

**Written Testimony of Caitlin Swain, Co-Director Forward Justice  
before the  
U.S. House of Representatives  
Committee on House Administration, Subcommittee on Elections  
“Voting Rights and Elections Administration in North Carolina”**

Thursday, April 18, 2019  
Weldon, North Carolina

Thank you, Chairwoman Fudge, and to all the Committee members, for the invitation to speak with you today. My name is Caitlin Swain, and I am Co-Director of Forward Justice, a non-partisan law, policy, and strategy center based in Durham, North Carolina dedicated to advancing racial, social, and economic justice in the U.S. South. In 2016, Forward Justice represented the NC NAACP State Conference group of plaintiffs in the U.S. Court of Appeals and Supreme Court phases of the landmark Section 2 litigation: *NC NAACP v. McCrory*.

Following the seismic reduction in protections for voters of color that resulted from the 2013 Shelby County decision, effectively forcing the abandonment of pre-clearance requirements in formerly covered jurisdictions, our organization has proudly played a lead role in legal challenges and advocacy efforts aimed at protecting the voting rights of voters of color and securing the free and equal right to vote in North Carolina. We stand shoulder to shoulder with a broad coalition of organizations and leaders, many represented here today, working toward realizing the promise of a fair democracy.

Justice too long delayed is justice denied. While axiomatic, the diagnosis so perfectly fits the illness plaguing voters in North Carolina it deserves repeating again. A vote suppressed causes an injury to democracy that can never be completely healed by after-the-fact remedies. Practically, once votes are cast and the final determinations on which votes count are made, elections are called, and new elections outside the regular cycle are rare remedies. Equally significant, when the injury is on the sacred battleground of American voting rights, the damage sown by allowing racial discrimination to seep back into the experience of the ballot box is magnified by the shameful history of race-based violence and exclusion which the injury echoes—and the signals sent by this return of discrimination to our democracy, at the individual, communal, and societal levels, are not easily erased by court order.

In North Carolina, for over half a decade now, the state and its people have been living out the drama of a highly contentious and high-stakes conflict over its voting processes and the core values that should animate and define the experience of voting in the state. First, the state experienced a surprising rise to power of a veto-proof GOP-legislative supermajority in 2011, which came to power through illegally and racially gerrymandered district maps that contaminated at least 77 out of North Carolina’s 100 counties and impacted 83 percent of the state’s population. Then, that same legislative

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1. *North Carolina v. Covington*, 198 L. Ed. 2d 110 (U.S. 2017) (per curiam) (affirming lower court holding that 28 North Carolina state legislative districts were unconstitutional racial gerrymanders). The U.S. Supreme Court affirmed the lower court ruling as to unconstitutional racial gerrymandering in North Carolina’s congressional districts in *Cooper v. Harris*, 137 S. Ct. 1455 (2016).

super-majority unleashed a spate of legislature-driven restrictions to impede voting access.

The 2011 redistricting maps were found to be an unconstitutional racial gerrymander in 2017 and the statewide legislative elections held in November 2018 were the first since 2012 to take place under remedial maps. Even once this supermajority was defeated in 2018, in its final months before power transferred to the newly elected legislature, the lame-duck NC General Assembly enacted a new photo voter ID law, N.C. Sess. L. 2018-144—overriding a scathing Gubernatorial veto—and set the requirement to be implemented in advance of the Presidential Election in 2020.<sup>2</sup>

The fight to enforce a constitutional and moral line in the sand—to end the use of voter suppression as a defensible political goal—has been waged within a hyper-polarized and racialized state and national discourse, unfairly criminalizing voters in general by stoking and then abusing fears of disproven voter fraud allegations, and, too often, specifically disparaging the intentions and actions of voters of color and their candidates of choice.

And yet, simple, clear truths about what is right and wrong have broken through in this context. These truths are laid out in the court opinions from landmark civil rights victories in recent years, in statements by voters and elections officials interviewed at the polls, and in the voices of moral leadership standing up for the rights of the most vulnerable, demanding fidelity to the Constitution and the commands of equality.

Through this testimony, my intent is to share with the Committee select background on recent barriers to ballot access *post-Shelby* in North Carolina. I highlight a few lessons here:

- Current needs in N.C. demonstrated by recent racial discrimination in voting, urgently justify new and restored voting protections;
- In North Carolina, H.B. 589 “the most restrictive voting law North Carolina has seen since the era of Jim Crow,” is a hallmark case of the devastating effect of the gutting of the VRA, which left this State vulnerable to a panoply of election regulation changes that simultaneously imposed new and intersecting restrictions to each step of the voting process—disproportionately and intentionally targeting African American voters and impacting other voters of color, the poor, the young and the elderly;
- Expensive and time-consuming after-the-fact litigation is not a substitute for pre-clearance and other federal protections;
- The negative impact on voting rights caused by confusing, successive changes in voting laws, including changes resulting from after-the-fact litigation, contributes to voter suppression, increases in voter distrust in the democratic process, and non-collaboration and distrust at the local elections administration level;

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2. On March 14, 2019, Gov. Roy Cooper signed into law Senate Bill 214 (N.C. Sess. L. 2019-4) delaying implementation of the photo ID requirement to vote until 2020. With the law, lawmakers acknowledged that voter ID rules could not be expedited in time for special primary elections in two Congressional races in CD3 and CD9 set for Spring 2019.

