

**TESTIMONY OF BRYAN P. TYSON, ESQ.
Partner, Taylor English Duma LLP**

**BEFORE THE U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS & CIVIL LIBERTIES**

Hearing on Legislative Proposals to Strengthen the Voting Rights Act

October 17, 2019

**TESTIMONY OF BRYAN P. TYSON, ESQ.
BEFORE THE U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS & CIVIL LIBERTIES**

**Hearing on Legislative Proposals to Strengthen the Voting Rights Act
October 17, 2019**

INTRODUCTION

Chairman Cohen, Ranking Member Johnson, and members of the Committee, thank you for inviting me to testify today about H.R. 4, the Voting Rights Advancement Act of 2019 (VRAA), one of the legislative proposals to update the Voting Rights Act being considered by the Subcommittee. My name is Bryan Tyson. I am a partner at Taylor English Duma LLP and have worked as an expert and litigator in redistricting and Voting Rights Act litigation for nearly twenty years. My goal today is to share a practitioner's perspective on the proposed VRAA and identify several issues for your consideration.

Although my law firm and I represent a number of governmental clients in Voting Rights Act and election litigation, I am speaking today in my individual, personal capacity based on my own perspective and experience. I am not speaking on behalf of the State of Georgia or any other client.

I. THE VOTING RIGHTS ACT OF 1965.

The Voting Rights Act of 1965 (VRA) is one of the most significant pieces of legislation enacted by Congress to secure the voting rights of minorities across the country. Without the VRA, our nation might not have ever effectively protected the right to vote—our most foundational right—for minority voters.

From 1965 through the Supreme Court’s *Shelby County*¹ decision in 2013, Section 5 required covered jurisdictions to submit any changes in election practices to either the Attorney General or the U.S. District Court for the District of Columbia for preclearance prior to their implementation.² Covered jurisdictions under the VRA included all or part of 16 states. Preclearance was necessary for decades following the enactment of the VRA because of the intentional racial discrimination in which governments of covered jurisdictions were engaging. That intentional conduct was the foundation for a dramatic statute requiring advance federal approval of a state’s actions,³ especially in light of the Constitution’s Elections Clause that gives primary responsibility for elections to the states.⁴

Even after *Shelby County*, the VRA retains significant force. Jurisdictions that engage in intentional racial discrimination can be bailed in under Section 3.⁵ Jurisdictions that dilute minority voting strength in violation of Section 2 face litigation with a strong incentive for plaintiffs: the full recovery of attorney and expert fees.⁶

Given this history, the question for this Committee regarding the VRAA is whether the burdens it seeks to impose will benefit minority voting rights and whether the proposed coverage formula will not be over- or under-inclusive given the types of triggering events contained in it. Answering those questions requires weighing a number of considerations that involve looking back and looking forward.

¹ *Shelby County v. Holder*, 570 U.S. 529, 133 S.Ct. 2612 (2013).

² 52 U.S.C. § 10304.

³ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 334, 86 S. Ct. 803, 822 (1966) (“exceptional conditions” justified VRA); *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211, 129 S. Ct. 2504, 2516 (2009) (recognizing “extraordinary” nature of preclearance).

⁴ U.S. CONST., art. I, § 4, cl. 1.

⁵ 52 U.S.C. § 10302(c).

⁶ 52 U.S.C. § 10301; 10310(e).

A. Burden of preclearance

I'll begin with the nature of preclearance submissions. Contrary to what some may believe, preclearance submissions are not simple documents. They are complicated and difficult to prepare. The Department of Justice required the following information for *each* submission:

1. A copy of the document embodying the proposed change affecting voting.
2. A copy of the document showing the state of the law, regulation, or practice prior to the proposed change.
3. A statement of the difference between existing law and the proposed change.
4. The contact information for the individual making the submission.
5. The name of the jurisdiction responsible for the change.
6. The identification of the body or person responsible for the change.
7. The statutory or other authority that allows the jurisdiction to decide to undertake the change, along with a description of the procedures required.
8. The date of the adoption of the change.
9. The date the change is to take effect.
10. An affirmation that the change has not yet been enforced or administered.
11. An explanation of the scope of the change.
12. A statement of the reasons for the change.
13. A statement of the anticipated effect of the change on minority groups.
14. A statement of any past or pending litigation involving the change.
15. A statement that the prior practice has been precleared or explaining why it is not subject to preclearance.

