LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
UNDER LAW

STATEMENT OF DAMON T. HEWITT

PRESIDENT AND EXECUTIVE DIRECTOR

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

HEARING ON
"VOTER SUPPRESSION AND CONTINUING THREATS TO DEMOCRACY"

JANUARY 20, 2022

I. Introduction

Chairman Cohen, Vice Chair Ross, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, my name is Damon T. Hewitt and I am the President and Executive Director of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on "Voter Suppression and Continuing Threats to Democracy." The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to pursue racial justice through mobilization of the private bar. Voting rights has been an organizational priority since the inception of the organization.

This hearing comes just five days after what would have been the 93rd birthday of the Rev. Dr. Martin Luther King, Jr., which we celebrated this last Monday. It is in the spirit of our national day of service, activism, and remembrance that I will turn first to Dr. King's immortal words on why equal access to the right to vote is so critical to voters of color as "Civil Right No. 1":

> Voting is the foundation stone for political action. With it the Negro can eventually vote out of office public officials who bar the doorway to decent housing, public safety, jobs, and decent integrated education. It is now obvious that the basic elements so vital to Negro advancement can only be achieved by seeking redress from government at local, state, and federal levels. To do this the vote is essential.[1]

No eligible voting-age citizen, particularly historically disenfranchised Black voters, should be confronted with barriers designed to make it more difficult for them to register to vote. Nor should they be limited to "participating in an empty ritual"[2] in which the ballots cast are rejected or are rendered meaningless by discriminatory procedures or redistricting practices. As Dr. King elaborated, for voters of color who have sacrificed so much in the service of this country, it would be "ironic to be governed, to be taxed, to be given orders, but to have no representation in a nation that would defend the right to vote abroad."[3]

Unfortunately, that irony has become a reality for millions of Black voters and other voters of color across this nation. But the peril to American democracy is not limited to them. Every citizen is impacted, and our government rendered less legitimate, when voter suppression denies eligible citizens a voice in the political process. The same is true when actions are taken to subvert the will of the people through laws or actions to change election outcomes when officials in power disagree with the results. The January 6th Insurrection and efforts to usurp the apparatus of local elections boards and processes is a warning that we all must heed.

Today we find ourselves at a crossroads. In 2006, the same year that we saw a strong bipartisan reauthorization of the Voting Rights Act, the United States was ranked as a "Full

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[1] Martin Luther King, Jr., *Civil Right No. 1: The Right to Vote*, THE N.Y. TIMES MAG., Mar. 14, 1965, at 26-27, *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 183 (James M. Washington ed., 1991).

[2] Martin Luther King, Jr., *Black Power Defined*, THE N.Y. TIMES MAG., June 11, 1967, at 26-27, *reprinted in* Washington, *supra*, at 307.

[3] Martin Luther King, Jr., *Who Speaks for the South?*, LIBERATION 2, Mar. 1958, at 13-14, *reprinted in* Washington, *supra*, at 92.

Democracy" by the Democracy Index. Less than two decades later, much has changed. In 2021, the United States is ranked as a "Flawed Democracy," driven by growing efforts at the state and local levels to suppress voting and to subvert legitimate election results. As the Democracy Index's authors explained, "public trust in the democratic process was dealt a blow by the refusal of Donald Trump and many of his supporters to accept the election result" in the 2020 elections.[4] For similar reasons, in November 2021 the International Institute for Democracy and Electoral Assistance, a respected European think-tank, for the first time placed the United States on its list of "backsliding democracies."[5] It is widely believed among our allies that we have embarked on a dangerous path towards authoritarianism.[6]

Recent polling confirms that most Americans agree that our democracy stands on the precipice. On the one-year anniversary of the January 6th insurrection, an NPR/Ipsos poll found that 64% of Americans believe U.S. democracy is "in crisis and at risk of failing." Notably, those results were consistent across party lines, but for different reasons. Most Democratic respondents and respondents of color expressed concerns about growing efforts to suppress the vote and Republican-led hyper-partisan efforts to ignore the will of voters by subverting legitimate voting counts in order to declare victory for their own candidates. In contrast, two-thirds of all Republican respondents subscribe to the "Big Lie" that the 2020 presidential election was somehow stolen from former President Trump because of rampant fraud, with fewer than half saying they are willing to accept the results of the 2020 election.[7]

Too many believe the way to win is to call their opponents cheaters and to make it as hard as possible for their opponents' supporters to cast a ballot—even if it means them being deprived of any chance to vote at all. These forces have fractured our government, our politics, and our people. The inescapable truth is that voter suppression and subversion are not just undermining democracy, but threaten to destroy the very foundation of this nation, which rests upon the consent of the governed. Without immediate action to renew and restore the fundamental right to vote, we face the end of the "great experiment" of American democracy.

My testimony will focus on current racial discrimination in voting and efforts underway to subvert the will of voters. I will explain why it is critical that Congress immediately act to remedy the damage to racial equality in voting caused by the Supreme Court's decisions in *Shelby County v. Holder*[8] and *Brnovich v. Democratic National Committee*.[9] I will offer examples of the Lawyers' Committee's post-*Shelby* litigation, as well as a summary of our forthcoming Election Protection report highlighting increased state-level efforts to suppress and subvert the vote.

My message to Congress is simple: The time to act in protecting the right to vote is now.

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[4] *Global Democracy Has a Very Bad Year*, THE ECONOMIST, Feb. 2, 2021, *available at* https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year.

[5] International Institute for Democracy and Electoral Assistance, *The Global State of Democracy Report 2021*, *available at* https://www.idea.int/gsod/sites/default/files/2021-11/the-global-state-of-democracy-2021_1.pdf.

