

**Testimony Submitted *by*
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U.S. House of Representatives,
Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights & Civil Liberties *on*

**Enforcement of the Voting Rights Act
in the State of Texas**

May 3, 2019
Houston, Texas



INTRODUCTION

It is a great honor to testify before this body, the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House of Representatives' Committee on the Judiciary. Thank you for inviting me to share on-the-ground insights about the state of voting rights in Texas.

For my testimony this morning, I draw from my work as President of the Texas Civil Rights Project ("TCRP"),¹ and appear on behalf of that organization. I also bring my experience as Chairwoman of the Texas State Advisory Committee to the U.S. Commission on Civil Rights ("Texas SAC"),² as an adjunct professor of "Election Law and Policy" at the University of Texas School of Law, and from my decade-long career working to advance voting rights and election reform.³

I have been asked to identify voting law changes in Texas that have harmed voters of color and voters who speak a language other than English since the U.S. Supreme Court's 2013 decision in *Shelby County v. Holder* rendered Section 5 of the Voting Rights Act inoperable. That decision lifted preclearance requirements from Texas, permitting our state to enact voting law changes without federal oversight. I understand that other members of my panel will discuss Texas' discriminatory photo ID law and racially gerrymandered statewide maps, laws that were initially rejected by federal courts pursuant to Section 5 but enforced by the State after the *Shelby County* ruling. These discriminatory acts, as documented by voluminous litigation records and factual findings by federal courts, are clear and egregious examples of the need for the protection that Section 5 provided. I thank my fellow panelists for sharing this information.

I focus my testimony elsewhere, on newer state laws and policies that create additional barriers to voting and are almost certainly borne disproportionately by voters of color. Unfortunately, without the preclearance process, the burden of proving this disparate burden falls upon targeted communities themselves, as well as organizations like TCRP that serve Texas communities. Such proof often requires access to data and other information that is held by state actors and can be

¹ We are Texas lawyers for Texas communities, serving the rising movement for equality and justice. Our Voting Rights Program tackles the systemic issues that suppress democratic participation in Texas—from voter registration to the moment when an individual casts their ballot. Through litigation and advocacy, TCRP fights to turn the tide on the Texas' abysmal voting rights record by removing barriers to voter registration and participation, supporting grassroots voter mobilization efforts and opposing new attempts to suppress voting. Learn more at texascivilrightsproject.org.

² Our committee conducted a study of voting rights in Texas in 2018, including an all-day public hearing in Houston in March 2018. Our findings were published in a report entitled *Voting Rights in Texas* available at <https://www.usccr.gov/pubs/2018/07-23-TX-Voting-Rights.pdf>.

³ My curriculum vitae has been submitted to the Subcommittee under separate cover.



onerous and expensive—and sometimes, impossible—for members of the public to access and analyze.

Thus, without preclearance, the full impact of the laws and policies I highlight today is not known. I am confident, however, that the data available to TCRP strongly suggests that these measures would have been subjected to heightened scrutiny by any U.S. Attorney General committed to meaningful enforcement of the Voting Rights Act. It's also clear that, in Section 5's absence, Texas lawmakers failed to undertake any meaningful review of the effect these changes would have on persons of color or, worse yet, undertook the changes *despite* knowing they would have a negatively disparate impact on these communities.

Before we begin, consider an important background fact about Texas: race, age and socioeconomic status are closely correlated. Indeed, the population of Texans under 40 is 35.5% Anglo (meaning, non-Hispanic Caucasian) and 58% Black or Latinx; over 40, those numbers flip to 56.5% Anglo and 38% Black or Latinx. Moreover, the extensive record in the Texas photo ID litigation confirmed that, “African-Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic effects caused by decades of racial discrimination.”⁴ Accordingly, in Texas, voting changes that disparately impact young people or poor people necessarily also disparately impact people of color. A law or policy that may not target persons of color on its face will discriminate against persons of color in fact if it has the effect of suppressing the voting rights of young or poor people.

