

- Changes political boundaries that reduce by three percentage points the VAP of a single racial/language minority group where two or more racial/language groups represent 20 percent of the VAP or where a single language minority groups represents 20 percent of the VAP on Indian lands;
- Changes the political boundaries of a district where a racial/language minority group has experienced an increase in its population over the past decade of at least 10,000 or 20 percent of the VAP in the district;
- Changes the “documentation or proof of identity” needed to register or vote that is stricter than Section 303(b) of the Help America Vote Act¹⁰ or stricter than what existed in state law on the day H.R. 4 is enacted;
- Reduces or alters the distribution of “multilingual voting materials”;
- “Reduces, consolidates, or relocates voting locations,” including for early and absentee voting, or reduces the “days or hours of in person voting on any Sunday” in any census tract where two or more racial/language minority groups represent 20 percent of the VAP or on Indian lands represent 20 percent of a language minority group; and
- Changes state voter registration procedures for removing ineligible registered voters if two or more racial/language minority groups represent 20 percent of the VAP.

These “practices” are so broad and cover such a wide spectrum of election administration and procedures that election changes made by state legislatures and local governments in virtually every state would now be within federal control. This is a startling invasion of state sovereignty that would likely be held unconstitutional by the U.S. Supreme Court, particularly since it allows the DOJ to object based purely on statistical disparities without any showing of any discriminatory purpose or intent.

New Disclosure Requirements

H.R. 4 imposes burdensome and impractical public information disclosure requirements on local officials, such as providing detailed demographic analysis of every single precinct, as well as on state officials with respect

to redistricting and other election changes. These changes must be posted within 48 hours, despite the fact that much of the information that must be disclosed, such as the number of registered voters in each precinct, is constantly changing up until Election Day.

Changing Legal Standards and Procedures

While Section 5 of the VRA could be enforced only by the Attorney General, which means that only the DOJ could file an enforcement action against any covered jurisdiction that failed to comply with the preclearance requirement, H.R. 4 would expand enforcement to allow “any aggrieved citizen” to file an enforcement action. This would open the floodgates to litigation by advocacy groups, particularly because the act would allow them to file a federal lawsuit if they disagreed with the DOJ’s preclearance of a voting change.

H.R. 4 creates a novel legal standard for injunctive relief that is unknown in modern jurisprudence and far less stringent than the legal standard used for all other cases in the federal courts. The usual standard for whether a preliminary injunction is appropriate requires a court to determine whether the plaintiff has shown a substantial likelihood of succeeding on the merits, the plaintiff is likely to suffer irreparable harm without the injunction, the balance of equities and hardships is in the plaintiff’s favor, and an injunction is in the public interest.¹¹

However, under H.R. 4, if a plaintiff such as the ACLU simply “raise[s] a serious question” about a voting change and the “hardship” imposed on the state by enjoining the change is less than the “hardship” that would be experienced by the plaintiff if an injunction is not issued, the court must grant an injunction. This weaker standard favors plaintiffs’ lawyers; reverses the principle that the burden of proof is on a plaintiff, not a defendant; and dramatically increases the odds that an injunction will be granted against state and local governments.

In another unprecedented move, H.R. 4 also severely restricts the ability of courts of appeal, including the U.S. Supreme Court, to issue stays of such injunctions. In a section entitled “Grounds for Stay or Interlocutory Appeal,” the act states that the inability of a state to enforce its own voting laws and regulations shall not “constitute irreparable harm to the public interest,” overriding the fundamental democratic principle that the public interest is best served by courts enforcing the laws under which citizens choose to govern themselves through the representational process.

Finally, the Act would *dramatically* expand the Attorney General’s power to challenge “any act prohibited by the 14th or 15th Amendment” of the U.S. Constitution. Under current law, the Attorney General can bring civil rights claims only under specific federal statutes such as the VRA that authorize the Justice Department to enforce the law. Only private plaintiffs can file lawsuits alleging violations of the Fourteenth or Fifteenth Amendment. This change would allow the Attorney General to become involved in a whole range of constitutional cases unrelated to race discrimination, such as highly partisan, politically charged election disputes like the *Bush v. Gore* decision of 2000.

Conclusion

Americans today have an easier time registering and voting than at any other time in our nation’s history. Moreover, both the enforcement record of the U.S. Department of Justice and voter registration and turnout data show that there is no widespread, systematic discrimination by state legislators and election officials to prevent citizens from registering and voting. The permanent, nationwide provisions of the Voting Rights Act, such as Section 2 and Section 3, are powerful provisions and more than adequate to protect voting rights in those increasingly rare instances where discrimination does occur.

There is simply no need to bring back the preclearance provisions of Section 5 of the VRA and certainly no need to implement a new, vastly expanded Section 5. It is not 1965, and there is no longer any justification for giving the federal government the ability to veto the election laws and regulations that citizens and their elected representatives choose to implement in their respective states.

H.R. 4 is nothing less than a federal power grab designed to thwart election reform and manipulate redistricting decisions made by the states.

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Endnotes

1. *Shelby County v. Holder*, 570 U.S. 529 (2013).
2. Hans A. von Spakovsky, "The Myth of Voter Suppression and the Enforcement Record of the Obama Administration," *University of Memphis Law Review*, Vol. 49, Book 4 (2019), p. 1147, https://www.memphis.edu/law/documents/07_von_spakovsky.pdf (accessed May 24, 2021).
3. Kyle Raze, "Voting Rights and the Resilience of Black Turnout," February 7, 2021, p. 1, https://kyleraze.com/files/shelby_county_voting.pdf (accessed May 24, 2021).
4. Press release, "2020 Presidential Election Voting and Registration Tables Now Available," U.S. Department of Commerce, U.S. Census Bureau, April 29, 2021, <https://www.census.gov/newsroom/press-releases/2021/2020-presidential-election-voting-and-registration-tables-now-available.html> (accessed May 24, 2021).
5. 52 U.S.C. § 10301.
6. 52 U.S.C. § 10302.
7. *South Carolina v. Holder*, 898 F.Supp.2d 30 (D. D.C. 2012).
8. *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), affirmed, 515 U.S. 900 (1995).
9. U.S. Department of Justice, Office of the Inspector General, Oversight and Review Division, *A Review of the Operations of the Voting Section of the Civil Rights Division*, March 2013, p. 209, <https://oig.justice.gov/reports/2013/s1303.pdf> (accessed May 24, 2021).
10. 52 U.S.C. § 21083(b).
11. See *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

The Myth of Voter Suppression and the Enforcement Record of the Obama Administration

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I. INTRODUCTION

The progressive Left's leadership, including former President Barack Obama, former Secretary of State Hillary Clinton, and former

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Attorney General Eric Holder,¹ created a false hue and cry about a supposed loss of voting rights in recent years. They claim that state legislatures', and particularly Republicans', including President Donald Trump, support for reforms intended to improve the election process's integrity, such as voter identification requirements and the maintenance procedures of statewide voter registration lists, amounts to widespread, systemic "voter suppression" of minority voters.²

In fact, there is no "voter suppression" epidemic, as demonstrated by, among other things, the enforcement record of the Voting Section of the Civil Rights Division of the U.S. Department of Justice (the "Civil Rights Division"). The Civil Rights Division is responsible for enforcing all federal voting rights laws that prohibit discrimination,

1. See, e.g., Attorney General Eric Holder, Attorney General Eric Holder Addresses the NAACP Annual Convention (July 16, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-naacp-annual-convention>; President Barack Obama, Remarks by the President at the National Action Network's 16th Annual Convention (Apr. 11, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/04/11/remarks-president-national-action-networks-16th-annual-convention>; Jamelle Bouie, *Hillary Clinton Hits the GOP on Voter Suppression*, SLATE (June 4, 2015, 9:29 PM), <https://slate.com/news-and-politics/2015/06/hillary-clinton-speaks-out-on-voting-rights-the-democratic-frontrunner-condemns-republicans-for-attempting-to-suppress-the-vote.html>.

2. The progressive Left seems to label almost any election rule or regulation they dislike as "voter suppression." See generally Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CTR. FOR AM. PROGRESS (July 11, 2018, 12:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/> ("Furthermore, states must have in place affirmative voter registration and voting policies in order to ensure that eligible voters who want to vote are able to and are not blocked by unnecessary and overly burdensome obstacles such as arbitrary voter registration deadlines and inflexible voting hours.") (emphasis added). That includes voter ID laws; not counting ballots cast outside of an assigned precinct; any steps taken by states to maintain the accuracy of voter registration rolls by removing ineligible voters; and even the requirement that has been in place for decades in the overwhelming majority of states that requires an individual to register prior to election day. See *id.* According to the founder of iVote, a partisan "advocacy group that campaigns to elect Democratic secretaries of state," "[v]oter registration itself is a voter-suppression tool." Ellen Kurz, *Registration Is a Voter-Suppression Tool. Let's Finally End It*, WASH. POST (Oct. 11, 2018), https://www.washingtonpost.com/opinions/registration-is-a-voter-suppression-tool-lets-finally-end-it/2018/10/11/e1356198-cca1-11e8-a360-85875bac0b1f_story.html?utm_term=.92b2beaaf1af.

intimidation, and other efforts intended to prevent individuals from voting, as well as federal requirements imposed on the states for offering voter registration opportunities and maintaining those records' accuracy.³

These new state regulations and laws addressing the security of our elections, such as requiring voter identification or participation in programs that compare state voter registration lists, cannot be validly termed as "voter suppression" because they comply with existing federal voting laws, particularly given the evidence that such reforms have not hurt turnout or prevented eligible individuals from being able to vote.⁴ Moreover, the U.S. Department of Justice ("DOJ") has seen a steady decrease in the number of enforcement cases due to decreasing violations of federal law.⁵

"Voter suppression" isn't even a legitimate, defined legal term under the statutes that protect voters, including the Voting Rights Act of 1965 ("VRA") and the National Voter Registration Act of 1993 ("NVRA").⁶ "Voter suppression" is a faux term artificially created to unfairly condemn any election reform with which critics disagree, including perfectly legal reforms. The term is a linguistic trick designed to lump reasonable, legal, and common-sense actions by states meant to safeguard the integrity of the election process with illegal activities like poll taxes and literacy tests, thereby tainting legal actions taken by states to protect voters and elections.