16. Any other information required by the Attorney General.⁷

The Department of Justice also includes a list of suggested supplemental information that jurisdictions would be wise to submit with preclearance submissions:

1. Demographic information, including:
 - a. Total and voting-age population of the affected area.
 - b. Registered voters for the affected area by race and language group.
 - c. Estimates of population by race and language group made in connection with the change.
2. Maps showing:
 - a. The prior and new boundaries of the voting unit or units.
 - b. The prior and new boundaries of voting precincts.
 - c. The location of racial and language minority groups.
 - d. Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units.
 - e. The location of prior and new polling places.
 - f. The location of prior and new voter registration sites.
3. Election returns showing:
 - a. The name of each candidate.
 - b. The race or language group of each candidate, if known.
 - c. The position sought by each candidate.
 - d. The number of votes received by each candidate, by voting precinct.
 - e. The outcome of each contest.

⁷ 28 C.F.R. § 51.27.

- f. The number of registered voters for the last 10 years, by race and language group, for each voting precinct for which election returns are furnished.
- 4. Public notices that show the public had an opportunity to participate including:
 - a. Copies of newspaper articles discussing the proposed change.
 - b. Copies of public notices that describe the proposed change and invite public comment or participation in hearings and statements regarding where such public notices appeared (e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups).
 - c. Minutes or accounts of public hearings concerning the proposed change.
 - d. Statements, speeches, and other public communications concerning the proposed change.
 - e. Copies of comments from the general public.
 - f. Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.
- 5. For annexations:
 - a. The present and expected future use of the annexed land (e.g., garden apartments, industrial park).
 - b. An estimate of the expected population, by race and language group, when anticipated development, if any, is completed.
 - c. A statement that all prior annexations subject to the preclearance requirement have been submitted for review, or a statement that identifies

all annexations subject to the preclearance requirement that have not been submitted for review.⁸

And all of the required and suggested information is just for a *single* preclearance submission—which included every change in a “voting practice,” meaning everything from moving a polling location from one public building to another public building nearby to statewide redistricting plans.

As an example of these challenges, one county in Georgia had used a school building as a polling place for years. The school was undergoing renovations over the summer, but school officials had assured the election officials that the renovations would be complete in time for the next election. But shortly before the election, the school officials notified the election staff that the school would not be ready in time. We prepared an emergency preclearance submission to move the polling place from the school undergoing renovations to another school that was right next door and had to include all of the above information. Failing to obtain preclearance ahead of the election would have meant the jurisdiction was subject to an enforcement action (including payment of the plaintiffs’ attorney fees)⁹ and was ineligible for bailout because it enforced a voting change that had not been precleared.¹⁰

The burden on jurisdictions is significant because not only must the jurisdiction provide all of this information, it must do so to prove a negative. Each submission had to show that the change would *not* cause a retrogression in the position of minority voters in order to receive preclearance. Failure to submit sufficient information would lead to a “More Information Request” or a rejection of the request for preclearance. This burden was

⁸ 28 C.F.R. § 51.28.

⁹ 52 U.S.C. § 10303.

¹⁰ 52 U.S.C. § 10303(a)(1)(D).

necessary for a State or a political subdivision to obtain advance *federal* approval of a proposed voting change adopted by local policymakers.

B. Past concerns regarding partisan administration.

While necessary in the 1960s and through the 1980s, concerns about partisan administration of the Voting Rights Act in Georgia began to grow in the 1990s. Georgia Democrats in the 1990s were concerned about the “Bush Justice Department” and its rejection of Democratic maps. Georgia Republicans in the 2011 cycle were equally concerned about the “Obama Justice Department.”

The men and women of the Voting Section are professionals who are deeply committed to their work. But concerns about partisan administration influenced how jurisdictions approached preclearance in 2011 cycle. For example, Georgia sought preclearance of its 2011 redistricting maps on both statutory tracks simultaneously: filing a declaratory judgment action seeking preclearance in the D.C. District Court and filing for administrative preclearance with the Attorney General.¹¹ The lawsuit included an alternative claim: if preclearance was not granted, then the formula imposing preclearance on Georgia was unconstitutional.¹² Texas used a similar strategy when seeking preclearance of its photo identification requirement for voting.¹³

¹¹ *Georgia v. Holder*, Case No. 1:11-CV-01788 (D. D.C.).

