

**Statement of Danielle Lang
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**Committee on House Administration
Subcommittee on Elections**

**Hearing on “Voting in America: The Potential
for Polling Place Quality and Restrictions on Opportunities
to Vote to Interfere with Free and Fair Access to the Ballot”
June 11, 2021**

Thank you for the opportunity to appear before you today to testify about the importance of polling place quality and varied voting opportunities to access the franchise, as well as current efforts to restrict such access across the country. I am the Director of the Voting Rights Program at the Campaign Legal Center (“CLC”), a nonpartisan 501(c)(3) organization dedicated to advancing American democracy through law. I am also an Adjunct Professor of Law at Georgetown University Law Center, where I teach an Election Law Practicum. In 2020, I also taught at Yale Law School as a visiting clinical lecturer with the Rule of Law Clinic. In my position at CLC, I have firsthand knowledge of the importance of the topics of this hearing. Indeed, I have led voting rights litigation addressing these issues in courts across the United States, from the trial level to the U.S. Supreme Court.

I will briefly describe the Voting Rights Act, its weakening by the Supreme Court in *Shelby County v. Holder*, and the resultant resurgence of voter suppression legislation across the country. I will then discuss two of the most significant ways in which the right to vote has been restricted in the years since the *Shelby County* decision: first through attacks on the quality of in-person voting sites, i.e., polling places, and second through restrictions on opportunities to vote, including early voting, absentee voting, and drop boxes. Both of these issues disproportionately—and too often intentionally—prevent voters of color from exercising their right to vote.

Polling place quality and varied opportunities to vote are crucial to the success of American democracy, public confidence, and political engagement. In 2020, voters

around the country participated in our elections at the highest rates in more than a century.¹ Yet, in many states, the response to this outpouring of collective action by the American people has been to limit, rather than expand, the number and quality of polling places and opportunities to vote.

While these broad topics highlight a myriad of distinct and compounding problems, both illustrate the dire need for legislative action to ensure that all levels of government afford every American meaningful and equitable opportunities to exercise their fundamental right to vote.

I. OVERVIEW

The Voting Rights Act of 1965, 52 U.S.C. § 10301 *et seq.* (“VRA” or the “Act”), is one of the most transformative pieces of civil rights legislation ever enacted in the United States.

Section 2 of the VRA “prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in [a] language minority group,” and, as of now, is the most actively litigated section of the statute.² Originally, Section 2’s prohibition was reinforced by Section 5 of the Act, which required states and localities with a history of discrimination in voting to seek preclearance from the federal government before making any changes in their voting laws. Indeed, given the ingenuity of legislators in devising racist voting restrictions during the Jim Crow era—which made post-enactment litigation a game of inefficient whack-a-mole—preclearance was the heart of the VRA’s success.

But in 2013, the Supreme Court invalidated the coverage formula for determining which jurisdictions were subject to preclearance, rendering Section 5 of the VRA

¹ Jacob Fabina, *Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, U.S. CENSUS BUREAU (Apr. 29, 2021), <https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html>.

² *Section 2 of the Voting Rights Act*, U.S. DEPT OF JUST., <https://www.justice.gov/crt/section-2-voting-rights-act>.

powerless to fight discrimination in voting.³ In a 5–4 decision, the Court ruled as a matter of law that “[o]ur country has changed” because the discriminatory “conditions that originally justified [the VRA’s preclearance] measures no longer characterize voting in the covered jurisdictions.”⁴ Sadly, the years since *Shelby County* have disproven that hypothesis.

The *Shelby County* decision was a tragic setback in our nation’s struggle to break down the entrenched barriers that minority groups must overcome to participate equally in the political process. And since then, civil rights advocates have struggled to keep up with the deluge of voter suppression legislation, regulation, and election administration changes across the country, especially in jurisdictions formerly subject to preclearance.

In the wake of the highest voter participation in more than a century during the 2020 elections,⁵ the war on voters has only intensified. Between January and May of this year, legislators in 48 states introduced at least 389 bills seeking to restrict the right to vote, and 14 states enacted 22 new restrictive laws.⁶

As a result, in many states it is substantially harder to vote now than it was before *Shelby County* was decided. Two significant ways in which the right to vote has been abridged are through (1) a decline in polling place quality—including polling place closures, relocations, long and racially disparate wait times, inaccessible or inhospitable polling sites, and insufficient resources—and (2) cutbacks on

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

⁴ *Id.* at 535, 557. *But see id.* at 590 (Ginsburg, J., dissenting) (“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”).

⁵ See Kevin Schaul, Kate Rabinowitz, & Ted Mellnik, *2020 Turnout is the Highest in Over a Century*, WASH. POST (Nov. 5, 2020), <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/>.

⁶ *State Voting Bills Tracker 2021*, BRENNAN CTR. FOR JUST. (last updated May 28, 2021), www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021; see also State Voting Rights Tracker, VOTING RIGHTS LAB (last updated June 7, 2021), <https://tracker.votingrightslab.org/>.

opportunities to vote, particularly constraints on early voting, absentee voting, and drop boxes.

II. POLLING PLACE QUALITY

Since *Shelby County*, states and localities across the country have imposed an unprecedented number of restrictions on in-person voting locations, i.e., polling places.⁷ Polling places—where many voters register to vote, update their registrations, and cast their ballots (either early or on Election Day)—are a bedrock of our electoral system.⁸ The quality of polling places—their number, location, accessibility, and resources—affects voter participation and confidence, thereby affecting the health and representative nature of American democracy.⁹

But free from the guardrails of preclearance, many jurisdictions have undermined polling place quality in a number of ways. Most frequently, though not exclusively, states and localities have closed or relocated polling places with minimal or no notice to voters, established polling places in inaccessible or inhospitable locations, and/or

⁷ See, e.g., *Democracy Diverted: Polling Place Closures and the Right to Vote* 10, LEADERSHIP CONFERENCE EDUC. FUND, (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> (documenting 1,688 polling place closures between 2012 and 2018).

⁸ See *Election Administration and Voting Survey: 2018 Comprehensive Report*, U.S. ELECTION ASSISTANCE COMM'N 7, 12 (June 2019), https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf (documenting more than 230,000 polling places used by almost 88 million Americans voting in-person, either early or on Election Day, during the 2018 elections).

⁹ See, e.g., Christopher Mann & Robert M. Stein, *The Impact of Polling Places on Voting*, Prepared for the Election Sci. Reform & Admin. Conference 19 (July 2019), <https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/7/538/files/2019/07/Mann-and-Stein-Polling-Place-Effect.pdf> (polling places and their attributes “often have important impacts on voter confidence in election”); VOTING RIGHTS LAB, *Polling Place Consolidation: Negative Impacts on Turnout and Equity* 7 (July 2020), <https://votingrightslab.org/wp-content/uploads/2021/01/Polling-Place-Consolidation-Negative-Impacts-on-Turnout-and-Equity.pdf> (“Longer distances to polling places ha[ve] been shown to reduce turnout in both large and small elections.”); Matt A. Barreto, Mara Cohen-Marks, & Nathan D. Woods, *Are All Precincts Created Equal? The Prevalence of Low-Quality Precincts in Low-Income and Minority Communities*, 62 POL. RES. Q. 445, 454 (Sep. 2009) (“[I]f a voter becomes familiar with his or her precinct location because it has been used year after year, this alone may have a significant impact on turnout”); Daniel Garisto, *Smartphone Data Show Voters in Black Neighborhoods Wait Longer*, SCI. AM. (Oct. 1, 2019), <https://www.scientificamerican.com/article/smartphone-data-show-voters-in-black-neighborhoods-wait-longer1> (finding that, in 2012, long lines at the polls were estimated to have deterred between 500,000 and 700,000 voters from casting their ballot).

failed to provide polling places with sufficient staff and resources. These problems, in turn, prolong polling place wait times and exacerbate voter confusion, which themselves depress turnout and risk disenfranchisement. All of these harms disproportionately burden voters of color and other historically marginalized groups,¹⁰ frustrating the very purpose of the Voting Rights Act and demonstrating the need for federal legislative action to protect voters' ability to meaningfully access polling places.

These problems are further exacerbated by the fact that local government election laws, policies, and practices governing polling places are often buried in local election codes and legislative meeting minutes. Thus, absent the protection of Section 5 preclearance, local officials have been left with unfettered discretion, too often using it to make it more difficult and more confusing for voters to vote, and leaving advocates struggling to track the proliferation of polling place restrictions.

A. Polling Place Closures

Empirical political science research has found that “reducing [] the number and location of polling places depress[es] voter turnout.”¹¹ Even apparently slight changes in the distance that voters have to travel to reach their polling place “can have a

¹⁰ See, e.g., Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places*, NPR (Oct. 17, 2020), <https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl>; Mark Nichols, *Closed voting sites hit minority counties harder for busy midterm elections*, USA TODAY (Oct. 30, 2018), <https://www.usatoday.com/story/news/2018/10/30/midterm-elections-closed-voting-sites-impact-minority-voter-turnout/1774221002/>; Alexa Ura, Chris Essig, & Madison Dong, *Polling places for urban voters of color would be cut under Texas Senate's version of voting bill being negotiated with House*, TEX. TRIB. (May 23, 2021), <https://www.texastribune.org/2021/05/23/texas-voting-polling-restrictions/>.

¹¹ Mann & Stein, *supra* note 9; see also Matt Vasilogambros, *Polling Places in Black Communities Continue to Close Ahead of November Elections*, GOVERNING (Sept. 5, 2018), <https://www.governing.com/archive/sl-polling-place-close-ahead-of-november-elections-black-voters.html> (“The number of polling places in a county can have a significant impact on who votes.”); John E. McNulty, Conor M. Dowling, & Margaret H. Ariotti, *Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters*, 17 POL. ANALYSIS 435 (Oct. 2009) (finding that polling place closures and consolidation can dissuade even habitual, motivated voters from going to the polls).

major impact on turnout: the greater distance to vote, the lower chance of voting.”¹² Polling place closures, in turn, can lead to longer lines at the remaining polling places, as well as confusion for voters, especially repeat voters who show up at their prior polling place only to find it closed. Both outcomes may dissuade or prevent some people from voting. *See infra* at II.C, Racial Disparities in Wait Times.

Worse still, the harmful effects of polling place closures are most pronounced for communities of color, where closures occur most frequently and impose the greatest costs on voters.¹³ First, voters of color are more likely to have their polling places closed, consolidated, or relocated, increasing voter confusion, depressing turnout, and risking disenfranchisement in already marginalized and historically disenfranchised communities.¹⁴ Second, the burdens on voters caused by polling place closures and relocations—having to find information about polling place changes, figure out where and how to get to a new polling place on short notice, and/or travel a greater distance to that new polling place—are higher for voters of color, who are more likely to have limited transportation options, and less flexibility or time to vote.¹⁵

¹² VOTING RIGHTS LAB, *Polling Place Consolidation*, *supra* note 9, at 5; *see also* Enrico Cantoni, *A Precinct Too Far: Turnout and Voting Costs*, 12 AM. ECON. J.: APPLIED ECON. 61 (2020) (finding that even a 0.25-mile increase in the distance to a polling place reduces the number of ballots cast by 2 to 5 percent over presidential, mid-term congressional, and municipal elections); Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 AM. POL. SCI. REV. 115 (Feb. 2011).