3. NC NAACP v. McCrory, 831 F.3d 204, 227 (4<sup>th</sup> Cir. 2016).

- The current incentive structure, absent additional enforcement mechanisms, sadly lacks sufficient incentives for state investment in voting infrastructure, voter modernization efforts, and expanding access to the ballot for all eligible voters; and
- Expanding the right to vote must include ending disenfranchisement based on criminal convictions, which in North Carolina is a vestige of the 1900 white supremacy disenfranchisement campaign and the Jim-Crow-era, and enforces a racially disproportionate bar to the right to vote.<sup>4</sup>

Out of the struggle to hold on to the hard-won gains of voting rights in the state, there is an unmistakable lesson for the nation. We are in urgent need of the full protections of the Voting Rights Act, particularly in the form of reinstating an effective pre-clearance process to re-calibrate incentives against voter suppression and create new incentives for inclusive, free, and fair access to the ballot.

### **1. N.C. Voting Restrictions: 2013 “Monster Voter Suppression Law”**

On April 24, 2013, more than a dozen college-aged youth filled the balcony gallery seats of the House Chambers of the North Carolina General Assembly. Duct tape covering their mouths read: “do not silence my vote.” The students, including members of the youth and college division of the NC NAACP State Conference,<sup>5</sup> were engaged in a coordinated expression of protest over the consideration of a Voter Photo ID bill that publicly available data showed would negatively and discriminately impact people of color, youth voters, women, and the elderly.<sup>6</sup> In the four months that followed, the April Voter Photo ID bill expanded from fourteen to fifty-seven pages implementing an “omnibus” electoral package that overhauled election access and administration in the state of North Carolina.

At the same time, public opposition to the actions of the then G.O.P.-supermajority legislature escalated from the silent balcony protest of April 24, to greater than one thousand people arrested after engaging in peaceful civil disobedience during weekly “Moral Monday” protest actions convened by the NC NAACP, clergy, and students. Those actions included 93-year-old civil rights activist Mrs. Rosanell Eaton, one of the first black voters to register in her racially segregated community in Franklin County in 1942, and one of the state’s first African American voters since Reconstruction. Mrs. Eaton, a celebrated advocate of voting rights in North Carolina, who, after successfully overcoming the hurdle of reciting the preamble to the U.S. Constitution to register to vote, a test administered by three white men; and after successfully becoming a leader in her community awarded for her work as a poll worker

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4. Under North Carolina state law, while the right to vote is restored automatically to a citizen upon full completion of a sentence under a felony conviction, the bar to voting continues based on a person’s probation or parole status, including when fees and fines conditions have not been fully paid, resulting both in confusion and discriminatory denial of the right to vote. The 1901 Constitutional Amendment instituting disenfranchisement based on criminal conviction also created both the poll tax and literacy test.

5. The NC NAACP is a nonpartisan, nonprofit organization composed of more than 100 local branches and 20,000 individual members throughout the state of North Carolina. The mission of the North Carolina NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial and ethnic discrimination; and the initiation of lawful action to secure the elimination of racial bias.

6. 182 F. Supp. 3d 320 (M.D.N.C. 2016).

and a special registrar, registering hundreds of thousands of new voters in the state, was now “fed up, and fired up.” More than seventy years after she cast her first ballot, Mrs. Eaton did not know whether under the new photo voter ID provision of H.B. 589 she would be denied her right to vote in the next election.<sup>7</sup>

As this Subcommittee is well aware, in North Carolina and across the country, the late-June 2013 decision in *Shelby County v. Holder*,<sup>8</sup> opened the door to a revival of voter restriction efforts. In North Carolina, the decision transformed the interests of the state and covered jurisdictions—and the relative burden on African Americans and other voters of color—by ending the obligation to seek and gain approval (or “preclearance”) from the U.S. Department of Justice or federal panel before making changes affecting voting, including any “voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting.” Absent an act of Congress, federal enforcement of Section 5 of the Voting Rights Act of 1965,<sup>9</sup> which created robust protections in the electoral process against vestiges of race discrimination, was nullified.

