

— An Assessment of —
MINORITY VOTING RIGHTS ACCESS
— in the United States —

★ ★ ★ ★ ★ 2018 STATUTORY REPORT ★ ★ ★ ★ ★



AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES

U.S. COMMISSION ON CIVIL RIGHTS

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The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. Congress directed the Commission to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.*

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*42 U.S.C. §1975a.

An Assessment of Minority Voting Rights Access in the United States

2018 Statutory Enforcement Report

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UNITED STATES COMMISSION ON CIVIL RIGHTS

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Letter of Transmittal

September 12, 2018

President Donald J. Trump
Vice President Mike Pence
Speaker of the House Paul Ryan

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *An Assessment of Minority Voting Rights Access in the United States*. The report is also available in full on the Commission’s website at www.usccr.gov.

The report examines the current and recent state of voter access and voting discrimination for communities of color, voters with disabilities, and limited-English proficient citizens. It also examines the enforcement record of the United States Department of Justice regarding the provisions of the Voting Rights Act of 1965 since the Act’s last reauthorization in 2006, and particularly since the Supreme Court decision in *Shelby County v. Holder* in 2013.

The Commission voted unanimously to reach key findings including the following: The right to vote is the bedrock of American democracy. It is, however, a right that has proven fragile and in need of both Constitutional and robust statutory protections. Racial discrimination in voting has been a particularly pernicious and enduring American problem. Voter access issues, discrimination, and barriers to equal access for voters with disabilities and for voters with limited English proficiency continue today.

The Voting Rights Act works to dislodge and deter the construction of barriers by state and local jurisdictions that block or abridge the right to vote of minority citizens. Especially following the 2013 Supreme Court decision in *Shelby County v. Holder* precluding operation of certain parts of the Voting Rights Act, the narrowness of statutory mechanisms to halt discriminatory election procedures before they are instituted has resulted in elections with discriminatory voting measures in place. After an election takes place with discriminatory voting measures, it is often impossible adequately to remedy the violation even if the election procedures are subsequently overturned as discriminatory, not least because officeholders chosen under discriminatory election rules have lawmaking power and the benefits of incumbency to continue those rules.

In states across the country, voting procedures that wrongly prevent some citizens from voting—including but not limited to: voter identification laws, voter roll purges, proof of citizenship

measures, challenges to voter eligibility, and polling places moves or closings—have been enacted and have a disparate impact on voters of color and poor citizens.

The Commission unanimously voted for key recommendations, including that: Congress should amend the Voting Rights Act to restore and/or expand protections against voting discrimination that are more streamlined and efficient than existing provisions of the Act. In establishing the reach of an amended Voting Rights Act coverage provision, Congress should include current evidence of voting discrimination as well as evidence of historical and persisting patterns of discrimination. A new coverage provision should account for evidence that voting discrimination tends to recur in certain parts of the country. It also should take account of the reality that voting discrimination may arise in jurisdictions that do not have extensive histories of discrimination since minority populations shift and efforts to impose voting impediments may follow. Importantly, Congress should provide a streamlined remedy to review certain changes with known risks of discrimination before they take effect—not after potentially tainted elections.

The Commission also unanimously calls on the United States Department of Justice to pursue more Voting Rights Act enforcement in order to address the aggressive efforts by state and local officials to limit the vote of citizens of color, citizens with disabilities, and limited English proficient citizens.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,

A handwritten signature in blue ink, appearing to read "C. Lhamon", is positioned above the printed name and title.

Catherine E. Lhamon
Chair

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The Commission's Office of Civil Rights Evaluation (OCRE) produced this report under the direction of Katherine Culliton-González, Esq., Director of OCRE. With Dr. LaShonda Brenson, Civil Rights Analyst, Culliton-González performed principal research and writing.

Commissioners and Commissioner Special Assistants Sheryl Cozart, Jason Lagria, Carissa Mulder, Amy Royce, Rukku Singla, Alison Somin, and Irena Vidulovic conducted research, edited, and examined the report.

The Commission's General Counsel, Maureen Rudolph, reviewed and approved the report for legal sufficiency.

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EXECUTIVE SUMMARY

Congress has directed the United States Commission on Civil Rights (“the Commission”) to annually examine “Federal civil rights enforcement efforts.”¹ In this report, the Commission examines minority voting rights access through the lens of the federal government’s enforcement of the Voting Rights Act (VRA) of 1965 since the 2006 reauthorization of its special provisions.² On February 2, 2018, the Commission held a field briefing in Raleigh, North Carolina.³ The Commission heard testimony from 23 voting rights experts, including former United States Department of Justice (DOJ or Department) officials from both Republican and Democratic administrations, state election officials, and voting rights experts and advocates.⁴ The Commission also heard from 33 members of the public, and received 31 post-briefing written statements in connection with this investigation. The Commission invited officials from relevant offices within the DOJ, but they declined the Commission’s invitation to testify at our field briefing. The Department provided data and documents, which are discussed in Chapter 5. The Department also reviewed a draft of this report and provided comments. The Commission draws this report from the above-referenced sources and independent research. Further, the Commission has considered and been informed by voting rights reports from its State Advisory Committees (SACs).⁵

Since its formation in 1957, the Commission has played a central role in documenting and explaining the need to enact, and then maintain, a strong federal VRA. In the late 1950s and early 1960s, the Commission reported on the pervasive discrimination in voting that then existed

¹ 42 U.S.C. § 1975a(c)(1).

² The “special provisions” of the VRA are temporary provisions that were set to expire and were reauthorized over time. *See* Chapter 1, Discussion and Sources cited therein at notes 101-48, *infra*. The 2006 VRA Reauthorization extended Section 4, which was the criteria requiring preclearance of all voting changes in certain jurisdictions, and Section 203, which provided for language access according to a threshold formula of minority voters unable to fully understand the ballot in English, from 2007 to 2032. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights and Reauthorization Amendments Act of 2006, Pub. L. 109-246. 120 Stat. 577 at § 4 (amending 52 U.S.C. § 10303(a)(7)-(8) (formerly 42 U.S.C. § 1973b(a)) and extending the preclearance criteria for 25 years, with an evaluation required after 15 years); § 7 (amending 52 U.S.C. § 10503(b)(1) (formerly 42 U.S.C. § 1973aa-1a(b)(a)) so that Section 203 is in force until August 23, 2032).

³ U.S. Commission on Civil Rights, “Commission Briefing: Voting Rights, Morning Session, Raleigh, NC 2/2/18,” Youtube Video, posted Feb. 2, 2018, <https://www.youtube.com/watch?v=eSb1vfk3WyM>.

⁴ Press Release, U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS BRIEFING SCHEDULE (Feb. 2, 2018), <http://www.usccr.gov/press/2018/01-19-PR-Briefing.pdf> [*hereinafter* Press Release, U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS]. U.S. Commission on Civil Rights, “Commission Briefing: Voting Rights, Afternoon Session, Raleigh, NC 2/2/18,” Youtube Video, posted Feb. 2, 2018, <https://youtu.be/dMCicLUn0Sc>; U.S. Commission on Civil Rights, “Commission Briefing: Voting Rights, Public Comment Session, Raleigh, NC 2/2/18,” Youtube Video, posted Feb. 2, 2018, <https://youtu.be/CKNDXMRyXig>.

⁵ *See, e.g.*, Advisory Memorandum from Alaska State Advisory Committee on Alaska Native Voting Rights to the U.S. Comm’n on Civil Rights, (Mar. 27, 2018) <http://www.usccr.gov/pubs/2018/05-25-AK-Voting-Rights.pdf>; *see also* New Hampshire Advisory Committee to the U.S. Comm’n on Civil Rights, *Voting Rights in New Hampshire*, (Mar. 2018), <https://www.usccr.gov/pubs/2018/05-16-NH-Voting-Rights.pdf> [*hereinafter* New Hampshire, Voting Rights Report]. For summaries of each SAC briefing and/or report issued in the last two years, relevant to voting rights, *see* Appendix D.

throughout most of the South and led to the passage of the VRA in 1965.⁶ The Commission further reported on initial efforts to enforce the VRA immediately after its passage, and provided reviews and analyses that assisted Congress in deciding to extend and expand the Act's temporary provisions in 1970, 1975, and 1982.

One of the central components of the VRA of 1965 was the preclearance process. As adopted, under the VRA's Sections 4 and 5, preclearance required certain jurisdictions with discriminatory voting laws and practices to seek federal pre-approval of any voting changes. Specifically, in jurisdictions that were "covered" for preclearance, the federal government could prevent any changes that were enacted with a discriminatory intent or had a discriminatory retrogressive effect, as measured against the status quo.

Moreover, under the VRA, the federal government could send federal examiners or observers to monitor elections inside the polls, and federal examiners could also register voters. Sections 4 and 5 were provisions that, unlike the permanent nationwide antidiscrimination prohibition under Section 2 of the VRA, had to be reauthorized at specified intervals to continue in force. After the passage of the VRA, black voter registration increased significantly in the covered jurisdictions. With strong bipartisan support, Congress reauthorized the VRA five times, each time under a different Republican president. Over the course of these reauthorizations, Congress expanded the preclearance provisions of the VRA to cover more jurisdictions and to provide additional protections—such as requiring greater voting access and assistance for minority voters with limited-English proficiency. The preclearance provisions were last reauthorized on July 27, 2006.

In 2006, Congress reauthorized preclearance for an additional 25 years. The 2006 VRA Reauthorization record included 15,000 pages of record evidence of ongoing discrimination in voting.⁷ Federal courts later described the Congressional record as follows: "The compilation presents countless 'examples of flagrant racial discrimination' since the last reauthorization; Congress also brought to light systematic evidence that 'intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that [S]ection 5 preclearance is still needed."⁸ In addition, Congress found that as "registration and voting of minority citizens increase[d]...., other measures may be resorted to which would dilute increasing minority voting strength."⁹

⁶ U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS XIII (1959), <https://www.law.umaryland.edu/marshall/usccr/documents/cr11959.pdf> [*hereinafter* U.S. COMM'N ON CIVIL RIGHTS 1959]. The Commission received its first voting complaint on Aug. 14, 1958. Within a few days, the Commission authorized a field investigation and promptly ordered such investigations of the other voting complaints that came in during succeeding months. *Id.* at 54.

⁷ H.R. REP. NO. 109-478, at 5 and 11-12 (2006).

⁸ *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 565 (2013) (Ginsburg, J., dissenting) (citing *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009)); *see also* *Shelby Cty., Ala. v. Holder*, 679 F.3d 848, 866 (D.C. Cir. 2012).

⁹ *City of Rome v. United States*, 446 U.S. 156, 181 (1980) (quoting H.R. REP. NO. 94-196, at 10 (1975)).

On June 25, 2013, in the case of *Shelby County v. Holder*, the Supreme Court ruled that the VRA unconstitutionally determined which jurisdictions needed the federal government’s pre-approval to change their voting procedures.¹⁰ Reasoning that minority voter access had progressed significantly, the Court concluded that the federal government should treat states equally. The Court declared that Congress could no longer use data from the past to determine which jurisdictions must seek federal approval to change their voting laws. The Court stated that Congress could adopt a different approach based on current conditions. While several legislative proposals have been introduced in both chambers of Congress, as of June 25, 2018,¹¹ Congress has not enacted legislation to restore the preclearance process.

While the *Shelby County* decision did not find that Section 5 was unconstitutional, by ruling that the formula in Section 4 was unconstitutional, the decision removed the mechanism for carrying out preclearance. In practice, this means that until Congress passes a new preclearance formula, previously covered jurisdictions are not currently required to obtain preclearance before making changes in voting laws, unless they are covered by a separate court order.¹²

Since *Shelby County*, jurisdictions have made changes to their voting procedures that would not have received the federal government’s approval. For example, some jurisdictions—including both formerly covered and non-Section 5 covered jurisdictions—have required strict forms of voter ID, purged voter rolls, reduced polling locations, required documentary proof of citizenship to register to vote, and cut early voting, among other contested voting changes that, on the specific facts in those states, operate to denigrate minority voting access in ways that would have violated preclearance requirements if they were still in effect. Data indicate that these voting procedure changes disproportionately limit minority citizens’ ability to vote.

After *Shelby County*, the federal government has limited tools to address these potentially discriminatory voting procedures and hardly any tools to prevent voting discrimination before it takes place. Prior to *Shelby County*, the DOJ primarily enforced Section 5 of the VRA by objecting to changes in voting procedures, though jurisdictions could also seek preclearance from a three-judge federal court. After *Shelby County*, under Section 2 of the VRA, the federal government and private groups can still file lawsuits to argue that voting changes would reduce minority citizens’ ability to vote, and these lawsuits have increased fourfold since the *Shelby County* decision. However, compared to the Section 5 preclearance process, Section 2 reverses the burden of proof: the federal government or private litigants must now prove that any voting procedure changes would hurt minority voters, while those measures are in place. Moreover, Section 2 lawsuits often take years and therefore do not prevent elections from occurring under procedures later found to be discriminatory. DOJ and private litigants can also file lawsuits to enforce Sections 4, 203, and 208 in order to ensure access for voters with disabilities and voters with limited-English proficiency. Outside of lawsuits, other VRA enforcement tools have also been limited, as the DOJ has interpreted *Shelby County* to mean that it can now only send election observers if ordered by

¹⁰ *Shelby Cty.*, 570 U.S. at 557.

¹¹ The Commission unanimously approved the text of this report and its findings and recommendations on June 26, 2018.

¹² U.S. Dep’t of Justice, *Fact Sheet on Justice Department’s Enforcement Efforts Following Shelby County Decision*, <https://www.justice.gov/crt/file/876246/download> (last accessed July 26, 2018) [*hereinafter* DOJ Fact Sheet].

a court. This means the DOJ is without a critical source of evidence in voting discrimination, as election observers are authorized to enter poll sites and witness firsthand actual behavior at the polls on Election Day.

During the time period reviewed by this report's investigation, the DOJ has litigated fewer VRA enforcement lawsuits than private groups. The DOJ has filed four of the 61 Section 2 cases since the *Shelby County* decision, one case about the VRA's required language access measures, and no cases about the right to assistance in voting. At the Commission's briefing, experts disagreed on whether the DOJ has failed to provide necessary enforcement or whether voter discrimination has decreased. While private groups have filed and continue to file suits, VRA litigation can be challenging for private parties due to their complexity and the significant resources needed to litigate these cases.

While voter turnout is an imperfect indicator of voter discrimination, data indicate that minority voter turnout still lags behind white voter turnout. Moreover, voter turnout among non-black minority groups lags significantly behind white voter turnout. Similarly, minority voter registration lags behind white voter registration, especially among non-black minority groups. Compared to white voters, data show that minority citizens are more likely to say that their reason for not registering to vote is due to registration requirements or difficulties, as opposed to disinterest in the political process.

The following report consists of five chapters, followed by the Commission's findings and recommendations. Chapter 1 ("Introduction and Background") discusses the relevant history of minority voting rights in the United States, from the time of the 14th and 15th Amendments to the U.S. Constitution to the present day. Chapter 1 also explains the VRA's most significant protections, and summarizes all subsequent reauthorizations including the 2006 VRA Reauthorization, while Appendix A summarizes the Commission's historical work on voting rights.

Chapter 2 ("The *Shelby County* Decision and Its Major Impacts") examines the impact of the Supreme Court's June 25, 2013 decision invalidating the VRA's preclearance provisions.¹³ This chapter examines the prior VRA preclearance regime and summarizes the status of minority voting rights after the 2006 VRA Reauthorization and prior to the *Shelby County* decision suspending preclearance. Chapter 2 then discusses the Supreme Court's decision, its reasoning that conditions had dramatically changed and its reliance on the principle of equal state sovereignty, as well as the precise language of the decision regarding any future preclearance regimes, and the decision's impact on federal VRA enforcement.

This chapter also briefly studies the impact of *Shelby County* in North Carolina and Texas, where litigation ensued under one of the remaining provisions of the VRA, Section 2, which is the nationwide ban on discriminatory voting procedures. Although there was discrimination in voting in both states prior to *Shelby County*, data from litigation in both states show that due to the loss of preclearance after *Shelby County*, elections were held with voting procedures that federal courts of appeals later held to be intentionally racially discriminatory.

¹³ *Shelby Cty.*, 570 U.S. at 557.

Chapter 3 examines four ways in which access to the ballot for minority voters has been impacted in the time period covered by this report (from the 2006 VRA Reauthorization to the present). These are: (i) strict voter ID laws, (ii) greater restrictions on voter registration procedures, (iii) cuts to early voting, and (iv) voter access to polling places, language access, and access for persons with disabilities. When relevant, this chapter discusses litigation and other actions brought to address VRA issues, and the results of those methods. Some of the measures examined are statewide, and others are local.

Chapter 3 provides further detail by examining various types of voter ID laws, and their impact on minority voters. This chapter then examines arguments that have been used to justify voter ID laws and measures restricting voter registration. The arguments examined include allegations of in-person voter fraud, double voting, bloated voting rolls, noncitizen voting, and partisanship. Chapter 3 also examines changes in voter registration procedures that have been justified by these same arguments, including documentary proof of citizenship requirements, challenges to voters on the rolls, and removal of voters from the rolls. It then examines cuts to early voting as well as various polling place and voter accessibility issues. Finally, Chapter 3 summarizes testimony and information the Commission received from its SACs regarding recent voting rights issues. Appendix D includes further information about the proceedings and relevant findings from SAC reports and investigations.

Research in Chapters 2 and 3 of this report shows the repeated and challenging nature of ongoing discrimination in voting in states previously covered by Section 5 and in other states. These chapters also analyze some emerging national patterns of voter registration and election administration practices that have a suppressive impact on minority voters, such as cuts to early voting, certain types of voter purging, strict voter ID requirements, and lack of accessibility. Appendix E provides a chart showing where these types of potentially discriminatory measures have been put in place, illustrating their incidence across the nation, while also comparing formerly covered jurisdictions with states where the preclearance formula did not apply. The data show a higher incidence of these types of potentially discriminatory measures in the formerly covered jurisdictions.

Chapter 4 (“Examining the Data”) reviews data about minority voters’ access to the ballot from the 2006 VRA Reauthorization, until the *Shelby County* decision and up until the present time. The chapter also examines minority voter turnout and registration over time, while also noting that turnout is not the only measure of whether current conditions evidence ongoing discrimination in voting. This chapter also includes research showing that current voter participation rates among Asian, Latino, and Native American communities are lower than the level of turnout that the drafters of the 1965 VRA considered to be indicia of discrimination.

Chapter 4 then provides an analysis of data regarding VRA enforcement measures within the particular time frame of this report. Quantitative analysis of the data reveals several trends. One key trend is that there are more successful Section 2 cases concentrated in the formerly covered jurisdictions. Moreover, comparing the five years prior to and five years after the *Shelby County* decision shows that the number of successful Section 2 cases have quadrupled in the latter time period. The data also demonstrate an inaccessibility of alternative protections such as preliminary injunctions and judicial preclearance.

Chapter 5 (“Evaluation of the DOJ’s VRA Enforcement Actions since the 2006 VRA Reauthorization”) examines the DOJ’s VRA enforcement efforts since the 2006 VRA reauthorization to the present. Like Chapter 4, this chapter provides a number of figures and graphs to show trends in VRA enforcement over time. The Commission’s study of the DOJ’s VRA enforcement actions during this time period shows that there has been a sharp decrease in actions brought to enforce Section 2 of the VRA, as well as similarly sharp decreases in enforcing the provisions of the VRA that are intended to protect the voting rights of voters with limited-English proficiency and voters with disabilities. This chapter’s quantitative analysis also shows that the number of DOJ enforcement actions are far fewer than the amount of successful VRA enforcement conducted by nonprofit groups on behalf of minority voters in the post-*Shelby County* era.

Chapter 6 of this report provides the findings and recommendations. To conclude the Executive Summary, the Commission highlights the following findings and recommendations made herein:

Findings

The right to vote is the bedrock of American democracy. It is, however, a right that has proven fragile and in need of both Constitutional and robust statutory protections. Racial discrimination in voting has proven to be a particularly pernicious and enduring American problem. Voter access issues, discrimination, and barriers to equal access for voters with disabilities and for voters with limited-English proficiency continue today.

The VRA works to dislodge and deter the construction of barriers by state and local jurisdictions that block or abridge the right to vote of minority citizens.

Preclearance proved a strong deterrent against state and local officials seeking to suppress the electoral power of growing minority communities through the enactment of policies and procedures that violated the protections of the VRA.

In *Shelby County*, the Supreme Court acknowledged ongoing voting discrimination, and noted that Congress may draft new coverage criteria for preclearance based on current conditions that do not treat states unequally based on past conditions of discrimination.

Without Section 5 preclearance, the DOJ has not been able to object to and prevent implementation of laws that courts later determined to have been specifically intended to limit black and Latino Americans’ right to vote.

The *Shelby County* decision had the practical effect of signaling a loss of federal supervision in voting rights enforcement to states and local jurisdictions.

The voting laws implemented in North Carolina and Texas immediately following the *Shelby County* decision are examples of the direct impact of the decision on the behavior of state and local officials. In both states, after prolonged litigation, the changes were eventually found to be discriminatory. A review of these voting changes and the litigation challenging them show:

- Changes that were previously not precleared by the federal government under Section 5 in covered states were immediately implemented;
- Federal courts held that the laws were motivated by an intent to discriminate against minority voters, in one case, “with surgical precision;”

- These voting changes remained in place through several elections, though courts eventually found that the changes were motivated by racial discrimination and/or had discriminatory effects; and
- Statewide discriminatory voting changes adversely impacted the rights of large numbers of eligible voters, and future judicial preclearance or “bail in” was not ordered by the courts in the wake of findings of intentionally racially discriminatory election changes.

In the face of ongoing discrimination in voting procedures enacted by states across the country, enforcement and litigation under Section 2 of the VRA is an inadequate, costly, and often slow method for protecting voting rights.

The narrowness of the remaining mechanisms to halt discriminatory election procedures before they are instituted has resulted in elections with discriminatory voting measures in place.

After an election with discriminatory voting measures in place, it is often impossible to adequately remedy the violation even if the election procedures are subsequently overturned as discriminatory. Officeholders chosen under discriminatory election rules have lawmaking power, and the benefits of incumbency to continue those rules perpetuate their continued election.

In states across the country, voting procedures that wrongly prevent some citizens from voting have been enacted and have a disparate impact on voters of color and poor citizens, including but not limited to: restrictive voter ID laws, voter roll purges, proof of citizenship measures, challenges to voter eligibility, and polling places moves or closings.

Because of the nature of voting rules being broadly applicable to all eligible voters, a single change in law, procedure, or practice can disproportionately affect large numbers of eligible voters and possibly discriminate against certain groups of people whose voting rights are protected by the VRA.

Failure to provide or make available legally required language access voting materials and to comply with Section 208’s requirement that allows voters to bring an assistant of their choosing imposes unnecessary barriers to voting for limited-English proficient Asian, Latino, and Native American voters.

Section 208 of the VRA has not been well-utilized or enforced. The DOJ appears to have limited its enforcement of Section 208 to language access cases, and failed to provide adequate guidance or enforcement for compliance with Section 208 in support of voters with disabilities.

Recommendations

Because of the depth of voting discrimination that continues across the nation today, citizens need strong, proactive federal protections—in statute and in enforcement—for the right to vote.

Congress should amend the VRA to restore and/or expand protections against voting discrimination that are more streamlined and efficient than Section 2 of the VRA.

- In establishing the reach of an amended VRA coverage provision, Congress should include current evidence of voting discrimination as required by *Shelby County* as well as evidence of historical and persisting patterns of discrimination. A new coverage provision should

account for evidence that voting discrimination tends to recur in certain parts of the country. It also should take account of the reality that voting discrimination may arise in jurisdictions that do not have extensive histories of discrimination, since minority populations shift and efforts to impose voting impediments may follow.

- Congress should invoke its powers under the Reconstruction Amendments and the Elections Clause to ground the new provisions upon the strong federal interest in protecting the right to vote in federal elections.

Congress should consider but not exclusively base any new coverage provision for Section 5 on turnout or registration statistics for various demographic groups.

- Congress should provide a streamlined remedy to review certain changes with known risks of discrimination before they take effect—not after potentially tainted elections.
- Congress should require greater transparency and effective public, including web-based, disclosure of voting changes affecting federal elections, and do so sufficiently in advance of elections so that voters are less likely to be surprised by changes and able to challenge those that have a discriminatory impact that would violate voting rights and election-related laws.
- Congress should take account of the range and geographic dispersion of racial and language minorities in any new geography-based coverage rule, for example, by adding elements that identify certain practices that may require closer preclearance.

Private litigants play a vital role as “private attorneys general” enforcing the VRA, however, litigation, particularly without Section 5, requires significant resources that only the federal government is able to expend. The DOJ should pursue more VRA enforcement in order to address the aggressive efforts by state and local officials to limit the vote of minority citizens and the many new efforts to limit access to the ballot in the post-*Shelby County* landscape.

CHAPTER 1: INTRODUCTION AND BACKGROUND

This chapter briefly reviews the history of racial discrimination in the United States, the relationship between citizenship and voting rights, the passage of the Voting Rights Act of 1965 (VRA), and its subsequent reauthorizations. The chapter then provides a summary of the VRA sections examined in this report: Sections 2, 4, 5, 203, and 208. This historical chapter also briefly examines how voting turnout and registration rates by race have changed over time. Finally, this chapter also includes analyses of the Commission’s prior reports on voting rights, which are also summarized in Appendix A.

History of Minority Voter Suppression

Since voting rights stem from citizenship, an understanding of the historical exclusion of people of color from American citizenship is needed to understand the history of minority voting rights in the United States. The country was founded with the express recognition of slavery; in 1787, the Constitution provided representation of “the whole number of free Persons,” including indentured servants (most of whom were white), but excluded “Indians not taxed,” and it counted slaves as only three-fifths of a person.¹⁴ In 1857, in the case of *Dred Scott v. Sanford*, the Supreme Court held that even if slaves became free, former slaves and their descendants were legally considered to be only three-fifths of a person and were not recognized as citizens.¹⁵ After the Civil War, in 1865, the 13th Amendment to the Constitution abolished slavery.¹⁶ In 1868, the 14th Amendment clarified that every person naturalized or born in the U.S. is a citizen.¹⁷ The 14th Amendment also forbids states from denying any person due process of law or equal protection of the laws.¹⁸ In 1870, the ratification of the 15th Amendment guaranteed all U.S. citizens the right to vote regardless of “race, color, or previous condition of servitude.”¹⁹

History demonstrates that Reconstruction laws were initially successful in expanding access to the ballot box for recently freed slaves, and in providing voter protections for African-American citizens by outlawing any action taken to suppress their vote.²⁰ The Reconstruction Era amendments galvanized African Americans’ political participation.²¹ The political arena was the “only area where black(s) and white(s) encountered each other on a basis of equality—sitting

¹⁴ U.S. CONST. art. I, § 2, cl. 3.

¹⁵ 60 U.S. 393 (1857).

¹⁶ U.S. CONST. amend. XIII, § 1.

¹⁷ U.S. CONST. amend. XIV, § 1.

¹⁸ *Id.*

¹⁹ U.S. CONST. amend. XV, § 1.

²⁰ Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1582 (2004).

²¹ Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 883 (1987) [*hereinafter* Foner, *Rights and the Constitution*]. Also, according to this study, while women were not allowed to hold political office or vote, black women were still politically active, and took part in rallies, parades, and mass meetings, and they formed their own auxiliaries to aid in electioneering. *Id.* at 878.

alongside one another on juries, in legislatures, and at political conventions; voting together on [E]lection [D]ay.”²² As historian Eric Foner has documented, “[b]y the early 1870s, biracial democratic government . . . was functioning effectively in many parts of the South, and [black] men only recently released from bondage were exercising political power.”²³ The Reconstruction Amendments led to black voter registration rates surpassing white registration rates in Louisiana, Mississippi, and South Carolina.²⁴ In other states, such as Alabama and Georgia, black citizens were nearly 40 percent of all registered voters.²⁵ Over 700,000 black citizens voted for the first time in the 1868 presidential election.²⁶ In fact, during Reconstruction, not deterred by violence, black voter turnout in many elections exceeded 90 percent.²⁷

In addition to a significant increase in black voter registration and turnout during Reconstruction, black citizens were elected to state legislatures in former confederate states.²⁸ In South Carolina, black legislators constituted a majority in the lower house of the legislature.²⁹ In 1869, at the national level, over 20 black citizens, some of whom were former slaves, were elected to the U.S. Congress.³⁰

The surge in black political power during Reconstruction was fleeting. The Reconstruction Amendments ensured the voting rights of African-American men and the federal government’s role in protecting these rights, but after the Compromise of 1877 and the removal of federal troops from the South,³¹ concerted efforts by southern states to subvert the Reconstruction Amendments and civil rights laws of the time resulted in a backlash limiting access to voting for African-American citizens.³²

During this time frame, the Supreme Court was also considering what the 14th and 15th Amendments meant for other communities of color. In 1884, the Supreme Court held that Native Americans who did not surrender their tribal citizenship and have it accepted by the United States

²² *Id.* at 878.

²³ Anderson Bellegarde François, *To Make Freedom Happen: Shelby County v. Holder, the Supreme Court, and the Creation Myth of American Voting Rights*, 34 N. ILL. U. L. REV. 529, 543 (2014) (quoting Eric Foner, *Forever Free: The Story of Emancipation and Reconstruction* 129 (2005)) [hereinafter François, *To Make Freedom Happen*].

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 542.

²⁷ Foner, *Rights and the Constitution*, *supra* note 21, at 878.

²⁸ François, *To Make Freedom Happen*, *supra* note 23, at 543.

²⁹ *Id.*

³⁰ *Id.*

³¹ The Gilder Lehrman Inst. of Am. Hist., *Compromise of 1877*, GILDERLEHRMAN.ORG (last accessed May 25, 2018) <https://new.gilderlehrman.org/history-by-era/reconstruction/timeline-terms/compromise-1877> (noting that the Compromise of 1877 was an informal agreement regarding the disputed 1876 Presidential Election that became contingent upon Florida, Louisiana, and South Carolina. Seeing this, Republicans who supported Republican Rutherford Hayes met with moderate southern Democrats to negotiate the removal of federal troops in the South to ensure Hayes’ victory).

³² François, *To Make Freedom Happen*, *supra* note 23, at 544.

through naturalization were not U.S. citizens.³³ The language of the relevant Supreme Court opinion shows that even after the Reconstruction Amendments, the belief remained that people of color were not “civilized” enough to be United States citizens.³⁴ Similarly, despite the guarantees of the 14th Amendment, it was not until 1898 and the Supreme Court’s decision in *United States v. Wong Kim Ark* that it was clear that children of nonwhite immigrants were entitled to birthright citizenship.³⁵ And it was not until 1924, when Congress passed the Indian Citizenship Act, that Native Americans were entitled to U.S. citizenship and voting rights (and that this entitlement did not impair the individual’s right to remain a tribal member).³⁶

Reliance upon tactics to suppress black voting rights expanded during the Jim Crow Era (between the end of Reconstruction in 1877 and the beginning of the 1950s Civil Rights Movement),³⁷ and black voter registration subsequently declined dramatically.³⁸ Jim Crow laws were pervasive and controlled many aspects of life for African Americans—especially equal access to citizenship.³⁹ In Mississippi, during Jim Crow, voter suppression was based on a new state constitution enacted in 1890, which specifically intended to exclude African Americans from political participation.⁴⁰ Since the 15th Amendment did not permit direct disenfranchisement, Mississippi instead required an annual poll tax that disparately burdened blacks, and a literacy test that “required a person seeking to register to vote to read a section of the state constitution and explain it to the county clerk . . . who was always white, [and who] decided whether a citizen was literate or not.”⁴¹ This effectively excluded “almost all black men, because the clerk would select complicated technical passages for them to interpret. By contrast, the clerk would pass whites by picking simple sentences in the state constitution for them to explain.”⁴²

³³ *Elk v. Wilkins*, 112 U.S. 94, 103 (1884).

³⁴ *Id.* at 106-07 (“The national legislation has tended more and more toward the education and civilization of the Indians, and fitting them to be citizens. But the question of whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.”).

³⁵ 169 U.S. 649, 705 (1884).

³⁶ Indian Citizenship Act, Pub. L. No. 68-175, 43 U.S. Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b)).

³⁷ Jim Crow was the name of the racial segregation system that operated mostly in southern and border states, between 1877 and the mid-1960s. See, e.g., USC Gould School of Law, *A Brief History of Civil Rights in the United States: Jim Crow Era*, <https://onlinellm.usc.edu/a-brief-history-of-jim-crow-laws/> (last accessed July 25, 2018).

³⁸ See, e.g., Smithsonian Nat’l Museum of Am. Hist., *White Only: Jim Crow in America* (last accessed June 21, 2018), <http://americanhistory.si.edu/brown/history/1-segregated/white-only-1.html> (“In Mississippi, fewer than 9,000 of the 147,000 voting-age African Americans were registered after 1890. In Louisiana, where more than 130,000 black voters had been registered in 1896, the number had plummeted to 1,342 by 1904.”).

³⁹ Public Broadcasting Service (PBS), *Freedom Riders: Jim Crow Laws, An American Experience*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/> (last accessed May 23, 2018).

⁴⁰ Constitutional Rights Foundation, *Race and Voting in the Segregated South*, CRF <http://www.crf-usa.org/black-history-month/race-and-voting-in-the-segregated-south> (last accessed May 23, 2018) [*hereinafter* Constitutional Rights Foundation, *Race and Voting*].

⁴¹ *Id.*

⁴² Following hearings in February 1965 in Mississippi, the Commission found that Mississippi’s white applicants might be asked, for example, to copy out and interpret:

In addition to poll taxes and literacy tests, other mechanisms to prevent African Americans from voting were instituted. These practices included grandfather clauses, excluding prior (white) registrants from the new strict rules, along with violence and intimidation of blacks attempting to register and vote.⁴³ These laws resulted in decreasing black voter registration.⁴⁴ For example, literacy tests effectively restricted the right to vote of African Americans, because at that time over 70 percent of black citizens were illiterate, whereas less than 20 percent of white citizens were illiterate.⁴⁵ Moreover, black citizens were subjected to more complex and difficult literacy tests than white citizens were.⁴⁶ Additionally, during this era, segregation was not only in the South, or only against blacks. In New York, newly arriving Puerto Rican citizens had their voting rights limited by highly complex English-literacy tests.⁴⁷

ARTICLE 12 Section 240. All elections by the people shall be by ballot. (MISS. CONST. art. 12, § 240).

In contrast, the Commission found that Mississippi's African-American applicants might be asked, for example, to interpret:

ARTICLE 7 Section 182. The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the state or any political subdivision thereof may be a party, except that the Legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period of not exceeding ten (10) years on each such enterprise hereafter constructed, and may grant exemptions not exceeding ten (10) years on each addition thereto or expansion thereof, and may grant exemptions not exceeding ten (10) years on future additions to or expansions of existing manufactures and other enterprises of public utility. The time of each exemption shall commence from the date of completion of the new enterprise, and from the date of completion of each addition or expansion, for which an exemption is granted.

When the Legislature grants such exemptions for a period of ten (10) years or less, it shall be done by general laws, which shall distinctly enumerate the classes of manufactures and other new enterprises of public utility, entitled to such exemptions, and shall prescribe the mode and manner in which the right to such exemptions shall be determined. (MISS. CONST. art. 12, § 240); *see also* U.S. COMM'N ON CIVIL RIGHTS, VOTING IN MISSISSIPPI 16-17 (1959), <https://www.law.umaryland.edu/marshall/usccr/documents/cr12v94.pdf>, [*hereinafter* U.S. COMM'N ON CIVIL RIGHTS, MS 1965].

⁴³ Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 1 (1965).

⁴⁴ *See, e.g.*, Smithsonian, *supra* note 38 (“In the former Confederacy and neighboring states, local governments constructed a legal system aimed at re-establishing a society based on white supremacy. African American men were largely barred from voting. Legislation known as Jim Crow laws separated people of color from whites in schools, housing, jobs, and public gathering places. Denying black men the right to vote through legal maneuvering and violence was a first step in taking away their civil rights. Beginning in the 1890s, southern states enacted literacy tests, poll taxes, elaborate registration systems, and eventually whites-only Democratic Party primaries to exclude black voters. The laws proved very effective. In Mississippi, fewer than 9,000 of the 147,000 voting-age African Americans were registered after 1890. In Louisiana, where more than 130,000 black voters had been registered in 1896, the number had plummeted to 1,342 by 1904.”).

⁴⁵ Christopher, *supra* note 43, at 2.

⁴⁶ *See, e.g.*, Constitutional Rights Foundation, *Race and Voting*, *supra* note 40.

⁴⁷ Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L.J. 201, 206 (2005); *see also* *Voting Rights: Hearings on H.R. Doc. No. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 508-17 (1965) (statement of U.S. Rep. Herman Badillo, Judge Vidal Santaella, and community activist Gilberto Gerena-Valentin); *see also* *United States v. Cty. Bd. of Elections of*

During the first half of the 20th Century, voting rights litigation did result in some increased access to the ballot for communities of color. After the Supreme Court invalidated the “white primary” in 1944 in the case of *Smith v. Allwright*,⁴⁸ black registration and participation rates began to increase across the South.⁴⁹ Since Texas law also barred Mexican Americans from the Democratic Party primary, Latino participation may have also risen, but there is little data about Latino voters in this era.⁵⁰

*Smith v. Allwright*⁵¹ was also an example of how some states defied federal court orders. The Supreme Court had first ruled that Texas’ 1923 all-white primary law violated the 14th Amendment in 1927,⁵² and then again in 1932.⁵³ And, “in 1953, the Court once again confronted an attempt by Texas to ‘circumven[t]’ the 15th Amendment by adopting yet another variant of the all-white primary[.]”⁵⁴

At the beginning of the civil rights movement and with more aggressive litigation, black registration rates increased by 6 percentage points from 1947 to 1950 across the South—yet by the mid-1950s, 75 percent of African Americans were not registered to vote.⁵⁵ The registration rate of black citizens in Mississippi was still less than 5 percent, and in states like Arkansas, Florida, Louisiana, and Texas, it was about one third.⁵⁶ At this time, it also became very clear that even if discriminatory state laws were overturned by successful litigation, nearly every law that was struck down as discriminatory would be replaced with another one.⁵⁷ In light of this, Congress began to

Monroe Cty., 248 F. Supp. 316, 317 (W.D.N.Y. 1965) (invalidating New York State’s English-language literacy test, holding Section 4(e) of the VRA prohibiting the condition of Puerto Rican’s voting rights on speaking English to be constitutional, and noting that though the VRA was “[b]orn out of the civil rights problems currently plaguing the [S]outh . . . this Act . . . was not designed to remedy deprivations of the franchise in only one section of the country. Rather, it was devised to eliminate second-class citizenship wherever present.”).

⁴⁸ 321 U.S. 649, 664 (1944); *see also* O. Douglas Weeks, *The White Primary: 1944-1948*, 42 AM. POL. SCI. REV. 500-10, n.3 (1948) (noting that white primaries were primary elections in the South where only white voters were allowed to vote. Since the Democratic Party dominated Southern elections, positions were often determined during the party’s primary elections since there was little chance of a Democrat losing in a general election. Therefore, white primaries essentially prevented black voters from having any significant effect on elections in the South despite their ability to vote in general elections.).

⁴⁹ *Id.* at 506.

⁵⁰ University of Texas, The Texas Politics Project, *Smith v. Allwright: White Primaries*, https://texaspolitics.utexas.edu/archive/html/vce/features/0503_01/smith.html (last accessed July 25, 2018). Texas’ 1923 white primary law limited the primary to Anglos only and excluded blacks and Latinos. *Id.*

⁵¹ 321 U.S. at 657.

⁵² *Nixon v. Herndon*, 273 U.S. 536, 541 (1927).

⁵³ *Nixon v. Condon*, 286 U.S. 73, 89 (1932).

⁵⁴ *Shelby Cty.*, 370 U.S. at 560 (Ginsburg, J., dissenting) (citing *Terry v. Adams*, 345 U.S. 461, 469 (1953)).

⁵⁵ Charles S. Bullock III, Ronald Keith Gaddie, and Justin L. Wert, *The Rise and Fall of the Voting Rights Act 25* (2016) (Norman: University of Oklahoma Press) [*hereinafter* Bullock, Gaddie, and Wert, *Rise*].

⁵⁶ *Id.* at 7.

⁵⁷ *Id.*; *see also* Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, § 101 (codified as amended at 42 U.S.C. § 1993), <https://www.gpo.gov/fdsys/pkg/STATUTE-71/pdf/STATUTE-71-Pg634.pdf> (last accessed Aug. 3, 2018); *see also* Christopher, *supra* note 43, at 10 (“In the past those intent on denying the rights guaranteed by the fifteenth amendment have managed to avoid court decrees and legislation by contriving new stratagems.”).

consider federal legislation to prohibiting state actors from enacting and implementing racially discriminatory restrictions on voting.⁵⁸

Congress first passed the Civil Rights Act in 1957; it was a voting rights bill, which authorized the Attorney General to file suit against local election officials in jurisdictions that had a pattern of discriminating against voters and secure preventative relief.⁵⁹ Protection of voting rights was thus no longer dependent upon actions brought by private individuals at their own expense, and possibly at the risk of physical and economic intimidation, as the bill also banned intimidation, threats or coercion of the right to vote of any person.⁶⁰

This 1957 act also created the U.S. Commission on Civil Rights,⁶¹ which then began to conduct studies documenting the inequalities confronted by black people in the South.⁶² The Commission faced numerous obstacles in conducting these field studies. In fact, some registrars would not permit the Commission to inspect their voter rolls and one state in particular passed legislation that permitted its voting registrars to destroy all past registration records.⁶³ In its first report, the Commission declared “against the prejudice of registrars and jurors, *the U.S. Government appears under present laws to be helpless to make good the guarantees of the U.S. Constitution.*”⁶⁴ The Commission therefore proposed appointing temporary federal registrars who would have authority to register applicants after certification by the Commission that they had been discriminated against in previous attempts to register.⁶⁵

The Civil Rights Act of 1957 proved to be ineffective at providing adequate protections against voting discrimination.⁶⁶ In part, this inefficacy resulted because some lower courts ruled that the Civil Rights Act was unconstitutional. Although the Supreme Court in *United States v. Raines* and *United States v. State of Alabama* invalidated these lower courts’ decisions, the Civil Rights Act of 1957 still proved to be insufficient in guarding against voting discrimination, as it did not provide specific authority for the Attorney General to enforce its provisions.⁶⁷ Congress later

⁵⁸ *Id.*

⁵⁹ The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, pt. IV, § 131(c) (“Whenever any person has engaged or there are reasonable grounds that any person is about to engage in any act or practice which would deprive any other person of any [voting] right or privilege secured . . . the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order.”), <https://www.gpo.gov/fdsys/pkg/STATUTE-71/pdf/STATUTE-71-Pg634.pdf> (last accessed Aug. 11, 2018).

⁶⁰ *Id.* at pt. IV, § 131(b).

⁶¹ *Id.* at pt. I, § 101.

