



**Written Testimony of Janai S. Nelson  
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**Before the United States House of Representatives  
Committee on House Administration  
Subcommittee on Elections**

**“Voting in America: A National Perspective on the Right to Vote, Methods  
of Election, Jurisdictional Boundaries, and Redistricting”**

**June 24, 2021**

Good morning, Chair Lofgren, Ranking Member Davis, and members of the Committee. My name is Janai Nelson, and I am Associate Director Counsel at the NAACP Legal Defense and Educational Fund, Inc. (“LDF”). Thank you for the opportunity to testify this morning on some of LDF’s efforts to protect and expand the voting rights of Black people through litigation and other forms of advocacy and to share some of what we have observed with regard to the proliferation of barriers to voting since the U.S. Supreme Court’s decision in *Shelby County, Alabama v. Holder* in 2013.<sup>1</sup>

Since its founding in 1940 by Thurgood Marshall, LDF has been a leader in the fight to secure, protect, and advance the voting rights of Black voters and other communities of color. LDF was launched at a time when the nation’s aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality in every area of life. Through litigation, public policy, and public education, LDF’s mission has remained focused on seeking structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. In advancing that mission, protecting the right to vote for African Americans has been positioned at the epicenter of our work. Beginning with *Smith v. Allwright*,<sup>2</sup> LDF’s successful U.S. Supreme Court case challenging the use of whites-only primary elections in 1944, LDF has been fighting to overcome a myriad of obstacles to ensure the full, equal, and active participation of Black voters.

The importance of the right to vote to the integrity of our democracy cannot be overstated. Indeed, Thurgood Marshall—who litigated LDF’s watershed victory in *Brown v. Board of Education*,<sup>3</sup> which set in motion the end of legal segregation in this country and transformed the direction of American democracy in the 20th century—referred to *Smith v. Allwright*, the case that outlawed all-white primaries, as his most consequential case. He held this view, he explained, because he believed that the vote, and the opportunity to access political power, was critical to fulfilling the guarantee of full citizenship promised to Black people in the 14th Amendment to the U.S. Constitution. LDF has prioritized its work protecting the right of Black citizens to vote for over 80 years—representing Martin Luther King Jr. and the marchers in Selma, Alabama in 1965, litigating seminal cases interpreting the scope of the Voting Rights Act, and working in communities across the South to strengthen and protect

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<sup>1</sup> *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013).

<sup>2</sup> 321 U.S. 629 (1994).

<sup>3</sup> 347 U.S. 483 (1954).

the ability of Black citizens to participate in the political process free from discrimination.

Despite the guarantees of the 14th and 15th Amendments, the Voting Rights Act (“VRA”), and other federal voting rights statutes, racial discrimination and targeted suppression of the Black vote persists, and the need for litigation by LDF and other civil rights organizations has not abated. Indeed, in the years since the infamous 2013 Supreme Court decision in *Shelby County, Alabama, v. Holder*,<sup>4</sup> methods of voter suppression have metastasized across the country. LDF helped to litigate the *Shelby* case, including presenting argument in the Supreme Court in defense of the constitutionality of Section 5 of the Voting Rights Act and importance of pre-clearance to the protection of voting rights. The Supreme Court’s decision in *Shelby*, disabling this key provision, has had a devastating effect on the voting rights of racial, ethnic, and language minorities in this country. In that decision, Chief Justice John Roberts invited Congress to update the Voting Rights Act to respond to modern conditions. In the eight years since *Shelby* was decided, however, Congress has failed to do so, leaving voters of color—and our democracy—unprotected.

### **Significance of the Voting Rights Act and the *Shelby* Decision**

The end of the Civil War has been described as this nation’s “Second Founding.”<sup>5</sup> It was then that the United States undertook efforts to amend our Constitution to provide Congress with substantial, affirmative power to finally enforce the principle espoused by the Founders, that *all* are created equal, and that access to the franchise is the cornerstone of citizenship and democracy. Importantly, the 14th and 15th Amendments to the Constitution also provided new, specific authority for Congress to defend equal rights, stating that Congress *shall* have power to enforce the Amendments through appropriate legislation.<sup>6</sup>

The Civil Rights Amendments give Congress the explicit power to enforce the guarantee of equal protection and protection against voting discrimination based on race. Yet for nearly 100 years after the ratification of those Amendments, as Black

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<sup>4</sup> 570 U.S. 529 (2013).

<sup>5</sup> See generally Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019)

<sup>6</sup> U.S. Const. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); U.S. Const. amend. XV, § 2 (“The Congress shall have the power to enforce this article by appropriate legislation.”).

people were systematically disenfranchised by poll taxes,<sup>7</sup> literacy tests,<sup>8</sup> property requirements,<sup>9</sup> threats,<sup>10</sup> and lynching.<sup>11</sup> Congress abdicated its obligation to use its enforcement powers. Post-Reconstruction, state and private actors subjected Black Americans to racial violence and flagrant discrimination in all areas of life, including education, employment, healthcare, housing, and transportation, which increased the suppressive force of many voting policies, whose very success was premised on the existence of racial discrimination in other aspects of social, economic, and political life.<sup>12</sup>

Congress finally took up its charge by passing the Voting Rights Act of 1965 (“VRA”), compelled by the Civil Rights Movement generally, and the violent events of Bloody Sunday in Selma, Alabama, specifically. The VRA fulfilled the promise of the 15th Amendment that the right to vote should not be denied because of race, color or previous condition of servitude, as well as the 14th Amendment’s guarantee of equal protection under the law. Its purpose was ambitious: to finally “banish the blight of racial discrimination in voting.”<sup>13</sup> The VRA enshrined our most fundamental values by guaranteeing to all citizens the right to vote, which the Supreme Court has called “preservative of all rights.”<sup>14</sup> In many ways, the VRA made the promise of the Civil Rights Amendments a reality and legitimized our democracy for the first time in our history.<sup>15</sup> Among the most transformative of the civil rights statutes passed in the

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<sup>7</sup> Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: University of Chicago Press, 2004).

<sup>8</sup> Jason Morgan Ward, *Hanging Bridge: Racial Violence and America’s Civil Rights Century* (New York: Oxford University Press, 2016).

<sup>9</sup> *Underwood v. Hunter*, 730 F.2d 614, 619 & n.10 (11th Cir. 1984).

<sup>10</sup> Michael Fellman, *In the Name of God and Country: Reconsidering Terrorism in American History* (New Haven, CT: Yale University Press, 2010); U.S. Commission on Civil Rights, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume VII: The Mississippi Delta Report: Chapter 3, Voting Rights and Political Representation in the Mississippi Delta* (last accessed June 21, 2021), <https://www.usccr.gov/pubs/msdelta/ch3.htm>.

<sup>11</sup> Brad Epperly, et al., *Rule by Violence, Rule by Law: The Evolution of Voter Suppression and Lynching in the U.S. South*, (Mar. 1, 2016), <https://ssrn.com/abstract=3224412>

<sup>12</sup> See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 310–11 & nn.9–10 (1966) (observing that the effectiveness of literacy tests at blocking Black Americans from voting resulted, in significant part, from the pervasiveness of racial discrimination in education); *Underwood v. Hunter*, 730 F.2d 614, 619 & n.10 (11th Cir. 1984) (explaining that, after 1890, Southern state legislatures “resort[ed] to facially neutral tests that took advantage of differing social conditions” between Black and white voters”).

<sup>13</sup> *Katzenbach*, 383 U.S. at 308.

<sup>14</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>15</sup> Nikole Hannah Jones, *Our democracy’s founding ideals were false when they were written. Black Americans have fought to make them true*, *New York Times Magazine* (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>

1960s,<sup>16</sup> the Voting Rights Act has been justly described as “the crown jewel” of the Civil Rights Movement.

Moreover, the VRA’s preclearance provisions brought profound changes to the country. The VRA was successful at dismantling the continuation of Jim Crow subjugation in the electoral arena specifically because of the preclearance process’s prophylactic design. Previously, when the Department of Justice obtained favorable decisions striking down suppressive voting practices, states merely enacted new discriminatory schemes to restrict Black people from voting. In establishing the preclearance framework of the VRA, Congress, therefore, “had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the [Voting Rights Act] itself.”<sup>17</sup> Section 5 of the VRA was expressly designed to address not only then-existing discriminatory voting schemes but also to address the “ingenious methods”<sup>18</sup> that might be devised and used in the future to suppress the full voting strength of African Americans. Section 5 preclearance was an efficient, effective, and *necessary* mechanism for detecting and redressing the many forms of voting discrimination *before* elections took place.