The critics of these reform efforts allege that maintaining accurate voter registrations rolls to ensure that only eligible individuals cast ballots, prosecuting actual cases of election fraud, and implementing basic security reforms such as voter identification requirements that the American people overwhelmingly support is somehow "voter suppression."⁷ Nothing could be further from the truth.

3. *Voting Section*, U.S. DEP'T JUST., <https://www.justice.gov/crt/voting-section> (last visited May 13, 2019).

4. See discussion *infra* Parts III & IV.

5. See discussion *infra* Part IV.

6. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified as amended in scattered sections of 52 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

7. See *supra* note 1.

This Essay will explain, in Part II, the need for election reform that addresses the vulnerabilities in our voter registration and election system and increases the security and integrity of the election process. Part III will demonstrate that these reforms do not constitute “voter suppression” and that there have been no widespread, systemic efforts to implement discriminatory legislation, including since the Supreme Court’s 2013 decision that lifted the Section 5 preclearance requirements from certain jurisdictions. Part IV will show that the DOJ’s recent enforcement record of applicable federal voting rights laws demonstrates that there is no ongoing voter suppression campaign. Part V will explain why a new Section 5 is not needed to protect voting rights across the country. Part VI concludes.

II. THE NEED FOR REFORM TO PREVENT ELECTION FRAUD

The United States has a long history of election fraud, and preventing it remains a legitimate state interest, contrary to those who claim that it doesn’t exist. As the U.S. Supreme Court observed when it upheld Indiana’s voter ID law, states have “a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient.”⁸ Unfortunately, with regard to election fraud, it remains true, as the Supreme Court stated:

[T]hat flagrant examples of such fraud . . . have been documented throughout this Nation’s history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana’s own experience with fraudulent voting . . . demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.⁹

Most states utilize an “honor” system for the voter registration and voting process that does a poor job of guarding against election fraud. The Heritage Foundation maintains the only database in the country of recent cases of election fraud, and as of May 2019, the database contained 1,199 proven instances of voter fraud, including over

8. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008).

9. *Id.* at 195–96 (footnotes omitted).

a thousand criminal convictions and other cases in which a court ordered new elections because of fraud.¹⁰ This database is not a comprehensive list of all the fraud that has occurred in American elections, but it is a sampling of the many different types of fraud that have occurred and serves as a sobering reminder of the need for election safeguards.¹¹

This catalog of cases does not include other evidence of election fraud. For example, the Government Accountability Institute (“GAI”) discovered that thousands of individuals had illegally cast votes in multiple states in the 2016 election.¹² GAI obtained voter rolls and voter histories from twenty-one states, representing 17% of all possible state-to-state combinations.¹³ GAI performed a data comparison of registered voters using a rigorous matching methodology that relied on names, birthdates, and full social security numbers.¹⁴ As GAI said in its report, “[t]he probability of correctly matching two records with the same name, birthdate, and social security number is close to 100 percent. Using these match points will result in virtually zero false positives from the actual matching process.”¹⁵

GAI found almost 8,500 individuals who had voted illegally in more than one state.¹⁶ That included 2,200 duplicate voters in Florida, where George W. Bush’s 2000 election margin of victory was only 537 votes, and the 2018 election had several extremely tight races including for governor and U.S. senator.¹⁷ Despite this clear evidence of fraud

10. *Election Fraud Cases from Across the Country*, HERITAGE FOUND., <https://www.heritage.org/voterfraud> (last visited May 13, 2019).

11. *Id.*; see, e.g., JOHN FUND & HANS VON SPAKOVSKY, WHO’S COUNTING?: HOW FRAUDSTERS AND BUREAUCRATS PUT YOUR VOTE AT RISK 33–44 (2012); LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 274–301 (1996).

12. GOV’T ACCOUNTABILITY INST., AMERICA THE VULNERABLE: THE PROBLEM OF DUPLICATE VOTING 2–3 (2017) [hereinafter AMERICA THE VULNERABLE], <http://g-a-i.org/wp-content/uploads/2017/07/Voter-Fraud-Final-with-Appendix-1.pdf>.

13. *Id.* at 2.

14. *Id.* at 3.

15. *Id.*

16. *Id.* at 2–3.

17. PowerPoint, Ken Block, Presidential Advisory Commission on Election Integrity, Data Mining for Potential Voter Fraud: Findings and Recommendations, Slide 8 (Sept. 12, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-ken-block->

by thousands of voters, there is no indication that a single election official in any of the states examined by GAI made any effort to obtain the names of any of these duplicate voters to initiate investigations and possible prosecutions. GAI estimated that extending its conservative matching formula to all 50 states “would indicate an expected minimum of 45,000 high-confidence duplicate voting matches.”¹⁸

The Public Interest Legal Foundation (“PILF”), a non-profit public interest law firm dedicated to improving election integrity,¹⁹ has also obtained official registration records from several states including Virginia, Michigan, and New Jersey. These records showed that thousands of noncitizens were removed from voter rolls after the noncitizens contacted officials and asked to be removed, but not before many of them had cast ballots in multiple elections.²⁰ What is most concerning about this is the fact that these noncitizens registered and cast illegal votes without detection by any election officials, which demonstrates the vulnerability of the current “honor” system most states have in the election process. The fact that these noncitizens were removed only after they voluntarily notified election officials of the problem begs the question: how many other undetected noncitizens are illegally registered and voting across the nation?

Just as with GAI’s findings, there is no indication that election officials forwarded the names of any of the noncitizens reported by

presentation.pdf; *Florida State Results*, FOX NEWS, <https://www.foxnews.com/mid-terms-2018/state/florida> (last visited May 13, 2019).

18. AMERICA THE VULNERABLE, *supra* note 12, at 3.

19. The author serves on the board of the Public Interest Legal Foundation. *About Us: Board of Directors*, PUB. INT. LEGAL FOUND., <https://publicinterestlegal.org/about-us/board-of-directors/> (last visited May 13, 2019).

20. See PUB. INTEREST LEGAL FOUND., ALIEN INVASION II: THE SEQUEL TO THE DISCOVERY AND COVER-UP OF NON-CITIZEN REGISTRATION AND VOTING IN VIRGINIA 2 (May 2017), <https://publicinterestlegal.org/files/Alien-Invasion-II-FINAL.pdf>; PUB. INTEREST LEGAL FOUND., GARDEN STATE GOTCHA: HOW OPPONENTS OF CITIZENSHIP VERIFICATION FOR VOTING ARE PUTTING NEW JERSEY’S NONCITIZENS AT RISK OF DEPORTATION 1 (Sept. 2017), https://publicinterestlegal.org/files/Garden-State-Gotcha_PILF.pdf; PUB. INTEREST LEGAL FOUND., MOTOR VOTER MAYHEM: MICHIGAN’S VOTER ROLLS IN DISREPAIR 1 (Oct. 2018), https://publicinterestlegal.org/files/Motor-Voters_Michigan-Report_FINAL_MediumQuality.pdf; PUB. INTEREST LEGAL FOUND., SAFE SPACES: HOW SANCTUARY CITIES ARE GIVING COVER TO NONCITIZENS ON THE VOTER ROLLS 1 (Aug. 2018), https://publicinterestlegal.org/files/Safe-Spaces_Final.pdf;

PILF to law enforcement officials for investigation and possible prosecution.

Our voter registration and election system desperately needs reforms intended to address these types of vulnerabilities, and these reforms are not, as some claim, “voter suppression.”

III. THE FALSE CLAIMS ABOUT SECTION 5, *SHELBY COUNTY*, AND VOTER SUPPRESSION

The supposed voter suppression epidemic is often blamed²¹ on the U.S. Supreme Court’s decision in *Shelby County v. Holder*, in which the Court struck down the coverage formula of Section 5 of the VRA.²² The claim is that once certain states were no longer covered under Section 5, their state legislatures rushed to pass laws intended to suppress minority voters and keep them from registering and casting their ballots.²³ Critics say these discriminatory laws would have been stopped by the DOJ under preclearance requirements of Section 5.²⁴ That is also a false claim.

Passed in 1965, Section 5 was originally an emergency five-year provision that required covered jurisdictions to get approval of any changes in their voting laws from the U.S. Department of Justice (“DOJ”) or a three-judge panel in federal court in Washington, D.C., a process known as preclearance.²⁵ It was renewed for an additional five years in 1970; for an additional seven years in 1975; for an additional twenty-five years in 1982; and finally an additional twenty-five years in 2006.²⁶ At the time of the *Shelby County* decision in 2013, Section 5 covered nine states and parts of six others.²⁷

21. See, e.g., Vanita Gupta, President & CEO, The Leadership Conference on Civil & Human Rights, Statement of Vanita Gupta at the DPCC Forum on Voting Rights 1 (Sept. 19, 2017), http://civilrightsdocs.info/pdf/testimony/vg_dpcc_statement_9_19_17.pdf.

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

23. See, e.g., Gupta, *supra* note 21, at 1–2.

24. *Id.*

25. 52 U.S.C. § 10304 (2012); *Shelby County*, 570 U.S. at 538.

26. *Shelby County*, 570 U.S. at 538–39.

27. See *Jurisdictions Previously Covered by Section 5*, U.S. DEP’T. JUST., <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (last updated Aug. 6, 2015) [hereinafter *Jurisdictions Previously Covered by Section 5*].