⁶² See, e.g., U.S. COMM’N ON CIVIL RIGHTS, 1961 U.S. COMMISSION ON CIVIL RIGHTS REPORT BOOK 1: VOTING, (1961) XVI, <http://www2.law.umaryland.edu/marshall/usccr/documents/cr11961bk1.pdf>, [*hereinafter* U.S. COMM’N ON CIVIL RIGHTS, VOTING 1961].

⁶³ *Id.*

⁶⁴ U.S. COMM’N ON CIVIL RIGHTS, 1959, *supra* note 6, at 133 (emphasis added).

⁶⁵ *Id.* at 134-42.

⁶⁶ Voting Rights Act of 1965, 1966 DUKE L. JOURN. 463 (1966), <https://scholarship.law.duke.edu/dlj/vol15/iss2/6> (last accessed Aug. 3, 2018).

⁶⁷ *United States v. Raines*, 362 U.S. 17, 26-27 (1960); see also *United States v. State of Ala.*, 362 U.S. 602, 604 (1960) (recognizing federal authority under Civil Rights Act of 1960 to bring voting rights action against Alabama).

enacted the Civil Rights Act of 1960⁶⁸ and Civil Rights Act of 1964⁶⁹ to address the limitations of the 1957 Act, but the amended acts still proved to be largely inadequate in addressing voting discrimination.⁷⁰

The Commission demonstrated this inadequacy in a report issued in the early 1960s, which documented that progress towards equal voting rights in the United States had stagnated, and argued that disenfranchisement would continue unless additional federal legislation was enacted to stop it.⁷¹ For instance, the Commission noted in its 1961 report that:

These [litigation] successes, however, do not indicate that current [1961] legislation, even with continued vigorous enforcement, affords a prompt solution to the existence of discriminatory denials of the right to vote on account of race or color. The Government, under existing federal law, must still proceed—suit by suit, county by county. Each suit, moreover, is expensive and time consuming; and although the [DOJ's] Civil Rights Division has been repeatedly increased in size and budget, and has concentrated its efforts in the voting field, it has not been able to prepare and file all the suits that appear warranted. While it can be truly said that present laws have proved to be effective tools to deal with discrimination in voting, the tools are limited in scope. There is no widespread remedy to meet what is still widespread discrimination.⁷²

In addition, the Commission's early reports documented obstacles that black voters, but not white voters, faced at the ballot box. In February of 1965, the Commission held hearings in Jackson, Mississippi, and found that black registration was declining in the state.⁷³ In addition, the Commission found that two distinct practices led to the suppression of the minority vote in Mississippi counties: the collection of a poll tax, and a registration test that required that a person be able to interpret a section of the state constitution.⁷⁴ In some cases, poll tax collectors refused payment from African-American voters, along with more subtle methods such as raising money or offering payment for white people but not for black people. Registrars often also used the registration test to unfairly penalize African-American voters by giving them harder sections of the state constitutions to interpret, and by enforcing much stricter rules about any mistakes on their applications. The Commission also found that there were cases of public officials' interference that amounted to voter intimidation against the African-American community. Moreover, many black citizens were afraid of physical violence, economic reprisals, or losing jobs, and therefore did not even attempt to register or vote.⁷⁵ As with previous reports, the Commission recommended

⁶⁸ Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 89 (1960).

⁶⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

⁷⁰ Bullock, Gaddie, and Wert, *Rise*, *supra* note 55.

⁷¹ U.S. COMM'N ON CIVIL RIGHTS, VOTING 1961, *supra* note 62.

⁷² *Id.* at 100.

⁷³ U.S. COMM'N ON CIVIL RIGHTS, MS 1965, *supra* note 42, at 1.

⁷⁴ *Id.* at 13-14.

⁷⁵ *Id.* at 23.

that all literacy tests⁷⁶ and similar instruments be eradicated, and that the President should establish an affirmative program to ensure that all citizens have the ability to register and vote in all elections.⁷⁷

Voting Rights Act of 1965

On March 7, 1965, protesters led by Rev. Dr. Martin Luther King, Jr. and now-Congressman John Lewis of Georgia—who at the time was the chairman of the Student Non-Violent Coordinating Committee (SNCC)—were beaten at the foot of the Edmund Pettus Bridge in Selma, Alabama while marching against unequal access to the ballot box.⁷⁸ Television stations broadcast the extreme violence that peaceful demonstrators endured, including violent beatings by patrolmen on horseback, which prompted a public outcry to members of Congress to enact the VRA.⁷⁹

A little over a week later, President Lyndon Baines Johnson issued a statement calling for legislation to “eliminate illegal barriers to the right to vote,”⁸⁰ following many of the recommendations made by the Commission as early as 1961.⁸¹ When the VRA passed in August of 1965,⁸² the final version was even stronger than the legislation proposed by President Johnson in his speech, significantly incorporating several recommendations made by the Commission in its voting rights report of May 1965.⁸³ Just three months after the report was published, the Commission’s recommendations that all literacy tests be eliminated, that all poll taxes be abolished, and that federal poll watchers be sent to observe the elections and register voters were all made part of the VRA.⁸⁴ Congress also took into account that states had manipulated voting

⁷⁶ For further information about poll taxes, literacy tests, grandfather clauses and other measures that were used to deny or abridge the voting rights of African Americans, see François, *To Make Freedom Happen*, *supra* note 23.

⁷⁷ U.S. COMM’N ON CIVIL RIGHTS, VOTING 1961, *supra* note 62, at 139-42.

⁷⁸ Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CONG. RESEARCH SERV. 11 (2015), <https://fas.org/sgp/crs/misc/R43626.pdf> [*hereinafter* Coleman, *The Voting Rights Act of 1965*].

⁷⁹ Ari Berman, *Give Us The Ballot: The Modern Struggle For Voting Rights In America* (New York: Picador, 2015), at 21-22 [*hereinafter* Berman, *Give Us The Ballot*].

⁸⁰ President Lyndon Johnson, *President Johnson’s Special Message to Congress: The American Promise*, <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise> (last accessed July 26, 2018) [*hereinafter* Johnson, *President Johnson’s Special Message to Congress*].

⁸¹ U.S. COMM’N ON CIVIL RIGHTS, VOTING 1961, *supra* note 62, at 139-42. Suggestions made in the 1961 report, such as the use of 14th and 15th Amendment powers to eliminate restrictions to voting rights, *id.* at 139, and the prohibition of any “arbitrary action” to deny the registration of eligible voters, *id.* at 141, were embodied in President Johnson’s speech when the President called for a bill that would “strike down restrictions to voting in all elections,” and “insure that properly registered individuals are not prohibited from voting.” See also Johnson, *President Johnson’s Special Message to Congress*, *supra* note 80.

⁸² Voting Rights Act of 1965, Pub. L. No. 89-110 (codified as amended at 52 U.S.C. § 10101), http://library.clerk.house.gov/reference-files/PPL_VotingRightsAct_1965.pdf (last accessed August 2, 2018).

⁸³ U.S. COMM’N ON CIVIL RIGHTS, MS 1965, *supra* note 42, at 61-63.

⁸⁴ *Id.*; Voting Rights Act of 1965, Pub. L. No. 89-110 (codified as amended at 52 U.S.C. § 10101).

rights by either ignoring court orders, or, as the Supreme Court later stated in upholding the VRA's constitutionality:

Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.⁸⁵

In the VRA of 1965, Congress strengthened the judicial remedies of the Civil Rights Act of 1957, 1960, and 1964, by allowing direct federal oversight and protections of election processes to ameliorate the effects of years of discrimination against racial minority voters in the United States.⁸⁶ Under Section 5 of the VRA, jurisdictions with a history of discrimination in voting had to submit all voting changes for clearance by the federal government to determine whether they would be discriminatory, before they could be implemented.⁸⁷ This process was known as preclearance, and it was considered necessary to stop these jurisdictions from repeatedly discriminating against voters of color.⁸⁸ The jurisdictions that were “covered” under Section 5 were identified by the following formula: (1) the use of discriminatory “tests and devices,” and (2) disparately low turnout.⁸⁹ “Tests or devices” included literacy tests (in which English-language literacy and/or civics knowledge was required to register or vote), poll taxes (in which remuneration was required to register or vote), and vouchers (wherein a person had to be “vouched” for by another voter to register or vote).⁹⁰

Moreover, the Attorney General could certify the need to send federal examiners to the covered jurisdictions, to observe voter registration and voting processes, and to register voters.⁹¹ By 1967, federal examiners authorized under the VRA registered more than 150,000 black southerners to

⁸⁵ *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

⁸⁶ U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ACT: TEN YEARS AFTER, at 3 (1975) [*hereinafter* U.S. COMM’N ON CIVIL RIGHTS, VOTING IN 1975]. The report also noted that the 1965 Act included specific protections against English literacy testing for Puerto Rican voters. *Id.* at 21. *See also Katzenbach v. Morgan*, 384 U.S. 641, 645 (1966) (discussing the legislative history of Section 4(e) of VRA, 42 U.S.C. § 1973(b)(e) (1965)). The literacy test portion of Section 4(e) was rendered moot with the passage of the Voting Rights Amendments of 1970, which expressly prohibited literacy tests. *See PROPA v. Kusper*, 350 F. Supp. 606, 610 (N.D. Ill. 1972)).

⁸⁷ 52 U.S.C. § 10304(a).

⁸⁸ *Katzenbach*, 383 U.S. at 314-15; *see also* Discussion of “white primaries” and Sources cited therein *supra* notes 48-54.

⁸⁹ 52 U.S.C. § 10303(b). Preclearance was required in:

any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

⁹⁰ 52 U.S.C. § 10304(a)-(b).

⁹¹ Bullock, Gaddie, and Wert, *Rise*, *supra* note 55, at 19.

vote in 58 counties covered by Section 5.⁹² Black registration rates changed dramatically after Section 5 and other key provisions of the VRA were implemented (see Table 1).⁹³ In particular, the table below illustrates that the VRA raised the black registration rate to over 50 percent of the black voting age population across the states reported below, and increased the black registration rate in pro-segregation states like Mississippi to more than eight times the pre-VRA rate.⁹⁴ According to the historical data compiled by the Commission reproduced in Table 1, white registration rates also increased across most southern states included in this study, and in some instances, these rates increased over 20 percent.⁹⁵

⁹² U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 12 (1968), <https://www.law.umaryland.edu/marshall/usccr/documents/cr12p753.pdf> [*hereinafter* U.S. COMM'N ON CIVIL RIGHTS, PARTICIPATION 1968].

⁹³ *Id.*

⁹⁴ *Id.* at 13.

⁹⁵ Voting rights historian Morgan Kousser has also documented ways in which the VRA tangibly benefitted poor white Americans who were disenfranchised. *See, e.g.*, J. Morgan Kousser, *Protecting the Right to Vote*, L.A. TIMES (Sept. 28, 2012), <http://articles.latimes.com/2012/sep/28/opinion/la-oe-kousser-voter-id-20120928> [*hereinafter* Kousser, *Protecting the Right to Vote*].

Table 1: Voter Registration by Race Before and After Passage of the Voting Rights Act of 1965⁹⁶

State	Pre-VRA ⁹⁷ Number of Registered Voters	Post-VRA ⁹⁸ Number of Registered Voters	Pre-VRA Percent of Voting Population Registered	Post-VRA Percent of Voting Age Population Registered
Alabama:				
Nonwhite... ⁹⁹	92,737	248,432	19.3	51.6
White ...	935,695	1,212,317	69.2	89.6
Arkansas:				
Nonwhite...	77,714	121,000	40.4	62.8
White...	555,944	616,000	65.5	72.4
Florida:				
Nonwhite...	240,616	299,033	51.2	63.6
White...	1,958,499	2,131,105	74.8	81.4
Georgia:				
Nonwhite...	167,663	332,496	27.4	52.6
White...	1,124,415	1,443,730	62.6	80.3
Louisiana:				
Nonwhite...	164,601	303,148	31.6	58.9
White...	1,037,184	1,200,517	80.5	93.1
Mississippi:				
Nonwhite...	28,500	263,754	6.7	59.8
White...	525,000	665,176	69.9	91.5
North Carolina:				
Nonwhite...	258,000	277,404	46.8	51.3
White...	1,924,000	1,602,980	96.8	83.0

⁹⁶ U.S. COMM'N ON CIVIL RIGHTS, PARTICIPATION 1968, *supra* note 92, at 12-13.

⁹⁷ *Id.* at 13. According to the Commission's 1968 report "Political Participation," the pre-VRA statistics came from the Information Center, U.S. Commission on Civil Rights, Registration and Voting Statistics, Mar. 1965. The voter registration percentages for Alabama are as of May 1964; Arkansas, Oct. 1963; Florida, May 1964; Georgia, Dec. 1962; Louisiana, Oct. 1964; Mississippi, Nov. 1964; North Carolina, 1964; South Carolina, Nov. 1964; Tennessee, Nov. 1964; Texas, Nov. 1964; and Virginia, Oct. 1964. According to this report, "[t]hese statistics represent estimates based on official and unofficial sources and vary widely in their accuracy. Even where official figures were available, registrars frequently failed to remove the names of dead or emigrated voters and thus reported figures which exceeded the actual registration. Unofficial figures which came from a variety of sources are subject to even greater inaccuracies."

⁹⁸ U.S. COMM'N ON CIVIL RIGHTS, PARTICIPATION 1968, *supra* note 92, at 13. Some of the post-VRA voter registration statistics were obtained from the U.S. Dep't of Justice as follows: for Alabama as of Oct. 1967; for Georgia, Aug. 1967; for Louisiana, Oct. 1967; for Mississippi, Sept. 1967; and for South Carolina, July 1967. All of the other post-VRA voter registration statistics for the other states came from the Voter Education Project of the Southern Regional Council contained in *Voter Registration in the South*, Summer 1966. The Voter Education Project accumulated its statistics during that summer.

⁹⁹ *Id.* Nonwhites in this study were primarily African-American citizens, but in some instances, the race of the registrant was unknown.

State	Pre-VRA ⁹⁷ Number of Registered Voters	Post-VRA ⁹⁸ Number of Registered Voters	Pre-VRA Percent of Voting Population Registered	Post-VRA Percent of Voting Age Population Registered
South Carolina:				
Nonwhite...	138,544	190,017	37.3	51.2
White...	677,914	731,096	75.7	81.7
Tennessee:				
Nonwhite...	218,000	225,000	69.5	71.7
White...	1,297,000	1,434,000	72.9	80.6
Texas:				
Nonwhite...	2,939,535 ¹⁰⁰	400,000	53.1	61.6
White...	(total)	2,600,000		53.3
Virginia:				
Nonwhite...	144,259	243,000	38.3	55.6
White...	1,070,168	1,190,000	61.6	63.4

Summary of Major Voting Rights Act Provisions

The Voting Rights Act was enacted by Congress in 1965 and has been amended since on a number of occasions.¹⁰¹ This section will serve as a reference throughout this report, to explain the major VRA provisions that this report addresses.

Section 2

Section 2 of the VRA is a nationwide prohibition against denial or abridgement of voting rights, prohibiting “any” voting practices and procedures that discriminate on the basis of race, color, or membership in a language minority group.¹⁰² These voting practices may include, but are not limited to, discriminatory redistricting plans, at-large election systems, and voter registration procedures.¹⁰³ Election practices need not be intentionally discriminatory to be prohibited under Section 2, as practices that are shown to have a discriminatory result are also prohibited.¹⁰⁴ Cases that are typically litigated under Section 2 by the Department of Justice¹⁰⁵ may be related to

¹⁰⁰ *Id.* at 12-13 (noting that the pre-VRA percentages and totals of registered voters divided out by race were not available.).

¹⁰¹ 42 U.S.C. §§ 1973 to 1973bb-1; 52 U.S.C. § 10301 (Section 2); U.S. Dep’t of Justice, *Statutes Enforced by the Voting Section*, <https://www.justice.gov/crt/statutes-enforced-voting-section#vra> [*hereinafter* DOJ Statutes] (last accessed Aug. 3, 2018).

¹⁰² 52 U.S.C. § 10301.

¹⁰³ DOJ Statutes, *supra* note 101.

¹⁰⁴ *Id.*

¹⁰⁵ See U.S. Dep’t of Justice, *Voting Section Litigation*, <https://www.justice.gov/crt/voting-section-litigation> [*hereinafter* DOJ Litigation] (last accessed Aug. 3, 2018).

redistricting plans,¹⁰⁶ current districting plans,¹⁰⁷ voter ID,¹⁰⁸ discriminatory treatment at the polls,¹⁰⁹ and at-large method voting systems.¹¹⁰

To prove a Section 2 violation, a plaintiff must show that:

based on a totality of circumstances . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to members of the class of citizens protected . . . in that its members have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.¹¹¹

As discussed in this report, Section 2 litigation can be resource-intensive and time-consuming.¹¹²

Sections 4 and 5, and the Supreme Court's Shelby County Decision

Section 4(b) of the VRA sets forth the criteria for identifying the jurisdictions covered under the preclearance provisions of the Voting Rights Act.¹¹³ The preclearance formula was enacted in 1965 and updated in 1970, 1975, 1982, and 2006. Until June 2013, it applied in jurisdictions with a history of discrimination in voting.

The preclearance provisions are in Section 5 of the VRA. Section 5 was enacted in 1965 to freeze *any* changes in election practices or procedures within jurisdictions covered under Section 4(b), until the practice was reviewed through administrative review by the Attorney General or by a

¹⁰⁶ See, e.g., *Perez v. Perry*, No. 5:11-CV-360 (W.D. Tex. 2013); *Greig v. City of St. Martinville*, 2000 WL 34610618 (W.D. La. 2000).

¹⁰⁷ See, e.g., *United States v. The Sch. Bd. of Osceola Cty.*, No. 6:08-CV-582-ORL-18DAB (M.D. Fla. 2008); *United States v. Upper San Gabriel Valley Municipal Water Dist.*, No. 2:00-CV-7903 (C.D. Cal. 2000).

¹⁰⁸ See, e.g., *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

¹⁰⁹ See, e.g., *United States v. Sandoval Cty., N.M.*, 797 F. Supp. 2d 1249 (D.N.M. 2011); *United States v. Salem Cty.*, No. 1:08-CV-03276-JHR-AMD (D.N.J. 2008); *United States v. City of Phila.*, C.A. No. 06-CV-4592 (E.D. Pa. 2007); *United States v. City of Bos.*, No. 05-11598-EGY (D. Mass. 2005); *United States v. Berks Cty., Pennsylvania*, 277 F. Supp. 2d 570 (E.D. Pa. 2003); *United States v. Osceola Cty.*, No. 6:02-CV-738-ORL-22JGG (M.D. Fla. 2002); *United States v. City of Hamtramck*, No. 00-73541 (E.D. Mich. 2000); *United States v. Town of Cicero*, 2000 WL 34342276 (N.D. Ill. 2000); *United States v. Cibola Cty.*, No. CV-93-1134-LH/LFG (D.N.M. 1993).

¹¹⁰ See, e.g., *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010); *United States v. Town of Lake Park, Fla.*, WL 3667071 (S.D. Fla. 2009); *United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008); *United States v. Euclid City Sch. Dist. Bd. of Ed.*, No. 1:08-CV-02832-KMO (N.D. Ohio 2008); *United States v. Georgetown Cty. Sch. Dist.*, No. 2:08-CV-00889-DCN (D.S.C. 2008); *United States v. Osceola Cty., Fla.*, 475 F. Supp. 2d 1220 (M.D. Fla. 2006); *United States v. Alamosa Cty., Colo.*, 306 F. Supp. 2d 1016 (D. Colo. 2006); *United States v. Charleston Cty., S.C.*, 365 F.3d 341 (4th Cir. 2004); *United States v. Morgan City*, No. CV-00-1541 (W.D. La. 2000); *United States v. City of Santa Paula*, No. CV-00-03691-GHK (C.D. Cal 2000); *United States v. Benson Cty.*, C.A. No. A2-00-30 (D.N.D. 2000).

¹¹¹ 52 U.S.C. § 10301(b).

¹¹² See Discussion and Sources cited therein in Chapter 4, *infra* notes 1308-10.

¹¹³ DOJ Statutes, *supra* note 101.

federal district court.¹¹⁴ This review was to ensure that changes in election practices had neither discriminatory purposes nor effects,¹¹⁵ and that they were not retrogressive—under this standard, Section 5 blocked changes that put minority voters in a position that was worse than before.¹¹⁶ Until June 2013, Section 5 applied statewide in Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas, and in certain counties or towns in California, Florida, Michigan, New York, North Carolina, South Dakota, and Virginia. In the states that were partially covered, only the local jurisdictions that were covered had to submit any changes to their local voting rules for preclearance, but any statewide changes that impacted them also had to be precleared.¹¹⁷ If a jurisdiction could show that it had not discriminated in voting for 10 years, it could “bail out” of Section 5 coverage.¹¹⁸

The DOJ reviewed thousands of voting changes under Section 5, and it objected to hundreds of proposed changes that would have been discriminatory had they been implemented.¹¹⁹ When the changes were litigated in federal court, some were also blocked under Section 5, if they were retrogressive.¹²⁰

On June 25, 2013, in the case of *Shelby County v. Holder*, the United States Supreme Court ruled that the formula in Section 4(b) identifying the jurisdictions that required Section 5 preclearance was unconstitutional.¹²¹ While the *Shelby County* decision did not find that Section 5 was unconstitutional, by ruling that the formula in 4(b) was unconstitutional, the decision removed the mechanism for carrying out preclearance. In practice, this means that until Congress passes a new preclearance formula, previously covered jurisdictions are not currently required to obtain preclearance before making changes in voting laws unless they are required to do so by a separate court order.¹²²

Language Minority Provisions

Sections 4(e), 4(f)(4), 203, and 208 are the “language minority” provisions of the Voting Rights Act. Section 203 requires that the Census Bureau identify jurisdictions that contain a number of language-minority voters who are limited in their English proficiency (LEP).¹²³ These jurisdictions across the country must provide bilingual written voting materials and voting assistance in the minority languages covered by the VRA.¹²⁴ Jurisdictions covered include both those provided

¹¹⁴ See 52 U.S.C. § 10304 (describing VRA Section 5 enforcement procedures).

¹¹⁵ DOJ Statutes, *supra* note 101.

¹¹⁶ See Discussion and Sources, *infra* notes 140-47 (explaining that the retrogression standard compares changes to prior “benchmark”).

¹¹⁷ See Discussion and Sources, *infra* note 867 and Table 12 (discussing the application of these rules in Florida).

¹¹⁸ See Discussion and Sources, *infra* notes 246-48 (explaining bailout procedures).

¹¹⁹ See, e.g., Discussion and Sources, *infra* notes 1387-92 (objections under Section 5 from 1982-present).

¹²⁰ See, e.g., *United States v. Beer*, 425 U.S. 130, 141 (1976).

¹²¹ *Shelby Cty.*, 570 U.S. at 552.

¹²² DOJ Statutes, *supra* note 101.

¹²³ 52 U.S.C. § 10503.

¹²⁴ *Id.*

under Section 4(f)(4) and those under Section 203.¹²⁵ These sections mandate that bilingual election materials be provided where the number of United States citizens of voting age in a single language group within the jurisdiction who are LEP make up either more than 10,000 or more than 5 percent of all voting age citizens, and their illiteracy rate is higher than the national rate; and also within any Indian reservation where the LEP population exceeds 5 percent of all reservation residents.¹²⁶ Typical litigation under Section 203 relates to a failure to provide election materials for language minorities,¹²⁷ or a failure to provide access to oral language assistance.¹²⁸ A map of the jurisdictions covered under Section 203 can be found in Chapter 3, Figure 10. In addition, Section 4(f)(4) requires that certain covered jurisdictions be subject to preclearance of any changes in their language access programs.¹²⁹

Section 4(e) of the 1965 VRA further provides rights for U.S. citizens educated “in American flag schools” in a language other than English.¹³⁰ Under Section 4(e), citizens educated in Puerto Rico in Spanish may not have their right to vote “conditioned” on the ability to read and understand English, regardless of whether they live in a jurisdiction covered by the high population threshold of Section 203.¹³¹

Section 208

Section 208 of the VRA mandates that particular voters who require assistance to vote be provided assistance of their choice.¹³² Whether by reason of blindness, disability, or inability to read or write, voters have the right to assistance by a person of their choosing, other than their employer, an agent of their employer, or an officer or agent of the voter’s union.¹³³ Section 208 litigation by the Department of Justice typically relates to a failure to provide language assistance or a failure to allow a disabled person to choose their assistance.¹³⁴

¹²⁵ 52 U.S.C. § 10303(f)(4); 52 U.S.C. § 10503.

¹²⁶ 52 U.S.C. § 10303(f)(4) (describing bilingual election requirements); *see also* 52 U.S.C. § 10503(b)(2)(A) (describing the coverage formula); *see also* U.S. Dep’t of Justice, *About Language Minority Voting Rights*, <https://www.justice.gov/crt/about-language-minority-voting-rights> (last accessed July 26, 2018).

¹²⁷ *See* U.S. Dep’t of Justice, *Cases Raising Claims Under Language Minority Provisions of the Voting Rights Act*, <https://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act#ftbend> (last accessed July 26, 2018) [*hereinafter* DOJ Cases Raising]; *see, e.g., United States v. Salem Cty.*, No. 1:08-CV-03726-JHR-AMD (D.N.J. 2008); *United States v. City of Phila.*, C.A. No. 06-CV-4592 (E.D. Pa. 2007); *United States v. Cibola Cty.*, No. CIV-93-1134-LH/LFG (D.N.M. 2007); *United States v. City of Bos.*, No. 05-11598-EGY (D. Mass. 2005); *Berks Cty.*, 277 F. Supp. 2d 570; *United States v. Osceola Cty.*, No. 6:02-CV-738-ORL-22JGG (M.D. Fla. 2002).

¹²⁸ *See* DOJ Litigation, *supra* note 105.

¹²⁹ 52 U.S.C. § 10303(f)(4).

¹³⁰ 52 U.S.C. § 10303(e).

¹³¹ 52 U.S.C. § 10303(e)(1).

¹³² *See* 52 U.S.C. § 10508.

¹³³ *Id.*

¹³⁴ *See* DOJ Litigation, *supra* note 105; *see, e.g., United States v. Fort Bend Cty.*, No. 4:09-CV-1058 (S.D. Tex. 2009); *United States v. City of Phila.*, No. 06-CV-4592 (E.D. Pa. 2007); *United States v. Brazos Cty.*, C.A. No. H-06-2165 (S.D. Tex. 2006); *Osceola Cty.*, No. 6:02-CV-738-ORL-22JGG.

Sections 3 and 8—Federal Observers and Judicial Preclearance

Sections 3 and 8 of the VRA provide for federal observers to monitor inside polling places and help ensure compliance with the VRA throughout Election Day.¹³⁵ Observers can be designated by the Attorney General in the jurisdictions covered for preclearance under Section 5.¹³⁶ Section 3(a) also permits a federal court to order that the Attorney General send federal observers, and Section 3(c) permits a federal court to order judicial preclearance of all voting changes, in jurisdictions that have been found to have repeatedly intentionally discriminated in their voting practices.¹³⁷

The Relationship Between Sections 2 and 5

Both Sections 2 and 5 have proven useful in stopping voting discrimination. Section 2 is a nationwide prohibition against discrimination in voting that requires bringing an affirmative case,¹³⁸ whereas Section 5 stopped discriminatory measures in certain covered jurisdictions with a history of discrimination before they could be enacted.¹³⁹ Another important distinction is that unlike Section 2, Section 5 is based on a retrogression standard of review for discrimination, which operates by evaluating the impact on minority voters of changes in voting in comparison to prior “benchmarks” of the previous practices that were in place. Specifically, the 1965 VRA required review of “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting *different from that in force or effect* on November 1, 1964.”¹⁴⁰ Furthermore, in 1976, the Supreme Court held that not all discriminatory election changes were prohibited under Section 5—only changes that made minorities worse off than they had been could be struck down by preclearance.¹⁴¹

The concurrent need for Section 2 is best illustrated by example. Under Section 5, long-standing, racially discriminatory practices that were not already struck down could not be addressed if they were not enacted after 1965. This was an issue with Mississippi’s procedures requiring voters to register separately for state and federal elections, which were enacted a century earlier in order to make it harder for black citizens to vote. When black voters wanted to challenge this dual-registration system in 1987, they had to bring an affirmative case under Section 2.¹⁴² After that, the state was forced to adopt a voter registration procedure that did not cause an additional,

¹³⁵ See 52 U.S.C. § 10305.

¹³⁶ 52 U.S.C. § 10303(b).

¹³⁷ 52 U.S.C. § 10302.

¹³⁸ See 52 U.S.C. § 10301.

¹³⁹ 52 U.S.C. § 10304(a).

¹⁴⁰ *Id.* (emphasis added). Voting procedures as of that date were therefore the original benchmark for the states that were covered under Section 5 in 1965. (For discussion of the coverage formula, see the following section of this report.) For jurisdictions that came under its coverage after 1965, the benchmarks were those practices in place prior to Nov. 1, 1968 (for those jurisdictions that came under coverage through the 1970 VRA Reauthorization) or Nov. 1, 1972 (for those that came under coverage through the 1975 or 1982 Reauthorizations). *Id.*

¹⁴¹ *Beer*, 425 U.S. at 141-42.

¹⁴² *Mississippi State Chapter of Operation PUSH v. Allain*, 674 F. Supp. 1245, 1247 (N.D. Miss. 1987).

discriminatory burden on poor voters, the majority of whom were black.¹⁴³ Later, when Mississippi resurrected dual registration in 1995, it was successfully challenged under Section 5, because it was retrogressive in that it made minority voters worse off than they had been after the 1987 Section 2 litigation.¹⁴⁴ However, unless the Section 2 case had been brought, Section 5 would not have been helpful to end the form of discrimination that had been enacted during the Jim Crow era and had not yet been struck down by civil rights litigation prior to the VRA statutory benchmarks discussed above (1964, 1968, or 1972).¹⁴⁵ Still, preclearance was extremely useful, because jurisdictions with a history of discrimination were continuing to come up with incrementally new ways to discriminate in voting, which could be struck down under Section 5 as retrogressive.¹⁴⁶ This pattern continued in some of the formerly covered jurisdictions up to and after the 2006 VRA Reauthorization.¹⁴⁷

Additionally, Section 2 was also needed to address discrimination in voting in jurisdictions that were not covered by preclearance.¹⁴⁸

Voting Rights Act Amendments and Reauthorizations

Although Section 5 of the VRA was scheduled to expire in 1970, Congress has amended and reauthorized the VRA five times to date: in 1970, 1975, 1982, 1992, and 2006. Each time, it was reauthorized with overwhelming bipartisan support.¹⁴⁹ One important detail that will be discussed below are the criteria for identifying which jurisdictions would be required to preclear any voting changes before they could be implemented, under Section 5.¹⁵⁰ In 1965, 1970, and 1975, the jurisdictions that were required to preclear their voting changes under Section 5 were identified by a two-part formula, based on (i) low minority turnout in the most recent presidential election, and

¹⁴³ *Id.*

¹⁴⁴ See *Young v. Fordice*, 520 U.S. 273, 281-82 (1997) (various iterations of changes in voter registration procedures required to be precleared); U.S. Dep't of Justice, *Voting Determination Letter from Acting Assistant Attorney General Isabelle Katz Pinzler to Mississippi Special Assistant Attorney General Sandra M. Shelton* (Sept. 22, 1997), <https://www.justice.gov/crt/voting-determination-letter-22> (noting that the DOJ objected to dual registration procedures as discriminatory and retrogressive).

¹⁴⁵ 52 U.S.C. § 10304(a) (outlining benchmarks of 1964, 1968, or 1972, depending on when the jurisdiction became covered).

¹⁴⁶ See Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 84 (2010), http://law.slu.edu/sites/default/files/Journals/plr30-1_garrett_article.pdf.

¹⁴⁷ See *infra*, Chapter 5, Table 13, and Sources cited therein.

¹⁴⁸ See, e.g., *Spirit Lake Tribe v. Benson Cty.*, 2010 WL 4226614, No. 2:10-CV-095 (D.N.D. 2010); *Large v. Fremont Cty.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010); *City of Euclid*, 580 F. Supp. 2d 584; *Osceola Cty.*, 475 F. Supp. 2d 1220.

¹⁴⁹ Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 18-23.

¹⁵⁰ 52 U.S.C. § 10304(a).

(ii) whether they had a discriminatory “test or device in place.”¹⁵¹ In 1982 and 2006, Congress renewed the coverage formula.¹⁵²

1970 Amendment

After lengthy Congressional hearings, the Voting Rights Act Amendments of 1970 were passed in the Senate after a 64-12 roll call vote,¹⁵³ then passed in the House of Representatives by a roll call vote of 272-132,¹⁵⁴ and signed into law by President Richard Nixon shortly thereafter. The 1970 amendments extended the prohibition of any “tests or device[s]” as prerequisites to voting or voter registration that were considered purposefully discriminatory practices for 10 years.¹⁵⁵ Second, the preclearance formula updated the turnout disparities formula. Thus, Section 5’s preclearance

¹⁵¹ The preclearance formula was as follows:

The provisions of subsection (a) [requiring preclearance] shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972. 52 U.S.C. § 10303(b).

¹⁵² Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 16. Also, in 1992, Congress expanded the language access protections to include more groups of minority voters based on findings of ongoing disparities and expanded definitions of “tests or devices”; *see also* H.R. 4312, 102nd Cong. (1992), <https://www.govtrack.us/congress/bills/102/hr4312> (last accessed July 26, 2018); *see also* James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, N.Y.U. J. LEG. & PUB. POL’Y 215 (2016), <http://www.nyuilpp.org/wp-content/uploads/2012/11/TUCKER-ENFRANCHISING-LANGUAGE-MINORITY-CITIZENS-TEH-BILINGUAL-ELECTION-PROVISIONS-OF-THE-VOTING-RIGHTS-ACT.pdf> [*hereinafter* Tucker, *Enfranchising Language Minority Citizens*].

¹⁵³ 116 CONG. REC. 6, at 7336 (Mar. 13, 1970) (Voting Rights Act Amendments of 1969).

¹⁵⁴ 115 CONG. REC. 28, at 38, 536-37 (Dec. 11, 1969) (Extension of Voting Rights Act of 1965).

¹⁵⁵ Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 19. “[T]est or device” became defined as follows:

The phrase “test or device” shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class. 52 U.S.C. §10304(c).

requirements¹⁵⁶ were extended to all jurisdictions where (i) a “test or device” (such as a literacy test or poll tax) was used, and (ii) less than 50 percent of voting age residents were registered or voted in the 1968 presidential election.¹⁵⁷ In addition, the 1970 VRA amendment introduced a specific ban on literacy tests, which was extended to all states, and the voting age was lowered from 21 to 18.¹⁵⁸ The 1970 Amendments extended Section 5’s preclearance requirements for five years, meaning that the states that were originally covered and any other jurisdictions that fell under the formula due to low black registration were required to submit their voting changes for federal review, and they had to prove that the changes would not be discriminatory before they could be implemented in any election.¹⁵⁹ Specifically, jurisdictions had to submit any proposed changes to either the DOJ or a federal court, and demonstrate that the proposed change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”¹⁶⁰

1975 Amendment

The second reauthorization of the VRA occurred in 1975. The Voting Rights Act Extension of 1975 was passed in both the House and Senate by strong bipartisan majorities, and signed into law by President Gerald Ford.¹⁶¹ This reauthorization extended Section 5 preclearance requirements for another seven years. The definition of permanently prohibited “test[s] or device[s]” was expanded to include:

any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five

¹⁵⁶ 52 U.S.C. § 10304(a).

¹⁵⁷ “Sec. 4. Section 4(b) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b) is amended by adding at the end of the first paragraph thereof the following new sentence: “On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.” See Voting Rights Act of 1965, Pub. L. No. 89-110 (codified as amended at 52 U.S.C. § 10101), http://library.clerk.house.gov/reference-files/PPL_VotingRightsAct_1965.pdf. See also 52 U.S.C. § 10303(b).

¹⁵⁸ Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 19-20. This provision of the Voting Rights Act Amendments of 1970 was enacted amidst the Vietnam War, during which youth argued that if they were old enough to be drafted, they should be old enough to vote on the policies that led to the war. It was immediately challenged, after which the Supreme Court found that Congress had the right to regulate the voting age in federal elections but not in state and local elections. See also *Oregon v. Mitchell*, 400 U.S. 112 (1970). In 1971, the Constitution was amended to provide that the right to vote of citizens over 18 “shall not be denied or abridged by the United States or any State on account of age.” U.S. CONST. amend. XXVI (emphasis added).

¹⁵⁹ 52 U.S.C. § 10304(a).

¹⁶⁰ *Id.*

¹⁶¹ Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 20.

per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.¹⁶²

The additional Section 5 geographic coverage adopted in 1970 and 1975 extended its protections to more counties and other political subdivisions¹⁶³ in a number of additional states, including Alaska, Arizona, and Texas in their entirety, and portions of California, Florida, Michigan, and South Dakota.¹⁶⁴ Further, the formula for preclearance under Section 5 was also updated to include disparately low minority voter turnout in the 1968 and 1972 presidential elections, and the 1975 reauthorization established a penalty of a substantial fine or five years in prison for voting more than once in a federal election.¹⁶⁵

The 1975 amendments also created Section 203 of the VRA, which requires voting materials to be provided in the language of the “applicable minority language group” of the voting jurisdiction, which includes Latinos, Asian and Pacific Islanders, Native Alaskans, and Native Americans.¹⁶⁶ After Congressional findings of discrimination and intimidation of voters with limited-English proficiency, which had led to ongoing socioeconomic disparities and low literacy rates, the 1975 amendments also included a formula under a new Section 203 for determining which jurisdictions would be required to provide bilingual election materials and voter assistance.¹⁶⁷

1982 Amendment

In 1982, when the 1975 seven-year extension was set to expire, Congress amended the VRA to extend it again. The Voting Rights Act Extension of 1982 was passed in the House and then in the Senate, where an amended version eventually passed on June 18, 1982, with an 85-8 roll call vote.¹⁶⁸ The House later approved the amended bill, and the VRA was renewed again and enacted into law by President Ronald Reagan.¹⁶⁹ While he had argued that a national formula might have been more appropriate than focusing on the jurisdictions originally covered in 1965, upon signing the 1982 amendments, Reagan remarked that:

[T]he right to vote is the crown jewel of American liberties, and we will not see its luster diminished . . . This legislation proves our unbending commitment to voting rights . . . It also proves that differences can be settled in good will and good faith . . .

¹⁶² 52 U.S.C. § 10303(f)(3).

¹⁶³ Political subdivisions refer to “any county or parish, except that, where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.” 52 U.S.C. § 10310(c)(2).

¹⁶⁴ Bullock, Gaddie, and Wert, *Rise*, *supra* note 55, at 24-25. *See also* 52 U.S.C. § 10303(b).

¹⁶⁵ *Id.*; Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 21.

¹⁶⁶ 52 U.S.C. § 10503; *see also* U.S. Dep’t of Justice, Civil Rights Division, *Language Minority Citizens*, <https://www.justice.gov/crt/language-minority-citizens> (last accessed Aug. 3, 2018).

¹⁶⁷ *See* Chapter 3, *Language Access*, *infra* notes 1434-46.

¹⁶⁸ Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 21.

¹⁶⁹ *Id.*

To so many of our people—our Americans of Mexican descent, our black Americans—this measure is as important symbolically as it is practically. . . . It says to every individual: “Your vote is equal. Your vote is meaningful. Your vote is constitutional.”¹⁷⁰

The 1982 amendment left in place the same preclearance formula. Based on an extensive congressional record of ongoing discrimination in the jurisdictions that had been covered, Congress extended preclearance for the covered jurisdictions for another 25 years.¹⁷¹ The 1982 amendments also made significant changes to Section 2 of the VRA. In particular, Section 2 was amended so that racial minorities could challenge existing laws and election practices without the need to prove discriminatory intent. According to Bullock et al., the decision to amend Section 2 was in response to the Supreme Court’s decision in *City of Mobile v. Bolden*, holding that proof of discriminatory intent was required to establish a Section 2 violation.¹⁷² Congress replaced the intent requirement in Section 2 with a “results” or “effects” test. Under this test, voting practices are prohibited if they are “imposed or applied . . . in a manner 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, or [membership in a minority language group].”¹⁷³

This new “results” test reduced the burden of proof for plaintiffs, since proving discriminatory intent had become increasingly difficult, due in part to the fact that blatant discrimination in the form of first-generation tests like poll taxes and literacy tests was no longer as common as in 1965. However, other forms of discrimination had become apparent. These included diluting the right to vote of minority communities through discriminatory forms of at-large elections, annexations, and

¹⁷⁰ Howell Raines, *Voting Rights Act Signed by Reagan*, N.Y. TIMES, June 30, 1982, <https://www.nytimes.com/1982/06/30/us/voting-rights-act-signed-by-reagan.html>.

¹⁷¹ Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 25.

¹⁷² Bullock, Gaddie, and Wert, *Rise*, *supra* note 55, at 25; *see also City of Mobile v. Bolden*, 446 U.S. 55, 75 (1980).

¹⁷³ 52 U.S.C. § 10301(a). The new language of Section 2 also provided that a violation was established if, “based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected . . . in that its members have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.” *Id.* at §10301(b).

redistrictings.¹⁷⁴ The amended Section 2 made it possible to prosecute these and other types of discriminatory voting practices, even in cases where intent could not be proven.¹⁷⁵

The 1982 amendments also included a new standard allowing jurisdictions to terminate (or bail out from) preclearance coverage if they could prove they had not discriminated in voting for the last 10 years.¹⁷⁶

1992 Amendment

Congress amended the VRA a fourth time in 1992.¹⁷⁷ The 1992 amendments extended the voting language assistance requirements for another 15 years. They also expanded the bilingual voting rules coverage to include not only jurisdictions in which 5 percent of eligible voters were limited-English proficient (LEP) and members of a language minority group, but to also include jurisdictions that did not meet the high 5 percent threshold but had at least 10,000 LEP citizens who were also members of a single language minority group, thereby reaching Latino- and Asian-

¹⁷⁴ Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 14; *see also* Daniel D. Polsby and Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering under the Voting Rights Act*, 92 MICH. L. REV. 652, 682 (1993) (analyzing the jurisprudence surrounding racially discriminatory redistricting (when redistricting is done in a manner that either divides or overly concentrates minority voters in districts that dilute their voting power) and at-large elections (when representatives are elected from one large district rather than at the community level, through local, single-member districts) and the impact of these practices in diluting the impact of the minority vote); *see also* James F. Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context*, 26 RUTGERS L.J. 517 (1995) (citing *Davis v. Bandemer*, 478 U.S. 109, 132-33 (1986) (opinion of White, J.), that vote dilution occurs “when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole”); *see also* Paul W. Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 354-55 (1976) (“At-large elections, in which one vote counts toward the election of several candidates, over-represent their constituents to the detriment of voters in single-member or smaller multi-member districts. In the geographically compact areas . . . minorities have the votes to determine the outcome of an election in a single-member district or ward system. By virtue of a multi-member or at-large plan, however, they remain a minority in such a system’s larger voting population. The majority elects all of the representatives, of course, and therefore candidates preferred by the minority group are consistently defeated. The consequence of this submerging of their votes, they argue, is to deny representation of their particularized views and needs. This asserted reduction in the ability of their votes to secure their preferred representation is alleged to amount to unconstitutional dilution of their votes.”); *see also* Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE L. & POL’Y REV. 354, 368 (1991) (“Finally, the Court discussed the possibility that at-large voting to minimize or cancel out the voting strength of racial or political the voting population . . . The minority group might also legitimately oppose modified at-large elections because the minority group will have to vote more or less uniformly to avoid splitting its strength.”); *see also* Chandler Davidson and George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 THE JOURN. OF POL. 982, 1005 (1981) (demonstrates through statistical analysis and independent research the effect of at-large elections in diluting the minority vote); *see also* *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986) (holding that voter dilution took place when the at-large electoral system effectively submerged minority vote); *see also* Garrett, *supra* note 146, at 77, 80 (explaining how these procedures may dilute minority voters’ impact on the political process, in violation of VRA’s key protections against racial discrimination in voting).

