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On Continuing Challenges to the Voting Rights Act Since *Shelby County v. Holder*  
Before the House Judiciary's Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
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Chairman Cohen, Ranking Member Johnson, Committee Members, thank you for allowing me to address this important hearing today, marking six years since the U.S. Supreme Court issued its decision in *Shelby County v. Holder*, a decision that has dramatically undermined access to full participation in our democracy by effectively negating the core mechanism for preventing voter suppression as enshrined in the 1965 Voting Rights Act. In so doing, the *Shelby* decision created a new channel for the troubling practice of voter suppression, during a time of dramatic demographic change, and thus has permitted the proliferation of laws and practices that seek to stymie a fundamental exercise of citizenship. However, no assault on democracy will ever be limited to its targets. As the franchise is weakened, all citizens feel the effects and even the perpetrators eventually face the consequences of collateral damage—an erosion of our democracy writ large.

I come today because I was raised in Mississippi, where my parents joined the civil rights movement as teenagers and where, in the wake of the Voting Rights Act, they cherished their right to vote and instilled in their six children a deep reverence for the franchise. I came of age in Georgia, where I registered voters in college, served as House Democratic Leader and founder of a voting rights organization, and where I stood for office as the Democratic nominee for Governor in 2018, an election plagued by voter suppression tactics all too common in a post-*Shelby* world.

Jurisdictions formerly covered under Section 5 have raced to reinstate or create new hurdles to voter registration, access to the ballot box, and ballot counting. New states facing changes to their voter composition have likewise taken up this opposition to full citizen participation by implementing rules that, while facially neutral, result in a disturbingly predictable effect on voter access among minority citizens. Among the states, however, Georgia has been one of the most aggressive in leveraging the lack of federal oversight to use both law and policy to actualize voter suppression efforts that target voters of color.

## **I. VOTER REGISTRATION IMPEDIMENTS**

As founder of the New Georgia Project, one of the state's largest voter registration organizations, I learned first-hand how insidious Georgia's post-*Shelby* obstacles to voter registration have become. Our organization conducted voter registration across 159 counties, well aware that for low-propensity voters, this type of in-person registration is most effective. Third-party voter registration is a critical path to engaging citizens of colors in the democratic process, and minorities are twice as likely to register through a voter registration drive than are whites.

In its report, *State Restrictions on Voter Registration Drives*, which focuses on the challenges posed across the country, the Brennan Center highlights research about the importance of third-party voter

registration for racial and ethnic minorities—namely nearly double the likelihood of registration from these efforts.<sup>1</sup> Specifically, “[i]n 2004, while 7.4% of non-Hispanic whites registered with private voter registration drives, 12.7% of Blacks and 12.9% of Hispanics did the same. In 2008, African Americans and Hispanics nationally remained almost twice as likely to register through a voter registration drive as whites. While 5% of non-Hispanic whites registered at private voter registration drives, 11.1% of African-Americans and 9.6% of Hispanics did the same. [In] the 2010 election, 4.4% of non-Hispanic whites registered at private drives, as compared to 7.2% of African-Americans and 8.9% of Hispanics.”

These registration efforts not only create new registrants but also serve to create new and active voters. Research completed by Dr. David Nickerson<sup>2</sup> at the University of Notre Dame sought to understand the impact of drives on voting. To this end, the researchers conducted experiments run in Detroit and Kalamazoo, Michigan and Tampa, Florida, the results of which demonstrate that 20% of low-income citizens who register in a door-to-door drive actually go out and vote. Their findings control for type of election year (municipal, Presidential, midterm) as well as turnout activities, and serve as a baseline to understand what we can expect from a voter registration drive focusing on under-represented groups.

There is no doubt a direct correlation between the effectiveness of such efforts, and the Post-*Shelby* legislation and efforts in states like Georgia, Tennessee, North Carolina, Texas and Florida to impede these activities.