¹³ *See, e.g.*, Vasilogambros, *supra* note 11; Mann & Stein, *supra* note 9, at 5 (“the depressing effect of distance to a polling place and voter turnout is enhanced three-fold in high racial/ethnic minority communities over non-minority communities”).

¹⁴ *See, e.g.*, Vasilogambros, *supra* note 11; *see also* Emily Green, ‘It’s Very Much a Racial Issue’: Why Georgia Has Slashed Hundreds of Polling Places in the Last 4 Years, VICE NEWS (Oct. 22, 2020), <https://www.vice.com/en/article/xgzqn7/its-very-much-a-racial-issue-why-georgia-has-slashed-hundreds-of-polling-places-in-the-last-4-years>; Seth Cohen, *Jim Crow 2.0? How Kentucky’s Poll Closures Could Suppress Black Votes*, FORBES (June 22, 2020), <https://www.forbes.com/sites/sethcohen/2020/06/22/kentucky-and-jim-crow-2-dot-0/?sh=6d27bca22219>; Richard Salame, *Texas closes hundreds of polling sites, making it harder for minorities to vote*, THE GUARDIAN (Mar. 2, 2020), <https://www.theguardian.com/us-news/2020/mar/02/texas-polling-sites-closures-voting>.

¹⁵ *See, e.g.*, VOTING RIGHTS LAB, *Polling Place Consolidation*, *supra* note 9, at 4; Sarina Vij, *Why Minority Voters Have a Lower Voter Turnout: An Analysis of Current Restrictions*, 45 HUM. RTS. MAG. (June 26, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout/ (“It is also far more difficult for members of

Despite these identifiable harms to voters, especially voters of color, polling place closures have been occurring at an unprecedented rate since *Shelby County*. The result has been a rapid decline in the number of in-person polling places, significantly reducing opportunities for people to vote.

In just the three years following the *Shelby County* decision, seventeen states and the District of Columbia closed large numbers of in-person polling places.¹⁶ The Leadership Conference Education Fund, the research arm of a coalition of over 200 civil rights groups, identified 868 polling places in jurisdictions formerly covered by Section 5 of the VRA that closed during that time.¹⁷ By 2018, that number had nearly doubled, totaling an astounding 1,688 polling place closures since *Shelby County*—despite a significant increase in voter turnout over the same period.¹⁸

Jurisdictions previously covered by Section 5—i.e., jurisdictions with a history of racial discrimination in voting—have, by far, the highest rates of polling place closures, closing roughly 20 percent more polling locations than other jurisdictions.¹⁹ And polling place closures have been most prevalent in already underserved and/or historically disenfranchised communities, particularly communities of color.²⁰

minority communities to be able to locate polling places on Election Day. Only 5 percent of white survey respondents reported that they had trouble finding polling locations, compared to 15 percent of African American and 14 percent of Hispanic respondents.”).

¹⁶ See VOTING RIGHTS LAB, *Polling Place Consolidation*, *supra* note 9, at 5.

¹⁷ LEADERSHIP CONFERENCE EDUC. FUND, *The Great Poll Closure* 4 (Nov. 2016), <http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf>.

¹⁸ LEADERSHIP CONFERENCE EDUC. FUND, *Democracy Diverted*, *supra* note 7, at 10; *see also* Andy Sullivan, *Southern U.S. states have closed 1,200 polling places in recent years: rights group*, REUTERS (Sept. 10, 2019), <https://www.reuters.com/article/us-usa-election-locations/southern-u-s-states-have-closed-1200-polling-places-in-recent-years-rights-group-idUSKCN1VV09J> (finding that between 2013 and 2019, southern states closed nearly 1,200 polling places).

¹⁹ Allison McCann, *How the Gutting of the Voting Rights Act Led to Hundreds of Closed Polls*, VICE NEWS (Oct. 16, 2018), https://news.vice.com/en_us/article/kz58qx/how-the-gutting-of-the-voting-rights-act-led-to-closed-polls.

²⁰ *See, e.g.*, Vasilogambros, *supra* note 11 (discussing polling place closures in Georgia, Florida, Indiana, Illinois, Kansas, Mississippi, Ohio, and Wisconsin, and the racial implications of such closures); VOTING RIGHTS LAB, *Polling Place Consolidation*, *supra* note 9, at 5 (describing racially disparate polling place closures in Indiana and Florida, among other states).

For example, by 2018, Texas—a state where 39 percent of the population that year was Latino and 12 percent Black—closed more polling places since *Shelby County* than any other state, roughly 750 sites.²¹ Most of these closures were in majority-minority communities, a pattern repeated in other states.

Arizona—where 30 percent of the population in 2018 was Latino, 4 percent Native American, and 4 percent Black—had the most widespread reduction in polling places, closing locations in almost every county (13 of 15) since Section 5 preclearance was abolished.²² Maricopa County, home to Phoenix and a large Latino population, closed more polling places than any other county studied, and more than the next two counties combined.²³

Georgia—where 31 percent of the population in 2018 was Black and 9 percent Latino—closed a greater percentage of polling places than any other state.²⁴ Several counties closed more than 80 percent of their polling places, leaving some with a single polling site to serve all voters within several hundred square miles.²⁵

Through public records requests and data provided by the Center for Public Integrity, CLC has continued to document recent polling place closures in Louisiana, Mississippi, and Alabama. Since *Shelby County*, Louisiana has seen a steady decline in polling place access, especially for urban communities. For example, Jefferson Parish, Louisiana’s largest parish, has seen an 8.7 percent *increase* in the number of Black registered voters between 2012 and 2020 but a 15 percent *decrease* in the number of polling places. Counties in Mississippi and Alabama display a similar pattern. Lauderdale County, Mississippi—which is 44 percent Black—closed 20 percent of its polling places between 2012 and 2020, even though the county’s citizen

²¹ LEADERSHIP CONFERENCE EDUC. FUND, *Democracy Diverted*, *supra* note 7, at 17.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 18; *see also* Vasilogambros, *supra* note 11 (reporting that, in 2018, 10 counties in Georgia with large Black populations closed polling places “after a white elections consultant recommended they do so to save money”).

²⁵ LEADERSHIP CONFERENCE EDUC. FUND, *Democracy Diverted*, *supra* note 7, at 18.

voting age population increased by 3 percent. And Shelby County, Alabama—namesake of the Supreme Court decision—closed roughly 10 percent of its polling places between 2012 and 2020, despite an increase of almost 13 percent in the county’s citizen voting age population.

CLC has not only documented but fought to prevent the harmful effects of polling place closures on communities of color. On October 12, 2020, CLC filed a federal lawsuit against the Recorder of Pima County, Arizona for her elimination (and refusal to reinstate) an in-person early voting site on the Pascua Yaqui Reservation, located outside Tucson.²⁶ The Pascua Yaqui Tribe had an in-person early voting site on their reservation from 2010 to 2018. But one month before the August 2018 primary, the county recorder closed the site, forcing 3,600 to 4,000 voters living on the reservation—93 percent of whom are Native American—to travel out of their community (more than two hours roundtrip by bus) just to vote at the nearest early voting location.²⁷ This is a difficult journey for members of a community where access to cars is limited, poverty and unemployment rates are high, and the median income is half that of the county average—and the burden on those voters was only magnified during the COVID-19 pandemic, which made early voting access paramount.

Though the Pascua Yaqui Tribe advocated for reinstatement of the early voting location in every election since its removal—with support from the Mayor of Tucson, the Pima County Board of Supervisors, and the Arizona Secretary of State’s office, as well as voting rights advocates—the voting site remained closed during the 2020 election because the recorder refused to reinstate it and a federal court declined to

²⁶ See Complaint, *Pascua Yaqui Tribe v. Rodriguez*, CV-20-00432-TUC-JAS at 7 n.10 (Oct. 12, 2020), <https://campaignlegal.org/sites/default/files/2020-10/Pascua-Recorder-Complaint%20%2010.11.2020%288704510.1%29.pdf>.

²⁷ “Longer distances to polling places ha[ve] been shown to reduce turnout in both large and small elections.” VOTING RIGHTS LAB, *Polling Place Consolidation*, *supra* note 9, at 7; *see also, e.g.*, Cantoni, *supra* note 12.

require her to do so.²⁸ The recorder refused to provide any early voting access on the reservation despite offers from the Secretary of State to fund the site and offers from the Tribe to provide alternative locations. These actions perpetuate the denial of the Pascua Yaqui Tribe’s equal access to voting, making it harder for them to participate fully in our democracy.

Still, the harms caused by polling place closures in states and localities across the country—and all the harms discussed herein—can be remedied through legislative action designed to ensure that all levels of government offer and expand opportunities to vote. Indeed, the experience of the Pascua Yaqui Tribe underscores why federal legislation is sorely needed. Under preclearance, the removal of this site would likely have been prevented; yet the Tribe was unable to vindicate their rights in federal court because of the proximity of the lawsuit to the election. Notably, the court did not hold that the Recorder’s actions were lawful under Section 2; only that it would not order a remedy before the election.²⁹ Restored preclearance under the John Lewis Voting Rights Advancement Act would prevent the Tribe from facing similar setbacks going forward.³⁰

B. Relocation of Polling Places

Polling places need not be closed entirely to make voting more difficult.³¹ Simply changing polling place locations—especially close to the date of an election—increases the risk of voter confusion and of voters showing up at the wrong polling place. This, in turn, can depress turnout and/or result in disenfranchisement.

²⁸ See *Court Declines to Reinstate Early Voting Site for Arizona*, CAMPAIGN LEGAL CTR. (Oct. 22, 2020), <https://campaignlegal.org/press-releases/court-declines-reinstate-early-voting-site-arizona-tribe>.

²⁹ See Order, *Pascua Yaqui Tribe v. Rodriguez*, CV-20-00432-TUC-JAS (Oct. 22, 2020), <https://campaignlegal.org/sites/default/files/2020-10/Pima%20County%20Order.pdf>.

³⁰ See H.R. 4, Voting Rights Advancement Act § 4A(b)(6) (2019-20), <https://www.congress.gov/116/bills/hr4/BILLS-116hr4rfs.pdf>.

³¹ See Vasilogambros, *supra* note 11 (“[I]t’s not just the number of polling places that affect voter outcomes. Moving voters to different voting environments also may affect how they vote.”).

Research shows that polling place stability, i.e., voter familiarity with their polling place location, has a significant effect on voter turnout.³² “Changing polling locations can lower turnout due to both transportation costs—distance, time, and the cost of finding and using transportation to polling places, and search costs—the cost of learning about and finding new polling locations.”³³ It can also prevent voters from casting their ballots when combined with other discriminatory laws like bans on out-of-precinct voting, which require an individual’s vote to be discarded if they show up to the wrong polling place after election officials make changes. *See infra* III.D, Out-of-Precinct Voting. Polling place consolidation is also likely to compound wait times and administrative issues, *see infra* at II.C, Racial Disparities in Wait Times, risking further depression of voter turnout.

Polling place relocations, as with closures, disproportionately affect communities of color.³⁴ Older voters, voters with disabilities, and low-income voters may also be affected, as they are less likely to be able to identify and/or get to a new location to cast their vote.

