



LAWYERS' COMMITTEE FOR  
**CIVIL RIGHTS**  
U N D E R L A W

TESTIMONY OF EZRA D. ROSENBERG  
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LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON THE CONSTITUTION,  
CIVIL RIGHTS, AND CIVIL LIBERTIES  
HEARING ON  
"THE IMPLICATIONS OF *BRNOVICH V. DEMOCRATIC NATIONAL  
COMMITTEE* AND POTENTIAL LEGISLATIVE RESPONSES"  
JULY 16, 2021

## I. Introduction

Chair Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties. My name is Ezra Rosenberg and I am the Co-Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for giving me the opportunity to testify today regarding the consequences for voting rights flowing from the recent decision of the United States Supreme Court in *Brnovich v. Democratic National Committee*,<sup>1</sup> and the potential legislative responses to that decision.

Racial discrimination in voting diminishes our democracy. The Voting Rights Act of 1965 (the "Act" or the "VRA"), and particularly Section 2 and Section 5, have been indispensable tools in the fight against such discrimination. Section 5 has already been effectively eviscerated by the Supreme Court's decision in *Shelby County v. Holder*.<sup>2</sup> In my view, the *Brnovich* opinion, while not gutting Section 2, makes it unnecessarily more difficult for plaintiffs to bring Section 2 vote denial "results" cases, running directly counter to Congress' intent in first enacting the Act in 1965, and then in broadening the scope of Section 2 of the Act in 1982. In the context of the steps already taken or about to be taken by legislatures in states such as Georgia and Texas in the aftermath of the 2020 election to raise additional barriers to the vote that will impact voters of color more severely than white voters, the full protections intended by Congress when the VRA was first enacted are desperately needed today. Moreover, there is a legitimate concern that some state legislatures will be emboldened by their reading of *Brnovich*, and view it as a signal from the Court to take even more suppressive action. Congress should take immediate steps to reassert its intention to fully protect the voting rights of voters of color in Section 2 of the Voting Rights Act.

I come to these views after having devoted the bulk of the last decade litigating voting rights cases on behalf of voters of color for the Lawyers' Committee. The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to mobilize the private bar to confront issues of racial discrimination pro bono. In fact, I first became associated with the Lawyers' Committee when I was a partner of a large global law firm, and volunteered in 2011 to take on a voting rights case pro bono. That case was the challenge to Texas's strict photo ID law. After I retired from private practice in 2014, the Lawyers' Committee asked me to join their staff, where I have, as Co-Director of its Voting Rights Project since 2015, supervised the filings on behalf of voters and civil rights organizations in over 100 cases dealing with voting rights, many of them with claims brought under the Voting Rights Act.

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<sup>1</sup> U.S. Supreme Court no. 19-1257, decided July 1, 2021.

<sup>2</sup> 570 U.S. 529 (2013).

My experience with the challenge to Texas’s Photo ID law heavily influences my views here today. In that case, we first intervened on behalf of our clients in the proceedings brought by the State of Texas to obtain preclearance from a federal court of its new photo ID requirements, as then required under Section 5 of the Voting Rights Act. The federal court refused to preclear the law,<sup>3</sup> but while Texas’s appeal was pending, the Supreme Court issued its decision in *Shelby County* effectively gutting Section 5. The same day, Texas announced it would start implementing the new photo ID law, forcing the Lawyers’ Committee and our clients, as well as other civil rights organizations and the Department of Justice to file suit under Section 2 of the Voting Rights Act.

That suit was successful, and Texas was forced to change its law, with the district court ruling – and the Fifth Circuit Court of Appeals affirming en banc – that Texas’s photo ID law discriminated against Black and Latinx voters under the effects prong of Section 2.<sup>4</sup> But the case was hard-fought and one of the relatively small number of “vote denial” cases brought under Section 2 of the Voting Rights Act in the last few decades. Yet, had *Brnovich* been issued earlier, it is difficult to predict how the lower courts and the Fifth Circuit would have construed *Brnovich*. One thing is certain, however, the case would have been more difficult to prove and more costly to litigate.

This does not make sense. Since 1965, Section 2 of the Voting Rights Act has stood as a bulwark against racial discrimination in voting, particularly after the 1982 amendment that explicitly created results claims under Section 2. Since this Court’s decision in *Shelby County*, Section 2 has become even more indispensable because it is the primary measure to challenge discriminatory voting changes. Congress originally enacted and amended Section 2 to stymie not only blatant, explicit discrimination, but also facially neutral voting laws that, through ingenious, sophisticated methods, had a significant impact on minority citizens’ right to vote. Consistent with the text and purpose of the Act as amended, prior to *Brnovich*, the Supreme Court and several of the Circuit Courts of Appeal had adopted a standard to ensure the effective implementation of those protections. That standard recognized that the Act applies broadly to all voting procedures and policies that abridge the right to vote—whether expressly or subtly. The standard also recognized that a challenged law cannot be viewed in isolation, because a seemingly innocuous voting practice can interact with underlying social conditions to result in pernicious discrimination.<sup>5</sup>

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<sup>3</sup> *Texas v. Holder*, 888 F.Supp.2d 113 (D.D.C. 2012).

<sup>4</sup> *Veasey v. Abbott*, 830 F.3d 216 (5<sup>th</sup> Cir. 2016) (en banc).

<sup>5</sup> *Gingles*, 478 U.S. at 47; *accord League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4<sup>th</sup> Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5<sup>th</sup> Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6<sup>th</sup> Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9<sup>th</sup> Cir. 2020) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9<sup>th</sup> Cir. 2003).

Under that standard, Section 2 has worked for decades as a judicially manageable mechanism to stop voting discrimination. There has been no flood of questionable Section 2 vote denial “results” cases, and no widespread invalidation of voting regulations. Indeed, *Brnovich* marked the first time since the 1982 amendments to the Act that the Supreme Court reviewed a pure vote-denial claim. The reason is clear: The lower courts have taken seriously the Court’s guidance, and carefully assessed the effects of challenged voting policies or procedures within each specific jurisdiction, based on the totality of the circumstances.

*Brnovich* compels an immediate response from this Congress, before some state legislators – intent on creating obstacles that disproportionately result in a negative impact on the rights of voters of color – hear it as a dog whistle to do just that, and before lower courts apply the opinion in ways that elevate unsubstantiated and untrue justifications for new burdensome voting practices over genuine and proved claims of racially discriminatory results.

I cannot put it better than Justice Kagan, in her dissent to *Brnovich*:

The Voting Rights Act of 1965 is an extraordinary law. Rarely has a statute required so much sacrifice to ensure its passage. Never has a statute done more to advance the Nation’s ideals. And few laws are more vital in the current moment.