¹⁷⁵ Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 22.

¹⁷⁶ Bullock, Gaddie, and Wert, *Rise*, *supra* note 55, at 30.

¹⁷⁷ Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 22.

American voters in large cities such as Los Angeles, Philadelphia, and San Francisco.¹⁷⁸ The 1992 amendments also included more expansive language access coverage formulas for Native Americans living on Indian Reservations.¹⁷⁹

2006 Reauthorization

Finally, President George W. Bush signed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, which had passed in the House by a 390-33 vote, and in the Senate, unanimously.¹⁸⁰ The 2006 reauthorization eliminated the ability of federal election examiners to be sent under Section 5 to register voters, but extended the remaining Section 5 and other VRA provisions for 25 years.¹⁸¹

During the debate on the House floor, some Republicans claimed that this reauthorization unfairly targeted certain states and infringed upon state sovereignty in their election processes.¹⁸² Four amendments were then presented, covering everything from changing the Section 5 coverage formula to “accelerating the sun setting of the law,”¹⁸³ but all were defeated.

On the Senate side, while voting 98-0 in favor of the 2006 reauthorization,¹⁸⁴ Senators also held extensive debates regarding the constitutionality of the bill and questioning the continued need for preclearance.¹⁸⁵ But President George W. Bush had publicly declared his support for the House bill “without [a proposed] amendment [eliminating preclearance],”¹⁸⁶ and the more fulsome bill was moved to the Senate floor and unanimously approved. Congressional findings included a continued need for the preclearance provisions of the VRA based on evidence of ongoing voter

¹⁷⁸ H.R. 4312, 102nd Cong. (1992), *supra* note 152. See Chapter 4, *infra* for discussion.

¹⁷⁹ Tucker, *Enfranchising Language Minority Citizens*, *supra* note 152, at 225-26.

¹⁸⁰ Coleman, *The Voting Rights Act of 1965*, *supra* note 78, at 22.

¹⁸¹ *Id.* at 23.

¹⁸² Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 182 (2007), https://www.yalelawjournal.org/pdf/606_21wshzpe.pdf.

¹⁸³ *Id.* at 183.

¹⁸⁴ 152 CONG. REC. 96 (daily ed. July 20, 2006) (Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006), <https://www.gpo.gov/fdsys/pkg/CREC-2006-07-20/pdf/CREC-2006-07-20-pt1-PgS7949-6.pdf> (last accessed Aug. 3, 2018).

¹⁸⁵ Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L.L. 385, 387 n.9 (2008) (“Summarizing his overall impressions of the process leading up to the renewal of the expiring provisions of the VRA, Senator Patrick Leahy (Democrat-VT) observed that ‘Senators had available to them an extensive record to inform their votes,’ including a ‘voluminous Senate Judiciary Committee record,’ a full record before the House of Representatives, the House Committee Report, the full debate on the House floor, and debate surrounding four proposed amendments that were all rejected. 152 Cong. Rec. S8372-73 (2006). Senator Leahy also noted that Senate members were provided ‘some of the extensive evidence received in the Judiciary Committee about the persistence of discriminatory practices in covered jurisdictions that supports reauthorization of this crucial provision.’”).

¹⁸⁶ White House, *President George W. Bush Addresses NAACP Convention*, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060720.html> (last accessed July 26, 2018).

discrimination against minorities.¹⁸⁷ In its review of over 15,000 pages of evidence, the House determined that there was evidence “of continued efforts to discriminate [against minority voters] and continuing need to reauthorize the temporary [preclearance] provisions.”¹⁸⁸ The Senate incorporated the Congressional Record developed by the House and hosted additional hearings. Two Senators expressed concern about the seeming lack of relevant differences between the covered and uncovered jurisdictions and the 25-year period of extension.¹⁸⁹

In particular, as discussed in the Supreme Court’s 2013 decision in *Shelby County v. Holder*, Congress focused significant debate on the constitutionality of the preclearance formula.¹⁹⁰ In 2006, most Members of Congress wanted to renew Section 5, but there was considerable disagreement about whether the underlying formula regarding which jurisdictions would be subject to preclearance needed to be updated.¹⁹¹

After much debate, in June 2006, both chambers reauthorized the temporary provisions of the VRA for another 25 years with bipartisan support, and approved the same preclearance formula that was later struck down in *Shelby County*. Moreover, after 21 hearings, the 2006 VRA Reauthorization Record included 15,000 pages of record evidence, including significant attention to ongoing discrimination in voting.¹⁹² Justice Ginsburg later described the Congressional record as follows: “The compilation presents countless ‘examples of flagrant racial discrimination’ since the last reauthorization; Congress also brought to light systematic evidence that ‘intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that [S]ection 5 preclearance is still needed.’”¹⁹³ Based on this record, Congress found that:

The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials. 2006 Reauthorization § 2(b)(1). But despite this progress, “second generation barriers constructed to prevent minority voters from fully participating in the electoral process” continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. §§ 2(b)(2)-(3), 120 Stat. 577. Extensive “[e]vidence of continued discrimination,” Congress concluded, “clearly show[ed] the continued need for

¹⁸⁷ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, §§ 2(b)(4)-(5) (second-generation barriers and racially polarized voting continued to exist) and §§ 2(b)(5) (“evidence clearly show[ed] the continued need for Federal oversight” in covered jurisdictions).

¹⁸⁸ *Voting Rights Act After the Supreme Court’s Decision in Shelby County: Hearing Before the H. Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 113th Cong. 61 (2013), <https://judiciary.house.gov/wp-content/uploads/2016/02/113-35-81983.pdf> (last accessed July 26, 2018).

¹⁸⁹ Persily, *supra* note 182, at 174, 189.

¹⁹⁰ *Id.* at 189-92.

¹⁹¹ *Id.* at 189.

¹⁹² H.R. REP. NO. 109-478, at 5, 11-12 (2006).

¹⁹³ *Shelby Cty.*, 570 U.S. at 565 (Ginsburg, J., dissenting) (citing *Northwest Austin*, 557 U.S. at 205).

Federal oversight” in covered jurisdictions. §§ 2(b)(4)-(5), *id.*, at 577-578. The overall record demonstrated to the federal lawmakers that, “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”¹⁹⁴

Congress also found that as “registration and voting of minority citizens increase[d], other measures may be resorted to which would dilute increasing minority voting strength.”¹⁹⁵

From the period of 1982 to 2006, there were 700 objections to voting changes under Section 5 of the VRA; these changes were blocked because they were considered by the DOJ or a federal court to be racially discriminatory.¹⁹⁶ Additionally, over 800 proposed voting changes were withdrawn or amended after the DOJ requested more information from the submitting jurisdiction.¹⁹⁷ All objections and other DOJ actions under Section 5 occurred in the formerly covered jurisdictions.¹⁹⁸ For a map of jurisdictions that were covered in this era (in January of 2008), see Chapter 2, Figure 2. The covered states were Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas, and the counties and other subdivisions that were covered were located in California, Florida, Michigan, New Hampshire, New York, North Carolina, South Dakota, and Virginia.¹⁹⁹

There were also a number of successful Section 2 cases from 1982 to 2006. These were cases in which federal courts held that jurisdictions had violated the nationwide prohibition against racial discrimination in voting—and most were brought in the jurisdictions that were covered under Section 5’s preclearance formula. The following graph generated by voting rights expert J. Morgan Kousser shows that the highest number of successful Section 2 cases were brought between 1982 and 2006, and that the great majority were brought in the formerly covered jurisdictions.

¹⁹⁴ *Id.* at 566.

¹⁹⁵ *City of Rome*, 446 U.S. at 180 (quoting H.R. REP. NO. 94-196, at 10 (1975)).

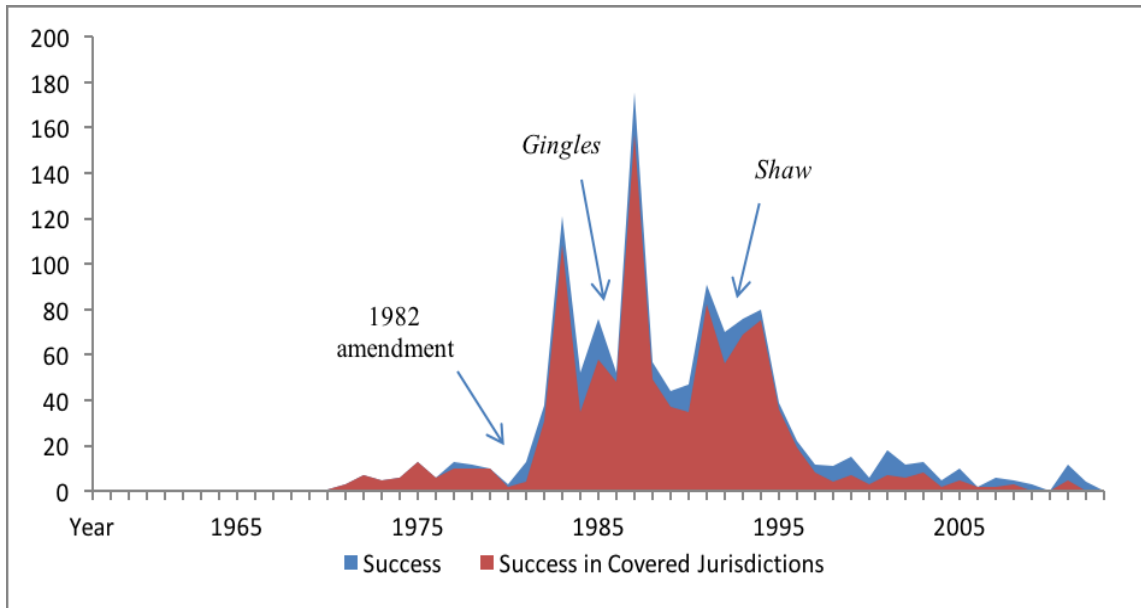
¹⁹⁶ H.R. REP. NO. 109-478, at 21 (2006); H.R. REP. NO. 109-478, at 40-41 (2006).

¹⁹⁷ H.R. REP. NO. 109-478, at 645 (2006).

¹⁹⁸ 52 U.S.C. § 10304(a).

¹⁹⁹ See Chapter 2, *infra* Figure 2 (DOJ map of jurisdictions covered under Section 5) (Jan. 17, 2008).

Figure 1: Successful Section 2 Cases in Covered and Noncovered Jurisdictions, 1957-2014²⁰⁰



In the years Kousser reviewed for the above graph (1965-2014), an average of five out of six (82.7 percent) of successful Section 2 cases occurred in formerly covered jurisdictions.²⁰¹

In 2006, Congress determined that the ongoing objections under Section 5 and the over-concentration of Section 2 violations provided evidence that the covered jurisdictions had higher ongoing incidents of discrimination than other jurisdictions. The 2006 Congress also took into account that many (but not all) of these jurisdictions had abandoned “first-generation” forms of discrimination consisting of denial or abridgement of access to the ballot, yet they had found new ways to discriminate in voting, through discriminatory forms of redistricting and other changes regarding electoral districts and rules of representation that diluted the weight of minority votes.²⁰²

When President George W. Bush signed the 2006 reauthorization into law, he commented that:

In four decades since the Voting Rights Act was first passed, we’ve made progress toward equality, yet the work for a more perfect union is never ending. We’ll continue to build on the legal equality won by the civil rights movement to help ensure that every person enjoys the opportunity that this great land of liberty offers.

²⁰⁰ Kousser, *Protecting the Right to Vote*, *supra* note 95, at 17.

²⁰¹ *Id.*

²⁰² H.R. REP. NO. 109-246, at 1 (2006).

Today, we renew a bill that helped bring a community on the margins into the life of American democracy. My administration will vigorously enforce the provisions of this law, and we will defend it in court.²⁰³

Overview of Past Reports of the U.S. Commission on Civil Rights Related to Voting Rights for Minorities

The U.S. Commission on Civil Rights was created through the enactment of the Civil Rights Act of 1957. Among other civil rights goals, the Act provided that the Commission should “investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote . . . by reason of their color, race, religion, or national origin[.]”²⁰⁴ Since its creation, the Commission has met this obligation by consistently investigating the state of voting rights across the country, and reporting the findings. The Commission has released over 20 briefing reports focused on the topic of voting rights.²⁰⁵ In addition to issuing briefing reports with findings and recommendations to the President and Congress, the Commission has issued a number of educational reports for general public consumption to both inform and instruct the public on the complexities of voting rights laws.

²⁰³ Press Release, White House, *President Bush Signs Voting Rights Act Reauthorization and Amendments Acts of 2006*, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727.html> (last accessed July 26, 2018).

²⁰⁴ Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634, §104(a)(1) (codified as amended at 42 U.S.C. § 1993).

²⁰⁵ See Appendix A for a summary of each of the Commission’s reports on voting rights.

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CHAPTER 2: THE SUPREME COURT'S *SHELBY COUNTY V. HOLDER* DECISION AND ITS MAJOR IMPACTS

This chapter first examines the Supreme Court's 5-4 decision in the *Shelby County v. Holder* case, which struck down the preclearance formula of the Voting Rights Act (VRA). It explains what preclearance was and where it applied, and examines the structural changes in VRA enforcement resulting from the Court's decision. It also discusses the rationale for the Supreme Court's holding that states and local jurisdictions with a history of discrimination in voting that were covered under the prior preclearance formula should no longer be subject to federal preclearance. This chapter also sets forth the precise language of the majority opinion's acknowledgement that Congress may enact a new preclearance formula based on current conditions. Appendix B describes various Congressional bills that have attempted to legislate new VRA preclearance criteria based on current conditions in the wake of *Shelby County*.

Chapter 2 then examines some of the major immediate impacts of the *Shelby County* decision, in North Carolina and Texas. These states have some of the most extensive post-*Shelby County* litigation, and both states altered pending legislation immediately following the *Shelby County* decision to include additional voting laws that no longer needed approval by the federal government under Section 5 of the VRA.²⁰⁶

The *Shelby County v. Holder* Decision

Brief Summary of Historical Context

The VRA was enacted in 1965, and subsequently reauthorized and extended in 1970, 1975, 1982, 1992, and 2006. After its enactment in 1965, and after subsequent reauthorizations, the Supreme Court upheld the constitutionality of the entire VRA.²⁰⁷ But as discussed below, in June 2013, the Supreme Court held that the formula for the preclearance process in Section 5 was unconstitutional.²⁰⁸

²⁰⁶ H.R. 589, 2013-2014 Gen. Assemb. (N.C. 2013), <https://www.ncleg.net/Sessions/2013/Bills/House/PDF/H589v9.pdf> (last accessed July 26, 2018) [*hereinafter* General Assembly of North Carolina, H.R. 589]; *see also* Ryan J. Reilly, *Harsh Texas Voter ID Law 'Immediately' Takes Effect After Voting Rights Act Ruling*, HUFFINGTON POST (Apr. 7, 2014), http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html; *see also* Jennifer L. Patin, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE VOTING RIGHTS ACT AT 50: THE TEXAS VOTER ID STORY (2015), http://lawyerscommittee.org/wp-content/uploads/2015/08/The-Voting-Rights-Act-at-50_printable.pdf [*hereinafter* Patin, *The Voting Rights Act at 50*].

²⁰⁷ *Lopez v. Monterey Cty.*, 525 U.S. 266, 287 (1999); *City of Rome*, 446 U.S. at 158; *Katzenbach*, 383 U.S. at 337; *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966).

²⁰⁸ *Shelby Cty.*, 570 U.S. at 557.

The 1965 VRA was passed to ensure the guarantees of the 14th and 15th Amendments of the U.S. Constitution against racial discrimination in voting.²⁰⁹ It does this through various provisions, including: a nationwide prohibition of discrimination in voting in Section 2; a nationwide prohibition of poll taxes, literacy tests, and other “tests and devices” that limit access to the ballot for minority voters; and protections against voter intimidation. Additional protections for voters with limited-English proficiency were enacted in 1975.²¹⁰ These and other remaining provisions of the VRA were not struck down by the *Shelby County* decision.²¹¹ The only part of the VRA that the *Shelby County* decision struck down was the preclearance formula of the 2006 reauthorization.²¹² The preclearance formula in Section 4(b) of the VRA determined which jurisdictions were “covered” and required to comply with the preclearance regime set forth under Section 5 of the VRA.²¹³ As will be explained in further detail below, preclearance meant that jurisdictions with a history of discrimination had to submit any changes in voting procedures to the DOJ or a federal court, and prove that the new voting procedures would not be discriminatory.²¹⁴ If they could not do so, the proposed changes in voting procedures would not be precleared and could not be implemented.²¹⁵ Historians have documented that Section 5’s preclearance rules were enacted because:

The drafters of the VRA clearly recognized that the historical record made a powerful case for ongoing oversight and protection of the voting rights of African Americans: just as the Fifteenth Amendment had been circumvented by devices such as literacy tests, the intent of the Voting Rights Act could readily be circumvented through other devices or alterations in the structure or mechanisms of elections. The pre-clearance provision was designed to prevent such circumventions, which would deprive American citizens of their political rights.²¹⁶

Prior to the *Shelby County* decision, the VRA’s preclearance rules applied to states and local jurisdictions (such as counties) with a history of discrimination in voting.²¹⁷ These states and local

²⁰⁹ *Katzenbach*, 383 U.S. at 308, 341-42; *Morgan*, 384 U.S. at 651.

²¹⁰ See Chapter 1, Summary of Major Voting Rights Act Provisions, *supra* notes 101-48.

²¹¹ *Shelby Cty.*, 570 U.S. at 557 (“Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula.”).

²¹² *Id.*

²¹³ 52 U.S.C. § 10303(b).

²¹⁴ 52 U.S.C. § 10304(a).

²¹⁵ *Id.*

²¹⁶ *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 242, 247-48 (2006) (statement of Alexander Keyssar, Kenn. Sch. of Gov., Harv. U.), <https://www.scribd.com/document/333618920/SENATE-HEARING-109TH-CONGRESS-RENEWING-THE-TEMPORARY-PROVISIONS-OF-THE-VOTING-RIGHTS-ACT-LEGISLATIVE-OPTIONS-AFTER-LULAC-V-PERRY> (last accessed June 12, 2018).

²¹⁷ 52 U.S.C. § 10304(a).

jurisdictions were subject to heightened scrutiny of voting changes until the *Shelby County* decision. (See Figures 2 and 3 for maps of jurisdictions that were subject to preclearance.)

As an important preliminary matter, the Commission notes that data examined in this report show that from the time of the 2006 VRA Reauthorization until the *Shelby County* decision, there were ongoing violations of Sections 2 and 5 of the VRA in the formerly covered jurisdictions, and that the Section 2 violations were concentrated in the formerly covered jurisdictions.²¹⁸ Also, during the 2006 reauthorization, “Congress found there were *more* DOJ objections [blocking proposed voting changes under Section 5 due to determinations that they would be discriminatory] between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490).”²¹⁹

What Were the Mechanics of Preclearance?

Section 5 of the VRA required that jurisdictions falling under the preclearance formula submit and receive approval of the federal government or a federal court before implementing any change in voting procedures.²²⁰ That requirement meant that the DOJ or a federal district court were statutorily required to review any changes in “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting”²²¹ in jurisdictions covered under the formula. The federal government would review the proposed changes to determine if they would discriminate against black, Latino, Asian, or Native American voters.²²² A three-judge federal district court would either issue a declaratory judgement approving or rejecting the change, or the U.S. Attorney General would approve, object, or request more information.²²³ Below are the major components of preclearance that were suspended by the *Shelby County* decision.

First, under Section 5, *any* voting law, practice, or procedure was subject to preclearance review prior to *Shelby County*, including:²²⁴

- All redistricting done after each decennial Census;
- Any other changes to voting district lines;
- Eliminating or moving polling places to less accessible areas or to locations that could be perceived as intimidating, such as Sheriff’s offices;
- New voter purge procedures;

²¹⁸ See Chapter 5, *infra* Table 13 and Sources cited therein.

²¹⁹ *Shelby Cty.*, 570 U.S. at 571 (Ginsburg, J., dissenting) (“On that score, the record before Congress was huge. In fact, Congress found there were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490).”); *Voting Rights Act: Evidence of Continued Need: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 172 (2006).

²²⁰ 52 U.S.C. § 10304(a).

²²¹ *Id.*

²²² *Id.*

²²³ See 28 C.F.R. § 51.10.

²²⁴ 52 U.S.C. § 10304(a); see also 28 C.F.R. § 51.10; *Allen v. State Bd. of Elections*, 393 U.S. 544, 548-89 (1969).

- English-language literacy tests;
- New voter ID laws;
- Cutting early voting or same-day voter registration;
- Moving Election Day to a day that would be inconvenient to an identifiable set of voters, such as a religious holiday, or taking away Sunday voting and limiting voting to a Tuesday, and;
- Any other change in registration, voting, or election procedures.²²⁵

Redistricting, which is constitutionally required after the 2020 Census, and any and all other changes in voting procedures in the post-*Shelby County* era, large and small, will not be subject to preclearance as they used to be, unless Congress enacts a new preclearance formula.²²⁶

Second, prior to the *Shelby County* decision, in the jurisdictions covered under the formula (see Figure 2, below), the DOJ or a federal court had to preclear or approve any proposed relevant voting change *before* the change could be implemented in any election. The standard for preclearance grappled with whether voting law changes “ha[ve] the purpose” or “will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) [the language minority requirements] of [the VRA].”²²⁷ Moreover, the burden to prove that the change would not be discriminatory fell on the jurisdiction (not the DOJ or private plaintiffs).²²⁸ The Code of Federal Regulations made clear that this meant the jurisdiction had to provide racial impact data to the federal government.²²⁹ None of this is required after *Shelby County*.

Third, as briefly discussed in Chapter 1, Section 5 of the VRA prohibited retrogression. Retrogression essentially means going backwards by decreasing access to the polls for voters of color. The measure of whether a change in voting practices was racially discriminatory (or not) was made *in comparison to* prior benchmarks.²³⁰ For example, if a state expanded early voting then sought to cut it (and if cuts to early voting disparately impacted voters of color), then the

²²⁵ See Chapter 5, *infra* Figure 24 and Sources cited therein.

²²⁶ *Shelby Cty.*, 570 U.S. at 530 (2013); U.S. Dep’t of Justice, *Jurisdictions Previously Covered by Section 5*, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (last accessed June, 7, 2018) [*hereinafter* DOJ Section 5].

²²⁷ 52 U.S.C. § 10304(a).

²²⁸ *Id.*; see also 28 C.F.R. § 51.10; *Allen*, 393 U.S. at 548-49.

²²⁹ See 28 C.F.R. § 51.27(n) (required contents of submission of voting changes for preclearance review include racial impact assessment); 28 C.F.R. § 51.27(r) (required contents also include: “Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in § 51.28 and is most likely to be needed with respect to redistrictings, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in § 51.37.”); § 51.28 (detailed demographic data will facilitate review).

²³⁰ Under Section 5, voting changes must be measured against the benchmark practice to determine whether they would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer*, 425 U.S. at 141.

change would not be precleared because it was retrogressive.²³¹ Or if a state or county cut back on the number of polling places, or changed an election date to a less convenient or accessible date, the DOJ could object if there were sufficient evidence the change would be retrogressive.²³²

Additionally, preclearance included public notice requirements: individuals and groups could register with the DOJ to receive weekly notice of the submissions of voting changes received by the DOJ or via federal court.²³³ As part of the preclearance review process, the DOJ also affirmatively reached out to members of the local minority community, to ask for their views on the proposed voting changes, and took into account “relevant information provided by individuals or groups.”²³⁴

But since the *Shelby County* decision struck down the preclearance formula, unless and until Congress updates it based on current conditions, Section 5’s preclearance requirements do not apply anywhere.²³⁵ Now, voting changes—including changes later proven to be discriminatory—may be implemented immediately, the burden of proof is no longer on the jurisdiction but instead on plaintiffs in a lawsuit (either impacted voters with access to counsel or the DOJ), no notice or data about impact is required, and retrogression is no longer clearly prohibited.²³⁶

What Was the Pre-*Shelby County* Preclearance Geographic Scope Criteria?

The *Shelby County* court struck down the preclearance geographic scope criteria of the 2006 VRA reauthorization, effectively halting heightened federal scrutiny in advance of voting changes in jurisdictions where the criteria applied.²³⁷ The criteria covered more than just states, because the rules of the VRA apply to any jurisdiction that conducts voter registration.²³⁸ These range from states to counties, to cities and townships and other subdivisions.²³⁹ The impacted states and localities are mapped out below in Figure 2.

²³¹ *Id.*

²³² See, e.g., U.S. Dep’t of Justice, *Section 5 Objection Letters*, <https://www.justice.gov/crt/section-5-objection-letters> (last accessed July 26, 2018).

²³³ 28 C.F.R. § 51.33.

²³⁴ 28 C.F.R. § 51.53; see also 28 C.F.R. §§ 51.29-51.31, 51.38; see also U.S. Comm’n on Civil Rights Briefing Meeting Feb. 2, 2018 (2018) at 41-42 (statement by Bishop Dr. William Barber II, President & Senior Lecturer of Repairers of the Breach) [*hereinafter* *Briefing Transcript*].

²³⁵ DOJ Fact Sheet, *supra* note 12.

²³⁶ *Id.* See also Chapter 4, Examination of the Data, *infra* Figure 21, and Sources cited therein (documenting cases where discrimination was proven under Section 2 with an overall limited ability to block such discriminatory voting changes through preliminary injunctions or judicial preclearance).

²³⁷ *Id.*

²³⁸ 52 U.S.C. § 10310(c)(2) (“political subdivision” shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.”).

²³⁹ DOJ, Jurisdictions Previously Covered by Section 5, *supra* note 226.

The preclearance geographic scope criteria identified jurisdictions with a history of discrimination in voting, whose record gave rise to the need for more extensive federal oversight.²⁴⁰ These were called “covered jurisdictions” or “jurisdictions covered under Section 5.”²⁴¹ As discussed in Chapter 1, this approach was originally based on finding jurisdictions with very low black voter registration and turnout, and with racially discriminatory barriers to the ballot. As conditions changed and the criteria were updated, preclearance coverage reached more jurisdictions.²⁴²

The most recent preclearance criteria were based on the 2006 Congressional record documenting what Congress found to be ongoing discrimination in voting in states and local jurisdictions that had previously been determined to have used discriminatory “tests and devices” and to have had disparately low minority voter turnout.²⁴³ This criteria covered nine states and 56 local jurisdictions with a history of discrimination in voting. Below is a map that was issued by the DOJ, showing the jurisdictions that were covered after the 2006 reauthorization, which since *Shelby County* are now termed “formerly covered jurisdictions.”²⁴⁴

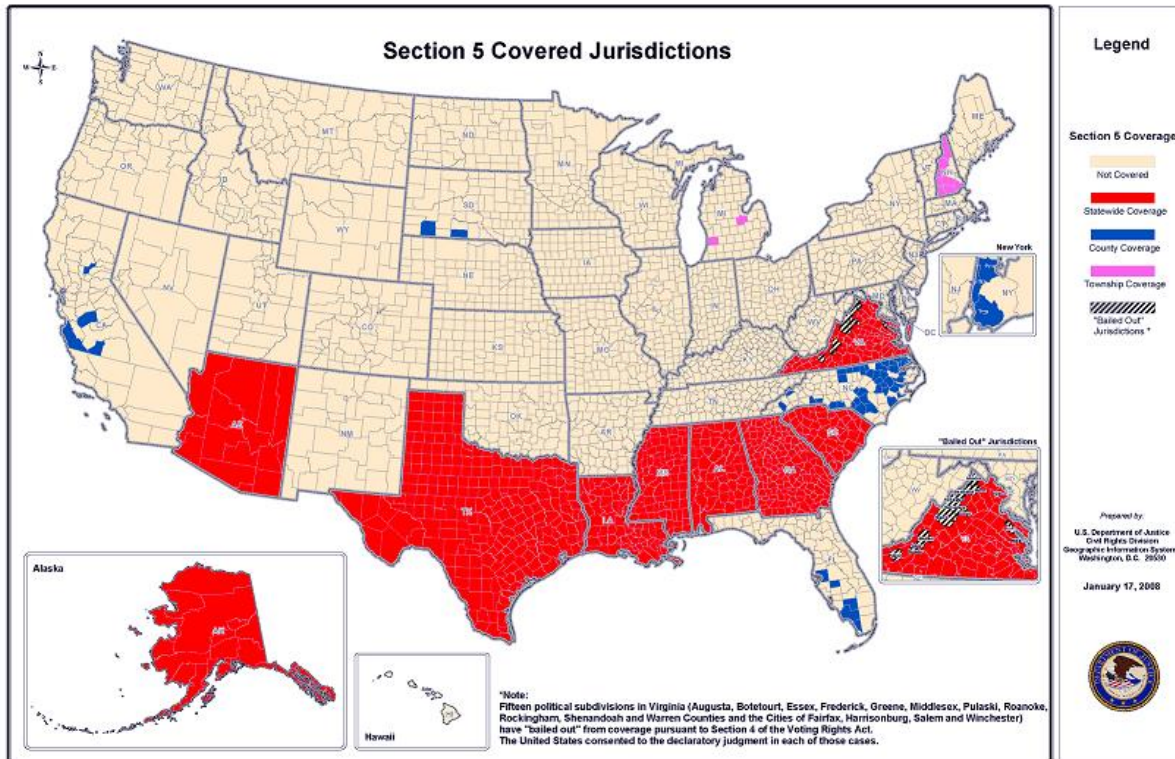
²⁴⁰ *Katzenbach*, 383 U.S. at 331.

²⁴¹ See, e.g., DOJ Section 5, *supra* note 226.

²⁴² See Chapter 1, Discussion and Sources, *supra* notes 87-95 and 153-92.

²⁴³ H.R. REP. NO. 109-478 (2006); S. REP. NO. 109-295 (2006).

²⁴⁴ DOJ Section 5, *supra* note 226.

Figure 2: Section 5 Formerly Covered Jurisdictions²⁴⁵

These formerly covered jurisdictions were subject to Section 5's preclearance rules unless they could "bail out." A statutory bailout was granted by a federal court to jurisdictions that could show that they had not discriminated in voting for over 10 years.²⁴⁶ If these jurisdictions could make the requisite showing, then they were no longer subject to heightened federal scrutiny via preclearance. Between 1985 and 2013, 40 counties and other sub-jurisdictions such as cities and townships in Alabama, California, Georgia, New Hampshire, North Carolina, Texas, and Virginia, bailed out of Section 5.²⁴⁷ A substantial portion (23 out of 42) of these bailouts were granted from 2010-2013.²⁴⁸

After these bailouts and immediately prior to *Shelby County*, the coverage map looked like this—although it is important to note that Alaska also remained covered (and that to provide the county-

²⁴⁵ *Id.*

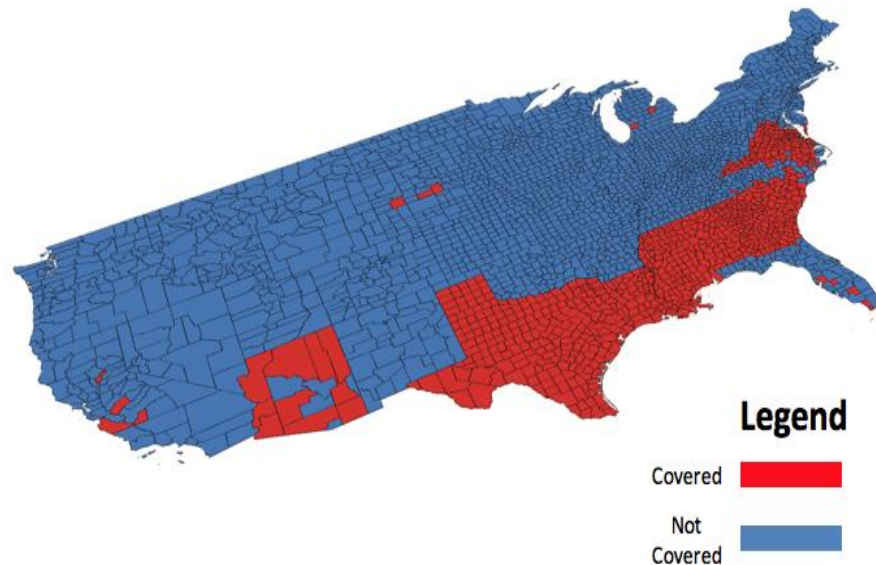
²⁴⁶ 52 U.S.C. § 10303(a).

²⁴⁷ U.S. Dep't of Justice, *Section 4 of the Voting Rights Act* (see "Jurisdictions Currently Bailed Out" subsection), https://www.justice.gov/crt/section-4-voting-rights-act#bailout_list (last accessed July 26, 2018) [*hereinafter* DOJ Section 4 Bailed Out Jurisdictions]; see also Appendix D for summary of New Hampshire State Advisory Committee Briefing (discussing bailout).

²⁴⁸ *Id.*

level of visual detail in other states in the map below, the researcher’s map had to cut off Alaska and Hawaii).²⁴⁹

Figure 3: Counties Covered Under Preclearance



Source: J. Morgan Kousser, Counties Covered Under Section 4 [the geographic scope criteria] at the Time of *Shelby County v. Holder* [excluding Alaska which was also covered on a statewide basis].²⁵⁰

The Supreme Court’s Reasoning in Shelby County

Shelby County was a 5-4 decision of the Supreme Court. Justice Roberts wrote the leading opinion, which Justices Scalia, Kennedy, Thomas, and Alito joined.²⁵¹ Justice Thomas wrote a concurring opinion,²⁵² and Justice Ginsburg wrote a dissenting opinion, in which Justices Breyer, Sotomayor, and Kagan joined.²⁵³ Justice Roberts based the majority opinion on (1) a finding that there had been “dramatic progress”²⁵⁴ in voting rights since the 1965 VRA was enacted, and (2) a conclusion that states in the South should not be treated unequally, based on “the principle of equal sovereignty” developed in the Court’s recent voting rights jurisprudence.²⁵⁵ It was mainly based

²⁴⁹ J. Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts’s Opinion in Shelby County?* TRANSATLANTICA 1, Map 2, 6 (2015), <http://journals.openedition.org/transatlantica/7462> [hereinafter Kousser, *Facts of Voting Rights*].

²⁵⁰ *Id.*

²⁵¹ *Shelby Cty.*, 570 U.S. 529.

²⁵² In his concurrence, Justice Thomas joined with the majority but also wrote separately to argue that not only the preclearance formula, but also Section 5 itself, was unconstitutional. *Shelby Cty.*, 570 U.S. at 557 (Thomas, J., concurring).

²⁵³ *Shelby Cty.*, 570 U.S. at 559 (Ginsburg, J., dissenting).

²⁵⁴ *Id.* at 556 (quoting *Northwest Austin*, 557 U.S. at 201 (2009)) (quotation marks omitted).

²⁵⁵ *Id.*

on these two factors that the majority held that the most recent (2006) VRA preclearance criteria covering certain states and counties were unconstitutional, and therefore could no longer be applied in those jurisdictions.²⁵⁶ Justice Roberts also stated that “Congress may draft another formula based on current conditions.”²⁵⁷

Progress in Voting Rights

The majority of the Court discussed that past discrimination in voting leading to the 1965 VRA was “pervasive,” “flagrant,” “widespread” and “rampant,” and that this level of discrimination justified the extraordinary measure of requiring states and local jurisdictions with a history of discrimination in voting to preclear any changes to their voting procedures with the federal government.²⁵⁸ The Court reasoned that it was based upon those conditions that in the case of *South Carolina v. Katzenbach* in 1966 and subsequent cases, the Court held that the original preclearance criteria and subsequent iterations during VRA reauthorizations were constitutional, as they were based on “exceptional conditions.”²⁵⁹

But after Congress reauthorized the VRA in 2006 for another 25 years, a Texas municipal utility district immediately challenged the preclearance criteria and argued that the preclearance requirements were unconstitutional. In its 2009 ruling in *Northwest Austin Municipal Util. Dist. No. One v. Holder* [hereinafter “*Northwest Austin*”], the Supreme Court took into account that this jurisdiction had never sought bailout, which would have alleviated the preclearance burden, and therefore declined to rule on the constitutionality of the preclearance formula of the VRA.²⁶⁰ However, in its opinion on *Northwest Austin*, the Court “expressed serious doubts about the [Voting Rights] Act’s continued constitutionality.”²⁶¹ In addition to believing that Section 5 “imposes substantial federalism costs,” in 2009, the Court justified its decision by commenting that “[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”²⁶²

²⁵⁶ *Id.*; Justice Ginsburg vehemently disagreed, arguing that any improvements in decreasing discrimination in voting were *due to* preclearance, and wrote in her dissent that: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.” *Shelby Cty.*, 570 U.S. at 590 (Ginsburg, J., dissenting).

²⁵⁷ *Id.* at 557.

²⁵⁸ *Id.* at 554.

²⁵⁹ *Id.* at 545 (discussing *Katzenbach*, 383 U.S. at 334). In *Katzenbach*, the Court relied in part on data that the USCCR generated regarding discrimination in voting in the South. 383 U.S. at 309 n.5, 311 n.10, 323 n.33, 337 n.51.

²⁶⁰ *Id.* at 539-40 (discussing *Northwest Austin*, 557 U.S. 193).

²⁶¹ *Id.* at 529.

²⁶² *Id.* at 540 (quoting *Northwest Austin*, 557 U.S. at 202); see also Kousser, *Facts of Voting Rights*, *supra* note 249, arguing that:

Devoting only two short sentences to the painstaking 84-page opinion of federal district court judge John Bates and only seven more to the thorough 32-page majority opinion of the Court of Appeals for the District of Columbia by Judge David S. Tatel, Chief Justice Roberts dismissed the 15,000-

In contrast to the Northwest Austin utility district, Shelby County, Alabama could not seek bailout because the Attorney General had recently objected to some of its voting changes as racially discriminatory. Because Shelby County could not prove that it had not discriminated in voting in the last 10 years,²⁶³ the Supreme Court found that it had standing to challenge the constitutionality of the preclearance provisions of the VRA. With standing established to challenge the VRA, the majority opinion then reviewed the type of past discrimination leading to the 1965 VRA. In particular, the majority noted that prior to 1965:

Several States had enacted a variety of requirements and tests “specifically designed to prevent” African-Americans from voting. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States “merely switched to discriminatory devices not covered by the federal decrees,” “enacted difficult new tests,” or simply “defied and evaded court orders.” Shortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. Those figures were roughly 50 percentage points or more below the figures for whites.²⁶⁴

The majority also noted that in 1965, “Congress chose to limit its attention to the geographic areas where immediate action seemed necessary.”²⁶⁵ Furthermore, those areas were places where

page record compiled by Congress, which the lower courts discussed extensively, as irrelevant because “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions.” “History,” Roberts reminded us, “did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it.” Yet apart from comparing voter registration rates in 1965 and 2004 in six Deep South states and making a brief, misleading reference to the rate of DOJ objections to election law changes, the Chief Justice ignored that history.

What if we delve into the history that Chief Justice Roberts disregarded? What if we look at where proven violations of the VRA and related laws and constitutional provisions actually took place and at the course of those violations over time? How do the geographical and temporal patterns from the years shortly before the passage of the Act in 1965 through the years after its latest renewal in 2006 reflect on the adequacy of the Section 4 coverage formula that the Chief Justice summarily rejected as “based on decades-old data and eradicated practices?” What can we learn about how voting rights law has actually worked by arraying the patterns of legal actions involving minority voting rights in maps and charts? Although Chief Justice Roberts’s opinion rested entirely on his assertions that voting rights violations had severely declined and that they were no longer concentrated in jurisdictions covered under Section 4 of the VRA, he only briefly and superficially examined the “historical experience” that he and Chief Justice Warren before him considered key to “the Constitutional propriety of the Voting Rights Act.” When we examine that experience in detail, will we reach the same conclusions that Chief Justice Roberts announced in *Shelby County*?

Id. (internal citations omitted).

²⁶³ *Id.* at 539-40.

²⁶⁴ *Id.* at 545-46 (quoting *Katzenbach*, 383 U.S. at 310-14 (internal pinpoint citations omitted)).

²⁶⁵ *Id.* at 546 (quoting *Katzenbach*, 383 U.S. at 328).

discriminatory voting “tests and devices” for voter registration were used, and where in the 1964 Presidential Election, turnout was at least 12 points below the national average.²⁶⁶

The majority opinion also considered that “tests and devices” were made illegal 40 years ago.²⁶⁷ Furthermore, in the 2006 reauthorization, Congress said that “[s]ignificant progress has been made in eliminating first-generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.”²⁶⁸ The opinion then included the following chart, emphasizing that it features voter registration data by race that were compiled before Congress reauthorized the preclearance formula in 2006.²⁶⁹

Table 2: Voter Registration Rate by Race, 1965, 2004²⁷⁰

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2%	19.3%	49.9%	73.8%	72.9%	0.9%
Georgia	62.[6]%	27.4%	35.2%	63.5%	64.2%	-0.7%
Louisiana	80.5%	31.6%	48.9%	75.1%	71.1%	4.0%
Mississippi	69.9%	6.7%	63.2%	72.3%	76.1%	-3.8%
South Carolina	75.7%	37.3%	38.4%	74.4%	71.1%	3.3%
Virginia	61.1%	38.3%	22.8%	68.2%	57.4%	10.8%

The majority noted that in the covered jurisdictions, “largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers.”²⁷¹ However, the Commission

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 547.

²⁶⁸ *Id.* (citing Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, § 2(b)(1)). During the reauthorization, Congress contrasted “first-generation barriers to ballot access,” which the VRA had made “significant progress” in “eliminating,” with “second generation barriers constructed to prevent minority voters from fully participating in the electoral process” which continued to exist. *Id.* at 565-66 (citing §§ 2(b)(2)-(3)).