¹² *Id.*, Complaint at pp. 19-25 (October 6, 2011) available at <http://redistricting.lls.edu/files/GA%20preclear%2020111006%20complaint.pdf>

¹³ *Texas v. Holder*, 888 F. Supp. 2d 113, 117 (D.D.C. 2012) vacated 570 U.S. 928 (2013).

II. H.R. 4 OVERVIEW.

The Committee is considering the VRAA, which would create a new formula to determine preclearance coverage, replacing the formula that was struck down in *Shelby County*. The proposed formula would cover any State (entirely) in which:

- 15 or more voting rights violations occurred in the State during the previous 25 calendar years; or
- 10 or more voting rights violations occurred in the State during the previous 25 calendar years, at least one of which was committed by the State itself (as opposed to a political subdivision within the State).¹⁴

The formula likewise covers any political subdivision where three or more “voting rights violations” occur in a 25-year period.¹⁵

The VRAA’s definition of “voting rights violation” includes five distinct types of events:

1. A final judgment by a court determining that there has been “a denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group, in violation of the 14th or 15th Amendment” anywhere within the State or one of its subdivisions.
2. A final judgment by a court determining that “a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting was imposed or applied or would have been imposed or applied anywhere within the State or subdivision in a manner that resulted or would have resulted in a

¹⁴ VRAA, Sec. 3(b)(1)(A).

¹⁵ VRAA, Sec. 3(b)(1)(B).

denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group, in violation of subsection (e) or (f), or section 2 or 203” of the Act.

3. A final judgment of a court denying a request for preclearance of a voting change in the State or any political subdivision.
4. An objection by the Attorney General to any voting change within the State or any political subdivision.
5. A consent decree or settlement that resulted in the alternation or abandonment of a voting practice that was challenged as a denial or abridgment of the right to vote on account of race, color, or membership in a language minority group anywhere in the State.

My testimony will focus primarily on the coverage formula proposed in the VRAA and its likely unintended consequences from the standpoint of someone who has prepared preclearance submissions and litigated voting cases. There are significant constitutional and practical problems with the provisions of Sec. 4A of the VRAA that would apply preclearance to all States and political subdivisions for designated categories of voting changes, but those problems are not the focus of my testimony today.

III. CONCERNS ABOUT FORMULA TO DETERMINE PRECLEARANCE.

The proposed formula raises several immediate concerns for me as a litigator involving its application, especially because the proposed formula opens the door to partisan administration of the VRA. The Subcommittee should ensure that any version of the VRAA does not create opportunities for the political abuse of the VRA to the detriment of its protections for minority voters.

A. Georgia lacks control over counties and other political subdivisions.

The first concern with the proposed formula is the ability of counties and political subdivisions in a State to force the state into preclearance coverage without any affirmative action on the State's part. Georgia has 159 counties. The proposed formula would make the State of Georgia accountable for the actions of all of its counties—in fact, if fewer than 10% of counties in the State of Georgia settled a single voting-rights case over 25 years, the entire state would be covered even if the State itself had no “voting rights violations” at all during the period in question

While the Georgia Secretary of State is identified as the chief elections official for purposes of the Help America Vote Act (HAVA), his responsibilities do not encompass the entire administration of elections. O.C.G.A. § 21-2-50 enumerates the statutory authority of the Secretary, and none of the 15 enumerated duties gives the Secretary control over counties and election superintendents. The Secretary must provide training to county elections officials (O.C.G.A. § 21-2-50(11)), but he does not watch them process voter registration applications, count ballots, administer provisional ballots, or control how local officials undertake those activities. The Secretary must maintain the official list of registered voters (O.C.G.A. § 21-2-50(a)(14)), but he does not enter information into the voter registration system; local voter registrars do. Similarly, the State Election Board's statutory duties are set forth in O.C.G.A. § 21-2-31, which also does not give it control over county officials. The Georgia Election Code is equally clear that the duties of administering and conducting elections fall onto local superintendents who “instruct poll officers and others in their duties” and “select and equip polling places.” O.C.G.A. § 21-2-70.