[6] Laura King, *As Capitol Riot Anniversary Nears, Western Allies Fear for Health of U.S. Democracy*, LA TIMES, Jan. 4, 2022.

[7] *Six in 10 Americans say U.S. democracy is in crisis as the "Big Lie" takes root*, NPR, Jan. 3. 2022, *available at* https://www.npr.org/2022/01/03/1069764164/american-democracy-poll-jan-6.

[8] 570 U.S. 529 (2013).

[9] 2021 WL 2690267 (2021).

II. *Shelby County* makes it harder to stop discrimination before it disenfranchises voters

A. The State of Affairs Prior to the *Shelby County* decision

Prior to the *Shelby County* decision, the combination of Section 2 and Section 5 of the Voting Rights Act provided an effective means of preventing and remedying racial discrimination in voting. Section 2, which is discussed more fully below, remains as the general provision enabling the U.S. Department of Justice ("DOJ") and impacted voters to challenge voting practices or procedures that have a discriminatory purpose or result. Section 2 applies nationwide.[10]

Section 5 required jurisdictions with a history of racial discrimination in voting, based on a formula set forth in Section 4(b), to obtain preclearance of any voting changes from DOJ or the District Court in the District of Columbia before implementing the voting change.[11] From its inception, there was a sunset provision for the coverage formula, and the sunset for the 2006 Reauthorization was 25 years.[12]

Jurisdictions covered by Section 5 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 voters of color.[13] Effect was defined as a change which would have the effect of diminishing the ability of people of color to vote or to elect their preferred candidates of choice.[14] 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.

Except in rare circumstances, covered jurisdictions would first submit their voting changes to the Department of Justice. DOJ had sixty days to make a determination on a change, and if DOJ precleared the change or did not act within that timeframe, the covered jurisdiction could implement the change.[15] The submission of additional information by the jurisdiction, which often happened because DOJ requested such information orally, would extend the 60-day period if the submitted information materially supplemented the submission.[16] DOJ could also extend the 60-day period once by sending a written request for information to the jurisdiction.[17] This often signaled to the jurisdiction that DOJ had serious concerns that the change violated Section 5. If DOJ objected to a change, it was blocked, but jurisdictions had various options, including requesting reconsideration from DOJ using Section 5 Procedures,[18] seeking preclearance from the federal court,[19] and modifying

[10] 52 U.S.C. § 10301.
[11] 52 U.S.C. §§ 10303(b),10304.
[12] 52 U.S.C. § 10303(b).
[13] 52 U.S.C. § 10304(c).
[14] 52 U.S.C. § 10304(b), (d).
[15] 52 U.S.C. § 10304(a).
[16] *Id.* Procedures for the Administration of Section 5 of the Voting Rights Act ("Section 5 Procedures"), 28 C.F.R. § 51.37.
[17] Section 5 Procedures, 28 C.F.R. § 51.37.
[18] 28 C.F.R. § 51.45.
[19] 52 U.S.C. § 10304(a).

the voting change and resubmitting it for preclearance.

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.
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> 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.[20]

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 burden of demonstrating that they were non-discriminatory. In the pre-*Shelby County* world, most covered jurisdictions knew better than to enact changes which would raise obvious concerns that they were discriminatory—like moving a polling place in a majority Black precinct to a sheriff's office. In the post-*Shelby County* world, a formerly-covered 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 was automatically sent to individuals and groups that electronically subscribed to receive the list.[21] 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.[22] But even more important, the Section 5 process incentivized jurisdictions to involve the Black community and other communities of color in voting changes. DOJ's Section 5 Procedures requested that jurisdictions with a significant population of people of color provide the names of community members of color who could speak to the change,[23] and DOJ's routine practice was to call at least

[20] NATIONAL COMMISSION ON VOTING RIGHTS, PROTECTING MINORITY VOTERS: OUR WORK IS NOT DONE 56 (2014) (hereinafter, "2014 National Commission Report").
[21] Section 5 Procedures, 28 C.F.R. § 51.32-51.33.
[22] *Id.* at 28 C.F.R. § 51.38(b).
[23] *Id.* at 28 C.F.R. § 51.28(h).

one local community member of color to ask 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.[24]

B. The *Shelby County* Decision

In the *Shelby County* case, the Supreme Court decided in a 5-4 vote that the coverage formula for Section 5 of the Voting Rights Act, found in Section 4(b), was unconstitutional. The majority held that because the Voting Rights Act "'impose[d] current burdens,'" it "'must be justified by current needs.'"[25] 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.[26] The four dissenting justices found that Congress had demonstrated that regardless of what data was used to determine the formula, racial discrimination in voting had persisted in the covered jurisdictions.[27] The majority made clear that "[w]e issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."[28]

Shelby County effectively immobilized Section 5; following the decision, preclearance is now limited only to those jurisdictions where it is imposed by a court after a finding of intentional racial discrimination in voting. As a result, Section 5 is essentially dead without a modernized coverage formula, such as the one in the John R. Lewis Voting Rights Advancement Act of 2021. There are compelling reasons for Congress to act—predictably, racial discrimination in voting has increased in the absence of Section 5, and Section 2 cannot adequately substitute for Section 5.