In July of 2013, mere weeks following *Shelby County*, the N.C. General Assembly, divided strictly along party lines and with no support from African American legislators, voted in the nation’s most sweeping voter restriction act in the modern era—North Carolina’s House Bill 589 (“H.B. 589”)—popularly known as the “monster voter suppression law.”<sup>10</sup> The new omnibus H.B. 589 (i) eliminated a full week of early voting access, including one of two Sundays disproportionately used by black churches to promote civic engagement; (ii) eliminated the opportunity for voters to register and vote on the same day (same-day- registration or “SDR”); (iii) eliminated qualification of valid votes cast in the correct county but the incorrect precinct on election day (out-of-precinct voting or “OOP”); and (iv) eliminated the option for “pre-registration” of 16 and 17-year olds, which provided a bridge to registration for young voters, particularly through high school registration drives and at times of likely interaction with the department of motor vehicles.<sup>11</sup> Then-Governor Patrick McCrory enacted the law by his signature on August 12, 2013. Within hours, the N.C. NAACP State Conference, led by President William Barber II, and individual plaintiffs, including Mother Rosanell Eaton, Mary Perry, Maria Palmer, Armenta Eaton, and Carolyn Q. Coleman, challenged the

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7. Ed Pilkington, *Woman Who Faced Jim Crow Takes on North Carolina’s Powers Over Voting Rights*, GUARDIAN (Sept. 25, 2014), <https://www.theguardian.com/world/2014/sep/25/north-carolina-voter-id-law-jim-crow-african-american>.

8. 133 S. Ct. 2612 (2013).

9. *Id.* at 2631. *Shelby County* ruled that the Section 4(b), which provided a formula that subjected certain “covered” jurisdictions to preclearance requirements defined in Section 5, was unconstitutional. *Id.* The Supreme Court issued its opinion in *Shelby County* on June 25, 2013. *Id.* at 2612. The following day, the Chairman of Senate Rules Committee announced that the General Assembly would now move ahead with the “full bill,” which would be “omnibus” legislation. Joint Appendix at 1831, N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320 (M.D.N.C. 2016) (No. 16-cv-1274). Prior to *Shelby County*, forty-one counties in North Carolina were covered under the Voting Rights Act and subject to federal preclearance requirements, which included statewide legislation. *Id.* at 1963. Under the preclearance regime, the State had to demonstrate that a change had neither the purpose nor effect of “diminishing the ability of any citizens” to vote “on account of race or color.” See 52 U.S.C. § 10304 (2012) (previously 42 U.S.C. § 1973c (2006)).

10. See H.B. 589, 2013 Gen. Assemb. (N.C. 2013), 2013 N.C. Sess. Law 381 (enacted as S.L. 2013-381).

11. See, e.g., Alice Miranda Ollstein, *North Carolina’s ‘Monster’ Voter Suppression Law Could Swing the Election*, THINKPROGRESS (Apr. 26, 2016), <https://thinkprogress.org/north-carolinas-monster-voter-suppression-law-could-swing-the-election-22e82ddffc3>.

12. See H.B. 589.

omnibus law as imposing unjustified and discriminatory electoral burdens unlawful under the Fourteenth and Fifteenth Amendments to the U.S. Constitution, and in violation of Section 2 of the Voting Rights Act of 1965.<sup>13</sup>

The panoply of election regulation changes adopted simultaneously imposed new and intersecting restrictions to each step of the voting process. In addition to retaining a strict Voter Photo ID requirement, the final law eliminated specific identification options such as government employee, university and community college, and public assistance IDs more likely to be possessed by African Americans and previously deemed acceptable by the same legislature pre-*Shelby*. All voting and registration practices eliminated were indisputably modes of voting disproportionately used by African Americans in North Carolina during a unique period of increased voting expansion—roughly between 2000 and 2012—and it was likewise indisputable that African Americans in North Carolina were less likely than whites to possess a form of qualifying voter ID under HB589.<sup>14</sup> Other controversial provisions of the law included an expansion of the number and authority of observers appointed by political parties able to engage in voter challenges, and the elimination of the longtime available and widely used option of straight-ticket-voting.<sup>15</sup>

## 2. Post-*Shelby* Section 2 Litigation Is No Substitute for Preclearance

It would not be until roughly three years after plaintiffs filed suit that Mrs. Eaton and all voters in North Carolina would learn with certainty which rules would govern in the 2016 election. On July 29, 2016, the United States Court of Appeals for the Fourth Circuit ruled in *NC NAACP v. McCrory*<sup>16</sup> that H.B. 589 was enacted with an impermissible racially discriminatory purpose in violation of Section 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, instituting an immediate and permanent injunction on five restrictions challenged by the NC NAACP. The landmark decision became final only in May 2017, once the Supreme Court denied the North Carolina General Assembly leadership's petition for certiorari in the case.