Critics point to the *Shelby County* decision as the genesis of the voter suppression movement despite the fact that voter ID requirements were implemented in places like Georgia, Indiana, and Arizona years before the Court decided *Shelby County*.²⁸ In fact, both Georgia and Arizona were covered under Section 5, and their ID laws were not only precleared and approved by the U.S. Department of Justice under Section 5 but also survived court challenges under Section 2 of the VRA.²⁹

The Court ruled that the coverage formula contained in Section 4, which determined which states and jurisdictions were subject to Section 5, was unconstitutional because it had not been updated to reflect modern conditions when it was renewed by Congress in 2006: “[H]istory did not end in 1965 . . . [Y]et the coverage formula that Congress reauthorized in 2006 . . . ke[pt] the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”³⁰

Congress specifically designed the coverage formula of Section 4 to capture those states that were engaging in blatant discrimination by taking into account black voters’ low registration and turnout caused by discriminatory practices.³¹ Thus, coverage under Section 4 was based on a jurisdiction maintaining a test or device as a prerequisite³² to voting as of November 1, 1964, and registration or turnout of *all* voters of less than 50% in the 1964 election.³³ Registration or turnout of less than 50% in the 1968 and 1972 elections was added in successive renewals of the law, the latest in 1975.³⁴ That was the last time the coverage formula was revised, and the Section 4 formula did not utilize more current information when Section 5 was renewed in 2006.

28. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185–86 (2008); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009), *cert. denied*, 556 U.S. 1282 (2009); *Gonzalez v. Arizona*, 485 F.3d 1041, 1046 (9th Cir. 2007).

29. See, e.g., *Common Cause/Ga. v. Billups*, 554 F.3d at 1357; *Gonzalez v. Arizona*, 485 F.3d at 1052; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

30. *Shelby County*, 570 U.S. at 552–53.

31. 52 U.S.C. § 10303(b) (2012).

32. A test or device referred to a practice such as a literacy test that was used by local election officials to deny or abridge the right to an individual. See *id.* § 10303(c).

33. *Id.* § 10303(b).

34. *Id.*

As the Court pointed out, the original conditions that justified the preclearance requirements no longer existed; in fact, the turnout of minority voters in the covered jurisdictions was higher than in the rest of the nation, and black turnout exceeded white turnout in “five of the six States originally covered by Section 5, with a gap in the sixth State of less than one half of one percent.”³⁵

Section 5 was needed in 1965. But as the Court recognized, time has not stood still, and “[n]early 50 years later, things have changed dramatically.”³⁶ Systematic, widespread discrimination against black voters has long since disappeared. As the Court recognized in the *Northwest Austin* case in 2009: “Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”³⁷

The Census Bureau’s May 2013 report on the 2012 election showed that blacks voted at a higher rate than whites nationally (66.2% vs. 64.1%).³⁸ That same report shows that black voting rates exceeded that of whites in Virginia, South Carolina, Georgia, Alabama, and Mississippi, all of which were covered in whole by Section 5, and in North Carolina and Florida, portions of which were covered by Section 5.³⁹ Louisiana and Texas, which were also covered by Section 5, showed no statistically significant disparity between black and white turnout.⁴⁰ Overall, the black voting rate is consistently higher than the white voting rate in the formerly covered jurisdictions than in most of the nation.⁴¹

Looking at long-term trends, in the 2014 congressional elections, black turnout was slightly above the black turnout rate in 1978 (40.6% vs. 39.5%) while white turnout in the same period had declined

35. *Shelby County*, 570 U.S. at 535.

36. *Id.* at 547.

37. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (citation omitted).

38. THOM FILE, U.S. CENSUS BUREAU, THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS) 3 (2013).

39. *Id.* at 9 fig.5.

40. *Id.*

41. *Id.* at 8.

by about five percentage points (50.6% vs. 45.8%).⁴² By comparison, there has been a steep downward trend in the overall turnout rate in congressional elections from 48.9% in 1978 to only 41.9% in 2014.⁴³ This turnout data does not support the claim that the turnout of black voters is somehow being “suppressed.” In fact, minority turnout has bucked the overall long-term downward trend in general turnout.⁴⁴

No one can reasonably claim that there is still widespread, official discrimination in any of the previously covered states, or that there are any marked differences between states such as Georgia, which was covered, and states such as Massachusetts, which was not covered.⁴⁵ As the Supreme Court approvingly noted and as Judge Stephen F. Williams pointed out in his dissent in the *Shelby County* decision in the District of Columbia Court of Appeals, jurisdictions covered under Section 4 before *Shelby County* had “higher black registration and turnout” than uncovered jurisdictions.⁴⁶ Covered jurisdictions also “ha[d] far more black officeholders as a proportion of the black population than do uncovered ones.”⁴⁷ In a study that looked at lawsuits filed under Section 2 of the VRA, Judge Williams found that the “five worst uncovered jurisdictions . . . have worse records than eight of the covered jurisdictions.”⁴⁸

Arizona and Alaska, which were covered under Section 5, had no successful Section 2 lawsuit ever filed against them in the 24 years

42. THOM FILE, U.S. CENSUS BUREAU, WHO VOTES? CONGRESSIONAL ELECTIONS AND THE AMERICAN ELECTORATE: 1978–2014, at 4 fig.3 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf>.

43. *Id.* at 4 fig.2.

44. The 2018 congressional election saw an increase in turnout. The turnout of the voting eligible population was 50.3%. *2018 November General Election Turnout Rates*, U.S. ELECTION PROJECT, <http://www.electproject.org/2018g> (last updated Dec. 14, 2018).

45. Georgia and Massachusetts had almost identical turnout of their voting eligible populations in the 2018 congressional election: 55% in Georgia and 54.6% in Massachusetts. *Id.*

46. *Shelby County v. Holder*, 570 U.S. 529, 541 (2013); *Shelby County v. Holder*, 679 F.3d 848, 891 (D.C. Cir. 2012) (Williams, J., dissenting) (emphasis added).

47. 679 F.3d at 892.

48. *Id.* at 897.

reviewed by that same study cited by Judge Williams.⁴⁹ The increased number of current black officeholders throughout the covered jurisdictions provides additional assurance that official, systemic discriminatory actions are highly unlikely to recur.

Without evidence of widespread voting disparities among the states, continuing the coverage formula unchanged in 2006 was irrational. As the Supreme Court said in *Shelby County*, Congress “did not use the record it compiled to shape a coverage formula grounded in current conditions.”⁵⁰ Instead, it reenacted Section 4 “based on 40-year-old facts having no logical relation to the present day.”⁵¹ It would be no different than if Congress in 1965 had based the coverage formula not on what had happened in the prior year’s election in 1964, but had instead opted to base coverage on registration and turnout from the Hoover era in 1928 or the Roosevelt election in 1932.

The *Shelby County* decision did not affect the viability of other portions of the VRA, including its most powerful tool. Section 2 of the VRA is a nationwide, permanent prohibition on the “denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees” that protect language minorities.⁵²

IV. THE RECENT ENFORCEMENT RECORD OF THE DOJ

If there really had been a flood of laws passed by state legislatures to suppress the votes of minority voters, particularly after *Shelby County*, there is no question that there would have been an increase in the enforcement activities of the DOJ under the various federal voting rights laws it is tasked with enforcing. Yet not only did that not occur, enforcement actually decreased during the Obama administration when compared to the prior Bush administration.

49. *Id.*

50. *Shelby County*, 570 U.S. at 554.

51. *Id.*

52. 52 U.S.C. § 10301(a) (2012). Under Section 203 of the VRA, language minorities are individuals who are not literate in English and “have suffered a history of exclusion from the political process: Spanish, Asian, Native American, and Alaskan Native.” *Section 203 of the Voting Rights Act*, U.S. DEP’T. JUST., <https://www.justice.gov/crt/language-minority-citizens> (last updated Feb. 26, 2018).

A. *The Recent Enforcement Record of the DOJ Under Section 2*

Tom Perez (2009–13) and Vanita Gupta (2014–17), two political appointees who headed the Civil Rights Division during the Obama administration, have made similar claims that so-called voter suppression is an ongoing issue.⁵³ Gupta claims that voting rights “in America are under assault” and that the “*Shelby County* decision emboldened states to pass voter suppression laws, such as those requiring photo identification.”⁵⁴ Perez claims he investigated “voter suppression” and spent “much of [his] time” as head of the Civil Rights Division “suing states that tried to block eligible voters from the ballot box.”⁵⁵

Given the very clear statements of members of the Obama administration, including the two heads of the Civil Rights Division who were responsible for enforcing the VRA, there is little doubt that if a state were to have engaged in voter suppression—abridging the right to vote in a discriminatory manner—the Obama administration would have filed suit to stop it. In fact, Attorney General Eric Holder announced on July 16, 2013, only one month after the *Shelby County* decision, that he was directing the Civil Rights Division “to shift resources to the enforcement of Voting Rights Act provisions that were not affected by the Supreme Court’s ruling—including Section 2.”⁵⁶

Yet a review of the litigation record of the Voting Section of the Civil Rights Division after *Shelby County* shows no sharp increase in enforcement actions that would correlate with a widespread (or even isolated) “voter suppression” effort.⁵⁷ In fact, the Obama administration’s enforcement record, contrary to the claims of Perez and Gupta, shows an overall substantial *downward* trend in the number of enforcement actions filed in comparison to the Bush administration under the

53. See Gupta, *supra* note 21; Tom Perez, *Trump Administration’s Voter Suppression Attempts Ahead of Midterms Are Not Only ‘Morally Wrong,’ They’re Illegal*, CNBC (Sept. 11, 2018, 10:44 AM), <https://www.cnbc.com/2018/09/11/trump-voter-suppression-attempts-are-morally-wrong-and-illegal.html>.