C. The Impact of the *Shelby County* Decision

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 by virtue of the Court's ruling. We predicted the following impacts:

- Voting rights discrimination would proliferate, particularly in the areas formerly covered by Section 5;
- Section 2 would not serve as an adequate substitute for Section 5 for numerous reasons:
    - The statutes are not identical but were instead intended to complement one another;
    - Section 5 prevents a discriminatory voting change from ever going into effect whereas discrimination can affect voters in a Section 2 case prior to a court decision or a settlement;

[24] *Id.* at 28 C.F.R. § 51.29.
[25] *Shelby County*, 570 U.S. at 536 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 203 2009)).
[26] *Shelby County*, 557 U.S. at 545-54.
[27] *Id.* at 560 (Ginsberg, J. dissenting).
[28] *Id.* at 556.

- Section 2 litigation is time-consuming and expensive compared to Section 5 which is efficient and less-resource intensive;

- Section 2 is less likely to prevent discrimination than Section 5 because:

  - Under Section 2 plaintiffs have the burden whereas under Section 5, jurisdictions have the burden of proof;

  - Section 2 has a complicated multi-factor test that provides numerous defenses for jurisdictions, whereas Section 5 has a simple retrogression test.

- The *Shelby County* decision, and DOJ's interpretation that it also bars use of the coverage formula for sending federal observers to monitor elections, has left voting processes vulnerable to discrimination.[29]

The subsequent years have demonstrated that all of the negative impacts we anticipated have come to pass.

The Lawyers' Committee's Voting Rights Project has never been busier than in the post-*Shelby County* years, where we have participated as a counsel to a party or as amici in more than 100 voting rights cases. Because the Lawyers' Committee has a specific racial justice mission, all of the cases we have participated in implicate race or racial discrimination in some fashion, even if there are no race discrimination claims in the case.

In previous testimony the Lawyers' Committee provided in 2019, we reviewed the 41 post-*Shelby County* voting rights cases we had litigated up to that time. The findings included the following:

- In the thirty-seven cases where we sued state or local governments, twenty-nine (78.3%) involved jurisdictions that were covered by Section 5, even though far less than half the country was covered by Section 5. Moreover, we sued seven of the nine states that were covered in their entirety by Section 5 (Alabama, Arizona, Georgia, Louisiana, Mississippi, Texas, Virginia), as well as two of the states that were partially covered at the local level (North Carolina and New York).

- We achieved substantial success, either proving discrimination or achieving a settlement to address our claims in the vast majority of the cases. Of the thirty-three cases where there had been some result at the time, we achieved a positive result in 26 of 33 (78.8%). In most of the seven cases where we were not successful, we had filed emergent litigation—either on Election Day or shortly before—where achieving success is most difficult.[30]

[29] 2014 National Commission Report, *supra*, at 12, 55-64.

[30] The difficulty in successfully challenging voting procedures adopted or implemented close to an election results from judicial application of the "Purcell Principle," in which the Supreme Court cautioned federal courts against issuing injunctions in voting rights cases close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). The John R. Lewis Voting Rights Advancement Act would address the *Purcell* Principle by clarifying the circumstances under which it is appropriate for federal courts to grant relief in emergent voting rights litigation.

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

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.[31] This 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 racial discrimination in voting, or where a jurisdiction changed its laws or practices based on litigation alleging racial discrimination in voting. We found that the successful court cases occurred in disproportionally greater numbers in jurisdictions that were previously covered under Section 5.

D. Why Section 2 is an inadequate substitute for Section 5

Prior to the *Shelby County* decision, critics of Section 5 frequently minimized the negative impact its absence would have by pointing out that DOJ and private parties could still address discriminatory voting changes by bringing affirmative cases under Section 2 of the Voting Rights Act. Indeed, in the same paragraph of *Shelby County* where the Supreme Court majority states that Congress could adopt a new formula for Section 5, it also notes that its "decision in no way affects the permanent, nation-wide ban on racial discrimination in voting found in §2."[32]

However, during the *Shelby County* litigation and the reauthorization process preceding it, defenders of Section 5 repeatedly pointed out why Section 2 was an inadequate substitute. Eight years of experience demonstrate this to be true.

This is hardly a surprise given that Section 5 and Section 2 were designed by Congress to complement one another and work in concert as part of a comprehensive set of tools to combat racial discrimination in voting. Section 5 was designed to prevent a specific problem—to prevent jurisdictions with a history of racial discrimination in voting from enacting new measures that would undermine the gains voters of color were able to secure through other voting protections, including Section 2. The Section 5 preclearance process was potent, but also efficient and surgical in its limited geographic focus and sunset provisions. It was also relatively easy to evaluate because the retrogressive effect standard—whether voters of color are made worse off by the proposed change—is simple to determine in all but the closest cases. Section 5 is designed to have prophylactic effect to protect against discriminatory changes to the status quo.

Section 2 is quite different. It evaluates whether the status quo is discriminatory and thus must be changed. The test for liability should be, and is, rigorous because it is a court-ordered change. Although Section 2 (results) and Section 5 (retrogression) both have discriminatory impact tests, they are distinct. As discussed above, the Section 5 retrogression test is quite straightforward in determining whether a jurisdictional-generated change should be blocked—asking the question, will voters of color be worse off because of the change?

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[31] Preliminary Report on Voting Discrimination Against Racial and Ethnic Minorities 1994-2019, *available at* https://lawyerscommittee.org/wp-content/uploads/2019/11/LC_VOTER_DISCRIM_RPT_H.pdf.

[32] *Shelby County*, 570 U.S. at 556.