I have attached the following Lawyers’ Committee documents as appendices to my testimony and my testimony draws liberally from them:

- The 2014 report of the National Commission on Voting Rights, *Protecting Minority Voters: Our Work Is Not Done* (“2014 National Commission Report”). The Lawyers’ Committee staffed the work of the National Commission, which conducted 25 field hearings and also issued a 2015 report on election administration issues. I have attached the 2014 National Commission Report as Appendix 1.
  - The Lawyers’ Committee’s *Preliminary Report of Racial and Ethnic Discrimination in Voting, 1994-2019*, is attached as Appendix 2.
  - A summary of the more than 100 voting cases the Lawyers’ Committee has participated in since the Shelby County decision is attached as Appendix 3.
  - The Amended Complaint that the Lawyers’ Committee filed against the 2021 voter suppression law enacted in Georgia is attached as Appendix 4.
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## II. Section 2 of the Voting Rights Act

From the ratification of the Fifteenth Amendment in 1870 through the 1960s, the federal government tried—and failed—to defeat the “insidious and pervasive evil” of “racial discrimination in voting,” which had been “perpetuated . . . through unremitting and ingenious defiance of the Constitution.”<sup>6</sup> Although Justice Frankfurter wrote long ago that the Fifteenth Amendment targeted “contrivances by a state to thwart equality in the enjoyment of the right to vote” and “nullifie[d] sophisticated as well as simple-minded modes of discrimination[,]”<sup>7</sup> prior to the VRA’s passage, this language proved largely aspirational.<sup>8</sup>

Responding to the states’ tenacious “ability . . . to stay one step ahead of federal law,” Congress passed the VRA to provide a “new weapon[] against discrimination.”<sup>9</sup> The Act “reflect[ed] Congress’ firm intention to rid the country of racial discrimination in voting.”<sup>10</sup> The essence of the VRA’s protections was exemplified in Section 2, which provided: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”<sup>11</sup>

Notwithstanding Section 2’s broad language, jurisdictions sought to evade its reach by placing “heavy emphasis on facially neutral techniques.”<sup>12</sup> These “techniques” included everything from “setting elections at inconvenient times” to “causing . . . election day irregularities” to “moving polling places or establishing them in inconvenient . . . locations.”<sup>13</sup> In one Mississippi county, voters were forced to “travel 100 miles roundtrip to register to vote.”<sup>14</sup> In one Alabama county, “the only registration office in the county [was] closed weekends, evenings and lunch hours.”<sup>15</sup> These regulations ostensibly governed the time, place, and manner of voting in a neutral way, but they “particularly handicap[ped] minorities.”<sup>16</sup>

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<sup>6</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966).

<sup>7</sup> *Lane v. Wilson*, 307 U.S. 268, 275 (1939)

<sup>8</sup> See, e.g., *Katzenbach*, 310–15 (describing pre-VRA efforts to enforce the Fifteenth Amendment).

<sup>9</sup> Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523, 524–25, 550 (1973) (hereinafter *Right to Vote*).

<sup>10</sup> *Katzenbach*, 383 U.S. at 315.

<sup>11</sup> Voting Rights Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437, 437.

<sup>12</sup> *Right to Vote*, *supra* at 552.

<sup>13</sup> *Id.* at 557–58.

<sup>14</sup> Steven L. Lapidus, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 Ford. L. Rev. 93, 93 (1983).

<sup>15</sup> *Id.* at 93–94.

<sup>16</sup> *Id.* at 96.

Against this backdrop, and responding to this Court’s plurality decision in *City of Mobile v. Bolden*, which had read into Section 2 a “discriminatory purpose” element,<sup>17</sup> Congress expressly expanded Section 2, now codified at 52 U.S.C. § 10301. As amended, Section 2 prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”<sup>18</sup> Congress further specified that, under Section 2, a violation is established if, “based on the totality of [the] circumstances,” the political processes leading to an election are not “equally open to participation” by minority voters so that they have less opportunity than white voters “to participate in the political process and to elect representatives of their choice.”<sup>19</sup> By adopting this “results test,” Congress captured the “complex and subtle” practices which “may seem part of the everyday rough-and-tumble of American politics” but are “clearly the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination.”<sup>20</sup>

Section 2 provides relief for both *vote dilution*—schemes that reduce the weight of minority votes—and *vote denial*—standards, practices, or procedures that impede minority citizens from casting votes or having their votes counted. Vote-denial cases were the paradigmatic, “first generation” cases brought under Section 2. Only later did the Supreme Court “determine[] that the Act applies to ‘vote dilution’ as well.”<sup>21</sup>

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<sup>17</sup> 446 U.S. 55, 62 (1980).

<sup>18</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. at 131, 134 (emphasis added).

<sup>19</sup> *Id.* A claim for violation of Section 2 (and the Fourteenth Amendment) can still be based on a finding of intentional discrimination, by application of the settled standards for proving intentional discrimination as set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which includes (1) the historical background; (2) the sequence of events leading to the challenged practice, including procedural and substantive deviations from normal process; (3) relevant legislative history; and (4) whether there is a disparate impact on any group. *See, e.g., N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 220-21 (4<sup>th</sup> Cir. 2016).

<sup>20</sup> S. Rep. No. 97-417, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 189 (“Senate Report”).

<sup>21</sup> *See* Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 Colum. L. Rev. 418, 423 (1995). The congressional record accompanying the 1982 Amendments is replete with examples of the discriminatory practices that concerned Congress. The House Judiciary Committee noted that counties in Virginia and Texas had instituted “inconvenient location and hours of registration” and other restrictive practices that acted as “continued barriers” to racial minorities. H.R. Rep. No. 97-227, at 14, 17 (1981) (“House Report”). The Senate Judiciary Committee similarly identified states’ “efforts to bar minority participation” through “registration requirements and purging of voters, changing the location of polling places[,] and insistence on retaining inconvenient voting and registration hours.” Senate Report at 10 n.22. For example, a Georgia county “adopted a policy that it would no longer approve community groups’ requests to conduct voter registration drives, even though only 24 percent of black eligible voters were registered, compared to 81 percent of whites.” *Id.* at 11.