As a result of the current state of Georgia law, the Secretary of State and State Election Board do not control and cannot directly prevent a local official(s) from (1) closing polling places; (2) not distributing provisional ballots; (3) not allocating sufficient resources to polling places; (4) processing absentee ballots; or (5) improperly entering information for voter registration. All of these are county functions as a matter of law—not the responsibility of the State. O.C.G.A. §§ 21-2-31, 21-2-50.

But despite these statutory limitations, under the proposed VRAA formula, Georgia counties and political subdivisions can engage in behaviors that may garner objections from the Attorney General or result in litigation that will later bind the *entire* State, even if the State has absolutely nothing to do with a problematic voting practice. This is a far cry from the intentional discrimination that triggered the preclearance concept in 1965. Stated differently, the State could be punished for the bad behavior of one or more of its counties and political subdivisions over which the State has no control.

The lack of control over jurisdictions also eliminates the effectiveness of the bailout provisions of Section 4 of the VRA¹⁶ as a check on the coverage formula. To be entitled to bailout, a jurisdiction must demonstrate that “all governmental units within its territory” have perfectly complied with the preclearance requirements during the previous ten years.¹⁷ Given the lack of operational control, that is a nearly impossible standard to meet.

Prior to *Shelby County*, a small county with little minority population asked our firm about seeking a bailout from preclearance under Section 4. Like the relationship of the State and counties, counties in Georgia do not control the cities within their boundaries. The

¹⁶ 52 U.S.C. § 10303(a).

¹⁷ *Id.* at (a)(1)(D).

county had several cities within it and we served open-records requests on the cities for their last ten years of preclearance records to attempt to meet the statutory requirements. The struggle to obtain those records and affirmatively demonstrate that every voting change had been precleared ultimately led the county to abandon its efforts to seek bailout.

Similar problems will remain with the new proposed formula. A jurisdiction seeking bailout because it was improperly covered by the proposed coverage formula has to make an affirmative showing of compliance that will be nearly impossible if it does not control the “governmental units within its territory.” The proposed formula should not pull entire states under preclearance due to the actions of jurisdictions over whom they exercise no control.

B. Local jurisdictions tend to be more likely to settle voting cases than fight them due to budget constraints.

The VRAA’s inclusion of consent decrees and settlements as a “voting rights violation” will also create significant problems. Many local jurisdictions lack the political will and financial resources to fight a voting-rights lawsuit, even if they have a reasonable defense. We are far from the days of Mississippi Governor Ross Barnett, who could triumphantly proclaim his resistance to integrating Ole Miss and garner a political benefit from that stand. Today, a jurisdiction being sued for voting discrimination is viewed as a very negative event.

When they are sued, local-government officials want to know the trajectory of the lawsuit and their potential exposure. As a practitioner, I have to immediately advise them of the potential attorney and expert fees they will have to pay if unsuccessful in their defense of the lawsuit. For a small county (even if they have a strong argument against the allegations in the lawsuit), the risk of paying the other side’s fees is often too great to pursue a defense.

That is especially true when voting cases could take several years to reach a favorable result for a jurisdiction.

Local governments tend to be on one of two extremes when it comes to voting litigation. First, many local governments will quickly settle voting lawsuits because of the potential cost and the negative publicity. For example, in 2006, the U.S. Department of Justice sued Long County, Georgia over challenges to Latino citizens' right to vote.¹⁸ Two days later, the parties agreed to a consent decree that would govern Long County's practices related to voters whose eligibility was challenged.¹⁹ The quick agreement is a dramatic contrast to the sustained resistance of local officials that led to the adoption of the original preclearance provisions in 1965. An immediate settlement within two days of a Voting Rights Act lawsuit in 2006 demonstrates a readiness to comply with the law, not resistance to it. Despite this fact and the cooperation of local officials, the Long County settlement would be considered a "voting rights violation" counted against the State of Georgia until the year 2031, 66 years after the VRA was first adopted.