In our work, CLC has seen firsthand the scale and disparate effects of polling place relocations. Through public records requests combined with open-source data, CLC found that, since *Shelby County*, East Baton Rouge Parish, Louisiana, the seat of the state’s capital, saw a more modest decrease in the number of polling places than other

³² See, e.g., Barreto, Cohen-Marks, & Woods, *supra* note 9, at 454 (“[I]f a voter becomes familiar with his or her precinct location because it has been used year after year, this alone may have a significant impact on turnout”); Jesse Yoder, *How Polling Place Changes Reduce Turnout: Evidence from Administrative Data in North Carolina*, Working Paper (Aug. 14, 2019), <https://www.dropbox.com/s/pk219n6bam4584d/pollingplaces.pdf?dl=1> (finding that, in North Carolina, polling place changes reduced voter turnout by between 0.7 and 2 percent per election, and that the negative effects on turnout were not offset by early or absentee voting).

³³ VOTING RIGHTS LAB, *Polling Place Consolidation*, *supra* note 9, at 6-7.

³⁴ See, e.g., Carrie Levine, Pratheek Rebala, & Matt Vasilogambros, *First Came the Floods. Then Came the Polling Place Changes*, CTR. FOR PUB. INTEGRITY (Sept. 24, 2020), <https://publicintegrity.org/politics/elections/ballotboxbarriers/first-came-the-floods-then-came-the-polling-place-changes/> (noting that, between 2012 and 2016, a higher percentage of Black voters than white voters in East Baton Rouge, Louisiana had their polling places relocated); Brian Amos, Daniel A. Smith, & Casey Ste. Claire, *Reprecincting and Voting Behavior*, 39 POL. BEHAVIOR 133 (Mar. 1, 2017) (finding that, in Manatee County, Florida, Black and Latino voters were significantly more likely than white voters to be reassigned to new polling places following polling place closures).

large parishes, but that voters in the parish—particularly Black voters—saw their polling places relocated with far greater frequency.³⁵ Such polling place location changes create barriers to access that disproportionately affect voters of color.

Ill-intentioned or poorly drafted legislation may make the relocation of polling places, particularly in minority communities, more likely. For example, Georgia’s newly enacted voter suppression legislation, S.B. 202, requires polling places that serve more than 2,000 voters and have wait times surpassing an hour to provide more voting equipment and/or poll workers *or split up the precinct*.³⁶ As polling places in minority communities generally serve more voters (because there are fewer polling places in these communities)³⁷ and have longer wait times, *see infra* at II.C Racial Disparities in Wait Times, this provision makes it more likely that polling places in minority communities will be relocated, creating confusion and uncertainty for voters. Thus, while the provision at the surface may seem ameliorative by addressing wait times, its design is likely to create as much harm as good.

Adding insult to injury, S.B. 202 further requires that, if a person shows up at the wrong polling place in their county, the voter must travel to their newly assigned polling place. The voter can only cast a provisional ballot that will count if: (1) it is cast after 5 P.M. but before the regular time for the closing of the polls on election day *and* (2) the voter executes a sworn statement, witnessed by a poll worker, stating that the voter is unable to vote at their correct polling place prior to the closing of the polls and giving the reason why.³⁸ *See infra* at III.D, Out-of-Precinct Voting.

Thus, Georgia’s S.B. 202—a bill that would have been subject to Section 5 preclearance before *Shelby County*—makes polling place relocations in minority communities more likely, and then compounds the disenfranchising effect of those

³⁵ See, e.g., Levine, Rebala, & Vasilogambros, *supra* note 34.

³⁶ Ga. S.B. 202 § 18 (As Passed, Mar. 25, 2021), <https://www.legis.ga.gov/api/legislation/document/20212022/201498>.

³⁷ See, e.g., sources cited *supra*, at n.10.

³⁸ Ga. S.B. 202 § 34.

relocations and any resultant voter confusion by refusing to allow most voters who appear at the wrong location to vote any ballot at all.

Much of the confusion caused by polling place relocations can be avoided through minimum notice requirements for voters affected by changes in location, as provided in H.R. 1 and S. 1.³⁹

C. Racial Disparities in Wait Times

The voting barriers identified above—polling place closures and relocations—compound another problem that disproportionately affects voters of color: wait times at the polls.⁴⁰

The longer people must wait to vote, the less likely they are to do so. And while wealthier voters can more easily afford to wait, lower income voters—often voters of color—are both more likely to face longer wait times *and* have less flexibility and time to vote. “It’s the worst of both worlds: The voters who can least afford to wait are those who are most likely to have to.”⁴¹

Research shows that lengthy wait times at the polls depress voter turnout during the

³⁹ See H.R. 1, For the People Act of 2021 § 1902 (2020-21), <https://www.congress.gov/117/bills/hr1/BILLS-117hr1eh.pdf>; S. 1, For the People Act of 2021 § 1902 (2020-21), <https://www.congress.gov/117/bills/s1/BILLS-117s1is.pdf>.

⁴⁰ See *Observations on Wait Times for Voters on Election Day 2012*, U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-850 (Sept. 2014), <https://www.gao.gov/assets/gao-14-850.pdf> (recommending that voters should not have to wait more than 30 minutes at a polling place to cast their ballot).

⁴¹ Brian Klass, *Opinion: Black voters have to wait longer to vote. Here’s how to fix it*, WASH. POST (July 9, 2020), <https://www.washingtonpost.com/opinions/2020/07/09/black-americans-have-wait-longer-vote-heres-how-fix-it/>; see also Charles Stewart III, *Managing Polling Place Resources*, CALTECH/MIT VOTING TECH. PROJECT 10 (Nov. 2015), <https://web.mit.edu/vtp/Managing%20Polling%20Place%20Resources.pdf> (“[L]ong lines discourage voting, lower voter confidence, and impose economic costs”).

election at issue.⁴² Research also suggests that wait times at polling places depress *future* voter turnout.⁴³

And these effects are not felt equally: voters of color are three times more likely than white voters to wait more than 30 minutes to vote and *six times* more likely to wait more than an hour.⁴⁴ During the 2016 presidential election, this meant that, “[r]elative to entirely-white neighborhoods, residents of entirely-[B]lack neighborhoods waited 29% longer to vote and were 74% more likely to spend more than 30 minutes at their polling place.”⁴⁵ During the 2018 midterm elections, “Latino voters waited on average 46 percent longer than white voters, and Black voters waited on average 45 percent longer than white voters.”⁴⁶

These stark racial disparities in polling place wait times are easily explained: polling places in minority communities often have fewer resources, including fewer poll

⁴² See, e.g., Robert M. Stein et al., *Waiting to Vote in the 2016 Presidential Election: Evidence from a Multi-county Study*, 73 POL. RES. Q. 439 (Mar. 28, 2019) (finding higher rates of people leaving the check-in line at polling places with longer lines and waiting times to check-in and vote); Garisto, *supra* note 9 (finding that, in 2012, long lines were estimated to have deterred between 500,000 and 700,000 voters from casting their ballot); Barreto, Cohen-Marks, & Woods, *supra* note 9 (reporting that voter turnout is significantly lower in Los Angeles polling places with longer lines and check-in times).

⁴³ See Stephen Pettigrew, *The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout*, 71 ELECTORAL STUD. 102188 (June 2021) (finding that, for every additional hour a voter waits in line to vote, their probability of voting in the subsequent election drops by 1 percent).

⁴⁴ Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527, 527 (2017); see also Matt Vasilogambros, *Voting Lines Are Shorter – But Mostly for Whites*, STATELINE, PEW CHARITABLE TRUSTS (Feb. 15, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/02/15/voting-lines-are-shorter-but-mostly-for-whites> (“On the day of Arizona’s 2016 presidential primary, the line outside the Maryvale Church of the Nazarene, the Maricopa County polling place for 213,000 mostly Latino, low-income people, extended through the parking lot, down busy North 51st Avenue, and into a neighborhood lined with palm and eucalyptus trees on the western edge of Phoenix. . . . Some voters waited for four hours or more in the 80-degree heat to cast their ballots[.]”).

⁴⁵ Keith M. Chen, Kareen Haggag, Devin G. Pope, & Ryne Rohla, *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data*, NAT’L BUREAU OF ECON. RES., Working Paper 26487 (rev. Oct. 2020), https://www.nber.org/system/files/working_papers/w26487/w26487.pdf.

⁴⁶ Hannah Klain, Kevin Morris, Max Feldman, & Rebecca Ayala, *Waiting to Vote: Racial Disparities in Election Day Experiences*, BRENNAN CTR. FOR JUST. 4 (June 3, 2020), https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf.

workers and voting machines per capita, to serve larger numbers of voters.⁴⁷ Disparities are further exacerbated by things like photo ID requirements, as voters in minority communities “are likely to lack the identification . . . required to vote, further lengthening lines and wait times” at polling places.⁴⁸

But fixing wait times cannot come at the expense of other polling place protections. Take again, for example, Georgia’s S.B. 202. As discussed *supra* at II.B, Relocation of Polling Places, S.B. 202 provides that polling places serving more than 2,000 voters that have wait times of more than an hour must provide more voting equipment and/or poll workers *or* split up the precinct.⁴⁹ As polling places in minority communities generally have longer wait times, this provision trades the potential for shorter wait times at the polls for more polling place relocations,⁵⁰ which themselves risk greater voter confusion, depressed turnout, and disenfranchisement.

There are better ways—entirely feasible through legislative action—to address racially disparate wait times: provide additional resources for polling places struggling with long wait times, including voting equipment and poll workers, to meet

⁴⁷ See, e.g., Pettigrew, *The Racial Gap in Wait Times*, *supra* note 44, at 537-38 (“Perhaps the most important factor in determining how long a line to expect on Election Day is the number of resources—particularly voting machines and poll workers—that are provided to a precinct. . . . [P]recincts that have higher concentrations of white voters tend to receive larger numbers of poll workers and voting machines than precincts with more minority voters.”); Christopher Famighetti, Amanda Melillo, & Myrna Pérez, *Election Day Long Lines: Resource Allocation*, BRENNAN CTR. FOR JUST. 1-2 (Sept. 15, 2014), <https://www.brennancenter.org/sites/default/files/publications/ElectionDayLongLines-ResourceAllocation.pdf> (finding that, in 2012, voters in precincts with more minorities had fewer voting machines and poll workers and experienced longer wait times; “the resources distributed to polling places are a key contributor to long lines”); Adam Rogers, *Why Are Lines at Polling Places So Long? Math*, WIRED (Oct. 30, 2020), <https://www.wired.com/story/why-are-lines-at-polling-places-so-long-math/> (“Fundamentally, the movement of the line is limited by how many resources are available to process the elements in the queue.”)

⁴⁸ Mann & Stein, *supra* note 9, at 3 (internal citation omitted); see also Stein et al., *supra* note 42 (in majority white polling places, scanning a voter’s driver’s license speeds up the check-in process, but, in majority non-white polling places, a voter ID requirement slows down the check-in process).

⁴⁹ Ga. S.B. 202 § 18.

⁵⁰ See *id.* § 34.

the needs of voters and election administrators without reducing opportunities to vote. H.R. 1 does just that.⁵¹

D. Polling Place Locations

While the number, stability of, and wait times at polling places are all crucial, so too are their chosen locations. The Supreme Court has already recognized as much, confirming that the location and accessibility of polling places can have a direct impact on a voter's ability to exercise their fundamental right to vote.⁵² Empirical research has repeatedly confirmed this holding.⁵³ Polling places should be accessible, equitably distributed throughout communities, and welcoming to voters. But, too often, they are not. And, once again, these barriers fall disproportionately on voters of color.