54. Gupta, *supra* note 21.

55. Perez, *supra* note 53.

56. Holder, *supra* note 1.

57. *Voting Section Litigation*, U.S. DEP’T JUST., <https://www.justice.gov/crt/voting-section-litigation> (last updated Apr. 26, 2019) [hereinafter *Voting Section Litigation*].

various provisions of the VRA from 2001 to 2016, including after 2013, the year *Shelby County* was decided.⁵⁸

The Voting Section's litigation list shows that the Bush administration filed sixteen cases to enforce Section 2 of the VRA in the administration's eight years.⁵⁹ Four of those cases were in three jurisdictions covered by Section 5: South Carolina, Georgia, and Mississippi.⁶⁰

The Obama administration filed only four cases to enforce Section 2 in that administration's eight years, three of which were filed after the *Shelby County* decision.⁶¹ Those three cases were in jurisdictions covered by Section 5: two in Texas (covered in whole) and one in North Carolina (where only part of the state was covered).⁶²

There was no upsurge in Section 2 cases after the 2013 *Shelby County* decision; in fact, the Obama administration filed far fewer Section 2 enforcement actions than the prior administration. The number of Section 2 cases filed in Section 5 jurisdictions by the Bush administration prior to *Shelby County* and the number of Section 2 cases filed in former Section 5 jurisdictions by the Obama administration after *Shelby County* was exactly the same—three.

So again, there was no sudden rise in enforcement actions filed to stop voting discrimination (or so-called voter suppression) in jurisdictions formerly covered by Section 5. Thus, despite its rhetoric, the Obama administration was not able to discern any widespread voter suppression efforts or else it would have filed many more Section 2 enforcement actions. Instead, it filed only one-third the number of cases of the prior Republican administration.

An examination of those Section 2 cases filed against Texas and North Carolina by the Obama administration also raises serious doubts about the "voter suppression" claim.

One of those Texas cases was a typical redistricting case, similar to many other redistricting cases that the Civil Rights Division filed

58. *Id.* The official DOJ list of cases and settlement agreements under the VRA and the NVRA is available on the webpage of the Voting Section of the Civil Rights Division. *Id.* The settlement agreements listed are in enforcement matters that were settled without suit being filed. *Id.* That webpage provides the numbers of enforcement cases cited in this article.

59. *Id.*

60. *Id.*; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

61. *Voting Section Litigation*, *supra* note 57.

62. *Id.*; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

over the long history of the VRA against both Democratic and Republican state legislatures.⁶³ Such cases often come down to a dispute over relatively small differences in the percentages of minority voters in particular districts and the effects those differences may or may not have on the ability of voters to elect their candidates of choice.⁶⁴ Those “effects” are often based on speculation by competing experts on whether candidates preferred by minority voters have the ability to get elected.⁶⁵ The “voter suppression” claim can’t be made against the Texas case given the Supreme Court’s conclusion that there was no evidence of intentional discrimination.⁶⁶

The other Texas enforcement action was against the state’s voter ID law,⁶⁷ while the case filed against North Carolina by the DOJ attacked not only the state’s voter ID law but also its changes in early voting, termination of same-day registration, and its reinstatement of a requirement for voting in a voter’s assigned precinct.⁶⁸

In *North Carolina State Conference of the NAACP v. McCrory*, a three-judge panel of the Fourth Circuit overruled a district court finding that none of these reforms were discriminatory in either purpose or

63. For the long, complicated history of the most recent redistricting dispute in Texas, see *Abbott v. Perez*, 138 S. Ct. 2305 (2018). The Supreme Court held that there was no evidence of bad faith or intentional discrimination when Texas adopted an interim redistricting plan; rejected claims that one congressional and two state house districts violated the VRA; and held that one state house district that had been turned into a Latino opportunity district by moving in Latino voters at the request of counsel for a plaintiff was an impermissible racial gerrymander. *Id.* at 2327, 2313–14, 2335. Texas was trying to make it easier to elect a Hispanic candidate, not harder.

64. In redistricting cases, Section 2 requires that protected groups have the same ability as other voters “to elect representatives of their choice.” 52 U.S.C. § 10301(b) (2012 & Supp. 2018) (originally codified at 42 U.S.C. § 1973(b)).

65. This is because Section 2 provides that the “extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered” when determining if a legislative district violates Section 2. *Id.*

66. See *Perez*, 138 S. Ct. at 2327.

67. *Veasey v. Abbott*, 888 F.3d 792, 795 (5th Cir. 2018). As discussed in detail later in this Section, the amended Texas voter ID law is in place today after being upheld by the Fifth Circuit.

68. See *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

effect.⁶⁹ Instead, it held that all these reforms, including the state's voter ID law, were discriminatory and violated the VRA.⁷⁰

The Fourth Circuit panel's decision regarding the North Carolina law, however, is an outlier that is not in accord with the findings and holdings of other courts. The Fourth Circuit panel accused the district court judge of having "missed the forest in carefully surveying the many trees" in finding that the North Carolina election reform law was not discriminatory.⁷¹ However, it is the Fourth Circuit panel that seems to have missed both the trees and the forest because the district court judge presented a detailed analysis of the factual evidence and the expert's opinion that demonstrated that the various reforms were not enacted with any discriminatory intent and would not have a discriminatory effect on voters.⁷²

As just one example, the panel assigned great weight (and assigned nefarious motives) to the fact that the state legislature requested racial data relevant to its proposed changes in election laws.⁷³ But the panel was seemingly ignorant of the DOJ's practices under the VRA. A portion of North Carolina had long been covered under the preclearance procedures of Section 5 until the *Shelby County* decision.⁷⁴ The state legislature was well aware that, because of that coverage, the DOJ

69. *Id.* at 214. On the denial of certiorari, Chief Justice Roberts noted that there was a dispute over the petition filed with the Court. *North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399, 1399–1400 (Roberts, C.J., concurring). It had been filed by the state, its governor (a Republican), and the state board of elections prior to the 2016 election. *Id.* The newly elected Democratic attorney general moved to dismiss the petition on behalf of the state and the new Democratic governor. *Id.* The North Carolina legislature objected, claiming the attorney general had no authority under state law to dismiss the petition on behalf of the state. *Id.* According to Roberts:

Given the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law, it is important to recall our frequent admonition that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case."

Id. at 1400.

70. *McCrary*, 831 F.3d at 215.

71. *Id.* at 214.

72. *See* *N.C. State Conf. of the NAACP v. McCrary*, 182 F. Supp. 3d 320, 351–412 (M.D.N.C. 2016).

73. *McCrary*, 831 F.3d at 216–17.

74. *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

always demanded such racial data from jurisdictions filing preclearance submissions.⁷⁵ While Section 5 was no longer in effect when this law was being considered by the state legislature, North Carolina was simply following the same procedures it had been following for 40 years as required under Section 5 practices.

Except for the voter ID requirement, all the other changes made by the North Carolina legislature at issue in the 2016 decision were actually in effect in the 2014 primary and general elections.⁷⁶ As the district court pointed out, “the greatest increase in turnout in the 2014 midterm primary was observed among African American voters, despite the implementation of [the election reform bill];” similarly, “[n]ot only did African American turnout increase more than other groups in 2014 . . . but that general election saw the smallest white-African American turnout disparity in any midterm” since 2002.⁷⁷ Thus, contrary to the panel’s speculation, there was actual evidence that these reforms did not have a discriminatory effect in depressing minority turnout.

The Fourth Circuit panel also threw out the voter ID portion of the election reform law.⁷⁸ But a different panel of the same Fourth Circuit upheld Virginia’s voter ID requirement in 2016, finding that it was not discriminatory under the VRA.⁷⁹ Virginia’s law requires a photo ID to vote but has an exemption that allows individuals to vote who don’t have an ID just as the North Carolina law did, which the Fourth Circuit said was discriminatory despite that exemption.⁸⁰

The Fourth Circuit’s decision in *NAACP v. McCrory* that not allowing voters to cast a ballot outside of their assigned precinct is discriminatory and amounts to voter suppression is not consistent with the law and decisions from other jurisdictions. As the Sixth Circuit said in *Sandusky County Democratic Party v. Blackwell*, requiring individuals

75. The author is the former Counsel to the Assistant Attorney General for Civil Rights and Coordinated Enforcement of Section 5 of the VRA when he was at the DOJ from 2001 to 2005.

76. *N.C. State Conf. of the NAACP*, 182 F. Supp. 3d at 332–37, 348–49.

77. *Id.* at 349–50.

78. *McCrory*, 831 F.3d at 219.

79. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 608 (4th Cir. 2016).

80. *Lee*, 843 F.3d at 594; *McCrory*, 831 F.3d at 219. Under the Virginia law, “if a voter does not possess an acceptable form of photo identification, Virginia’s Board of Elections must provide one to the voter free of charge and without any requirement that the voter present documentation.” *Lee*, 843 F.3d at 594.

to vote in an assigned precinct is an “aspect common to elections in almost every state” and did not violate federal law.⁸¹ There are rational and reasonable grounds for such a requirement:

The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences.⁸²

A panel of the Ninth Circuit recently held that “Arizona’s longstanding requirement that in-person voters cast their ballots in their assigned precinct” is not a violation of Section 2 of the VRA or the First, Fourteenth, and Fifteenth Amendments.⁸³ Such a requirement imposes “only a minimal burden on voters” and serves “Arizona’s important regulatory interests.”⁸⁴

There cannot be a violation of the law when there is no discrimination present that prevents individuals from voting in their assigned precincts even though it may be more “convenient” to vote outside of an assigned precinct.

The Sixth Circuit also disagreed with the Fourth Circuit panel’s distorted view of early voting and same day registration and issued a warning to courts about getting “entangled, as overseers and micromanagers, in the minutiae of state election processes.”⁸⁵ The Fourth Circuit held that North Carolina’s elimination of same day registration (which the majority of states do not allow)⁸⁶ and its reduction in the

81. 387 F.3d 565, 568 (6th Cir. 2004) (per curiam).