**a. Lack of Transparency—Blackout Periods and Exact Match**

Through our project and in cooperation with other organizations that work to increase registration among communities of color, we tracked the processing of forms, and we proactively attempted to collaborate with the office of the Secretary of State. In response to our efforts, which submitted thousands of verified forms, then-Georgia Secretary of State Brian Kemp, and those he oversaw as the state’s election superintendent, refused to process registration forms in a timely manner.

As a result, we uncovered unpublished internal rules such as the 90-day blackout period during which no voter registration forms were processed and which resulted in untimely delays. Only due to a federal lawsuit in 2017 during a special Congressional election were citizens able to effectively challenge and eliminate this secret policy. Under a fully functional Voting Rights Act, no such period would be permitted without preclearance and transparency.

Due to the unprecedented number of applications submitted from primarily voters of color, we also uncovered the racially discriminatory effect of the “exact match process” that disproportionately captures voters of color. Exact match requires perfect data entry by state employees to secure a proper registration in Georgia. In 2009, under preclearance requirements, the Justice Department summarily rejected exact match as presenting “real,” “substantial,” and “retrogressive” burdens on voters of color.<sup>3</sup>

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<sup>1</sup><http://www.brennancenter.org/sites/default/files/legacy/publications/State%20Restrictions%20on%20Voter%20Registration%20Drives.pdf>

<sup>2</sup> [https://www3.nd.edu/~dnickers/files/papers/Nickerson\\_Registration\\_temp.pdf](https://www3.nd.edu/~dnickers/files/papers/Nickerson_Registration_temp.pdf)

<sup>3</sup> <https://www.justice.gov/crt/voting-determination-letter-58>

Post-*Shelby*, the policy took effect and led to more than 34,000 applications being suspended under the system, including thousands submitted in 2014. Once the use of exact match was uncovered, in 2016, a group of organizations filed suit in federal court. Mr. Kemp agreed to a settlement and processing of those delayed applications. However, in the following state legislative session, another iteration of exact match passed through the Georgia legislature despite his 2016 federal court settlement. This use of exact match led to 53,000 voter registrations being held hostage in 2018, 80 percent of whom were people of color and 70 percent of whom were black voters, who comprise roughly 30 percent of Georgia's eligible voters. In 2018, Georgia officials lost another lawsuit pertaining to exact match.

In the period between 2015-2018, federal courts admonished both blackout periods and multiple iterations of the exact match process; however, absent a robust preclearance process, these remedies came too late for participants in the 2014, 2016 and 2018 state and federal elections, as well as other elections where voters had no notice of these processes.

#### **b. Excessive Voter Purges**

The right to vote begins with being able to get on the rolls, but remaining on the voter rolls has also been implicated by the gutting of the Voting Rights Act. Post-*Shelby*, the former Secretary of State misappropriated practical devices approved to maintain accurate voter files and instead undermined lawful access to the franchise. Under his regime and without the oversight of the Justice Department, facially neutral rules for removing voters who have died or left the state, as demonstrated by tracking voter behavior, have instead become tools for voter purges, where long-time voters find themselves cast from the rolls, forced to prove their rights against an indifferent bureaucracy.

During his tenure, in a state with 6 million voters, the former Secretary of State removed over 1.4 million voters from the rolls. In July 2017, four years free from preclearance scrutiny, he removed more than half-a-million voters from the rolls in a single day, reducing the number of registered voters in Georgia by 8 percent.<sup>4</sup> An estimated 107,000 of these voters were removed through a “use-it-or-lose-it” scheme, under which eligible Georgia voters were designated for removal merely for not having voted in prior elections, something that is a First Amendment right.<sup>5</sup> The process for removal is also shrouded in inefficiencies and challenges, as a number of those removed could demonstrate regular voting patterns.

Of 159 counties in Georgia, 156 counties removed a higher rate of voters from the rolls post-*Shelby*, which resulted in an increase in the number of voters being forced to cast provisional ballots.<sup>6</sup> While the availability of provisional ballots may be seen as a remedy, the operative concern is why the vast majority of counties, with the tacit approval of the Secretary of State, forces citizens to traverse a gauntlet of additional obstacles to exercise a fundamental right.