HARMS FROM RECENT VOTING LAW CHANGES

Since 2017, at least three state law and policy changes have created additional barriers to voting that are almost certainly borne disproportionately by persons of color:

- a 2019 policy targeting naturalized citizens to be purged from the voter registration rolls;
- a 2017 state law eliminating straight ticket voting; *and*
- a 2017 state law creating a new class of election law “conspiracy” crimes, increasing liabilities for Texans engaged in voter registration drives.

Without the oversight imposed by Section 5, these laws and policies were enacted with no meaningful review of their impact. Post-implementation, the voter purge policy was subject to litigation and the State's policy changed due to a court settlement finalized just days ago. The other

⁴ *Veasey v. Perry*, 71 F. Supp. 3d 627, 664 (S.D. Tex. 2014).



two laws remain on the books. Their full effects are just now being realized as affected communities weigh their legal options with the best use of their limited resources.

2019 VOTER PURGE

In Texas, as everywhere, election officials have an obligation to remove voters from the rolls if they have moved, died or are otherwise ineligible, but can only do so based upon a careful, uniform, reliable process. On January 25, 2019, the Texas Secretary of State issued an explosive advisory claiming that there are 95,000 people on the voter rolls who indicated that they were not citizens in paperwork submitted to the department of motor vehicles, and that 58,000 of these individuals subsequently voted in at least one election. The Secretary immediately sent lists of these “fraudulent” voters to Texas counties and the Texas Attorney General for investigation and created a media firestorm, fanned by instant cries of “voter fraud” on social media by the President of the United States, Texas’ Governor, Texas’ Attorney General, and others.



Ken Paxton ✓
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VOTER FRAUD ALERT: The [@TXsecofstate](#) discovered approx 95,000 individuals identified by DPS as non-U.S. citizens have a matching voter registration record in TX, approx 58,000 of whom have voted in TX elections. Any illegal vote deprives Americans of their voice.

2:37 PM - 25 Jan 2019

34,300 Retweets 81,829 Likes



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It became apparent, almost immediately, that the State’s process was deeply flawed and in fact erroneously flagged tens of thousands of naturalized citizens. Nearly 30,000 individuals, for instance, had already proven their citizenship to state agencies. In some counties, such as McLennan County, every name on the Secretary of State’s list proved erroneous, following investigations by county officials. In Harris County, Texas’ largest, roughly 60% of the list was immediately eliminated because the voters had either already proven their citizenship at the department of motor vehicles or had been registered by Harris County officials themselves at naturalization ceremonies.

Litigation ensued within days, including a lawsuit brought by TCRP and other legal advocacy groups on behalf of civic engagement organizations and a targeted voter.⁵ A federal judge quickly halted the attempted purge, describing it as “ham-handed” and as exemplifying “the power of government to intimidate the least powerful among us.”⁶ The court emphasized that the burden was borne by “perfectly legal naturalized Americans” and that “no native born Americans were subjected to such treatment.”⁷

The parties settled on April 26, 2019, less than 90 days after the purge was announced. According to the terms of the settlement, the State will rescind its original advisory announcing the purge effort and agree to a new voter database maintenance process that is much more limited in scope. The State has also agreed to provide and maintain information regarding the implementation of the process, which the plaintiffs will monitor. Texas will pay nearly half a million dollars in attorneys fees and litigation costs.

According to Census data, over 87% of Texas’s naturalized citizens are people of color—specifically, Black, or of Latinx or Asian origin. Large numbers are, of course, language minorities. At best, the State proceeded with a sloppy, “ham-handed” purge effort despite the obvious disparate impact on persons of color. At worse, the disparate impact was a feature of the program, not a bug. Either way, had Section 5 been in effect, Texas would have been forced to publicly grapple with the racially discriminatory effects of this policy *before* it threatened the voting rights of tens of thousands of

⁵ TCRP, ACLU of Texas, the national ACLU Voting Rights Project, Demos, and the Lawyers’ Committee for Civil Rights Under Law filed the lawsuit against Texas Secretary of State David Whitley and Director of Elections Keith Ingram, as well as local elections officials in eight counties, representing Move Texas Civic Fund, Jolt Initiative, the League of Women Voters of Texas and an individual voter. Two separate lawsuits were filed by Texas LULAC and the Campaign Legal Center and by the Mexican American Legal Defense and Education Fund on behalf of additional community organizations and Texas voters. The cases were consolidated as Texas *LULAC v. Whitley*, 5:19-cv-00074.