82. *Id.* at 569.

83. Democratic Nat’l Comm. v. Reagan, 904 F.3d 686, 696–97 (9th Cir. 2018), *reh’g en banc granted*, 911 F.3d 942 (2019).

84. *Id.* at 697.

85. Ohio Democratic Party v. Husted, 834 F.3d 620, 622–23 (6th Cir. 2016), *application for stay denied*, 137 S. Ct. 28 (2016).

86. As of January 2019, only 17 states and the District of Columbia allow same day (or election day) registration. *Same Day Voter Registration*, NAT’L CONF. ST.

number of early voting days from seventeen to ten (although the number of hours the polls stayed open remained the same) was also discriminatory.⁸⁷ But the claim that making changes in early voting or not offering same day registration is somehow discriminatory is not only not true, it amounts to a court micromanaging the state's election process.

As the Sixth Circuit pointed out in *Ohio Democratic Party v. Husted*, the "Constitution does not require *any* opportunities for early voting."⁸⁸ The plaintiffs in that case claimed that the Ohio legislature's decision to reduce the number of early voting days from thirty-five to twenty-nine days before Election Day was discriminatory under Section 2 of the VRA and unconstitutional.⁸⁹ According to the Sixth Circuit, which ruled against the plaintiffs, this was "an astonishing proposition":

Nearly a third of the states offer no early voting. Adopting plaintiffs' theory of disenfranchisement would create a "one-way ratchet" that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances. Further, while the challenged regulation may slightly diminish the convenience of registration and voting, it applies even-handedly to all voters, and, despite the change, Ohio continues to provide generous, reasonable, and accessible voting options to all Ohioans.⁹⁰

Those who argue that not allowing same day registration or early voting amounts to voter suppression and a violation of federal law because such opportunities might benefit some voters are making the wrong inquiry. As the Sixth Circuit laid out:

LEGISLATURES (Apr. 17, 2019), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

87. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 242 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

88. *Ohio Democratic Party*, 834 F.3d at 623.

89. *Id.*

90. *Id.*

The issue is not whether some voter somewhere would benefit from . . . early voting or from the opportunity to register and vote at the same time. Rather, the issue is whether the challenged law results in a cognizable injury under the Constitution or the Voting Rights Act. We conclude that it does not.⁹¹

If all voters in a state, regardless of their racial or ethnic background, have the same opportunity to register and exercise their right to vote, it is not voter suppression of minority voters if they are not given a certain number of days of early voting or are not allowed to register and vote on Election Day. As the Sixth Circuit in *Ohio Democratic Party* stated, it is as if the critics want to “disregard the Constitution’s clear mandate that the states (and not the courts) establish election protocols, instead reading the document to require all states to maximize voting convenience.”⁹² Under that legal theory:

[L]ittle stretch of imagination is needed to fast-forward and envision a regime of judicially-mandated voting by text message or Tweet (assuming of course, that cell phones and Twitter handles are not disparately possessed by identifiable segments of the voting population).⁹³

Similarly, in 2012, a federal judge rejected a challenge to the State of Florida’s reduction of early voting from twelve to eight days, concluding it was not a violation of the VRA or the Constitution.⁹⁴ The fact that more minority voters might prefer early voting did “not demonstrate that the changes will deny minorities equal access to the polls.”⁹⁵ The court pointed out that many states do not have early voting at all, yet under the theory being pushed by the plaintiffs, the “next logical step” would be a claim:

[T]hat if a state with a higher percentage of registered African-American voters than Florida did not implement

91. *Id.*

92. *Id.* at 629.

93. *Id.*

94. *See Brown v. Detzner*, 895 F. Supp. 2d 1236, 1255–56 (M.D. Fla. 2012).

95. *Id.* at 1246.

an early voting program a Section 2 violation would occur because African-American voters in that state would have less of an opportunity to vote than voters in Florida. It would also follow that a Section 2 violation could occur in Florida if a state with a lower percentage of African-American voters employed an early voting system . . . that lasts three weeks instead of the two week system currently used in Florida. This simply cannot be the standard for establishing a Section 2 violation.⁹⁶

Contrary to the Fourth Circuit panel's view about early voting, although some voters may find it more convenient, turnout data show that early voting seems to actually *decrease* turnout. For example, a 2013 study released by professors from the University of Wisconsin that compared turnout in early voting states to those without early voting showed that "early voting lowers the likelihood of turnout by three to four percentage points."⁹⁷

Even the experts retained by the challengers in *NAACP v. McCrory* admitted that early voting does not increase turnout. The district court pointed out that one of the experts opined, in a peer reviewed publication, that the "research thus far has already disproved one commonly made assertion, that early voting increases turnout. It does not."⁹⁸ In fact, the longer the window of early voting, the greater the effect on lowering turnout.⁹⁹ The reasons that early voting hurts turnout have not been conclusively determined. But a reasonable inference is that allowing voters to vote over an extended period of time diffuses the effectiveness of mobilization activities by candidates and political parties.

In addition to the North Carolina voter ID law that was challenged by the DOJ, a Section 2 lawsuit was also filed by the Obama

96. *Id.* at 1254 (quoting *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335–36 (M.D. Fla. 2004)).

97. Barry C. Burden, et al., *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL. SCI. 95, 102 (2014); see also Memorandum, Hans A. von Spakovsky, The Heritage Found., Legal Memorandum No. 218: The Costs of Early Voting (Oct. 3, 2017), <https://www.heritage.org/sites/default/files/2017-10/LM-218.pdf>.

98. *N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 383 (M.D.N.C. 2016) (emphasis omitted).

99. Hans A. von Spakovsky, *The Costs of Early Voting*, *supra* note 97, at 3.

administration against Texas in *Veasey v. Abbott*.¹⁰⁰ Despite the frequently asserted claim that all ID laws are intended to suppress votes, they have been upheld as nondiscriminatory, an intangible burden on voters, and constitutional in court decisions in numerous states including Georgia, Indiana, Tennessee, South Carolina, Virginia, Wisconsin, and Alabama, among others.¹⁰¹

The end result of *Veasey* is that, with minor modifications, the voter ID law is in place in Texas.¹⁰² This litigation resulted in a series of decisions by the Southern District of Texas and the Fifth Circuit. In an *en banc* decision, the Fifth Circuit found the ID requirement had a disparate impact on minority voters but reversed the district court's finding that the ID requirement was enacted with a discriminatory purpose and remanded the case for further consideration.¹⁰³ The Fifth Circuit said that the district court's finding was "infirm" and that the court had "relied too heavily on the evidence of State-sponsored discrimination dating back hundreds of years" instead of more contemporary examples.¹⁰⁴ Furthermore, said the Fifth Circuit, "[n]o one questions the legitimacy" of the concerns of the state legislature in passing this law that "centered on protection of the sanctity of voting, avoiding voter fraud, and promoting public confidence in the voting process."¹⁰⁵

It should be noted that actual voter turnout contradicted the claims that the Texas voter ID law would have a disparate impact on minority voters in Texas, reflecting that the *en banc* court's conclusion

100. See *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

101. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009), *cert. denied*, 129 U.S. 2770 (2009); *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018); *Green Party of Tenn. v. Hargett*, 194 F. Supp. 3d 691 (M.D. Tenn. 2016); *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749 (M.D. Tenn. 2015); *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012).

102. See *Veasey*, 888 F.3d 792. The original Texas statute required a Texas driver's license, non-driver's license ID, or "Election Identification Certificate" issued by the Texas Department of Public Safety, a Texas concealed carry permit, a U.S. passport, or military ID. *Veasey v. Abbott*, 830 F.3d 216, 225 (5th Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 612 (2017).

103. See *Veasey*, 830 F.3d at 272.

104. *Id.* at 230–31.

105. *Id.* at 231.

on the effect of the law was wrong.¹⁰⁶ Before the ID law was preliminarily enjoined, it was in effect for the 2013 state elections in Texas in which there were state constitutional amendments on the ballot, as well as candidates and other ballots issues in individual counties.¹⁰⁷ Turnout went up with the ID law in place when compared to the 2011 state election, including in counties that are heavily minority counties.¹⁰⁸

On remand from the Fifth Circuit, the district court issued a permanent injunction against the ID law.¹⁰⁹ This was later reversed as an abuse of discretion by a panel of the Fifth Circuit, which held that an amendment to the original law that had been approved by the state legislature ameliorated the problems claimed by the plaintiffs.¹¹⁰ That amendment allowed any voter without one of the free photo IDs issued by the state to vote after completing a “Declaration of Reasonable Impediment” form and presenting a specified form of non-photo ID.¹¹¹

Election officials could not question the reasonableness of the voter’s explanation in the declaration of why the voter was not able to obtain the free photo ID.¹¹² The form of non-photo ID that had to be presented with the declaration included a valid voter-registration or birth certificate, a current utility bill, bank statement, government check, paycheck, or other government documents with the voter’s name and address.¹¹³

Contrast the Obama administration’s position in the *Veasey* case with its position in *NAACP v. McCrory*. When *Veasey* was on remand, the DOJ filed a joint pleading with Texas prior to the 2016 election in which the DOJ agreed that an appropriate interim remedy would be a “reasonable impediment” exemption—the very same exemption that

106. Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 4146: Lessons from the Voter ID Experience in Texas (Feb. 11, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/IB4146.pdf. In fact, turnout in the 2013 election doubled from turnout in 2011. *Id.* at 2.

107. *Id.* at 1.

108. *Id.* at 2.

109. *Veasey v. Abbott*, 265 F. Supp. 3d 684, 700 (S.D. Tex. 2017).

110. *Veasey v. Abbott*, 888 F.3d 792, 795–96 (5th Cir. 2018).

111. *Id.* at 796.