Finding in favor of plaintiffs, the court concluded that “[t]he new provisions target African Americans with almost surgical precision” and “impose cures for problems that did not exist.”<sup>17</sup> “Upon receipt of [racially disaggregated data on voting

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13. See generally Complaint, *NC NAACP*, 182 F. Supp. 3d 320 (No. 16-cv-1274); see also U.S. CONST. amends. XIV, XV; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)). Section 3(c), 52 U.S.C. 10302(c), which authorizes courts to impose a preclearance requirement if a discriminatory purpose is found.

Other NC NAACP plaintiffs included churches and students: Emmanuel Baptist Church, Clinton Tabernacle AME Zion Church, Barbee's Chapel Missionary Baptist Church, and Bethel A. Baptist Church; Baheeya Madany, Jocelyn Ferguson-Kelly, and Faith Jackson. The North Carolina-based League of Women Voters and A. Phillip Randolph Institute along with Common Cause, Uniform One Stop Collaborative and individual plaintiffs filed suit on the same day represented by the Southern Coalition for Social Justice and the ACLU and were later joined by intervening youth plaintiffs bringing a novel 26<sup>th</sup> Amendment challenge to the law. All private Plaintiffs' actions were consolidated with the U.S. Department of Justice, which, under Attorney General Eric Holder, acted swiftly to enforce the Voting Rights Act of 1965 in a legal challenge filed shortly after the enactment of H.B. 589. See U.S. DEP'T OF JUSTICE, JUSTICE DEPARTMENT TO FILE LAWSUIT AGAINST THE STATE OF NORTH CAROLINA TO STOP DISCRIMINATORY CHANGES TO VOTING LAW (Sept. 30, 2013), <https://www.justice.gov/opa/pr/justice-department-file-lawsuit-against-state-north-carolina-stop-discriminatory-changes>.

14. See e.g., *NAACP v. McCrory* 831 F.3d 204 (4th Cir. 2016).

15. See *id.*

16. 831 F.3d 204 (4th Cir. 2016).

17. *Id.* at 214.

patterns and usage],” the Fourth Circuit found that “the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.”<sup>18</sup>

“[W]ith race data in hand,” the General Assembly had crafted a photo ID requirement that excluded the specific types of photo IDs that it knew black voters disproportionately lacked, and enacted other provisions after learning that black voters used early voting at a much higher rate than whites, black voters specifically used the first week of early voting more heavily than whites, black voters disproportionately benefited from same day registration as compared to whites, black voters voted out-of-precinct at higher rates than whites and thus benefitted more from the partial counting of those ballots, and black youth used preregistration at higher rates than whites.” The court invalidated the challenged provisions of H.B. 589, eliminating the photo voter ID requirement, and reinstating the previously available early voting week, same-day registration during the early voting period, and election day safeguards of out-of-precinct voting just in time for the 2016 presidential election. This case “comes as close to [including] a smoking gun as we are likely to see in modern times,” the court explained, “[when] the State’s very justification for a challenged statute hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.”<sup>19</sup>

Prior to *Shelby*, the omnibus H.B. 589—as well as many other voter suppression laws enacted in formerly covered jurisdictions—could not have been implemented until reviewed and cleared as non-discriminatory by the Department of Justice or three-judge court. After *Shelby*, such laws immediately go into effect and the burden is on private plaintiffs and the Department of Justice to bring lawsuits seeking to enjoin such racially discriminatory voting practices. This litigation often takes years prior to the issuance of an injunction and during that time voters of color suffer under disproportionate burdens that ultimately are found to constitute racial discrimination. For example, voters in North Carolina endured the elimination of same day registration, of partial counting of out of precinct ballots, of the loss of 7 days of early voting and of preregistration of 16 and 17-year olds during the 2014 federal election cycle, the 2015 local election cycle and the 2016 primary elections. Voters in North Carolina also were required, during the 2016 primary elections, to show one of the approved types of photo voter ID under the ultimately overturned discriminatory law. All of these practices were found in August 2016 to have been enacted with a “surgical” racial purpose, but it is impossible to get back the votes that were lost while the suppression measures were in place.”

Case by case after-the-fact litigation is also extremely expensive and the burden of finding the resources to support such litigation falls disproportionately on voters of color already burdened by socio-economic disadvantages caused by racial discrimination. For example, the private law firms representing plaintiffs in the H.B. 589 case publicly stated that they expended more than \$10 million on the case. Non-

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18. *Id.*

19. NC NAACP v. McCrory, 831 F.3d 204, 216- 17 (4th Cir. 2016) (citing NC NAACP v. McCrory, 182 F. Supp. 3d 320, 372, 384 n.74,398, 404, 408, 491 (M.D.N.C. 2016)), cert. denied, 137 S. Ct. 1399 (2017).