²⁶⁹ *Id.* at 548 (citing S. Rep. No. 109-295, at 11 (2006); H.R. Rep. No. 109-478, at 12, and noting that: “The 2004 figures come from the Census Bureau. Census Bureau data from the most recent election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent.”).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 553.

notes that the Court did not take into account turnout data among Asian, Latino, and Native Americans,²⁷² who are also protected under the VRA, including Section 5.²⁷³

The majority did take into account that during the 2006 reauthorization, Congress relied heavily on “second-generation barriers” regarding “vote dilution” as opposed to vote denial (or barriers to ballot access).²⁷⁴ Chief Justice Roberts described these second-generation barriers that Congress relied on in the 2006 reauthorization—which were various forms of racial gerrymandering and moving district lines to dilute the political power of minority voters—as “not impediments to the casting of ballots but rather electoral arrangements that affect the weight of minority votes.”²⁷⁵ The Court’s opinion stated that “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day.”²⁷⁶

This phrase could refer back to the 1975 VRA Reauthorization.²⁷⁷ As discussed in Chapter 1, in renewing the preclearance formula during the 1975 VRA Reauthorization, Congress took into account updated black voter registration and turnout numbers, while also adding review of low turnout among other voters of color.²⁷⁸ In contrast, the 1982 and 2006 VRA Reauthorizations were not based upon turnout. Instead, the later reauthorizations took into account ongoing Section 5 violations in the formerly covered jurisdictions, an over-concentration of Section 2 violations in them, and the fact that these jurisdictions were inventing new ways to discriminate against minority voters.²⁷⁹ The majority opinion did not review this newer type of data underlying the differential treatment of states in the 2006 VRA Reauthorization, which showed a higher rate of discrimination in the previously covered jurisdictions.²⁸⁰ However, the Court’s holding certainly shows that it found the geographic scope criteria resulting from the data to be unconstitutional.²⁸¹ Chief Justice Roberts wrote that: “Regardless of how to look at the [2006] record, however, no one can fairly

²⁷² *Id.*; Cf. Chapter 4, *Disaggregation of Racial Disparities*, and sources cited therein at *infra* notes 1262-72 (discussing black voter turnout and showing large turnout gaps and under 50 percent participation rates in recent years among these groups).

²⁷³ For example, Section 5 determinations are evaluated based on whether the voting change in a covered jurisdiction “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title [protecting ‘language minority groups’].” 52 U.S.C. § 10304(a). This language has been used to object to voting changes on the basis that they discriminated against Asian, black, Latino and Native Americans. *See, e.g.*, 52 USC § 10310(c)(3) (“The term “language minorities” or “language minority group” means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.”).

²⁷⁴ *Shelby Cty.*, 570 U.S. at 554 (“Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution.”).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 554.

²⁷⁷ *See id.* at 538.

²⁷⁸ *See* Chapter 1, Discussion and Sources cited in notes 162-67, *supra*.

²⁷⁹ *See* Chapter 1, Discussion and Sources cited in notes 172 and 202, *supra*.

²⁸⁰ *See Shelby Cty.*, 570 U.S. at 554.

²⁸¹ *Id.*

say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.”²⁸² Moreover as discussed below, the Court also held that for preclearance criteria to be constitutional, current conditions would have to show compelling reasons to treat states differently.

The Principle of Equal Sovereignty

The principle of equal sovereignty among the states originated in the context of evaluating whether to admit new states, and became a states’ rights theory during the Reconstruction Era.²⁸³ In upholding the constitutionality of the Voting Rights Act in 1966, the Supreme Court concluded that the principle of equal sovereignty did not apply in the voting rights context.²⁸⁴ While relying on pre-1966 cases, equal sovereignty was resurrected by the Supreme Court’s 2009 decision in *Northwest Austin*,²⁸⁵ and became a pillar of the *Shelby County* decision.²⁸⁶

The principle of equal sovereignty simply means that states, as entities, should not be discriminated against and all states should be treated equally. It does not mean that states could never be treated differently, based upon their records.²⁸⁷ In its modern application, in the *Northwest Austin* and *Shelby County* cases, the Supreme Court has held that this principle means that states in the South and other jurisdictions covered by the preclearance provisions of the VRA should not be treated differently than other states based only on their history.²⁸⁸ This iteration of the states’ rights principle represents the majority’s criticism that the VRA preclearance criteria fell too harshly

²⁸² *Id.*

²⁸³ *Id.* at 544.

²⁸⁴ *Id.* at 545; *see also id.* at 544 (“Not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of equal sovereignty’ among the States. *Northwest Austin, supra*, at 203 (citing *United States v. Louisiana*, 363 U.S. 1, 16 (1960); *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845)); *see also Texas v. White*, 7 Wall. 700, 725-726 (1869); (emphasis added). Over a hundred years ago, this Court explained that our Nation ‘was and is a union of States, equal in power, dignity and authority.’ *Coyle v. Smith*, 221 U.S. 559, 567 (1911). Indeed, ‘the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.’ *Id.* at 580. *Coyle* concerned the admission of new States, and [*Morgan v.*] *Katzenbach* [deciding the constitutionality of the 1965 VRA in 1966] rejected the notion that the principle operated as a bar on differential treatment outside that context. 383 U. S. at 328-29. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States. 557 U. S. at 203.”).

²⁸⁵ 557 U.S. at 203.

²⁸⁶ *Shelby Cty.*, 570 U.S. at 544.

²⁸⁷ *See, e.g., id.* at 557 (the majority of the Roberts Court held that Congress may draft a new VRA preclearance formula based on current conditions, which presumably means that the formula would not apply the same way in every state, as it would have to be based on actual and current conditions that vary from state to state); *see also Northwest Austin*, 557 U.S. at 203 (requiring “disparate geographic coverage” to be “sufficiently related” to its targeted problem).

²⁸⁸ The *Shelby County* court explained that the “fundamental principle of equal sovereignty” among states was first re-established in the Court’s decision in *Northwest Austin* in 2009, and it considered the principle to be “highly pertinent” in evaluating disparate treatment of States. *Shelby Cty.*, 570 U.S. at 544 (citing *Northwest Austin*, 557 U.S. at 203).

upon the modern South. For example, in applying the principle of equal sovereignty in *Shelby County*, writing for the majority, Chief Justice Roberts considered that:

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.²⁸⁹

In analyzing whether the covered jurisdictions were treated with equal respect for their sovereignty in comparison to other places in the country, Chief Justice Roberts also reasoned that Congress did not change the VRA's prior coverage formula during their 2006 reauthorization (as discussed above, the prior coverage criteria was a formula identifying jurisdictions based on past discriminatory "tests or devices" and low minority turnout). The majority held that while the old coverage formula was justified in 1965, current conditions had improved in the covered jurisdictions. In defending the VRA in 2013, the federal government had argued before the Court that there was ongoing discrimination in the jurisdictions that were originally covered by the turnout-based formula in 1965, 1970, and 1975,²⁹⁰ and that jurisdictions could also bail out if they could prove that they had not discriminated in voting in 10 years.²⁹¹ But writing for the majority, Justice Roberts reasoned that "history did not end in 1965. By the time the [Voting Rights] Act was reauthorized in 2006, there had been 40 more years of it."²⁹² In sum, along with quantitative data comparing 1965 and 2004 black registration and turnout numbers,²⁹³ based on the qualitative assessment that conditions had "dramatically improved" in the South,²⁹⁴ the Court held that the preclearance criteria used in the 2006 VRA Reauthorization were unconstitutional.²⁹⁵

The Precise Holding

The immediate and ongoing implications of the *Shelby County* decision are discussed in subsequent sections of this report. But it is important to note that the majority opinion also acknowledged ongoing discrimination, and that the Chief Justice clearly stated that Congress may draft another set of preclearance criteria based on current conditions. The precise language of the Supreme Court's holding bears repeating as a guidepost to the role of the federal government in protecting minority voting rights going forward:

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current

²⁸⁹ *Id.* at 551.

²⁹⁰ 52 U.S.C. §10303(a)(1) (describing turnout formula).

²⁹¹ *Shelby Cty.*, 570 U.S. at 539.

²⁹² *Id.* at 552.

²⁹³ *Id.* at 549.

²⁹⁴ *Id.* at 550.

²⁹⁵ *Id.* at 556.

conditions.²⁹⁶ Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an “extraordinary departure from the traditional course of relations between the States and the Federal Government.” *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 500-501 (1992). Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.²⁹⁷

This text provides an opportunity to evaluate current conditions upon which Congress may constitutionally base another preclearance formula. The *Shelby County* holding makes clear that for such an updated preclearance criteria to be constitutional, it should not treat states unequally based on past conditions of discrimination that are not ongoing in the present. This opinion also justifies examination of whether the remaining provisions of the VRA are sufficient to protect our nation and its citizens from discrimination in voting.

Congressional Responses to the Shelby County Decision

Subsequent to the *Shelby County* decision directing that Congress “must ensure that the legislation it passes to remedy that problem [of discrimination in voting] speaks to current conditions,”²⁹⁸ despite current conditions evidencing ongoing discrimination in voting,²⁹⁹ Congress has not passed VRA legislation to address new preclearance criteria. In contrast, Congress had previously reauthorized the VRA on five separate occasions and each reauthorization received overwhelming bipartisan support.³⁰⁰ The post-*Shelby County* VRA bills that have been introduced but not voted upon are discussed in Appendix B.

The Impact of Shelby County on Federal VRA Enforcement

The most immediate and profound impact of the *Shelby County* decision is that formerly covered jurisdictions are no longer required to obtain preclearance for voting changes before they can be implemented. After the decision, the DOJ issued a *Fact Sheet on Justice Department's Enforcement Efforts Following Shelby County Decision* (“DOJ Fact Sheet”), describing its view of the impacts.³⁰¹ It stated that, “In the areas covered by the Section 4(b) [preclearance] formula,

²⁹⁶ Chief Justice Roberts even commented on Congressional inaction prior to the *Shelby County* decision. He stated that in striking down an Act of Congress [the 2006 VRA Reauthorization Act]:

We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. *Congress could have updated the coverage formula at that time, but did not do so.* 570 U.S. at 556-7 (emphasis added).

²⁹⁷ *Id.* at 557.

²⁹⁸ *Id.*

²⁹⁹ See Chapters 3-4 and Sources cited therein, *infra*.

³⁰⁰ Berman, *Give Us The Ballot*, *supra* note 79, at 137, 140.

³⁰¹ DOJ Fact Sheet, *supra* note 12.

the department used to be able to block discriminatory changes to election rules and practices before they took effect.... One of the impacts of *Shelby County* is that now, those discriminatory changes can go into and remain in effect while the department pursues litigation.”³⁰² In Chapter 5 of this report, the Commission will evaluate the Department’s pre- and post-*Shelby County* federal voting rights enforcement efforts.

The DOJ Fact Sheet and other public statements set forth DOJ’s view that it can no longer send federal observers trained by the Office of Personnel Management (OPM) who may enter the polling place to observe elections in formerly covered jurisdictions, because their certification by the Attorney General is based in part on the coverage formula in Section 4(b).³⁰³ The Commission notes that DOJ may still send federal observers if so ordered by a federal court. Also, DOJ may still send its own personnel to monitor elections, but unlike observers, they have no statutory right to enter the polls and watch the voting process.³⁰⁴

Another impact of *Shelby County* is in the area of language access. Section 4(f)(4) of the VRA requires specific jurisdictions to provide election-related materials and information in languages other than English; these are jurisdictions in which the Attorney General determined that an illegal voting test or device was in place in 1968 and that participation was less than 50 percent of citizens of voting age at that time.³⁰⁵ The DOJ Fact Sheet states that Section 4(f)(4) jurisdictions are “dependent on a part of the Section 4(b) formula,”³⁰⁶ but does not provide any citation to the statute for that analysis.³⁰⁷ Therefore, DOJ believes that jurisdictions formerly covered under Section

³⁰² *Id.*

³⁰³ *Id.*; see also 52 U.S.C. § 10305 (a)(2); see also U.S. Dep’t of Justice, Attorney General Loretta E. Lynch Delivers Remarks at the League of United Latin American Citizens National Convention (July 15, 2014), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-league-united-latin-american-citizens>. (“Unfortunately, our use of observers is largely tied to the preclearance coverage formula that the Supreme Court found to be unconstitutional in *Shelby County* and so our ability to deploy them has been severely curtailed.”)

³⁰⁴ *Cf.* 52 U.S.C. § 10305(d) (“Observers shall be authorized to—(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.”) (emphasis added); see also Justin Levitt, Loyola L. Sch., Written Testimony for the U.S. Comm’n on Civil Rights, Feb. 2, 2018 at 15-16 [*hereinafter* Levitt, Written Testimony] (noting that in 2016 DOJ had sent more than 500 observers to observe elections in 67 jurisdictions in 28 states).

³⁰⁵ 52 U.S.C. § 10303(f)(4) (“Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”) (emphasis added); 52 U.S.C. § 10303(b).

³⁰⁶ DOJ Fact Sheet, *supra* note 12.

³⁰⁷ *Id.*

4(f)(4) no longer have to provide language access (unless they are also covered under other minority language provisions of the VRA).

Finally, the very process of preclearance required that jurisdictions provide data about the racial impact of any proposed voting changes, and that the DOJ contact minority community members in the jurisdiction to investigate the impact on their communities.³⁰⁸ Absent preclearance, DOJ is no longer required to contact minority community members regarding their views, and affected jurisdictions are no longer required to provide to DOJ data regarding the racial impact of proposed voting changes.

Summary of the Impact

1. Voting changes go into effect immediately, unless litigation is quickly brought and successfully secures a preliminary injunction under the remaining provisions of the VRA, the Constitution, or another state or federal law;
2. DOJ is no longer sending federal observers to formerly covered jurisdictions (unless they are separately ordered by a court);
3. DOJ no longer believes that previously covered jurisdictions have to provide language access under Section 4(f)(4);
4. Neither the DOJ nor voters have the right to receive notice of changes in voting procedures, shifting the burden of monitoring election changes to voting rights groups, and imposing a large burden on communities, who must now stretch limited resources to track changes themselves in the absence of government transparency;³⁰⁹
5. Section 5's rule against retrogression, or determining the impact of voting changes on minority voters as compared to a prior benchmark, is no longer in operation;
6. Formerly covered jurisdictions no longer have to provide the DOJ or the public information or notice about the racial impact of their voting changes; and

³⁰⁸ 28 C.F.R. § 51.27(n) (Required contents) (“a statement of the anticipated effect of the change on members of racial or language minority groups.”); 28 C.F.R. § 51.38 (Processing of [Section 5] Submissions, Obtaining Information From Others).

³⁰⁹ See, e.g., Democracy North Carolina, *Election Board Monitoring*, <https://democracync.org/take-action/board-of-elections-monitoring> (last accessed June 6, 2018); see also Go Vote Georgia, *Election Board Monitoring*, <https://www.govotega.org/current-issues/election-board-monitoring> (last accessed June 6, 2018); see also Common Cause Georgia, Help Wanted: Sign Up to Monitor Local Board of Elections for Voter Suppression, <https://159georgiatogether.org/159-civic-engagement/2017/9/10/help-wanted-sign-up-to-monitor-local-board-of-elections-for-voter-suppression> (last accessed June 6, 2018); see also Patin, *The Voting Rights Act at 50*, *supra* note 206; see also Tomas Lopez, Executive Director, Democracy North Carolina, Written Testimony for the U.S. Comm’n on Civil Rights, Feb. 2, 2018 [*hereinafter* Lopez, Written Testimony] (Lopez states that since 2013, Democracy North Carolina has: established a program monitoring the activities of county-level boards of elections (CBOEs), which determine critical ballot access policies; established a poll monitoring program to document the impact of changes to state voting rules in H.R. 589 on voters and the voting experience; engaged in substantial public education efforts to inform the general public about changes in state and local voting rules, including those relating to H.R. 589 and related litigation; and participated as plaintiffs in litigation to remedy voting rights violations).

7. DOJ no longer regularly reaches out to members of impacted communities to hear their point of view about the impact of proposed voting changes.³¹⁰

Immediate Post-*Shelby County* Impact on Minority Voting Rights

Within two hours after the Supreme Court issued its decision in the *Shelby County* case, the Texas state Attorney General tweeted that the state would immediately reinstitute its strict photo ID law,³¹¹ which had previously been struck down by a federal court under the VRA's prior preclearance procedures. The day after the *Shelby County* decision, the North Carolina General Assembly amended a pending bill to make its voter ID law stricter, and added other provisions eliminating or restricting opportunities to vote that had been beneficial to minority voters.³¹² Federal courts later found these actions in both states to be intentionally racially discriminatory, after years of litigation.³¹³ But in the intervening years before the litigation process led to their being struck down, the discriminatory provisions went into effect in elections.³¹⁴

In the post-*Shelby County* era, new state restrictions on voting have resulted in at least 10 final findings of Section 2 violations by federal courts,³¹⁵ and there are other indicia of ongoing discrimination in voting in the formerly covered jurisdictions and in other states.³¹⁶ Whether and how current conditions across the nation evidence racial discrimination in voting is examined in depth in the following sections and chapters of this report.

North Carolina and Texas, Before and After the *Shelby County* Decision

In this section, the Commission analyzes the status of voting rights challenges in North Carolina and Texas, where some of the most intense litigation over VRA issues in this era occurred. The Commission's report examines conditions from the 2006 VRA Reauthorization to the present, including before and after the June 25, 2013 *Shelby County* decision. Cases in these two states show several fact patterns: changes that were previously not cleared by the federal government were immediately implemented; the changes remained in effect through several elections despite

³¹⁰ 28 C.F.R. §§ 51.33-51.50 (DOJ Processing of [Section 5] Submissions, covering notice, release of information to public, consideration, obtaining information from submitting authority, supplemental information and related submissions, judicial review and record of decisions).

³¹¹ Greg Abbott (@GregAbbott_TX), Twitter (Jun. 25, 2013 9:19 AM), https://twitter.com/GregAbbott_TX/status/349532390336643075 (last accessed May 1, 2018).

³¹² See The Post-*Shelby County* Voter Information Verification Act (VIVA/HB 589), at notes 336-42, *infra*.

³¹³ See Findings of Discriminatory Intent, at notes 354-69, *infra*.

³¹⁴ See One of Several Preliminary Injunctions Nullified by the Supreme Court Just Prior to the 2014 Election, at note 347-53, *infra* (noting that in major VRA cases including in North Carolina and Texas, limited preliminary injunctions were stayed by the Supreme Court, just prior to the November 2014 election).

³¹⁵ Chapter 4 of this report documents these cases.

³¹⁶ Chapter 3 of this report documents various types of voting changes in this era, and their impact on minority voters.

courts' eventual findings that the changes were racially discriminatory; and judicial preclearance was not ordered in the wake of findings of racially discriminatory changes.

In North Carolina, there were ongoing VRA violations up until 2006, and prior to *Shelby County*.³¹⁷ Moreover, immediately after the *Shelby County* decision, minority voters were subjected to cutbacks in same-day registration, early voting, and out-of-precinct voting, along with a strict voter ID law, all of which were found by a federal court of appeals to be intentionally discriminatory.³¹⁸ In Texas, there was a high number of ongoing VRA violations continuing into the post-2006 VRA Reauthorization, pre-*Shelby County* era.³¹⁹ But the impact of *Shelby County* was felt soon after the decision, when Texas' strict voter ID law that had been struck down under preclearance was immediately put back into place.³²⁰ An amended, less strict voter ID law was recently adopted in Texas,³²¹ but despite intense litigation under Section 2, three years had passed with the state's original, strict voter ID law in place, which federal courts have found was enacted with intentional discrimination against black and Latino voters.³²²

The impact of the loss of preclearance is also evident through intervening elections in both states. In both North Carolina and Texas, multiple elections were held, during which practices were applied that federal courts determined to have been intentionally racially discriminatory and in violation of longstanding constitutional and federal law.³²³

Even when intentional discrimination has been proven, it has been challenging for minority voters to receive the protections of judicial preclearance. The judicial preclearance provision of the VRA is one of the statute's remaining provisions,³²⁴ and some advocates argue that it will suffice in the place of the former federal administrative preclearance provisions that were struck down by the

³¹⁷ See *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 224-25 (4th Cir. 2016) (several Section 5 objections since 2000, with 55 successful Section 2 cases from 1980-2013). The Fourth Circuit held that North Carolina "state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day."

³¹⁸ *Id.* at 215-18.

³¹⁹ See Chapter 5, Evaluation of the DOJ's Enforcement Efforts Since the 2006 VRA Reauthorization and the 2013 *Shelby County* Decision, Table 13 *infra*, and Sources cited therein.

³²⁰ See Discussion and Sources cited in section on Texas, notes 405-20, *infra*.

³²¹ S.B. 5, 85th Leg., Reg. Sess. (Tex. 2017), <https://legiscan.com/TX/text/SB5/id/1625211/Texas-2017-SB5-Enrolled.html> (last accessed July 26, 2018) [*hereinafter* Texas Senate Bill 5].

³²² *Veasey*, 830 F.3d at 241 (finding sufficient evidence of racially discriminatory intent for remand to the district court).

³²³ See Discussion and Sources cited in notes 347-53 and 530 (intervening elections in North Carolina), and 443-44 and 531 (intervening elections in Texas), *infra*. Litigators from the DOJ and the nonprofit sector representing minority voters tried to get preliminary injunctions to stop discriminatory procedures from being implemented in elections. But as documented below, they were only partially successful, and the Supreme Court overturned them. See Discussion and Sources cited in notes 347-51. The Commission notes that the communities most impacted are minority voters, as federal courts' findings of Section 2 violations in both states show that members of these groups had "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

³²⁴ *Shelby Cty.*, 570 U.S. at 557.

Shelby County decision.³²⁵ Judicial preclearance enables a court to order that any changes in voting procedures have to be precleared by the court before they could be implemented, in jurisdictions where there has been a federal judicial finding of ongoing, intentional discrimination.³²⁶ It's application is discretionary.³²⁷ The DOJ was apt at winning judicial preclearance such decrees in about a dozen prior cases.³²⁸ However, in the post-*Shelby County* era, Section 3 remedies have

³²⁵ Hans A. von Spakovsky, Manager, Election Law Reform Initiative and Senior Legal Fellow, Heritage Foundation, Written Testimony for the U.S. Commission on Civil Rights, Feb. 2, 2018 at 8-9 [*hereinafter* von Spakovsky, Written Testimony].

³²⁶ 52 U.S.C. § 10302(c); *see also* *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), *appeal dismissed* 111 S. Ct. 1096, *on subsequent appeal* 992 F.2d 826, *on remand* 835 F. Supp. 1101 (upon finding violation of voting guarantees of 14th and 15th Amendments (which require proof of intent), court has discretion in determining whether to order a judicial preclearance remedy)).

³²⁷ The statutory language includes the term “shall,” but it is limited to equitable relief, which is a subjective test. 52 U.S.C. § 10302(c) (“If in any proceeding instituted by the Attorney General or an aggrieved person *under any statute to enforce the voting guarantees of the 14th or 15th amendment* in any State or political subdivision the court finds that violations of the 14th or 15th amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color[.]”) (emphasis added).

³²⁸ *See, e.g.*, Brief for Respondent, *Shelby Cty. v. Holder*, 2013 WL 315242 (U.S.), Jurisdictions That Have Been Ordered by a District Court to Comply With Preclearance Requirement Pursuant to Bail-in Mechanism in Section 3(c) of the Voting Rights Act:

- (1) Thurston County, Nebraska, *see United States v. Thurston Cty.*, C.A. No. 78-0-380 (D. Neb. May 9, 1979);
- (2) Escambia County, Florida, *see McMillan v. Escambia Cty.*, C.A. No. 77-0432 (N.D. Fla. Dec. 3, 1979) (559 F. Supp. 720 (N.D. Fla. 1983));
- (3) Alexander County, Illinois, *see Woodring v. Clarke*, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983);
- (4) Gadsden County School District, Florida, *see N.A.A.C.P. v. Gadsden City Sch. Bd.*, 589 F. Supp. 953 (N.D. Fla. 1984);
- (5) State of New Mexico, *see Sanchez v. Anaya*, C.A. No. 82-0067M (D.N.M. Dec. 17, 1984);
- (6) McKinley County, New Mexico, *see United States v. McKinley Cnty.*, No. 86-0029-C (D.N.M. Jan. 13, 1986);
- (7) Sandoval County, New Mexico, *see United States v. Sandoval Cty.*, C.A. No. 88-1457-SC (D.N.M. May 17, 1990);
- (8) City of Chattanooga, Tennessee, *see Brown v. Bd. of Comm’rs of City of Chattanooga*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990);
- (9) Montezuma-Cortez School District RE01, Colorado, *see Cuthair v. Montezuma-Cortez Sch. Dist. No. RE-1*, No. 89-C-964 (D. Col. Apr. 8, 1990);
- (10) State of Arkansas, *see Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), *appeal dismissed*, 498 U.S. 1129 (1991);
- (11) Los Angeles County, California, *see Garza v. Los Angeles Cty.*, C.A. Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 26, 1991);
- (12) Cibola County, New Mexico, *see United States v. Cibola Cty.*, C.A. No. 93-1134-LH/LFG (D.N.M. Apr. 21, 1994);
- (13) Socorro County, New Mexico, *see United States v. Socorro Cty.*, C.A. No. 93-1244-JP (D.N.M. Apr. 11, 1994);
- (14) Alameda County, California, *see United States v. Alameda Cty.*, C.A. No. C 95-1266 (SAW) (N.D. Cal. Jan. 22, 1996);

been granted through federal court opinions in only two known cases.³²⁹ Similarly, Section 3(a) permits courts to order that federal observers be deployed to monitor elections, either under an interlocutory order or through a final judgment, if intentional discrimination has been found and the court considers this relief necessary.³³⁰ Considering that the DOJ is no longer sending federal observers to formerly covered jurisdictions,³³¹ these provisions could be useful in the post-*Shelby County* era.

However, as this section documents, to date, judicial preclearance was not ordered in what may be the most harmful instance of intentional discrimination in the post-*Shelby County* era, in which minority voters were targeted “with almost surgical precision.”³³² Future litigation may show that judicial preclearance will be more available in the post-*Shelby County* era, but as shown below, in North Carolina and Texas, this alternative method of preclearance has been elusive.

North Carolina

The Commission held its national voting rights briefing in North Carolina,³³³ where significant legislation, litigation, and statewide discussion of voting rights issues have arisen. The following section documents the effects of the Voter Information Verification Act (HB 589), which the state legislature enacted immediately after the *Shelby County* decision.³³⁴ This section also documents the pre-*Shelby County* history of discrimination in voting in North Carolina, and a federal court of appeals holding regarding its ongoing impact.

The Post-*Shelby County* Voter Information Verification Act (VIVA/HB 589)

Within two months of the *Shelby County* decision, North Carolina enacted the Voter Information Verification Act (VIVA or HB 589).³³⁵ This bill put in place a strict photo ID law³³⁶ and cut back

(15) Bernalillo County, New Mexico, *see United States v. Bernalillo Cty.*, C.A. No. 93-156-BB/LCS (D.N.M. Apr. 22, 1998);

(16) Buffalo County, South Dakota, *see Kirke v. Buffalo Cty.*, C.A. No. 03-CV-3011 (D.S.D. Feb. 10, 2004);

(17) Charles Mix County, South Dakota, *see Blackmoon v. Charles Mix Cty.*, C.A. No. 05-CV-4017 (D.S.D. Dec. 4, 2007); and

(18) Village of Port Chester, New York, *see United States v. Village of Port Chester*, C.A. No. 06-CV-15173 (S.D.N.Y. Dec. 22, 2006).

³²⁹ *See Allen v. City of Evergreen*, 2014 WL 12607819, No. 13-0107 (S.D. Ala. 2014); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

³³⁰ 52 U.S.C. § 10302(a).

³³¹ *See* Discussion and Sources cited in The Impact of Shelby County on Federal VRA Enforcement, *supra* notes 309-10 (regarding DOJ Fact Sheet with decision to no longer send observers to formerly covered jurisdictions).

³³² *McCrary*, 831 F.3d. at 214.

³³³ Press Release, U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS, *supra* note 4.

³³⁴ General Assembly of North Carolina, H.R. 589, *supra* note 206.

³³⁵ *Id.*

³³⁶ Strict photo ID laws are defined as those requiring a state-issued photo identification with current name and address in order to vote (rather than voter registration cards or more accessible forms of ID). These types of IDs require underlying documentary proof of citizenship such as birth certificates or naturalization papers. *See* Discussion and Sources cited in Chapter 2, Section 1 at notes 464-65, *infra*.

or eliminated registration and voting procedures.³³⁷ The North Carolina State Conference of the National Association for the Advancement of Colored People (NC NAACP), the North Carolina League of Women Voters, and several other local groups and individuals sued the state of North Carolina over HB 589. The DOJ also filed suit against North Carolina, and its lawsuit was combined with the other actions.³³⁸ Plaintiffs alleged violations of Section 2 of the VRA, for discriminatory intent and effect, as well as violations of the 14th, 15th, and 26th Amendments of the U.S. Constitution.³³⁹ After three-and-one-half years of litigation, the Fourth Circuit Federal Court of Appeals³⁴⁰ held that HB 589's strict photo ID law, along with its cuts to same-day registration, early voting, and out-of-precinct voting, were enacted with illegal intentional discrimination targeting African Americans "with almost surgical precision."³⁴¹ Between 2013 and 2017, the State spent over five million dollars defending election changes stemming from HB 589.³⁴²

Preliminary Injunction Temporarily Halting Some Discriminatory Provisions

As 2014 began, plaintiffs were concerned about the impact of the comprehensive cutbacks on voter access in upcoming midterm elections, including in early voting. The North Carolina NAACP requested a preliminary injunction on May 19, 2014, but on August 8, 2014, the federal district court denied it.³⁴³ Plaintiffs appealed, and on October 1, 2014, the Fourth Circuit Court of Appeals partially reversed the lower court's decision and issued a preliminary injunction,³⁴⁴ but it only applied to block the elimination of same-day registration and counting out-of-precinct ballots, as

³³⁷ *N. Carolina NAACP v. McCrory*, 997 F. Supp. 2d 332, 334 (M.D.N.C. 2014).

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* For a description of federal courts of appeals, see United States Courts, Court Role and Structure, Court of Appeals, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last accessed July 26, 2018) ("There are 13 appellate courts that sit below the U.S. Supreme Court, and they are called the U.S. Courts of Appeals. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals. The appellate court's task is to determine whether or not the law was applied correctly in the trial court."); see also U.S. Courts, *How Appellate Courts are Different from Trial Courts*, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals> (last accessed July 26, 2018). ("At a trial in a U.S. District Court, witnesses give testimony and a judge or jury decides who is guilty or not guilty—or who is liable or not liable. The appellate courts do not retry cases or hear new evidence. They do not hear witnesses testify. There is no jury. Appellate courts review the procedures and the decisions in the trial court to make sure that the proceedings were fair and that the proper law was applied correctly.")

³⁴¹ *McCrory*, 831 F.3d at 214.

³⁴² NAACP Legal Defense and Educational Fund, *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder* 34 (2018), http://www.naacpldf.org/files/case_issue/States%20s%20responses%20post%20Shelby%206.22.18.pdf [hereinafter NAACP LDF, *Democracy Diminished*].

³⁴³ *McCrory*, 997 F. Supp. 2d at 354.

³⁴⁴ The Fourth Circuit considered that plaintiffs met the high standard set by the Supreme Court for a preliminary injunction: plaintiffs were likely to succeed on the merits of their Section 2 claims against these practices; the plaintiffs were likely to suffer irreparable harm absent an injunction; the balance of hardships weighed in their favor; and the injunction was in the public interest. *League of Women Voters of N. Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (standard for preliminary injunction)).

there was evidence that these measures most clearly targeted black voters.³⁴⁵ The appeals court denied preliminary injunctive relief regarding the other challenged provisions, because plaintiffs could not show that they would be immediately harmed in the upcoming election.³⁴⁶

One of Several Preliminary Injunctions Nullified by the Supreme Court Just Prior to the 2014 Election

Implementation of North Carolina's elimination of same-day registration and out-of-precinct voting would have been enjoined during the November 2014 election; however, on October 8, 2014, the Supreme Court stayed the Fourth Circuit's injunction.³⁴⁷

In the months before the 2014 federal election, in cases in Ohio, North Carolina, Wisconsin, and Texas, plaintiffs tried to bring complex cases as quickly as possible, in order to secure relief from allegedly discriminatory provisions before they could be implemented during the upcoming

³⁴⁵ *League of Women Voters of N. Carolina*, 769 F.3d at 244-45. The Fourth Circuit took into account that "Plaintiffs' expert presented unrebutted testimony that African American North Carolinians have used same-day registration at a higher rate than whites in the three federal elections during which it was offered. Specifically, in 2012, 13.4 percent of African American voters who voted early used same-day registration, as compared to 7.2 percent of white voters; in the 2010 midterm, the figures were 10.2 percent and 5.4 percent, respectively; and in 2008, 13.1 percent and 8.9 percent." *Id.* at 233.

And with regard to out-of-precinct voting, the Fourth Circuit took into account that:

The district court found that (1) between the years 2006 and 2010, an average of 17.1 percent of African Americans in North Carolina moved within the State, as compared to only 10.9 percent of whites; and (2) 27 percent of poor African Americans in North Carolina lack access to a vehicle, compared to 8.8 percent of poor whites... According to calculations the district court accepted, the total number of African Americans using out-of-precinct voting represents 0.342 percent of the African American vote in that election. The total share of the overall white vote that voted out-of-precinct was 0.21 percent. *Id.* House Bill 589 bars county boards of elections from counting such ballots. *Id.* at 233-34 (internal citations omitted).

The Fourth Circuit did not preliminarily enjoin the cuts to early voting, despite the evidence that "in 2010, 36 percent of all African American voters that cast ballots utilized early voting, as compared to 33.1 percent of white voters. By comparison, in the presidential elections of 2008 and 2012, over 70 percent of African American voters used early voting compared to just over 50 percent of white voters." *Id.* at 234. This was because the court of appeals considered that a preliminary injunction would pose "significant risk" of "substantial burden" to the State, due to the fact that the ruling was issued only two weeks before the start of the full early voting schedule, were it to be restored. *Id.* at 236.

³⁴⁶ *Id.* at 236-37. Notably, the photo ID provision was difficult to enjoin because unlike the other provisions of HB 589 taking immediate effect, it was subject to a "soft roll-out" in which it would be implemented later in time. *Id.* at 230 (soft roll-out) and 237 (preliminary injunction denied despite concerns about lack of poll worker training to properly implement soft roll-out; although injury may be shown at trial, irreparable injury in upcoming election was "speculative").

³⁴⁷ *North Carolina v. League of Women Voters of N. Carolina*, 135 S. Ct. 6 (2014); *League of Women Voters of N. Carolina*, 769 F.3d 224. On April 6, 2015, the Supreme Court denied certiorari on the case and effectively restored the Fourth Circuit's partial preliminary injunction. *North Carolina v. League of Women Voters of N. Carolina*, 135 S. Ct. 1735 (2015). This meant that in North Carolina, same-day registration and out-of-precinct voting were temporarily restored until there was a decision on the merits—but this was *after* the November 2014 election had already occurred. *McCrorry*, 831 F.3d at 219. Furthermore, implementation of the other challenged provisions of HB 589—including others that were also later found to be unconstitutional due to being intentionally racial discriminatory—was never enjoined. *Id.*

election. But in a series of rapid decisions in which both plaintiffs and defendants asked for emergency stays, from September 24-October 18, the Supreme Court decided against making any changes to existing voting procedures too close to the election.³⁴⁸ The Court so ruled even with regard to those changes that would seem to be designed to prevent irreparable harm to voters in the upcoming election.³⁴⁹ In addition, these decisions were inconsistent, as preliminary injunctions were upheld in Ohio and Wisconsin (where discriminatory effect, but not intent, was found), but not in North Carolina or Texas (where intentional discrimination had been found).³⁵⁰ Another new development was that in deciding on these post-*Shelby County* preliminary injunctions, the Court effectively counted new voting restrictions as the existing procedures that should not be changed too close to an election.³⁵¹ In contrast, under Section 5, the benchmark was considered to be the conditions *prior to* the new voting changes.³⁵² Moreover, under Section 5, the new restrictions would not have gone into effect in the first place in North Carolina and Texas.³⁵³

Findings of Discriminatory Intent

After appeal, in its final ruling on the merits in 2016, the Fourth Circuit held that in enacting HB 589, the North Carolina state legislature and governor had violated the VRA's prohibition against intentional discrimination under Section 2, as well as the 14th Amendment to the United States Constitution.³⁵⁴ The federal court of appeals held that HB 589's strict voter ID law,³⁵⁵ cuts to early

³⁴⁸ *Husted v. Ohio Conference of N.A.A.C.P.*, 135 S. Ct. 42 (2014); *North Carolina*, 135 S. Ct. 6; *Frank v. Walker*, 135 S. Ct. 7 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014).

³⁴⁹ See, e.g., *North Carolina*, 135 S. Ct. 6 and discussion above.

³⁵⁰ *Veasey v. Perry*, 769 F.3d 890, 892, 895 (5th Cir. 2014).

³⁵¹ See, e.g., *Veasey*, 135 S. Ct. at 10 (2014) (Ginsburg, J., dissenting) (“Texas need only reinstate the voter identification procedures it employed for ten years (from 2003 to 2013) and in five federal general elections. To date, the new regime, Senate Bill 14, has been applied in only three low-participation elections—namely, two statewide primaries and one statewide constitutional referendum, in which voter turnout ranged from 1.48 percent to 9.98 percent.”).

³⁵² *Beer*, 425 U.S. at 141 (under preclearance, voting changes must be measured against the benchmark practice to determine whether they would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”).

³⁵³ 52 U.S.C. § 10304(a).

³⁵⁴ *McCrorry*, 831 F.3d. at 219.

³⁵⁵ *Id.* This was the holding even though North Carolina amended its voter ID law, such that voters who declare they had a reasonable impediment to getting current, government-issued photo ID with their current name and address may be challenged by another voter, whether or not they were from the same county. H.R. 836, Gen. Assemb., §§ 163-82.1B(a) (N.C. 2015) [*hereinafter* North Carolina General Assembly, H.R. 836].

North Carolina voters also have to present their current voter registration card, or the last four digits of their social security number and date of birth as part of the reasonable impediment declaration process. North Carolina General Assembly, H.R. 836, §§ 163-66.15(c). Also, their provisional ballot would not be counted if they were challenged by another voter with grounds “to believe the [reasonable impediment] declaration is factually false, merely denigrated the photo identification requirement, or made obviously nonsensical statements;” or if the voter’s registration could not be confirmed, or if they were otherwise disqualified. *Id.* at §§ 163-82.1B(a).

Anita Earls, former Executive Director of the Southern Coalition for Social Justice, testified before the Commission about the “reasonable impediments” procedure not being well-implemented, because the list of reasonable impediments was so narrow and interpreted in limiting ways by poll workers. See Anita Earls, Former Executive

voting, same-day registration, out-of-precinct voting, and pre-registration were enacted “with discriminatory intent” and “target[ed] African American [voters] with almost surgical precision.”³⁵⁶ The factors examined included the sequence of events leading up to enactment:

[A]fter *Shelby County* it [the North Carolina legislature] moved forward with what it acknowledged was an omnibus bill that restricted voting mechanisms it knew were used disproportionately by African Americans, and so likely would not have passed preclearance. And, after *Shelby County*, the legislature substantially changed the one provision that it had fully debated before. As noted above, the General Assembly completely revised the list of acceptable photo IDs, removing from the list the IDs held disproportionately by African Americans, but retaining those disproportionately held by whites. This fact alone undermines the possibility that the post-*Shelby County* timing was merely to avoid the administrative costs.³⁵⁷

The fact that the legislature also asked for data about the racial impact of each and every one of the contemplated changes, found that they would have a racially discriminatory impact, and then enacted those changes without any further debate, also indicated discriminatory purpose.³⁵⁸ The Fourth Circuit also found it probative that the data revealed that white voters disproportionately used absentee voting, yet the state legislature did not restrict absentee voting in any way. Instead, the new law “drastically restricted all of these other forms of access to the franchise, but exempted absentee voting from the photo ID requirement.”³⁵⁹ The court went on to conclude that “[i]n sum, relying on this racial data, the General Assembly enacted legislation restricting all—and only—

Director, Southern Coalition for Social Justice, Written Testimony for the U.S. Commission on Civil Rights, Feb. 2, 2018 [*hereinafter* Earls, Written Testimony].

³⁵⁶ *McCrorry*, 831 F.3d. at 214-15.

³⁵⁷ *Id.* at 229 (internal citations omitted).

³⁵⁸ *Id.* at 216.

³⁵⁹ *Id.* at 230.

practices disproportionately used by African Americans.”³⁶⁰ Additionally, taken altogether, the discriminatory effect was cumulative.³⁶¹

³⁶⁰ *Id.* at 230. Regarding the strict photo ID law:

[D]ata showed that African Americans disproportionately lacked the most common kind of photo ID [required], those issued by the Department of Motor Vehicles (DMV). The pre-Shelby County version of SL 2013-381 provided that all government-issued IDs, even many that had been expired, would satisfy the requirement as an alternative to DMV-issued photo IDs. J.A. 2114-15. After Shelby County, with race data in hand, the legislature amended the bill to exclude many of the alternative photo IDs used by African Americans. As amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess. *McCrory*, 831 F.3d. at 216.

Regarding the cuts to early voting: “60.36 percent and 64.01 percent of African Americans voted early in 2008 and 2012, respectively, compared to 44.47 percent and 49.39 percent of whites . . . In particular, African Americans disproportionately used the first seven days of early voting.” *McCrory*, 831 F.3d at 216 (citing *McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016), *reversed and remanded by McCrory*, 831 F.3d 204).

Regarding elimination of same-day registration:

The legislature’s racial data demonstrated that, as the district court found, “it is indisputable that African American voters disproportionately used [same-day registration] when it was available.” . . . African American registration applications constituted a disproportionate percentage of the incomplete registration queue. And the court found that African Americans “are more likely to move between counties,” and thus ‘are more likely to need to re-register.’ As evidenced by the types of errors that placed many African American applications in the incomplete queue, in-person assistance likely would disproportionately benefit African Americans. *McCrory*, 831 F.3d. at 217-18 (internal citations omitted).

Regarding elimination of out-of-precinct voting:

Legislators additionally requested a racial breakdown of provisional voting, including out-of-precinct voting . . . which required . . . each county to count the provisional ballot of an Election Day voter who appeared at the wrong precinct, but in the correct county, for all of the ballot items for which the voter was eligible to vote. This provision assisted those who moved frequently . . .

The district court found that the racial data revealed that African Americans disproportionately voted provisionally. In fact, the General Assembly that had originally enacted the out-of-precinct voting legislation had specifically found that “of those registered voters who happened to vote provisional ballots outside their resident precincts’ in 2004, ‘a disproportionately high percentage were African American.’” With SL 2013-381, the General Assembly altogether eliminated out-of-precinct voting. *McCrory*, 831 F.3d. at 217.

Regarding elimination of pre-registration of 16- and 17-year-olds:

African Americans also disproportionately used preregistration. Preregistration permitted 16- and 17-year-olds, when obtaining driver’s licenses or attending mandatory high school registration drives, to identify themselves and indicate their intent to vote. This allowed County Boards of Elections to verify eligibility and automatically register eligible citizens once they reached eighteen. Although preregistration increased turnout among young adult voters, SL 2013-381 eliminated it. *McCrory*, 831 F.3d at 217-18.