First, “[l]onger distances to polling places ha[ve] been shown to reduce turnout,”⁵⁴ and “the depressing effect of distance to a polling place and voter turnout is enhanced three-fold in high racial/ethnic minority communities over non-minority communities.”⁵⁵

Second, polling places are too often located in buildings that are not easy to access physically, lack parking, lack nearby public transportation options, or are otherwise inaccessible to voters with disabilities. In 2014, the Government Accountability Office found that a staggering 83 percent of the polling places it studied had one or more

⁵¹ See H.R. 1 § 1906.

⁵² *Perkins v. Matthews*, 400 U.S. 379, 387 (1971).

⁵³ See, e.g., Barreto, Cohen-Marks, & Woods, *supra* note 9, at 445 (finding that polling places locations in older facilities, with less parking, limited access by public transit, and in higher crime areas, depress voter turnout); see also *id.* at 455 (finding that the quality of polling place locations tended to be “lower” in low-income and minority communities).

⁵⁴ VOTING RIGHTS LAB, *Polling Place Consolidation*, *supra* note 9, at 7; see also Cantoni, *supra* note 12 (finding that even a 0.25-mile increase in the distance to a polling place reduces the number of ballots cast by 2 to 5 percent over presidential, mid-term congressional, and municipal elections).

⁵⁵ Mann & Stein, *supra* note 9, at 5.

potential impediments to voters with disabilities.⁵⁶ Today, such impediments to voters remain rampant in polling places across the country.⁵⁷

Third, inhospitable voting locations chill voter participation. Indeed, research has also shown that the nature of polling places—whether they are located in a church, school, police station, etc.—“can shape whether and how [] a person chooses to vote.”⁵⁸

But some jurisdictions place polling sites in locations, such as police stations, that can intimidate voters—particularly voters of color—and thereby depress turnout.⁵⁹ In Orleans Parish, Louisiana, for example, a public polling place was for years located at the Israel Augustine Justice Center, a criminal court facility attached to a jail. Voters were required to navigate caution signs, ongoing construction replaced by a barbed wire fence, and a restricted parking lot filled with police vehicles just to vote. During some elections, voters were even required to go through a metal detector and navigate hallways staffed by armed police personnel in order to reach the polling site

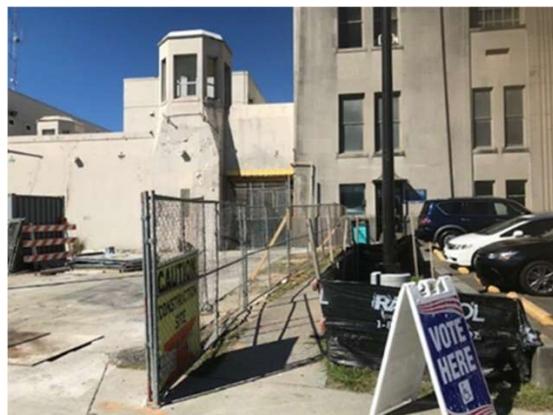
⁵⁶ *Voters with Disabilities: Observations on Polling Place Accessibility and Related Federal Guidance*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-4 (Oct. 2017), <https://www.gao.gov/assets/gao-18-4.pdf>.

⁵⁷ *See Polling Places Remain Inaccessible to Voters with Disabilities, Here's How to Fix Them*, NAT'L DISABILITY RTS. NETWORK (Aug. 18, 2020), <https://www.ndrn.org/resource/polling-places-remain-inaccessible-to-voters-with-disabilities-heres-how-to-fix-them/>. Existing problems of accessibility are only heightened by restrictions on those voting practices, like curbside voting, that are crucial for voters with disabilities to exercise their fundamental right to vote. *See, e.g., Alabama governor signs bill to ban curbside voting*, ASSOCIATED PRESS (May 26, 2021), <https://apnews.com/article/al-state-wire-alabama-bills-voting-health-72ad59fa58777feb539d83d22b63ec5c>.

⁵⁸ Mann & Stein, *supra* note 9, at 4-5; *see also* Jordan P. LaBouff, *Balloting in Churches Sways Attitudes and Votes towards More Conservative Policies and Candidates*, LSE UNITED STATES POLITICS & POLICY (Sept. 11, 2014), <http://blogs.lse.ac.uk/usappblog/2014/09/11/balloting-in-churches-swaps-attitudes-and-votes-towards-more-conservative-policies-and-candidates/>; Abraham M. Rutchick, *Deus Ex Machina: The Influence of Polling Place on Voting Behavior*, 31 POL. PSYCHOL. 209 (2010); Jonah Berger, Marc Meredith, & S. Christian Wheeler, *Contextual Priming: Where People Vote Affects How They Vote*, 105 PNAS 8846 (July 1, 2008), <https://www.pnas.org/content/pnas/105/26/8846.full.pdf>.

⁵⁹ *See, e.g.,* Katheryn Tucker, *Polling Precinct in Police Station Chills Voting Rights, ACLU Claims*, LAW.COM (Oct. 16, 2019), <https://www.law.com/dailyreportonline/2019/10/16/polling-precinct-in-police-station-chills-voting-rights-aclu-claims/?slreturn=20210508110850>.

inside.⁶⁰ Such barriers can render polling places inaccessible or intimidating to the general public.



Polling Place, Israel Augustine Justice Center, 2019 & 2020⁶¹

The murder of George Floyd and the events of the past year have demonstrated in the starkest of possible lights that encounters with police and the criminal justice system are particularly unwelcome and intimidating for voters of color. And courts have recognized that stationing police officers outside polling places is a “familiar

⁶⁰ This information was provided by a volunteer for 866-OUR-VOTE and by the Center for Public Integrity’s national data release regarding polling place locations. See Carrie Levine, Praatheek Rebala, & Matt Vasilogambros, *National Data Release Sheds Light on Past Polling Places Changes*, CTR. FOR PUB. INTEGRITY (Sept. 29, 2020), <https://publicintegrity.org/politics/elections/ballotboxbarriers/data-release-sheds-light-on-past-polling-place-changes/>.

⁶¹ Pictures provided by volunteers with 866-OUR-VOTE.

form of voter intimidation.”⁶² Similarly, Native American voters have reported placement of polling locations outside of their communities where they are met with hostile attitudes and intimidations.⁶³ Voting locations must be chosen with consideration for whether they will create a welcoming environment for all constituents.

Finally, there is one acceptable (and important) reason to have polling places inside of jails: to serve the eligible voters incarcerated in them. Every day, more than 700,000 Americans are incarcerated in jails across the country, and most of them retain their right to vote since pretrial detention *never* impacts voter eligibility and incarceration for a misdemeanor conviction rarely impacts voter eligibility. Indeed, the Supreme Court has affirmed the constitutional right of eligible incarcerated voters to cast their ballots.⁶⁴

But casting a ballot from jail is enormously difficult. Because incarcerated voters cannot vote in-person at their regular polling places, they often must rely on absentee voting in order to cast their ballots, which is necessarily limited: voters must request absentee ballots days or sometimes weeks before Election Day and allow additional time for their requests and ballots to arrive in the mail. Thus, every Election Day, thousands of eligible voters incarcerated shortly before the election are disenfranchised because their arrest comes after the absentee ballot application

⁶² *Shelby County v. Holder*, 811 F. Supp. 2d 424, 486–87 (D.D.C. 2011), *rev'd on other grounds*, 570 U.S. 529 (2013); *see also Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 196 (3d Cir. 2012) (noting that the district court entered a consent decree to resolve claims of voter intimidation tactics including “enlist[ing] the help of off-duty sheriffs and police officers to intimidate voters by standing at polling places in minority precincts”).

⁶³ *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, NATIVE AM. RIGHTS FUND (2020), https://vote.narf.org/obstacles_at_every_turn/.

⁶⁴ *See O'Brien v. Skinner*, 414 U.S. 524, 530 (1974) (finding that pretrial detainees suffer “no legal disability impeding their legal right to register or to vote”); *Goosby v. Osser*, 409 U.S. 512 (1973).

deadline, and their states failed to provide them with polling places inside jails or other alternative means of voting while incarcerated.⁶⁵

While a small number of jurisdictions have taken steps to address this problem—most notably Illinois and Washington, D.C.—the vast majority of jurisdictions do not provide jailed voters with any in-person or Election Day voting options.⁶⁶ As a result, hundreds of thousands of eligible voters face certain disenfranchisement every election because of the lack of accessible election infrastructure.

Despite the scale of these problems, the solutions to them are simple. States and localities should provide voting options for incarcerated eligible voters in correctional settings. And, except for sites designed to serve incarcerated voters, polling places should not be located in law enforcement-related facilities, such as police stations and sheriffs' offices, that could intimidate voters or subject them to unnecessary security measures and/or intrusions on their privacy.⁶⁷ More generally, states should allow voters to cast their ballots at any one of several open, accessible polling places, rather than forcing voters to use a single designated site.⁶⁸ These requirements—combined

⁶⁵ See *Mays v. LaRose*, 951 F.3d 775, 782 (6th Cir. 2020) (finding that jailed voter had no means of requesting or casting a ballot because he was arrested and confined after the State's ballot request deadline had passed); see also Ashish Prashar, *An Emergency Correction to City Voter Disenfranchisement*, GOTHAM GAZETTE (May 19, 2021), <https://www.gothamgazette.com/games-archive/130-opinion/10479-emergency-correction-nyc-voter-disenfranchisement-jails> (discussing the inability of voters incarcerated in pretrial detention after the absentee ballot request deadline to vote); Michael Barajas, *In Harris County, A Group is Working to Expand Voting Access in Jails*, TEX. OBSERVER (Aug. 6, 2020), <https://www.texasobserver.org/harris-county-jail-voting/> (discussing the need for a polling place inside Harris County Jail).

⁶⁶ See Dana Paikowsky, *Jails as Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829 (2019).

⁶⁷ See The BREATHE Act, Federal Bill Proposal § 3b, <https://breatheact.org/wp-content/uploads/2020/09/The-BREATHE-Act-V.16.pdf> (last visited June 5, 2021).

⁶⁸ Barriers to access can be exponentially more difficult to overcome in jurisdictions that restrict the number of polling places allowed in any given precinct or county or that require voters to cast their ballots at a designated precinct-based polling location. Vote centers—i.e., polling sites that are open to any registered voter in a given jurisdiction—offer a promising alternative to the precinct-based model. See *Vote Centers*, NAT'L CONFERENCE OF ST. LEGISLATURES <https://www.ncsl.org/research/elections-and-campaigns/vote-centers.aspx> (last visited June 6, 2021). Vote centers not only allow voters the flexibility to vote in the polling location of their choice—making it more likely that they will find a polling place accessible to them—vote centers have also been shown to boost voter turnout, especially among low propensity voters. See Robert M. Stein &

with measures improving polling place accessibility—will ensure that no individual’s right to vote depends on their comfort with or ability to access their assigned polling place.

E. Polling Place Resources

Finally, even when polling places do exist in accessible, stable locations and wait times are short, Americans’ ability to vote often depends on the availability and quality of resources in those polling places.