20. *Id.*

21. For example, the photo ID requirement disproportionately disenfranchised Black voters in the March 2016 primary. In the March 2016 Primary, the provisional ballots cast by 1,419 voters who did not present a photo ID were rejected. These rejections disproportionately affected Black voters. 34% of the rejected provisional ballots were cast by African-Americans. By contrast, only 23% of the registered voters in March were African American. See Brief of Amicus Curiae Democracy North Carolina at 9, N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).

profit groups' additional costs exceeded several millions. Prevailing plaintiffs recovered only a fraction of the resources expended on the case as court-awarded attorneys' fees. Those fees as well as the millions of dollars paid by the state to its private attorneys ultimately fall on the taxpayers of North Carolina.

### **3. Barriers to the Ballot Are Multi-faceted, Interconnected, and Local**

Following the Fourth Circuit's August 2016 ruling enjoining the statewide law, the local fight at the county level against barriers to voting access continued. Efforts to educate the public on the changes in voting laws coincided with the severe impact of the hard-hitting natural disaster of Hurricane Matthew on communities and voters, particularly in low-income and disproportionately African American communities in Eastern North Carolina. As Isela Gutierrez of Democracy North Carolina explained in a laudably comprehensive report on the 2016 election: "In North Carolina, elections officials faced a constantly shifting landscape of election law, forcing them to quickly retrain poll workers, change early voting schedules, adjust voting systems, and navigate intense disputes in a hyper-partisan atmosphere."<sup>22</sup>

#### **a. Early Voting Access and Wait Times**

Early voting access and poll closures created new concerns in the 2016 election at the county level, even after the Fourth Circuit enjoined the statewide discriminatory provisions of H.B. 589. When the Fourth Circuit's injunction required restoration of early voting hours in the first seven days, the implementation of this remedy fell to the County Boards of Election and the State Board of Elections. Then North Carolina Republican Party's Executive Director Dallas Woodhouse produced and distributed a memo to Republican County Board of Election members that instructed them to make "party-line" decisions when constructing and voting on new early voting plans that were required to comply with the court's decision – decisions which included voting *against* Sunday hours for voting and maintaining decreased numbers of hours and polling sites during the first week of early voting.<sup>23</sup> For example, in Guilford County, where over 30% of voters are black, voters had sixteen early voting sites available to them in the first week of early voting in 2012, but in 2016, only one site was open, resulting in lines reported to be over three hours.<sup>24</sup>

A celebratory press release by the NC Republican Party summed up the November early voting election results the day before election day, pointing generally to a "significant decrease in Democrat Party performance during early voting," but noting specifically that "African American early voting is down 8.5% from this time in 2012" and "[a]s a share of Early Voters, African Americans are down 6.0%, (2012: 28.9%, 2016: 22.9%) and Caucasians are up 4.2%, (2012: 65.8%, 2016: 70.0)."

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22. Isela Gutierrez, From the Voter's View: Lessons from the 2016 Election, (Jan. 2018), [https://democracync.org/wp-content/uploads/2018/01/PostElectionReport\\_DemNC\\_web.pdf](https://democracync.org/wp-content/uploads/2018/01/PostElectionReport_DemNC_web.pdf).

23. See, e.g., Colin Campbell, *NC Republican Party Seeks 'Party Line Changes' to Limit Early Voting Hours*, NEWS & OBSERVER (Aug. 17, 2016), <http://www.newsobserver.com/news/politics-government/election/article96179857.html>.

24. Julia Harte, *Insight: Emails Show How Republicans Lobbied to Limit Voting Hours in North Carolina*, REUTERS (Nov. 4, 2016), <http://www.reuters.com/article/us-usa-election-northcarolina-insight-idUSKBN12Y0ZY>.

## b. Voter Purges at the County Level

Just days prior to the start of 2016 early voting, Ms. Grace Bell Hardison, a 100-year-old African American voter, who had been a lifetime resident of North Carolina and voted consistently for 24 years, received notice that her voter registration status had been challenged by another voter in her community, Republican Shane Hubers, based on a mailing returned as undeliverable. The Beaufort County Board of Election had already scheduled a hearing on her eligibility to vote.<sup>25</sup> NC NAACP quickly learned of additional evidence that similar residency-based challenges and pending removal proceedings were underway in other counties. On October 31, 2016, when requests to the State Board of Elections failed to produce a remedy, Forward Justice represented the NC NAACP, individual plaintiffs and local branches in filing suit in *NC NAACP v. NC State Board Elections*.<sup>26</sup>