Second, local governments with a budget to advance reasonable defenses against Voting Rights Act lawsuits may fight the lawsuit but ultimately still find the costs to be too much. For example, Fayette County (a relatively wealthy county close to the City of Atlanta) was sued in 2011 regarding its long-time at-large system of electing county

¹⁸ Complaint, *U.S. v. Long County, Ga.*, Case No. 2:06-cv-00040-AAA (S.D. Ga. February 8, 2006) available at

https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/long_comp.pdf

¹⁹ Consent Decree, *U.S. v. Long County, Ga.*, Case No. 2:06-cv-00040-AAA (S.D. Ga. February 10, 2006) available at

https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/long_cd.pdf

commissioners.²⁰ The key question of that case involved the interaction of the constitutional limitations against racial gerrymandering versus the requirements of Section 2 of the Voting Rights Act to create new majority-minority districts because of African-American population growth.²¹ That suit dragged on for more than five years (including a trip to the Eleventh Circuit²²) before finally settling with the payment to the plaintiffs of hundreds of thousands of dollars in attorney fees.²³ The settlement ultimately left one at-large district in place but—despite the carefully negotiated solution agreeable to all sides—would still be considered by the VRAA as a “voting rights violation” attributable to the State of Georgia for purposes of preclearance coverage.

In both examples, local officials were trying their best to do what was right. Current voting cases are nothing like the resistance encountered by federal officials seeking to enforce voting rights in the 1960s and 1970s. It is a rare case today where officials systematically work to injure minority voting rights. All local election officials with whom I have worked are motivated to run elections properly and in accordance with the law. They take extremely personally any allegation that they are working to disenfranchise any voter.

There will be further unintended effects of making settlements a trigger for preclearance coverage. Groups interested in voting access issues are incentivized to sue

²⁰ Complaint, *Ga. State Conf. of the NAACP v. Fayette County Bd. of Commissioners*, Case No. 3:11-cv-123-TCB (N.D. Ga. August 9, 2011).

²¹ See discussion in preliminary-injunction order, *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 950 F. Supp. 2d 1294, 1304-1308 (N.D. Ga. 2013).

²² *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336 (11th Cir. 2015).

²³ Consent Order (Doc. 289), *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, Case No. 3:11-cv-123-TCB (N.D. Ga. January 28, 2016) (settling Board of Education claims); Consent Motion (Doc. 305), *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, Case No. 3:11-cv-123-TCB (N.D. Ga. September 2, 2016) (settling Board of Commissioner claims).

rather than work with local officials to correct what they see as problems, because they now have a method to force jurisdictions under preclearance. Making settlements a trigger for coverage also removes incentives for local officials to settle meritorious litigation involving voting because of the long-term effect of those settlements. And the fact that those settlements may bind the state *for the next 25 years* creates additional incentives for states to step in to defend local governments, potentially creating a significant burden on the courts with continued litigation of cases that could otherwise be easily settled.

I would urge the Subcommittee to remove the language about settlements from the VRAA, or at the very least, modify the language to take into account the nature and extent of the settlement versus the fact of the settlement itself.

C. The coverage formula in the VRAA raises the distinct possibility of politicized enforcement of preclearance.

The prior preclearance regime focused on the evil still used in Section 3(c)'s bail-in provisions: intentional discrimination. The targeted efforts of election officials to stop minorities from registering and voting, driven by racial animus, was the basis for the "extraordinary circumstances" that made the preclearance process constitutionally valid for decades.

That focus on intentional discrimination is completely upended by the VRAA. The revised bail-in provisions would give federal courts the authority to bring a jurisdiction under preclearance under *any* violation of Section 2's vote dilution provisions, which can often be unintentional or the result of changing population demographics.²⁴ That is a

²⁴ VRAA, Sec. 2(a)-(b).

dramatic change in federal law and significantly raises the stake for every jurisdiction litigating a Section 2 case.

Moreover, because the VRAA defines a “voting rights violation” as an unsuccessful application for preclearance to the Attorney General or a federal court,²⁵ jurisdictions that simply do not provide sufficient data can find themselves on the hook for preclearance. Because jurisdictions must prove the lack of discrimination in their preclearance submission, allowing a rejection *for any reason* to constitute a voting rights violation grants significant latitude to the Attorney General to force jurisdictions under preclearance by rejecting applications for preclearance. At the very least, the VRAA should only include objections by the Attorney General for grounds other than a lack of information as a triggering event.