⁶ Order, *LULAC v. Whitley*, No. 5:19-cv-00074, Dkt. 61 at 1 (Feb. 27, 2019).

⁷ *Id.*

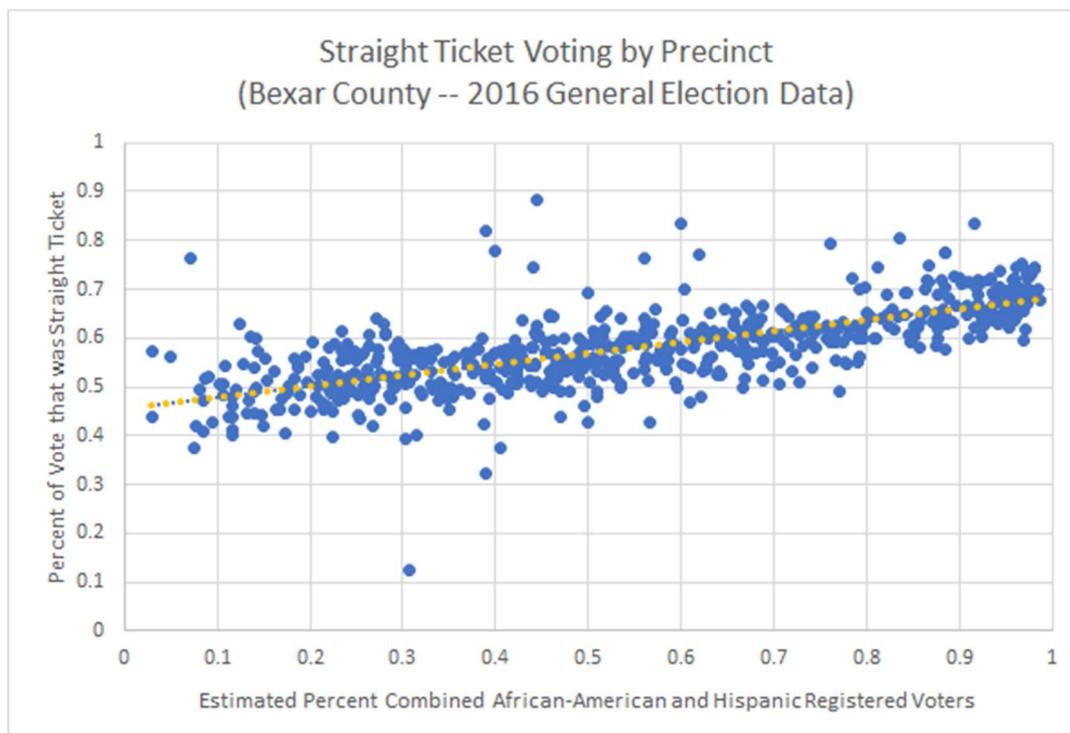


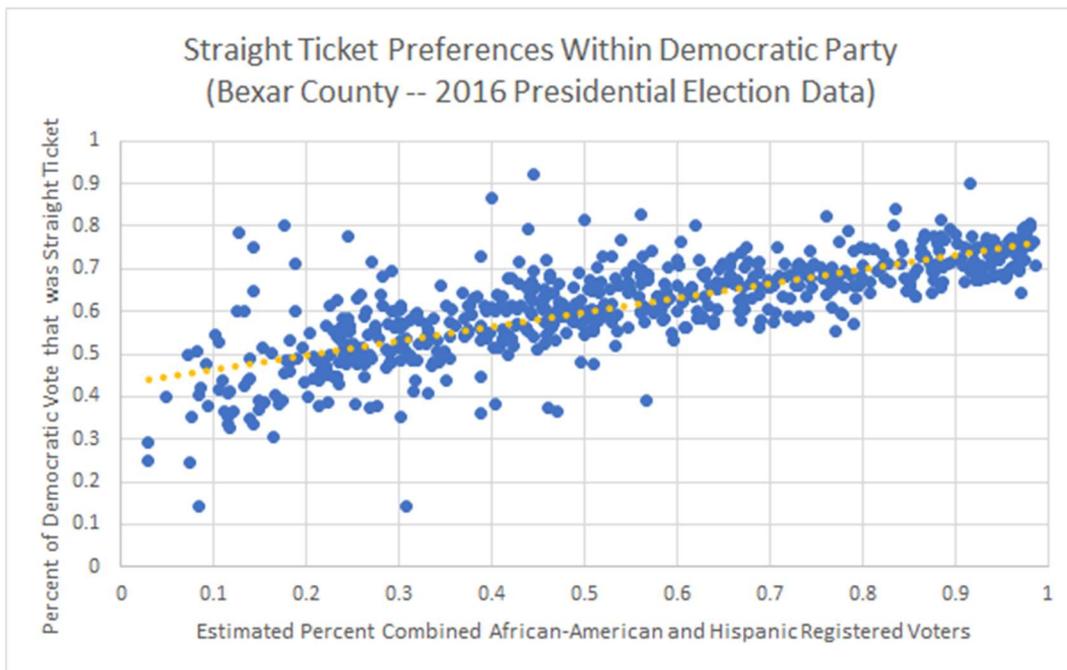
persons of color and sowed fear into immigrant communities. It is hard to imagine that this program would have been precleared.

2017 LAW PROHIBITING STRAIGHT TICKET VOTING

In 2017, the Texas Legislature passed House Bill 25, which eliminated straight ticket voting in Texas and is set to take effect for the first time in the 2020 elections. Although facially neutral, the discriminatory impact of eliminating straight ticket voting is evident from our preliminary analysis of available data from Bexar County (shown below). Accordingly, we believe this law would have had little chance of getting pre-cleared under the pre-*Shelby County* regime.

Our preliminary analysis of voting patterns in Bexar County, home to San Antonio, indicates a strong relationship between race and straight ticket preference. Moreover, this correlation is not simply a product of partisan preference since the relationship appears to grow even stronger when one limits the analysis to voters who voted for the Democratic presidential candidate in the last election. Out of those who voted for the 2016 Democratic candidate, voters in majority Black and Latinx precincts strongly preferred casting straight party tickets, while the majority Anglo precincts tended towards casting individual votes for the candidate.





In certain jurisdictions the practical impact of taking away straight ticket voting is especially pronounced for communities of color. In particular, Harris County, home to Houston, is known for having long ballots given the large number of countywide judicial offices that are in play each cycle. The 2018 ballot, for instance, featured a total of 92 races, including 78 state judicial races. Harris County is also home to the largest non-White population in the state, including the largest Black population in Texas and the second largest Latinx population in the entire nation. Thus, the direct result of eliminating straight ticket voting will be to drastically increase the time it takes for Texas's largest communities of color to cast their votes.