On November 4, 2016 after an emergency hearing, the district court ruled for the NC NAACP and impacted plaintiffs including Ms. Hardison on their preliminary injunction motion, and issued an immediate preliminary injunction to stop the illegal purging of voters in North Carolina, and to reinstate purged voters to the voting rolls in Beaufort, Cumberland, and Moore County.<sup>27</sup> This relief was made final when the court granted the NC NAACP's motion for partial summary judgment in August 2018.<sup>28</sup>

## 4. Racialized Incentives and the Cumulative Impact of Discrimination

The *NC NAACP v. McCrory* case took place against an important recent historical backdrop. North Carolina experienced a remarkable decade of expansion in voting access under the pre-clearance regime of the Voting Rights Act. Most notably, from 2000 to 2012, African-American voter turnout in the state surged by over 51 percent, the largest increase in African American turnout in the country.<sup>29</sup> At historic levels, African Americans overcame past barriers to the franchise “to a degree unmatched in modern history.”<sup>30</sup> By 2013, the Fourth Circuit found, African Americans in North Carolina “were poised to act as a major electoral force.”<sup>31</sup> In both the 2008 and 2012 Presidential elections, African-American voters surpassed turnout rates of whites for the first time in the state's history. It was in this context that H.B. 589 was constructed and enacted.<sup>32</sup>

In North Carolina, as conceded at trial by the state, “African-American race is a better predictor for voting Democratic than party registration.”<sup>33</sup> The phenomenon of what authors Bruce Cain and Emily Zhang call racially “conjoined polarization”

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25. Complaint, *supra* note 13, at 8.

26. National Voter Registration Act, 52 U.S.C. § 20507 (2002).

27. *N.C. NAACP v. State Bd. Of Elections*, No. 16-cv-1274 (M.D.N.C. Nov. 14, 2016) (order granting preliminary injunction).

28. *NC NAACP v. NC State Bd. of Elections*, 1:16CV1274, 2018 U.S. Dist. LEXIS 134228 (M.D.N.C. Aug. 8, 2018).

29. 831 F.3d at 215. Between 2004 and 2012, North Carolina's African Americans achieved a ten-percentage-point swing in voter strength as compared to whites between 2004 and 2012.

30. *See* Ollstein, *supra* note 11.

31. 831 F.3d at 214.

32. Joint Appendix 1193-1197, 1268-1269.

33. *Id.* at 225 (quoting Joint Appendix at 21400, *N.C. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (No. 16-1468, No. 16-1469, No. 16-1474, No. 16-1529)).



characterized by “more consistent alignment of race, party and ideology since 1965” has received increased scholarly attention following the election of Barack Obama.<sup>34</sup> Understanding the link between this phenomenon (of politically cohesive racially polarized voting outcomes), and the imbalanced incentives for racially motivated voter suppression is critical to protect against current barriers to the right to vote.<sup>35</sup>

Historian Jim Leloudis explained in a thorough report to the court that the enactment of H.B. 589 and the racially polarized voting patterns in the state of North Carolina are “best understood in the context of three historical periods of political realignment in which African Americans’ access to the franchise in North Carolina has been significantly redefined.”<sup>36</sup> These periods can be understood in terms of what has been called the first, second, and third Reconstruction in the United States.

*First*, the period of the rise of the southern Democratic party’s violent white supremacist disfranchisement campaign in the south, which forced the end of Reconstruction—in direct response to African American’s enfranchisement and emerging political power at the conclusion of the civil war.

*Second*, the period immediately following the immense gains achieved by African Americans and other people of color during the civil rights movement, including the dismantling of Jim Crow rule and the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. This period saw an historic increase in the participation of people of color civically, socially, and economically, and also produced a racial division, resentment, and violent anti-Black backlash by white Southerners—ultimately, a racialized division that would aid in white southerners becoming consolidated voters for the Republican party by Richard Nixon in his historic presidential runs in 1968 and 1972 through his political “southern strategy.”

And *third*, the period we are currently living within: following the election of President Barack Obama in 2008, when a multi-racial electorate and unprecedented potential of black political power aligned with Latino voters, other voters of color, and allied white voters in the south and nationally demonstrated a real possibility for a transformed southern state and federal electoral map—followed by a wave of proposals by Republican leadership to implement discriminatory restrictions to voting access.

Each of these periods, when examined closely, is marked by what the Supreme Court has termed “the demonstrated ingenuity of state and local governments in hobbling minority voting power.”<sup>37</sup> While this history of discrimination does not alone define our present, if we ignore the cumulative impacts and cyclical nature of voter suppression efforts in the state of North Carolina and nationally, we are in greater

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34. Bruce E. Cain & Emil Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L. J. 868, 869 (2016). See also Ed Kilgore, *Racially polarized voting is getting extreme in the South*, NEW YORK MAGAZINE (Dec. 5, 2016), <http://nymag.com/daily/intelligencer/2016/12/racially-polarized-voting-is-getting-extreme-in-the-south.html> (Summarizing that in the 2014 election, according to Cooperative Congressional Election Study (CCES) data, “Southern whites voted Republican 70 percent to 28 percent [Democrat]— a margin of over 40 percentage points, [and] more than double the GOP’s margin among white Southerners in 2006.”)