³⁶⁰ The Fourth Circuit reasoned that “a court must be mindful of the number, character, and scope of the modifications enacted together in a single challenged law . . . Only then can a court determine whether a legislature

Finally, the federal court of appeals also took into account the tenuous relationship between the asserted reasons for the restrictions—“to combat voter fraud and promote public confidence in the electoral system”—and the record evidence that the legislature would not have enacted its photo ID requirement “if it had no disproportionate impact on African American voters.”³⁶² In particular, the state had been unable to “identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina.”³⁶³ The overbreadth of the voter ID requirement was considered to be “most stark in the General Assembly’s decision to exclude as acceptable identification all forms of state-issued ID disproportionately held by African Americans.”³⁶⁴ Similarly, the opinion states that the State’s proffered administrative interests in eliminating same-day registration, cutting early voting (particularly on Sundays), and eliminating out-of-precinct voting were not logical, and the goals could have been accomplished by nondiscriminatory means.³⁶⁵ And regarding eliminating pre-registration of 16- and 17-year olds, which was also disproportionately used by African-American voters, the sponsor of the law said

would have enacted the law regardless of its impact on African American voters.” *McCrary*, 831 F.3d at 234. It considered that:

For example, the photo ID requirement inevitably increases the steps required to vote, and so slows the process. The early voting provision reduced the number of days in which citizens can vote, resulting in more voters voting on Election Day. Together, these produce longer lines at the polls on Election Day, and absent out-of-precinct voting, prospective Election Day voters may wait in these longer lines only to discover that they have gone to the wrong precinct and are unable to travel to their correct precincts. Thus, cumulatively, the panoply of restrictions results in greater disenfranchisement than any of the law’s provisions individually. *McCrary*, 831 F.3d. at 231.

³⁶² *McCrary*, 831 F.3d at 235. The photo ID law was also complex because it was amended on June 18, 2015, on the eve of the July 2015 trial on the merits. The amendment permitted people who did not have an unexpired, state government-issued photo ID (excluding state-issued student IDs) to cast a provisional ballot if they completed a declaration under penalty of perjury that they had “reasonable impediment” to acquiring such an ID. See General Assembly of North Carolina, H.R. 836, § 8(d), <https://www.ncleg.net/Sessions/2015/Bills/House/PDF/H836v6.pdf> (last accessed Aug. 3, 2018). North Carolina argued that this was akin to the reasonable impediment provision a federal court had approved under Section 5 of the VRA, in the case of South Carolina’s voter ID law. See Discussion of *South Carolina v. United States* in Chapter 3, Section (A), and Sources cited therein at notes 506-08, *infra*. But North Carolina’s law was more stringent as North Carolina voters would be required to list the specific reasonable impediment under penalty of perjury. General Assembly of North Carolina, H.R. 836, §§ 163-66.15(e), requiring the voter to check one of the following boxes, under penalty of perjury:

- a. Lack of transportation.
- b. Disability or illness.
- c. Lack of birth certificate or other documents needed to obtain photo identification.
- d. Work schedule.
- e. Family responsibilities.
- f. Lost or stolen photo identification.
- g. Photo identification applied for but not received by the voter voting in person.
- h. Other reasonable impediment. If the voter checks the “other reasonable impediment” box, a further brief written identification of the reasonable impediment shall be required, including the option to indicate that State or federal law prohibits listing the impediment.

³⁶³ *McCrary*, 831 F.3d. at 235.

³⁶⁴ *Id.* at 236.

³⁶⁵ *Id.* at 236-39.

it was to “offer some clarity and some certainty as to when” a “young person is eligible to vote,” but the Fourth Circuit concluded “that explanation does not hold water.”³⁶⁶ The Fourth Circuit held that: “[HB 589 was] not tailored to achieve its purported justifications, a number of which were in all events insubstantial. In many ways, the challenged provisions . . . constitute solutions in search of a problem.”³⁶⁷ Because Section 5 also prohibited changes in voting procedures that were enacted with unconstitutional intentional discrimination,³⁶⁸ it is clear that the provisions of HB 589 would have been struck down and their implementation would have been prohibited under the prior preclearance regime that the Supreme Court quashed in *Shelby County*.³⁶⁹

Racially Polarized Voting and Ongoing History of Discrimination

In deciding that the State had violated the VRA, the Fourth Circuit also took into account high levels of racially polarized voting in North Carolina. Under the VRA, racially polarized voting or racial bloc occurs when “the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.”³⁷⁰ In evaluating the role of racially polarized voting in the post-*Shelby County* VRA case in North Carolina, the Fourth Circuit noted that recent scholarship suggested that in the years following President Obama’s election, racial discrimination and racially polarized voting had increased in jurisdictions formerly covered by Section 5.³⁷¹ The research showed that, “[t]his gap is not the result of mere partisanship, for even when controlling for partisan identification, race is a statistically significant predictor of vote choice, especially in the covered jurisdictions.”³⁷² The court of appeals recognized that racially polarized voting alone does not prove racial discrimination, “[b]ut it does provide an incentive for intentional discrimination in the regulation of elections.”³⁷³

Additionally, the Fourth Circuit took into account the impact of HB 589’s provisions with regard to the history of discrimination in voting in North Carolina, which it considered to be extensive and ongoing. While the trial court had found the record free of “official discrimination” from 1980 to 2013, the appeals court took into account that the DOJ had issued over 50 objection letters under Section 5 regarding proposed election law changes in North Carolina from 1980 to 2013, including

³⁶⁶ *Id.* at 238.

³⁶⁷ *Id.*

³⁶⁸ 52 U.S.C. § 10304(a); *Beer*, 425 U.S. at 141 (holding that reapportionment legislation that enhances the position of racial minorities in the electoral process does not violate Section 5 if it discriminates on the basis of race or color as to violate the constitutional protections against intentional discrimination).

³⁶⁹ *Shelby Cty.*, 570 U.S. 529.

³⁷⁰ *Gingles*, 478 U.S. at 51 (internal citations omitted).

³⁷¹ *McCrary*, 831 F.3d. at 221-22 (citing Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 206 (2013)).

³⁷² *Id.* at 222 (quoting Ansolabehere, *supra* note 371) (alteration in original).

³⁷³ *Id.*

several since 2000.³⁷⁴ Also during the same period, private plaintiffs brought 55 successful cases under Section 2 of the VRA in North Carolina, and a few months before the Fourth Circuit decision, a federal court had found that a redistricting plan enacted by the North Carolina General Assembly violated the Equal Protection Clause of the U.S. Constitution because it was impermissibly motivated by race.³⁷⁵ The Fourth Circuit held that “[t]he district court failed to take into account these cases and their important takeaway: that state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day.”³⁷⁶ Considering this context, the court of appeals ruled that the legislature enacted HB 589 with discriminatory intent. It emphasized that:

Our conclusion does not mean, and we do not suggest, that any member of the General Assembly harbored racial hatred or animosity toward any minority group. But the totality of the circumstances—North Carolina’s history of voting discrimination; the surge in African American voting; the legislature’s knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so—cumulatively and unmistakably reveal that the General Assembly used SL 2013-381 [HB 589] to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party. Even if done for partisan ends, that constituted racial discrimination.³⁷⁷

The law requires that any voting changes based upon discriminatory purpose must be struck down.³⁷⁸ Therefore, based on its conclusion that the North Carolina state legislature enacted HB 589 with racially discriminatory intent, the Fourth Circuit did not have to (and did not) address whether HB 589 also violated Section 2’s prohibition of discriminatory effects. After several years of litigation, the Fourth Circuit reversed and remanded the lower court’s decision, instructing that it issue an order permanently enjoining HB 589’s intentionally discriminatory provisions. The State petitioned to the Supreme Court, but on May 15, 2017, the Court declined the State’s petition to review the case.³⁷⁹

Judicial Preclearance Denied

Plaintiffs and the DOJ had also requested judicial preclearance under Section 3 of the VRA, but the court of appeals denied this request.³⁸⁰ Despite the findings of discriminatory purpose and consequent violation of the 14th Amendment, the Fourth Circuit “decline[d] to impose any of the

³⁷⁴ *Id.* at 224 (citing U.S. Dep’t of Justice, *Voting Determination Letters for North Carolina (DOJ Letters)* (Aug. 7, 2015), <https://www.justice.gov/crt/voting-determination-letters-north-carolina>) (further citations omitted). Twenty-seven objections were to laws originating in or approved by the General Assembly. *Id.*

³⁷⁵ *Id.* at 224-25.

³⁷⁶ *Id.* at 225.

³⁷⁷ *Id.* at 233.

³⁷⁸ *Id.* at 240 (citing *Veasey*, 830 F.3d at 268).

³⁷⁹ *North Carolina v. N. Carolina State Conference of NAACP*, 137 S. Ct. 1399 (2017).

³⁸⁰ *McCrary*, 831 F.3d at 241.

discretionary additional relief available under § 3 of the Voting Rights Act, including imposing poll observers during elections and subjecting North Carolina to ongoing preclearance requirements.”³⁸¹ Citing federal case law, it found that “[s]uch remedies ‘[are] rarely used’ and are not necessary here in light of our injunction [of HB 589].”³⁸² This may be because current case law shows that judicial preclearance may only be granted if it is imperative—and regarding North Carolina, the Fourth Circuit reasoned that its permanent injunction striking down HB 589 made such remedies “not necessary.”³⁸³

Relevant Testimony and Ongoing Voting Rights Issues in North Carolina

During the Commission’s February 2 briefing, Bishop Dr. William Barber II, President and Senior Lecturer of Repairers of the Breach, testified that in 2016 a Republican party official

produced and distributed a memo to Republican members of the County Board of Elections instructing them to make party line decisions in drafting new early voting plans, including voting against Sunday hours or voting and maintaining decreased number of hours at sites, particularly on weekends. This resulted in 2016 [that there were] 158 fewer early voting sites in the 40 previously covered counties, [than the number of polling places] that we had in 2012. This is another example of [a] blatant . . . attempt to block the power of the African-American and minority vote.³⁸⁴

His testimony is corroborated in detail by reporting summarizing the email records of the Executive Director of the state’s Republican Party, Dallas Woodhouse, which were obtained by public records request of *The News & Observer*.³⁸⁵ Woodhouse’s emails were sent to Republican members of county boards of elections, who are politically appointed.³⁸⁶ After the Fourth Circuit ruled against HB 589’s reductions in early voting, county boards of elections still had to set and vote upon the actual early voting schedules, as well as the number, location, and hours of polling places to be open during early voting.³⁸⁷ In addition to the directions to reduce polling places, the party Executive Director’s emails also told county election officials to end early voting on Sundays (stating that “six days of voting . . . is enough”) and same-day registration (stating that it was only available during early voting and “ripe with voter fraud, or the opportunity commit it”).³⁸⁸ And regarding polling places on college campuses, the party chair wrote that: “No group of people are entitled to their own early voting site, including college students, who already have more voting

³⁸¹ *Id.*

³⁸² *Id.* (quoting *Conway Sch. Dist. v. Wilhoit*, 854 F. Supp. 1430, 1442 (E.D. Ark. 1994)).

³⁸³ *Id.*

³⁸⁴ *Briefing Transcript*, *supra* note 234, at 41-42 (statement by Bishop Dr. William Barber II).

³⁸⁵ Colin Campbell, *NC Republican Party Seeks “Party Line Changes” to Limit Early Voting*, THE NEWS AND OBSERVER (Aug. 17, 2016), <http://www.newsobserver.com/news/politics-government/election/article96179857.html> [*hereinafter* Campbell, *NC Republican Party*].

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

options than most other citizens.”³⁸⁹ There may be VRA concerns regarding student voting issues because they may (or may not) disparately impact student voters of color, especially on historically black or Hispanic college campuses.³⁹⁰ Moreover, the younger generation attending colleges is more racially diverse than older generations.³⁹¹

In addition, Bishop Barber testified about the visible presence of KKK members and swastikas on streets near pro-voting marches as well as derogatory comments from bystanders.³⁹² For Barber, this reemergence of voter suppression tactics in North Carolina is a result of the loss of preclearance due to the Supreme Court's decision in *Shelby County*.³⁹³ The Commission notes that because of high levels of racially polarized voting in North Carolina, targeting African-American voters can be a way of targeting Democratic voters.³⁹⁴ The allegedly partisan motives for reducing access to polling places are beyond the scope of this report; however VRA issues may possibly arise when partisanship is mixed with racially discriminatory results (and/or intent),³⁹⁵ as was the case in the cuts to early voting and other measures in HB 589 in North Carolina.³⁹⁶ Therefore, it is possible, although still unproven, that the Republican Party State Executive Director's proposed elimination of 158 polling places could be of concern under Section 2 (and if it were still applicable, Section 5). These issues show yet another likely negative impact of the loss of preclearance: at the very least, it is impossible to know if there is a racially discriminatory impact without the data that the preclearance process would have provided.³⁹⁷

³⁸⁹ *Id.*

³⁹⁰ See, e.g., Emily Foxhall, *Waller County Backs Off Plan to Limit Early Voting*, HOUSTON CHRONICLE (Jan. 5, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Waller-Co-backs-off-plan-to-limit-early-voting-6739007.php> (describing local officials' plans to operate no early voting locations within walking distance of an HBCU campus).

³⁹¹ See, e.g., OurTime.org and the Advancement Project, *The Time Tax: America's Newest Form of Voter Suppression for Millennials, and How it Must be Eliminated to Make Voting Accessible for the Next Generation*, 2-3, OURTIME.ORG AND THE ADVANCEMENT PROJECT (Nov. 18, 2013), <https://advancementproject.org/resources/the-time-tax/>.

³⁹² Bishop Dr. William Barber II, Written Testimony for the U.S. Comm'n on Civil Rights, Feb. 2, 2018 [*hereinafter* Barber, Written Testimony].

³⁹³ *Id.*

³⁹⁴ See, e.g., *McCrary*, 831 F.3d at 214. Notably, according to NC GOP Executive Director Woodhouse, the Democratic Party was also involved in advocacy regarding early voting. See Campbell, *NC Republican Party*, *supra* note 385.

³⁹⁵ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006); see also Discussion and Sources cited in Chapter 4, Section B at notes 1334-37 (discussion of allegations of partisanship in voting rights litigation; discussion of partisanship mixed with racial discrimination).

³⁹⁶ *McCrary*, 831 F.3d at 216 (“The racial data provided to the legislature revealed that African Americans disproportionately used early voting in both 2008 and 2012,” particularly the first seven days and during “souls-to-the-polls Sundays in which African American churches provided transportation to voters.”) and 238 (“The only clear factor linking these various ‘reforms’ is their impact on African American voters. The record thus makes obvious that the ‘problem’ the majority in the General Assembly sought to remedy [by cutting early voting and other reforms] was emerging support for the minority party. Identifying and restricting the ways African Americans vote was an easy and effective way to do so.”).

³⁹⁷ See 28 C.F.R. §§ 51.33-51.50 (preclearance regulations), *supra* note 310.

In addition, there is current litigation about alleged discriminatory challenges of voters in North Carolina, which is discussed in Chapter 3, in the Current Voter Registration Issues section of this report.³⁹⁸

Most recently, on June 7, 2018, North Carolina House Speaker Tim Moore and other House Republicans proposed a ballot measure for the November 2018 election through which voters would decide on a constitutional amendment requiring voter ID.³⁹⁹ The proposed ballot language is as follows: “Photo identification for voting in person. Every person offering to vote in person shall present photo identification before voting in the manner prescribed by law.”⁴⁰⁰ Their amendment would leave the actual voter ID requirements up to the state legislature, although it would not cover absentee voting,⁴⁰¹ which is disproportionately used by whites in the state.⁴⁰² While the bill sponsor stated that the constitutional amendment is “a commonsense measure to secure the integrity of our elections system[;]” Allison Riggs of the Southern Coalition for Social Justice commented that, “It’s certainly not constitutional to embed discrimination in the state constitution.”⁴⁰³

Texas

The state of Texas has the highest number of recent VRA violations in the nation,⁴⁰⁴ and that record renders in depth analysis of the state’s importance in this report. Moreover, during its recent national field briefing on voting rights in North Carolina, the Commission received extensive testimony concerning voting rights access issues in Texas. The following section documents the effect of strict voter ID legislation in Texas, relevant litigation, and its impact on minority voters.

Ongoing Voter ID Litigation in Texas Spans the Pre- and Post-Shelby County Era to the Present

The ongoing saga of Texas voter ID litigation shows the differences in ability to protect minority voting rights before and after the *Shelby County* decision. Prior to *Shelby County*, it was possible to stop a discriminatory change in voting procedures before it could deny or abridge access for voters of color. Under the pre-*Shelby County* legal regime, Texas’ strict voter ID law (SB 14) was

³⁹⁸ See Discussion and Sources cited at notes 835-43, *infra*.

³⁹⁹ Travis Fain, *Amendment Would Put Voter ID in NC Constitution*, WRAL (June 7, 2018), <https://www.wral.com/amendment-would-put-voter-id-in-nc-constitution/17611888/>.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *McCrary*, 831 F.3d at 230.

⁴⁰³ Ari Berman, *North Carolina Republicans Want a Constitutional Amendment to Require ID to Vote: The Voter ID Law Was Struck Down in Court, So Now the GOP Is Putting It On the November Ballot*, MOTHER JONES (June 7, 2018), <https://www.motherjones.com/politics/2018/06/north-carolina-republicans-want-a-constitutional-amendment-to-require-id-to-vote/>.

⁴⁰⁴ See, e.g., Chapter 4, Table 12 (Chart of Successful Post-*Shelby County* Section 2 Cases), *infra*, note 1322 (showing that five of the 21 cases (23.8 percent) of successful Section 2 cases in the post-*Shelby County* era were in Texas).

enacted in 2011,⁴⁰⁵ and blocked by a federal court in 2012 as it failed the preclearance process under Section 5 of the VRA, due to it being retrogressive.⁴⁰⁶ Of all types of voter ID laws, Texas' was the strictest in the country and it disproportionately impacted African-American and Hispanic voters.⁴⁰⁷ The data that Texas was required to submit as part of the preclearance process showed that over 6 percent of the state's registered voters did not have identification required by SB 14.⁴⁰⁸ In addition, the DOJ's analysis of this data demonstrated that Latino voters in Texas were over 45 percent more likely than others to lack identification required by SB 14.⁴⁰⁹ That was enough to show retrogression, so the DOJ did not require further information about the impact on black voters, nor did it evaluate whether SB 14 was enacted with discriminatory intent. Texas appealed the DOJ's decision, and a federal court found that the cost of obtaining the underlying documents needed to get the ID required to vote in Texas ranged from \$22 to \$354.⁴¹⁰ The court reviewed more expansive data, and determined the state failed to demonstrate that SB 14 would not have a disparate and retrogressive impact on African-American and Latino-American voters.⁴¹¹ It held that:

None of the burdens associated with obtaining an EIC⁴¹² [the "free ID" required to vote] has ever before been imposed on Texas voters. Based on the

⁴⁰⁵ S.B. 14, 82d Leg., Reg. Sess. (Tex. 2011). (In May 2011, Texas' SB 14 amended the amount and type of acceptable documents that voters were required to present in order to cast a ballot); *see also Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012), *vacated and remanded by Texas v. Holder*, 133 S. Ct. 2886 (2013) (describing that prior to SB 14, registrants could vote by presenting a voter registration certificate or sign an affidavit along with presenting one of various forms of identification, including state-issued photo IDs as well as a utility bill, expired driver's license, "official mail addressed to the person . . . from a governmental entity," any "form of identification containing the person's photograph that establishes the person's identity," or "any other form of identification prescribed by the secretary of state." Under SB 14, these types of identification were no longer permissible.).

⁴⁰⁶ *Texas*, 888 F. Supp. 2d at 144-45 (holding that SB 14 was retrogressive and violated Section 5), *vacated and remanded* on June 27, 2013, based on *Shelby Cty.*, 570 U.S. 529 (2013), after which the state put SB 14 immediately back into effect.

⁴⁰⁷ *Veasey v. Perry*, 71 F. Supp. 3d 627, 642, 659 (S.D. Tex. 2014), *affirmed in part, reversed in part, and vacated in part by Veasey*, 830 F.3d 216 (5th Cir. 2016).

⁴⁰⁸ Thomas Pérez, Asst. U.S. Attorney General, U.S. Dep't of Justice, *Voting Determination Letter by at the Department of Justice to Keith Ingram, Director of Elections in Texas*, <https://www.justice.gov/crt/voting-determination-letter-34> (last accessed July 26, 2018); *see also* TEX. ELEC. CODE ANN. § 65.0541, <https://capitol.texas.gov/tlodocs/82R/billtext/html/SB00014F.HTML> (Voters were required to present either a driver's license, personal identification card that is no more than 60 days expired, U.S. military ID card that is no more than 60 days expired, U.S. citizenship certificate with a photo, U.S. passport that is no more than 60 days expired, or a license to carry a concealed handgun. Voters who did not present identification required by SB 14 at the polling location were permitted to vote provisionally, but in order for the ballot to count the voter had to present the required identification within six days.).

⁴⁰⁹ *Id.*

⁴¹⁰ *Texas*, 888 F. Supp. 2d at 116.

⁴¹¹ *Id.* at 142.

⁴¹² TEX. TRANSP. CODE ANN. § 521A.001(e) (If registrants were unable to obtain an ID to satisfy SB 14, the State offers an Election Identification Certificate (EIC) free of charge); *see also Texas*, 888 F. Supp. 2d at 117. However, SB 14 required EIC applicants to show Department of Public Safety officials at least one of the following forms of identification: an expired Texas driver's license or personal ID card, an original or certified copy of a birth certificate, U.S. citizenship or naturalization papers, or a court order indicating a change of name and/or gender.

record evidence before us, it is virtually certain that these burdens will disproportionately affect racial minorities. *Simply put, many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by SB 14, likely be unable to vote in the next election. This is retrogression.*⁴¹³

The court ruled that the photo ID law imposed “strict, unforgiving burdens on the poor, and racial minorities in Texas,” who disproportionately live in poverty.⁴¹⁴ Because the voting change failed preclearance under Section 5, Texas voters were not obliged to comply with SB 14’s strict photo ID rules in 2012 and early 2013 elections.⁴¹⁵

After *Shelby County*, the same discriminatory measure was implemented during elections and could only be stopped after several years of litigation. Two hours after *Shelby County*, the Texas Attorney General tweeted that the state’s strict voter ID law would be re-enacted.⁴¹⁶ The following day, plaintiffs filed a lawsuit alleging that the bill was adopted with unconstitutional discriminatory intent, and that it also violated Section 2 through its discriminatory effect on black and Latino voters.⁴¹⁷ Similar to the prior ruling, a federal court found that SB 14 had a discriminatory effect because it burdened Texans living in poverty, a disproportionate number of whom are African American and Latino,⁴¹⁸ but this time the court also found that SB 14 constituted an unconstitutional poll tax.⁴¹⁹ It issued a preliminary injunction to block its implementation, which was affirmed by the court of appeals, but in October 2014, the Supreme Court overturned it, leaving the strict voter ID law in place in Texas during the November 2014 election.⁴²⁰

After a trial on the merits, SB 14 was also held to have been enacted with racially discriminatory intent against black and Latino voters in Texas. And in determining on the merits whether SB 14 violated Section 2 of the VRA, the federal court followed the requirements of the leading Supreme Court case, *Thornburg v. Gingles*, under which it analyzed the state’s history of discrimination in voting and its ongoing effects.⁴²¹ This was part of a “totality of circumstances” analysis⁴²² that was not necessary under Section 5.⁴²³ After relevant testimony, the court found that since 1970, “[i]n every redistricting cycle since 1970, Texas has been found to have violated the VRA with racially

⁴¹³ *Texas*, 888 F. Supp. 2d at 141 (emphasis added) (citing *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 324 (2000)).

⁴¹⁴ *Id.* at 144.

⁴¹⁵ Patin, *The Voting Rights Act at 50*, *supra* note 206, at 8.

⁴¹⁶ Reilly, *Harsh Texas Voter ID Law*, *supra* note 206; *see also* Patin, *The Voting Rights Act at 50*, *supra* note 206.

⁴¹⁷ Mary Kate Sexton, *Identity Crisis: Veasey v. Abbott and the Unconstitutionality of Texas Voter ID Law SB14*, 37 B.C.J.L. & SOC. JUST. E. SUPP. 75, 79 (2016), <http://lawdigitalcommons.bc.edu/jlsj/vol37/iss3/7>.

⁴¹⁸ *Id.* at 80.

⁴¹⁹ *Veasey*, 71 F. Supp. 3d at 633, affirmed in part, reversed in part, and vacated in part by *Veasey*, 830 F.3d 216.

⁴²⁰ *Id.* at 707 (where SB 14 was preliminarily enjoined on the basis of likelihood of success on the merits for intentional discrimination and with regard to Section 2’s prohibition of discriminatory effects, but this was stayed upon appeal, *Veasey*, 769 F.3d at 896, and the motion to vacate the stay was denied, *Veasey*, 135 S. Ct. 9).

⁴²¹ *Veasey*, 71 F. Supp. 3d at 633-37 (discussing expert testimony regarding Texas’ all-white primaries, literacy tests, poll taxes, voter purging, and redistricting).

⁴²² 52 U.S.C. § 10301(b).

⁴²³ 52 U.S.C. § 10304(a).

gerrymandered districts.”⁴²⁴ The court also found that in Texas, even intimidation at the polls was ongoing and continued to impact minority voters.⁴²⁵ After testimony from numerous expert and lay witnesses, the trial court made its decision on the merits, and found that:

[T]he record as a whole (including the relative scarcity of incidences of in-person voter impersonation fraud, the fact that SB 14 addresses no other type of voter fraud, the anti-immigration and anti-Hispanic sentiment permeating the 2011 legislative session, and the legislators’ knowledge that SB 14 would clearly impact minorities disproportionately and likely disenfranchise them) shows that SB 14 was racially motivated.⁴²⁶

However, without preclearance and with the time and complexity of Section 2 litigation, implementation of SB 14 was not blocked until 2016.⁴²⁷ The Fifth Circuit Court of Appeals also held that despite its finding of discriminatory intent, the State of Texas would not be subject to the alternative remedy of judicial preclearance under Section 3 of the VRA.⁴²⁸ Also, a subsequent, July 2016 *en banc* decision of the entire Fifth Circuit affirmed the discriminatory results ruling regarding SB 14 but remanded the discriminatory intent ruling for further consideration by the lower court,⁴²⁹ while also ordering the federal district court to fashion an appropriate interim remedy before the November 2016 election.⁴³⁰ It stated that:

[A]ny new law would present a new circumstance not addressed here. Such a new law *may* cure the deficiencies addressed in this opinion. Neither our ruling here nor any ruling of the district court on remand should prevent the Legislature from acting

⁴²⁴ *Veasey*, 71 F. Supp. 3d at 636 (internal citations omitted).

⁴²⁵ The court found that:

Minorities continue to have to overcome fear and intimidation when they vote. Reverend Johnson testified that there 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. State Representative Ana Hernandez-Luna testified that a city in her district, Pasadena, recently made two city council seats into at-large seats in order to dilute the Hispanic vote and representation. *Id.* at 636-37 (internal citations omitted).

⁴²⁶ *Id.* at 659 (internal citations omitted).

⁴²⁷ *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2016) (holding that SB 14 was intentionally racially discriminatory, and sending the case back to the district court to determine the proper remedies), *affirmed in part, reversed in part, and vacated in part by Veasey*, 830 F.3d 216 (5th Cir. 2016) (*en banc*); in Aug. 2016 the parties then agreed to an interim remedy for the 2016 election, which the court accepted, and in May 2017, Texas amended SB 14 and introduced SB 5, which “essentially mirror[ed]” that interim remedy and provided for new exceptions to the strict voter ID bill, including a “reasonable impediment procedure” and an expansion of the list of acceptable identifications (*Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018)).

⁴²⁸ *Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018).

⁴²⁹ *Veasey*, 830 F.3d at 265. *En banc* is way to ask for reconsideration of a ruling by only several judges. See *En banc*, Law.com, <https://dictionary.law.com/Default.aspx?selected=625> (last accessed June 14, 2018) (*en banc* is way to ask for reconsideration of a ruling by only several judges).

⁴³⁰ *Veasey*, 830 F.3d at 271.

to ameliorate the issues raised in this opinion. Any concerns about a new bill would be the subject of a new appeal for another day.⁴³¹

After this order, the two parties agreed to an amended version of Texas' strict photo ID law that provided exceptions for voters with "reasonable impediments" to getting current, state-issued photo ID, which was accepted by the court.⁴³² Implementation of the strict photo ID law (SB 14) was then finally blocked in 2016.⁴³³

Under the new Administration, in February 2017, DOJ withdrew its discriminatory intent claim, based in part on the parties' agreement to an interim remedy providing for "reasonable impediment" exceptions to the strict voter ID rules, and Texas' plan to enact substantively the same provisions that the parties had agreed to.⁴³⁴ In May 2017, Texas enacted an amended voter ID law (SB 5) with these exceptions to the strict photo ID rules.⁴³⁵

In August 2017, the federal district court ruled that SB 5 does not ameliorate the discriminatory aspects of SB 14 but rather "perpetuates" them, and permanently prohibited Texas from enforcing

⁴³¹ *Id.* (emphasis added).

⁴³² *Veasey v. Abbott*, 265 F. Supp. 3d 684, 687 (S.D. Tex. 2017).

⁴³³ *Veasey*, 796 F.3d at 493 (holding that SB 14 was intentionally racially discriminatory, and sending the case back down to the district court to determine the proper remedies), *affirmed in part, reversed in part, and vacated in part by Veasey*, 830 F.3d 216; in Aug. 2016 parties then agreed to an interim remedy for the 2016 election, which the court accepted, and in May 2017, Texas amended SB 14 and introduced SB 5, which "essentially mirror[ed]" that interim remedy and provided for new exceptions to the strict voter ID bill, including a "reasonable impediment procedure" and an expansion of the list of acceptable identifications. *Veasey*, 888 F.3d 792, 804.

⁴³⁴ See United States's Motion for Voluntary Dismissal of Discriminatory Purpose Claim without Prejudice, *Veasey v. Abbott*, 2017 WL 3670954 (S.D. Tex. 2017). Despite granting the DOJ's Motion for Voluntary Dismissal because it was unopposed, the district court noted that:

It is well-settled that new legislation does not ipso facto eliminate the discriminatory intent behind older legislation and moot a dispute regarding the violation of law. *Hunter v. Underwood*, 471 U.S. 222, 232-33, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (events over 80 years to change the terms of the law do not eliminate its original discriminatory intent); *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 408-09 (5th Cir. 1991) (each bill must be evaluated on its own terms for discriminatory purpose); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016) (reasonable impediment amendment does not eliminate all lingering effects of law that was discriminatory when passed); *Perez v. Texas*, 970 F.Supp.2d 593, 603 (W.D. Tex. 2013) (claims of intentional discrimination in connection with legislation are not mooted by subsequent legislation so long as requested relief is available for purposeful discrimination); *Perez v. Abbott*, 253 F.Supp.3d 864, 872 (W.D. Tex.) (finding intentional discrimination claims not moot so long as relief was available to remedy the associated harm, even if remedy for discriminatory effects claim was mooted by later legislation).

Veasey v. Abbott, 248 F. Supp. 3d 833, 835 (S.D. Tex. 2017).

⁴³⁵ This "reasonable impediment" exception is available if a voter could not reasonably obtain the necessary ID due to one of seven given reasons: (1) lack of transportation, (2) lack of birth certificate or other documents needed to obtain acceptable form of photo ID, (3) work schedule, (4) lost or stolen identification, (5) disability or illness, (6) family responsibilities, or (7) acceptable form of photo ID applied for but not received. See Texas Senate Bill 5, *supra* note 321.

both SB 14 and SB 5.⁴³⁶ The district court therefore found that SB 5 violated Section 2 of the VRA as well as the U.S. Constitution, and permanently enjoined its enforcement.⁴³⁷ But the federal district court's ruling was overturned by a 2-1 vote of the Fifth Circuit in April 2018,⁴³⁸ reversing the ruling that SB 5 was tainted with intentional discrimination.⁴³⁹ As of June 25, 2018, five years after the *Shelby County* decision, SB 5 is still subject to potential litigation regarding whether it should be invalidated as the fruit of intentional discrimination, or permitted unless ongoing discriminatory effect can be proven.⁴⁴⁰ As of this writing, SB 5 was in effect during the March 2018 federal primary,⁴⁴¹ and will continue to be in effect in the 2018 federal elections in Texas.⁴⁴²

Absent Section 5, it has taken several elections and years of litigation, which likely is not over as of the writing of this report, to determine which aspects of Texas' post-*Shelby County* voter ID law discriminated against minority voters.

Relevant Testimony and Ongoing Voting Rights Issues in Texas

During the February 2 national briefing, the Commission heard extensive testimony from various experts about the voter ID litigation in Texas. NAACP Legal Defense Fund (LDF) President and

⁴³⁶ *Veasey*, 265 F. Supp. 3d at 697-98, *affirmed in part, reversed in part, and vacated in part by Veasey*, 888 F.3d at 796. The district court also left open the possibility of imposing the additional VRA remedy of Section 3(c) preclearance. *Id.* at 700.

⁴³⁷ *Id.* at 688-89. See also Derrick Robinson, Victory for Voters: Judge Rules New Texas Voter ID Law is Still Discriminatory and Doesn't Fix Damage Caused by 2011 Law, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW (Aug. 23, 2017), <https://lawyerscommittee.org/2017/08/victory-voters-judge-rules-new-texas-voter-id-law-still-discriminatory-doesnt-fix-damage-caused-2011-law/>.

⁴³⁸ *Veasey*, 888 F.3d at 796 ("Nothing we conclude today disposes of any potential challenges to SB 5 in the future. Plaintiffs may file a new lawsuit, and bear the burden of proof, if the promise of the law to remedy disparate impact on indigent minority voters is not fulfilled. They did not challenge SB 14, for instance, for several years after its effective date. As a remedy for the deficiencies found by this court in *Veasey II*, however, there is no evidentiary or legal basis for rejecting SB 5, and the district court was bound not to take the drastic step of enjoining it. Further, because SB 5 constitutes an effective remedy for the only deficiencies testified to in SB 14, and it essentially mirrors an agreed interim order for the same purpose, the State has acted promptly following this court's mandate, and there is no equitable basis for subjecting Texas to ongoing federal election scrutiny under Section 3(c).") (internal citations omitted).

⁴³⁹ The Fifth Circuit remanded the case to the district court, which issued its judgment in accordance. *Veasey v. Abbott*, No. 2:13-CV-193 (S.D. Tex., June 19, 2018).

⁴⁴⁰ See, e.g., Manny Fernandez, *Texas' Voter ID Law Does Not Discriminate and Can Stand*, *Appeals Court Rules*, N.Y. TIMES (April 27, 2018), <https://www.nytimes.com/2018/04/27/us/texas-voter-id.html> (also noting that an appeal from the 3-judge court's ruling that SB 5 was not prohibited as the fruit of intentional discrimination by the Plaintiffs to the full Fifth Circuit or the Supreme Court "seems likely"); see also *Veasey*, 888 F.3d at 804-05 (Justice Jones' discussion of potential new case in which disparate impact evidence may be developed (for a Section 2 claim based in discriminatory results)). The staff-generated portion of this report was adopted by the Commission on June 25, 2018. Subsequent developments are therefore not reported here.

⁴⁴¹ See, e.g., Alexa Ura, *What to Expect in Texas' Voting Rights Court Fights in 2018*, TEX. TRIB. (Jan. 3, 2018), <https://www.texastribune.org/2018/01/03/what-expect-texas-voting-rights-court-fights-2018/>; see also Texas Sec'y of State, Important Election Dates, SOS.STATE.TX, <https://www.sos.state.tx.us/elections/voter/2018-important-election-dates.shtml> (last accessed July 26, 2018).

⁴⁴² See, e.g., Texas Sec'y of State, *What Kind of Identification is Required to Vote in Person?*, VOTETEXAS.GOV, www.votetexas.gov/faq (last accessed June 24, 2018).

Director Counsel Sherrilyn Ifill testified that while the Texas voter ID litigation has been pending, Texas elected a U.S. Senator in 2014, all 36 members of the Texas delegation to the U.S. House of Representatives, Governor, Lieutenant Governor, Attorney General, Controller, various statewide Commissioners, four Justices of the Texas Supreme Court, candidates for special election in the state Senate, state boards of education, 16 state senators, all 150 members of the state House, over 175 district judges, and over 75 district attorneys.⁴⁴³ In the meantime, Texas' strict voter ID law (SB 14) was found to be discriminatory in both intent and effect, in violation of the U.S. Constitution and Section 2 of the VRA. SB 14 had been blocked by preclearance, and but for the *Shelby County* decision, it would not have been implemented.⁴⁴⁴

In reflecting on the process of Section 2 litigation in Texas following the *Shelby County* decision, former DOJ Voting Section Historian Peyton McCrary remarked that it is “slow, time-intensive, [and] it ties up precious resources” and can take years to work its way through the courts.⁴⁴⁵ ACLU Voting Rights Project Director Dale Ho stated that Section 2 litigation is like “a ray of light,” but he believes that litigation is inherently not fast enough to keep up with the discriminatory voting provisions enacted in Texas and around the country.⁴⁴⁶ Ho noted that it will be difficult to not only prosecute Section 2 cases in a timely matter, but also to have the resources to bring such complex litigation in the first place. He added that the ACLU alone has brought more Section 2 cases than the DOJ, and the current administration is shifting gears away from a focus on voting rights.⁴⁴⁷ Justin Levitt, former Deputy Assistant Attorney General for Civil Rights in the DOJ, stated in his written testimony that “the Federal Judicial Center determined that of 63 different forms of litigation, voting rights cases are the sixth most cumbersome for the courts: more cumbersome than an antitrust case, and nearly twice as cumbersome as a murder trial.”⁴⁴⁸

Levitt also offered his views that since the Supreme Court's 2006 ruling about Texas in *LULAC v. Perry*, recognizing indicia of ongoing intentional discrimination in voting,⁴⁴⁹ “[w]hen it comes to racial misconduct, Texas has unfortunately proven themselves to be an unrepentant recidivist....

⁴⁴³ *Briefing Transcript*, *supra* note 234, at 90 (statement by Sherrilyn Ifill).

⁴⁴⁴ 52 U.S.C. § 10304(a) (requirement that any alterations in voting procedures be approved through preclearance by the Attorney General or a federal court, before they may be implemented).

⁴⁴⁵ Dr. Peyton McCrary, George Wash. U. L. Sch., Written Testimony for the U.S. Comm'n on Civil Rights, Feb. 2, 2018 at 12 [*hereinafter* McCrary, Written Testimony].

⁴⁴⁶ Dale Ho, Director, Voting Rights Project, American Civil Liberties Union, Written Testimony for the U.S. Comm'n on Civil Rights, Feb. 2, 2018 at 12 [*hereinafter* Ho, Written Testimony]; *see also Briefing Transcript*, *supra* note 234 at 96-97 (statement by Sherrilyn Ifill) (Ifill also notes that the recent voting litigation in Texas has established that Section 2 litigation takes too long and in the meantime, harm is being done to minority communities).

⁴⁴⁷ *Id.*

⁴⁴⁸ Levitt, Written Testimony, *supra* note 304, at 8 (citing Federal Judicial Center, 2003-2004 District Court Case-Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States (2005), <https://www.fjc.gov/sites/default/files/2012/CaseWts0.pdf>).

⁴⁴⁹ *League of United Latin Am. Citizens*, 548 U.S. at 440-41.

the same legislature passed a restrictive ID law also found to be intentionally discriminatory.”⁴⁵⁰ He also believes that if preclearance still existed it would have blocked Texas’ voter ID law.⁴⁵¹

Mexican American Legal Defense and Educational Fund (MALDEF) Litigation Director Nina Perales testified about repeated, successful lawsuits against voting rights violations in Texas, particularly regarding discriminatory redistricting.⁴⁵² Perales pointed out that while the Latino population and Latino political participation have grown in Texas, the state has been intransigent and continued to enact redistricting plans every decade that are found to be discriminatory.⁴⁵³ Jerry Vattamala, Director of the Democracy Program at the Asian American Legal Defense and Education Fund (AALDEF), also testified about recent violations of Section 208 of the VRA, limiting the rights of Asian voters to receive required language assistance in Texas until litigation forced the state to change its law.⁴⁵⁴

Several voting rights experts commented on DOJ’s switching positions in the Texas voter ID litigation, with remarks of disappointment and serious qualms about the future of the Justice Department’s voting rights enforcement efforts. Vanita Gupta, the former head of the Civil Rights Division and current President and CEO of the Leadership Conference on Civil and Human Rights, stated that it was “really troubling” that this decision reversed a position that DOJ lawyers had been pursuing for years.⁴⁵⁵ In her written testimony to the Commission, she characterized the DOJ’s change of position as “embracing a vote suppression agenda,”⁴⁵⁶ with “wholesale programmatic shifts”⁴⁵⁷ evidenced in DOJ actions in the North Carolina, Ohio, and Texas cases.⁴⁵⁸ Justin Levitt, Ezra Rosenberg, Dale Ho, Peyton McCrary, Sherrilyn Ifill, Gerry Hebert, Lorraine Minnite, and Nina Perales—who all provided expert testimony at the Commission’s briefing—also critiqued the DOJ switching positions in the Texas voter ID.⁴⁵⁹

⁴⁵⁰ *Briefing Transcript*, *supra* note 234, at 36 (statement by Justin Levitt).

⁴⁵¹ *Id.* at 15.

⁴⁵² *Briefing Transcript*, *supra* note 234, at 92-93 (statement by Nina Perales, Vice Pres. of Litigation, Mexican American Legal Defense and Educational Fund (MALDEF)).

⁴⁵³ Nina Perales, Written Testimony for the U.S. Comm’n on Civil Rights, Feb. 2, 2018 at 2-3 [*hereinafter* Perales, Written Testimony]; *see also League of United Latin Am. Citizens*, 548 U.S. 399; *see also Perez v. Abbott*, 253 F. Supp. 3d 864 (W.D. Tex. 2017) (Congressional maps); *see also Perez v. Abbott*, 274 F. Supp. 3d 624 (W.D. Tex. 2017) (state legislative maps); *see also Benavidez v. Irving Indep. Sch. Dist.*, 2014 WL 4055366 (N.D. Tex. 2014); *see also Beaumont Indep. Sch. Dist. v. United States*, 944 F. Supp. 2d 23 (D.D.C. 2013); *see also Patino*, 230 F. Supp. 3d 667 (granting 3(c) remedy).

⁴⁵⁴ *Briefing Transcript*, *supra* note 234, at 181-82 (statement by Jerry Vattamala, Director of Testimony, Asian American Legal Defense and Education Fund (AALDEF)); *see also* Jerry Vattamala, Written Statement for the U.S. Comm’n on Civil Rights, Feb. 2, 2018, at 9 [*hereinafter* Vattamala, Written Testimony] (discussing the case of *Organization of Chinese Americans v. Texas* brought to enforce Section 208 of the VRA).

⁴⁵⁵ *Id.*

⁴⁵⁶ Vanita Gupta, Pres. and CEO, Leadership Conference on Civil and Human Rights, Written Testimony for the U.S. Comm’n on Civil Rights, Feb. 2, 2018, at 3 [*hereinafter* Gupta, Written Testimony].