For example, no American should be excluded from democratic participation based on their inability to speak or understand enough English to engage in the electoral process. Too often, though, that is exactly what happens. Though the Voting Rights Act requires that voting and election materials must be offered in non-English languages under certain circumstances,⁶⁹ one study suggests that forty percent of such jurisdictions fail to provide both oral and written language assistance to limited-English proficiency voters.⁷⁰ It is essential that this barrier to access be remedied such that jurisdictions with sizeable language minority communities actually provide all election materials, including polling place materials, in the appropriate language(s), as well as interpretation services.⁷¹

Similarly, jailed voters face barriers to the ballot box based on a lack of polling place resources. Because of their incarceration, these voters cannot independently access

Greg Vonnahme, *Engaging the Unengaged Voter: Vote Centers and Voter Turnout*, 70 J. OF POL. 487 (2008).

⁶⁹ See Voting Rights Act § 203.

⁷⁰ See James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163, 176, 188 (2007) (stating that only 60.4 percent of 361 polled jurisdictions “reported providing both oral and written language assistance”); Mindy Acevedo, Matthew A. Barreto, Michael Cohen, Chad W. Dunn, & Sonni Waknin, *Ensuring Equal Access to the Mail-In Ballot Box*, 68 U.C.L.A. L. REV. DISC. (LAW MEETS WORLD) 4, 17-18 (2020).

⁷¹ See Vij, *supra* note 15 (“In communities that spoke little English, translated voting ballots were found to be responsible for increasing voter turnout by 11 points in the 2004 presidential election. In addition to increased voter turnout, the translated ballots allowed for higher voter engagement on all legislation.”).

the information they need to determine their eligibility to vote, how to vote, when elections are being held, and what will be on the ballot. Although these resources are critical, states and jurisdictions often fail to provide them to jailed voters, and have even, at times, impeded advocates' efforts to do so.⁷² This problem is particularly urgent because of who it impacts: jails disproportionately incarcerate voters of color, low-income voters, homeless voters, and voters with disabilities. Thus, jail-based disenfranchisement, in its many forms, disproportionately deprives already marginalized communities of their political voices.

F. An Obligation to Act to Improve Polling Place Quality

In sum, the last eight years since *Shelby County* have seen unprecedented efforts by states and localities across the country to undermine the number and quality of polling places, as well as the resources available to them. These restrictions disproportionately affect voters and communities of color, and other historically disenfranchised groups. Federal legislative action is necessary to ensure that all Americans have access to quality in-person polling places where they can exercise their fundamental right to vote.

III. OPPORTUNITIES TO VOTE

The variety and equity of opportunities to vote are integral pieces to preserving democracy for all Americans. Yet, voters' opportunities to vote early, vote by mail or absentee, correct any mistakes made during the voting process, and vote while incarcerated are all areas that disproportionately harm voters of color and voters with disabilities. The structural inequities in opportunities to vote are often exacerbated by state legislation that intentionally or negligently targets voters of color, including

⁷² Madeleine Carlisle & Lissandra Villa, *Whether or Not You're Able to Vote in Jail May Come Down to Where You're Incarcerated*, TIME (Oct 1, 2020) <https://time.com/5895219/voting-jail-2020-election/>; Carlos Ballesteros & Emily Heorner, *Injustice Watch mailed its judicial election guide to 1,000 detainees at Cook County Jail. They never received them.*, INJUSTICEWATCH (Oct. 26, 2020) <https://www.injusticewatch.org/news/2020/cook-county-jail-rejects-1000-judicial-election-guides-mailed-to-detainees/>.

the elimination of early voting days most used by, voting requirements that disproportionately harm, and ballot verification processes that disproportionately discount voters of color.

A. Early Voting Opportunities

Early voting makes it possible for voters of color, who are more likely to work low-income jobs and cannot take off work on Election Day, to vote conveniently and without losing pay or risking their job security. In 2020, polls showed that Black voters were the most likely to cast an early ballot and in 2016, Latino voters were the most likely to cast an early ballot.⁷³

One of the most important early voting days of the week in America is Sunday, which has always been a sacred day for Black people to not only exercise their right to vote, but fight for it.⁷⁴ During the Civil Rights Movement, one of the struggle's most memorable and tragic days took place on Bloody Sunday, March 7, 1965, when the late Congressman John Lewis and nearly six hundred others marched from Selma to Montgomery to fight for their right to vote, only to be met with brute force from police officers ordered by Alabama Governor George Wallace "to use whatever measures are necessary to prevent a march."⁷⁵ Today, Black churches across the country, especially in the Deep South, gather their congregations after Sunday services and organize transportation to take their members to the polls to vote. This hallowed tradition, colloquially known as "Souls to the Polls," began during the 1990s and became a full-fledged national movement during the early 2000s.⁷⁶

⁷³ Geoffrey Skelley, *A Record Number Of Black Americans Could Vote Early This Year*, FIVETHIRTYEIGHT (Sept. 21, 2020), <https://fivethirtyeight.com/features/a-record-number-of-black-americans-could-vote-early-this-year/>.

⁷⁴ See Ruby J. Garrett, *A Call for Prophylactic Measures to Save Souls to the Polls: Importing a Retrogression Analysis in Sec. 2 of the Voting Rights Act*, 2015 U. CHI. LEGAL. F. 633 (2016).

⁷⁵ Christopher Klein, *How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement*, HISTORY (last updated Jul 18, 2020), <https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement>.

⁷⁶ David D. Daniels III, *The Black Church has been Getting 'Souls to the Polls' for More Than 60 Years*, THE CONVERSATION (Oct. 30, 2020), <https://theconversation.com/the-black-church-has-been-getting-souls-to-the-polls-for-more-than-60-years-145996>. While the practice of churches organizing and transporting their members to the polls after church began in the 1990s, the NAACP is credited

But there are those politicians today who continue to engineer means of targeting Black political power by reducing opportunities to vote used by the Black community. In recent years, one of those means has been the reduction—and in some cases outright elimination—of early in-person voting, particularly Sunday early voting. These measures transparently take aim at Black churches and “Souls to the Polls” events. During the 2020 legislative session, numerous state legislators introduced proposals to restrict or eliminate Sunday early voting, only to be drowned out by the voices of organizers, activists, and voters on the ground who refused to allow these bills to pass. But while states like Georgia and Texas failed to restrict Sunday voting during this year’s legislative sessions, these racist efforts to limit Black Americans’ access to the ballot have been continuous over the past decade and are certain to persist unless the Voting Rights Act of 1965 is restored to its full strength.

In 2011, the Florida legislature passed a bill eliminating Sunday voting on the Sunday immediately preceding Election Day.⁷⁷ This bill came after data from the 2008 Presidential election showed that “[a]cross all early voting days, the two days that featured the lowest white participation rates...were both Sundays,” but “on the first Sunday of early voting, the racial and ethnic group with the highest relative participation rate was African-American voters. And on the last Sunday, the group with the highest relative participation rate was Hispanic voters, followed by African-American voters.”⁷⁸

North Carolina notoriously eliminated one of its two Sunday early voting days in July 2013 and subsequently argued that the change was justified because “counties with Sunday voting...were disproportionately black” and “disproportionately Democratic.”⁷⁹ The United States Court of Appeals for the Fourth Circuit labeled

with creating the slogan: “souls to the polls,” in 2000. See Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L.J. 331 (2012).

⁷⁷ See Herron & Smith, *supra* note 76.

⁷⁸ *Id.* at 343.

⁷⁹ *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 226 (4th Cir. 2016) (internal quotations and citations omitted).

North Carolina’s restriction on Sunday voting “as close to a smoking gun as we are likely to see in modern times,” noting that “the State’s very justification . . . hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.”⁸⁰

Black voters’ high turnout on Sundays is directly tied to Black churches’ “Souls to the Polls” efforts. As Evelyn Garcia, then-President of the Democratic Haitian-American Caucus of Florida, explained in 2011, “We go to church on Sunday, and then we go together and early-vote...People try to help each other because transportation was a problem and knowing where to vote was a problem with some people who were new in the community.”⁸¹ In 2014, data from Georgia and North Carolina similarly showed that 53 percent of the 25,000 early votes cast on the second Sunday before Election Day were from Black voters, compared with 27 percent of the votes cast by all early voters in the 2014 midterm elections.⁸²

In light of this data, Georgia legislators attempted to ban Sunday voting earlier this year through H.B. 531, a precursor bill to S.B. 202.⁸³ Unlike the previous restrictions in Florida and North Carolina, Georgia’s law would have eliminated Sunday voting in Georgia completely—immediately after the 2021 runoff elections in which Black voters helped elect Georgia’s first Black and Jewish U.S. Senators. The Georgia Assembly’s 2021 attempt to ban Sunday voting was a continuation of its 2016 legislative efforts, when State Senator Fran Millar and State Representative Mike Jacobs initiated an investigation to “stop this action” and “eliminate [the] election law loophole” that allows “Souls to the Polls” events to occur.”⁸⁴ While the ban on Sunday voting passed the Georgia House of Representatives earlier this year, it was killed in

⁸⁰ *Id.*

⁸¹ Herron & Smith, *supra* note 76 at 340.

⁸² Nate Cohn, *The Big Role of Black Churches in Two Senate Races*, N.Y. TIMES (Oct. 29, 2014), <https://www.nytimes.com/2014/10/30/upshot/data-from-sunday-points-to-black-churches-role-in-mobilizing-voters.html>.

⁸³ *Black Church Leaders in Georgia on the Importance of ‘Souls to the Polls’*, NPR (Mar. 22, 2021) <https://www.npr.org/transcripts/977929338>.

⁸⁴ Garrett, *supra* note 74, at 634.

the Georgia Senate after fierce advocacy from organizations in Georgia like Black Voters Matter and the Georgia State Conference of the NAACP.

Georgia was not the only state that targeted “Souls to the Polls” events this year. Less than two weeks ago, Texas attempted to ban Sunday voting before 1:00 p.m. and after 9:00 p.m.⁸⁵ This restrictive proposal came after organizations like DFW (Dallas/Ft. Worth) Metro Justice and Equality hosted “Souls to the Polls” events on two early voting Sundays in four separate locations at 11:00 am and 11:30 a.m.⁸⁶ In Waco, Texas, church congregations caravanned in cars and church vans decorated with balloons and ribbons to go vote on Sunday.⁸⁷ After voting, church members usually have a meal together, join in fellowship with each other, and sometimes even dance together.⁸⁸ Texas’s proposal was added to S.B. 7, the State’s omnibus voter suppression bill, during the conference committee at the 25th hour and never appeared in either the version of the bill that passed the Texas House or Senate. After legislators who opposed the restrictions broke quorum by walking out of the legislative session, the bill failed, but the Governor has already vowed to call the legislature back into session later this year to pass a bill that will likely include some form of a restriction on Sunday voting.⁸⁹

Texas Representative Travis Clardy claimed that this racially targeted voting restriction was a “typo” and that “[w]hat should have been 11 was actually printed up as [1].”⁹⁰ But as Harris County Judge Lina Hidalgo explained, a typo would not

⁸⁵ Patrick Svitek, *Republicans Say They’ll Tweak Part of Texas Elections Bill Criticized for Impact on Black Churchgoers*, TEX. TRIB. (June 1, 2021), <https://www.texastribune.org/2021/06/01/texas-voting-bill-sunday-republicans/>.