Thirty-five years ago, in *Gingles v. Thornburg*,<sup>22</sup> the Court recognized that Congress inserted the words “results in” to frame the Section 2 inquiry. Instead of asking whether, in a vacuum, a voting practice facially sounds as if it denies or abridges the rights of minority voters, the question is: in context, does the practice “interact” with pre-existing social and historical conditions to *result in* that burden? Answering this question requires courts to examine the challenged practice not as a theoretical postulate, but as a law or regulation that interacts with real-world conditions and must be evaluated through a fact-heavy, “intensely local appraisal,”<sup>23</sup> that accounts for the “totality of [the] circumstances.”<sup>24</sup>

In *Gingles*, the Court explained the “essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the [voting] opportunities enjoyed by black and white voters.”<sup>25</sup> Recognizing Section 2’s command that courts consider the “totality of circumstances,” the *Gingles* Court looked to the Senate Report accompanying the 1982 amendments to compile a list of relevant “circumstances.”<sup>26</sup> These nine social and historical conditions—the “Senate Factors”—include considerations such as the history of official discrimination in the jurisdiction (Factor One); the extent of discrimination in the jurisdiction’s education, employment, and health systems (Factor Five); and whether the challenged practice has a tenuous justification (Factor Nine).<sup>27</sup>

Since *Gingles*, four different Circuits addressing vote-denial cases have used the foundation laid in *Gingles* to analyze these matters. This formulation distills Section 2 liability into a two-part test: (1) there must be a disparate *burden* on the voting rights of minority voters (“an inequality in the opportunities enjoyed”); and (2) that burden must be *caused* by the challenged voting practice (“a certain electoral law, practice, or structure . . . cause[s] an inequality”) because the practice “interacts with social and historical conditions” of racial discrimination.<sup>28</sup> No other Circuit has put forth an alternative formulation.

The Section 2 results inquiry is complex and resource intensive to litigate. The “totality of circumstances” test set forth in the statute is fact-intensive by its own definition. The Senate Report supporting the 1982 amendment to Section 2 lists factors that courts have used as a starting point in applying the totality of

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<sup>22</sup> 478 U.S. 30, 47 (1986).

<sup>23</sup> *Id.* at 79 (quotation marks omitted).

<sup>24</sup> 52 U.S.C. § 10301(b).

<sup>25</sup> 478 U.S. at 47.

<sup>26</sup> 478 U.S. at 36.

<sup>27</sup> *Id.* at 36–37 (citing Senate Report at 28–29).

<sup>28</sup> *Gingles*, 478 U.S. at 47; *accord League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

circumstances test to include seven such factors (along with two factors plaintiffs have the option to raise).<sup>29</sup>

## II. *Brnovich v. Democratic National Committee*

### A. The Facts

That was the situation until *Brnovich*. In *Brnovich*, the Supreme Court reviewed two Arizona voting practices: one mandated that votes cast out of the voter's precinct ("OOP") not be counted; the other prohibited the collection of mail-in ballots by anyone other than an election official, a mail carrier, or a voter's family member, household member or caregiver. Plaintiffs had claimed that these practices violated Section 2 of the Voting Rights Act.

The United States District Court for the District of Arizona had ruled against the plaintiffs on both claims, but, applying the settled standards described above, the United States Court of Appeals for the Ninth Circuit had reversed, en banc, finding that the out-of-precinct policy violated the "results" prong of Section 2 and that the limitations on collections of absentee ballots violated both the "results" and "intent" prongs of Section 2.

As to the out-of-precinct policy, the Ninth Circuit identified several factors, acknowledged by the district court, leading to a higher rate of OOP voting by voters of color than by white voters: frequent changes in polling locations (polling places of voters of color experienced stability at a rate 30 percent lower than the rate for whites);<sup>30</sup> confusing placement of polling locations (indigenous populations in particular lived farther from their assigned polling places than did white voters,<sup>31</sup>); and high rates of residential mobility.<sup>32</sup> As a result, 1 in every 100 Black voters, 1 in every 100 Latinx voter, and 1 in every 100 indigenous peoples voter cast an OOP ballot, compared to 1 in every 200 white voters.<sup>33</sup>

As to the absentee-ballot collection limitation, the Ninth Circuit relied on the district court's finding that voters of color were more likely than white voters to

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<sup>29</sup> See *Gingles*, 478 U.S. 30, 44-45 (1986).

<sup>30</sup> *Brnovich v. Democratic National Committee*, Joint Appendix, at 590 (online at [https://www.supremecourt.gov/DocketPDF/19/19-1257/162052/20201130133300128\\_19-1257%20-1258%20Joint%20Appendix.pdf](https://www.supremecourt.gov/DocketPDF/19/19-1257/162052/20201130133300128_19-1257%20-1258%20Joint%20Appendix.pdf)).

<sup>31</sup> *Id.* at 592.

<sup>32</sup> *Id.* at 594.

<sup>33</sup> *Id.* at 595-96.



return their early ballots with the assistance of third parties.<sup>34</sup> The disparity was the result of the special challenges experienced by communities that lack easy access to outgoing mail services, socioeconomically disadvantaged voters who lacked reliable transportation, and voters who had trouble finding time to return mail because they worked multiple jobs or lacked childcare services, all burdens that disproportionately fall on Arizona's minority voters.<sup>35</sup>

Applying the “totality of circumstances” test, with primary reliance on the Senate factors that demonstrated a history of discrimination in Arizona that persists to this day, the Ninth Circuit found that both the OOP policy and the absentee-ballot collection law violated the “results” prong of Section 2 of the VRA. The court also found that the absentee ballot law had been enacted with discriminatory intent, based on statements of the sponsor and a racist video used to promote passage of the law.<sup>36</sup>

## **B. The Decision, Its Meaning, and Its Consequences**

In *Brnovich*, a 6-3 Court reversed the Ninth Circuit's decision. Had it done so by applying the settled standards, we may not be here today. But, in writing for the Court's majority, Justice Alito provided guidelines for future treatment of Section 2 vote denial “results” cases that were not only new, but also contrary – or at least dilutive of – the decades-long accepted standards.

I emphasize *Brnovich* does not spell the end of Section 2 cases. Rather, it unnecessarily and unreasonably makes it more difficult for civil rights plaintiffs to win Section 2 actions, when they already were difficult to win. And it does so in a way that flies in the face of congressional intent. Further, it raises too many ambiguities in too many important areas to leave it to the courts to fill in the blanks. The greater difficulty and ambiguity threaten to undermine the core purpose of the Voting Rights Act.

### **1. *Brnovich* is a solution in search of a problem**

First, *Brnovich* purports to cure a non-existent problem. One of the premises of *Brnovich* is that “[i]n recent years, [Section 2 vote denial claims] have proliferated in the lower courts.”<sup>37</sup> In support of this statement, the Court relies on the amicus curiae briefs of Sen. Ted Cruz, the State of Ohio, and the Liberty Justice Center.<sup>38</sup>

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<sup>34</sup> *Id.* at 597.

<sup>35</sup> *Id.* at 598.

<sup>36</sup> *Id.* at 681.