In contrast, the Section 2 results inquiry is complex and resource intensive to litigate. As discussed in greater detail below in the context of the *Brnovich* decision, 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 circumstances test to include seven such factors (along with two factors plaintiffs have the option to raise).[33] On top of the Senate factors, courts have introduced additional requirements. For example, in vote dilution cases, which typically involve challenges to redistricting plans or to a method of election, the plaintiff must first satisfy the three preconditions set forth by the Supreme Court in *Thornburg v. Gingles*,[34] before even getting to the Senate factors. These *Gingles* preconditions require plaintiffs to show that a group of people of color is compact and numerous enough to constitute a majority of eligible voters in an illustrative redistricting plan and whether there is racially polarized voting (voters of color are cohered in large number to support certain candidates and those candidates are usually defeated because of white bloc voting) and are necessarily proven by expert testimony. In vote denial cases, which involve challenges to practices such as voter identification laws, courts have also added an additional test, with the developing majority view requiring that plaintiffs demonstrate that the challenged law imposes a discriminatory burden on members of a protected class and that this "burden must be in part caused by or linked to social conditions that have or currently produce discrimination against members of the protected class."[35]

The result is that Section 2 cases are extremely time-consuming and resource-intensive, particularly when defendants mount a vigorous defense. For example, *United States v. Charleston County*[36] was a successful challenge to the at-large method of electing the Charleston (South Carolina) County Council. The litigation took four years, and it involved more than seventy witness depositions and a four-week trial, even though DOJ had prevailed on the *Gingles* preconditions on summary judgment,[37] and needed to litigate only the totality of circumstances in the district court. In sharp contrast, between 1965 and 2005, DOJ objected to 32 redistricting plans submitted by the State of South Carolina or its political subdivisions. Section 5 prevented those 32 plans from being implemented because of their discriminatory purpose or effect, thereby avoiding disenfranchisement of Black voters that would have occurred if each plan had to be challenged separately in the courts.[38]

Four specific examples from the Lawyers' Committee's litigation record illustrate why Section 2 is an inadequate substitute for Section 5.

The first and most prominent example is the Texas voter identification law, which illustrates the time and expense of litigating a voting change under Section 2 that both DOJ and the federal district court found violated Section 5 prior to the *Shelby County* decision.[39] The same afternoon that *Shelby County* was decided, then-Texas Attorney General Greg Abbott announced that the State

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[33] *See e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).
[34] *Id.* at 50-51.
[35] *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (quoting *League of Women Voters of N.C. v. North Carolina,* 769 F.3d 224, 240 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015)); *see also Ohio State Conference for the NAACP v. Husted*, 786 F.3d 524, 554 (6th Cir. 2014).
[36] 316 F. Supp. 2d 268 (D.S.C. 2003), aff'd, 365 F.3d 341 (4th Cir.), *cert denied*, 543 U.S. 999 (2004).
[37] *United States v. Charleston County*, 318 F. Supp. 2d 302 (D.S.C. 2002).
[38] Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Preclearance, Discrimination, and the Department of Justice: The Case of South Carolina*, 828 S.C. L. REV. 827, 844 (2006).
[39] *Veasey*, 830 F.3d at 227 n.7.

would immediately implement s restrictive voter ID law.[40] Several civil rights groups, including the Lawyers' Committee, filed suit in federal court, challenging SB 14 under several theories, including Section 2. DOJ filed its own suit under Section 2 and, ultimately, all of the cases were consolidated. The parties then embarked on months of discovery, leading to a two-week trial in September 2014, where dozens of witnesses, including 16 experts—half 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 Black and Hispanic voters were two to three times less likely to possess the IDs required under SB 14 and 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, after being deemed to be discriminatory, remained in effect.[41] Subsequently, a three-judge panel and later an *en banc* panel of the United States Court of Appeals for the Fifth Circuit Court, affirmed the District Court's finding.[42] As a result, the elections that took place between the day the *Shelby County* decision was handed down June 25, 2013 and the date of the Fifth Circuit's *en banc* opinion on July 20, 2016 took place under the discriminatory voter ID law. Section 5 could have changed this result. **Had Section 5 been enforceable, the discriminatory law would could have been prevented from going into effect**, and enormous expense and effort would have been spared. The district court awarded private plaintiffs $5,851,388.28 in attorneys' fees and $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.[43] Even with no published information from DOJ, more than $10 million in time and expenses were expended in that one case.

Second, in *Gallardo v. State*,[44] the Arizona legislature passed a law that applied only to the Maricopa County Community College District, adding two at-large members to what was previously a five-member single district board. The legislature had submitted the change for Section 5 preclearance. The Department of Justice issued a letter requesting more information based on concerns that the addition of two at-large members, in light of racially polarized voting in Maricopa County, would weaken the electoral power of voters of color on the board. After receiving the letter, Arizona officials did not seek to implement the change—an indication of the prophylactic power of Section 5 to stop discrimination before it happens. However, after the *Shelby County* decision, they moved forward, precipitating the lawsuit brought by the Lawyers' Committee and its partners. **Section 5 was the most viable remedy under federal law because the facts on the ground allowed the jurisdiction to evade review under Section 2.** We could not challenge the change under Section 2, especially because we would not have been able to meet the first *Gingles* precondition. Instead we made a claim in state court alleging that the new law violated Arizona's constitutional prohibition against special laws because the board composition of less populous counties was not changed. Reversing the intermediate appellate court, the Arizona Supreme Court rejected our argument, holding that the special laws provision of the state constitution was not violated. Unsurprisingly, the Latino candidate who ran for the at-large seat in the first election lost and the two at-large members are white.

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[40] *Id.* at 227.
[41] *Id.* at 227-29, 250.
[42] *Id.* at 224-25.
[43] Jim Malewitz & Lindsay Carbonell, *Texas' Voter ID Defense Has Cost $3.5 Million*, THE TEX. TRIB. (June 17, 2016), *available at* https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/.
[44] 236 Ariz. 84, 336 P.3d 717 (2014).