Unfortunately, the Supreme Court’s decision in *Shelby* brought an abrupt halt to the successes of the VRA’s preclearance provisions. As the late Justice Ruth Bader Ginsberg noted in her dissent to the *Shelby* decision: “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.”<sup>19</sup> The *Shelby* decision allowed state and local governments to unleash discriminatory voter suppression schemes virtually unchecked.<sup>20</sup> At its pre-*Shelby* strength, Section 5 would have prevented many of the voter suppression schemes that we have encountered since 2013.

Today, our nation is at a critical juncture in the decades-long struggle to create, maintain, preserve, and ensure true equality of voting rights for all citizens. For the

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<sup>16</sup> See *Nw. Austin, Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198, 201 (2009) (the “historic accomplishments of the [VRA] are undeniable”).

<sup>17</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 314, 335 (1966). As Chief Justice Earl Warren explained: “Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures.” *Id.* at 30.

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

<sup>19</sup> *Shelby County*, 570 U.S. at 590 (Ginsburg, J., dissenting).

<sup>20</sup> U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report* (2018), [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf).

first time in more than half a century, we enter a redistricting cycle without the protection of preclearance under Section 5 of the Voting Rights Act. At the same time, with voter suppression intensifying at the local and state levels, the right to vote for Black people and other people of color is facing its greatest threat in decades.

Of course, Black voters and other voters of color still have Section 2 of the Voting Rights Act, the provision that authorizes private actors and the U.S. Department of Justice to challenge discriminatory voting practices in the federal courts. Section 2 applies nationwide and places the burden on voters harmed by voting discrimination to bring litigation to challenge a law that has discriminatory results and/or a discriminatory purpose.<sup>21</sup> Section 2’s “permanent, nationwide ban”<sup>22</sup> on racially discriminatory dilution or denial of the right to vote is now the principal tool under the VRA to block and remedy these new discriminatory measures.

As a result of litigation brought under Section 2, the 14th and 15th Amendments to the U.S. Constitution, and other provisions, some federal courts are serving as democracy’s checkpoint, reviewing extensive evidence and ruling that some of the most egregious forms of discriminatory voting changes are unconstitutional and/or violate the VRA. Racial minorities are currently facing an array of schemes designed to restrict and suppress their participation at *every phase of the democratic process*—from their eligibility to vote, to their ability to register to vote, access a polling place or apply for an absentee ballot, and cast a ballot that is *counted*.

However, as discussed below, litigation is slow and costly—and court victories may come only after a voting law or practice has been in place for several election cycles. All the while, critical elections for the presidency, congress, state legislative seats, and scores of seats at the local levels have come and gone. Individual voting-rights lawsuits filed under Section 2 or other provisions, simply put, cannot substitute for the prophylactic power of Section 5 preclearance.

The extensive record of discriminatory voting practices enacted since *Shelby* demands that Congress fulfill its constitutional obligation to protect voters from an onslaught of new and “ingenious methods” of voter discrimination.

### **Generational Obligation to Protect the Right to Vote**

It is unacceptable that in 2021—56 years after the passage of the Voting Rights Act—the right to vote remains under threat.

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<sup>21</sup> 52 U.S.C. § 10301(a).

<sup>22</sup> *Shelby County*, 570 U.S. at 537.

However, Congress purposefully designed Section 5 to address our current crisis. Congress's predecessors on both sides of the aisle and with the signature of presidents from both major political parties supported for nearly 50 years Section 5, a provision meant to address racial discrimination in voting and block any practices and procedures which may result in discrimination before they are implemented, elections are held, and harms to voters occur. This was an explicit intention of Congress in 1965, which expressly sought to prevent not only then-existing discriminatory voting schemes, but to also prevent the "ingenious methods" that might be devised to suppress votes in the future.<sup>23</sup>

The passage of the VRA was spurred by the grassroots activism of thousands across the country, and especially in the South, who faced down billy clubs, police dogs, and vitriol from white mobs in order to secure the unencumbered right to vote. It was the result of the tremendous sacrifice of those beaten on the Edmund Pettus Bridge, including the late Congressman John Lewis, the martyrdom of Medgar Evers, Jimmie Lee Jackson, Viola Gregg Liuzzo, Andrew Goodman, James Chaney and Michael Schwerner and so many unnamed others<sup>24</sup> that proved crucial in ensuring that the federal government take seriously its duty to affirmatively enforce the right to the franchise. In short, the right to vote that we enjoy today was forged by courageous people who demanded change and demanded the protection and expansion of the franchise. The activists and protestors and organizers of today are carrying the torches of change, lit during the struggle for freedom from slavery and sustained during the Civil Rights Movement throughout the 1960s, to ensure that the next generation can exercise the right to vote as a tool for transformation.

It is the heroism of the average American to speak out, protest and demand change when faced with injustice, that we see again today in the calls for federal legislation to protect the right to vote. It is the obligation of this generation of lawmakers to respond to their call and ensure that the hard-won gains of the past are not lost. People and institutions across the country have decried the onslaught of voting restrictions, from influential Black executives in corporate America, corporations like Coca Cola and Delta Airlines,<sup>25</sup> sports associations like Major

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

<sup>24</sup> Marty Roney, *Remembering the Martyrs of Bloody Sunday*, USA Today (Mar. 7, 2015), <https://www.usatoday.com/story/news/nation/2015/03/03/bloody-sunday-martyrs/24344043/>; Deborah Barfield Berry, *"Bloody Sunday" pilgrimage to move through Miss.*, USA Today (Feb. 10, 2014), <https://www.usatoday.com/story/news/nation/2014/02/10/civil-rights-pilgrimage/5376225/>.

<sup>25</sup> Andrew Ross Sorkin & David Gelles, *Black Executives Call on Corporations to Fight Restrictive Voting Laws*, New York Times (March 31, 2021),

League Baseball,<sup>26</sup> film industry icons,<sup>27</sup> religious leaders,<sup>28</sup> and more. In 2020, we saw thousands of people risk contracting the deadly COVID-19 virus in order to exercise their full rights as American citizens by voting.<sup>29</sup> The ability to participate in civic life—to have a voice in choosing the elected officials whose decisions impact our lives, families, and communities—is at the core of citizenship.

Congress has the explicit constitutional duty to protect the right of every eligible person to vote, and to ensure that each vote counts. Congress' power remains undiminished and, in fact, includes the power to impose prophylactic measures to combat discriminatory election laws and practices before they take effect.

The people call on Congress once again to use the power enshrined in the Constitution, and entrusted to this body, to ensure the franchise for all citizens and to build a 21<sup>st</sup> century democracy that is representative of, and responsive to, our growing and diverse nation. Congress must seize this moment to take courageous action. Indeed, it is the obligation of this Congress to continue to uphold the principles of democracy—and to continue the great tradition of perfecting our union by protecting the right to vote.

### **Discriminatory Election Changes post-*Shelby***

Since the Supreme Court's *Shelby* decision, states and localities have unleashed countless schemes that seek to deny or abridge the rights of voters of color. Indeed, every year since 2013, communities of color throughout our country have sought to vote and participate equally and meaningfully in the political process without the core protections of the Voting Rights Act. And every year since the *Shelby* decision, restrictive and suppressive voting changes are implemented

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

<sup>26</sup> Kevin Draper et al., *M.L.B. Pulls All-Star Game From Georgia in Response to Voting Law*, New York Times (Apr. 6, 2021), <https://www.nytimes.com/2021/04/02/us/politics/mlb-all-star-game-moved-atlanta-georgia.html>.

<sup>27</sup> Kimberly Chin, *Will Smith Movie Pulls Production Out of Georgia Over GOP Voting Law*, Wall Street Journal (Apr. 12, 2021), <https://www.wsj.com/articles/will-smith-movie-emancipation-pulls-production-out-of-georgia-overgop-voting-law-11618257076>.

<sup>28</sup> Lakisha Lemons, *Faith leaders fight back against what they call voter suppression bills*, Spectrum News 1 (Apr. 14, 2021), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/04/14/faith-leaders-fight-back-against-voter-suppression-laws->

<sup>29</sup> Jocelyn Stewart, *People Died So I Could Vote*, Time Magazine (Sep. 23, 2014) <https://time.com/3423102/people-died-so-icould-vote/>.

that would have been blocked by Section 5. Numerous reports<sup>30</sup> have catalogued these suppressive practices—including strict voter identification laws, unfair purging, cuts to early voting, and eliminating polling places—utilized in many states and jurisdictions throughout the country.