<sup>37</sup> *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at \*8 (2021).

<sup>38</sup> *Id.* at n. 6.

However, those briefs describe a total of perhaps 16 cases, dating back over 7 years, and only 3 of them led to a finding of Section 2 liability.

The fact is that since Congress amended Section 2 in 1982 and since the Supreme Court supplied its test for adjudicating Section 2 violations, the Supreme Court has never deemed it necessary to review a single Section 2 vote-denial case. At the same time, there was absolutely no evidence that courts were being overwhelmed by Section 2 vote denial cases. And when such cases are brought, courts have had no trouble applying the standard to separate discriminatory voting practices from benign election regulations. In short, the pre-existing standard had worked well.

## 2. *Brnovich* reads a remedial statute narrowly

One of the most important canons of statutory construction – and one that gives the greatest deference to congressional intent – is that remedial statutes are to be broadly construed,<sup>39</sup> and there are few statutes in this Nation’s history more remedial than the Voting Rights Act of 1965. Yet, rather than read the Act expansively, the Court created new stringent guidelines, most prominently setting higher standards for both the size of the burden and the size of the disparity, and a lower standard for the State to meet to justify the burdens it is placing on the right to vote.

The touchstone of the *Brnovich* opinion is the Court’s construction of the requirement in Section 2(b) that the political process be “equally open” as the “core” requirement of the law.<sup>40</sup> The concept of equal “opportunity” as used in the same statute, the Court acknowledged somewhat grudgingly, “may stretch that concept to some degree to include consideration of a person’s ability to *use* the means that are equally open.”<sup>41</sup> In that context, the Court turned to the “totality of the circumstances” test, and said that “any circumstance that has a logical bearing on whether voting is ‘equally open’ and afford equal ‘opportunity’ may be considered,” and proceeded to list five “important circumstances” that were relevant.<sup>42</sup>

For the most part (with the exception of number (2)), these “important circumstances” seem fairly innocuous: (1) the size of the burden; (2) the degree of departure of the challenged practice from practices standard when Section 2 was amended or which are widespread today; (3) the size of the disparity; (4) the opportunities provided by the electoral process as a whole; and (5) the strength of the

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<sup>39</sup> See *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (broadly construing the VRA as “aimed at the subtle, as well as the devious, state regulations which have the effect of denying citizens their right to vote”); *Tcherepnin. Knight*, 389 U.S. 332, 336 (1967) (stating general rule of statutory construction).

<sup>40</sup> *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at \*12; 52 U.S.C. § 10301.

<sup>41</sup> *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at \*12 (emphasis in original).

<sup>42</sup> *Id.*

state's justification for the practice. The devil, however, is in the details and in the ambiguities created by the Court's specific choice of language that may pave the way for state legislatures to enact additional discriminatory laws and for lower courts to apply Section 2 parsimoniously in vote denial "results" cases.

3. **The size of the burden should include factors specific to the affected community resulting from discrimination**

The first factor that Justice Alito highlighted was the "size of the burden," emphasizing that voters "must tolerate the usual burden of voting."<sup>43</sup> Although this may sound somewhat innocuous, its application by legislatures and lower courts might be colored by a footnote at the end of the paragraph on burden, where Justice Alito expounded on what "openness" and "opportunity" might mean (as, say, with museums or school courses that are open to all) as compared to the "absence of inconvenience" (such as lack of adequate transportation or conflicting obligations).<sup>44</sup> The vagueness with which the Court left this issue, and its relegation to a footnote, may limit its precedential impact, but its practical impact may be substantial.

What Justice Alito does not acknowledge is that some of these indicia of what he calls "inconvenience" are themselves not simply subjective to an individual, but, are reflective of a group's socio-economic circumstances that are themselves the product of a history of discrimination. In the Texas Photo ID case, for example, we were able to demonstrate that not only were Black and Latinx voters more likely than white voters not to possess the required photo ID, but that they were more likely than white voters not to be able to get the ID because of, among other reasons, lack of access to transportation.<sup>45</sup>

The same logic might apply to polling place location and closure decisions that might make it just that much more burdensome for voters of color than for white voters to vote. Or, as in the new Georgia statute, SB 202, prohibiting "line-warming," the provision of food and water to those waiting in line to vote, particularly when voters of color are much more often confronted with long wait-times than are white voters.<sup>46</sup>

Mandating additional voter ID requirements in order to submit an application for an absentee ballot or to return a voted absentee ballot is another new hurdle

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016).

<sup>46</sup> Georgia Senate Bill 202 (online at <https://www.legis.ga.gov/api/legislation/document/20212022/201498>); *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint (Appendix 4), at 36; Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places*, Georgia Public Broadcasting, Oct. 17, 2020, accessible at <https://www.npr.org/2020/10/17/924527679/why-do-nonwhitegeorgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl>.

voters will now face in Georgia under its new omnibus bill. Under this provision, voters requesting an absentee ballot must submit with their application their driver's license number, their personal identification number on a state-issued personal identification card, or a photocopy of other specified forms of identification. For voters who do not have a Georgia's driver license or state ID card number, voting absentee will now require access to photocopy technology. Voters without such access to technology will face a higher burden in complying with these ID requirements. Recent data shows that Black Georgians are 58% more likely and Latinx Georgians are 74% more likely to lack computer access in their homes as compared to their white counterparts.<sup>47</sup> Thus, we can expect voters of color to face a significantly higher burden than white voters in complying with the ID requirements for requesting and returning absentee ballots.

If *Brnovich* is construed by state legislatures as permitting them to impose barriers that affect different racial or ethnic groups differently because of their relative wealth – particularly when those differences are themselves the product of historic discriminatory practices – it will have a serious impact on the voting rights of persons of color.

#### **4. 1982 Standards and Widespread Practice Are Not Important**

Second, Justice Alito said that another relevant factor was the degree of departure of the challenged practice from the “standard practice when §2 was amended in 1982,” a choice which is largely left unexplained, other than in rebuttal to Justice Kagan's dissent, in which he writes, somewhat tautologically, that “rules that were and are commonplace are useful comparators when considering the totality of the circumstances.”<sup>48</sup> Although the Court acknowledges that this would not apply to practices that themselves were discriminatory in 1982, the fact is that such benchmarks are neither necessary nor productive. If the history of voter discrimination in this country has taught us anything, it is that those who want to stop voters of color from voting change their methods with the times, and with the change in the ways voters of color are voting.