Third, 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 purge 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 unlawfully-removed voters being placed back on the register.[45] Ultimately, plaintiffs and the Hancock County Board agreed to the terms of a Consent Decree that would remedy the violations, and required the county's policies to be monitored for five years. But before this relieve could be secured, Sparta, a predominantly Black city in Hancock County failed to elected a Black mayor for the first time 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. **By the time Section 2 could offer relief, the damage was already done.**

The fourth matter is ongoing and reflects the significant present-day impact of the *Shelby County* decision and the loss of Section 5. 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. It has spawned several federal lawsuits, most of which include voting discrimination claims. The Lawyers' Committee is counsel in the one of these suits. The litigation will unquestionably be resource-intensive, even if the various cases are fully or partially consolidated and the Plaintiffs engage in substantial coordination. It will require numerous experts and extensive fact discovery. There will be elections—and possibly multiple cycles of elections—that will occur before Plaintiffs will have the evidence needed to establish a constitutional or Section 2 violation and the court will set aside the time to hear and decide the claims. If Plaintiffs prevail, Georgia will undoubtedly appeal and even more time will pass. **But for the *Shelby County* decision, this onerous law would not exist.** There would be no SB 202, at least not in its current form, because at least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place. 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

[45] *Georgia State Conference of the NAACP v. Hancock County*, Case No. 15-cv-414 (M.D. Ga. 2015).

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.[46]

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 (25.3%) voters.[47] Given this seemingly disproportionate impact on voters of color, if Georgia were subject to Section 5, these provisions likely would have been found retrogressive, and never would have been in effect. Instead, these provisions will be contested through time and resource-intensive litigation under complex legal standards. In the meanwhile, voters of color will suffer.

III. *Brnovich* reduces the effectiveness of Section 2 as a tool to stop voting discrimination

A. 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."[48] 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[,]"[49] prior to the Voting Rights Act's passage, this language proved largely aspirational.[50]

Responding to the states' tenacious "ability . . . to stay one step ahead of federal law," Congress passed the Voting Rights Act to provide a "new weapon[] against discrimination."[51] The Act "reflect[ed] Congress' firm intention to rid the country of racial discrimination in voting."[52] The essence of the Voting Rights Act'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

[46] *Georgia State Conference of the NAACP, et al. v. Raffensperger*, et al., N.D. GA, no. 1:21-cv-1250-JPB, First Amended Complaint, Doc. 35, ¶¶ 134-158.
[47] *Id.*, ¶¶ 92-100.
[48] *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966).
[49] *Lane v. Wilson*, 307 U.S. 268, 275 (1939)
[50] *See*, *e.g.*, *Katzenbach*, 310–15 (describing pre-Voting Rights Act efforts to enforce the Fifteenth Amendment).
[51] Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 524–25, 550 (1973) (hereinafter *Right to Vote*).
[52] *Katzenbach*, 383 U.S. at 315.

States to vote on account of race or color."[53]

Notwithstanding Section 2's broad language, jurisdictions sought to evade its reach by placing "heavy emphasis on facially neutral techniques."[54] 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." [55] In one Mississippi county, voters were forced to "travel 100 miles roundtrip to register to vote."[56] In one Alabama county, "the only registration office in the county [was] closed weekends, evenings and lunch hours."[57] These regulations ostensibly governed the time, place, and manner of voting in a neutral way, but they "particularly handicap[ped] minorities."[58]

Against this backdrop, and responding to the Supreme Court's plurality decision in *City of Mobile v. Bolden*, which had read into Section 2 a "discriminatory purpose" element,[59] 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."[60] 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 voters of color so that they have less opportunity than white voters "to participate in the political process and to elect representatives of their choice."[61] 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."[62]

Section 2 provides relief for both *vote dilution*—schemes that reduce the weight of votes cast by people of color—and *vote denial*—standards, practices, or procedures that impede people of color 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."[63]

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[53] Voting Rights Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437, 437.
[54] *Right to Vote*, *supra* at 552.
[55] *Id*. at 557–58.
[56] 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).
[57] *Id*. at 93–94.
[58] *Id*. at 96.
[59] 446 U.S. 55, 62 (1980).
[60] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. at 131, 134 (emphasis added).
[61] *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 (4th Cir. 2016).
[62] S. Rep. No. 97-417, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 189 ("Senate Report").
[63] *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

Thirty-five years ago, in *Gingles v. Thornburg*,[64] 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 voters of color, 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,"[65] that accounts for the "totality of [the] circumstances."[66]

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."[67] 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."[68] 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).[69]

Since *Gingles*, four different Circuits addressing vote-denial cases have used the foundation laid in that case 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 voters of color ("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.[70] No other Circuit has put forth an alternative formulation.

B. The Facts of *Brnovich*

That was the situation until the Supreme Court's decision in *Brnovich v. Democratic National Committee.* In *Brnovich*, the 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-

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"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.

[64] 478 U.S. 30, 47 (1986).

[65] *Id*. at 79 (quotation marks omitted).

[66] 52 U.S.C. § 10301(b).

[67] 478 U.S. at 47.

[68] 478 U.S. at 36.

[69] *Id*. at 36–37 (citing Senate Report at 28–29).

[70] *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).