Since 2008, LDF has monitored elections through our Prepared to Vote initiative (“PTV”). Our PTV initiative places LDF staff and volunteers on the ground for primary and general elections every year to conduct non-partisan election protection, poll monitoring, and to support Black political participation in targeted jurisdictions—primarily in the South.

LDF is also a founding member of the non-partisan civil rights Election Protection Hotline (1-866-OUR-VOTE), administered by the Lawyers’ Committee for Civil Rights Under Law. The Election Protection hotline coalition works year-round to ensure that all citizens have an equal opportunity to vote and have that vote count. Election Protection provides Americans from coast to coast with comprehensive information and assistance at all stages of voting—from registration to absentee and early voting, to casting a vote at the polls, and overcoming obstacles to their participation.

Accordingly, our PTV initiative equips voters with non-partisan educational information about how to comply with confusing, onerous, or newly changed election laws, including burdensome registration requirements, stringent voter ID laws, and strict absentee qualifications. On election day, PTV volunteers visit polling sites

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<sup>30</sup> In 2014, the Lawyer’s Committee organized the National Commission on Voting Rights which issued a report documenting ongoing voting discrimination. National Commission on Voting Rights, *Protecting Minority Voters: Our Work Is Not Done* (2014), <http://votingrightstoday.org/ncvr/resources/discriminationreport>; In 2016, the Leadership Conference on Civil and Human Rights released a report before the first presidential election conducted without the full safeguards of the VRA detailing polling place reductions on a massive scale in many of the jurisdictions that were once protected by Section 5 of the VRA. The Leadership Conference Education Fund, *The Great Closure Report*, Civilrights.org, (Nov. 2016) <http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf>; In 2018 the Leadership Conference published a report finding 1,688 polling place closures between 2012 and 2018, almost double the 868 closures found in their 2016 report. The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote*, (Sep. 2019) [democracydiverted.org](http://democracydiverted.org); Leading up to the 2018 midterm elections the United States Commission on Civil Rights presented a report to the 116<sup>th</sup> Congress with urgent recommendations regarding the protection of voting rights across the nation. U.S. Commission on Civil Rights, *U.S. Commission on Civil Rights Urges Congress to Prioritize Civil Rights Oversight and Legislation*, Dec. 7, 2018, <https://www.usccr.gov/press/2018/12-07-Priorities-for-116th-Congress.pdf>; The Election Protection Coalition amassed extensive data evidencing systemic barriers faced by voters in Georgia, Texas, Florida and North Dakota. Laura Grace & Morgan Conley, *Election Protection 2018 Midterm Elections Preliminary Report*, (2018) <https://866ourvote.org/wp-content/uploads/2019/01/Election-Protection-Preliminary-Report-on-the-2018-MidtermElections.pdf>.

to ensure voters are informed of their state’s voting requirements, answer questions about how to comply with election laws, and, when necessary, engage in rapid response actions to ensure every eligible voter is able to cast a ballot. PTV plays a critical role in tracking, monitoring, and reporting practices that make it harder for Black people and other people of color to exercise the fundamental right to vote.

Through its report, titled “Democracy Diminished: State and Local Threats to Voting post-*Shelby County, Alabama v. Holder*,” LDF tracks, monitors, and publishes a record of discriminatory voting changes in jurisdictions formerly protected by Section 5.<sup>31</sup> *Democracy Diminished* details the many tactics that state and local policymakers have implemented with alarming speed since the *Shelby* decision, including barriers to voter registration, cuts to early voting, purges of the voter rolls, strict photo identification requirements, and last-minute polling place closures and consolidations.

### **2020 Election and Post-Election Assessment**

2020 was an unprecedented year in many respects. With the COVID-19 pandemic, the country faced not only a public health crisis, but also a threat to the very foundation of our democracy: free and fair elections. The staggering rate of transmission, infection, and death related to COVID-19 placed many voters in the unthinkable position of choosing to risk their health or lose their right as citizens to participate and vote. It cannot be overemphasized that voters were forced to make a life-risking choice in elections across the country because their government would not protect them.<sup>32</sup> The actions and lessons learned over the past year force us to reconsider the arc of voter suppression. We now know that we must be vigilant about fighting voter suppression from the stages of registration and participation in primaries to the counting and canvassing of ballots. Indeed, in the 2020 Election, efforts at voter suppression continued beyond Election Day: stoked and encouraged by the former President, misguided individuals across the country participated in a

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<sup>31</sup> NAACP Legal Defense Fund, *Democracy Diminished*, LDF’s Thurgood Marshall Institute, <https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished-State-and-Local-Threatsto-Voting-Post-Shelby-County-Alabama-v.-Holder.pdf>

<sup>32</sup> *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM Research Lab (last updated March 5, 2021), <https://www.apmresearchlab.org/covid/deaths-by-race>; *COVID-19 hospitalization and deaths by race/ethnicity*, Centers for Disease Control and Prevention (last updated March 12, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-raceethnicity.html>.

campaign to disrupt the counting and certification of the presidential election and ultimately to overturn its results.<sup>33</sup>

Accounts from LDF's Voting Rights Defender and PTV teams detailed in the LDF Thurgood Marshall Institute's report *Democracy Defended*,<sup>34</sup> reveal the depth and breadth of the issues voters faced on Election day. In sum, the 2020 election did not, as numerous news reports suggested, "go smoothly."<sup>35</sup> Voters overcame a litany of barriers and obstacles with determination and resilience. The Herculean efforts of civil rights groups, grassroots activists and civic groups proved critical to ensuring access to the polls for millions of voters. This model is not sustainable.

### **LDF Voting Rights Litigation Post-Shelby and the Need for Prophylactic Legislation**

Without the protection of Section 5 of the Voting Rights Act, voters have had to rely on other provisions of the VRA and other laws to help protect the right to vote. Since the *Shelby* decision federal courts have struck down voting changes that violate the Constitution,<sup>36</sup> the 24th Amendment to the U.S. Constitution,<sup>37</sup> Sections 2 and 203 of the Voting Rights Act, and the Americans with Disability Act. Indeed, there have been at least nine federal court decisions finding that states or localities enacted racially discriminatory voting laws or practices intentionally, for the purpose of

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<sup>33</sup> Simon Romero, Shaila Dewan & Giulia McDonnell Nieto del Rio, *In a Year of Protest Cries, Now It's 'Count Every Vote!' and 'Stop the Steal!'*, New York Times (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/us/electionprotests-vote-count.html>; Bill Bostock, *Videos show Trump protesters chanting 'count those votes' and 'stop the count' outside separate ballot-counting sites in Arizona and Michigan*, Business Insider (Nov. 5, 2020), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11>; Jake Lahut, *Dozens of pro-Trump protesters chant 'Fox News sucks' outside major election HQ in Arizona, with several reportedly trying to get inside as votes are being counted*, Business Insider (Nov. 4, 2020), <https://www.businessinsider.com/video-fox-news-sucks-chant-crowd-outside-maricopa-election-arizona-2020-11?r=US&IR=T>; Maura Ewing et al., *Two charged with carrying weapons near Philadelphia vote-counting site amid election tensions*, Washington Post (Nov. 6, 2020), <https://www.washingtonpost.com/nation/2020/11/06/philadelphiaattack-plot-vote-count-election/>.  
<sup>34</sup> *Democracy Defended: Executive Summary*, NAACP Legal Defense Fund Thurgood Marshall Institute (Feb. 10, 2021), [https://www.naacpldf.org/wp-content/uploads/LDF\\_02102021\\_DemocracyDefendedPreview11.pdf?\\_ga=2.209659025.2082701624.1617629692-217316157.1616678028](https://www.naacpldf.org/wp-content/uploads/LDF_02102021_DemocracyDefendedPreview11.pdf?_ga=2.209659025.2082701624.1617629692-217316157.1616678028).

<sup>35</sup> Sherrilyn Ifill, *No, This Election Did Not Go 'Smoothly'*, Slate (Nov. 9, 2020), <https://slate.com/news-andpolitics/2020/11/2020-election-voting-did-not-go-smoothly.html>.