Again, Georgia is illustrative. In Georgia, state legislators responded to the record-shattering turnout of 2020 by passing omnibus legislation that restricts the right to vote at nearly every step of the process and disproportionately affects voters of color. Among its provisions, the law requires voter identification in order to request an absentee ballot and vote absentee; severely limits access to absentee ballot drop boxes; and significantly shortens the period in which voters can apply for and cast absentee ballots. These restrictions were adopted right after the November 2020 election where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4%) and Asian (40.3%) voters, at higher rates than white

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<sup>47</sup> *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint (Appendix 4), at 44.

<sup>48</sup> 2021 WL 2690267, at n.15.

(25.3%) voters.<sup>49</sup> But, Justice Alito’s reasoning may be construed as supporting the proposition that, if in 1982, Georgia did not make absentee ballots universally available, that could be a “highly important” consideration, even if voters of color are more heavily impacted than white voters by these changes. State legislatures should not be led to believe that they can get away with erecting new barriers to vote based on what they did 40 years ago.

#### 5. So-called “small differences” can be important.

Third, in explaining the importance of the size of the disparities, Justice Alito indicates that “small differences should not be artificially magnified,”<sup>50</sup> again dealing obliquely with the consequences of the differences being caused by differences in wealth – which may themselves be the result of historic discrimination. Specifically, the Court criticized the Ninth Circuit for finding disproportionate impact based on a relative comparison of the percentage of voters whose votes were rejected because they were cast OOP. In the case of Indigenous, Black, and Latinx voters, the percentage was 1% for each group; in the case of white voters, the percentage was .05.<sup>51</sup>

The Court did not note that the discriminatory OOP practice meant that almost 4,000 votes cast by voters of color had been rejected – and that if their circumstances were equivalent to those of white voters, 2,000 of their votes would have counted.

The Texas Photo ID case is illustrative. There, the court found that, even though over 90% of all groups had the required ID, Black voters were twice as likely as white voters not to have the ID, and Latinx voters were about three times as likely. In fact, the court found that 608,470 Texas voters lacked the ID.<sup>52</sup> Obviously, the Texas numbers are meaningful no matter how viewed. But the point is that smaller numbers may be too. Legislatures and lower courts should not be led to believe that they can chip away at electoral margins by reducing the likelihood of voters of color being able to cast their votes, no matter how small the effect. We need not dwell on the closeness of the 2020 presidential election in Arizona, Georgia, and Wisconsin to underscore the importance of even small differentials in impact.

#### 6. Other opportunities to vote do not necessarily ameliorate discrimination in particular methods of voting

Fourth, Justice Alito explained that the opportunities provided by the entire electoral system should be factored into the equation, implying that the fact that, for

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<sup>49</sup> *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint (Appendix 4), at 47.

<sup>50</sup> 2021 WL 2690267, at \*13.

<sup>51</sup> *Id.* at \*4.

<sup>52</sup> *Veasey v. Perry*, 71 F.Supp.3d 627, 659 (S.D. Tex. 2014).

example, access to absentee ballots may be curtailed, it may not matter if the voter can still vote in person.<sup>53</sup> But, if an advantageous means of voting is curtailed as to one group more than it is to another, what difference does it matter that there may be other methods of voting? If all methods of voting made voting equally accessible, there would have to be only one method. Obviously, expanding methods of voting makes it more likely that people will vote. And, equally obviously, contracting them makes it less likely that people will vote. Contracting them in a way that affects some racial or ethnic groups more than others is inconsistent with the language and Congressional intent of Section 2. States should not be led to believe that they have carte blanche to target specific voting practices, when the effect is discriminatory, and try to justify it by the availability of other means of voting.

#### 7. Justification for discriminatory practices must be based on reality

And, fifth, in explaining the state justification factor, the Court seemed to open the door to a state's justifying virtually any discriminatory action simply by parroting the words "fraud prevention."<sup>54</sup> Again, while the Court did not say so explicitly, the fear is that lower courts – and, worse, state legislatures – may so interpret the Court's opinion.

The incongruity of the Court's approach is seen in comparing the hundred of thousands of voters who were potentially deprived from voting under Texas's prior Photo ID law, with the infinitesimally small number of persons even accused of fraudulently voting. A state's choice to prevent non-existent fraud at the expense of thousands of votes, disproportionately of person of color, is not legitimate. Again, permitting such choice, is inconsistent with the language of Section 2 and Congressional intent.

#### 8. The Senate Factors are relevant

The *Brnovich* majority went on to raise questions as to whether the Senate Factors are relevant to a Section 2 vote denial case, implying they are not, but leaving ambiguous precisely what the Court means as to how the few Factors the Court deems potentially relevant fit in, other than superficially.<sup>55</sup>

Although *Gingles* involved vote dilution, the decision addressed Section 2 writ large, recognizing that "Section 2 prohibits *all* forms of voting discrimination, not just vote dilution."<sup>56</sup> Further, *Gingles* recognized the applicability of the various Senate

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<sup>53</sup> 2021 WL 2690267, at \*13.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 478 U.S. at 45 n.10 (emphasis added); see Senate Report at 30 (confirming that Section 2 "prohibits practices, which . . . result in the denial of equal access to any phase of the electoral process for minority group members") (emphasis added).

Factors would naturally turn on the type of Section 2 claim at issue.<sup>57</sup> The *Gingles* Court’s statement that the Senate Factors will “often be pertinent to *certain types* of § 2 violations,” such as dilution,<sup>58</sup> cannot be reconciled with a conclusion that the Factors “*only*” inform one specific type of Section 2 claim.

9. **There is no reason not to apply the “least restrictive means” test to Section 2 claims**

The one area that the Court conclusively shuts the door on is the use of what it calls the “strict necessity requirement,” under which courts had previously required states accused of discriminatory practices to justify “that their legitimate interests can be accomplished only by means of the voting regulations in question.”<sup>59</sup> After *Brnovich*, states no longer have to justify their acts of discrimination with such facially reasonable proofs. As Justice Kagan explained in her dissent, an alternative-means inquiry is a legitimate way to ensure that a State is not using facially neutral laws to achieve a discriminatory intent. “[A] State that tries both to serve its electoral interests and to give its minority citizens equal electoral access will rarely have anything to fear from a Section 2 suit.”<sup>60</sup> This should not be a heavy lift for a state interested in helping people to vote as opposed to making it more difficult for them to vote.

IV. **The Confluence of *Shelby County* and *Brnovich***

When first enacted in 1965 and after the 1982 amendments, the combination of Section 2 and Section 5 of the Voting Rights Act worked together to provide a relatively effective means of preventing and remedying minority voting discrimination. Because of the *Shelby County* decision, that has dramatically changed.