This law was seemingly passed with the hope that voters of color would skip the down-ballot races in urban areas such as Harris County. Regardless of whether that turns out to be true in practice, the Texas Legislature's choice to remove the preferred voting method of voters of color is retrogressive in effect and, accordingly, suspect. Indeed, even the State leadership's purported rationale for the law is questionable. They claimed that eliminating straight-ticket voting forces greater individualized consideration of each candidate, but this logic indicates that voters of color are incapable of making their own well-reasoned voting decisions.

The discriminatory impact of the no-straight-ticket-voting law is precisely what the Voting Rights Act was meant to prevent. But the absence of Section 5 protection allowed the Texas Legislature to freely enact this law, despite its retrogressive effects and suspect rationale. Without federal oversight,



the only recourse to communities of color is expensive litigation under Section 2 of the Voting Rights Act after the law is implemented.

2017 “ORGANIZED ELECTION FRAUD” LAW

Texas consistently boasts some of the lowest voter registration rates in the country, with millions of eligible voters excluded from the rolls. But even worse is that the current electorate does not adequately represent the population. Asian-American and Latinx voters are significantly less likely to be registered than their Anglo peers, and young voters are woefully underrepresented,⁸ translating to an electorate that is older and whiter than Texas’ citizen voting-age population as a whole. Disparate registration rates are at least partially due to laws and policies that create systemic barriers to voter registration for people of color, young people and poor people.