⁸⁶ See *Souls to the Polls: An Early Voting Event with Social Distancing*, N. DALLAS GAZETTE (Oct. 20, 2020), <https://northdallasgazette.com/2020/10/20/souls-to-the-polls-an-early-voting-event-with-social-distancing>.

⁸⁷ Cuevas Peacock, *Souls to the Polls*, Baylor Univ. External Affairs (Dec. 3, 2020) <https://www.baylor.edu/externalaffairs/news.php?action=story&story=221253>.

⁸⁸ *Id.* After the bill failed, Texas State Senator Bryan Hughes incorrectly stated, “You can correct me, but souls to the polls — I thought we went to church and ate lunch and then voted.” Svitek, *supra* note 85.

⁸⁹ *Texas Governor Vows Action After Democrats Walk Out Over Voting Bill*, NPR (June 1, 2021), <https://www.npr.org/2021/06/01/1002018197/texas-governor-vows-action-after-democrats-walk-out-over-voting-bill>.

⁹⁰ *Id.*

explain the difference between PM and AM after the additional “1”.⁹¹ Moreover, such a “typo” that could affect the right to vote of hundreds of thousands of Texans is just one small example of why such slapdash and secretive attempts to reshape our election laws for partisan gain must be stopped. Regardless, even an 11 a.m. restriction on Sunday voting would limit access and as every attorney, judge and Member of Congress knows, each successful restriction on a right can pave the way for the eventual elimination of that right. “Not only does each day lost decrease the amount of votes, but also each successful restrictive measure makes it easier for the next one to be implemented. A proponent of decreasing electoral participation can chip away at Sunday voting [in bits and pieces] until it is eliminated.”⁹²

The elimination of Sunday voting is not the only restriction on early voting a state has used to target minority voters. In Ohio, state officials eliminated the state’s “Golden Week,” which allowed voters to register and vote at the same time and was particularly popular with minority voters.⁹³ The evidence in that case showed that the voting rate during Golden Week was the highest in communities with the highest percentage of Black voters.⁹⁴ Yet despite this overwhelming evidence, which the district court found dispositive, the U.S. Court of Appeals for the Sixth Circuit held that the elimination of Golden Week imposed a justifiable, minimal burden on Black voters in Ohio and was therefore not discriminatory.⁹⁵ Once again, this decision underscores the inadequacy of our current federal protections on the right to vote.

There is no question that Georgia, Texas, North Carolina, Ohio, and Florida’s restrictions on early voting—whether proposed, challenged, or ultimately enacted—intentionally target Black voters. Restoring the full protections of Section 5 of the

⁹¹ Lina Hidalgo (LinaHidalgoTX), TWITTER (June 1, 2021 6:59 PM), <https://twitter.com/LinaHidalgoTX/status/1399863204562485248?s=20>.

⁹² Garrett, *supra* note 74.

⁹³ Adam Liptak, *Supreme Court Won’t Restore ‘Golden Week’ Voting in Ohio*, N.Y. TIMES (Sept. 13, 2016), <https://www.nytimes.com/2016/09/14/us/politics/supreme-court-wont-restore-golden-week-voting-in-ohio.html>.

⁹⁴ *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 718, (S.D. Ohio 2016).

⁹⁵ *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

Voting Rights Act provides the clearest path to preventing similar proposals from being enacted in the future.

S. 1 would invalidate the restrictions proposed in Texas, North Carolina and Florida and implemented in Ohio. In Ohio, every week of early voting would be Golden Week because S. 1 requires all states to offer same day registration. If North Carolina, Florida, Texas, and Georgia are covered under H.R. 4's revised preclearance formula, they would be required to offer at least 10 hours of early voting for at least two Sundays prior to each federal election. Moreover, the John Lewis Voting Rights Advancement Act would specifically require all reductions in Sunday voting opportunities to undergo preclearance. This preclearance requirement is particularly well-tailored to address the racist attacks on "Souls to the Polls" in recent years. Restoring the full protections of Section 5 of the Voting Rights Act provides a path to preventing these proposals from being enacted in the future.

B. Absentee Voting Opportunities

Absentee voting is one of the most accessible, equitable, and secure methods of voting that states can implement. While the COVID-19 pandemic exponentially heightened the importance of allowing Americans to vote absentee and by mail, this method of voting is critical even absent pandemic conditions. But access to absentee voting in America is notoriously uneven. While some Americans can access a mail ballot for every election, have easy and varied means of returning that ballot, and are protected by procedures to ensure their ballot is counted, others are locked out of this option. Equitable absentee or mail-in voting requires widespread eligibility, accessible processes for receiving and casting ballots, and protections for voters at the ballot verification stage. Through its litigation, Campaign Legal Center has direct experience with the disproportionate harms that failures on all of these fronts can have on voters of color.

i. Eligibility to Vote Absentee

During the 2020 elections, the national spotlight called attention to inequitable eligibility rules for voting absentee in many states across the nation. While the majority of states have adopted uniform access to vote by mail for all their citizens, 16 states continue to restrict vote by mail access to limit categories of voters.⁹⁶ And those categories often disproportionately exclude voters of color. Since vote by mail has proven secure and effective, there is no reason for states to arbitrarily limit access to this option to only favored categories of voters.

Texas's rules stand out in this regard. In May 2020, CLC moved to intervene on behalf of the League of United Latin American Citizens (LULAC) and its Texas chapter in a lawsuit filed by the Texas Democratic Party challenging Texas's vote-by-mail eligibility restrictions.⁹⁷ Texas's restrictive eligibility criteria for requesting and casting absentee ballots deny the majority of Texans the ability to vote by mail—particularly Latino and younger voters. Texas law restricts access to absentee ballots to voters who meet one of a handful of specific eligibility criteria: voters who (1) will be away from their county on Election Day and during the entire early voting period; (2) are sick or disabled; (3) are 65 years of age or older on Election Day; or (4) are confined in jail, but eligible to vote.⁹⁸ Moreover, Texas officials have threatened criminal prosecution of voters who attempt to cast mail ballots if they do not meet these narrow criteria.⁹⁹

⁹⁶ *Voting Outside the Polling Place Report, Table 2: Excuses to Vote Absentee*, NAT'L CONFERENCE OF ST. LEGISLATURES (Apr. 20, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx>.

⁹⁷ See Mot. to Intervene, *Tex. Democratic Party v. Abbott*, 5:20-cv-00438 (May 11, 2020), <https://campaignlegal.org/sites/default/files/2020-05/2020.05.11%20-%20Motion%20to%20Intervene.pdf>.

⁹⁸ Tex. Election Code §§ 82.001-.004.

⁹⁹ Ltr. to Rep. Stephanie Klick from Ryan M. Vassar, Deputy Attorney Gen. for Legal Counsel, Tex. Office of the Attorney Gen. (Apr. 14, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/4.14.20%20Letter%20to%20Rep.%20Klick.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

Latino voters in Texas are significantly younger than the average Texas voting population, which means they are disproportionately unable to avail themselves of the over-65 exception to the absentee eligibility criteria.¹⁰⁰ This case remains pending in federal court, where CLC will continue to argue that Texas's eligibility requirements disproportionately harm Texas's Latino voters, even absent pandemic conditions.

ii. Absentee Voting Procedure

Equally important to eligibility is the accessibility of the vote by mail process. In most states and for most voters, absentee voting is both secure and accessible. But some states have anachronistic and unduly burdensome requirements for absentee voting that make it an illusory option even for those who qualify under the eligibility criteria. Alabama and Mississippi are two extreme examples. Alabama requires voters to send an application for absentee voting for every election to a special absentee election manager for the county, include a photocopy of their voter ID, and then return the ballot with a notary signature or the signature of two witnesses.¹⁰¹ In Mississippi, an application to vote by mail must be notarized.¹⁰²

This legislative session, politicians have targeted vote by mail accessibility from every angle. They have proposed bills to require photocopies of photo ID with vote by mail ballots, limit the time period for applying for and returning absentee ballots, and criminalize voter assistance in the vote by mail process, among other restrictions. In Kansas and Georgia, the legislatures passed bills that either outright prohibit or seriously restrict even the dissemination of applications to vote absentee to eligible voters.¹⁰³ These restrictions on absentee ballot distribution are clear restrictions on

¹⁰⁰ See Complaint, *Tex. Democratic Party v. Abbott*, 5:20-cv-00438 at 12 (May 11, 2020), <https://campaignlegal.org/sites/default/files/2020-05/2020.05.11A%20-%20Ex%201%20-%20Complaint.pdf>.

¹⁰¹ *Absentee Voting Information*, ALA. SECRETARY OF ST., <https://www.sos.alabama.gov/alabama-votes/voter/absentee-voting> (last visited June 9, 2021).

¹⁰² Miss. Code Ann. §23-15-715(b)

¹⁰³ *Voting rights advocates sue over 2 new Kansas election laws*, ASSOCIATED PRESS (June 2, 2021), <https://apnews.com/article/kansas-voting-rights-laws-elections-voting-2e10b25e00158f9f08844c1f9493a2ea>; Quinn Scanlan, *Civic Groups File Lawsuit Challenging*

get out the vote activity in violation of the First Amendment. CLC has challenged these laws in both states.

As vote by mail usage increases, it is crucial that we modernize our absentee voting laws. Too many states maintain unnecessary hurdles to the vote by mail process. For example, while Minnesota generally has expansive vote by mail access, its witness signature requirement poses a serious obstacle for many voters. CLC brought a lawsuit in Minnesota last year on behalf of individual plaintiffs and the League of Women Voters of Minnesota Education Fund, challenging that requirement.¹⁰⁴ While a number of states require absentee voters to have a witness sign the envelope of their absentee ballot, Minnesota is the only state that requires the witness to be registered to vote in Minnesota. This requirement is unworkable, not only for voters out-of-state who are unlikely to be proximate to other Minnesota registered voters, but also for voters who live in mixed citizenship status households. In order to register to vote in Minnesota, as in any every state, one must also be a U.S. Citizen. Voters who are newly naturalized citizens or first and second-generation immigrants are more likely to be the only citizens in their homes and communities. Therefore, unlike other Americans, who could easily have a family member serve as a witness for their absentee ballot, Minnesota voters in mixed citizenship status households face additional hurdles to cast an absentee ballot.

To further illustrate how cursory this requirement is, the only other option available to Minnesota voters who seek to vote absentee is to have a notary or someone otherwise authorized to administer oaths serve as a witness. Yet, there is no citizenship requirement to be a notary.¹⁰⁵ Thus, a Minnesota voter who lives in a mixed citizenship status household or community is unable to have a non-U.S. citizen

Absentee Ballot Provisions in Georgia's Election Law, ABC NEWS (Apr. 8, 2021), <https://abcnews.go.com/Politics/civic-groups-file-lawsuit-challenging-absentee-ballot-provisions/story?id=76945055>.

¹⁰⁴ See Complaint, *League of Women Voters of Minn v. Simon*, 20-cv-1205 (ECT/TNL) (May 19, 2020), <https://campaignlegal.org/sites/default/files/2020-05/2020%2005%2019%20Complaint%20for%20Declaratory%20and%20Injunctive%20Relief%20%28LWVM%20v.%20Simon%29%20v1.pdf>.