⁴⁵⁷ *Id.* at 6.

⁴⁵⁸ *Id.* at 3-6.

⁴⁵⁹ *Briefing Transcript*, *supra* note 234, at 26, 78, 109, 212 and 219.

On March 18, 2018, in a briefing held by the Texas SAC to the Commission, Assistant Professor of Law at the University of Houston Teddy Rave declared the importance of running election decisions through preclearance as an “additional institution” would not have partisan interests.⁴⁶⁰ He noted that when preclearance was established by the DOJ, it served as an “external check” on partisan decisions and helped ensure that legislation was not enacted if it was created with the goal of assuming a partisan advantage. Rave noted that the DOJ is “not beholden to the same interests as local election officials” which allowed preclearance to succeed, when it was enforced before *Shelby County*. At the same briefing, AALDEF’s Jerry Vattamala pointed out the recent lack of enforcement of voting rights by the DOJ, and stressed the utmost importance of the Department’s role in monitoring elections.⁴⁶¹

Not Just a North Carolina and Texas Problem

At least 23 states have enacted newly restrictive statewide voter laws since the *Shelby County* decision.⁴⁶² The findings of federal courts show that North Carolina’s HB 589, Texas’ SB 14, and similar electoral changes have violated Section 2 of the VRA and negatively impact minority voters.⁴⁶³

In the following chapter, the Commission reviews the main types of changes in voting procedures that impact minority voters and are relevant to federal VRA enforcement, from the 2006 VRA Reauthorization to the present.

⁴⁶⁰ Teddy Rave, Assist Prof. of Law, Univ. of Houston, Tex. Advisory Committee to the U.S. Comm’n on Civil Rights, Mar. 13, 2018 at 22-30 [*hereinafter Houston Meeting*].

⁴⁶¹ Jerry Vattamala, *Houston Meeting*, at 97.

⁴⁶² Barber, Written Testimony, *supra* note 392, at 1. According to the Brennan Center, since 2010, 23 have passed new restrictions on voting. In addition, 13 have more restrictive voter ID laws, 11 introduced stricter rules for voter registration, 6 cut back on early voting days and hours, and 3 made it harder for persons with past felony convictions to vote. See also The Brennan Cent. for Justice, *New Voting Restrictions in America*, THE BRENNAN CENT. FOR JUSTICE, <https://www.brennancenter.org/new-voting-restrictions-america> (last accessed July 26, 2018) [*hereinafter Brennan, New Voting Restrictions in America*].

⁴⁶³ See Chapter 4, Table 12 at note 1322, *infra* (listing and citing 23 successful Section 2 cases in the post-*Shelby County* era).

CHAPTER 3: RECENT CHANGES IN VOTING LAWS AND PROCEDURES THAT IMPACT MINORITY VOTERS

This chapter examines some of the main changes in voting laws and procedures from the time of the 2006 Reauthorization of the Voting Rights Act (VRA) until the present, providing an analysis of the impact of these measures on minority voters. When relevant, this chapter discusses litigation and other actions brought to address VRA issues, and the results of those methods. The analysis herein focuses at the state and local level, and includes information about relevant proceedings of the Commission's SACs.

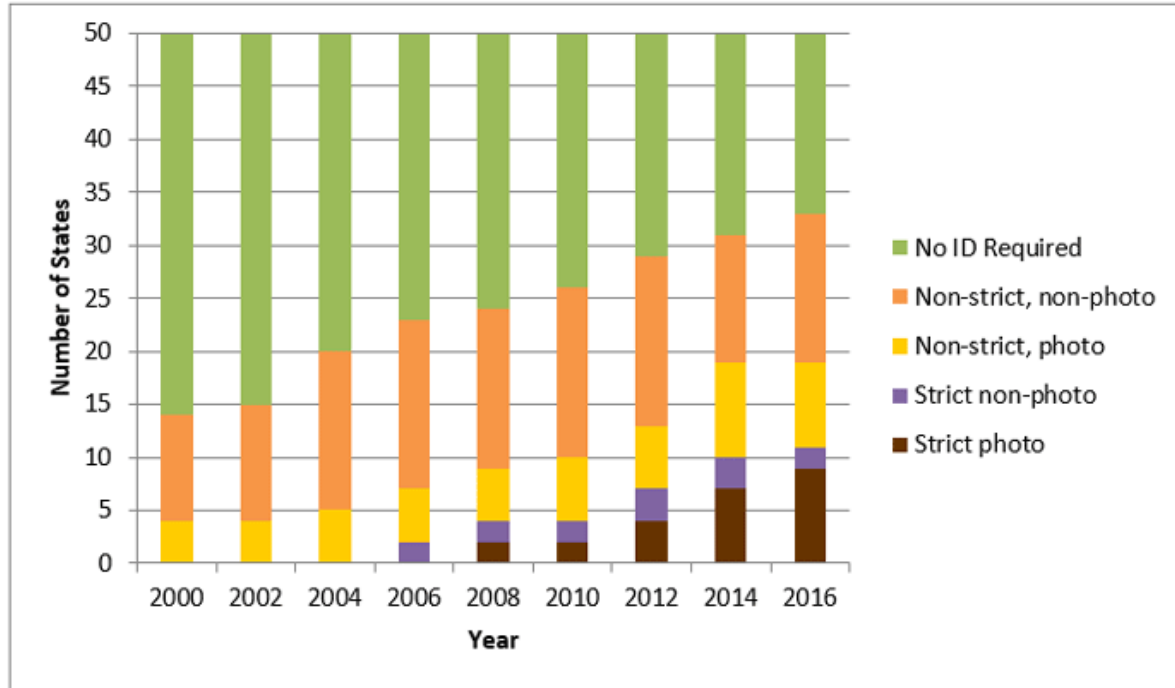
Chapter 3 begins by examining voter ID laws and their impact on minority voters. It then documents and evaluates various arguments about voter fraud that have been used to justify voter ID laws and other measures discussed in this chapter. This chapter then examines the impact on minority voters of recent state rules requiring documentary proof of citizenship for voter registration, challenges of voters on the rolls, and removal or purges of voters from the voter registration list. The impact of recent cuts to early voting are also documented. Finally, this chapter discusses various polling place and accessibility issues, including moving or closing polling places, language access issues, and accessibility for voters with disabilities. Appendix E summarizes the overall results in a table showing where potentially discriminatory issues have occurred across the nation, in a state-by-state chart. Research shows that in the 15 formerly covered states, there were an average of at least two potentially discriminatory voting changes per state during the time period studied in this report. In comparison, there was an average of less than one potentially discriminatory voting change per state in the 35 states that were not formerly covered. In total, 55.4 percent of the potentially discriminatory voting changes occurred in the 15 formerly covered states, while 44.6 percent occurred in other states.

Voter Identification Laws

Voter identification (ID) laws that require eligible voters to present identification when casting a ballot are a highly debated and contested issue in state legislatures and courtrooms throughout the United States. This section illustrates the various types of voter ID laws and which states have enacted them. It briefly discusses relevant federal legal background, then summarizes the status of voter ID laws in the states (from 2006 to the present). The Commission then examines further detail about whether and how voter ID laws have a discriminatory impact on minority voters. As will be discussed below, federal court decisions as well as current, available data show that different types of voter ID laws enacted by different states have different levels of discriminatory impact, ranging from those that federal courts have found to be racially discriminatory and in violation of the VRA, to those that may have negligible impact.

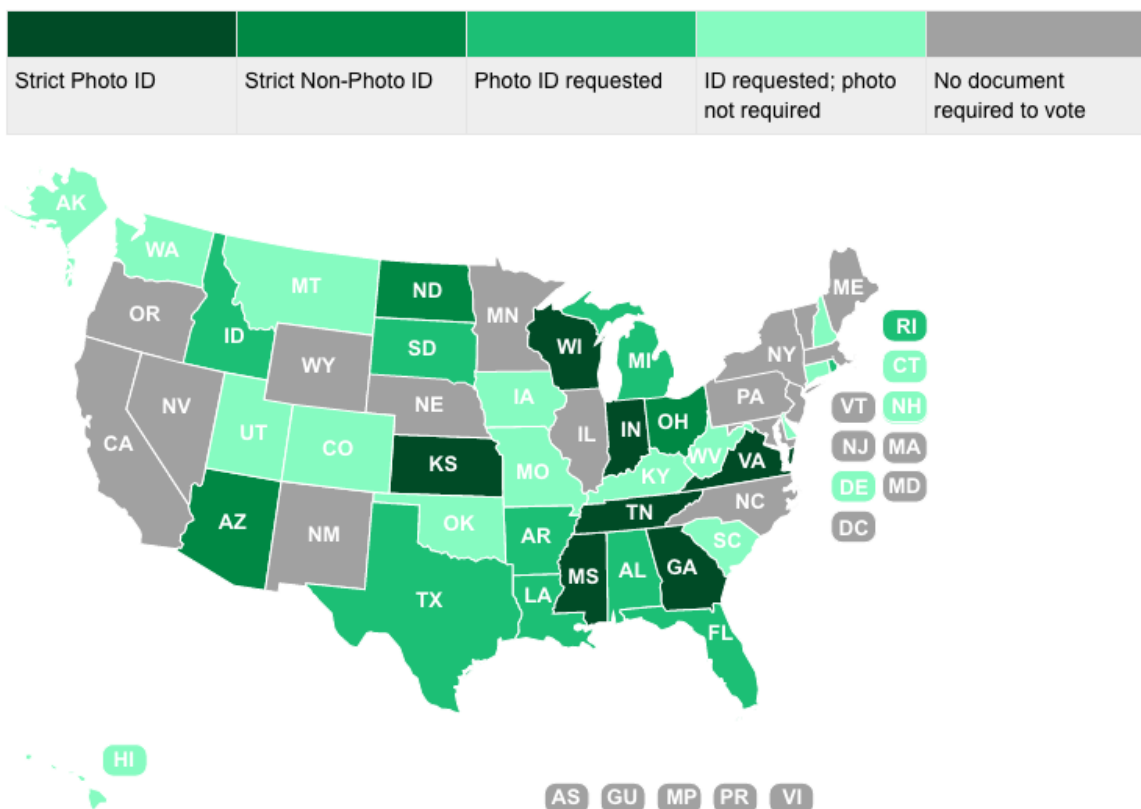
Data regarding the various types of voter ID laws are found in the following graph and map:

Figure 4: Type of Voter Identification Law in U.S. States, 2000-2016



Source: National Conference of State Legislatures⁴⁶⁴

⁴⁶⁴ Nat'l. Conf. of State Legislators (NCSL), *History of Voter ID*, <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx> (last accessed July 26, 2018) [*hereinafter* NCSL, *History of Voter ID*]. NCSL documented that these states adopted four types of voter ID laws. These are: strict photo ID laws (government-issued photo IDs are *required* to vote), non-strict photo ID laws (photo IDs are not required, but *requested* before voting), strict non-photo ID laws (non-photo IDs are *required* to vote), and non-strict non-photo ID laws (non-photo IDs are *requested* before voting). NCSL adds that strict voter ID laws are also characterized by the inability of voters without ID to have even provisional ballots counted, unless the person presents appropriate ID within several days after Election Day. *Id.*

Figure 5: Voter Identification Laws in Effect in 2018

Source: National Conference of State Legislatures⁴⁶⁵

Legal Background

Voter ID laws were not prominent until the late 20th century.⁴⁶⁶ Prior to the 1965 VRA, poll workers sometimes required other voters or poll workers to “vouch” for the voter’s identity or qualifications.⁴⁶⁷ This practice was used in such a racially discriminatory manner in some jurisdictions, particularly in the South, that the 1965 VRA legislated a permanent, nationwide ban

⁴⁶⁵ Wendy Underhill, *Voter Identification Requirements*, NCSL (May 15, 2018), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [hereinafter Underhill, *Voter ID Requirements*].

⁴⁶⁶ NCSL, *History of Voter ID*, *supra* note 464.

⁴⁶⁷ Voting Rights Act of 1965, Pub. L. 89-110, § 4(c) (codified as amended at 52 U.S.C. § 10303(c)), http://library.clerk.house.gov/reference-files/PPL_VotingRightsAct_1965.pdf (prohibited tests and devices as prerequisites to voting or registration included any requirement that a person “prove his qualification by the voucher of registered voters or members of any other class.”); see also NAACP LDF, *Jim Crow Era Voucher Laws “Have No Place in Modern Day Alabama,”* NAACP LDF (May 29, 2014), <http://www.naacpldf.org/press-release/naacp-legal-defense-fund-calls-state-alabama-stop-using-discriminatory-voucher-test>; see also U.S. COMM’N ON CIVIL RIGHTS VOTING 1961, *supra* note 62, at 26, 50, 53 (displaying evidence of this practice of requiring someone to vouch for a potential voter’s identity or qualifications).

on vouchers.⁴⁶⁸ Between this time and 2008, states verified the identity of voters through a variety of other formal and informal methods. In 2008, the Supreme Court summarized these methods:

States employ different methods of identifying eligible voters at the polls. Some merely check off the names of registered voters who identify themselves; others require voters to present registration cards or other documentation before they can vote; some require voters to sign their names so their signatures can be compared with those on file; and in recent years an increasing number of states have relied primarily on photo identification.⁴⁶⁹

In addition, state and federal law include criminal penalties for impersonating another voter.⁴⁷⁰ The VRA itself provides criminal penalties, including fines of \$10,000 and 5 years' imprisonment, for voting twice.⁴⁷¹

The first law requiring voters to show identification at the polls was passed in South Carolina in 1950, followed by four other states—Hawaii (1970), Texas (1971), Florida (1977), and Alaska (1980)—that all passed laws.⁴⁷² Throughout the next several decades, several more states began considering voter ID laws and by the 2000 election, 14 states passed voter ID laws.⁴⁷³ Since the 2000 Presidential Election, the number of state voter ID laws has been on the rise.⁴⁷⁴ After the recount in Florida that changed the initial results of the 2000 election, Congress enacted the Help America Vote Act (HAVA).⁴⁷⁵ In addition to other reforms, HAVA included a new federal law requirement that every person who registers to vote must either present identification at that time, or at the polls, if the person is a first-time registrant in that jurisdiction.⁴⁷⁶ The types of ID that HAVA considers acceptable are: a current driver's license or state ID card, or a "current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."⁴⁷⁷ HAVA also includes a provision for "fail-safe voting" if the

⁴⁶⁸ *Id.*; see also Voting Rights Act of 1965, Pub. L. 89-110, § 4(c) (codified as amended at 52 U.S.C. § 10303(c)).

⁴⁶⁹ *Crawford v. Marion Cty.*, 553 U.S. 181, 197 (2008).

⁴⁷⁰ U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, DEPT. OF JUSTICE 26 (7th Edition, May 2007) <https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-rvs0807.pdf> (According to the Justice Department, this can occur when "Voting in federal elections for individuals who do not personally participate in, and assent to, the voting act attributed to them, or impersonating voters or casting ballots in the names of voters who do not vote in federal elections (42 U.S.C. §§ 1973i(c), 1973i(e), 1973gg-10(2))." See also Thomas J. Baldino & Kyle L. Kreider, *Of the People, by the People, For the People: A Documentary Record of Voting Rights and Electoral Reform* 631 (2010) (Santa Barbara, Calif.: Greenwood); The Heritage Foundation, *Voter Fraud Cases*, THE HERITAGE FOUNDATION, <https://www.heritage.org/voterfraud> (last accessed Aug. 2, 2018) [*hereinafter* Heritage, *Voter Fraud Cases*] (noting their database of 1,132 "proven instances of voter fraud" from 1979 to 2018).

⁴⁷¹ 52 U.S.C. § 10307(e).

⁴⁷² NCSL, *History of Voter ID*, *supra* note 464.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 32 U.S.C., 56 U.S.C.), <https://www.eac.gov/assets/1/6/HAVA41.PDF>; see also 2000 and 2001 USCCR voting investigations discussed in Appendix A.

⁴⁷⁶ 52 U.S.C. § 21083(b) (also stating that the State shall implement these requirements "in a uniform and nondiscriminatory manner").

⁴⁷⁷ 52 U.S.C. § 21083(b)(2)(A)(i)(II).

voter does not bring ID to the polls, by providing for provisional ballots, which are special ballots election administrators must offer to voters who believe they are eligible but are rejected at the polls due to state or local rules, after which administrators must notify voters as to whether their vote was counted.⁴⁷⁸ HAVA, however, does not require states to count provisional ballots.⁴⁷⁹ Using the definitions of the National Conference of State Legislatures, HAVA therefore includes a “non-strict voter ID rule.”⁴⁸⁰ However, HAVA also permits states to adapt their own, more restrictive or strict voter ID rules.⁴⁸¹

⁴⁷⁸ 52 U.S.C. § 21083(b)(2)(B).

⁴⁷⁹ 52 U.S.C. §§ 21082(a), 21085 (leaving method of implementation to the states). *See, e.g.*, Nat’l. Conf. of State Legislators, *Provisional Ballots: What are the Reasons for Rejecting/Accepting a Provisional Ballot?*, NCSL (June 19, 2015) <http://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx#Accept/Reject> (discussing widely varying state laws on whether provisional ballots are counted).

⁴⁸⁰ NCSL, *History of Voter ID*, *supra* note 464; 52 U.S.C. § 21083(a)(5)(i) (stating HAVA’s ID requirements as a minimum. “Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes [a drivers’ license or the last 4 digits of the applicant’s social security number, which will then be verified through presentation of ID when they vote].”) The voter registration verification requirements under 52 U.S.C. §21083(b) of the statute include the following:

(5) VERIFICATION OF VOTER REGISTRATION INFORMATION

(A) Requiring provision of certain information by applicants

- (i) In general Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes—
 - (I) in the case of an applicant who has been issued a current and valid driver’s license, the applicant’s driver’s license number; or
 - (II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant’s social security number.
- (ii) Special rule for applicants without driver’s license or social security number:

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver’s license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided:

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

⁴⁸¹ 52 U.S.C. § 21083(b)(5)(A)(II)(iii); *see also* 52 U.S.C. §§ 21082(a), 21085 (leaving decision of whether to count provisional ballots without ID to the states).

From 2000 to 2016, 34 states adopted various forms of new voter ID laws,⁴⁸² which are analyzed further below.

Post-2006 VRA Reauthorization and Post-*Shelby County* Voter ID Litigation

Indiana adopted the nation's first voter ID law that required voters to show an unexpired, state-issued photo ID, with their current name and address, at the polls in order to vote.⁴⁸³ Indiana's law is not an entirely strict photo ID law,⁴⁸⁴ because it does not apply at all for absentee voters, persons voting at licensed care facilities, or voters with religious objections.⁴⁸⁵ Additionally, indigent voters may sign an affidavit permitting them to vote after procuring a free photo ID card at the state Bureau of Motor Vehicles.⁴⁸⁶ Indiana's photo ID law was immediately challenged and the case rose to the Supreme Court. In 2008, in *Crawford v. Marion County Election Board*, the Court held that Indiana's law requiring photo identification when casting a ballot did not violate the 14th Amendment of the U.S. Constitution.⁴⁸⁷

In deciding *Crawford*, the Court reasoned that in prior constitutional cases, it did not apply "any 'litmus test' that would neatly separate valid from invalid restrictions" on the right to vote, and that "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."⁴⁸⁸ This balancing test, evaluating state interests versus the burden on voters, impacts how challenges to voter ID laws have been decided since *Crawford*, even under VRA claims.⁴⁸⁹

⁴⁸² Underhill, *Voter ID Requirements*, *supra* note 465.

⁴⁸³ S. Enrolled Act (SEA) 483, §1, 114th Leg., 1st Sess. (Ind. 2005), <http://www.in.gov/legislative/bills/2005/SE/SE0483.1.html> [*hereinafter* SEA 483] (requiring that in order to cast a ballot, voters must show proof of identification as follows:

“Proof of identification’ refers to a document that satisfies all the following:

- (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.
- (2) The document shows a photograph of the individual to whom the document was issued.
- (3) The document includes an expiration date, and the document (i) is not expired; or (ii) expired after the date of the most recent general election.
- (4) The document was issued by the United States or the state of Indiana.”)

⁴⁸⁴ *Id.*; *Cf.* NCSL, *History of Voter ID* (with definitions of types of voter ID laws), *supra* note 464.

⁴⁸⁵ SEA 483, *supra* note 483.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Crawford*, 553 U.S. at 202-04.

⁴⁸⁸ *Id.* at 189-90 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)) (plurality opinion of Justices Stevens, Roberts, and Kennedy, who were joined by Justices Scalia, Thomas, and Alito in a concurring opinion) and at 200 (resulting in a 6-3 majority holding that Indiana's photo ID law was constitutional).

⁴⁸⁹ *See, e.g., Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014), *cert. denied* 135 S. Ct. 1551 (2015); *Frank v. Walker II*, 819 F.3d 384, 386-87 (7th Cir. 2014); *but see McCrory*, 831 F.3d at 235 (distinguishing *Crawford*'s balancing test in case of voter ID by stating that “at least in part, race motivated the North Carolina legislature. Thus, we do not ask whether the State has an interest in preventing voter fraud—it does—or whether a photo ID

In *Crawford*, the Court agreed that the following three interests put forth by the state were compelling: modernizing election administration, preventing voter fraud, and “safeguarding voter confidence.”⁴⁹⁰ Despite the lack of specific evidence of in-person voter fraud, which the Court noted is the only type of voter fraud that Indiana’s photo ID law would address, it found that each of these three state interests were valid.⁴⁹¹ Regarding the burden on voters, the Court reasoned that most people have a government-issued photo ID,⁴⁹² and furthermore:

[J]ust as other States provide free voter registration cards, the photo identification cards issued by Indiana’s [Bureau of Motor Vehicles (BMV)] are also free. For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.⁴⁹³

requirement constitutes one way to serve that interest—it may—but whether the legislature would have enacted SL 2013-381’s photo ID requirement if it had no disproportionate impact on African American voters”).

⁴⁹⁰ *Crawford*, 553 U.S. at 191.

⁴⁹¹ *Id.* Regarding election administration, the Court took into account the legislative language of HAVA, as well as the findings of the bipartisan Carter-Baker Commission report issued in 2005 and stating that establishing voter identification connecting directly to a voter’s registration would enhance the integrity in elections without adding additional costs to participation. *See* Commission on Federal Election Reform, *Building Confidence in the U.S. Elections* 6 (September 2005); *see also* NCSL, *History of Voter ID*, *supra* note 464. (The Commission was chaired by former President Jimmy Carter and former Secretary of State James A. Baker III in order to increase voter participation and assure integrity in U.S. elections.) The Court found that this interest was valid. *Id.* at 193-94. (In particular, the Court took into account this finding of the Carter-Baker Commission: “There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo [identification cards] currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.”). Regarding voter fraud, the majority in *Crawford* was very clear that: “The only kind of voter fraud that SEA 483 [Indiana’s voter ID law] addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.” *Id.* at 194-95. However, the Court held that even so, the state still had a general interest in protecting election integrity. *Id.* And regarding voter confidence, the *Crawford* opinion noted that, “While that interest is closely related to the State’s interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Id.* at 197.

⁴⁹² *Id.* at 198.

⁴⁹³ *Id.* at 199. In their concurring opinion, Justices Scalia, Thomas, and Alito found the evidence presented by opponents of Indiana’s voter ID law even more lacking and wrote that:

The lead opinion assumes petitioners’ premise that the voter-identification law “may have imposed a special burden on” some voters, but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny. That is true enough, but for the sake of clarity and finality (as well as adherence to precedent), *I prefer to decide these cases on the grounds that petitioners’ premise [of voter ID laws burdening voters] is irrelevant and that the burden at issue is minimal and justified.* *Id.* at 204 (emphasis added).

In their plurality (or “leading”) opinion, Justices Stevens, Roberts, and Kennedy also took into account the weak evidentiary record in the case,⁴⁹⁴ and determined that “Indiana’s voter photo ID law imposed only a ‘limited burden’ on voting rights that is justified by the state interest in protecting election integrity.”⁴⁹⁵ Thus, on the factual record before it, the Court characterized Indiana’s voter ID law as “neutral” and “nondiscriminatory.”⁴⁹⁶ Justice Kennedy’s leading opinion simply held that, “on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.”⁴⁹⁷

The type of legal challenge that the *Crawford* Court reviewed was also important. The majority in *Crawford* rejected a facial challenge (i.e., a case to invalidate the entire statute), brought without any showing of individual harm, but it left open the possibility of challenges to particular applications of such laws (“as-applied” challenges).⁴⁹⁸ The leading opinion also cautioned that voter ID laws might be unconstitutional in certain circumstances, if the laws could be shown to burden particular voters.⁴⁹⁹ Yet although the *Crawford* opinion left open the possibility that voter ID laws could be challenged by individual as-applied claims, these types of claims can be difficult to bring for several reasons. First, the individual plaintiffs who would bring these claims are less likely to have the resources needed to pursue litigation since they are also the people who are unable to obtain a photo ID.⁵⁰⁰ Second, it is possible that some plaintiffs who were previously rejected in their application would be granted an ID after litigation was brought, likely moot⁵⁰¹

⁴⁹⁴ *Id.* at 200.

⁴⁹⁵ Eric A. Fisher, R. Sam Garrett, and L. Paige Whitaker, *State Voter Identification Requirements: Analysis, Legal Issues, and Policy Considerations*, 6 CONG. RESEARCH SERV., R42806 (2016), <https://fas.org/sgp/crs/misc/R42806.pdf>.

⁴⁹⁶ *Crawford*, 553 U.S. at 203-04. The Court also noted that:

[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. The state interests identified as justifications for SEA 483 are both neutral and sufficiently strong to require us to reject petitioners’ facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting “the integrity and reliability of the electoral process.” *Id.* at 204.

⁴⁹⁷ *Id.* at 202.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*; see also Richard Sobel, *The High Cost of ‘Free’ Photo Voter Identification Cards*, at 4, HARV. L. SCH. INST. FOR RACE & JUSTICE (June 2014), <https://today.law.harvard.edu/wp-content/uploads/2014/06/FullReportVoterIDJune20141.pdf> [hereinafter Sobel, *High Cost*].

⁵⁰⁰ Kathleen M. Stoughton, Note, *A New Approach to Voter ID Challenges: Section 2 of the Voting Right Act*, 81 GEO. WASH. L. REV. 292, 302 (2013), http://www.gwlr.org/wp-content/uploads/2013/01/Stoughton_81_1.pdf.

⁵⁰¹ Wex Legal Dictionary explains the doctrine of mootness as follows:

Because Federal Courts only have constitutional authority to resolve actual disputes (see Case or Controversy) legal actions cannot be brought or continued after the matter at issue has been resolved, leaving no live dispute for a court to resolve. In such a case, the matter is said to be “moot.” For Supreme Court decisions focusing on mootness, see, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) and *Hicklin v. Orbeck*, 437 U.S. 518 (1978). Wex Legal Dictionary, Moot (Legal Information Institute, Cornell Univ.), <https://www.law.cornell.edu/wex/moot>.

out the viability of further litigation on behalf of that plaintiff.⁵⁰² Although federal courts may recognize that the tactic of making changes in the face of litigation (as opposed to permanent, systemic changes) is not a permanent solution to voting rights violations,⁵⁰³ in private litigation, individual plaintiffs who are injured are still needed for standing, and in order to prove the case.⁵⁰⁴ Despite these hurdles, after the *Crawford* decision, voter ID laws were challenged in a number of other states in the pre- and post-*Shelby County* era. The research shows that in addition to the above factors, the success of these challenges has been closely dependent upon the factual details of each case.

Prior to *Shelby County*, voter ID laws had been precleared under Section 5 in Georgia (2011)⁵⁰⁵ and South Carolina (2012), but as discussed in Chapter 2 of this report, Texas' strict voter ID law was not precleared (2012).⁵⁰⁶ The DOJ also objected to South Carolina's voter ID law as retrogressive, but it was eventually precleared by a federal court after the state added a "reasonable impediment" exception.⁵⁰⁷ Specifically, the court stated that:

... South Carolina's new law, Act R54, does not require a photo ID to vote. Rather, under the expansive "reasonable impediment" provision in Act R54—as authoritatively interpreted by the responsible South Carolina officials, an interpretation on which we base our decision today—voters with the non-photo voter registration card that sufficed to vote under pre-existing law may still vote without a photo ID. Those voters simply must sign an affidavit at the polling place and list the reason that they have not obtained a photo ID.⁵⁰⁸

In contrast, Texas' strict photo ID law (SB 14) was struck down as retrogressive in litigation under Section 5,⁵⁰⁹ primarily because of the racially discriminatory impact of requiring photo ID in order

⁵⁰² Jessica Parks, *Lead Plaintiff in Pennsylvania Voter ID Case Gets Photo ID*, PITTSBURGH POST-GAZETTE (Aug. 18, 2012), <http://www.post-gazette.com/news/state/2012/08/18/Lead-plaintiff-in-Pennsylvania-voter-ID-case-gets-photo-ID/stories/201208180187> (showing that 93-year-old Viviette Applewhite (lead plaintiff) was given ID after she testified that she could not get ID needed to vote after various attempts at the Pennsylvania Department of Motor Vehicles).

⁵⁰³ *Puerto Rican Org. for Political Action v. Kusper*, 350 F. Supp. 606, 611 (N.D. Ill. 1972).

⁵⁰⁴ See *Applewhite v. Com.*, 2014 WL 184988, No. 330 M.D. 2012 (Pa. Commw. Ct. 2014), <https://www.clearinghouse.net/chDocs/public/VR-PA-0115-0009.pdf>.

⁵⁰⁵ See, e.g., Press Release, Rome News Tribune, *Secretary of State: Georgia's Voter ID Requirement Cleared by Feds*, ROME NEWS TRIBUNE (April 4, 2011), http://www.northwestgeorgianews.com/rome/secretary-of-state-georgia-s-voter-id-requirement-cleared-by/article_ec638578-2423-57b3-a792-e5b7eae70647.html [*hereinafter* Rome News Tribune, *Georgia's Voter ID*].

⁵⁰⁶ DOJ Section 5, *supra* note 226 (last updated Aug. 6, 2015); see also *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012); *Texas*, 888 F. Supp. 2d at 144-45 (D.D.C. 2012), *vacated and remanded*, 49 F. Supp. 3d 27 (D.D.C. 2014) (2013) (remanded based on *Shelby Cty.*).

⁵⁰⁷ *South Carolina*, 898 F. Supp. 2d at 32.

⁵⁰⁸ *Id.*

⁵⁰⁹ See *Texas*, 888 F. Supp. 2d at 144-45.

to vote, ongoing racial disparities in access to the underlying documents, and disparities in access to the time and transportation needed to get a government-issued photo ID.⁵¹⁰

As in Indiana, to mitigate some of the strict voter ID laws they have enacted, some states have begun offering free voter IDs to registrants who lack the proper identification demanded by the statute.⁵¹¹ *National Review* columnist John Fund testified during the Commission’s briefing that a free voter ID card would be like the “Freedom Cards” supported by Martin Luther King III and former Atlanta Mayor Andrew Young, in that it would not only enable a person to vote, but also enable the “poor and disadvantaged” people to enter “mainstream American life.”⁵¹² Despite any potential benefits, many opponents of voter ID laws equate these laws to the poll taxes of the Jim Crow era. They argue that even if the ID itself is offered free of charge, there are other costs citizens must pay in order to receive these IDs. For instance, expenses for documentation (e.g., birth certificate), travel, and wait times are significant—especially for low-income voters (who are often voters of color)—and they typically range anywhere from \$75 to \$175.⁵¹³ According to Professor Richard Sobel, even after being adjusted for inflation, these figures represent far greater costs than the \$1.50 poll tax outlawed by the 24th Amendment in 1964.⁵¹⁴ Similarly, during the Commission’s New Hampshire SAC briefing on voting rights, advocates commented that although their state’s voter ID law is not strict, it still presents barriers for homeless, disabled, and elderly voters.⁵¹⁵

Table 3 summarizes the status of litigation of voter ID laws in the time period studied by the Commission in this report. Post-2006, pre-*Shelby County* cases include Section 5 matters in Georgia, South Carolina, and Texas, and a Section 2 claim in Arizona. Post-*Shelby County*, voter ID laws have been challenged through litigation of Section 2 claims in Alabama, North Carolina, Texas, Virginia, and Wisconsin; and during this time period, voter ID laws in Arkansas, Missouri, North Dakota, Pennsylvania, and Tennessee were challenged in state courts under state constitutional protections. State constitutional claims are included herein because due to the complexity of Section 2 litigation, advocates are reaching for non-VRA theories to protect voting rights.⁵¹⁶

⁵¹⁰ See Discussion and Sources cited at notes 421-26, *supra*.

⁵¹¹ See Sobel, *High Cost*, *supra* note 499, at 2 (noting that many states post-Crawford began offering “free” photo voter IDs, specifically noting Pennsylvania, South Carolina, and Texas as three states who have done such programs).

⁵¹² John Fund, Written Testimony for the U.S. Comm’n on Civil Rights, Feb. 2, 2018, at 2 [*hereinafter* Fund, Written Testimony] (“The Freedom Card would eliminate some of the worst barriers to poor people participating in our banking industry. In addition, the Freedom Card would significantly improve the integrity of the I-9 employee verification process since it would be much harder for a person applying for a job to use another worker’s card”).

⁵¹³ Sobel, *High Cost*, *supra* note 499, at 2.

⁵¹⁴ *Id.* at 2, 30-31.

⁵¹⁵ See Appendix D for a summary of New Hampshire State Advisory Committee (also discussing only 2 documented cases of voter fraud from 2000-2012 (0.0003 percent of all voters)).

⁵¹⁶ See, e.g., NAACP Legal Defense and Educational Fund, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, NAACP LDF (Oct. 25, 2017), http://www.naacpldf.org/files/case_issue/Section%202%20costs%2010.25.17.pdf (discussing Section 2 cases

In the following chart, an “amended” photo ID law means that an original, strict photo ID law was amended to include exceptions, such as the provision of free IDs or the ability for a voter to cast a ballot without an ID based on an affidavit. The chart illustrates that VRA claims against voter ID laws are not always successful, and that to date, success varies with whether an extensive evidentiary record can be developed to prove discriminatory impact in a timely manner, and whether there are exceptions to the photo ID rule.

Table 3: Results of Major Litigation Challenging Voter Identification Laws (2006-Present)

State (date of ruling(s))	Status	Type of Claims
Georgia (2011) ⁵¹⁷	Precleared under Section 5 likely based on exceptions permitting voters to sign affidavits swearing they could not get photo ID and vote without ID.	Section 5
South Carolina (2012) ⁵¹⁸	Precleared under Section 5 based on “reasonable impediment” type of exceptions permitting voters to sign affidavits swearing they could not get photo ID and vote without ID.	Section 5
Arizona (2012) ⁵¹⁹	Ninth Circuit affirmed lower federal court’s opinion rejecting facial challenge (based on the limited evidence brought in haste to try to get a preliminary injunction).	Section 2; U.S. Constitution
Pennsylvania (2012 and 2014) ⁵²⁰	Strict photo ID enjoined (2012) and an amended photo ID law was struck down because even with “free ID,” the law still burdened state constitutional rights to vote for those without state ID who would have to procure one (2014).	State constitutional claim
Texas (2012, 2014, 2016, 2018) ⁵²¹	Strict photo ID law (SB14) struck down under Section 5 (2012), but this was vacated 2 days after <i>Shelby</i>	Section 2; U.S. Constitution

costing millions of dollars, and that Section 2 cases take 2-5 years to resolve); *see also* Dale Ho, *Voting Rights Litigation After Shelby County, Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEG. & PUB. POL’Y 675, 697-705 (2014), <http://www.nyujlpp.org/wp-content/uploads/2014/11/Ho-Voting-Rights-Litigation-After-Shelby-County-17nyujlpp675.pdf> (discussing fewer Section 2 precedents and complexity of elements in vote denial cases and need to develop new legal precedents in the wake of *Shelby County*).

⁵¹⁷ *See, e.g.*, Rome News Tribune, *Georgia’s Voter ID*, *supra* note 505.

⁵¹⁸ *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012).

⁵¹⁹ *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012).

⁵²⁰ *Applewhite v. Com.*, 2012 WL 3332376, No. 330 M.D. 2012 (Pa. Commw. Ct. 2012), *vacated*, 617 Pa. 563, 54 A.3d 1 (2012), <https://www.clearinghouse.net/chDocs/public/VR-PA-0115-0001.pdf>; *see also Applewhite v. Com.*, 2014 WL 184988, No. 330 M.D. 2012 (Pa. Commw. Ct. 2014), <https://www.clearinghouse.net/chDocs/public/VR-PA-0115-0009.pdf>.

⁵²¹ There are four main decisions regarding voter ID in Texas in this era: (1) *Texas*, 888 F. Supp. 2d at 144-45 (D.D.C. 2012), *vacated and remanded*, *Texas v. Holder*, 570 U.S. 928 (2013) (remanded on June 27, 2013, based on *Shelby County*, after which the SB 14 was immediately put back into effect); (2) *Veasey*, 71 F. Supp. 3d at 707 (SB 14 was preliminarily enjoined on basis of likelihood of success on the merits for intentional discrimination and with regard to Section 2’s prohibition of discriminatory effects), but this was stayed upon appeal, *Veasey*, 769 F.3d at

State (date of ruling(s))	Status	Type of Claims
	<i>County</i> ; then preliminarily enjoined under Section 2 (2014) and permanently enjoined as intentionally discriminatory (2016); amended photo ID law (SB 5) was struck down by lower court (2017), but recently overturned by 5 th Circuit panel (April 27, 2018).	
Tennessee (2013, 2015) ⁵²²	Strict photo ID law of 2011 upheld by state supreme court (2013); amended in 2013 to limit acceptable IDs to federal or Tennessee-issued IDs only. Students sued alleging discrimination, particularly against out-of-state students, but the court granted the state's motion to dismiss (Dec. 22, 2015).	14 th and 26 th Amendments of U.S. Constitution
Wisconsin (2014 and 2016) ⁵²³	Strict and amended photo ID laws struck down by lower federal court under Section 2; overturned by 7 th Circuit (2014); with subsequent limited success on U.S. Constitutional claims as applied to college IDs (2016).	Section 2; U.S. Constitution
North Carolina (2016) ⁵²⁴	Strict photo ID law and amended version both struck down by Fourth Circuit due to discriminatory intent (2014).	Section 2; U.S. Constitution
Virginia (2016) ⁵²⁵	Fourth Circuit upheld lower federal court's opinion that photo ID law with significant exceptions and free ID provisions did not present undue burden or have discriminatory effect (2016).	Section 2; U.S. Constitution

898, 135 S. Ct. 9 (2014) (denying motion to vacate stay); (3) *Veasey*, 830 F.3d at 272 (SB 14 found to be intentionally racially discriminatory, remanded to district court on equal protection claim and on remedies); in the interim, Texas amended SB 14 and introduced SB 5, which provided for new exceptions to the strict voter ID bill, including a "reasonable impediment procedure," as well as expanding the list of acceptable identifications. SB 5 was also found to be intentionally discriminatory in (4) *Veasey v. Abbott*, 248 F. Supp. 3d 833, 835-37 (S.D. Tex. 2017) (holding that SB 5 must be invalidated as tainted fruit of intentional discrimination), but after the Fifth Circuit (en banc) affirmed the relevant decision and remanded the remedies issue, on remand, on April 27, 2018, a three-judge panel of the Fifth Circuit concurred to strike down the en banc ruling of the full Fifth Circuit, based on the theory that Texas' appeal was not moot and that SB 5 should be independently evaluated. *Veasey v. Abbott*, 888 F.3d 792, 795-96, 799, 2018 WL 1995517 (5th Cir. 2018). In this latest ruling, which is likely to be appealed, in the 2-1 decision, of the three judges, one ruled that the lower court's opinion was based on inequitable remedies because SB 5 was not "tainted" by prior discrimination and that the state's appeal was moot, *Id.* at 801-02, the second agreed with overturning the permanent injunction because it was moot as the legislature should be allowed to solve problems, *Id.* at 804-06, and the third judge that it was still "tainted." *Id.* at 823.

⁵²² *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013). See also *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749 (M.D. Tenn. 2015) (granting state's motion to dismiss). Notably, the mayor of Memphis found a unique way to provide access to voters, by issuing a library card that qualifies. See Brentin Mock, *The Overlooked Fight Against Voter ID in Tennessee*, FACING SOUTH (Nov. 1, 2013), <https://www.facingsouth.org/2013/11/the-overlooked-fight-against-voter-id-in-tennessee.html>.

⁵²³ *Frank*, 768 F.3d 744. But see *One Wisconsin Inst. v. Walker*, 186 F. Supp. 3d 958 (W.D. Wis. 2016) (state did not have a rational basis for excluding expired college or university IDs).

⁵²⁴ *McCrorry*, 831 F.3d at 236-37 (2016), cert. denied 137 S. Ct. 1399 (2017).

⁵²⁵ *Lee v. Virginia Bd. Elections*, 843 F.3d 592 (4th Cir. 2016).

State (date of ruling(s))	Status	Type of Claims
North Dakota (2016) ⁵²⁶	Preliminary injunction issued due to likelihood of success under U.S. Constitutional claims, holding that the state could not enforce its new strict law requiring photo ID with a current address that excluded P.O. boxes and did not have fails-safe mechanism, which burdened Native Americans, and required the state to return to previous voter ID guidelines that included affidavit option (2016); state complied.	Section 2; U.S. and state constitutions
Arkansas (2014 and 2018) ⁵²⁷	The state Supreme Court struck down a strict photo ID law, holding that it violated the state's Constitution (2014); amended version also enjoined (2018) but stayed (May 2, 2018).	State constitutional claim
Alabama (2018) ⁵²⁸	A federal court granted Defendants' Motion to Dismiss claims against photo ID rule with affidavit option (2018), but plaintiffs recently appealed.	Section 2

Post-*Shelby County* Considerations

In the post-*Shelby County* era, due to the lack of preclearance in formerly covered jurisdictions, strict and potentially discriminatory voter ID laws are implemented soon after their enactment. As discussed above, this speedy implementation occurred within hours of the *Shelby County* decision in the case of Texas, and in North Carolina, the day after.⁵²⁹ Since elections occur with frequency in the United States, post-*Shelby County* voter ID litigation is on an accelerated timeline. For example, in 2014 in North Carolina, elections were held on May 6 (local school board and federal primary, plus 12th Congressional district special election) and November 4 (local school board, statewide ballot measure and federal general election).⁵³⁰ In Texas in 2014, elections were held on January 28 (state house special election), March 4 (primary), May 10 (state senate special election, 56 school board elections), May 13 (one school board election), May 27 (primary runoff election date), and November 4 (federal, statewide ballot measure and 28 school board elections).⁵³¹

⁵²⁶ *Brakebill v. Jaeger*, 2016 WL 7118548, No. 1:16-CV-0008 (D.N.D. Aug. 1, 2016),

<https://www.documentcloud.org/documents/3002700-North-Dakota-Ruling.html>.