A. **Section 5**

Section 5 required jurisdictions with a history of discrimination, based on a formula set forth in Section 4(b), to obtain preclearance of any voting changes from the Department of Justice or the District Court in the District of Columbia before implementing the voting change.<sup>61</sup> From its inception, there was a sunset provision for the formula, and the sunset provision for the 2006 Reauthorization was 25 years.<sup>62</sup>

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<sup>57</sup> *See id.* at 45.

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> 2021 WL 2690267, at \*14.

<sup>60</sup> 2021 WL 2690267 (KAGAN, J., dissenting) at n.5.

<sup>61</sup> 52 U.S.C. §§ 10303(b), 10304.

<sup>62</sup> 52 U.S.C. § 10303(b).

Section 5 covered jurisdictions had to show federal authorities that the voting change did not have a discriminatory purpose or effect. Discriminatory purpose under Section 5 was the same as the Fourteenth and Fifteenth Amendment prohibitions against intentional discrimination against minority voters.<sup>63</sup> Effect was defined as a change which would have the effect of diminishing the ability of minority voters to vote or to elect their preferred candidates of choice.<sup>64</sup> This was also known as retrogression, and in most instances was easy to measure and administer. For example, if a proposed redistricting plan maintained a majority black district that elected a black preferred candidate at the same black population percentage as the plan in effect, it would be highly unlikely to be found retrogressive. If, however, the proposed plan significantly diminished the black population percentage in the same district, it would invite serious questions that it was retrogressive.

The benefits of Section 5 were numerous and tangible. The 2014 National Commission Report provided the following statistics and information regarding DOJ objections:

By any measure, Section 5 was responsible for preventing a very large amount of voting discrimination. From 1965 to 2013, DOJ issued approximately 1,000 determination letters denying preclearance for over 3,000 voting changes. This included objections to over 500 redistricting plans and nearly 800 election method changes (such as the adoption of at-large election systems and the addition of majority-vote and numbered-post requirements to existing at-large systems). Much of this activity occurred between 1982 (when Congress enacted the penultimate reauthorization of Section 5) and 2006 (when the last reauthorization occurred); in that time period approximately 700 separate objections were interposed involving over 2,000 voting changes, including objections to approximately 400 redistricting plans and another 400 election method changes.

Each objection, by itself, typically benefited thousands of minority voters, and many objections affected tens of thousands, hundreds of thousands, or even (for objections to statewide changes) millions of minority voters. It would have required an immense investment of public and private resources to have accomplished this through the filing of individual lawsuits.<sup>65</sup>

In addition to the changes that were formally blocked, Section 5's effect on deterring discrimination cannot be understated. Covered jurisdictions knew that their voting changes would be reviewed by an independent body and they had the

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<sup>63</sup> 52 U.S.C. § 10304(c).

<sup>64</sup> 52 U.S.C. § 10304(b), (d).

<sup>65</sup> 2014 National Commission Report at 56.



burden of demonstrating that they were non-discriminatory. In the post-*Shelby* world, a jurisdiction is likely to get away with implementing a discriminatory change for one election (or more) before a plaintiff receives relief from a court, as the Hancock County, Georgia voter purge and Texas voter identification cases detailed later illustrate.

The Section 5 process also brought notice and transparency to voting changes. Most voting changes are made without public awareness. DOJ would produce a weekly list of voting changes that had been submitted, which individuals and groups could subscribe to in order to receive this weekly list from DOJ.<sup>66</sup> For submissions of particular interest, DOJ would provide public notice of the change if it believed the jurisdiction had not provided adequate notice of the change.<sup>67</sup> But even more important, the Section 5 process incentivized jurisdictions to involve the minority community in voting changes. DOJ's Section 5 Procedures requested that jurisdictions with a significant minority population provide the names of minority community members who could speak to the change,<sup>68</sup> and DOJ's routine practice was to call at least one local minority contact and to ask the individual whether she or he was aware of the voting change and had an opinion on it. Moreover, involved members of the community could affirmatively contact DOJ and provide relevant information and data.<sup>69</sup>

## **B. The *Shelby County* Decision**

In the *Shelby County* case, the Supreme Court decided in a 5-4 vote that the Section 4(b) coverage formula was unconstitutional. The majority held that because the Voting Rights Act “impose[d] current burdens,” it “must be justified by current needs.”<sup>70</sup> The majority went on to rule that because the formula was comprised of data from the 1960s and 1970s, it could not be rationally related to determining what jurisdictions, if any, should be covered under Section 5 decades later.<sup>71</sup> The four dissenting justices found that Congress had demonstrated that regardless of what data was used to determine the formula, voting discrimination had persisted in the covered jurisdictions.<sup>72</sup> The majority made clear that “[w]e issue no holding on §5

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<sup>66</sup> Section 5 Procedures, 28 C.F.R. § 51.32-51.33.

<sup>67</sup> *Id.* at 28 C.F.R. § 51.38(b).

<sup>68</sup> *Id.* at 28 C.F.R. § 51.28(h).

<sup>69</sup> *Id.* at 28 C.F.R. § 51.29.

<sup>70</sup> *Shelby County*, 570 U.S. at 536 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 at 203 (2009)).

<sup>71</sup> *Shelby County*, 557 U.S. at 545-54.

<sup>72</sup> *Id.* at 560 (Ginsberg, J. dissenting).

itself, only on the coverage formula. Congress may draft another formula based on current conditions.”<sup>73</sup>

The effect of the *Shelby County* decision is that Section 5 is effectively immobilized as, for now, preclearance is limited only to those jurisdictions where it is imposed by a court after a court previously made a finding of intentional voting discrimination. This special preclearance coverage is authorized by Section 3(c) of the Act. Courts have rarely ordered Section 3(c) coverage, and when they do, it is typically quite limited. Indeed, the only jurisdictions I am aware of that have been subject to Section 3(c) coverage since the *Shelby County* decision are Pasadena, Texas and Evergreen, Alabama.<sup>74</sup> In the case of Pasadena, the only changes subject to preclearance relate to the method of election and redistricting.<sup>75</sup>

As a result, Section 5 is essentially dead until Congress takes up the Supreme Court’s invitation to craft another coverage formula. There are compelling reasons for Congress to do so because, as discussed below, voting discrimination has increased in the absence of Section 5, and by, diluting the power of Section 2, and by creating ambiguities as to Section 2’s reach, the Supreme Court has now made matters worse.

### C. Pre-*Brnovich*, Section 2 was an Imperfect Substitute for Section 5

The year after the *Shelby County* decision was issued, the Executive Summary and Chapter 3 of the 2014 National Commission Report discussed what was lost in the *Shelby County* decision. The Report predicted that voting rights discrimination would proliferate in the absence of Section 5.<sup>76</sup> The subsequent years have demonstrated that the negative impacts we anticipated have come to pass.