## **II. OBSTACLES TO BALLOT ACCESS AND BALLOT COUNTING**

As vital as preclearance had been to access to registration, the most pernicious effect of its absence can be found in the very act of casting a vote. Section 5 provided an effective check against hyper-local suppressive tactics that often fly under the radar, like the proposed closing of 7 of 9 polling places in a

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<sup>4</sup> <https://www.apmreports.org/story/2018/10/19/georgia-voter-purge>

<sup>5</sup> *Id.*

<sup>6</sup> [https://www.brennancenter.org/sites/default/files/publications/Purges\\_Growing\\_Threat\\_2018.pdf](https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.pdf)

majority-black South Georgia county last year, or the erroneous institution of “challenge” proceedings against voters of color, including troubling cases in 2015.<sup>7</sup> These groups are forced to scramble considerable resources and organize from a defensive posture. Even in ostensibly positive actions, like in-person early voting, some jurisdictions have opted to locate the sole venue in the police department/judicial complex, where poor relations with law enforcement serve as a chilling effect on engagement. Section 5’s restoration would require a clear-eyed and thoughtful calculus not currently mandated.

Last election cycle, Georgia officials lost a series of lawsuits pertaining to access to the ballot and the counting of votes. Over several days, separate federal courts ruled against policies for rejecting absentee ballots and ballot applications under trivial pretenses, for implementing a haphazard and inconsistent provisional balloting system, and for improperly disallowing access to translators in the polling booth. However, these practices have proliferated since the suspension of Section 5, and while these lawsuits brought remedy to some, thousands more may have faced similar discrimination without the resources or the knowledge to gain relief.

The core value of the Voting Rights Act was to, at last, create equal access to the ballot, irrespective of race, class or partisanship. Yet, by denying the real and present danger posed by those who see voters of color as a threat to be neutralized rather than as fellow citizens to be engaged, *Shelby* has destabilized the whole of our democratic experiment. Rather than a Justice Department that prevents discriminatory voting policies from taking effect in the first place, the Supreme Court created a system of disproportionate impact, one in which justice could prevail in select instances and only after multiple federal courts intervened.

As a result, post-*Shelby*, groups dedicated to expanding the franchise for voters of color instead must traverse an obstacle course of discriminatory voting practices, through resource-intensive litigation and advocacy work often aimed at yet another permutation of the same discriminatory policies like exact match, targeted poll closures or rejected absentee ballots. This anti-voting system has the concomitant effect of harming taxpayers, as voter suppressors nonchalantly expend tax dollars to defend voter suppression in court.

At the end of the 2018 contest, I acknowledged the legal result of an election marred by widespread election irregularities. The rules of the process permitted some dubious actions, ignored unconstitutional behaviors and encouraged an abdication of responsibility by too many charged with the guardianship of this sacred trust. Therefore, I have redoubled my commitment to voting rights through the creation of Fair Fight Action. Fair Fight has filed a federal lawsuit against the Georgia Secretary of State, asking for Georgia’s preclearance requirement to be reinstated under Section 3 of the Voting Rights Act. Our groundbreaking lawsuit involves numerous co-plaintiffs including Ebenezer Baptist Church, the ancestral congregation of the Rev. Dr. Martin Luther King, Jr.

We are hopeful for judicial relief from voter suppression, including the prevention of any future racially discriminatory voting changes. Costly litigation bankrolled by taxpayers should not be necessary, and

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<sup>7</sup> [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf) at 139.

members of Congress from both parties should fulfill their responsibility to protect voters of color in Georgia and across the country.

The currently proposed Voting Rights Advancement Act and Voting Rights Amendment Act represent considerable promise towards restoring the preclearance protections of the original Voting Rights Act, including needed modern-day protections like requiring nationwide preclearance to prohibit known discriminatory practices.<sup>8</sup> I urge Congress to act on them as top priorities.

Thank you again for this opportunity to appear today.

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<sup>8</sup> <https://sewell.house.gov/media-center/press-releases/sewell-leahy-introduce-voting-rights-advancement-act>