⁵²⁷ *Martin v. Kohls*, 444 S.W.3d 844 (Ark. 2014); see also Andrew DeMillo, *Arkansas Supreme Court Says State Can Enforce Voter ID Law*, ASSOCIATED PRESS, (May 2, 2018),

<https://apnews.com/656a45047efc4e9d998a61de714ad892> (discussing current and prior decisions).

⁵²⁸ *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018),

<https://www.documentcloud.org/documents/4346593-AL-Voter-ID-Decision.html>; see also Press Release, NAACP LDF, *LDF Files Notice of Appeal in Alabama Photo ID Case*, NAACP LDF (Jan. 12, 2018),

<http://www.naacpldf.org/press-release/ldf-files-notice-appeal-alabama-photo-id-case>.

⁵²⁹ See Discussion and Sources cited in Chapter 2, at notes 311-12, *supra*.

⁵³⁰ Ballotpedia, *North Carolina Elections, 2014*, BALLOTPEDIA,

https://ballotpedia.org/North_Carolina_elections_2014 (last accessed July 30, 2018).

⁵³¹ Ballotpedia, *Texas's 2014 Elections*, BALLOTPEDIA, https://ballotpedia.org/Texas_elections_2014 (last accessed July 30, 2018).

Professor Michael Pitts, who has participated in and studied voting rights litigation, testified at the Commission’s briefing that it is challenging to locate individual plaintiffs in time to petition for injunctive relief before the next election.⁵³² Other litigation experts also testified that the relevant litigation is exceedingly time-consuming and expensive.⁵³³ It is also critically impactful that the Supreme Court held in various recent cases (in 2014 in particular) that injunctive relief may not be granted too close to Election Day,⁵³⁴ making the rush to the courthouse to file a case even more time-sensitive. Because the Supreme Court has made clear that it will be hesitant to grant injunctive relief during the two months before a federal election, plaintiffs must be identified, preliminary evidence must be collected, and their case must be filed well in advance of Election Day.⁵³⁵

Furthermore, the number and complexity of voter ID cases summarized above show that this is a rapidly developing area of law, particularly under Section 2 of the VRA.⁵³⁶ Since its 2008 decision in *Crawford*, the Supreme Court has not yet heard the as-applied voter ID case it would seem to welcome, much less a case to determine what the parameters of Section 2 are in voter ID cases. What is clear is that in states formerly subject to preclearance under Section 5 of the VRA, these new laws are being tested on voters during elections, rather than being put on hold until they could be proven to be nondiscriminatory.⁵³⁷

⁵³² *Briefing Transcript, supra* note 234, at 187 (statement by Michael J. Pitts, Professor, Indiana U.); *see also Gonzalez*, 677 F.3d at 407 (“The record does include evidence of Arizona’s general history of discrimination against Latinos and the existence of racially polarized voting. But Gonzalez adduced no evidence that Latinos’ ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice. Without such evidence, we cannot say that the district court’s finding that Gonzalez failed to prove causation was clearly erroneous. Therefore we affirm the district court’s denial of Gonzalez’s VRA claim.”); and *id.* at 389 (plaintiffs filed shortly after passage of the voter ID law).

⁵³³ McCrary, Written Testimony, *supra* note 445, at 7 (discussing the Texas voter ID litigation cost “well into six figures.”); *see also Briefing Transcript, supra* note 234, at 187 (statement by Michael J. Pitts); *see also Briefing Transcript, supra* note 234, at 90 (statement by Sherrilyn Ifill) (noting Texas voter ID case that was filed in 2014 is still ongoing and has lasted four years, during which a voter ID law that was found to be intentionally discriminatory has not been enjoined. Therefore, elections are being conducted while an estimated 600,000 eligible voters, who are disproportionately black and Latino, lack the type of ID needed to vote); *see also Briefing Transcript, supra* note 234, at 29 (statement by Vanita Gupta) (testifying that voting rights litigation is “slow,” “time-intensive,” and takes many “resources” to do correctly.); *but see* 42 U.S.C. § 1988 (allowing, however, attorneys’ fees and litigation costs to be granted eventually to private litigants (but not the DOJ) in these cases). Some advocates do not see the merit in challenging voter ID laws. *See Briefing Transcript, supra* note 234, at 189 (statement by Cleta Mitchell, Partner, Foley & Lardner LLP, testifying that litigation against voter ID laws is part of what she derided as “the professional grievance industry.”).

⁵³⁴ *See Husted*, 135 S. Ct. 42; *North Carolina*, 135 S. Ct. 6; *Frank*, 135 S. Ct. 7; and *Veasey*, 135 S. Ct. 9.

⁵³⁵ *Id.*; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

⁵³⁶ *See, e.g., Dale Ho, Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby*, 127 YALE L. J. (2017-2018), <https://www.yalelawjournal.org/forum/the-new-vote-denial-litigation-since-shelby-county> (discussing federal court of appeals circuit splits over the standards of proof in Section 2 vote denial cases, including voter ID cases in North Carolina, Texas, and Wisconsin).

⁵³⁷ 52 U.S.C. §10304(a).

Impact of Voter ID Laws on Racial Minorities

Various studies have found that photo ID laws have a racially discriminatory impact. A recent study conducted by MIT political scientist Dr. Charles Stewart surveyed 10,000 registered voters from all 50 states and Washington, D.C. and found that in comparing types of ID possessed, the great majority had some form of government identification; however, the registered voters surveyed that did not vote in strict photo ID states were twice as likely to state they did not vote due to a lack of identification.⁵³⁸ As discussed below, like others, Stewart also found significant racial differences, with black and Latino voters disproportionately lacking photo ID.⁵³⁹ In addition to this study, several large-scale surveys of the American public have documented significant disparities in the possession of government issued IDs by race, age, and income.⁵⁴⁰ Federal courts have found that this absence of ID is in large part due to less access to the underlying documents needed to secure a government-issued photo ID, such as a birth certificate or naturalization documents, both of which are costly to replace.⁵⁴¹ Furthermore, several courts and scholarly studies have found that socioeconomic disparities may make the cost of finding out about voter ID rules and visiting government offices—which may not be accessible in terms of hours, location, and other factors—disproportionately burdensome to voters of color.⁵⁴²

Dr. Stewart's 2012 survey also found that black and Latino voters were asked to present ID more often than white voters, even in jurisdictions that do not require voter ID.⁵⁴³ Other research suggests in jurisdictions where voter ID laws are established, poll workers disproportionately ask racial minorities for identification.⁵⁴⁴ As shown in Table 4 below, a 2012 national survey of adults

⁵³⁸ Charles Stewart, *Voter Id: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 22 (2013), <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1063&context=olr> (“[W]hile few non-voters attribute their failures to vote to their lack of identification, the type of voter-identification regime does matter—nonvoters in states with strict photo identification laws are twice as likely to state they failed to vote due to the lack of identification, compared to nonvoters in states in which such laws are less strict (or even non-existent).”).

⁵³⁹ *Id.* at 25.

⁵⁴⁰ See Matt Barreto, Stephen Nuño, & Gabriel Sánchez, *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, PS: POL. SCI. & POL., 42(1), 111-116 (2009), http://mattbarreto.com/papers/PS_VoterID.pdf; see also M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Status*, 36 AM. POL. RESEARCH 555 (July 2008) (unofficial version available at: https://www.brennancenter.org/sites/default/files/legal-work/download_file_50886.pdf).

⁵⁴¹ See, e.g., *McCrary*, 831 F.3d at 236 (regarding “the General Assembly’s decision to exclude as acceptable forms of state-issued ID disproportionately held by African Americans”).

⁵⁴² Keesha Gaskins & Sundeep Iyer, *THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION*, The Brennan Center for Justice (2012), <http://www.brennancenter.org/publication/challenge-obtaining-voter-identification>; see also Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 THE J. OF POL. 363 (2017) [*hereinafter* Hajnal, Lajevardi, Nielson, *Voter Identification Laws*]; see also *Applewhite*, 2014 WL 184988, <https://www.clearinghouse.net/chDocs/public/VR-PA-0115-0009.pdf>.

⁵⁴³ Charles Stewart III, MIT, *Survey of the Performance of American Elections*, iii (2012), https://elections.delaware.gov/pdfs/SPAE_2012.pdf.

⁵⁴⁴ *Id.*; see also Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: POL. SCI. & POL. 127 (2009).

aged 18-29 also found that even in places without photo ID laws, black and Latino millennials were asked to show ID more than their white counterparts.

Table 4: Percentage of Young Voters Asked for ID by Type of State Law

Group	No ID Requirement (%)	ID Required (%)
All Youth	48.6%	86.1%
Black Youth	65.5%	94.3%
White Youth	42.8%	84.3%
Latino Youth	55.3%	81.8%

Source: November 2012 Black Youth Quarterly Survey⁵⁴⁵

In “Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies,” Keith G. Bentele and Erin E. O’Brien examined the factors associated with the introduction and enactment of what they refer to as “restrictive voter access” proposals from 2006 to 2011,⁵⁴⁶ defining restrictive voter access legislation as those policies that relate to photo ID requirements for casting a ballot, proof of citizenship requirements, laws that introduce restrictions on voting, or restrictions on absentee and early voting.⁵⁴⁷ The authors found that restrictive voter access legislation was introduced from 2006 to 2011 in nearly every state, but these proposals passed more frequently in southern states in which federal elections are highly contested.⁵⁴⁸

The statistical models the researchers employed found that the racial composition of a state is strongly related to the proposed changes that would restrict voter access. That is, restrictive voter access laws were substantially more likely to be introduced in states with a larger share of African-American persons, noncitizen populations, and higher minority voter turnout, as well as in states where both minority and low-income turnout recently increased.⁵⁴⁹

In 2017, an in-depth study by researchers Zoltan Hajnal, Nazita Lajevardi, and Lindsay Nielson found that strict photo ID laws have a disproportionate negative impact on the turnout of racial minorities in primaries and general elections.⁵⁵⁰ This disparity was especially pronounced in

⁵⁴⁵ OurTime.org, *The Time Tax*, *supra* note 391 (citing and reproducing results of Nov. 2012 Black Youth Quarterly Survey, as analyzed by Professors John G. Rogowsky and Cathy J. Cohen. The original survey data are available at http://blackyouthproject.com/wp-content/uploads/2015/11/voter_id_effect_2012.pdf).

⁵⁴⁶ Keith G. Bentele & Erin E. O’Brien, *Jim Crow 2.0?: Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSPECTIVES IN POL. 1088 (2013), https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1010&context=sociology_faculty_pubs [hereinafter Bentele and O’Brien, *Jim Crow 2.0*].

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.* at 1089.

⁵⁴⁹ *Id.* (The authors demonstrate this finding both from their independent variables that measure turnout amongst communities of color in previous presidential elections, and the larger fraction of African Americans who are statistically significantly associated with more proposed restrictive access legislation. In addition, the authors found that restrictive voter access legislation is more likely to be proposed where low-income registrants turned out to vote in higher rates in the previous presidential elections, and where there is a larger share of noncitizens.)

⁵⁵⁰ Hajnal, Lajevardi, Nielson, *Voter Identification Laws*, *supra* note 542 (The authors coded a state’s voter identification law as “strict” if required voters are required to show photo identification to cast ballots. The authors

primary elections, and the researchers suspected is due to these elections being generally seen as less salient, and because any additional costs to accessing the ballot box disproportionately affect racial minority voters.⁵⁵¹

The Hajnal study also found that in the period 2006-2014 that the study analyzed, Latino turnout was 7.1 percent lower in strict voter ID states in general elections, and 5.3 percent lower in primaries; the black turnout gap was negligible in general elections, but 4.6 percent lower in primaries; Asian turnout was 5.4 percent lower in general, and 6.2 percent lower in primaries; multiracial turnout was 5.3 percent lower in general, and 6.7 percent lower in primaries; while white turnout was 0.2 percent higher in general, and 0.4 percent higher in primaries.⁵⁵²

The authors found a substantial increase in the white vs. non-white voter turnout gap in strict voter ID states.⁵⁵³ Their results are robust because even after controlling for state-level electoral laws, campaign dynamics, and individual characteristics, communities of color were found to be disproportionately and negatively affected.⁵⁵⁴ Moreover, the white vs. non-white gaps were especially pronounced among Latino- and Asian-American voters. For example, in comparing turnout in states with strict voter ID laws vs. states with non-strict voter ID laws:

- The predicted Latino-white gap in turnout rates for a general election jumped from 4.9 percent in states without strict voter ID laws to 13.5 percent in states with strict voter ID laws; and this gap more than tripled in primary elections;⁵⁵⁵
- For Asian-American voters, the voter turnout gap relative to white voters increased from 6.5 percent to 11.5 percent in general elections, and from 5.8 percent to 18.8 percent in primary elections;⁵⁵⁶
- The model predicts that Latino Americans were 10 percent less likely to turn out in states with strict voter ID laws than in states without strict voter ID laws, and that these effects were almost as large (9.3 percent) in primary elections;⁵⁵⁷

also study more lenient voter identification laws that do not require photo identification, and they also identified several other gaps in the literature on the impact of voter ID laws. For instance, much of the previous research relied upon self-reported voter turnout data instead of verified voter turnout data. Using self-reported estimates of voter turnout makes it more difficult to study the impact of these laws on minority voters, as racial minorities are more likely to over-report their participation than white registered voters, and therefore, under-report any negative impacts of voter ID laws). *See id.* at 375 (“More critically, those who over-report turnout differ by race and class from those who do not over-report turnout. Racial minorities, in particular, are particularly prone to over-report their participation in elections.”). This study analyzed 51 elections—26 general and 25 primary—across 10 states from 2006 to 2014 with strict voter ID laws using validated voter turnout data from the Cooperative Congressional Election Study (CCES). *Id.* at 369.

⁵⁵¹ *Id.* at 368.

⁵⁵² *Id.*

⁵⁵³ *Id.*; *see also* Ho, Written Testimony, *supra* note 446, at 7.

⁵⁵⁴ Hajnal, Lajevardi, Nielson, *Voter Identification Laws*, *supra* note 542, at 368.

⁵⁵⁵ *Id.* at 369.

⁵⁵⁶ *Id.* at 368.

⁵⁵⁷ *Id.*

- African-American turnout could be expected to decrease by 8.6 percent in strict voter ID states;⁵⁵⁸ and
- Similarly, Asian-American turnout could be expected to decrease by 12.5 percent.⁵⁵⁹

Despite the plethora of statistical evidence presented in their article, the authors concluded that they could not demonstrate a causal connection between voter ID laws and turnout.⁵⁶⁰ It is extremely challenging to disaggregate the impact of voting procedures from other factors such as the popularity of candidates,⁵⁶¹ and even the weather on Election Day.⁵⁶² However, the evidence presented in the article strongly suggests that where strict voter ID proposals are enacted, racial and ethnic minorities are less apt to vote.

But Dan Morenoff, Executive Director of the Equal Voting Rights Institute, a public-interest law firm that seeks to protect every Americans' fundamental right to vote and election integrity, while seeking to "redeem the VRA" as they believe it has been used to create "racial entitlements,"⁵⁶³ believes this is false. He argues in his written testimony to the Commission that there is significant scholarly disagreement on the impact of laws enacted or enforced post-*Shelby County*, including strict voter ID laws and their effect on voter turnout.⁵⁶⁴ Morenoff testified that while one study found that voter ID laws have dramatic impact in decreasing minority voters, other articles with statistically significant results found that these laws may actually increase turnout for minority voters.⁵⁶⁵ So, on the one hand, Morenoff asserts that it is not possible to know if turnout has been

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ Gustavo Lopez & Antonio Flores, *Dislike of Candidates or Campaign Issues was Most Common Reason for not Voting in 2016*, PEW CENT. RESEARCH (June 1, 2017), <http://www.pewresearch.org/fact-tank/2017/06/01/dislike-of-candidates-or-campaign-issues-was-most-common-reason-for-not-voting-in-2016/> [*hereinafter* Lopez and Flores, *Dislike of Candidates*].

⁵⁶² Anna Bassi, *Weather, Mood, and Voting: An Experimental Analysis of the Effect of Weather Beyond Turnout*, UNI OF N.C. (June 2, 2013), <https://www.unc.edu/~abassi/Research/weather-mood-voting.pdf>.

⁵⁶³ See Equal Voting Rights Institute, *Our Mission*, <http://equalvotingrights.org/our-mission/> (last accessed July 30, 2018).

⁵⁶⁴ Daniel Morenoff, Written Testimony for the U.S. Comm'n on Civil Rights, Feb. 2, 2018, at 5 [*hereinafter* Morenoff, Written Testimony].

⁵⁶⁵ *Id.* at 5, n.14; see also Hajnal, Lajevardi, Nielson, *Voter Identification Laws*, *supra* note 542 (the authors found that voter ID laws skew the elections to the right.); but also see Justin Grimmer, Eitan Hersh, Marc Meredith, Jonathan Mummolo, & Clayton Nall, *Comment on "Voter Identification Laws and the Suppression of Minority Votes,"* (Aug. 17, 2017), STANFORD, https://stanford.edu/~jgrimmer/comment_final.pdf. (However, a replicated study led by Justin Grimmer questioned the validity of their research, suggesting that although the effects of voter identification laws may exist, the study employed flawed data and made miscalculations that impeded the authors' ability to make conclusions about the impact of voter identification laws. According to Grimmer and colleagues, the Hajnal et al. study's conclusions are problematic for several reasons. First, the data employed in the study estimated voter turnout rate was 10 points below the verified turnout rates in 15 states. *Id.* at 3. Second, according to the authors of the replication study, the researchers had significant miscalculations and misinterpretations of their data and results. *Id.* at 9. Lastly, Grimmer et al. demonstrated that when the errors were corrected, they could recover positive, negative, or null estimates of the effect of voter ID laws on turnout, making it difficult to claim any firm conclusions concerning the impact of voter ID laws on turnout. *Id.*)

impacted at all by the influx of voter ID laws; and on the other, whatever the impact is, it might not be substantial enough to determine an election.⁵⁶⁶ The Commission also received testimony from another panelist, John Park, Counsel with Strickland Brockington Lewis LLP, stating that after the implementation of voter ID laws in Georgia and Indiana, voter turnout increased, and in Virginia, registrars and experts reported little to no impact on voting or registration because of the recently enacted voter ID law.⁵⁶⁷

While scholarly data on impact on turnout seem to be split, as various expert witnesses noted, the legal test as to whether voter ID laws may be discriminatory does not depend on turnout. Under the VRA, the test of whether a voting procedure is discriminatory depends on whether voters of color do or do not have equal access to political participation. Therefore, even if turnout has not decreased or even increased,⁵⁶⁸ if voters of color have less access or higher barriers to political participation and the ability to elect representatives of their choice, strict voter ID laws may violate their rights under the VRA. This has been the case in North Carolina and Texas, where federal courts found that black and Latino voters disproportionately lacked access to the type of photo IDs required to vote.⁵⁶⁹

In his testimony before the Commission, Professor Justin Levitt argued that voter ID laws are not needed, since every state already has provisions that require voters to confirm their identity when casting ballots.⁵⁷⁰ Levitt added that the controversy surrounding voter ID laws is not about whether we should or should not have an identification or a security system. Instead, according to Levitt, the issue is that there are states that are quite restrictive in the documentation they allow.⁵⁷¹ Moreover, Levitt testified that these restrictions disparately impact minority voters and in some cases were proven to have been enacted *because of* that disparate impact.⁵⁷² Therefore, the disparate impact is not a condition of having an identification system in place; rather, it is the result of particular choices that some state legislatures have made. Concerns about these laws arise when they are enacted with discriminatory intent or have a discriminatory effect on minority voters.⁵⁷³

But despite any discriminatory impact, proponents of voter ID legislation posit that voter ID legislation is necessary to protect the integrity of the electoral process and guard against voter fraud.⁵⁷⁴ For instance, Kansas Secretary of State Kris Kobach, a proponent of strict voter ID laws,

⁵⁶⁶ *Id.*

⁵⁶⁷ John Park, Written Testimony for the U.S. Comm'n on Civil Rights, Feb. 2, 2018, at 10 [*hereinafter* Park, Written Testimony].

⁵⁶⁸ *See, e.g., Briefing Transcript, supra* note 234, at 175 (statement by Sherrilyn Ifill).

⁵⁶⁹ *See* Discussion and Sources cited at notes 193 (NC) and 288 (Tex.), *supra*.

⁵⁷⁰ *Briefing Transcript, supra* note 234, at 66 (statement by Justin Levitt); *see also* HAVA rules discussed in the text accompanying notes 381-82, *supra*.

⁵⁷¹ *Briefing Transcript, supra* note 234, at 67 (statement by Justin Levitt).

⁵⁷² *Id.* at 68.

⁵⁷³ *Id.*

⁵⁷⁴ *See* von Spakovsky, Written Testimony, *supra* note 325; *see also* Fund, Written Testimony, *supra* note 512; *see also* Cleta Mitchell, Written Testimony for the U.S. Comm'n on Civil Rights, Feb. 2, 2018 [*hereinafter* Mitchell, Written Testimony]; *see also* Hans von Spakovsky, *Voter Photo Identification: Protecting the Security of Elections*,

argues, “[f]ear that elections are being stolen erodes the legitimacy of our government,” and “voter identification laws protect this legitimacy.”⁵⁷⁵ In addition, these experts argue that IDs are ubiquitous, easy to obtain, and needed in everyday life.⁵⁷⁶ Others contend that the photo IDs should be made easy to acquire, as this will also help people navigate other aspects of society.⁵⁷⁷ These arguments are discussed and relevant data are analyzed in the following section of this chapter.

Voter Fraud and Other Arguments

The prominent argument championed by supporters of voter ID laws and similar measures is that they prevent voter fraud. Voter fraud includes allegations of: in-person voter fraud, noncitizen voting, double voting, and voter registration rolls that are “bloated” and contain ineligible voters who should be removed. Each of these allegations arose during the Commission’s national briefing on minority voting rights as reasons for strict voter ID laws and other measures discussed in this chapter (these include: cuts to early voting, requiring documentary proof of citizenship to register, challenges to voter eligibility, and purges of voter registration rolls). After a general review of data regarding voter fraud, each of the major allegations regarding voter fraud that the Commission heard testimony about are examined in turn below.

A 2011 study by the Republican National Lawyers Association found that from 2000 to 2010, 21 states had only one or two convictions each “for some form of voter irregularity.”⁵⁷⁸ Professors David Cottrell, Michael C. Herron, and Sean J. Westwood examined the main types of voter fraud alleged in 2016 (impersonation, double voting and ineligible voting)⁵⁷⁹ to determine how common they were in the 2016 Presidential Election.⁵⁸⁰ They used aggregate election statistics to examine allegations and found that:

Consistent with existing literature, we do not uncover any evidence supportive of Trump’s assertions of systemic voter fraud in 2016. Our results imply neither that there was no fraud at all in the 2016 General Election They do strongly suggest, however, that the expansive voter fraud concerns espoused by Donald Trump and

THE HERITAGE FOUNDATION (July 13, 2011), <https://www.heritage.org/report/voter-photo-identification-protecting-the-security-elections>.

⁵⁷⁵ Kris Kobach, *The Case for Voter ID*, WALL ST. J. (May 23, 2011), <https://www.wsj.com/articles/SB10001424052748704816604576333650886790480>.

⁵⁷⁶ *Id.*

⁵⁷⁷ Fund, Written Testimony, *supra* note 512, at 1-2.

⁵⁷⁸ See Debbie Hines, *New Republican Data Shows No Need for Voter ID Laws*, HUFFINGTON POST (Feb. 11, 2012), https://www.huffingtonpost.com/debbie-hines/voter-fraud-statistics_b_1139085.html (discussing underlying data found at Republican National Lawyers Association, *Election Integrity News*, <http://www.rnla.org/votefraud.asp>).

⁵⁷⁹ David Cottrell, Michael C. Herron, & Sean J. Westwood, *A Rigged Election? Evaluating Donald Trump’s Allegations of Massive Voter Fraud in the 2016 Presidential Race*, 51 ELECTORAL STUDIES 123, 129-30 (Feb. 2018).

⁵⁸⁰ *Id.* at 124 (abstract).

those allied with him are not grounded in any observable features of the 2016 election.⁵⁸¹

In a 10-year independent study by News21 commissioned by the Knight Foundation (“News21 Study”), researchers examined public news and court records of all *allegations* of voter fraud in all 50 states. Researchers found that there were 2,068 cases of alleged fraud from 2000-2010, but only 10 cases of allegations of in-person voter fraud (approximately one case per every 15 million eligible voters).⁵⁸² They found that the most common form of reported allegations of voter fraud was absentee ballot fraud (24.2 percent), followed by “unknown” (19.0 percent), registration fraud (17.8 percent), casting ineligible votes (13.0 percent), and double voting (7.4 percent).⁵⁸³ This research was updated on a smaller scale in 2016, when data about cases from five states in which politicians had alleged voter fraud showed that no prosecutions were brought for in-person voter fraud.⁵⁸⁴

In 2007, Professor Levitt reviewed nationwide allegations of voter fraud and found that “by any measure, voter fraud is extraordinarily rare,”⁵⁸⁵ and that it is many times attributable to “clerical or typographical errors” or bad data matching that leads to “jumping to conclusions.”⁵⁸⁶ In 2014, Levitt conducted a comprehensive study of in-person voter fraud from 2000 to 2014, and found that there were 31 credible instances among one billion votes cast in general and primary elections.⁵⁸⁷ In December 2016, writing for the *Washington Post*, Philip Bump found that there were only four documented cases of voter fraud in the 2016 election.⁵⁸⁸

⁵⁸¹ *Id.*

⁵⁸² NEWS21, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID Is Needed*, NEWS21 (Aug. 12, 2012), <https://votingrights.news21.com/article/election-fraud/>; see also the described database at NEWS21, *Election Fraud in America*, NEWS21 (Aug. 12, 2012), <http://votingrights.news21.com/interactive/election-fraud-database/> [hereinafter, NEWS21, *Election Fraud*] (documenting 2,068 allegations of voter fraud between 2000 and 2012, and noting that News21 is a student reporting project created by the Carnegie Corporation of New York and the John S. and James L. Knight Foundation, and based at Arizona State University’s Walter Cronkite School of Journalism).

⁵⁸³ *Id.*

⁵⁸⁴ Sami Edge & Sean Holstege, *Voter Fraud Is Not a Persistent Problem*, NEWS21 (Aug. 20, 2016), <https://votingwars.news21.com/voter-fraud-is-not-a-persistent-problem/> [hereinafter Edge and Holstege, *Voter Fraud Is Not a Persistent Problem*].

⁵⁸⁵ Justin Levitt, *The Truth About Voter Fraud*, 7 THE BRENNAN CENT. JUSTICE (2007), <https://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

⁵⁸⁶ *Id.* at 7-9.

⁵⁸⁷ See Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.71e2bad379f3 (linking to underlying data).

⁵⁸⁸ Philip Bump, *There Have Been Just Four Documented Cases of Voter Fraud in the 2016 Election*, WASH. POST (Dec. 1, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/?utm_term=.e7c658b95c21 (explaining methodology (Nexis news-aggregation database search) and describing the four cases).

At the Alabama SAC briefing, Alabama Secretary of State John Merrill testified that he has secured 6 convictions for voter fraud in Alabama during his three-year tenure as Secretary of State.⁵⁸⁹ He also testified that before he became Secretary of State in January 2015, more than a decade had passed since any voter fraud conviction had been secured in Alabama.⁵⁹⁰ Moreover, before passage of a state voter ID law that he championed to address election integrity, he knew of no evidence of voter fraud in Alabama.⁵⁹¹ In balancing these interests, he has also publicly challenged the NAACP LDF to show him any cases of voters who have been unable to get Alabama's free voter ID.⁵⁹²

Another database of election fraud was collected by the Heritage Foundation, which compiled 1,132 instances of what they term "Proven Voter Fraud" in the last two years, with 983 criminal convictions and 48 civil penalties in the country.⁵⁹³ Reviewing the data from the Heritage Foundation database shows that the most common forms of election fraud it contains are in the following categories, related most to political operatives and not individual voters: absentee ballot fraud, fraudulent signatures on ballot petitions, vote buying, election insiders, and voter intimidation.⁵⁹⁴

As discussed above, this section of the Commission's report addresses the type of voter fraud that voter ID laws and the other major types of recent restrictions on voting that impact minority voters were enacted to correct.⁵⁹⁵ Therefore, allegations of in-person voter fraud, double voting, "bloated" voting rolls, and noncitizen voting are each examined below. These allegations have been used alone or in combination to justify voter ID laws,⁵⁹⁶ requirements of documentary proof of citizenship,⁵⁹⁷ challenges to voter eligibility,⁵⁹⁸ removal of voters from the rolls,⁵⁹⁹ cuts to early

⁵⁸⁹ Alabama State Advisory Committee to the U.S. Comm'n on Civil Rights Transcript: Access to Voting in Alabama, statement by John Merrill, Sec. of State of Ala., (Feb. 22, 2018) at 5 [*hereinafter* Merrill, Alabama SAC, Briefing].

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.* at 14.

⁵⁹² *Id.* at 25.

⁵⁹³ Heritage, *Voter Fraud Cases*, *supra* note 470.

⁵⁹⁴ *Id.*

⁵⁹⁵ These are different from the most common forms of fraud identified by either the Heritage Foundation or News21. For example, none of the main types of restrictions discussed herein (voter ID, documentary proof of citizenship, challenges to eligibility, purges, cuts to early voting, or decreasing access to the polls) are designed to address absentee ballot fraud, which is the most common type of voter fraud identified in both databases. *Id.*; *see also* NEWS21, *Election Fraud*, *supra* note 582.

⁵⁹⁶ *See, e.g.*, Discussion and Sources cited, *supra* notes 362-64, 490-99 and 571-76 (strict voter ID laws justified by allegations of in-person voter fraud, relevant court findings).

⁵⁹⁷ *See, e.g.*, Discussion and Sources, *infra* notes 697-710 (arguments that documentary proof of citizenship requirements justified by allegations of various types of voter fraud).

⁵⁹⁸ *See, e.g.*, Discussion and Sources cited, *infra* notes 835-42 and 848-50 (arguments that challenges of voters on the rolls justified by allegations of various types of voter fraud).

⁵⁹⁹ *See, e.g.*, Discussion and Sources cited, *infra* notes 858-60, 867, 873-880, 884-89, 918, 926-28 and 938 (systemic voter roll purging based on allegations of various types of fraud, eligibility, and election integrity concerns).

voting,⁶⁰⁰ and cuts to language access.⁶⁰¹ Before examining the allegations, the Commission notes that the measures used to remedy them have at times resulted in restricting or infringing upon the rights of eligible voters and disparately impacted minority voters.⁶⁰²

In-Person Voter Fraud

The Heritage Foundation found 12 instances during the past two years of “impersonation voter fraud at the polls,” defined as “[v]oting in the name of other legitimate voters and voters who have died, moved away, or lost their right to vote because they are felons, but remain registered.”⁶⁰³ Current data from Heritage Foundation indicate that impersonation voter fraud at the polls amounted to 1.06 percent of all cases in the last two years.⁶⁰⁴

The News21 Study found there is “utterly no evidence”⁶⁰⁵ that points to any significant level of instances of in-person voter fraud. Out of 2,068 incidents of alleged voter fraud from 2000-2012, only 10 (0.5 percent) were allegations of in-person voter fraud.⁶⁰⁶ The News 21 Study found that in-person voter fraud allegations were only 0.5 percent of all allegations in all 50 states for over 10 years.⁶⁰⁷ Yet, in-person voter fraud is the only type of voter fraud that voter ID laws protect against.⁶⁰⁸

In the Commission’s briefing, Professor Levitt testified that a number of other empirical studies have found that in-person voter fraud is exceedingly rare.⁶⁰⁹ Courts have also taken into account that in-person voter fraud is “extremely rare,”⁶¹⁰ and a “truly isolated phenomenon.”⁶¹¹ Moreover,

⁶⁰⁰ See *McCrary*, 831 F.3d at 235; *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 547-58 (6th Cir. 2014), vacated on other grounds, *Ohio State Conference of The Nat. Ass’n For The Advancement of Colored People v. Husted*, 2014 WL 10384647, No. 14-3877 (6th Cir. Oct. 1, 2014) (staying the preliminary injunction pending petition of writ of certiorari); see also Discussion and Sources *supra*, notes 365-67 (North Carolina) and *infra*, note 995 (Ohio) (the Sixth Circuit concluded that the district court “properly identified that the specific concern Defendants expressed regarding voter fraud—that the vote of an EIP [early in-person] voter would be counted before his or her registration could be verified—was *not logically linked* to concerns with voting and registering on the same day.”).

⁶⁰¹ See Discussion and Sources, *infra* notes 1124-27 (alleging fraud among arguments against providing language access).

⁶⁰² See, e.g., *McCrary*, 831 F.3d 204; *Veasey*, 830 F.3d 216; *Arcia v. Detzner*, 908 F. Supp. 2d 1276 (S.D. Fla. 2012), *rev’d sub nom. Arcia v. Fla. Sec’y of State*, 746 F.3d 1273 (11th Cir. 2014), *opinion vacated and superseded*, 772 F.3d 1335 (11th Cir. 2014), and *rev’d and remanded sub nom. Arcia v. Fla. Sec’y of State*, 772 F.3d 1335 (11th Cir. 2014), and *vacated*, 2015 WL 11198230, No. 12-22282-CIV (S.D. Fla. Feb. 12, 2015).

⁶⁰³ Heritage, *Voter Fraud Cases*, *supra* note 470.

⁶⁰⁴ *Id.*

⁶⁰⁵ Edge and Holstege, *Voter Fraud Is Not a Persistent Problem*, *supra* note 584.

⁶⁰⁶ Heritage, *Voter Fraud Cases*, *supra* note 470.

⁶⁰⁷ *Id.*

⁶⁰⁸ See, e.g., *Frank v. Walker*, 773 F.3d 783, 783 (7th Cir. 2014) (denial of rehearing en banc) (Posner, Wood, Rovner, Williams, and Hamilton, J.J., dissenting).

⁶⁰⁹ *Briefing Transcript*, *supra* note 234, at 77-78 (statement by Justin Levitt).

⁶¹⁰ *Id.* (citing sources).

⁶¹¹ *Id.* (citing sources).

when voter fraud occurs, it is often aggressively prosecuted, even if the person was mistaken that the person had the right to vote and did not intend to vote illegally.⁶¹²

Studies also show that because instances of in-person voter fraud account for such a small percentage of voter fraud, current prohibitions outside of voter ID laws seem to be effectively preventing it.⁶¹³ At the Commission's briefing Peyton McCrary, a historian who was employed at the Justice Department for almost 40 years, testified that "[t]here is no evidence of which I am aware that there's in-person voter fraud at the polls. The only kind of casting ballots that is covered by the photo ID requirement of these laws exists anywhere in the United States except in a handful of cases, and I mean literally a handful, in most states throughout the millions of votes cas[t]."⁶¹⁴

McCrary does acknowledge that in some states there is some degree of election fraud with absentee ballots.⁶¹⁵ However, the majority of voter ID laws do not apply to absentee ballots or any related absentee ballot reform. McCrary added that there is another kind of election fraud that may be perpetrated by partisan election officials, and there was one relevant case brought by the DOJ, *United States v. Ike Brown*, that dealt with fraud by party officials in Noxubee County, Mississippi.⁶¹⁶ That case did not involve in-person voter fraud, but instead involved possible fraudulent conduct of election officials.⁶¹⁷

Allegations of "Bloated" Voting Rolls and Double Voting

Another type of voting fraud is due to a voter "double voting" which can occur if an individual casts multiple ballots under different registration records in the same election. Many argue that "bloated" voting rolls, in which there are more registered voters on the rolls than there should be, pose a significant risk of double or invalid votes. The Commission received testimony about this issue from panelists.⁶¹⁸ Moreover, John Park, Counsel with Strickland Brockington Lewis L.L.P., pointed out that the independent, nonprofit group Government Accountability Institute (GAI) raised concern about inaccurate voter rolls that contain registrants who are no longer eligible, as follows:

In 2012, Pew Research found 24 million (one in eight) voter registrations were either invalid or significantly inaccurate. About 1.8 million deceased voters were

⁶¹² See Michael Wines, *Illegal Voting Gets Woman 8 Years in Prison, and Almost Certain Deportation*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/us/illegal-voting-gets-texas-woman-8-years-in-prison-and-certain-deportation.html>; see also BBC News, *Texas woman jailed for five years for accidental voter fraud*, BBC NEWS (Mar. 30, 2018), <http://www.bbc.com/news/world-us-canada-43597908?SThisFB> (discussing former felony conviction in Texas).

⁶¹³ German Lopez, *In 2016, In-person Voter Fraud Made up 0.00002 Percent of All Votes in North Carolina*, VOX (Apr. 26, 2017), <https://www.vox.com/policy-and-politics/2017/4/26/15424270/voter-fraud-north-carolina>.

⁶¹⁴ *Briefing Transcript*, *supra* note 234, at 63-64 (statement by Peyton McCrary).

⁶¹⁵ *Id.* at 64.

⁶¹⁶ *Id.*; see also *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009).

⁶¹⁷ *Briefing Transcript*, *supra* note 234, at 62 (statement by Peyton McCrary).

⁶¹⁸ Park, *Written Testimony*, *supra* note 567, at 9; see also *Briefing Transcript*, *supra* note 234, at 178-79 and 200 (statement by John Merrill).

discovered on state voter rolls, and 2.75 million people were registered to vote in more than one state. These findings alone do not equate to voter fraud, but show a system rife with error and vulnerability.⁶¹⁹

Researchers Sharad Goel and colleagues conducted a study on double voting in the 2012 U.S. Presidential Election.⁶²⁰ Their findings suggest that double voting is not carried out in a systematic way, thus not presenting a threat to the integrity of American elections. In an election in which about 129 million votes were cast, at most 33,000 votes cast were a double vote, which only equates to 0.02 percent of votes cast.⁶²¹ The authors stressed this estimate should be considered an upper bound of the potential for double votes and contrasted it to erroneous estimates of double voting numbering in the millions.⁶²² Goel et al. conclude their study by stating:

[M]any policies that would reduce the potential for fraud also make it more difficult for some legitimate votes to be cast. Likewise, many policies that make voting more accessible also increase opportunities for fraud. Emphasizing accessibility or integrity, without consideration for the other, is likely to lead to poor election administration.⁶²³

A 2016 report by the GAI studied voter registration lists from 21 states and found that it is “highly likely” that 8,741 votes cast in the 2016 election were duplicate votes cast by voters who voted in more than one state.⁶²⁴ Hans von Spakovsky, attorney and senior legal fellow in The Heritage Foundation’s Edwin Meese III Center for Legal and Judicial Studies, has written about this report and stated that the GAI extrapolated the data from 21 states to all 50 states, used a conservative name-matching system, and found with “high reliability” that there are “45,000 duplicate votes.”⁶²⁵ However, the Heritage Foundation database currently indicates that there have been 84 instances of duplicate voting that were confirmed through a government adjudicative process in the last two years.⁶²⁶ Regarding the Heritage Foundation database and conclusions, the Brennan Center

⁶¹⁹ Park, Written Testimony, *supra* note 567, at 9; *see also* Government Accountability Institute, *America the Vulnerable: The Problem of Duplicate Voting*, GAI 4-5 (2017), <http://www.g-a-i.org/wp-content/uploads/2017/07/Voter-Fraud-Final-with-Appendix-1.pdf> (citing The PEW Center on the States, *Inaccurate, Costly and Inefficient: Evidence That America’s Voter Registration System Needs an Upgrade*, PEW (Feb. 2012), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/pewupgradingvoterregistrationpdf.pdf).

⁶²⁰ Sharad Goel, Marc Meredith, Michael Morse & David Rothschild, *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections* (Oct. 24, 2017), working paper, <https://www.dropbox.com/s/bbzgpeo1rh1s7dy/OnePersonOneVote.pdf?dl=0> [*hereinafter* Goel et al., *One Person, One Vote*].

⁶²¹ *Id.* at 29.

⁶²² *Id.* at 27-28.

⁶²³ *Id.* at 29.

⁶²⁴ Park, Written Testimony, *supra* note 567, at 9 (citing GAI, *The Problem of Duplicate Voting*, *supra* note 619).

⁶²⁵ Hans A. von Spakovsky, *New Report Exposes Thousands of Illegal Votes in 2016 Election*, THE HERITAGE FOUNDATION (July 28, 2017), <https://www.heritage.org/election-integrity/commentary/new-report-exposes-thousands-illegal-votes-2016-election>.

⁶²⁶ Heritage, *Voter Fraud Cases*, *supra* note 470.

commented that their analyses of double voting cases show that “clerical errors and confusion are more likely to be the culprit than intent to defraud the election system.”⁶²⁷

There is no evidence to support allegations that double registration leads to double voting.⁶²⁸ Many voters are registered in two states because they moved without filing a change of address form with the U.S. Postal Service, which may be used by states to update their voter rolls under the National Voter Registration Act (NVRA).⁶²⁹ A jurisdiction’s failure to perform voter list maintenance and fulfill its duties under the NVRA to remove voters who have moved state-to-state, after notice has been attempted to verify such a move,⁶³⁰ also does not mean that the voter has voted in both states.⁶³¹ Additionally, because voters of color and other low-income voters move more often than white voters do, aggressive removal programs may lead to disparate impact because their names are thus more likely to appear as duplicate registrations if they fail to cancel their previous voter registration at their old address. November 2016 U.S. Census data reflected that:

The highest mover rates by race were for the black or African-American alone population (13.8 percent) and the Asian alone population (13.4 percent). These two mover rates were not statistically different. The white alone population moved at a rate of 10.3 percent. The Hispanic or Latino population (12.6 percent) were more mobile than the non-Hispanic white population (9.8 percent).⁶³²

However, allegations of persons being registered to vote in two states are often used to justify aggressive voter list maintenance to remove voters from the rolls. Aggressive removal programs are also sometimes justified by the simple fact that there are more voters on the rolls than the most

⁶²⁷ Rudy Mehrbani, *Heritage Fraud Database: An Assessment*, THE BRENNAN CENT. FOR JUSTICE 5 (Sept. 8, 2017), https://www.brennancenter.org/sites/default/files/publications/HeritageAnalysis_Final.pdf [*hereinafter* Mehrbani, *Heritage Fraud Database: An Assessment*].

⁶²⁸ *Id.*; see also Sam Levine, *Trump Claims Without Evidence that Millions of People Are Voting Illegally in California*, HUFFINGTON POST (Apr. 5, 2018), https://www.huffingtonpost.com/entry/trump-california-voter-fraud_us_5ac68372e4b0337ad1e5eb06 (noting that the White House pointed to a study that showed there were nearly 3 million people registered in more than one state to support the President’s claim that millions voted illegally).

⁶²⁹ See 52 U.S.C. § 20507(c)(1) (stating that notice to voter to confirm change of address before removal may be sent after information change-of address information supplied to Postal Service is received).

⁶³⁰ 52 U.S.C. § 20507(a)(4) requires that “each State shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—the death of the registrant; or (B) a change in the residence of the registrant [after appropriate notice is sent to the voter’s address to confirm is either confirmed or not returned, and after 2 federal election cycles].”