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 *en banc* United States Court of Appeals for the Ninth Circuit had reversed, 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 out of precinct (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);[71] confusing placement of polling locations (indigenous populations in particular lived farther from their assigned polling places than did white voters,[72]); and high rates of residential mobility.[73] 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.[74]

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 return their early ballots with the assistance of third parties.[75] 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 voters of color.[76]

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 Voting Rights Act. 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.[77]

C. The *Brnovich* 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 created guidelines for future treatment of Section 2 vote denial "results" cases that were not

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[71] *Brnovich v. Democratic National Committee*, Joint Appendix, at 590, *available at* https://www.supremecourt.gov/DocketPDF/19/19-1257/162052/20201130133300128_19-1257%20-1258%20Joint%20Appendix.pdf.
[72] *Id*. at 592.
[73] *Id*. at 594.
[74] *Id*. at 595-96.
[75] *Id*. at 597.
[76] *Id*. at 598.
[77] Id. at 681.

only new, but also contrary—or at least dilutive of—the decades-long accepted standards. The guidelines reflect lack of understanding, or lack of concern, about how racial discrimination operates in practice.

Brnovich does not spell the end of Section 2 cases. Rather, it unnecessarily and unreasonably makes it more difficult for impacted voters 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."[78] 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.[79] However, those briefs describe a total of perhaps 16 cases, dating back over seven years, and only three of them led to a finding of Section 2 liability. That number of cases is hardly indicative of a floodgates problem.

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 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 lower courts were being overwhelmed by Section 2 vote denial cases. And when such cases were brought, lower courts had no trouble applying the standard to separate discriminatory voting practices from benign election regulations. In short, the pre-existing standard worked well, and there was no reason to disturb it.

2. ***Brnovich* reads a critical remedial statute too 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,[80] and there are few statutes in this Nation's history with greater remedial value than the Voting Rights Act of 1965. Yet, rather than read the Act expansively, the Court created new stringent "guideposts," most prominently suggesting 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 purported touchstone of the *Brnovich* opinion is the Court's construction of the requirement in Section 2(b) that the political process be "equally open", which it describes as the "core" requirement of the law.[81] 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."[82] In that context, the Court

[78] *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *8 (2021).
[79] *Id*. at n.6.
[80] *See Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (broadly construing the Voting Rights Act as "aimed at the subtle, as well as the devious, state regulations which have the effect of denying citizens their right to vote"); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (stating general rule of statutory construction).
[81] *Brnovich v. Democratic National Committee,* 2021 WL 2690267, at *12; 52 U.S.C. § 10301.
[82] *Brnovich,* 2021 WL 2690267, at *12 (emphasis in original).

turned to the "totality of the circumstances" test, and found that "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered," and proceeded to list five "important circumstances" that were relevant.[83]

Some of these "important circumstances" seem fairly innocuous on their face: e.g., the size of the burden, the size of the disparity. Others not so much: e.g., the degree of departure of the challenged practice from practices that were standard when Section 2 was amended in 1982 or which are widespread today, and the opportunities provided by the electoral process as a whole. Another has never been deemed relevant to Section 2 analysis: the strength of the state's justification for the practice—except in connection with assessment of the tenuousness of that justification. Overall, however, the devil 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."[84] The application of this "guidepost" 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).[85] 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.[86]

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 relief - 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.[87]

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[83] *Id*.
[84] *Id.*
[85] *Id.*
[86] *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc).
[87] Georgia Senate Bill 202, *available at* https://www.legis.ga.gov/api/legislation/document/20212022/201498); *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, 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, *available at* https://www.npr.org/2020/10/17/924527679/why-do-nonwhitegeorgia-voters-have-to-wait-in-line-for-

Mandating additional voter ID requirements in order to apply for an absentee ballot or to return a voted absentee ballot is another new hurdle 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.[88] 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 various 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 devastating impact on the voting rights of persons of color.

4. 1982 standards and widespread practice should not be dispositive

Second, Justice Alito said that other relevant factors included 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."[89] 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 changes 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 in which 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 (25.3%) voters.[90] 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.

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hours-too-few-polling-pl.

[88] *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 44.

[89] 2021 WL 2690267, at n.15.

[90] *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 47.

Further, Justice Alito also observed that the "widespread" present day acceptance of the voting practice could justify its use. But it was precisely because certain discriminatory practices were "widespread" that the Voting Rights Act was necessary. It seems incongruous, if not irrational, to justify discrimination against people of color on the basis of "widespread" acceptance.

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,"[91] again dealing obliquely with the consequences of the differences being caused by differences in wealth—which may themselves be the result of historic racial 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 out of precinct. 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.[92] The Court neglected to note that the out of precinct 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.[93] 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. The existence of 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, for example, access to absentee ballots may be curtailed, as long as the voter can still vote in person.[94] But, if an advantageous means of voting is curtailed as to one group more than it is to another, what difference does it make 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, limiting methods of voting makes it less likely that people will vote. Limiting 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—and of the entire remedial scheme of the Voting Rights Act. 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

[91] 2021 WL 2690267, at *13.
[92] *Id*. at *4.
[93] *Veasey v. Perry*, 71 F.Supp.3d 627, 659 (S.D. Tex. 2014).
[94] 2021 WL 2690267, at *13.

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."[95] 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 hundreds 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.[96]

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."[97] Further, *Gingles* recognized the applicability of the various Senate Factors would naturally turn on the type of Section 2 claim at issue.[98] The *Gingles* Court's statement that the Senate Factors will "often be pertinent to *certain types* of § 2 violations," such as dilution,[99] cannot be reconciled with a conclusion that the Factors "*only*" inform one specific type of Section 2 claim.

D. The Growing Present Need

As with the need for the resuscitation of Section 5, recent events reflect the significant present-day need for an immediate response to *Brnovich*. As detailed throughout this testimony, for example, the recently enacted Georgia voter suppression law, 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 not for the decision in *Shelby County*. 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 making of these arguments demonstrates how those who support the erection of barriers to vote intend on using that

[95] *Id*.
[96] *Id*.
[97] 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).
[98] *See id*. at 45.
[99] *Id* (emphasis added).