35. See, e.g., Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 206 (2013) (“This gap is not the result of mere partisanship, for even when controlling for partisan identification, race is a statistically significant predictor of vote choice, especially in the covered jurisdictions.”).

36. See also Joint Appendix, *supra* note 33, at 3535.

37. *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994).

danger of not understanding the patterns and incentives driving racial discrimination in voting, and therefore, of repeating a disgraceful history. Professor Leloudis's report is attached as Appendix 1.

## 5. The Fight Continues: 2018's Photo Voter ID Constitutional Amendment

Mere days after the Supreme Court issued its denial of the General Assembly's petition for certiorari in *NC NAACP v. McCrory*, the Republican caucus—comprised largely of the same lawmakers responsible for passing the Monster Voter Suppression Law with racially discriminatory intent—announced that they would begin work on passing a new photo voter ID bill.<sup>38</sup> The Republican Chair of the House Elections Committee quickly revealed that, this time, leadership would seek to enact the photo voter ID requirement as a state constitutional amendment, reasoning that enshrining photo voter ID in the state Constitution, rather than merely in statute, would serve to “mute future court challenges.”<sup>39</sup>

The GOP leadership caucus viewed their agenda as more urgent to enact now when, during that same summer of 2017, the U.S. Supreme Court also issued a final ruling in *Covington v. North Carolina*, summarily affirming in a *per curiam* decision, the lower court's finding that the 2011 maps were infected by a sweeping unconstitutional racial gerrymander.<sup>40</sup> The General Assembly was able to engage in various delay tactics to hold up the drawing of court-ordered remedial maps, and ultimately succeeded in making it impossible for special elections to be held before the regularly-scheduled November 2018 elections.<sup>41</sup> But this still left the General Assembly with only one more regular legislative session left before a new legislature would be elected in 2018 without the racially discriminatory maps that were the illegal source of the GOP legislative supermajority.

Knowing the power of the unconstitutional supermajority was on the precipice of disappearing, in the months before the November 2018 election, the General Assembly took the step, unprecedented in this State, of using their supermajority to enact a slate of six proposed constitutional amendments to be placed on the 2018 ballot—including a constitutional amendment to require photo voter ID. Several of these vague and misleadingly-worded proposed amendments, including the photo voter ID amendment, were passed by statewide vote in the 2018 election, an election that also saw the end to the extremist supermajority in the General Assembly, who could not hold on to their seats without the aid of their illegally racially-gerrymandered 2011 legislative maps.

Rather than waiting for the new legislature to be seated, however, GOP leadership convened again in the few short weeks after the election intent on completing a long-held purpose to impose a discriminatory photo voter ID barrier to the ballot box. During a December lame-duck special session, which was met by the strong protest of

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38. Anne Blythe, *Supreme Court won't rescue NC voter ID law; GOP leaders say they will try again with new law*, THE NEWS & OBSERVER (May 15, 2017), available at <http://www.newsobserver.com/news/politics-government/politics-columnsblogs/under-the-dome/article150554992.html>.

39. Jeff Tiberii, *NC Lawmakers Consider Another Voter ID Bill*, WUNC, (July 13, 2017), available at <https://www.wunc.org/post/nc-lawmakers-consider-another-voter-id-bill>.

40. *Covington v. North Carolina*, 137 S. Ct. 2211 (2017) (*per curiam*).

41. *Covington v. North Carolina*, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017) (noting with disapproval that Legislative Defendants had “acted in ways to that indicate they are more interested in delay than they are in correcting this serious constitutional violation” and reluctantly declining to order special elections due to concerns that the “compressed and overlapping schedule such an election would entail is likely to confuse voters, raise barriers to participation, and depress turnout”).

the NC NAACP and its partners, the GOP leadership rushed through S.B. 824, legislation to implement the photo voter ID constitutional amendment. Ultimately, the final act of the unconstitutional GOP supermajority's six-year reign was to use its illegal power to override the gubernatorial veto of S.B. 824, enacting the implementation of photo voter ID into law.