<sup>36</sup> *4th Circuit Court of Appeals strikes down North Carolina omnibus voting law finding "provisions target African Americans with almost surgical precision."*, Robert Barnes & Ann Marrow, *Appeals court strikes down North Carolina's voter-ID law*, Washington Post (Jul. 29, 2016), [https://www.washingtonpost.com/local/publicsafety/appeals-court-strikes-down-north-carolinass-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583\\_story.html](https://www.washingtonpost.com/local/publicsafety/appeals-court-strikes-down-north-carolinass-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583_story.html).

<sup>37</sup> NAACP v. Billups, 554 F.3d 1340 (2009)

discriminating against Black voters, Latino voters, or other voters of color.<sup>38</sup> This fact should alarm us. In Texas, for example, a trial court held that the state enacted its strict voter ID law with the purpose of discriminating against Black and Latino voters.<sup>39</sup> In Wisconsin, a federal court struck down various voting restrictions under the Voting Rights Act, and found one, a limitation on hours for in-person absentee voting, based on intentional discrimination in violation of the Fifteenth Amendment.<sup>40</sup> And in North Carolina, the Fourth Circuit Court of Appeals found that the North Carolina legislature worked with “surgical provision” to ensure that its omnibus voting law would disproportionately disenfranchise African American voters.<sup>41</sup> These findings by federal courts are a shocking condemnation of our voting systems, and demonstrate what the unfettered post-*Shelby* world has wrought.

LDF has litigated challenges to many of these restrictive voter ID laws, absentee voting restrictions, and discriminatory early voting restrictions. LDF challenged President Trump’s Election Integrity Commission,<sup>42</sup> and currently remains in litigation against former President Trump and the Republican National Committee for their efforts to discredit the legitimacy of ballots cast by voters in cities with large Black populations.<sup>43</sup> LDF also sued the United States Postal Service (“USPS”) in 2020 to ensure the timely delivery of mail-in ballots cast in the November Presidential election and January special election in Georgia.<sup>44</sup>

While LDF also continues to vigorously pursue litigation to protect voting rights under Section 2 of the VRA, the U.S. Constitution, and other laws, we know

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<sup>38</sup> See, e.g., *People First of Ala.v. Merrill*, 2020 WL 5814455 (N.D. 2020); *Jones v. Jefferson County Board of Education*, 2019 WL 7500528 (N.D. Ala. 2019); *Stout v. Jefferson County Board of Education*, 882 F.3d 988 (11<sup>th</sup> Cir. 2018); *Allen v. City of Evergreen*, 2014 WL 12607819 (S.D. Ala. 2014); *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9<sup>th</sup> Cir. 2020); *Michigan State A Philip Randolph Institute v. Johnson*, 326 F. Supp. 3d 5323 (E.D. Mich. 2019); *Holmes v. Moore*, 840 S.E.2d 244 (2020); *North Carolina NAACP v. McCrory*, 831 F.3d 204 (4<sup>th</sup> Cir. 2016); *Perez v. Abbott*, 250 F.Supp.3d 123 (W.D. Tex. Apr. 20, 2017); *Perez v. Abbott*, 253 F.Supp.3d 864 (W.D. Tex. May 2, 2017); *Veasey v. Abbott*, 265 F.Supp.3d 684 (S.D. Tex. 2017); *Patino v. City of Pasadena*, 230 F.Supp.3d 667 (S.D. Tex. 2017).

<sup>39</sup> *Veasey v. Abbott*, No. 2:13-CV-193, 2017 WL 3620639 (S.D. Tex. Aug. 23, 2017).

<sup>40</sup> *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016).

<sup>41</sup> *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4<sup>th</sup> Cir. 2016).

<sup>42</sup> *LDF and Local Alabama Organization File Federal Lawsuit Challenging President’s “Election Integrity” Commission*, NAACP Legal Defense and Educ. Fund, Inc. (Jul. 18, 2017), <https://www.naacpldf.org/press-release/ldf-and-local-alabama-organization-file-federal-lawsuit-challenging-presidents-election-integrity-commission/>.

<sup>43</sup> *LDF Files Amended Complaint in its Lawsuit Against President Trump and His Campaign’s Attempts to Overturn the Election by Disenfranchising Black Voters*, NAACP Legal Defense and Educ. Fund, Inc. (Dec. 22, 2020), <https://www.naacpldf.org/press-release/ldffiles-amended-complaint-in-its-lawsuit-against-president-trump-and-his-campaigns-attempts-to-overturn-theelection-by-disenfranchising-black-voters/>.

<sup>44</sup> *NAACP v. U.S. Postal Service*, No 1:20-cv-02295 (D. D.C.2020).

that this is not enough to fully protect the right to vote.<sup>45</sup> Below is a brief overview of selected litigation that LDF has brought post-*Shelby*, which is representative of the broad and persistent attack on voting rights that defines our national moment.

## **Alabama**

### ***Challenging Alabama’s Discriminatory Photo ID Law***

In 2011, before the 2013 *Shelby* decision, the Alabama state legislature passed House Bill (HB) 19, a law which required voters to present a form of government-issued photo identification to vote.<sup>46</sup> The law also included a provision that would allow a potential voter without the required ID to vote *if* that person could be “positively identified” by two poll workers, a provision that harkened back to pre-1965 vouch-to-vote systems. Notably, although HB 19 passed the state legislature—alongside judicially recognized discriminatory redistricting plans<sup>47</sup>—and was sent to the Governor’s desk in 2011, it was not implemented until after the *Shelby* decision in 2013—after the state no longer had to submit this and other voting changes to the federal government for review under Section 5.

As reports show, variations of photo ID laws across the country have a disproportionate and burdensome effect on African American and Latino voters.<sup>48</sup> HB 19 is no different. Record evidence shows that 118,000 already registered voters lack the photo ID required by this law.<sup>49</sup> Black and Latino voters are two times more likely than white voters to lack the required ID and Black voters are over four times more likely than other voters to have their provisional ballots rejected because of a lack of acceptable ID.

On top of imposing this unnecessary and discriminatory extra requirement to vote, in 2015 Alabama closed 31 driver’s license issuing offices predominately in majority Black counties for the entirety of 2016—a presidential election year.<sup>50</sup>

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<sup>45</sup> *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, <sup>45</sup> NAACP Legal Defense and Educ. Fund, Inc. (Feb. 14, 2019), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs02.14.19.pdf>; Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed); Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) (“Two to five years is a rough average” for the length of Section 2 lawsuits) [http://commdocs.house.gov/committees/judiciary/hju24120.000/hju24120\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju24120.000/hju24120_0.HTM).

<sup>46</sup> *AL HB 19* (2011), <https://legiscan.com/AL/text/HB19/id/327641>.

<sup>47</sup> *Alabama Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (MD Ala. 2017).

<sup>48</sup> *Citizens Without Proof*, Brennan Center for Justice at NYU School of Law (Nov. 2006) [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf).

<sup>49</sup> Appellant’s Br., *Greater Birmingham Ministries v. Merrill*, No. 18-10151, 2018 WL 1135793, at \*3, 20-27 (11th Cir. Feb. 21, 2018).

<sup>50</sup> Mike Cason, *State to Close 5 Parks, Cut Back Services at Driver License Offices*, Alabama.com (Sept. 2015) [https://www.al.com/news/2015/09/state\\_announces\\_to\\_close\\_becau.html#incart\\_river\\_home](https://www.al.com/news/2015/09/state_announces_to_close_becau.html#incart_river_home).

Driver’s licenses are the primary form of photo ID that most voters can and do use to vote. Alabama only reopened these offices in December 2016, after the election, because the U.S. Department of Transportation concluded that the closings were racially discriminatory in violation of the Civil Rights Act of 1964.<sup>51</sup>

LDF filed a federal lawsuit in December of 2015, arguing that HB 19 violated the Fourteenth and Fifteenth Amendments to the U.S. Constitution, and Section 2 of the VRA.<sup>52</sup> Representing Greater Birmingham Ministries, the Alabama NAACP and individual voters, we contended that voters of color without photo ID are more likely to lack transportation, and more likely to live below the poverty line than white voters without a required ID. This makes it extremely difficult—if not impossible—for many people to get to a location that issues photo IDs, even before accounting for other obstacles like taking time off work and being able to afford fees associated with obtaining an ID. We also challenged the “positively identify” provision of HB 19, which places voters at the mercy of poll workers to vote. Indeed, there are reported instances of people who have voted at the same location for decades but could not be “positively identified” by election officials who had just moved to the area. Unfortunately, a federal judge granted summary judgment to the Alabama Secretary of State in January 2018, denying relief to the plaintiffs represented by LDF, and the Eleventh Circuit affirmed this outcome in April 2021.<sup>53</sup>

### ***Alabama Absentee Voting During COVID-19***

On May 1, 2020, in response to the COVID-19 pandemic, LDF filed a lawsuit against Alabama Governor Kay Ivey, Secretary of State John Merrill, and others challenging Alabama’s unduly burdensome absentee voting provisions.<sup>54</sup> Specifically, the suit challenged the requirement that an absentee ballot application be accompanied by a copy of a photo ID (the “Photo ID Requirement”); the requirement that an absentee ballot affidavit be notarized or signed by two witnesses (the “Witness

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<sup>51</sup> Melanie Zanona, *Feds: Closing driver's license offices in Ala. violates civil rights*, The Hill (Dec. 28, 2016) <https://thehill.com/policy/transportation/312055-feds-closing-driver-license-offices-in-alabama-violates-civil-rights>.