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 at this writing, Texas has passed 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."[100]

As with Georgia's SB 202, some of these provisions might have been stopped by an effective Section 5 before they went into effect, and Section 2 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.[101]

IV. Ongoing efforts to undermine and subvert the record participation in the 2020 election.

During the 2020 Presidential Election, we witnessed the largest voter turnout in American history. For the first time, the United States exceeded 140 million people who voted, turning out at a record of 159,633,396 voters. Turnout was the highest in 120 years in terms of the percentage of voting-eligible population, with 66.7 percent casting ballots. President Biden became the first U.S. presidential candidate to receive more than 80 million votes, with a final tally of 81,283,098 votes, or 51.3 percent of all votes cast for President. Former President Trump received the second highest total of any U.S. presidential candidate, trailing President Biden by a little over seven million votes.[102]

As a result of the pandemic, an unprecedented number of ballots were cast through Early Voting or vote-by-mail. Over 101.4 million voters in the Presidential Election cast their ballots before Election Day, nearly two-thirds of all ballots cast. Of those early votes, about 65.6 million were returned via mail-in ballots. Elections security experts lauded the 2020 Presidential Election as the "most secure in American history."[103]

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[100] *Veasey v. Perry*, 71 F. Supp. 3d 627, 636–37 (S.D. Tex. 2014), *aff'd and reversed on other grounds*, *Veasey v. Abbott*, 830 F. 3d 216 (5th Cir. 2016) (en banc).

[101] *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).

[102] James M. Lindsay, *The 2020 Election by the Numbers*, Council on Foreign Relations, Dec. 15, 2020, *available at* https://www.cfr.org/blog/2020-election-numbers.

[103] Sara Cook, *Election infrastructure officials: 2020 election was "most secure in American history"*, CBS News, Nov. 20, 2020, *available at* https://www.cbsnews.com/live-updates/2020-election-most-secure-history-dhs/.

That conclusion was shared by then-President Trump's own appointees. A joint statement issued by the Department of Homeland Security's Cybersecurity & Infrastructure Security Agency, or CISA, concluded:

> The November 3rd election was the most secure in American history…. There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised. Other security measures like pre-election testing, state certification of voting equipment, and the U.S. Election Assistance Commission's (EAC) certification of voting equipment help to build additional confidence in the voting systems used in 2020. While we know there are many unfounded claims and opportunities for misinformation about the process of our elections, we can assure you we have the utmost confidence in the security and integrity of our elections, and you should too. When you have questions, turn to elections officials as trusted voices as they administer elections.[104]

Despite this success, the 2020 Election and its aftermath highlighted some important challenges that remain. The Lawyers' Committee received reports of barriers that prevented voters of color to register to vote, cast their ballot and to have their ballot counted. A little over 54 percent of all voters who called the 866-OUR-VOTE Election Protection Hotline and reported their race or ethnicity were voters of color. They reported several basic barriers to voting access, which disproportionately impacted voters of color:

- Restrictions or lack of information about voter registration;
- Lack of notice about the consolidation or closure of polling places;
- Purging of voter rolls in violation of the National Voter Registration Act;
- Lack of information about how to access vote-by-mail opportunities;
- Unreasonable vote-by-mail deadlines, due to mail delivery and return delays;
- Rejection of absentee ballots through misuse of signature-matching procedures;
- Restrictive voter identification laws, which failed to provide alternatives to voters lacking required information (such as those voters with nontraditional mailing addresses) or who do not have reasonable access to government offices that offer accepted forms of identification; and
- Long lines that resulted in hours long wait times due to an insufficient number of

[104] Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees, Nov. 12, 2020, *available at* https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election.

voting machines or equipment malfunctions.

We also received reports of violations of federal law, including the failure to provide language assistance in violation of Section 203 of the Voting Rights Act and the denial of assistance from a person chosen by the voter in violation of Section 208 of the Act. Many of these barriers were exacerbated by overwhelmed election officials who were unprepared and under-resourced for the unprecedented levels of voter participation.

Rather than working to remove existing barriers to voting, many states have taken a different path. Since the 2020 Election, several legislatures have introduced and passed legislation targeting a reduction in turnout by voters of color in future elections. As the Brennan Center for Justice reported in its most recent summary of pending voting legislation:

> Between January 1 and December 7, at least 19 states passed 34 laws restricting access to voting. More than 440 bills with provisions that restrict voting access have been introduced in 49 states in the 2021 legislative sessions. These numbers are extraordinary: state legislatures enacted far more restrictive voting laws in 2021 than in any year since the Brennan Center began tracking voting legislation in 2011. More than a third of all restrictive voting laws enacted since then were passed this year. And in a new trend this year, legislators introduced bills to allow partisan actors to interfere with election processes or even reject election results entirely.[105]

This trend is particularly threatening to the foundations of our democracy because the legislation that has been introduced, and in some cases enacted, does not stop at suppressing the votes of communities of color. Some legislation goes much further, allowing party officials to reject the will of the voters if those officials disagree with the election results.