In 2019, the Lawyers’ Committee did a 25 year look back on the number of times that an official entity made a finding of voter discrimination in the *Preliminary Report of Racial and Ethnic Discrimination in Voting, 1994-2019*, which is attached as Appendix 2. This preliminary analysis of administrative actions and court proceedings identified 340 instances between 1994 and 2019 where the U.S. Attorney General or a court made a finding of voting discrimination or where a jurisdiction changed its laws or practices based on litigation alleging voting discrimination. We found that the successful court cases occurred in disproportionately greater numbers in jurisdictions that were previously covered under Section 5.

The Lawyers’ Committee’s Voting Rights Project itself has never been busier than in the *post-Shelby County* years. As of 2019, we had participated in 41 cases, achieving some success in almost 80% of them. By the end of last year, the total of

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<sup>73</sup> *Id.* at 556.

<sup>74</sup> See *Patino v. City of Pasadena*, 230 F. Supp. 667, 729 (S.D. Tex. 2017).

<sup>75</sup> *Id.*

<sup>76</sup> 2014 National Commission Report at 12, 55-64.

post-*Shelby* cases where we participated as a counsel to a party or as amici had ballooned to 100. A short summary of each case is attached as Appendix 3. Because the Lawyers' Committee's has a racial justice mission, all of the cases we have participated in implicate race in some fashion in our view, even if there are no race claims in the case.

This data tells us that voting discrimination remains substantial, especially considering that the Lawyers' Committee is but one organization, and particularly in the areas previously covered by Section 5.

A few specific examples from the Lawyers' Committee's litigation record illustrate why, even before *Brnovich*, Section 2 was an imperfect substitute for Section 5, and why post-*Brnovich*, without congressional action, the situation is more dire.

Prior to *Shelby County*, Texas passed the strictest voter ID law in the country. Because Section 5 was in place, Texas could not implement the law (SB 14) without preclearance from either the Attorney General or the United States District Court for the District of Columbia. The Attorney General refused to preclear the law, and a three-judge panel found that the law had a retrogressive impact on the rights of Black and Latinx voters.<sup>77</sup> The afternoon that *Shelby* was decided, then-Texas Attorney General Greg Abbott announced that the State would immediately implement the ID law.<sup>78</sup> Several civil rights groups, including the Lawyers' Committee, filed suit in Texas federal court, challenging SB 14 under several theories, including Section 2 and DOJ filed its own suit under Section 2, and all of the cases were consolidated. The parties then embarked on months of discovery, leading to a two-week trial in September 2014, where 55 witnesses, including 16 experts — three-quarters of whom were paid for by the civil rights groups — testified. Prior to the November 2014 election, the District Court ruled that SB 14 violated the “results” prong of Section 2 of the Voting Rights Act, because it had a discriminatory result in that Black and Hispanic voters were two to three times less likely to possess the SB 14 IDs and that it would be two to three times more burdensome for them to get the IDs than for white voters. The District Court's injunction against SB 14, however, was stayed pending appeal by the Fifth Circuit, so the law — now deemed to be discriminatory — remained in effect.<sup>79</sup> Subsequently, an *en banc* panel of the Fifth Circuit Court of Appeals, affirmed the District Court's finding.<sup>80</sup> But because Section 5 was no longer in effect, elections that took place from June 25, 2013 until the Fifth Circuit *en banc* opinion on July 20, 2016 took place under the discriminatory voter ID law. Had Section 5 been enforceable, enormous expense and effort would have been spared. The district court awarded private plaintiffs \$5,851,388.28 in attorneys' fees and

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<sup>77</sup> *Texas v. Holder*, 888 F.Supp.2d 113 (D.D.C. 2012).

<sup>78</sup> *Veasey v. Abbott*, 830 F.3d 216, 227 (5th Cir. 2016).

<sup>79</sup> *Id.* at 227-29, 250.

<sup>80</sup> *Id.* at 224-25.

\$938,945.03 in expenses, for a total of \$6,790,333.31. The fee award is currently on appeal. As of June 2016, Texas had spent \$3.5 million in defending the case.<sup>81</sup> Even with no published information from DOJ, more than \$10 million in time and expenses were expended in that one case. And, as noted above, with the issuance of *Brnovich*, the case would have been harder – and certainly more expensive – for plaintiffs to litigate.

In 2015, the Board of Elections and Registration, in Hancock County, Georgia, changed its process so as to initiate a series of “challenge proceedings” to voters, all but two of whom were African American. This resulted in the removal of 53 voters from the register. Later that year, the Lawyers’ Committee, representing the Georgia State Conference of the NAACP and the Georgia Coalition for the Peoples’ Agenda and individual voters, challenged this conduct as violating the Voting Rights Act and the National Voter Registration Act, and obtained relief which resulted in the placement of unlawfully-removed voters back on the register.<sup>82</sup> Ultimately, plaintiffs and the Hancock County Board agreed to the terms of a Consent Decree that will remedy the violations, and required the county’s policies to be monitored for five years. But after the purge and prior to the court order, Sparta, a predominantly black city in Hancock County, elected its first white mayor in four decades. And before the case was settled, and the wrongly-purged voters placed back on the rolls, at least one of them had died.

### C. The Growing Present Need

Recent events reflect the significant present-day impact of the *Shelby County* decision and the loss of Section 5 and the potential impact of *Brnovich*. It involves a law that Georgia, a previously covered jurisdiction, enacted this year, SB 202, a 53 section, 98-page law that changes many aspects of Georgia elections. The law was passed in the aftermath of 2020 and 2021 elections that were extremely close and saw the margins of victory in both presidential and senatorial elections decided by the votes of people of color.

SB 202 has spawned several federal lawsuits, most of which include voting discrimination claims. The Lawyers’ Committee is counsel in one of these suits and the Amended Complaint from that case is attached as Appendix 4.

SB 202 increases the burdens for virtually every aspect of voting from voting by mail through voting in person. At least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place were it

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<sup>81</sup> Jim Malewitz & Lindsay Carbonell, Texas’ Voter ID Defense Has Cost \$3.5 Million, The Texas Tribune (June 17, 2016), <https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/>.