<sup>52</sup> *Greater Birmingham Ministries v. Alabama*, <https://www.naacpldf.org/wp-content/uploads/Greater-Birmingham-Ministries-v.-Alabama-Complaint.pdf>.

<sup>53</sup> See *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018), *aff'd sub nom. Greater Birmingham Ministries v. Sec'y of State for Alabama*, 966 F.3d 1202 (11th Cir. 2020), *opinion vacated and superseded sub nom. Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021), and *aff'd sub nom. Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021).

<sup>54</sup> *LDF, SPLC, and ADAP File Federal Lawsuit Challenging Alabama’s Lack of Safe and Accessible Voting During COVID-19 Pandemic*, NAACP Legal Defense and Educ. Fund, Inc. (May 1, 2020), <https://www.naacpldf.org/press-release/ldf-splc-and-adap-file-federal-lawsuit-challenging-alabamas-lack-of-safe-and-accessible-voting-during-covid-19-pandemic/>.

Requirement”); and the Secretary of State’s policy prohibiting curbside voting (the “Curbside Voting Prohibition,” collectively, the “Challenged Provisions”).

In light of the COVID-19 pandemic, LDF alleged the aforementioned provisions would force thousands of Alabamians who were unable to meet the absentee voting requirements to make a choice between voting in person during the July primary runoff, August municipal elections, and November 2020 elections—and thereby risking their health—or forgoing their fundamental right to vote. In June 2020, the district court granted LDF’s request for a preliminary injunction in part, enabling Alabamians to utilize no-excuse absentee voting for the state’s July 14 primary runoff. The State of Alabama then extended the no-excuse policy for the November election. On September 8, 2020, a remote trial began with respect to the witness requirement, ID requirement, and *de facto* ban on curbside voting. On September 30, 2020, the District Court entered a 197-page favorable opinion and granted a permanent injunction against all three provisions challenged by LDF and co-counsel.<sup>55</sup> The injunction was in place for two weeks, during which time Alabama absentee voters were able to apply for absentee ballots without Photo ID or submit absentee ballots without two witness signatures or a notary stamp under the injunction. On October 13, 2020, the Eleventh Circuit stayed the injunction of the Photo ID and Witness Requirements but left in place the injunction of Secretary Merrill’s *de facto* Curbside Voting Ban.<sup>56</sup> On October 21, 2020, the Supreme Court of the United States, by a 5-3 vote, stayed the permanent injunction of the Curbside Voting Ban, over a dissent by Justice Sotomayor, joined by Justices Breyer and Kagan.<sup>57</sup>

### **Attempted Secession in Gardendale, Alabama**

In 2016, the largely white City of Gardendale, Alabama attempted to secede from the more diverse Jefferson County School Board. The Gardendale secession would have effectively transferred Black voters in Gardendale from the County School Board’s election system—in which Black voters have some ability to elect candidates of their choice and some representation—to the jurisdiction of the Gardendale city council’s at-large election system in which Black voters have no

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<sup>55</sup> *Federal Court Rules Alabama Must Take Steps to Better Protect Voters During COVID-19 Pandemic*, American Civil Liberties Union (Sep. 30, 2020), <https://www.aclu.org/press-releases/federal-court-rules-alabama-must-take-steps-better-protect-voters-during-covid-19>.

<sup>56</sup> *SPLC Responds to 11<sup>th</sup> Circuit Decision in Alabama COVID-19 Voting Case*, Southern Poverty Law Center (Oct. 13, 2020), <https://www.splcenter.org/presscenter/splc-responds-11th-circuit-decision-alabama-covid-19-voting-case>.

<sup>57</sup> *Merrill v. People First of Ala.*, <https://www.law.cornell.edu/supremecourt/text/20A67>

ability to elect candidates of their choice and no representation at all.<sup>58</sup> In 2018, the Eleventh Circuit blocked the secession after LDF successfully proved that Gardendale was motivated by racial discrimination.<sup>59</sup> Before *Shelby*, the Department of Justice had used Section 5 to block similar discriminatory school district secessions in Alabama and elsewhere.<sup>60</sup>

### ***Discriminatory Local Electoral Systems in Alabama***

Against the backdrop of statewide and local barriers to registration and voting, Black Alabamians also face electoral structures which minimize their power to elect their preferred candidates to local government.<sup>61</sup> Often times, these structures exist in the form of dilutive electoral methods and redistricting plans that disburse voters of color among many districts or pack them into too few districts.

Since *Shelby County*, LDF has warned officials in at least four local jurisdictions that the at-large aspects of their electoral systems may violate Section 2 of the VRA and potentially also the U.S. Constitution. This includes cases currently in litigation or other active advocacy in which we challenge at-large voting systems that have kept African Americans from electing their representatives of choice to various offices in Pleasant Grove, Madison County, Morgan County.<sup>62</sup> At-large elections can allow 51 percent of voters to control 100 percent of the seats on an elected body, which, in the presence of racially polarized voting and other structures, can dilute a racial minority group's voice in the electoral system. It is no surprise then that for decades congressional, state, and many local officials have been elected by districts.

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<sup>58</sup> *Stout v. Jefferson County Bd. of Educ.*, 250 F. Supp. 3d 1092, 1142, 1183 (N.D. Ala. 2017) (finding that the all-white Gardendale city council had declined to appoint a Black person with more experience to the proposed city board of education and ordering the appointment of a Black member).

<sup>59</sup> *Stout v. Jefferson County Bd. of Educ.*, 882 F. 3d 988 (11th Cir. 2018).

<sup>60</sup> See, e.g., *Lee v. Chambers County Bd. of Educ.*, 849 F. Supp. 1474, 1479 (M.D. Ala. 1994); *Robinson v. Alabama State Dept. of Educ.*, 652 F. Supp. 484, 485-86 (M.D. Ala. 1987) (three judge court).

<sup>61</sup> Nation-wide, racial and ethnic minorities are underrepresented in city government, including offices elected at-large, with Black communities comprising approximately 12% of our country's population, but only 4.3% of city councils and 2% of all mayors. Zoltan Hajnal, *Averting the Next Ferguson: One Simple Solution*, Political Violence at a Glance (Aug. 28, 2014), <http://politicalviolenceataglance.org/2014/08/28/averting-the-next-ferguson-one-simple-solution/>.

<sup>62</sup> NAACP LDF, *LDF Files Complaint Against Pleasant Grove, Alabama Over Voting Rights Act Violations* (Dec. 13, 2018), <https://www.naacpldf.org/files/about-us/Pleasant%20Grove%20letter.pdf>; NAACP LDF, *LDF Sends Letter to Madison County Official Over Voting Rights Concerns* (Jan. 1, 2019), <https://www.naacpldf.org/wp-content/uploads/Ltr-to-Madison-Cty-Cmmn.pdf>; NAACP LDF, *LDF Sends Letter to Alabama County Commission Expressing At-large Voting Concerns* (Feb. 7, 2019), <https://www.naacpldf.org/news/ldf-sends-letter-alabama-county-commission-expressing-large-voting-concerns/>.

## **Florida**

### ***Challenging Legislative Attack on Voting Rights Restoration***

On November 6, 2018, the people of Florida voted to approve a state constitutional amendment, Amendment 4, to restore voting rights to more than 1.4 million people with felony convictions upon the completion of their sentences. The passage of Amendment 4 reflected the understanding that restoring returning citizens' voting rights strengthens public safety, reduces recidivism, and builds a healthy democracy for all.<sup>63</sup> Amendment 4 generated overwhelming bipartisan support, with a supermajority of Florida voters—more than 64 percent<sup>64</sup>—approving the measure, which resulted in the largest expansion of the electorate since Congress passed the Voting Rights Act in 1965. However, that same year, the Florida Legislature enacted SB 7066, a law that, among other requirements, mandated that people with past felony convictions pay all legal financial obligations (“LFOs”) imposed by a court pursuant to a felony conviction before they are eligible to vote, including those LFOs converted to civil obligations, even if they cannot afford to pay.