These legislative actions, which are directed at the rejection of free and fair elections, place our nation on the dangerous path towards authoritarianism and totalitarianism. They deviate from basic norms of our democratic system, taking away what Dr. King described as the "foundation stone of political action"[106] and making voters of color and others disfavored by those controlling the elections "that much less a citizen."[107] In the process, these anti-democratic laws would leave every American who disagrees with the party that controls the elections without any recourse to protect themselves from further repressive measures that systematically eliminate all of their basic civil and human rights.[108]

The threat to American democracy is very real. We were confronted by the ugly specter of authoritarianism in the January 6th Insurrection that breached the sacred walls of our Capitol in an effort to prevent the peaceful transfer of power for the first time in our history. Stoked by the fanatical

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[105] Brennan Center for Justice, *Voting Rights Laws Roundup: December 2021*, updated Jan. 12, 2022, *available at* https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021.

[106] *Civil Right No. 1*, *supra*.

[107] *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) ("To the extent that a citizen's right to vote is debased, he is that much less a citizen.").

[108] *See generally* W.E.B. DuBois, THE SOULS OF BLACK FOLK 52 (Signet Classic ed. 1995) ("The power of the ballot we need in sheer self-defense, -else what shall save us from a second slavery?").

rhetoric of a defeated President, his sycophants and other political opportunists, as well as white supremacist groups, directed a violent mob towards this building in a failed effort to stop the electoral count. We witnessed in real time the antisemitic and racist epithets that these violent insurrectionists hurled at the thin blue line of law enforcement officers protecting the Vice President and Members of Congress.[109]

V. Immediate passage of the John Lewis Voting Rights Advancement Act and the Freedom to Vote Act is needed to protect the fundamental right to vote of all Americans.

The harm caused by *Shelby County* has been well-documented. The full effects of *Brnovich* remain to be seen. It is time for Congress to act. The full protections of the Voting Rights Act are desperately needed today, particularly given the steps already taken—or about to be taken—by legislatures in states such as Georgia, Florida, 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. Moreover, there is a legitimate concern that some state legislatures will be emboldened by their reading of *Brnovich*, as they were by the decision in *Shelby*, and view it as a signal from the Court to take even more suppressive action. We cannot allow partisan election officials to subvert the will of the majority when they disapprove of it.

Congress should immediately reassert its intention to fully protect the voting rights of voters of color in Sections 2 and 5 of the Voting Rights Act through the John Lewis Voting Rights Advancement Act and the Freedom to Vote Act.

Our recommended responses to the *Shelby County* and *Brnovich* decisions stem from the different scope and rationales of the decisions themselves. The complete evisceration of Section 5 wrought by the *Shelby County* decision necessitates a comprehensive remedy, but one that is instructed by the reasoning of that decision and therefore considers both the ongoing history of discrimination in voting in particular states and the current need for prophylactic measures to ensure that no state or sub-jurisdiction can implement a change in voting practices that discriminates against voters of color. The more limited impact of the *Brnovich* decision calls for a correspondingly focused response, one that zeroes in on the specific deviations of the Court from the clear intent of Congress in its 1982 amendments to Section 2.

Thus, our recommended response to the *Shelby County* decision starts with our support for provisions including a replacement coverage formula that would be applied to the preclearance provisions of Section 5 and the federal observer provisions of Section 8, and a transparency provision that requires all jurisdictions—irrespective of any coverage formula—to provide public notice of changes in voting practices.

It also is necessary to include an additional amendment to Section 2, tied to the transparency provision: the creation of a "retrogression cause of action," which allows the Attorney General or private parties an opportunity to stop changes in voting practices anywhere in the country before they diminish the voting rights of voters of color. The retrogression cause of action would meet the current

[109] Domenico Montanaro, *Capitol Police Officer Testifies To The Racism He Faced During The Jan. 6 Riot*, NPR, July 27, 2021, *available at* https://www.npr.org/2021/07/27/1021197474/capitol-police-officer-testifies-to-the-racism-he-faced-during-the-jan-6-riot.

need to stop suppressive laws that discriminate against voters of color, using a tried and true standard, with limited interference with state sovereignty, and without implicating issues relating to differentiation among the states.

Our recommended congressional response to *Brnovich* is more limited, as Congress does not have to completely rewrite Section 2. It simply has to remove any ambiguity in the statute caused by the *Brnovich* opinion, which gave short shrift to a substantial legislative record and decades of jurisprudence which run counter to the *Brnovich* majority's constricted view of this remedial statute. Congress originally enacted and later 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 the right to vote for people of color. Consistent with this purpose, prior to *Brnovich*, the Supreme Court and several Courts of Appeal had adopted a standard to ensure the effective implementation of those protections. That standard recognized not only that the Act applies broadly to all voting procedures and policies that abridge the right to vote—whether expressly or subtly—but also 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.[110]

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.

In closing, as we celebrate the lives and legacies of Dr. King and Congressman John Lewis, let us heed their words. Dr. King powerfully observed, "Freedom is like life. It cannot be had in installments. Freedom is indivisible—we have it all, or we are not free."[111] Voting is foundational to securing that freedom. As Congressman Lewis explained, "The vote is precious. It is almost sacred. It is the most powerful non-violent tool we have in a democracy."[112]

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[110] *Gingles v. Thornburg*, 478 U.S. 30, 47 (1986); *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).

[111] Martin Luther King, Jr., *The Case Against "Tokenism"*, N.Y. TIMES MAG., Aug. 5, 1962, in Washington, *supra*, at 111.

[112] Sean Collins, *Rep. John Lewis's Voting Rights Legacy is in Danger*, Vox, July 20, 2020, *available at* https://www.vox.com/policy-and-politics/2020/7/18/21329623/rep-john-lewis-voting-rights-legacy-supreme-court (quoting Rep. Lewis).

It is time for action. We must protect the fundamental right to vote for all Americans now, or else none of us will be free.

Thank you very much for your attention and your commitment to making voting fully accessible for all Americans. I welcome any questions you may have.