112. *Id.*

113. *Id.*

the Texas legislature then adopted in 2017, which the Fifth Circuit subsequently held ameliorated the plaintiffs' claims.¹¹⁴ This submission was made by Vanita Gupta, who was the principal deputy (and thus acting) attorney general for the Civil Rights Division.¹¹⁵

Significantly, the DOJ's position in *Veasey* was inconsistent with the position it took in *McCrory*. The North Carolina voter ID law challenged by the DOJ (that was eventually thrown out by the Fourth Circuit Court of Appeals panel)¹¹⁶ in *McCrory* had been similarly amended by the state legislature to add a reasonable impediment exemption.¹¹⁷ The North Carolina law allowed an individual to vote after completing a declaration of reasonable impediment form, *without* the second requirement of showing an identification document such as a valid voter-registration or birth certificate, a current utility bill, bank statement, government check, paycheck, or other government documents with the voter's name and address.¹¹⁸ Thus, the North Carolina law was less "burdensome" than the Texas law that the Civil Rights Division had previously approved.

Yet, contrary to the position it took in *Veasey*, the DOJ claimed, and a panel of the Fourth Circuit agreed, that even with the reasonable impediment exemption, the North Carolina ID law was discriminatory.¹¹⁹ The Fourth Circuit's view was not only out of step with the Fifth Circuit in *Veasey*, it was also not in accord with a three-judge panel decision in the District of Columbia.

In 2012, when Section 5 of the VRA was still in effect, South Carolina filed a lawsuit in the District of Columbia seeking preclearance of its new voter ID law, which had a reasonable impediment exemption.¹²⁰ Individuals would still be able to vote without a photo ID

114. *Id.*; Joint Submission of Agreed Terms at 2, Tex. State Conf. of NAACP Branches v. Cascos, No. 2:13-cv-291 (S.D. Tex. Aug. 3, 2016) & Taylor v. Texas, No. 2:13-cv-348 (S.D. Tex. Aug. 3, 2016) [hereinafter Joint Submission of Agreed Terms].

115. Joint Submission of Agreed Terms at 4, *supra* note 114.

116. See N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

117. N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 344–345 (M.D.N.C. 2016).

118. *McCrory*, 831 F.3d at 243.

119. See *id.* at 240.

120. South Carolina v. United States, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

by signing “an affidavit at the polling place” that listed “the reason that they have not obtained a photo ID” provided by the state for voting without a fee.¹²¹

In an opinion written by then-District of Columbia Circuit Court Judge (now Associate Justice) Brett Kavanaugh, the panel held that South Carolina’s voter ID law did not violate the VRA.¹²² The court stated that the South Carolina law “does not have a discriminatory retrogressive effect” and “was not enacted for a discriminatory purpose.”¹²³ That law has been in place since 2013 without any reported problems.

The idea that it is a violation of the VRA if there is some slight disparity between racial groups in the percentage of black and whites who already have a photo ID is simply not credible nor reasonable. When the Seventh Circuit upheld Wisconsin’s voter ID law against claims that the law was discriminatory because, it was alleged, there was a slight disparity between the percentage of whites and blacks who already possess photo IDs, the court articulated a common sense argument that disrupts the voter-ID-is-voter-suppression mantra:

Plaintiffs describe registered voters who lack photo ID as “disenfranchised.” If the reason they lack photo ID is that the state has made it impossible, or even hard, for them to *get* photo ID, then “disfranchised” might be an apt description. But if photo ID is available to people willing to . . . stand in line at the office that issues drivers’ licenses, then all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time.¹²⁴

The numbers often put forward by those who claim that large numbers of Americans don’t have photo ID are, as the Seventh Circuit correctly noted, “fanciful” in a:

121. *Id.*

122. *Id.*

123. *Id.* Under Section 5, no voting change could be approved if it would have a retrogressive effect, i.e., putting voters in a worse position than before the change. *See id.*

124. *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014).

[W]orld in which photo ID is essential to board an airplane, enter Canada or any other foreign nation, drive a car (even people who do not own cars need licenses to drive friends' or relatives' cars), buy a beer, purchase pseudoephedrine for a stuffy nose or pick up a prescription at a pharmacy, open a bank account or cash a check at a currency exchange, buy a gun, or enter a courthouse to serve as a juror or watch the argument of this appeal.¹²⁵

Thus, the DOJ's recent record of enforcement of Section 2 of the VRA provides little evidence to support the claim that there are widespread, unlawful, voter suppression actions being taken against minority voters by states and local jurisdictions. The Texas voter ID litigation in *Veasey* resulted in only minor changes to its election procedures, and the court's decision in the North Carolina case, *NAACP v. McCrory*, is inconsistent with both the law and what actually happened in North Carolina when the law was in effect.

B. The Recent Enforcement Record of the DOJ Under Section 11(b)

Another provision of the VRA that could be used to go after actual voter suppression is Section 11(b), which provides that “[n]o

125. *Id.* Voter ID laws have not been shown to depress turnout, and turnout has increased in many states that implemented voter ID law. See Justin Grimmer et. al., *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, J. POL. 80, No. 3 (July 2018): 1045–51; Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 3451: Lessons from the Voter ID Experience in Georgia (March 19, 2012); Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 3679: Lessons from the Voter ID Experience in Kansas (July 25, 2012), http://thf_media.s3.amazonaws.com/2012/pdf/ib3679.pdf (detailing that only 0.002% of registered voters requested an ID); Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 4180: Lessons from the Voter ID Experience in Tennessee (Mar. 25, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/IB4180.pdf; Memorandum, Hans A. von Spakovsky, The Heritage Found., Legal Memorandum No. 70: Voter Photo Identification: Protecting the Security of Elections (July 13, 2011), https://thf_media.s3.amazonaws.com/2011/pdf/lm0070.pdf; see also Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence From a U.S. Nationwide Panel, 2008–2016*, at 1 (Nat'l Bureau Econ. Research, Working Paper 25522, 2019) (“[Voter ID] laws have no negative effect on registration or turnout, overall or for any group defined by race, gender, age, or party affiliation.”), https://www.nber.org/papers/w25522?utm_campaign=ntwh&utm_medium=email&utm_source=ntwg22.

person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote”¹²⁶ Part (a) of the same statutory provision prohibits failing or refusing to permit someone to vote who is entitled to vote or to otherwise refuse to “tabulate, count, and report such person’s vote.”¹²⁷

Yet during its entire eight years in office, the Obama administration *did not file a single case* to enforce this provision of the VRA. In contrast, the Bush administration filed two cases to enforce Section 11(b), including *United States v. New Black Panther Party* in Pennsylvania and *United States v. Brown* in Mississippi.¹²⁸ Regardless, this record provides no evidence of any widespread, recent voter suppression efforts that would violate this provision of the VRA.

C. *The Recent Enforcement Record of the DOJ Under Section 208*

Section 208 of the VRA requires local governments to allow “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write [to] be given assistance by a person of the voter’s choice”¹²⁹ Although this may sound like an

126. 52 U.S.C. § 10307(b) (2012).

127. *Id.* § 10307(a).

128. See *Cases Raising Claims Under Section 11(B) of the Voting Rights Act*, U.S. DEP’T JUST., <https://www.justice.gov/crt/cases-raising-claims-under-section-11b-voting-rights-act#philadelphia> (last updated Aug. 6, 2015) [hereinafter *Cases Raising Claims Under Section 11(B) of the Voting Rights Act*]. The mishandling by the Obama administration of the New Black Panther Party lawsuit filed by the Bush Administration just before it left office was very controversial. The complaint alleged that members of the New Black Panther Party, dressed in black, paramilitary-style uniforms and carrying nightsticks, threatened and intimidated individuals at a polling place in Philadelphia. The case in large part was dismissed with a watered-down injunction even though the DOJ could have obtained a default judgment when the defendants failed to answer the lawsuit. FUND & VON SPAKOVSKY, *supra* note 11, at 139–47. *U.S. v. Brown* was the first case ever filed by the DOJ against local black officials for discriminating against white voters. The district court judge concluded that the VRA protects all voters and that the defendants engaged in racially-motivated manipulation of the electoral process to dilute the votes of white voters. See *United States v. Brown*, 494 F. Supp. 2d 440, 486–87 (S.D. Miss. 2007), *aff’d*, 561 F.3d 420 (5th Cir. 2009).

129. 52 U.S.C. § 10508 (2012).

innocuous provision, the DOJ has used it in the past to go after jurisdictions that were refusing to allow voters to be assisted or who were allowing improper assistance—assistance that was intimidating or involved threats to voters to make them vote for particular candidates.¹³⁰

Yet the Obama administration filed only one enforcement action utilizing this provision in its entire eight years in office, and that case was filed in 2009,¹³¹ four years before *Shelby County*. In comparison, the Bush administration filed ten cases to enforce Section 208.¹³² Only two of those cases were filed in a jurisdiction covered by Section 5, both in Texas.¹³³

Again, the record of the last ten years of enforcement of Section 208 shows no widespread voter suppression effort that prevents voters from getting the assistance they need to vote.

D. The Recent Enforcement Record of the DOJ Under the National Voter Registration Act

Often claims of “voter suppression” relate to registration list maintenance procedures that remove voters who have died, moved away, or otherwise become ineligible to vote. The NVRA¹³⁴ sets out strict standards that specify the rules governing such maintenance procedures (which the law requires to be utilized on a regular basis)¹³⁵ and the conditions under which registrants can be removed from the voter rolls. Compliance with the NVRA cannot reasonably be termed “voter suppression.”

130. See, e.g., Consent Decree, Judgment, and Order, *United States v. Fort Bend Cty.*, No. 4:09-cv-1058 (S.D. Tex. April 13th, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/ftbend_cd.pdf.

131. *Voting Section Litigation*, *supra* note 57.

132. *Id.*

133. *Id.*; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

134. 52 U.S.C. § 20501 (2012). There are also requirements governing statewide voter registration lists as well as voter registration in general in the Help America Vote Act of 2002. See *id.* § 20901; see also *id.* § 21083 (entitled “Computerized statewide voter registration list requirements and requirements for voters who register by mail”).