On June 28, 2019, LDF and other civil rights and good governance groups filed a lawsuit in the U.S. District Court for the Northern District of Florida challenging SB 7066.<sup>65</sup> We alleged that, by conditioning the right to vote on payment of LFOs, SB 7066 violates fundamental fairness and unconstitutionally burdens the right to vote under the Fourteenth Amendment, discriminates on the basis of wealth in violation of the Equal Protection Clause, violates the prohibition against poll taxes enshrined in the Twenty-Fourth Amendment, and imposes punitive sanctions in violation of the Ex Post Facto Clause. We further alleged that SB 7066 is unconstitutionally vague in violation of the Due Process Clause because Florida fails to provide returning citizens with sufficient information to determine whether LFOs continue to disqualify them from voting. Finally, we alleged that SB 7066 chills the voter registration activities of local organizations in violation of the First Amendment and that SB 7066 intentionally discriminates on the basis of race. On October 18, 2019, the district court granted a partial preliminary injunction, ordering that the individual Plaintiffs in the case must be permitted to vote because they have shown they cannot afford to

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<sup>63</sup> Steven Lemongello, *Floridians will vote this fall on restoring voting rights to former felons*, Sun Sentinel (Jan 23, 2018), <https://www.sun-sentinel.com/news/florida/fl-reg-felon-voters-amendment-20180123-story.html>; Steven Bousquest et al., *1.2 Million Floridians Have a Lot Riding on Passage of Amendment 4*, Miami Herald (Nov. 2, 2018), <https://www.miamiherald.com/news/politicsgovernment/state-politics/article221021940.html>.

<sup>64</sup> Tim Mak, *Over 1 Million Florida Felons Win Right To Vote With Amendment 4*, National Public Radio (Nov. 7, 2018), <https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4>.

<sup>65</sup> *Gruver, et al. v. Barton, et al.*, No. 1:19-cv-121 (N.D. Fla. 2019).

pay their legal financial obligations.<sup>66</sup> In May 2020, the district court found SB7066 and its wealth-based hurdles to voting unconstitutional. The decision restored voting rights to of thousands of citizens. The State appealed the decision to the Eleventh Circuit Court of Appeals *en banc* which reversed the district court, effectively denying the voting rights of thousands of people with past felony convictions.

### ***Ongoing Challenge to Florida’s Omnibus Voting Bill (S.B. 90)***

On May 6, 2021, LDF filed a lawsuit on behalf of the Florida State Conference of the NAACP, Disability Rights Florida, and Common Cause against the Florida Secretary of State, challenging multiple provisions in SB 90, a bill signed into law by Governor DeSantis that same day, including: (i) new identification requirements for voters requesting vote-by-mail (“VBM”) ballots; (ii) restrictions and new requirements for standing VBM applications; (iii) limitations on where, when, and how drop boxes can be used; (iv) limitations on third-party VBM ballot return; and (v) a vague and overbroad prohibition on conduct near polling places, including likely criminalizing offering free food, water, and other relief to Florida voters waiting in long lines. This litigation is in progress.

### **Georgia**

#### ***At-Large Voting in Fayette County, Georgia***

In 2015 in Fayette County, Georgia, the County Commission tried to revert to an at-large voting system in a special election to replace a Black Commissioner who had died unexpectedly. LDF won a Section 2 ruling that stopped this change and required the election to use single-member districts, which allowed Black voters to again elect their preferred candidate.<sup>67</sup>

### ***Ongoing Challenge to Georgia’s Omnibus Voting Bill (S.B. 202)***

Since the *Shelby* decision, the State of Georgia has enacted voting restrictions across five major categories studied by the U.S. Commission on Civil Rights: voter identification requirements, documentary proof of citizenship requirements, voter purges, cuts to early voting, and polling place closures or relocations. These barriers have made voting materially more difficult for historically disenfranchised communities, including voters of color, voters with disabilities, older voters, student voters, and voters experiencing poverty.

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<sup>66</sup> P.R. Lockhart, *A controversial Florida law stops some former felons from voting. A judge just blocked part of it.*, Vox.com (Oct. 19, 2019), <https://www.vox.com/policy-and-politics/2019/7/2/20677955/amendment-4-florida-felon-voting-rights-injunction-lawsuits-fines-fees>.

<sup>67</sup> *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm’rs*, 118 F.Supp.3d 1338 (ND Ga. 2015)

Despite these barriers, Georgia voters and Black voters, specifically, turned out in record numbers for the 2020 November General Election and 2021 January Runoff Election. This record participation occurred notwithstanding the global COVID-19 pandemic—a pandemic that has disproportionately harmed Black people. The integrity of the General Election and Runoff Election was repeatedly recognized, including with statements praising Georgia’s election system by its Governor, Secretary of State, and other top election officials.

Two days after the Runoff Election, and a day after the insurrection led by white supremacists, on January 7, 2021, the Georgia House Speaker David Ralston announced the creation of a Special Committee on Election Integrity (“EIC”). LDF, jointly with the Southern Poverty Law Center (“SPLC”), provided oral and written testimony throughout the session to oppose omnibus bills restricting access to the right to vote, arguing that these bills would disproportionately harm low-income and racial minority voters. Despite these concerns, the Georgia General Assembly refused to conduct any racial-impact study of these bills.

On March 17, 2021, with little notice to EIC members, let alone members of the public, an EIC member introduced a substitute bill to Senate Bill 202 (“S.B. 202”), which expanded from three pages to over ninety pages, only hours before a full hearing. With limited opportunity for meaningful engagement and review, the EIC rushed S.B. 202 through additional hearings. A little over a week later, on March 25, 2021, the House and Senate passed S.B. 202, followed by the Governor signing it into law during a closed-door session and days before the end of legislative session.

On March 30, 2021, LDF, along with the American Civil Liberties Union, ACLU of Georgia, SPLC, Wilmer Hale, and Davis Wright Tremaine, filed a lawsuit in the Northern District of Georgia challenging S.B. 202 on behalf of the Sixth District of the African Methodist Episcopal Church, the Georgia Muslim Voter Project, Women Watch Afrika, Latino Community Fund Georgia, and the Delta Sigma Theta Sorority, Inc. Plaintiffs raise the following federal constitutional and statutory voting claims: (1) intentional racial discrimination and discriminatory results under Section 2 of the VRA, (2) intentional racial discrimination under the Fourteenth and Fifteenth Amendments, (3) an unconstitutional burden on the right to vote under the First and Fourteenth Amendments; and (4) an unconstitutional burden on the right to freedom of speech and expression concerning the ban on line relief under the First Amendment. Plaintiffs are challenging S.B. 2020 for discrimination on the basis of disability under Title II of the American Disabilities Act, discrimination on the basis of disability under Section 504 of the Rehabilitation Act of 1973, and a violation of

the Civil Rights Act of 1964’s prohibition on immaterial requirements to voting. This case is now proceeding to the next stages of litigation.

## **Louisiana**

### ***Discriminatory Judicial Districting in Terrebonne Parish, Louisiana***

In 2017, LDF proved that the Louisiana Legislature intentionally maintained at-large elections for the state courts in Terrebonne Parish to prevent the election of a Black judge. Under Section 2 of the VRA and the U.S. Constitution, LDF challenged Louisiana’s use of at-large voting to maintain a racially segregated state court (32nd JDC), which has jurisdiction over Terrebonne Parish.<sup>68</sup> A Black candidate has never been elected as a judge on this court in a contested election. After the initial trial, the court ruled that the at-large electoral scheme for the 32nd JDC “deprives Black voters of the equal opportunity to elect candidates of their choice in violation of Section 2 of the Voting Rights Act of 1965, and it has been maintained for that purpose, in violation of Section 2 and [the Fourteenth and Fifteenth Amendments to the] United States Constitution.”<sup>69</sup>

In early December 2018, the Court entered an order, determining that it would use a special master to help determine the appropriate remedy in this case. In April 2019, the special master issued his findings and recommendations to the Court about the remedial districting plan, and in July 2019, the Court adopted a plan recommended by the special master. Subsequently, the Court issued final judgment and an injunctive order. The next day, the Attorney General filed a notice of appeal. Oral argument before the Fifth Circuit Court of Appeals was held in January 2020. In June 2020, a three-judge panel of the Fifth Circuit reversed the district court’s post-trial favorable decision—which found that plaintiffs clearly established vote dilution through experts who found some of the most stark racially-polarized voting anywhere in the country—and denied LDF’s petition for rehearing *en banc*.