¹⁰⁵ See Minn. R. 8210.0600, subp. 1a; Minn. R. 8210.3000, subp. 4b.

witness their absentee ballot for free, but if they pay a notary fee, they are able to have a non-citizen witness their absentee ballot. This is yet another example of how absentee ballot laws and restrictions in states around the country present minority voters with less of an opportunity to vote than white voters.

From start to finish, Tennessee makes vote by mail unduly difficult and inaccessible. While CLC has several pending lawsuits in Tennessee, two of them are particularly relevant to minority voters' opportunities to vote. One such case, *Memphis A. Philip Randolph Institute v. Hargett*, challenges Tennessee's strict limitations on who can vote by mail and the state's failure to allow voters to fix issues with their absentee ballots after they are rejected due to a perceived signature mismatch.¹⁰⁶ Among other things, Tennessee law does not allow most first-time voters to vote by mail even if they otherwise qualify under Tennessee's strict eligibility criteria. Thus, new voters—who are disproportionately young and of color—are locked out of absentee voting even when they have no way to present themselves to vote in person. The second lawsuit, *Lichtenstein v. Hargett*, challenges the state's criminal penalties, which punish voter advocacy organizations and individuals who distribute absentee ballot applications, even where a voter requests one and even though that form is available online.¹⁰⁷ CLC represents an individual plaintiff and five community organizations in these cases: Jeffrey Lichtenstein, Memphis A. Phillip Randolph Institute, The Equity Alliance, Free Hearts, Memphis Central Labor Council, and the Tennessee State Conference of the NAACP.

Our plaintiff organizations primarily engage in voter advocacy with minority voters in Tennessee, many of whom live in communities without access to reliable internet service, printers, and other technology required to download and print out absentee ballot applications. Tennessee's criminal penalties for sending these voters absentee ballot applications prohibit organizations like Tennessee NAACP and The Equity

¹⁰⁶ See Complaint, *Memphis A. Philip Randolph Institute v. Hargett*, 3:20-cv-0374 (May 1, 2020), <https://campaignlegal.org/sites/default/files/2020-05/COMPLAINT.PDF>.

¹⁰⁷ See Complaint, *Lichtenstein v. Hargett*, 3:20-cv-0736 (Aug. 28, 2020), <https://campaignlegal.org/sites/default/files/2020-09/Lichtenstein%20Complaint.pdf>.

Alliance from reaching as many Black voters as possible and ensuring they have an equal opportunity to vote.

iii. Absentee Voting Procedure

Even when voters are able to obtain absentee ballot applications and ultimately submit their absentee ballots, there is no guarantee that their vote will be counted because election officials have the discretion to reject a ballot if they perceive discrepancies in the voter's signature. This process, known as signature matching, has been shown to disproportionately discount the ballots of voters with disabilities, older voters, and voters who are non-native English speakers or racial minorities. *Memphis A. Philip Randolph Institute v. Hargett* is just one of several cases CLC has brought challenging states' deficient signature matching processes, which can result in the erroneous deprivation of voters' right to have their ballots counted—oftentimes without even providing voters with notice or an opportunity to cure any problems with their signatures.

In the lead-up to the 2020 election, Campaign Legal Center brought successful legal challenges to three states' signature matching procedures: New York, New Jersey, and Pennsylvania, which proved to be pivotal in last year's election.

New Jersey previously allowed election officials, who were not properly trained in signature analysis, to determine whether a voter's signature matched other signatures in their voter record and reject that voter's ballot without giving them pre-rejection notice or an opportunity to cure any perceived errors with their signatures.

This process resulted in numerous eligible New Jersey voters having their ballots rejected during May 2020 local elections in Paterson, New Jersey—including the deputy speaker of the New Jersey Assembly, his wife and two of his children.¹⁰⁸ After CLC sued New Jersey on behalf of the League of Women Voters of New Jersey, the

¹⁰⁸ Jayed Rahman, *New Jersey Assembly Deputy speaker's mail-in vote rejected in Paterson election*, PATERSON TIMES (May 23, 2020), <https://patersontimes.com/2020/05/23/new-jersey-assembly-deputy-speakers-mail-in-vote-rejected-in-paterson-election/>.

NAACP New Jersey State Conference and three individual voters, the State agreed to establish a notice-and-cure process that required election officials to notify a voter of a signature mismatch issue within 24 hours and give the voter an opportunity to fix any issues with their absentee ballot before discounting their vote.¹⁰⁹

In response to our lawsuit challenging Pennsylvania’s signature verification process—which had no mandate in state law, was haphazardly applied by some counties and not others, and similarly did not include established standards for signature matching and did not require local officials to notify voters when their ballots were rejected or give them an opportunity to cure—Secretary of State Kathy Boockvar issued guidance to county board of elections advising them that Pennsylvania law did not permit them to reject absentee ballots solely because of a perceived signature mismatch.¹¹⁰ And in New York, the state legislature passed a bill in response to a lawsuit CLC brought on behalf of plaintiffs including the League of Women Voters.¹¹¹ The new statute requires the Board of Elections to inform each absentee voter by phone or email, as well as by mail, of errors with their ballot and give them an opportunity to fix it. CLC’s lawsuit ensured that New York, which had a 14 percent absentee ballot rejection rate in 2018, rejected far fewer voters in the 2020 general election.¹¹²

¹⁰⁹ Stipulation and Order, *League of Women Voters of N.J. v. Way*, 3:20-cv-05990, Doc. 44 (D.N.J. July 27, 2020).

¹¹⁰ Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes, PA. DEP’T OF ST. (Sept. 11, 2020), <https://campaignlegal.org/sites/default/files/2020-09/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>.

¹¹¹ Katie Honan, *New York Lawmakers Work to Avoid Problems With Absentee Ballots*, WALL ST. JOURNAL (July 26, 2020), <https://www.wsj.com/articles/new-york-lawmakers-work-to-avoid-problems-with-absentee-ballots-11595782800>; see also Complaint, *League of Women Voters v. Kosinski*, 1:20-cv-05238-MKV (July 8, 2020), https://campaignlegal.org/sites/default/files/2020-07/S.D.N.Y.%2020-cv-05238%20dckt%20000001_000%20filed%202020-07-08.pdf.

¹¹² Edward McKinley, Deal Ensures Fewer Absentee Ballots Will Get Tossed in New York, TIMES UNION (last updated Sept. 17, 2020), [https://www.timesunion.com/news/article/State-agrees-to-expand-review-process-for-nixed-15575118.php?utm_campaign=CMS%20Sharing%20Tools%20\(Premium\)&utm_source=t.co&utm_medium=referral](https://www.timesunion.com/news/article/State-agrees-to-expand-review-process-for-nixed-15575118.php?utm_campaign=CMS%20Sharing%20Tools%20(Premium)&utm_source=t.co&utm_medium=referral).

C. Drop Boxes

Ballot drop boxes are another efficient and effective method for voters to safely and securely cast their ballots. Ballot drop boxes are arguably more reliable than the traditional USPS blue boxes, which many voters used to submit their absentee ballots prior to the COVID-19 pandemic.¹¹³ Last year, approximately 41 percent of voters who voted absentee used ballot drop boxes, just 3 percent less than the percentage of voters who returned their ballots using the United States Postal Service.¹¹⁴ Drop boxes were a key driver of 2020's historic voter turnout. Yet, in the midst of the expansion of this safe and secure opportunity to vote, Texas moved to restrict voters' ability to submit their absentee ballots using drop boxes.

In October of last year, just a month before the general election, Texas Governor Greg Abbott issued a proclamation prohibiting each of Texas's 254 counties from providing more than one mail ballot drop off location, regardless of the county's geographic size or population.¹¹⁵ The Governor's order significantly limited Texas voters' options for hand-delivering their mail-in ballots in the 2020 General Election and upended weeks of planning by local election officials.¹¹⁶ This eleventh-hour decision to limit access to safe ballot drop off locations so close to the election sowed mass confusion. Moreover, it disproportionately affected Black and Latino voters living in major metro areas,

¹¹³ "Using an official drop box can be a more reliable option when there are concerns about the time it may take a ballot to go through the U.S. Postal Service." Elections Project Staff, *Drop Boxes Are Trusted Ballot Return Options*, BIPARTISAN POL. CTR. (Oct. 23, 2020), <https://bipartisanpolicy.org/blog/official-ballot-drop-boxes-are-secure-and-reliable/>.

¹¹⁴ *Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct*, PEW RES. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/>.

¹¹⁵ See Proclamation by Gov. Greg Abbott (Oct. 1, 2020), https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_10-01-2020.pdf.

¹¹⁶ Emma Platloff, *Gov. Greg Abbott limits counties to one absentee ballot drop-off location, bolstering GOP efforts to restrict voting*, TEX. TRIB. (Oct. 1, 2020), <https://www.texastribune.org/2020/10/01/greg-abbott-texas-vote-mail>; Nola Valente, *Gov. Greg Abbott limits counties to 1 mail ballot drop-off location shortly after Fort Bend County adds more*, COMMUNITY IMPACT NEWSPAPER (Oct. 1, 2020), <https://communityimpact.com/houston/katy/election/2020/10/01/gov-greg-abbott-limits-counties-to-1-mail-ballot-drop-off-location-shortly-after-fort-bend-county-adds-more/>.

and voters who were entitled to vote by mail because they were older or had disabilities.

Campaign Legal Center Action (CLCA) represented two individual voters and plaintiff organizations including the League of Women Voters of Texas, Texas LULAC, the Mexican American Legislative Conference of the Texas House of Representatives, and the Texas Legislative Black Caucus in a federal lawsuit challenging Governor Abbott’s proclamation immediately after he signed it into law.¹¹⁷

Governor Abbott’s order targeted voting in highly populous and majority-minority counties like Harris County, which has 4.7 million residents—more than 26 states—and had set up 12 drop off locations spread out over roughly 1,700 square miles. The order forced the closure of 11 of those locations. In addition to harming voters living in high-population counties, Abbott’s order also harmed large rural counties, like majority-minority Brewster County on the Texas-Mexico border. At 6,184 square miles, Brewster County is larger in area than the states of Rhode Island and Delaware combined.¹¹⁸ Yet Governor Abbott’s order also restricted Brewster County to just one ballot drop off location.

Governor Abbott’s proclamation created voter confusion and restricted voting options for minority voters in Texas. CLCA’s lawsuit was successful at the district court level, but eventually overturned by the U.S. Court of Appeals for the Fifth Circuit. Ohio similarly moved to restrict the distribution of ballot drop boxes to one per county in 2020 and subsequently moved to make that restriction permanent earlier this year. There, as in Texas, a district court initially blocked the Secretary of State’s “arbitrary and unreasonable” order before the U.S. Court of Appeals for the Sixth Circuit

¹¹⁷ See Complaint, *LULAC v. Abbott*, 1:20-cv-01006 (Oct. 1, 2020), <https://campaignlegal.org/sites/default/files/2020-10/Dkt%201%20-%20Complaint.pdf>.

¹¹⁸ QuickFacts: Brewster County, Texas, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/brewstercountytexas>.

effectively reinstated the order.¹¹⁹ The fates of our lawsuit and the lawsuit in Ohio against these racially discriminatory measures underscores the necessity of reviving the Voting Rights Act by passing the John Lewis Voting Rights Advancement Act.