But the inclusion of settlements as a “voting rights violation” is the most dangerous provision that opens the door to political application of the VRA. Plaintiff groups or an Attorney General can strategically file lawsuits against small political subdivisions to force settlements that count against a jurisdiction for purposes of preclearance, especially as the 25-year window is approaching. As discussed above, the pressures on elected officials to settle VRA cases is often significant and groups can target particular political subdivisions within states, sue them, and force settlements that then could place jurisdictions under preclearance for the next 25 years. If the Subcommittee is going to proceed with the VRAA, it should at the very least require a finding of intentional discrimination or other changes that would avoid the high likelihood that politics could become a key driver in litigation under the VRAA.

²⁵ VRAA, Sec. 4(b)(3)(C)-(D).

D. The continued politicization of voting litigation adds to concerns about the political use of the VRAA.

The broad definition of “voting rights violations” also raises significant concerns about future political abuse of the VRA because of the current partisan use of litigation and arguments about voting practices. Ignoring the oft-quoted saying, “the plural of anecdote is not data,” today’s voting litigation is often highly organized along partisan lines, frequently combining a variety of scattered events in an attempt to utilize the federal courts to control elections in states. These types of political efforts to obtain federal-court (and federal government) oversight of state election processes will be heightened by the VRAA. Because settlements of any case involving voting are included as “voting rights violations,” political parties or other interested groups can strategically use litigation—such as the litigation filed in Georgia following the 2018 elections—to bring entire states back under preclearance.

Many election cases are often settled before reaching the merits stage of the litigation. The settlement then becomes the basis for further partisan attacks on the electoral system of a state as “voter suppression” that makes a compelling political story regardless of whether the facts are true. Unlike the crisis situation across the covered states in 1965, complaints about election administration today tend to involve the collection of scattered stories woven into a partisan narrative that is contrary to the data on the election as a whole.

Georgia was accused of massive voter suppression during the 2018 elections. Claims alleged that Georgia election officials held up over 50,000 voter registration applications, closed polling places, and targeted minority voters with overly restrictive database-matching processes. But the data show a dramatically different picture. In 2018:

- Georgia had a record number of registered voters.²⁶
- Georgia had record voter turnout for a midterm election with 3.9 million voters in 2018 that almost matched the total number of voters who voted in the 2016 presidential election (4 million). The last midterm election in 2014 had approximately 2.5 million voters.²⁷
- The voting eligible population turnout rate for 2018 was 55%, significantly higher than the 2014 midterm (38.6%) and the 2010 midterm (40.6%).²⁸
- In 2018, African-American voter turnout increased 32.5% compared to the 2014 midterm.²⁹
- Hispanic voter turnout increased 97.7% over the 2014 midterm.³⁰
- Asian-American voter turnout increased 98.2% over the 2014 midterm.³¹

Georgia offers automated voter registration, no-excuse absentee voting, and at least three weeks of in-person advance voting—and all of those practices were in place for the 2016 and 2018 elections.³² The Brennan Center for Justice identified Georgia’s automated voter

²⁶ See http://sos.ga.gov/index.php/Elections/current_and_past_elections_results (last visited October 14, 2019).

²⁷ *Id.*

²⁸ See <http://www.electproject.org/2018g> (last visited October 14, 2019).

²⁹ See http://sos.ga.gov/index.php/Elections/voter_turn_out_by_demographics (last visited October 14, 2019).

³⁰ *Id.*

³¹ *Id.*

³² See History of AVR & Implementation Dates. *Brennan Center for Justice*. <https://www.brennancenter.org/analysis/history-avr-implementation-dates> (last visited October 14, 2019). See also State Laws Governing Early Voting, *National Conference of State Legislatures*, <http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx> (last visited October 14, 2019) and Absentee and Early Voting, *National Conference of State Legislatures*, <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> (last visited October 14, 2019).

registration program as the most successful in the country, almost doubling the rate of voter registration.³³