## **Texas**

### ***Discriminatory Voter ID Law***

For years, LDF prosecuted a statewide lawsuit against the State of Texas involving the state’s photo ID law, SB 14—the same law previously blocked by Section

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<sup>68</sup> *Terrebonne Par. Branch NAACP v. Jindal*, 274 F. Supp.3d 395, 462 (MD La. 2017).

<sup>69</sup> *Fifth Circuit Rejects Louisiana’s Attempt to Prematurely Appeal Voting Rights Decision*, NAACP Legal Defense and Educ. Fund, Inc. (Nov. 14, 2017), <https://www.naacpldf.org/press-release/fifth-circuit-rejects-louisianas-attempt-to-prematurely-appeal-voting-rights-decision/>

5 in 2012.<sup>70</sup> SB 14 was widely described as the most restrictive voter ID law in the country as it permitted concealed hand-gun license owners to vote with that ID, a form disproportionately held by white Texans but prohibited the use of student ID, and employee or trial state or federal government-issued IDs in voting. After the State of Texas implemented SB 14 within hours of the *Shelby* decision,<sup>71</sup> LDF and other civil rights advocates challenged the law on behalf of individual voters and organizations, including Black college students, harmed by the strict photo ID law.<sup>72</sup>

In 2014, a federal district court struck down that photo ID law, holding that “SB 14 creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African Americans [i.e., they comprise a disproportionate share of the more than 600,000 registered voters and one million eligible voters who lack the requisite photo ID], and was imposed with an unconstitutional discriminatory purpose,” and that it “constitutes an unconstitutional poll tax.”<sup>73</sup> Following that decision, the Fifth Circuit U.S. Court of Appeals affirmed in 2016 that Texas’s ID law, SB 14, had a discriminatory impact on Black and Hispanic Texans. violated Section 2.<sup>74</sup> On remand, the trial court found that Texas had enacted the law for the purpose of discriminating against voters of color.<sup>75</sup>

Although LDF was ultimately successful in that litigation, in the years after the trial and while the case made its way twice to the 5th Circuit Court of Appeals and back to the trial court, Texas elected numerous candidates to state and federal office including: a U.S. senator, members of the Texas delegation to the U.S. House of Representatives, Governor, Lieutenant Governor, Attorney General, Controller, various statewide Commissioners, Justices of the Texas Supreme Court, state boards of education, state senators, members of the state House, state court trial judges, and over district attorneys.

### ***Discriminatory Early Voting Schedules in Waller County, Texas***

In 2018, prior to Election Day, LDF received reports that students at Prairie View A&M University (“PVAMU”), a historically Black university located in Waller

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<sup>70</sup> *Texas v. Holder*, 888 F.Supp.2d 113, 144-45 (D.D.C. 2012), *vacated and remanded*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2886 (2013).

<sup>71</sup> Ed Pilkington, *Texas rushes ahead with voter ID law after supreme court decision*, The Guardian (June 25, 2013), <https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-courtdecision>.

<sup>72</sup> *Veasey v. Perry*, 71 F. Supp. 3d 627, 693 (S.D. Tex. 2014).

<sup>73</sup> *Id.*

<sup>74</sup> *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

<sup>75</sup> *Veasey v. Abbott*, 249 F. Supp. 3d 868 (S.D. Tex. 2017).

County, Texas, did not have adequate early voting sites or hours, and that county officials refused student requests to provide them. On October 22, 2018, LDF filed a federal lawsuit against officials in Waller County. County officials have long discriminated against Black voters at PVAMU and in the majority-Black City of Prairie View, dating back to at least the early 1970s.<sup>76</sup> During the 2018 election, the County provided fewer early voting opportunities to PVAMU students, as compared to other voters in Waller, despite students' reliance on this means of voting. During the first week of early voting, no polling sites were available anywhere in the City of Prairie View or on campus; in the second week, while Prairie View, where PVAMU is located, provided five early voting days, two of those were off campus at a site inaccessible to many PVAMU students who lack transportation. By contrast, in the majority-white city of Waller, voters had two locations to vote during the first week and, overall, 11 days of early voting. During the second week of early voting, two voting sites were open in Prairie View, but for considerably fewer hours than voting sites in Waller and other areas with larger white populations. On Wednesday, October 24—the eve of the 2018 election—LDF filed a motion for a temporary restraining order (“TRO”) seeking an emergency change to Waller County’s early voting schedule that would include early voting on-campus during the first week of early voting.

Later that same day, county commissioners in Waller County modestly expanded early voting in Prairie View by providing 5 hours of voting at the Prairie View City Hall on Sunday, October 28, and by extending the hours of early voting on the PVAMU campus to 7:00am to 7:00pm on Monday, October 29, through Wednesday, October 31.<sup>77</sup> Consequently, LDF withdrew its TRO request for emergency relief. However, LDF continued to litigate its claims under Section 2 of the Voting Rights Act and the 14th, 15th, and 26th Amendments to the U.S. Constitution on behalf of PVAMU students, who were still denied equal and adequate voting opportunities in the election under the modified plan. In the fall of 2020, LDF and our clients in Prairie View participated in a twelve-day trial for this lawsuit; post-trial briefing was completed in March of this year, and the parties are now awaiting the court’s decision.

### **Additional Representative Voting Rights Litigation**

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<sup>76</sup> *The Walk of Political Engagement*, Prairie View A&M University (Mar. 31, 2017), <https://www.pvamu.edu/1876/2017/03/31/the-walk-of-political-engagement-at-pvamu/>.

<sup>77</sup> *Waller County Modestly Expands Early Voting in Prairie View, LDF’s Suit Still Pending* NAACP Legal Defense and Educ. Fund, Inc. (Oct. 25, 2018), <https://www.naacpldf.org/press-release/waller-county-modestly-expandsearly-voting-prairie-view-ldfs-suit-still-pending-2/>.

In addition to those cases where LDF is specifically involved, over the last few years, we also are aware of numerous states and localities across the country that have implemented laws and practices which impeded and/or discouraged individuals from exercising their right to vote. For example:

In North Dakota, we saw the state implement a law requiring voters to provide IDs with a residential street address, threatening to disenfranchise thousands of Native American people who live on rural reservations where residential addresses are uncommon.<sup>78</sup> Studies commissioned by Native American rights groups who sued to challenge the law revealed that roughly 35 percent of that population did not have an acceptable ID with a residential address.

In Dodge City, Kansas, voting was limited to one polling location, which was outside of town and inaccessible via public transportation. The nearest bus stop was more than a mile away and at times, freight trains in the area block traffic, slowing access to the polls. Dodge City's population is 60 percent Hispanic, and the voter turnout among Latinx voters is lower than the national average.<sup>79</sup>

And, in Wisconsin, the state implemented a law requiring voters to present a current driver's license, passport, or state or military ID to cast a ballot. There were substantial legal challenges to the state's voter ID law; however, aspects of it were allowed to stand for the 2016 election. Post-election surveys and other evidence clearly demonstrate that the law discouraged and/or prevented many people from exercising their right to vote.<sup>80</sup>

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With this sampling of challenges to voting at every stage of the voting process since *Shelby*, we should understand that there are numerous methods of voter suppression and that they are effective and successful in their goal: to confuse, discourage, make burdensome, or deny the right to vote. The intimidation and disenfranchisement of Black voters has always been central to the American story and the nation's attachment to white supremacy. Indeed, the loathsome methods of voter suppression that we see today, are not dissimilar from the methods of the past

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<sup>78</sup> Cheyenne Haslett, *North Dakota Native Americans fight to protect their right to vote after court ruling*, ABC News (Oct. 21, 2018), <https://abcnews.go.com/Politics/native-americans-north-dakota-fight-protect-voting-rights/story?id=58585206>

<sup>79</sup> Kansas City Star Editorial Board, *Voter suppression at its worst: This Kansas town aims to keep people away on Election Day*, The Kansas City Star (Oct. 24, 2018), <https://www.kansascity.com/opinion/editorials/article220341790.html>

<sup>80</sup> Ari Berman, *Rigged: How Voter Suppression Threw Wisconsin to Trump And Possibly Handed Him the Whole Election*, Mother Jones (Nov./Dec. 2017), <https://www.motherjones.com/politics/2017/10/voter-suppression-wisconsin-election-2016/>

in their intent or results. Much of what we see is a modernization of old tactics, a modernization of the poll tax and grandfather clauses. But we also see the same strategies used during the Jim Crow era—such as confusing and ever-changing registration requirements and discriminatory at-large election schemes. What is different from recent decades is that we are operating today without the protection of Section 5 of the VRA—at great costs to our democracy.