D. Out-of-Precinct Voting

As explained above, oftentimes polling place quality and opportunities to vote issues merge together to create voting disasters, particularly in communities of color. *See supra* at II.B, Relocation of Polling Places. When polling places are closed, relocated, or consolidated, one of the most common mistakes that voters make afterwards is showing up to vote at the incorrect polling place. Allowing voters who make this understandable mistake to cast out-of-precinct provisional ballots is an equitable way to ensure that they have the opportunity to vote. Yet over the past few years, there have been efforts by states such as Arizona and Georgia to toss out the vote of any voter who shows up the wrong precinct.

This month, the Supreme Court is expected to issue its decision in *Brnovich v. DNC*, a case that the Court can use to either solidify Section 2 of the Voting Rights Act as one of the country's most effective defenses against racially discriminatory voting laws or significantly limit, if not all together eliminate, Section 2's efficacy as a tool to eradicate those laws. While *Brnovich* focuses on two voting issues, the first issue—a ban on out of precinct ballots—bears directly on minority voters' *opportunities* to vote.

Brnovich involves an Arizona law requiring voting officials to discard ballots cast in the wrong precinct, rather than counting the ballots for the races the voter was eligible to vote in and not counting any local races the voter was not eligible to vote

¹¹⁹ Andrew J. Tobias, *Ohio judge says Secretary of State Frank LaRose's one ballot drop box per county rule is 'arbitrary and unreasonable'*, CLEVELAND.COM (Sept. 15, 2020), <https://www.cleveland.com/open/2020/09/ohio-judge-rules-against-secretary-of-state-frank-laroses-arbitrary-and-unreasonable-one-ballot-drop-box-per-county-rule.html>; Randy Ludlow, *Split federal appeals court blocks multiple ballot drop boxes in Ohio counties*, THE COLUMBUS DISPATCH (Oct 10, 2020), <https://www.dispatch.com/story/news/2020/10/10/appeals-court-issues-stay-ballot-box-order/5951882002>.

in because they voted at the incorrect precinct. The evidence in this case showed that Arizona’s out-of-precinct policy targets voters of color, who are as much as two times as likely to cast an out-of-precinct ballot as white voters due to frequent polling place changes in minority communities. The U.S. Court of Appeals for the Ninth Circuit ruled that the out-of-precinct ban violates Section 2 of the Voting Rights Act. If the Ninth Circuit’s decision is overruled and Section 2’s protections against vote denial on the basis of race are weakened, the Court will have neutralized the strongest remaining provision of the Voting Rights Act of 1965 that remains after *Shelby County*.

Georgia’s omnibus bill, S.B. 202, also includes a new ban on out-of-precinct ballots. Prior to S.B. 202’s passage, Georgia voters who showed up the wrong precinct could cast a provisional ballot and have their votes counted in the elections they were eligible to vote in, such as statewide or national races. Now, voters who cast their ballots out-of-precinct will not have their provisional ballots counted unless they are voting at the incorrect precinct after 5:00 p.m. on the final day of voting.¹²⁰

This provision is especially troubling when combined with the new triggers that S.B. 202 includes for relocating polling places described above. *See supra* at II.B, Relocation of Polling Places. Not only does the formula all but ensure that polling places in minority communities will be disproportionately relocated, it will work in tandem with the out-of-precinct ban to prevent voters who show up to the wrong polling place from having their votes counted at all. Gaylon Tootle, a Black disability rights advocate from Augusta, Georgia explained how Georgia’s new out-of-precinct policy will be doubly harmful for minority voters with disabilities. “You’re not taking into account that I may have...a cognitive disability or learning disability, which sometimes causes me to simply make mistakes,” Tootle explained.¹²¹ “You’re going to

¹²⁰ Mark Niese, *How Georgia’s Voting Law Works*, ATLANTA J.-CONSTITUTION (May 6, 2021), <https://www.ajc.com/politics/how-georgias-new-voting-law-works/GF6PLR44PNESPKR5FXCBE7VEOY>.

¹²¹ Sanya Mansoor, *‘It’s Mean-Spirited.’ A Blind Disability Advocate on How Georgia’s New Election Law Could Make Voting Even Harder*, TIME (Apr. 14, 2021), <https://time.com/5953063/disability-advocate-georgia-new-election-law>.

have some Black and brown folk that go in there, simply made a mistake and their vote will be automatically cancelled.”¹²²

E. Incarcerated Voters

While restrictions on opportunities to vote harm all voters, these restrictions most acutely impact voters that are already marginalized in our democracy. Incarcerated eligible voters provide a particularly salient example of this reality. Although thousands of eligible voters are incarcerated in jails in all 50 states, the vast majority of these voters are unable to participate because of the enormous barriers to the ballot box they confront. Because jailed voters are systematically denied in-person and Election Day voting opportunities, *see supra* at II.D, Polling Place Locations, they are often forced to rely on absentee voting.

But voting absentee while incarcerated, under the best of circumstances, is extremely challenging.¹²³ Incarcerated voters lack ready access to even the most basic instrumentalities of voting, including writing utensils, stamps, and ballot request forms. They also routinely lack information about elections, such as when an election is, how to request a ballot, and who will be on that ballot. The more restrictions are placed on absentee voting, then, the more complicated the task of voting becomes for incarcerated voters.

In Wisconsin, for example, where voters must submit a copy of a qualifying photo ID in order to request an absentee ballot, jailed voters will be disenfranchised unless they had a qualifying ID with them at the time of their incarceration and can obtain a copy of that ID from the sheriff at their jail.¹²⁴ In South Carolina, which requires absentee ballot request forms be signed by a witness, jailed voters in Sumter County

¹²² *Id.*

¹²³ See Paikowsky, *supra* note 66; see also Ginger Jackson-Gleich & Rev. Dr. S. Todd Yeary, *Eligible, but excluded: A guide to removing the barriers to jail voting*, PRISON POLICY INST., https://www.prisonpolicy.org/reports/jail_voting.html (last visited June 6, 2021).

¹²⁴ *Ex-Felons and Incarcerated Voters*, Wis. Gov’t Accountability Bd., https://elections.wi.gov/sites/default/files/publication/154/voting_guide_for_ex_felons_incarcerated_voters_pd_24428.pdf (last visited June 6, 2021).

Jail were unable to submit their absentee ballot request forms in the spring of 2020 after the woman who ran the jail’s programming was diagnosed with COVID-19.¹²⁵ For incarcerated voters in these states and others that require not only IDs or witness signatures, but also potentially notarization of absentee ballot request forms or ballots, the process of successfully voting can often require persistence or, worse, luck. Even if incarcerated eligible voters are able to obtain and fully complete an absentee ballot request form, timely submitting these forms (and others, including registration forms and absentee ballots) can be challenging or even impossible. Incarcerated voters are not only forced to rely on the United States Postal Service—which, in 2020 was notably delayed in its services—to deliver their election materials, they also confront additional challenges from restrictive and delay-prone jail mail systems.¹²⁶ In Maryland and Connecticut, advocates sought to obviate the need for incarcerated voters to confront these delays by asking their states to put drop boxes into the jails. These innovative efforts, however, were met with resistance and ultimately unsuccessful.¹²⁷ The more restrictions that states put on accessibility mechanisms like drop boxes, the harder it becomes to find ways to ensure these voting options can serve the hardest to reach constituencies—like jailed voters—who crucially need them.

¹²⁵ Kira Lerner, *States Expect People to Risk Their Health Even When Voting by Mail, Advocates Warn*, THE APPEAL (June 17, 2020) <https://theappeal.org/politicalreport/absentee-ballots-witness-notary-requirements/>.

¹²⁶ Shawn Mulcahy, *Cuts to USPS Threaten Voting Access for Hundreds of Thousands of Americans in Jails*, THE GUARDIAN (Sept. 15, 2020) <https://www.theguardian.com/us-news/2020/sep/15/usps-cuts-threaten-ballot-access-inmates>. Restrictions on what size and type of mail can enter jails, as well as requirements related to the sealing and inspection of jail mail, have also prevented or complicated voting for incarcerated voters. Carlisle & Villa, *supra* note 72; Ballesteros & Heorner, *supra* note 72.

¹²⁷ *Voting from Jail in Connecticut: Legally Permitted, Practically Impossible*, ARTHUR LIMAN CTR. FOR PUB. INT. L., YALE L. SCH. (Mar. 2021), https://law.yale.edu/sites/default/files/area/center/liman/document/voting_from_jail_information_sheet.pdf; Alison Knezevich & Emily Opilo, *Maryland advocates working to ensure people in jail can still cast a ballot*, BALTIMORE SUN (Oct 30, 2020), <https://www.baltimoresun.com/politics/bs-md-voting-in-jails-20201030-e7a2xv3nqvhuiprtppftiwo2gy-story.html>; Bennett Leckrone, *As other states move to restrict voting, the Maryland General Assembly passed bills to expand access*, WTOP NEWS (April 23, 2021) <https://wtop.com/maryland/2021/04/as-other-states-move-to-restrict-voting-the-maryland-general-assembly-passed-bills-to-expand-access/>.

For incarcerated eligible voters, disenfranchisement comes in the way of death by a thousand cuts. It is not just the single imposition of an ID requirement on an absentee ballot request form or the failure to put a polling place in the jail that denies these voters access to our democracy, it is the cumulative impact of a system that has profoundly failed to account for the needs of an entire group of eligible voters. Incarcerated voters, too, represent a microcosm of historically marginalized voters. They are disproportionately people of color, low income people, people with disabilities, and homeless or transient individuals.¹²⁸ In many instances, incarcerated voters are only incarcerated and thus unable to vote because of an inability to pay bail, meaning the bail imposed thus functions as a poll tax.¹²⁹ Voters who spend even short durations of time in jail, too, are less likely to participate upon their release.¹³⁰ Rather than making it harder for these voters to participate, we should be finding ways to reform our system to make it more inclusive.

IV. CONCLUSION

America knows what a weakened, toothless Voting Rights Act looks like. It looks like the free pass that states had to discriminate against minority voters in the period between the passage of the Fifteenth Amendment in 1870 and the passage of the Voting Rights Act in 1965. For nearly one hundred years, the Fifteenth Amendment was incapable of stopping the litany of tests, devices, and restrictions that white supremacists used to stop minorities from voting. If Congress fails to restore the full protections of the Voting Rights Act by reestablishing preclearance and strengthening Section 2, America risks going back to that dark time.

¹²⁸ See Paikowsky, *supra* note 66.

¹²⁹ *Id.*

¹³⁰ See Ariel White, *Misdemeanor Disenfranchisement? The demobilizing effects of brief jail spells on potential voters*, MIT Open Access Articles at 3, 21 (Oct. 2018), available at https://dspace.mit.edu/bitstream/handle/1721.1/128563/misdemeanor_draft_spring2018_0.pdf?sequence=2&isAllowed=y (finding that Black men who spent even short periods of time in jail were 13 percent less likely to cast ballots in upcoming elections, despite there being no change to their eligibility).

But this Congress has a historic opportunity to seize on the lessons of the 2020 election and modernize our voting system, create an equitable baseline of voting opportunities through H.R. 1/S. 1, and stop the onslaught of discriminatory voting proposals in every legislative session in its tracks by restoring preclearance. Campaign Legal Center urges Congress to prevent the backsliding of this nation's progress in voting rights and act quickly and decisively to protect the freedom to vote for all Americans.