135. States must “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters . . .” *Id.* § 20507(a)(4).

Violations of the NVRA by, for example, removing eligible voters from statewide voter registration lists, could, on the other hand, be considered voter suppression. Yet the enforcement records of the Voting Section of the Civil Rights Division show a sharp *downturn* in the number of enforcement actions filed under the NVRA over the past decade, including since *Shelby County*.¹³⁶ While the Bush administration filed ten lawsuits to enforce the NVRA and entered into two settlement agreements, for a total of 12 enforcement actions, the Obama administration filed only four cases to enforce the NVRA and entered into two settlement agreements, for a total of six enforcement matters in the eight years it was in office, less than one per year.¹³⁷

That hardly constitutes evidence of widespread “voter suppression” given the number of election jurisdictions across the United States, which includes thousands of counties and individual townships in addition to the fifty states and the District of Columbia. In total, there are over 10,000 election administration jurisdictions in the United States.¹³⁸ And that record certainly does not support the claim of the former head of the Civil Rights Division, Tom Perez, that he spent most of his time “suing states that tried to block eligible voters from the ballot box.”¹³⁹

Two of the NVRA lawsuits filed by the Obama administration, against Rhode Island and Louisiana, claimed that the states were not offering “voter registration opportunities in [state] public assistance offices and offices that provide state-funded programs primarily serving persons with disabilities.”¹⁴⁰ One enforcement action against Florida

136. See *Cases Raising Claims Under the National Voter Registration Act*, U.S. DEP'T JUST., <https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act#rhodeisland> (last updated Mar. 27, 2019) [hereinafter *Cases Raising Claims Under the National Voter Registration Act*].

137. See *id.*; see also *Voting Section Litigation*, *supra* note 57. The Obama administration initiated an action against New York by letter dated January 6, 2017, but the case was ultimately settled by the Trump administration. See *Memorandum of Understanding*, U.S. DEP'T JUST. (June 20, 2017), <https://www.justice.gov/crt/case-document/memorandum-understanding>.

138. *Election Administration at State and Local Levels*, NAT'L CONF. ST. LEGISLATURES (June 15, 2016), <http://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx>.

139. Perez, *supra* note 53.

140. *Cases Raising Claims Under the National Voter Registration Act*, *supra* note 136.

asserted it was conducting a list-maintenance program within 90 days of a federal election, which is prohibited under the NVRA.¹⁴¹ A fourth lawsuit against the City of New York, which is not exactly known as a Republican stronghold, was over the city's list maintenance procedures.¹⁴² The DOJ claimed New York's flawed procedures included not removing voters from the registration list who had died or moved away, as well as removing some voters for a failure to vote without using the notice procedures mandated in the NVRA.¹⁴³ Although these cases all involved technical violations of the NVRA, none of them showed intentional, partisan conduct aimed at suppressing minority voters.

Both of the settlement agreements entered into between the Obama administration and the states of Connecticut and Alabama concerned the development of an electronic voter registration system for driver's license applicants to replace the states' paper-based systems.¹⁴⁴ While that may certainly be a more efficient method of ensuring voter registration at DMV offices, the NVRA has no requirement for an electronic-based system.¹⁴⁵ While the Obama administration persuaded these states to agree to implement new procedures not required under federal law, these settlement agreements cannot even remotely be classified as correcting any type of voter suppression, systemic or otherwise.

A relatively recent Supreme Court decision, *Husted v. A. Philip Randolph Institute*,¹⁴⁶ lays to rest the claim that complying with the NVRA's requirement of removing voters who have moved, died, or otherwise become ineligible to vote to improve the accuracy of statewide voter registration rolls constitutes "voter suppression." As that decision pointed out, registration lists in this country are very unreliable and inaccurate: "24 million voter registrations in the United

141. *See id.*

142. *Id.*

143. Complaint in Intervention at 14–15, *Common Cause N.Y. v. Bd. of Elections in N.Y.*, No. 1:16-cv-06122-NGG-RML (E.D.N.Y. Jan. 18, 2017).

144. *See Voting Section Litigation*, *supra* note 57.

145. See 52 U.S.C. § 20504 (2012), which requires states to provide applicants for a driver's license with a voter registration form. There is no mention of an electronic form being required versus a paper form.

146. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

States—about one in eight—are either invalid or significantly inaccurate. And about 2.75 million people are said to be registered to vote in more than one State.”¹⁴⁷

Husted dealt with Ohio’s list maintenance procedures.¹⁴⁸ Ohio uses the precise method outlined in the NVRA to maintain the accuracy of its voter rolls, procedures that the plaintiffs claimed violated both the NVRA and the Help America Vote Act (“HAVA”) of 2002.¹⁴⁹ As the Supreme Court summarized:

Ohio uses the failure to vote for two years as a rough way of identifying voters who may have moved, and it then sends a preaddressed, postage prepaid card to these individuals asking them to verify that they still reside at the same address. Voters who do not return this card *and* fail to vote in any election for four more years are presumed to have moved and are removed from the rolls.¹⁵⁰

According to the Court, Congress anticipated that some voters would not return the prepaid card to confirm they have not moved, and the NVRA treats that failure as non-dispositive evidence that they no longer reside at their registered address.¹⁵¹ The NVRA then allows states to remove that voter from the registration list if the voter fails to vote in two federal elections *after* the date the notice was sent out.¹⁵²

The plaintiffs’ challenge, claiming that states cannot remove registrants for a failure to vote under any circumstances, “not only second-guesses the congressional judgment embodied in [the NVRA’s] removal process, but it also second-guesses the judgment of the Ohio Legislature as expressed in the State’s [removal process].”¹⁵³ States that comply with the NVRA therefore cannot be engaged in “voter suppression.”

Finally, it should be noted that the Obama administration filed one enforcement action under HAVA, which supplements the NVRA,

147. *Id.* at 1838 (citation omitted).

148. *See id.*

149. *Id.* at 1838–41.

150. *Id.* at 1838.

151. *Id.* at 1839.

152. *Id.* at 1839–40.

153. *Id.* at 1846.

and entered into one settlement agreement.¹⁵⁴ The DOJ settlement agreement was in regard to Palm Beach County, Florida's failure to use voting machines that were fully compliant with Section 301 of HAVA, which requires at least one voting machine in each precinct that can be used by blind or disabled voters.¹⁵⁵

The HAVA enforcement action was filed against Fort Bend County, Texas, for not providing provisional ballots as required under Section 302 of HAVA, and the case settled through a consent decree.¹⁵⁶ HAVA's provisional ballot provision allows any individual to vote after asserting that she is eligible and registered, even if her name does not appear on the list of registered voters in her precinct or if an election official challenges her eligibility.¹⁵⁷ The voter casts a provisional ballot that is forwarded to election officials at the end of Election Day.¹⁵⁸ Those officials determine if the individual was entitled to vote.¹⁵⁹ If so, the vote must be counted, and the voter must be notified of the election officials' decision, and if it is not counted the reasons for the decision.¹⁶⁰

Thus, if an eligible voter is removed from the registration list due to an administrative error or some kind of intentional misconduct by election officials, that voter will still be able to vote through the provisional balloting process. That is why claims of so-called voter

154. See *Voting Section Litigation*, *supra* note 57.

155. 52 U.S.C. § 21081(a)(3) (2012 & Supp. 2014) (originally codified as 42 U.S.C. 15482(a) (2012)); see *MOA- Palm Beach County FL HAVA*, U.S. DEP'T JUST., <https://www.justice.gov/crt/case-document/palm-beach-county-fl-hava>. Gov. Ron DeSantis removed the supervisor of the Palm Beach Elections Department, Susan Bucher, a Democrat, in January 2019 for incompetence, neglect of duty, and malfeasance for violating state election laws. Steve Bousquet & Skyler Swisher, *Gov. DeSantis Replaces Palm Beach Elections Chief After 2018 Election Woes*, SUNSENTINEL (Jan. 18, 2019, 2:30 PM), <https://www.sun-sentinel.com/news/politics/fl-ne-ron-de-santis-suspends-susan-bucher-20190118-story.html>.

156. 52 U.S.C. § 21082(a); *Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, U.S. DEPT. JUSTICE, <https://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act#ftbend> (last updated Oct. 16, 2015).

157. See 52 U.S.C. § 21082(a).

158. *Id.* § 21082(a)(3).

159. *Id.* § 21082(a)(4).

160. *Id.* § 21082(a)(4)–(5).

suppression over the supposedly unfair efforts to remove ineligible individuals from voter registration rolls should ultimately fail—because HAVA’s provisional balloting requirement acts as a failsafe to ensure that every individual who complies with his or her state’s registration requirement will be able to vote. And in its entire eight years in office, the Obama administration found only one instance from anywhere across the nation in which a political jurisdiction was violating the provisional balloting requirement.¹⁶¹

The overall enforcement record of the DOJ under the VRA, the NVRA, and HAVA does not support the claim that there is widespread, unlawful “voter suppression” of minority voters going on across the country, either before or after the *Shelby County* decision. In fact, there has been a sharp downturn in the number of enforcement actions filed by the DOJ to enforce federal voting rights laws, particularly during the Obama administration.

Those who still claim there is a “voter suppression” epidemic cannot blame a lack of resources or personnel at the Civil Rights Division to pursue such claims either because the DOJ retained the lawyers and staff who worked full-time on Section 5 matters after the 2013 *Shelby County* decision.¹⁶² As directed by Eric Holder, that staff was reassigned to enforce the other provisions of the VRA and the NVRA (and HAVA).¹⁶³ And appropriations from Congress for the Civil Rights Division have steadily increased from \$136 million in FY 2013, the year *Shelby County* was decided, to \$147.2 million in FY 2018.¹⁶⁴

Given that no one questions the Obama administration’s willingness to enforce provisions of the VRA, the NVRA, and HAVA, the

161. Consent Decree, Judgment, and Order, *United States v. Fort Bend Cty.*, Tex., No. 4:09-cv-1058 (S.D. Tex. April 13, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/ftbend_cd.pdf; *Voting Section Litigation*, *supra* note 57.