According to the *Election Administration and Voting Survey 2018 Comprehensive Report* (the “EAVS Report”), Georgia is the top state in the country for voter registration through its driver services department and the sixth in overall voter registration.³⁴ In 2018, significantly fewer absentee ballots were rejected than in previous years (7,512 in 2018 vs. 18,266 and 13,677 in 2016 and 2014, respectively).³⁵ Further, comparing the number of rejected absentee ballots to the overall ballots cast, the measure preferred by the Massachusetts Institute for Technology Election Lab, Georgia’s absentee ballot rejection rate decreased by 40% from 2016 to 2018, from 0.33% to 0.199%.³⁶

The EAVS report also showed that, in 2018, Georgia counted a higher percentage of provisional ballots compared to previous elections: 55% of provisional ballots were ultimately counted, compared with 45% in the 2016 election.³⁷ Voters cast more provisional ballots in 2018 than in 2016 (21,600 total provisional ballots cast in 2018 v. 16,739 in

³³ Morris, Kevin and Peter Dunphy, AVR Impact on State Voter Registration, *Brennan Center for Justice* (April 2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_AVR_Impact_State_Voter_Registration.pdf (last visited October 14, 2019).

³⁴ U.S. Election Assistance Commission, *Election Administration and Voting Survey 2018 Comprehensive Report* at 56, 64 (June 2019) available at https://www.eac.gov/assets/1/6/2018_EAVS_Report.pdf These findings are also consistent with an analysis by FiveThirtyEight, which found Georgia registered and updated more voters than any other state using automated voter registration. Nathaniel Rakich, *What Happened When 2.2 Million People Were Automatically Registered to Vote*, FiveThirtyEight.com (October 10, 2019), <https://fivethirtyeight.com/features/what-happened-when-2-2-million-people-were-automatically-registered-to-vote/>

³⁵ See the 2018, 2016, and 2014 EAVS reports.

³⁶ See 2018 EAVS Report. See also MIT Election Lab Election Performance Index, <https://elections.mit.edu/#state-GA> (last visited on October 14, 2019).

³⁷ 2018 EAVS Report at 33; 2016 EAVS Report

2016),³⁸ but almost all of the increase in provisional ballots (4,793 of the 4,861 increase from 2016) was due to registered voters voting in the wrong precinct in their county.³⁹

While some organizations claim a dramatic contraction of voting rights in Georgia after *Shelby County*, Georgia has actually expanded early in-person voting after that decision. Most Georgia counties provide Sunday voting and add additional weekend voting days beyond what is required by statute.

Georgia has continued to innovate and expand its election laws as recently as earlier this year. During an update of election laws passed in the 2019 legislative session, Georgia took its existing, precleared HAVA database-matching process for new voters and ensured that all voters would be immediately placed into “active” status even if they do not match the database check so long as they produce one of the forms of identification required by HAVA for first-time registrants.⁴⁰ Georgia’s precleared voter-list maintenance process that previously allowed voters to be removed from the voting rolls after six years was changed to a more expansive law, not allowing removal until almost 10 years—matching the renewal period for state driver’s licenses to ensure that updates would be included in the automated-voter-registration process.⁴¹ Georgia also restricted counties from changing polling places within 30-60 days prior to an election.⁴²

The data tell a different story from the political narrative. To avoid the partisan usage of the VRA, the Subcommittee should recognize government officials’ willingness and

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ O.C.G.A. § 21-2-220.1 as amended by 2019 Ga. Laws Act 24 (H.B. 316); O.C.G.A. § 21-2-417(c).

⁴¹ O.C.G.A. § 21-2-234 as amended by 2019 Ga. Laws Act 24 (H.B. 316).

⁴² O.C.G.A. § 21-2-265(f) as amended by 2019 Ga. Laws Act 24 (H.B. 316).

urgency to settle cases involving voting rights so that it can make changes. The decisions regarding enforcement of the VRA should be driven by data, not by partisan considerations.

IV. CONCLUSION.

Protecting voting rights is critically important. But the VRAA will ultimately undermine the purposes of the VRA. It includes a number of provisions that will adversely affect the ability of states and local jurisdiction to effectively operate elections and opens the door to the partisan use of legislation designed to protect voting rights.

The Subcommittee should strongly consider amending the legislation to address intentional discrimination, but at the very least remove settlements as a triggering event, recognizing that extraordinary circumstances must be required to justify the massive federal intervention of preclearance.