One such set of policies govern third-party voter registration activities, such as voter registration drives. These policies have a disparate impact because it is well established that persons of color and young people are much more likely to register to vote through third-party activities. For instance, in the November 2016 election, Black and Latinx voters were nearly twice as likely as white voters to have registered through a voter registration drive than through other means.⁹ Additionally, more than 10% of all young voters registered to vote at school, resulting (almost certainly) from voter registration drives at those schools.¹⁰

The registration drive laws are complicated, but the upshot is this: it is a crime to register voters in Texas unless you are certified in advance by every Texas county where you register voters. If you mistakenly collect a form from a voter who resides in a county where you have not been deputized, you have “purport[ed] to act as a volunteer deputy registrar” without “effective appointment” and have committed a misdemeanor crime punishable by \$500.¹¹ Once deputized in a county, the State

⁸ For the 2016 general election, only 48% of Texans ages 18 to 24 were registered to vote, while 78% of Texans over the age of 65 were registered. This is seven percentage points lower than the national average rate for eligible voters ages 18-24.

⁹ See U.S. Census Bureau, Voting and Registration in the Election of November 2016 (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>. Note that while these counts include voter registration by other means, voter registration drives are viewed as an increasingly important source of registration, “especially for low-income citizens, students, members of racial and ethnic minority groups, and people with disabilities.” Wendy R. Weiser & Lawrence Borden, Brennan Center for Justice, *Voting Law Changes in 2012* (2011), available at <https://www.brennancenter.org/publication/voting-law-changes-2012>.

¹⁰ *Id.*

¹¹ Tex. Elec. Code § 13.044.



strictly regulates the conduct of “volunteer deputy registrars” and thus, effectively restricts voter registration drives themselves. Freedom summer would have been illegal in Texas.

Beginning just before the *Shelby County* decision, the State has continued to introduce new rules to make the process of organizing voter registration drives increasingly complicated, confusing and wrought with legal liability. As one community organizer memorably put it, Texas law requires “a PhD in voter-obstacle-ology to navigate the system.”¹² As I have detailed elsewhere, the predictable result of this regime has been to significantly chill voter registration drives since 2011, one of the most effective methods to engage historically disenfranchised voters of color and young voters who are new to the process.¹³ No other state has imposed such a punishing web of regulations on voter registration drives.

In 2017, Texas upped the stakes yet again by adding a new layer of criminal penalties in a sweeping law entitled “Engaging in Organized Election Fraud Activity.” Effective September 1, 2017, this law makes it a state jail felony to act with three or more persons in a so-called “vote harvesting organization” which is broadly defined as any collaborative effort that runs afoul of the Texas Election Code, including the laws governing voter registration drives.¹⁴ Violations under the new scheme are punishable by a mandatory minimum sentence of at least 180 days in jail.

Under the 2017 “Organized Election Fraud” law, the Attorney General could prosecute, *for felony crimes*, persons associated with civic engagement groups who are engaged in voter registration activities just because they mistakenly run afoul of complicated and often vague regulations. This might mean, for instance, that community organizers and grassroots volunteers unwittingly collect registration forms from voters who live in counties encompassed by their city but in which they are not deputized.¹⁵ Or perhaps volunteers accidentally deliver registration forms to county officials six

¹² Ari Berman, *Texas’s Voter-Registration Laws Are Straight Out of the Jim Crow Playbook*, THE NATION, Oct. 6, 2016, <https://www.thenation.com/article/texass-voter-registration-laws-are-straight-out-of-the-jim-crow-playbook/>.

¹³ See generally Mimi Marziani & Robert Landicho, *What Starts in Texas Doesn’t Always Stay in Texas: Why Texas’s Systematic Elimination of Grassroots Voter Registration Drives Could Spread*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (May 2018) <https://www.acslaw.org/wp-content/uploads/2018/07/What-Starts-in-Texas.pdf>.