162. Holder, *supra* note 1.

163. *See id.*

164. CIVIL RIGHTS DIVISION, U.S. DEP’T JUSTICE, FY 2019 BUDGET REQUEST AT A GLANCE, <https://www.justice.gov/jmd/page/file/1033091/download>; CIVIL RIGHTS DIVISION, U.S. DEP’T JUSTICE, FY 2016 BUDGET REQUEST AT A GLANCE, https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/16_bs_section_ii_chapter_-_crt.pdf.

downturn in enforcement actions most likely reflects a reduction in discriminatory actions by states and localities that would otherwise be sufficient to justify the DOJ filing a lawsuit.

V. A NEW SECTION 5?

Proponents of the “voter suppression” myth have called upon Congress to reinstate Section 5 of the VRA.¹⁶⁵ The enforcement record, however, demonstrates that there is no need for Congress to reinstate Section 5. While Section 5 might have been a necessary measure at the time it was enacted, it constituted an unprecedented and extraordinary intrusion into state sovereignty, requiring covered states to get the federal government’s approval for voting changes made by state and local officials. No other federal law presumes that states cannot govern themselves and that they must obtain the federal government’s approval before they implement any changes to their own laws. As the Supreme Court said, Section 5 “employed extraordinary measures to address an extraordinary problem.”¹⁶⁶

Today, six years after *Shelby County*, as the DOJ’s enforcement record shows, there is still no evidence of widespread, systemic, official discrimination by any of the formerly covered jurisdictions (or any other state) that would justify re-imposing the onerous Section 5 preclearance requirement. In the relatively few jurisdictions where a Section 2 violation has been found, there is no evidence that those political bodies have evaded the court-imposed remedies to implement further discriminatory practices.

That is a key point because the fundamental reason that Section 5 was implemented in 1965 as an adjunct to Section 2 was to stop efforts by local jurisdictions to evade court-ordered remedies. As the Supreme Court said in 1966 in *Katzenbach v. South Carolina*, in which it upheld the constitutionality of Section 5, the preclearance requirement was tailored to stop such “obstructionist tactics.”¹⁶⁷ But in 2013, the Supreme Court in *Shelby County* reiterated its earlier observation

165. Mike Lillis, *Dems Vow Quick Action to Bolster Voting Rights upon Taking Power*, THE HILL (Nov. 30, 2018, 4:08 PM), <https://thehill.com/home-news/house/419187-dems-vow-quick-action-to-bolster-voting-rights-upon-taking-power>.

166. *Shelby County v. Holder*, 570 U.S. 529, 534 (2013).

167. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

in *Northwest Austin* that nearly half a century later, “[b]latantly discriminatory evasions of federal decrees are rare.”¹⁶⁸

Moreover, it would be fundamentally unfair to impose preclearance requirements on states or other political jurisdictions because of discriminatory actions—if they occur—that are committed by political subdivisions over which they have no control.

To meet the requirements of the Constitution and justify federal supervision of state and local government, a new coverage formula for Section 5 would have to identify those jurisdictions for which Section 2 would not be effective because of systemic racial discrimination and evasion of federal court decrees. That will not be possible because there is no evidence of such behavior in voting either in the states formerly covered under Section 5 or anywhere else.¹⁶⁹

The absence of Section 5 does not mean jurisdictions can never be subject to federal oversight and a preclearance requirement. Critics of *Shelby County* seem to ignore another provision of the VRA, Section 3, which can be used to supervise any jurisdiction that has a proven pattern of discriminatory conduct.¹⁷⁰ While the Supreme Court struck down the coverage formula of Section 4 that triggered Section 5 preclearance requirements, Section 3 was not at issue in *Shelby County*. Although Section 3 has rarely been used, if a jurisdiction has engaged in repeated discrimination and a court finds it is necessary to prevent future problems, Section 3 provides that the court can essentially place the jurisdiction into the equivalent of Section 5 coverage.¹⁷¹

If that happens, then “no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless” the court or the Attorney General has precleared the change and found that it “does not have the purpose and will not have the effect of denying or abridging the right to vote.”¹⁷²

The point here is that while the Supreme Court in *Shelby County* found that the general conditions in covered states today do not justify their continued exception from general constitutional principles and

168. *Shelby County*, 570 U.S. at 531 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

169. *See supra* Part IV.

170. 52 U.S.C. § 10302(c) (2012).

171. *Id.*

172. *Id.*

structures, a court can still appoint federal examiners and place a particular jurisdiction into the equivalent of federal receivership—Section 5 preclearance—if it finds sufficient evidence of current, repeated discrimination and a recalcitrant defendant.

Section 5 was also unprecedented in the way it violated fundamental American principles of due process: it shifted the burden of proof of wrongdoing from the government to the covered jurisdiction.¹⁷³ Unlike all other federal statutes that require the government to prove a violation of federal law, covered jurisdictions were put in the position of having to prove a negative—that a voting change was not intentionally discriminatory and did not have a discriminatory effect.¹⁷⁴ While such a reversal of basic due process principles may have been constitutional at the time it was enacted, given the extraordinary circumstances present in 1965, it cannot be justified today.

Section 3 does not present this constitutional due process problem because it does not shift the burden of proof for preclearance to covered jurisdictions *until* the government or a private plaintiff has *proven* that the jurisdiction has engaged in discrimination.¹⁷⁵ Thus, it remains a valuable, case-specific tool for those jurisdictions that a court finds should have a preclearance requirement.

And this powerful tool to combat attempts to suppress the votes of eligible, legitimate voters by recalcitrant jurisdictions has been successfully employed in two relatively recent cases in Alabama and Texas.¹⁷⁶ The fact that there have only been two cases since *Shelby County* in which a political jurisdiction was ordered to be covered un-

173. *Id.* § 10304(a). Section 5 required a jurisdiction to prove that its voting change would not have “the purpose nor will have the effect of denying or abridging the right to vote.” *Id.*

174. *Id.*

175. *Id.* § 10302(c).

176. See *Patino v. Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017); *Allen v. City of Evergreen*, No. 13-0107-CG-M, 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014). These are the only two cases in which a federal court has found evidence sufficient to warrant imposition of the preclearance regime of Section 3 since *Shelby County*. This is another indication of how rare the circumstances are that would warrant preclearance. In the Texas voter ID case, Section 3 was not imposed on the state because the Fifth Circuit held that the district court not only had “no legal or factual basis to invalidate” the Texas ID law, but that “its contemplation of Section 3(c) relief accordingly fails as well.” *Veasey v. Abbott*, 888 F.3d 792, 801 (5th Cir. 2018).

der Section 3, though, also shows that there is no evidence of widespread, voting discrimination or voter suppression anywhere in the country. It seems obvious that this claim is a myth created for partisan political purposes to scare voters.

VI. CONCLUSION

Americans today have an easier time registering and voting than at any time in our nation's history. The DOJ's enforcement record under the VRA, the NVRA, and the HAVA demonstrates that there is no widespread, systemic voter suppression effort by state legislatures to discriminate against minority voters and deny them (or any other citizens) the ability to vote.

In fact, the substantial reduction in enforcement actions during the eight years of the Obama administration demonstrates that the opposite is true—we have less discriminatory conduct today than ever before. The data on turnout in recent elections also provides no evidence that state laws and regulations governing registering to vote, casting ballots, or maintaining voter rolls are suppressing the ability of any American to cast ballots and participate in the electoral process.

This record also shows that there is no reason to reinstate the preclearance requirements of Section 5 of the VRA to, in essence, place certain states in the equivalent of federal receivership when it comes to their laws and regulations governing voting. In fact, Congress would have a difficult time coming up with any kind of coverage formula that would withstand constitutional scrutiny and justify imposing such an extraordinary requirement on state and local governments.

To ensure fair elections that accurately reflect the will of the voters, states must have the ability to maintain the accuracy of voter registration rolls. In fact, federal law requires that they do so.¹⁷⁷ Furthermore, states have an obligation to address the vulnerabilities in the honor system in place by implementing reforms that help improve the integrity of the democratic process, from the casting of votes to the counting of ballots.

Manufacturing false claims of voter suppression when states try to improve the security and integrity of the election process or when

177. 52 U.S.C. § 20507(a)(4) (2012).

they make routine changes such as moving a polling place is a disservice to our democratic system. Not only does it damage public confidence, but also it clogs the judicial system with meritless claims in an attempt to persuade judges to, as the Sixth Circuit said, “become entangled, as overseers and micromanagers, in the minutiae of state election processes.”¹⁷⁸ That is a serious error that federal judges should avoid.

It is also not a violation of the Constitution and it is not a discriminatory violation of the VRA to require voters to: vote on Election Day, as opposed to weeks before that day; register prior to the election;¹⁷⁹ vote in the precinct where they reside; show some proof of identity; or verify that they still reside in a jurisdiction when election officials receive evidence that they may have moved out of state and thus have become ineligible to vote. This is not voter suppression.

A common refrain when it comes to voting rights and election administration is that we want to ensure that every eligible American citizen can vote and that fraud or administrative errors do not dilute his vote. That requires states to take reasonable, common sense actions that impose minimal burdens on voters and do not constitute “voter suppression.” Any claims to the contrary are wrong.

178. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622–23 (6th Cir. 2016), *application for stay denied*, 137 S. Ct. 28 (2016).

179. Although, states cannot require registration more than 30 days before Election Day. *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972). James F. Blumstein, the plaintiff, is the University Professor of Constitutional Law at the Vanderbilt University School of Law. *Id.* at 331.