### **Limits of Litigation**

As the summary of cases above demonstrates, voting rights litigation can be slow and expensive. The parties often spend millions litigating these cases.<sup>81</sup> The cases take up significant judicial resources.<sup>82</sup> And the average length of Section 2 cases is two to five years.<sup>83</sup> But, in the years during a case’s pendency, thousands—and, in some cases, millions—of voters are effectively disenfranchised. For these reasons, the need for prophylactic legislation is both urgent and acute. Litigation is a blunt instrument. The beauty and innovative genius of Section 5 preclearance review was that it allowed federal authorities to stop voting discrimination *before* it inevitably harmed voters in a variety of federal, state, or local elections.

### **Need for Full Restoration and Enforcement of the Voting Rights Act**

When Congress reauthorized the VRA in 2006, it legislated against the backdrop of an unbroken line of Supreme Court authority holding that the VRA’s preclearance process was a constitutional means for the Congress to ensure the equal right to vote.<sup>84</sup> Despite the devastating effect of the Court’s *Shelby* decision, the Court did not overrule the constitutionality of a measured and properly tailored preclearance provision—nor did it render other such remedies inherently unconstitutional. The Court in *Shelby* held that the VRA’s preclearance coverage formula was unconstitutional because it had not been updated since the 1970s, and therefore was not based on “current conditions.”<sup>85</sup> But the Court’s opinion left

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<sup>81</sup> *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, NAACP Legal Defense and Educ. Fund, Inc. (Feb. 14, 2019), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs02.14.19.pdf>.

<sup>82</sup> Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed).

<sup>83</sup> Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) (“Two to five years is a rough average” for the length of Section 2 lawsuits).

<sup>84</sup> See *Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>85</sup> *Shelby County, Ala. v. Holder*, 570 U.S. 529, 554 (2013).

opportunity for Congress to establish a new preclearance framework responsive to current conditions. Indeed, the Supreme Court found preclearance a “stringent” and “potent” measure, fully available to Congress to deploy as an “extraordinary” tool to confront racial discrimination in elections and voting systems.<sup>86</sup> And, as noted above, Chief Justice Roberts expressly invited Congress to establish such a framework.<sup>87</sup>

In the previous century, the Constitution was amended only twelve times—each time with careful, deliberate consideration. That a Constitutional Amendment was devoted solely to the prohibition of racial discrimination in voting—and that the Amendment expressly delegated enforcement powers to Congress—underscores the extraordinary harm of the denial to vote based on race.<sup>88</sup> Further, the Supreme Court has long recognized that the Fifteenth Amendment’s prohibition on “sophisticated as well as simple-minded modes of discrimination”<sup>89</sup> endows Congress with extraordinary power to “use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”<sup>90</sup> A legislative remedy such as an updated preclearance mechanism would, therefore, be justified as an exercise of this extraordinary power.

Even one election in which the right to vote is restricted, threatened, diluted, denied, impeded, or violated, is one election too many. Violations of our electoral rights are not ordinary harms and must therefore be met with extraordinary remedies. An election conducted under conditions later found to be racially discriminatory has consequences that existing methods of defense cannot combat. The inability of the courts to retroactively correct these wrongs further disenfranchises and threatens to disengage voters who may understandably believe that their vote does not matter if discriminatory voting practices are left unchecked. Racially discriminatory practices in the electoral system have consequences that preclearance can prevent and correct. Preclearance was designed as a unique and powerful intervention to stop discrimination *before* elections take place.

It is not only imperative that Congress restore the VRA, but also that Congress *strengthen* the VRA to better address the ingenious methods that are, and will be, used to suppress the full voting strength of African Americans and people of color.

### **The Need for Known Practices Coverage Protections**

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<sup>86</sup> *Id.* at 545-46.

<sup>87</sup> *Id.* at 557.

<sup>88</sup> U.S. Const. amend. XV.

<sup>89</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 342, (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

<sup>90</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

In addition to a preclearance requirement for states with a history of voting rights violations, a Known Practices Coverage (“KPC”) preclearance framework is necessary to address specific forms of voting discrimination that continue to threaten rights of voters of color. KPC would require preclearance for any voting policies or practices that pose a significant potential for violations of voting rights as demonstrated by broad historical experience. For example, the creation of at-large seats, annexations of suburban populations, and redistricting completed by incumbents all raise concerns when they occur in a jurisdiction that has experienced recent, significant growth of a specific minority population. Importantly, a KPC framework would require federal preclearance of voting practices that are known to correlate with racial or language-based discrimination only in jurisdictions that have a significant racial or language minority citizen voting age population. KPC combines a demographic threshold with the prevalence of specific, known practices of voting rights discrimination.

We urge Congress to take up the Court’s invitation to legislate to enforce the promise of an equal right to vote for all, and to employ the full force of its constitutional authority to protect the American voters from the extraordinary harm of denying or diminishing their right to vote.

### **Proliferation of Suppressive Voting Measures in the States**

Today, we see a repeat of history. Justice Ginsburg, in her *Shelby* dissent, compared efforts to combat voter suppression in the states as similar to “battling the Hydra.”<sup>91</sup> According to Greek mythology, for every head cut off the Hydra, a mythical and monstrous creature, two more would grow in its place.<sup>92</sup> Preclearance was designed to address the Hydra problem—to eliminate adaptive, and unrelenting discriminatory voting practices.

Indeed, the Hydra problem is what we see unfolding in the states. Across the country, a resurgence of Jim Crow-style voter discrimination is targeting voters of color by restricting access to the ballot for Black, Latino, Asian American and Pacific Islander, and Native American communities. According to the Brennan Center, as of March 24<sup>th</sup>, state legislators have introduced over 360 bills with restrictive provisions in 47 states.<sup>93</sup> The states of Georgia, Florida, Iowa, Arkansas, and Utah have already

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<sup>91</sup> *Shelby County*, 570 U.S. at 560 (Ginsburg, J., dissenting)

<sup>92</sup> *Hydra: Greek Mythology*, Britannica.com (last accessed May 24, 2021), <https://www.britannica.com/topic/Hydra-Greek-mythology>

<sup>93</sup> *State Voting Bills Tracker 2021*, Brennan Center for Justice (last updated May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021>.

passed strict voter suppression legislation and several others stand poised to do the same in the coming weeks.<sup>94</sup>

A significant number of the most suppressive voting laws in the states are made possible by the Supreme Court's *Shelby* decision. That decision not only freed covered jurisdictions from their duty to report any changes in voting laws or rules to the federal government but signaled to jurisdictions throughout the country that the federal government would not screen for improper limits, restrictions, and barriers to voting participation.

Voting access left to the whims of state lawmakers has proven that the scourge of voter suppression reaches far beyond the states and jurisdictions previously covered by the VRA. The proliferation of state anti-voting laws across the country demonstrates the urgent need for Congress to bring the VRA's preclearance formula into the modern era, to reinstate federal oversight over discriminatory voting practices, and to strengthen and protect voting rights wherever suppression occurs. States have proven time and time again, that they are incapable of monitoring themselves and federal legislation is needed to protect voters.

## **Conclusion**

Congress has the constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race today just as it did in 1965. The VRA's preclearance process provided a quick, efficient, and non-litigious way of addressing America's pervasive and persistent problem of voting discrimination, and most importantly to address it *before* the harm of disenfranchisement occurred. This Congress should not retreat from establishing a new preclearance framework that reflects the current conditions of the nation.

The VRA was drafted to rid the country of discrimination in voting—not to reduce discrimination to a level tolerable by some and now considered the norm across the country. The loss of the right to vote, or restrictions imposed on ballot access, even if ultimately vindicated, can never be fully remedied. The preclearance framework of the VRA was established expressly to address such harms. It is past time for Congress to fulfill its constitutional duty to the American people by once again taking up the charge of eradicating racial discrimination in voting and by renewing its commitment to protecting and strengthening the fundamental right to vote.

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<sup>94</sup> *Voting Laws Roundup: March 2021*, Brennan Center for Justice (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>.