The NC NAACP is currently playing a leading role in the charge of challenging this illegal photo voter ID constitutional amendment and its accompanying implementing legislation, S.B. 824, represented by Forward Justice in state and federal court. On February 22, 2019, the Wake County Superior Court issued an Order firmly grounded in principles of our state Constitution, ruling that "the General Assembly has the authority to submit proposed amendments to the Constitution only insofar as it has been bestowed with popular sovereignty." The court found that "the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state Constitution before an amendment proposal can be submitted to the people for a vote, breaking the requisite chain of popular sovereignty between North Carolina citizens and their representatives," and therefore "the constitutional amendments placed on the ballot in November 6, 2018 were approved by a General Assembly that did not represent the people of North Carolina."<sup>42</sup> Accordingly, the court ordered the photo voter ID amendment (along with the also-challenged "tax cap" amendment, N.C. Sess. L. 2018-128) void *ab initio*. The case is now on appeal, and ultimate resolution will come following review by the North Carolina Supreme Court.

The NC NAACP's separate challenge filed in December 2018 against S.B. 824 as unconstitutionally racially discriminatory both in its intent and in its results also remains pending before a federal district court.<sup>43</sup> Plaintiffs argue there that the newly enacted photo ID requirement suffers from the same flaws as the prior version (in H.B. 589) and violates Section 2 of the Voting Rights Act. Both were the product of rushed legislative processes, devoid of meaningful input from protected classes and fulsome consideration of the impact of voting changes on voters of color. Both were based on pre-textual justifications, making changes to the voting process when there was nothing wrong in the first place. And both carve out classes of identification or otherwise impose onerous rules that will have a disproportionate impact on citizens' ability to participate in the political process based on race.

## 6. Conclusion and Final Recommendations

If voting access is the cornerstone of our democracy, the evidence from North Carolina makes clear our foundation is unsteady and in need of immediate reinforcement. In North Carolina, even as the people have stood up and fought back, achieving historic and vital victories, the lasting impacts of voter suppression remain. Delay in justice has indeed denied justice. In June 2018, the NC General Assembly enacted more legislation making additional changes to early voting hour requirements prior to the 2018 election—contributing to what ProPublica analyzed to be close to a 20% decrease in polling locations available to voters in the state in the 2018 midterm elections than had been available in the comparable 2014 cycle. As one County Board of Elections Member in Bladen County explained when asked about the law: "I do not see it as an isolated event, but rather a part of a larger voter suppression effort. I see it as

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42. *NC NAACP v. Moore*, 18 CVS 9806, Order (Feb. 22, 2019).

43. *NC NAACP v. Cooper*, 18-cv-01034 (M.D.N.C. filed Dec. 20, 2018).

anti-voter, period.”<sup>44</sup>

Amid an ever-changing political context, with new revelations forthcoming seemingly daily about wrongdoing by politicians and political actors in the state and across the nation, it is little wonder why people express confusion, dismay, and outright anger about the strength of America’s commitment to the fundamental right to vote.

In the last year, we mourned the deaths of both Mrs. Grace Bell Hardison and Mrs. Rosanell Eaton. Mrs. Eaton died the first week of December 2018, mere days before the lame duck N.C. General Assembly passed into law the revived Photo Voter ID requirement. As then- President Barack Obama wrote in a letter to the New York Times in August 2015: “I am where I am today only because men and women like Rosanell Eaton refused to accept anything less than a full measure of equality.”<sup>45</sup> The responsibility for ensuring that our system of democracy measures up though, should not fall time and again on people like Mrs. Rosanell Eaton and Mrs. Grace Bell Hardison and organizations like the North Carolina NAACP.

More than fifty years after the first passage of the Voting Rights Act, it is time to restore the enforcement powers of the historic law. In North Carolina, the suppression of voting based on race is far from ancient history; this extraordinary problem persists in the form of statewide legislation, discriminatory redistricting, local changes to availability and locations of polling sites, in racialized appeals, and in false challenges and accusations levied against voters—all taking place in interaction with socioeconomic barriers and other vestiges of past discrimination. And because of this persistence, we must urgently move forward – in the determined tradition of past generations who fought mightily to give us the right to vote free of racial discrimination—to immediately restore preclearance protections, to end Jim-Crow-era disfranchisement based on criminal convictions, and to invest in new incentives to encourage expanded, open and equal access to the ballot.

If there is further information I can provide to the Committee that may be of use, it will be my sincere pleasure to do so.

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44. Blake Paterson, ProPublica, *Bipartisan Furor as North Carolina Election Law Shrinks Early Voting Locations by Almost 20 Percent*, (Sept. 24, 2018), available at: <https://www.propublica.org/article/bipartisan-furor-as-north-carolina-election-law-shrinks-early-voting-locations-by-almost-20-percent>.

45. Barack Obama, New York Times, *President Obama’s Letter to the Editor*, (Aug. 15, 2015), available at: <https://www.nytimes.com/2015/08/16/magazine/president-obamas-letter-to-the-editor.html?module=inline>