¹⁴ Tex. Elec. Code § 276.011. “Collaboration” is a tenuous term, and may be found even if “participants may not know each other’s identity, membership in the organization may change from time to time, and participants may stand in a candidate-consultant, donor-consultant, consultant-field operative, or other arm’s length relationship in the organization’s operations.”

¹⁵ Dissenting in *Voting for America v. Steen*, 732 F.3d 382 (2013), Court of Appeals Judge W. Eugene Davis, made this point:



days after collection, violating the five-day period prescribed by law, or unwittingly put registration forms in the mail rather than deliver them in person.¹⁶

The full effects of this law are just now being realized. But two facts point to a likely disparate impact on communities of color: *First*, the Texas Attorney General has ramped up prosecutions under the Texas Election Code in recent months, under a new “Election Fraud Unit.”¹⁷ Based on data collected by TCRP, people of color appear to be targeted and are receiving longer sentences. *Second*, as detailed above, restricting third-party registration activity in and of itself disparately impacts communities of color in Texas, given their greater use of drives to become registered to vote.

Thus, the combination of the Attorney General’s newly expanded power, direct attacks on voters of color and the morass governing voter registration drives creates an environment where community registration efforts will almost certainly continue to decrease—the risks are just too high. If even one high-profile case was brought against a civic engagement group, justified or not, registration activity would surely plunge.

At the very least, the preclearance process would have required the State to provide data and other information to ascertain the justifications for the 2017 “Organized Election Fraud” law and the extent to which the law will in fact decrease registration opportunities in communities of color. Without Section 5, communities of color are simply left waiting for the “other shoe” to drop, with little recourse available in the meantime.

As of the date of this testimony, there are multiple pending bills that threaten voting rights in communities of color in the current legislative session but, nonetheless, have significant support from Texas political leaders. Without the deterrent effect of Section 5, at least some of these bills have been advancing in the legislative process with no meaningful inquiry into their likely impact on

[A] VDR must be appointed in every county in which an applicant resides so that a VDR who is appointed in County A yet submits an application for a citizen who resides in County B is subject to criminal prosecution. . . . These rules force the organizations to have their canvassers and managerial staff appointed as VDRs in multiple counties. This is especially burdensome in the larger metropolitan areas where voters may reside in one of several area counties.

¹⁶ Tex. Elec. Code § 13.043.

¹⁷ Ashley Lopez, *Ahead of the 2018 Election, Texas AG Ramps Up Voter Fraud Prosecutions*, NPR.ORG (Oct. 28, 2018), <https://www.npr.org/2018/10/28/661020113/ahead-of-the-2018-election-texas-ag-ramps-up-voter-fraud-prosecutions>.



voters of color.¹⁸ If one of more of these bills pass, once again, expensive, after-the-fact litigation will be the only recourse available for affected communities—depending, of course, on the resources to support such litigation.

If any of these bills significantly advance before the end of the hearing submission period, we will update this testimony accordingly.

I am happy to answer any questions the Subcommittee might have and provide additional information upon request. Once more, thank you for the honor of testifying today.

Respectfully submitted by:

A handwritten signature in black ink, appearing to read "Mimi Murray Digby Marziani".

Mimi Murray Digby Marziani, Esq.
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[REDACTED]

¹⁸ One example is HB 3964, and its companion, SB 1255, which have both passed out of their respective committees in the Texas Legislature and are eligible to be considered by the whole House and Senate any day. These bills would change the methodology governing the locations of Election Day vote centers within a county, pegging the allocation of polling places to the proportion of registered voters in a certain area. But, given the lower registration rates in communities of color, this law would in effect eliminate polling places from communities of color while simultaneously increasing the number of polling places in heavily Anglo areas. TCRP's preliminary analysis, shared with the legislature in written testimony on April 15, 2019, demonstrates the significant, discriminatory impacts associated with the bill's provisions. (Available here: <https://texascivilrightsproject.org/wp-content/uploads/2019/05/TCRP-Testimony-Against-HB-3964.pdf>). If passed, this law would constitute a textbook Section 5 violation.