<sup>82</sup> Georgia State Conference of the NAACP v. Hancock County, Case No. 15-cv-414 (M.D. Ga. 2015).

not for the decision in *Shelby County*. This is perhaps most clearly demonstrated by Georgia introducing several restrictions focused on voting by mail:

- The new absentee ballot ID requirements mandate that voters include a Georgia Driver's license number or Georgia State ID number on their absentee ballot application. If they have neither, voters are required to copy another form of acceptable voter ID and attach the copies of ID documents along with other identifying information to both their absentee ballot applications and inside the absentee ballot envelope when returning the voted ballot.
- The bill also prohibits public employees and agencies from sending unsolicited absentee ballot applications to voters, yet threatens private individuals and organizations who are not so prohibited with a substantial risk of incurring hefty fines for every application they send to an individual who has not yet registered to vote or who has already requested a ballot or voted absentee.
- SB 202 significantly limits the accessibility of absentee ballot drop boxes to voters. While all counties would be required to have at least one, the placement of drop boxes is limited to early voting locations and drop boxes are available only to voters who can enter the early voting location during early voting hours to deposit their ballot inside the box. Thus, drop boxes are essentially useless to voters who can vote early in-person or who cannot access early voting hours at all due to work or other commitments during early voting hours.
- The bill also mandates an earlier deadline of 11 days before an election to request an absentee ballot, leaving some voters who become ill or have to travel out of the area in the lurch if they cannot vote during early voting and are unable to meet the earlier deadline to apply for a ballot.<sup>83</sup>

SB 202 does not stop with its effect on voting by mail. It takes direct aim at voting in person, in a way that targets voters of color, who are more likely to confront long voting lines than white voters in Georgia. Specifically, it prohibits the provision of food and water to such voters within 150 feet of a polling place, other than by election officials.

The effect of the *Brnovich* decision on the challenge to SB 202 remains to be seen, but already defendants have moved to dismiss the complaints on the basis of *Brnovich*. Although, we strongly believe that the complaints as drafted fully and adequately plead a "results" claim under Section 2 even post-*Brnovich*, the very

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<sup>83</sup> *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint (Appendix 4), at 57-58.

making of these arguments demonstrate how those who support the erection of barriers to vote intend on using that opinion.

Georgia, of course, is not the only state that is considering or has passed laws with new barriers to voting that disproportionately affect voters of color. Florida did so, with SB 90, a law that – similar to Georgia’s – imposes new and unnecessary restrictions on absentee ballots, the use of drop-boxes, and line-warming. And Texas appears poised at this writing to pass an omnibus voting bill that would, among other things, empower partisan poll watchers with virtually unfettered access in polling places, while at the same time tying the hands of election officials to stop the poll watchers from engaging in intimidating conduct. Texas has a well-documented history of voter intimidation by poll watchers that has disproportionately affected voters of color. The courts have acknowledged this pattern before—in 2014, a federal district court described this very issue: “Minorities continue to have to overcome fear and intimidation when they vote. . . . [T]here are still Anglos at the polls who demand that minority voters identify themselves, telling them that if they have ever gone to jail, they will go to prison if they vote. Additionally, there are poll watchers who dress in law enforcement-style clothing for an intimidating effect to which voters of color are often the target.”<sup>84</sup>

The law being considered by the Texas legislature would also ban election officials from distributing absentee ballot applications without request from a voter; allow for the rejection of absentee ballots on the basis of signatures that do not exactly match – in the eyes of untrained election officials – the signatures on file – a practice which has been shown to adversely affect voters of color disproportionately; and place additional burdens on persons assisting others in need of help to vote.

As with Georgia’s SB 202, some of these provisions might have been stopped by an effective Section 5 and challenges to some of them may be hampered by the effect of the *Brnovich* decision. The bottom line, however, is that recent events have only underscored the need for a robust Voting Rights Act.<sup>85</sup>

## V. The Appropriate Congressional Response

There are at least two approaches that Congress can and should take in response to the *Shelby County/Brnovich* assault on the Voting Rights Act. The record since the *Shelby County* decision demonstrates what voting rights advocates feared: that without Section 5, voting discrimination would increase substantially. Without

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<sup>84</sup> .” *Veasey v. Perry*, 71 F. Supp. 3d 627, 636–37 (S.D. Tex. 2014), *aff’d and reversed on other grounds*, 830 F. 3d ---- (5<sup>th</sup> Cir. 2016).

<sup>85</sup> *See, e.g., Shelby Cnty.*, 570 U.S. at 536 (“[V]oting discrimination still exists; no one doubts that.”); *Nomination of the Hon. Amy Coney Barrett to the Supreme Court: Hearing Before S. Comm. on the Judiciary* (Oct. 14, 2020) (“[R]acial discrimination still exists in the United States and I think we’ve seen evidence of that this summer.”) (statement of Amy Coney Barrett).

legislation like the John Lewis Voting Rights Advancement Act that addresses the hole in the Voting Rights Act left by the *Shelby County* decision, our democracy is at risk. The first step is for Congress to pass such legislation.

*Brnovich* presents new challenges. Its impacts have yet to be measured, but common sense and history instruct us that those who wish to target voters of color will undoubtedly feel emboldened by a decision that can be read as making it more difficult for plaintiffs to prove a Section 2 violation giving state legislatures a “Get Out of Jail” card to pass voter suppressive legislation, and justify it simply by claiming “voter fraud.” Although we firmly believe that the courts should not apply *Brnovich* in such manner, the threat is there. Continued commitment to the core purpose of the Voting Rights Act should not be left in the uncertainty created by the ambiguous and problematic language of *Brnovich*. We identify here a number of issues for consideration and would be pleased to work with the Committee on legislative text.:

- Clarify that the “totality of the circumstances” to support a Section 2 violation includes whether historical socio-economic discrimination interacts with the challenged voting practice to make it more difficult for voters protected by the Act to cast their ballots.
- Clarify that to prove the “result” of the discriminatory act, plaintiffs can apply any validly accepted statistical test, which can then be assessed in the totality of the circumstances.
- Clarify that a discriminatory law cannot be justified on the basis that it was a standard practice at a particular date, such as 1982, or is widespread today, but must be judged solely on the totality of the circumstances in the particular jurisdiction, as viewed at the time the action under Section 2 is brought.
- Clarify that, while circumstances relating to the entire electoral system may be relevant to a Section 2 determination, the fact that there are other methods to vote than the challenged practice cannot be conclusive as to a results claim under Section 2.
- Clarify that the state’s interest furthered by the challenged conduct may be one factor, and not a singularly overriding factor, in determining the totality of the circumstances, but must be based on more than unfounded apprehensions and the means chosen must be necessary to fulfill the asserted interest.

- Clarify that “totality of the circumstances” may include any or all of the factors deemed relevant by *Gingles*, including the Senate Factors.
- Clarify that partisan motives cannot be an adequate justification for the challenged conduct, if a discriminatory result is the means chosen to meet those motives.
- Put an end to any doubt, as raised by the concurring opinion of Justices Gorsuch and Thomas that there is a private cause of action for a Section 2 violation, as every Circuit Court of Appeals has held.