⁶³¹ See e.g., Kurtis Lee, *President Trump says it’s illegal to be registered to vote in two states—but he’s wrong*, L.A. TIMES (Feb. 1, 2017), <http://www.latimes.com/nation/la-na-voters-registered-multiple-states-20170127-story.html>.

⁶³² See Press Release, U.S. Census Bureau, *Americans Moving at Historically Low Rates*, U.S. CENSUS BUREAU (Nov. 16, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-189.html> (including racial data on frequency of moving as per *Geographical Mobility: 2015 to 2016*, a collection of national- and regional-level tables from the Current Population Survey Annual Social and Economic Supplement).

recent Census data indicate as the number of citizens of voting age in the jurisdiction.⁶³³ This could mean that voters who have moved, died, are ineligible or otherwise become ineligible (through criminal convictions in certain states) are wrongfully on the voting rolls.⁶³⁴

The Supreme Court has held that “bloated” voting rolls, in conjunction with interest in protecting against potential voting fraud and safeguarding voter confidence in elections, may be sufficient justification for photo ID laws. In *Crawford*, the Court held that: “Even though Indiana’s own negligence may have contributed to the serious inflation of its registration lists when SEA 483 [the state’s photo ID law] was enacted, the fact of inflated voter rolls does provide a neutral and nondiscriminatory reason supporting the State’s decision to require photo identification.”⁶³⁵ The Court further explained that the combination of Indiana’s interests were “both neutral and sufficiently strong” to survive a facial invalidation against its photo ID law, SEA 483.⁶³⁶

Regarding list maintenance, the Public Interest Legal Foundation (PILF), headed by J. Christian Adams, recently sent letters to 248 jurisdictions stating that their voter registration lists contained too many voters; PILF has brought several lawsuits alleging that the high number of voters on the rolls indicates that there are ineligible voters on the lists.⁶³⁷ However, some of PILF’s and their allies’ lawsuits have been unsuccessful, and recently a federal judge in Florida found in her ruling that the claims were “misleading,”⁶³⁸ because the Census data they relied on was outdated and the county that they sued was growing in population.⁶³⁹

In order to address “bloated” voter rolls, states have coordinated with one another to facilitate keeping accurate voter rolls. Two existing systems have been developed: Interstate Voter Registration Crosscheck Program (Crosscheck) and Electronic Registration Information Center (ERIC).

Crosscheck

Crosscheck can be problematic due to high error rates.⁶⁴⁰ It operates by including data from registered voters in all the participating states, then comparing their first names, last names, and

⁶³³ See Public Interest Legal Foundation, *Sample October 2017 “NVRA Violation” Letter 2(f)*, PILF (Sept. 15, 2017), <https://publicinterestlegal.org/files/Sample-2017-notice.pdf> [*hereinafter* PILF, *Sample NVRA Violation*].

⁶³⁴ *Id.*

⁶³⁵ *Crawford*, 553 U.S. at 196-97.

⁶³⁶ *Id.* at 204.

⁶³⁷ See PILF, *Sample NVRA Violation*, *supra* note 633.

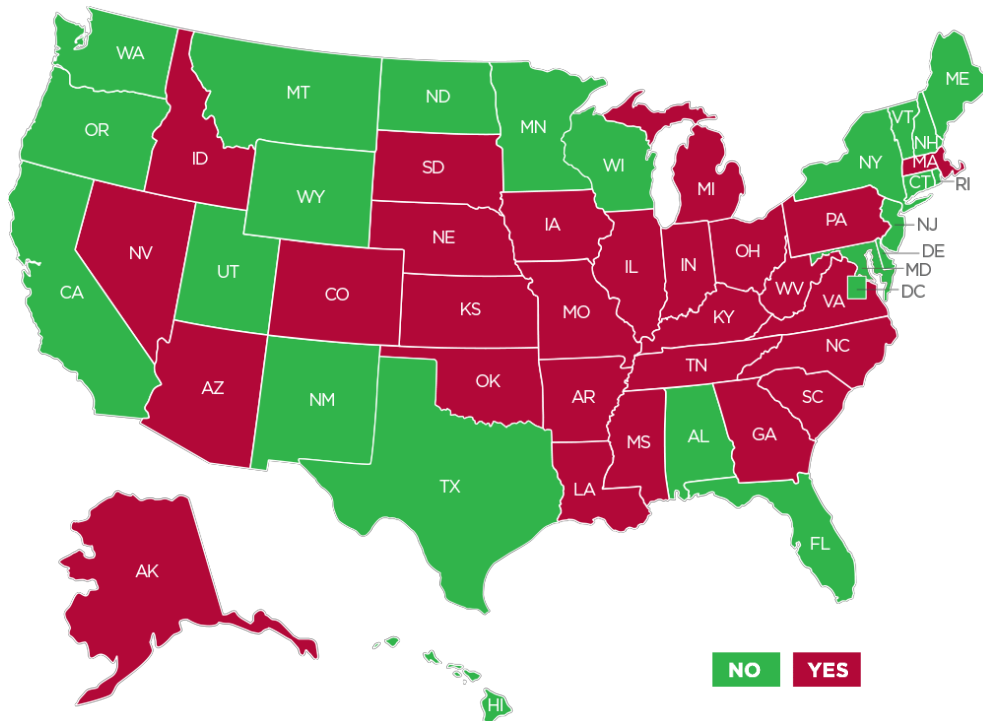
⁶³⁸ Order, *Bellitto v. Snipes*, No. 16-CV-61474 (S.D. Fla. 2018), <https://publicinterestlegal.org/files/Broward-Trial-Order.pdf>, at 19-20 (due to using American Community Survey data that do not provide an accurate comparison to registered voters, “the Court finds that the registration rates presented by ACRU are inaccurate. ACRU’s argument that Broward County’s registration rates are unreasonably high is, therefore, unsupported by any credible evidence and necessarily fails to support ACRU’s contention that [Broward County Supervisor of Elections] Snipes failed to comply with the NVRA’s list maintenance requirements.”).

⁶³⁹ *Id.*

⁶⁴⁰ See Discussion and Sources cited at notes 643-44 and 652-56, *infra*.

dates of birth, to generate lists of voters who may be registered in more than one state.⁶⁴¹ Currently, 27 states participate in the Crosscheck system created by Kansas. Here is a map of states participating in Crosscheck, with the states participating in Crosscheck colored red, and the states not participating in Crosscheck colored green:

Figure 6: Participation in the Interstate Crosscheck System



Source: Health of State of Democracies: Participation in the Crosscheck System

While allegations of double voting are used to justify aggressive purges of purported “bloated” voter rolls and the use of Crosscheck,⁶⁴² the Crosscheck 2014 Participation Guide states that: “Experience in the crosscheck program indicates that a significant number of apparent double votes are false positives and not double votes.”⁶⁴³ The Crosscheck Participation Guide therefore recommends using “other information” such as middle name, suffix, or the last four Social Security

⁶⁴¹ See, e.g., Interstate Voter Registration Crosscheck, *2014 Participation Guide*, 4 (Dec. 2014), https://wei.sos.wa.gov/agency/osos/en/press_and_research/weekly/Documents/Participation%20Guide%20with%20Comments.pdf (“An apparent duplicate registration is produced when first names, last names and dates of birth in two records match exactly. Other information such as middle name, suffix and SSN4 should be used to confirm whether the two records are matches. It may be necessary to contact another jurisdiction to obtain more information, such as signatures.”) [*hereinafter* Crosscheck, *2014 Participation Guide*].

⁶⁴² See, e.g., Goel et al., *One Person, One Vote*, *supra* note 620, at 5 (the authors note that “[l]ittle existing election forensics work examines the issue of double voting, despite it being one of the most commonly asserted forms of voter fraud and a factor in the purging of voter rolls.”).

⁶⁴³ Crosscheck, *2014 Participation Guide*, *supra* note 641, at 4.

Number digits to confirm whether names that are flagged as apparent duplicate records are actually duplicate records before cancelling the record or taking other action.⁶⁴⁴

Security of voter data is another issue. As of February 2018, “in light of recent insecurity revelations,” Alaska, Florida, Kentucky, Massachusetts, New York, Oregon, Pennsylvania, and Washington State had left the program.⁶⁴⁵ At the Commission’s 2018 Indiana SAC briefing on voting rights, testimony included criticisms of the state’s removal of voters from the rolls, without notification or permission, using the Crosscheck program.⁶⁴⁶ Indiana was sued by the local NAACP, League of Women Voters, and Common Cause about its state law permitting the use of Crosscheck for voter list maintenance.⁶⁴⁷ On June 8, 2018, a federal judge temporarily enjoined Indiana from using Crosscheck, due to likely violations of federal law provisions that protect eligible voters from being removed through systems that are not reasonable, uniform, and nondiscriminatory.⁶⁴⁸

At the Commission’s briefing, John Park testified that he believes that Crosscheck is the solution to “bloated” voting rolls and protecting against double votes. His written testimony stated:

⁶⁴⁴ *Id.*

⁶⁴⁵ Russ Feingold, *The Crosscheck Database is a Security Threat*, THE NATION (Feb. 22, 2018), <https://www.thenation.com/article/the-crosscheck-voter-database-is-a-security-threat/> (noting that the voters’ data are unencrypted and therefore vulnerable to being hacked).

⁶⁴⁶ See Appendix D for a summary of Indiana State Advisory Committee Briefing; Complaint, *Indiana State Conference of Nat’l Ass’n for Advancement of Colored People v. Lawson*, No. 1:17-CV-3936 (S.D. Ind. 2018), https://www.brennancenter.org/sites/default/files/legal-work/Indiana_NAACP_v._Lawson_Complaint.pdf; *Indiana State Conference of Nat’l Ass’n for Advancement of Colored People v. Lawson*, 2018 WL 2752564, No. 117-CV-02897-TWP-MPB (S.D. Ind. June 8, 2018) (granting plaintiffs’ motion for preliminary injunction), https://ecf.insd.uscourts.gov/cgi-bin/show_public_doc?12017cv2897-63.

⁶⁴⁷ See *Lawson*, 2018 WL 2752564, at *14 (granting plaintiffs’ motion for preliminary injunction) (“Plaintiffs argue that the Crosscheck system has inherent flaws and limitations, which make it an unreliable source on which to base voter registration cancellations without further investigation. Plaintiff’s offer evidence that Crosscheck produces many false positives because many people have a matching first name, last name, and birthdate, but in reality, they are not the same person. Crosscheck and the state’s voter registration system are unreliable because they do not collect or disseminate the actual voter registration documents, thereby depriving states of the opportunity to verify the conclusory data with the underlying documents. The system also has limited data and functionality, which reduces its reliability for county officials to cancel voter registrations based solely on Crosscheck and the data uploaded into the statewide voter registration system. Furthermore, the data definitions are not consistently used or applied by each of the participating states, and thus, some data may be missing or may be used in disparate ways by the different states. This is especially true of the dates of registration. Plaintiffs point out that, because of these inherent limitations with Crosscheck, historically, it has been used only as a starting point in Indiana’s voter cancellation process. Crosscheck will now be used to determine whether a duplicate voter registration exists and then cancellation of the Indiana registration will promptly follow.”).

⁶⁴⁸ *Id.* at *23 (“Because SEA 442 removes the NVRA’s procedural safeguard required in particular cases of providing for notice and a waiting period, the Court determines that Plaintiffs have a high likelihood of success on the merits of their claim. The Court briefly notes that it appears the implementation of SEA 442 will likely fail to be uniform based on the evidence that King and Nussmeyer provide differing guidance to county officials on how to determine whether a particular registered voter is a duplicate registered voter in a different state. This is also true based on the evidence that county officials are left to use wide discretion in how they determine a duplicate registered voter, and they have used that discretion in very divergent ways.”).

The Interstate Voter Registration Crosscheck program can identify potentially duplicative entries on voter rolls in different states. In a letter to a local Idaho newspaper, Idaho's Secretary of State reported that 28,113 potential duplicates were found in 2016, and that approximately 9,000 of them were from a single county.⁶⁴⁹

Park also stated that: "The Department of Justice should put its resources to use in enforcing the statutory list maintenance obligations of the States. There is no good reason for a county . . . to have more registered voters than eligible citizens. Likewise, states should participate in the Interstate Voter Registration Crosscheck program."⁶⁵⁰ However, Ezra Rosenberg, Co-Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, expressed concerns about Crosscheck targeting minority voters, and cited studies showing that Crosscheck is highly inaccurate.⁶⁵¹

As discussed, Crosscheck uses first name, last name, and date of birth to compare the voting rolls, and provides states with lists of voters who may be registered in two states. However, comparing only the three fields of first name, last name, and date of birth leads to numerous errors.⁶⁵² Statistical research analysis demonstrates that among a list of only 23 people, there is a more than 50 percent chance that at least two will share the same birthday.⁶⁵³ In another study, Professors Levitt and McDonald also found a high prevalence of common names such as William Smith and María Rodríguez showing up hundreds of times on state election rolls.⁶⁵⁴

A recent study by scholars from Stanford, University of Pennsylvania, Harvard, Yale, and Microsoft found that there were three million cases in a national voter file of 2012 in which the voters shared a common first name, last name, and date of birth.⁶⁵⁵ More granular data (such as last four digits of social security number and other data available to election officials) show that fewer than 0.02 percent could have been double votes; but Crosscheck's recommended strategy of purging the earlier registration record when a pair of registrations is found with match of first

⁶⁴⁹ Park, Written Testimony, *supra* note 567, at 4-5 (citing Lawrence Denney, Idaho Secretary of State, Letter to the Editor, *The True Facts of the Crosscheck Program*, BONNER COUNTY DAILY BEE (Nov. 16, 2017), http://www.bonnercountydailybee.com/letters_to_the_editor/20171116/the_true_facts_of_the_crosscheck_program).

⁶⁵⁰ Park, Written Testimony, *supra* note 567, at 7.

⁶⁵¹ See Ezra Rosenberg, Written Testimony for the U.S. Comm'n on Civil Rights, Feb. 2, 2018, at 9-10, 10 n.31 [*hereinafter* Rosenberg, Written Testimony]. Rosenberg pointed to the Goel et al. study, stating that "researchers recently found that using Crosscheck to purge the voter rolls in one state would 'impede 200 legal votes for 'every double vote prevented.'" *Id.* (quoting Goel et al., *One Person, One Vote*, *supra* note 620, at 33).

⁶⁵² Goel et al., *One Person, One Vote*, *supra* note 620.

⁶⁵³ Michael McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 ELECTION L. J. 111, 112 (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=997888.

⁶⁵⁴ *Id.* at 120. McDonald and Levitt examined voter files from New Jersey's 2014 elections. In those elections, the most common names—William Smith, Maria Rodriguez, etc.—showed up hundreds of times, reflecting their prevalence in the general population.

⁶⁵⁵ *Id.*; Goel et al., *One Person, One Vote*, *supra* note 620, at 1.

name, last name, date of birth, would still “eliminate more than 300 registrations used to cast a seemingly legitimate vote for every double vote prevented.”⁶⁵⁶

New Hampshire state election officials recently reported that of the 94,000 voters that had the same first name, last name, and date of birth as a voter in a different state and would thus be flagged by Crosscheck, all but 142 were confirmed as different people.⁶⁵⁷ Associate Attorney General of New Hampshire Anne Edwards clarified that “those unverified voters do not indicate that those individuals cast an unlawful vote” and supported the conclusion that the number of possible invalid or duplicate votes in the 2016 election was “statistically miniscule.”⁶⁵⁸

Furthermore, Crosscheck’s system of name-matching may disparately impact voters of color. A report by the Center for American Progress on the Health of State Democracies summarized studies finding that:

50 percent of people of color share a common surname, while only 30 percent of white people do—this leads to a greater number of flagged potential double voters, and thus a significant overrepresentation of minority voters on the Crosscheck list: While white voter names are underrepresented by 8 percent, African American voters are overrepresented by 45 percent; Hispanic voters are overrepresented by 24 percent; and Asian voters are overrepresented by 31 percent.⁶⁵⁹

In Virginia 2012, a voter claimed he was purged because the Crosscheck system said he had moved from the state, when in fact he had recently moved from South Carolina to Virginia.⁶⁶⁰ The Commonwealth removed 40,000 voters from the rolls prior to Election Day on the basis of information from Crosscheck.⁶⁶¹ One local registrar refused to purge any voters as was requested by Virginia because he found that nearly 10 percent of the names given to him for removal from the voter rolls were eligible voters.⁶⁶²

Electronic Registration Information Center (ERIC)

Another system is the Electronic Registration Information Center (ERIC) system; evidence indicates that ERIC could reduce bloated voter rolls while not removing the same number of

⁶⁵⁶ Goel et al., *One Person, One Vote*, *supra* note 620, at 3.

⁶⁵⁷ John DiSato, *Exhaustive Investigation Reveals Little Evidence of Possible Voter Fraud in NH*, WMUR9 (May 29, 2018), http://www.wmur.com/article/exhaustive-investigation-reveals-little-evidence-of-possible-voter-fraud-in-nh/20955267?wpm=1&wpsrc=nl_daily202.

⁶⁵⁸ *Id.*

⁶⁵⁹ Lauren Harmon, Charles Posner, Michele L. Jawando & Matt Dhaiti, *The Health of State Democracies*, 25 THE CENTER FOR AM. PROGRESS ACTION FUND (July 7, 2015), <https://www.americanprogressaction.org/issues/courts/reports/2015/07/07/116570/the-health-of-state-democracies/>.

⁶⁶⁰ Jonathan Brater, *Virginia Offers Lessons for Voter List Maintenance*, THE BRENNAN CENT. FOR JUSTICE (Nov. 25, 2013), <https://www.brennancenter.org/analysis/virginia-offers-lessons-voter-list-maintenance>.

⁶⁶¹ Dartunorro Clark, *This System Catches Voter Fraud and the Wrath of Critics*, NBC NEWS (Aug. 12, 2017), <https://www.nbcnews.com/politics/white-house/system-catches-vote-fraud-wrath-critics-n790471>.

⁶⁶² *Id.*

legitimate voters as with Crosscheck. According to the 2013 bipartisan Presidential Commission on Election Administration (PCEA), “States that participate in ERIC are able to check their voter registration lists against data gathered from other states and several nationally available lists, such as those maintained by the U.S. Postal Service or the Social Security Administration.”⁶⁶³ ERIC provides information to states about which voters may have died, moved, or changed their names—and it provides states with information about which eligible voters might not be registered, so that they can reach out to them and register them.⁶⁶⁴ ERIC may have greater privacy protections than Crosscheck.⁶⁶⁵ In contrast to Crosscheck’s matching system of name and date of birth that produces matches that election officials then have to verify, ERIC matches more data points, including the last four digits of social security numbers, mailing address, and other data already linked through state motor vehicle agencies and the federal databases mentioned above.⁶⁶⁶ Here are the states that are currently participating in ERIC as of the date of writing of this report:

Table 5: States Participating in ERIC

Alaska*	Delaware	Missouri*	Pennsylvania*	Washington D.C.
Alabama	Illinois*	Nevada*	Rhode Island	West Virginia*
Arizona*	Louisiana*	New Mexico	Utah	Wisconsin
Colorado*	Maryland*	Ohio*	Virginia*	
Connecticut	Minnesota	Oregon	Washington ⁶⁶⁷	

*States marked with an asterisk also participate in Crosscheck.⁶⁶⁸

⁶⁶³ Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, PCEA 29 (Jan. 2014), <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/466754/doc/slspublic/Amer%20Voting%20Exper-final%20draft%2001-04-14-1.pdf> (co-chaired by Robert F. Bauer and Benjamin L. Ginsberg) [*hereinafter* PCEA Report].

⁶⁶⁴ *Id.*

⁶⁶⁵ Electronic Registration Information Center, *Technology and Security Overview*, ERIC (Apr. 3, 2018), http://www.ericstates.org/images/documents/ERIC_Tech_and_Security_Brief_v3.0.pdf. Private and sensitive information such as date of birth (“DOB”) and the last four digits of a Social Security number (“SSN”) are “anonymized” at the source—the state—and then transmitted to the ERIC data center where the data are anonymized again upon receipt.

⁶⁶⁶ Reid Wilson, *Here’s How to Clean Up Messy Voter Rolls*, WASH. POST (Nov. 3, 2013) <http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/03/heres-how-to-clean-up-messy-voter-rolls/> (quoting David Becker, Pew’s director of election initiatives: “It’s impossible for [states], based on only a name and birth date, to keep their lists up to date and identify when some has died, for example.”); *see also* Shane Hamlin & Erika Haas, *Presentation from the Pew Registration Summit*, ERIC 30-37 (July 2014), http://www.ericstates.org/images/documents/ERIC_July_2013_VR_Conference_Notes.pdf (last accessed May 1, 2018).

⁶⁶⁷ ELECTRONIC REGISTRATION INFORMATION CENTER, *We’re Growing!*, ERIC, <http://www.ericstates.org/> (last accessed June 4, 2018) (data are current as of January 17, 2018).

⁶⁶⁸ *See* Figure 6, *supra*.

Allegations of Noncitizen Voting

The belief that noncitizens are voting in large numbers in elections and skewing election results is an often-cited concern about voter fraud.⁶⁶⁹ This concern arose through oral and written testimony before the Commission's national briefing.⁶⁷⁰ However at the same briefing, when Alabama's Secretary of State John Merrill was asked if he was aware of a "rash of noncitizen voting," he answered: "No, I am not."⁶⁷¹ The News21 study of all known allegations of voter fraud showed

⁶⁶⁹ Then-President Elect Trump stated on November 27, 2016 that three million noncitizens voted in the latest Presidential Election. Donald J. Trump (@realDonaldTrump), Twitter (Nov. 27, 2016, 12:30 PM), https://twitter.com/realDonaldTrump/status/802972944532209664?ref_src=twsrc%5Etfw. Experts immediately noted that these allegations were patently false; however, they became the basis for the Pence-Kobach Presidential Commission on Election Integrity, which was charged with reviewing allegations of improper and fraudulent voting, improper voter registration, and voter suppression. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017). Hans A. von Spakovsky and Christian Adams testified at the Commission's briefing and were part of the Presidential Commission on Election Integrity, but did not testify about it; *see also* von Spakovsky, Written Testimony, *supra* note 325; J. Christian Adams, President and General Counsel, Public Interest Legal Foundation, Written Testimony for the U.S. Comm'n on Civil Rights, Feb. 2, 2018 [*hereinafter* Adams, Written Testimony]. As various panelists noted, the Presidential Commission on Election Integrity was beleaguered with litigation challenging whether its mission was racially discriminatory and in violation of the VRA, whether it had the right to collect voter data from the states, and whether it was in compliance with the Administrative Procedures Act and other federal rules, including federal transparency rules. *See Briefing Transcript, supra* note 234, at 220-22 (statement by Dale Ho), *Briefing Transcript, supra* note 234, at 82 (statement by Ezra Rosenberg). When the Presidential Commission on Election Integrity began asking for data, forty-five states and the District of Columbia stated they would decline to release any data or by only providing limited information to the panel. Nineteen states refused to comply due to privacy concerns and claims that the commission was politically motivated and twenty-six states stated that they would only hand over public data. *See* Dartunorro Clark, *Forty-five States Refuse to Give Voter Data to Trump Panel*, NBC NEWS (July 6, 2017), <https://www.nbcnews.com/politics/white-house/forty-four-states-refuse-give-voter-data-trump-panel-n779841>. Further, the Department of Homeland Security (DHS) stated that they would not compare the Presidential Commission's data with federal immigration records, and they therefore refused to accept any of the Presidential Commission's data to compare with their federal immigration records, after which the White House stated it would be destroying the Presidential Commission's data; *see also* Spencer S. Hsu, *White House Says It Will Destroy Trump Voter Panel Data, Send No Records to DHS*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/local/public-safety/white-house-says-it-will-destroy-trump-voter-panel-data-send-no-records-to-dhs/2018/01/10/e70704a8-f616-11e7-b34a-b85626af34ef_story.html?utm_term=.d1eb25f95c8d. On Jan. 3, 2018, President Trump disbanded the Presidential Commission; *see also* Michael Tackett & Michael Wines, *Trump Disbands Commission on Voter Fraud*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/us/politics/trump-voter-fraud-commission.html>. On Jan. 9, 2018, it told a federal court that it would not be releasing any data nor any findings whatsoever. *See* Memorandum in Support of Defendant's Motion to Reconsider, *Dunlap v. Presidential Comm'n. on Election Integrity*, No. 1:17-CV-02361-CKK, 1-2 (D.D.C., Jan. 9, 2018), <https://www.politico.com/f/?id=00000160-dde0-da3c-a371-ddfebfa60000>. ("[S]tate voter data will not be transferred to or accessed or utilized by, DHS or any other agency, except to the National Archives and Records Administration ('NARA'), pursuant to federal law, if the records are not otherwise destroyed. Pending resolution of outstanding litigation involving the Commission, and pending consultation with NARA, the White House intends to destroy all state voter data. Non-public Commission records will continue to be maintained as Presidential Records, and they will not be transferred to the DHS or another agency, except to NARA, if required, in accordance with federal law.")

⁶⁷⁰ *Briefing Transcript, supra* note 234, at 153-54 (statement by Cleta Mitchell); *see also Briefing Transcript, supra* note 234, at 155 (statement by John Merrill); *see also* Park, Written Testimony, *supra* note 567, at 9.

⁶⁷¹ *Briefing Transcript, supra* note 234, at 156 (statement by John Merrill).

that of the 16 allegations regarding all types of voter fraud in Alabama between 2000 and 2012, only one had to do with noncitizen registration and/or voting.⁶⁷² The Heritage Foundation reported the same case as one of 16 cases of “Proven Voter Fraud” it identified in Alabama between 2000 and 2017.⁶⁷³

A Public Interest Legal Foundation report stated that 5,556 voters were removed from Virginia’s rolls between 2011 and May 2017 because they were noncitizens, and one third of those removed voted illegally.⁶⁷⁴ One of the witnesses who testified before the Commission, J. Christian Adams, is quoted in the report and its press release.⁶⁷⁵ Other groups have countered that PILF’s allegations are exaggerated and based on false methodology; these groups have successfully litigated against related voter purges that were advocated by PILF and its allies in Florida.⁶⁷⁶ At the Commission’s briefing, the ACLU’s Dale Ho testified that while Florida was purging alleged noncitizens, “thousands of U.S. citizens were wrongly designated as noncitizens and threatened with removal from the rolls . . . An analysis conducted by the Miami Herald indicated that 87 percent of those identified by the state as noncitizens on the [voting] rolls were minorities.”⁶⁷⁷

The News21 study discussed above also identified few incidents of noncitizen voting in their national database of all voter fraud allegations from 2000-2012. Their study reviewing all public databases found that of 2,068 public allegations of voter fraud between 2000 and 2012, there were 56 allegations of noncitizen voting; of these, 16 were dismissed, not charged or acquitted; and 40 were convicted, pleaded, subject to consent order, or had unknown results.⁶⁷⁸ During the 12 years studied, there were 488,090,031 ballots cast in presidential elections alone.⁶⁷⁹ Based on allegations alone, noncitizen voting represented 2.7 percent of all allegations of voter fraud from 2000 to 2012, and 0.000011 percent of all ballots cast.⁶⁸⁰ The Heritage Foundation database documented an

⁶⁷² See NEWS21, *Election Fraud*, *supra* note 582 (noting that 75 percent of cases involved absentee voter fraud).

⁶⁷³ See Heritage, *Voter Fraud Cases*, *supra* note 470 (see information on Ala.).

⁶⁷⁴ Public Interest Legal Foundation, *Report: 5500+ Noncitizens Discovered on Voter Rolls in Virginia*, PILF (May 30, 2017), <https://publicinterestlegal.org/blog/report-5500-noncitizens-discovered-voter-rolls-virginia/>.

⁶⁷⁵ *Id.*

⁶⁷⁶ See, e.g., *Bellitto v. Snipes*, No. 16-CV-61474 (S.D. Fla. 2018), <https://publicinterestlegal.org/files/Broward-Trial-Order.pdf>.

⁶⁷⁷ *Briefing Transcript*, *supra* note 234, at 171 (statement by Dale Ho). See also Discussion of *Arcia v. Detzner* and Sources cited at notes 730 and 866-70, *infra* (stipulated settlement of Section 2 claim in 2012 Florida purge of alleged noncitizens).

⁶⁷⁸ In August 2012, News21 released a Carnegie-Knight investigative report about voter fraud in the U.S, finding only 10 cases of alleged, in-person voter impersonation since 2000. NEWS21, *Election Fraud*, *supra* note 582 (noting that there were 2,068 allegations of voter fraud between 2000 and 2012, and only 56 involved allegations of noncitizens casting an ineligible vote).

⁶⁷⁹ There were 105,396,630 ballots cast in the 2000 Presidential Election; 122,295,345 in 2004; 131,313,815 in 2008; and 129,084,241 in 2012. CQ Press Voting and Elections Collection (accessed by Commission Staff) <http://library.cqpress.com/elections/index.php> (last accessed Aug. 6, 2018). This totals 488,090,031 ballots cast in presidential elections alone in the time period studied by News21.

⁶⁸⁰ *Id.* (Commission Staff calculations of percentages).

alleged 41 cases of noncitizen voting since 2000,⁶⁸¹ representing an even smaller number of ballots allegedly cast by noncitizens in American elections.

Current Legal Protections Against Noncitizen Voting

There are already strong legal deterrents against noncitizens voting in federal elections. These include that noncitizen registration⁶⁸² and voting⁶⁸³ are subject to federal criminal penalties, as well as deportation.⁶⁸⁴ Most states also criminalize noncitizen voting.⁶⁸⁵ The U.S. Constitution requires persons to be 18 years of age or older and citizens in order to vote in federal elections.⁶⁸⁶ The NVRA requires that any person registering to vote must attest under penalty of perjury that the person is a United States citizen, over 18, and otherwise eligible to vote.⁶⁸⁷ During the NVRA

⁶⁸¹ See Mehrbani, *Heritage Fraud Database: An Assessment*, *supra* note 627, at 2.

⁶⁸² 18 U.S.C. § 1015(f) (“Whoever knowingly makes any false statement or claim that he is a citizen of the United States in order to register to vote or to vote in any Federal, State, or local election (including an initiative, recall, or referendum)—[s]hall be fined under this title or imprisoned not more than five years, or both”) (emphasis added).

⁶⁸³ 18 U.S.C. § 611 (enacted as part of 1996 immigration law reforms, making it a felony punishable by a fine and/or one year in prison, for noncitizens to vote in “any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner”).

⁶⁸⁴ See 8 U.S.C. § 1182(a)(6)(C) (falsely claiming U.S. citizenship for any purpose under Federal or State law renders person inadmissible); 8 U.S.C. § 1227(a)(1)(A) (persons who are inadmissible cannot be legally admitted and are subject to deportation); 8 U.S.C. § 1182(a)(10)(D)(i) (any noncitizen “who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation” is also inadmissible); 8 U.S.C. § 1182(a)(6)(C)(iii) (while there are waivers for other offenses, there is no waiver for misrepresentation of U.S. citizenship or for noncitizen voting); 8 U.S.C. § 1227(a)(6) (noncitizen voting is also an affirmatively removable (deportable) offense).

⁶⁸⁵ In Texas, a noncitizen who voted was recently sentenced to eight years in prison. See Claire Z. Cardona, *Grand Prairie Woman Illegally Voted for the Man Responsible for Prosecuting Her*, DALLAS NEWS (Feb. 10, 2017), <http://www.dallasnews.com/news/tarrant-county/2017/02/08grand-prairie-woman-found-guilty-illegal-voting>.

⁶⁸⁶ U.S. CONST., amends. XV § 1, XIX, XXVI § 1.

⁶⁸⁷ See 52 U.S.C. § 20505(a) (requiring that States use the federal registration form, which includes an affidavit of citizenship made under penalty of perjury). Also, under the NVRA, every agency that registers voters through applications for drivers’ licenses, social services applications, and/or through paper forms, must “enable State election officials to assess the eligibility of the applicant,” and “shall include a statement that (i) states each eligibility requirement (including citizenship); (ii) contains an attestation that the applicant meets each such requirement; and (iii) requires the signature of the applicant under penalty of perjury.” 52 U.S.C. § 20504(c)(2)(C)(i)-(iii). See also 52 U.S.C. § 20508(b)(2)(A)-(C) (requiring attestation of citizenship under penalty of perjury on mail voter registration forms). The NVRA also requires that any other state-designated voter registration agencies “shall” distribute the same mail voter registration form, and spells out that the form must specify each eligibility requirement, including citizenship, and contains an attestation that the applicant meets such requirement, which the applicant signs under penalty of perjury. 52 U.S.C. § 20506 (a)(6)(A)(i)(I)-(III). According to the DOJ: “The requirements of the NVRA apply to 44 States and the District of Columbia. Six States (Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming) are exempt from the NVRA because, on and after August 1, 1994, they either had no voter-registration requirements or had election-day voter registration at polling places with respect to elections for federal office. Likewise, the territories are not covered by the NVRA (Puerto Rico, Guam, Virgin Islands, American Samoa). While the NVRA applies to elections for federal office, States have extended its procedures to all elections.” U.S. Dep’t of Justice, *The National Voter Registration Act of 1993*, <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (last accessed Aug. 3, 2018).

debates, Congress deliberated about—but ultimately rejected—language allowing states to require “presentation of documentary evidence of the citizenship of an applicant for voter registration.”⁶⁸⁸ It determined that this was not necessary and could interfere with one of the main purposes of the Act, e.g., to expand voter registration in a nation with very low voter participation rates.⁶⁸⁹

Any time a U.S. citizen moves to a new jurisdiction, in order to exercise the right to vote, the citizen must register to vote in that jurisdiction, and the citizen will be considered a “first-time registrant” under HAVA. This means that thousands of local jurisdictions will require voter registration for any new residents who are eligible to vote.⁶⁹⁰ The NVRA and HAVA already require that registrants attest to their citizenship and provide some form of identification, but new documentary proof of citizenship laws make the requirements stricter by requiring a birth certificate, passport, or naturalization or citizenship papers.⁶⁹¹

As discussed above, evidence of noncitizen voting is sparse. Studies and litigation records indicate that there are few documented incidents of noncitizen voting.⁶⁹² This is not to say there are zero incidents of noncitizen voting, but widespread data show that noncitizen voting occurs extremely rarely in U.S. elections.⁶⁹³ In 2016, in a survey of election officials in 42 jurisdictions representing places with high numbers of noncitizens, “improper noncitizen votes accounted for 0.0001 percent

⁶⁸⁸ See H.R. REP. NO. 103-66, at 23 (1993).

⁶⁸⁹ *Id.*

⁶⁹⁰ According to the U.S. Census, in 2010, there were 3,143 counties and county-equivalents (organized boroughs, census areas, independent cities) in the United States. See U.S. Census Bureau, *2010 Census Geographic Entity Tallies by State and Type*, U.S. CENSUS BUREAU https://www.census.gov/geo/maps-data/data/tallies/all_tallies.html (last accessed Aug. 2, 2018). Because residency is required to vote in local elections, counties and county equivalents typically process voter registration applications. See, e.g., 52 U.S.C. § 10502 (outlining residency requirements for voting). Each of the 50 states (except North Dakota, where voter registration is not required) and the District of Columbia also administer elections and may enact their own voter registration rules, as long as they do not conflict with federal law. See, e.g., *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 13-15, 20 (2013) (discussing pre-emption; holding that NVRA pre-empts contravening state law).

⁶⁹¹ See Discussion and Sources cited at notes 732-96, *infra*.

⁶⁹² See, e.g., Joseph Tanfini, *No, There Is No Evidence That Thousands of Noncitizens Are Illegally Voting and Swinging Elections*, L.A. TIMES (Oct. 25, 2016), <http://www.latimes.com/politics/la-na-pol-noncitizen-voters-20161025-snap-story.html> (citing studies and evidence disproving cases alleging widespread noncitizen voting); see also Wendy Weiser & Douglas Keith, *The Actual True and Provable Facts About Non-citizen Voting*, TIME (Feb. 13, 2017), <http://time.com/4669899/illegal-citizens-voting-trump/> (noting that the National Association of Secretaries of State and experts agree that Trump’s allegations are false; “Multiple nationwide studies have uncovered only a handful of incidents of non-citizens voting.”); see also The Brennan Center for Justice, *Noncitizen Voting is Vanishingly Rare*, THE BRENNAN CENT. FOR JUSTICE (Jan. 25, 2017), <http://www.brennancenter.org/analysis/analysis-noncitizen-voting-vanishingly-rare> (detailing multiple studies and voter fraud prosecution records).

⁶⁹³ Noncitizens may vote in some local elections, if their ballots are separate and the local jurisdictions permits it regarding strictly local issues. See, e.g., John Haltiwanger, *Immigrants Are Getting the Right to Vote in Cities Across America*, NEWSWEEK (Sept. 13, 2017), <http://www.newsweek.com/immigrants-are-getting-right-vote-cities-across-america-664467>.

of the 2016 votes in those jurisdictions.”⁶⁹⁴ This may be because of the laws with severe penalties already on the books.⁶⁹⁵

Some advocates have argued that because of the alleged problem of noncitizen voting, strict voter ID laws should be enacted, voter rolls should be purged, and documentary proof of citizenship should be required in order to register to vote.⁶⁹⁶ Examining the relevant testimony before federal courts shows that these allegations may be overstated.⁶⁹⁷ For example, the American Civil Rights Union (ACRU) submitted an amicus (friend of the court) brief to the Supreme Court with allegations of noncitizen voting that were exaggerated.⁶⁹⁸ One of the main proponents of the theory that noncitizen voting is rampant, Kansas Secretary of State Kris Kobach, estimated that 18,000 noncitizens may be registered to vote in his state.⁶⁹⁹ On June 18, 2018, a federal court in his state found that there was “no credible evidence that a substantial number of noncitizens registered to vote.”⁷⁰⁰ A federal court of appeals had already found that during the time period at issue, 30 noncitizens registered to vote, about three per year.⁷⁰¹ “Of those . . . , there is evidence that three actually cast votes under the mistaken belief that they were entitled to vote.”⁷⁰² Kansas’ law—

⁶⁹⁴ Christopher Famighetti, Douglas Keith & Myrna Pérez, *Noncitizen Voting: The Missing Millions*, Brennan Center for Justice, THE BRENNAN CENT. FOR JUSTICE (May 15, 2017), <https://www.brennancenter.org/publication/noncitizen-voting-missing-millions>

⁶⁹⁵ See Discussion and Sources cited at notes 682-85, *supra* (discussing federal criminal penalties, risk of deportation and NVRA’s and HAVA’s requirement of attestation of citizenship under penalty of perjury).

⁶⁹⁶ *Briefing Transcript*, *supra* note 234, at 153-54 (statement by Clela Mitchell); see also *Briefing Transcript*, *supra* note 234, at 155 (statement by John Merrill).

⁶⁹⁷ When the American Civil Rights Union (ACRU) submitted a brief to the Supreme Court backing the Kansas Secretary of State in a prominent case involving documentary proof of citizenship in Kansas, its allegations of noncitizen voting were not backed by facts. Brief of the American Civil Rights Union as Amicus Curiae in Support of Petitioners at 11-12, *Kobach v. United States Election Assistance Com’n*, 2015 WL 1848103, 135 S. Ct. 2891 (2015) (No. 14-1164). ACRU submitted 13 registration forms from Texas in which noncitizens were registered, but none had attested that they were citizens. These noncitizens had either checked NO on the citizenship box, or checked both YES and NO, or left the citizenship box blank. There was no evidence that any of them had voted. On a national level, the ACRU could only point to one confirmed allegation of noncitizen voting.

⁶⁹⁸ *Id.*

⁶⁹⁹ Zachary Mueller, *Fish v. Kobach Trial— Day One*, INSTITUTE FOR RESEARCH AND EDUCATION ON HUMAN RIGHTS (Mar. 6, 2018), <https://www.irehr.org/2018/03/06/fish-v-kobach-trial-day-one/>. Notably, these were the same number of voter registration applications that were suspended for failure to provide the strict forms of documentary proof of citizenship Kansas requires to register to vote that were discussed during the preliminary injunction phase of this case, *Fish v. Kobach*, 840 F.3d 710, 754-55 (10th Cir. 2016). But failure to provide a birth certificate or naturalization papers does not correspond to noncitizenship. *Id.* at 745.

⁷⁰⁰ *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1101 (D. Kan. 2018), <https://www.aclu.org/legal-document/fish-v-kobach-findings-fact-and-conclusions-law>.

⁷⁰¹ *Fish v. Kobach*, 189 F. Supp. 3d 1107, 1137-38 (D. Kan. 2016).

⁷⁰² *Id.* (emphasis added). The court also found that:

The evidence shows that the DMV clerks currently ask applicants if they are United States citizens, and they check a box if the applicant responds affirmatively. This was the method Kansas used to assess citizenship eligibility prior to the effective date of the SAFE Act in 2013. Between January 1, 2006 (seven years before the documentary proof of citizenship law became effective), and March 23, 2016, 860,604 people registered to vote in the State of Kansas . . .

broadly restricting access to voter registration as a remedy for this relatively small problem—was therefore permanently enjoined on June 18.⁷⁰³ Secretary of State Kobach had already been held in contempt for disobeying a prior federal court order.⁷⁰⁴

Hans von Spakovsky was an expert in this case, testifying to broad allegations of noncitizens voting, but he admitted during the trial that he knew of no federal elections in which the outcome was decided by noncitizens.⁷⁰⁵ The federal court ruled that:

The Court gives little weight to Mr. von Spakovsky’s opinion and report because they are premised on several misleading and unsupported examples of noncitizen voter registration, mostly outside the State of Kansas. His myriad misleading statements, coupled with his publicly stated preordained opinions about this subject matter, convinces the Court that Mr. von Spakovsky testified as an advocate and not as an objective expert witness.⁷⁰⁶

Associate Professor Jesse Richman also testified for Kobach, estimating that 1,000-18,000 noncitizens were registered on the voting rolls; but he admitted that his estimate was based on surveys that are not peer-reviewed and have been challenged in a letter signed by 200 political scientists.⁷⁰⁷ Moreover:

In one survey, Richman and a graduate assistant flagged names on the list of suspended voters in Kansas that sounded foreign. When American Civil Liberties Union attorney Dale Ho asked if the name “Carlos Murguia” would be flagged,

This evidence supports the conclusion that *very few noncitizens in Kansas successfully registered to vote under an attestation regime*. Importantly, there is no evidence that under that regime, thousands of otherwise eligible applicants were cancelled or held in suspense for failure to establish eligibility requirements. On this record, Plaintiffs make a strong showing that the documentary proof of citizenship law cannot be justified as the minimum amount of information necessary to assess citizenship eligibility, where the rates of noncitizen voter fraud prior to the Act’s passage are at best nominal.

⁷⁰³ *Fish*, 309 F. Supp. 3d at 1119, <https://www.aclu.org/legal-document/fish-v-kobach-findings-fact-and-conclusions-law>.

⁷⁰⁴ *Fish v. Kobach*, 294 F. Supp. 3d 1154, 1156 (D. Kan. 2018) (holding Kobach in contempt of the court’s order as he continued to enforce the documentary proof of citizenship law).

⁷⁰⁵ See, e.g., Brian Lowry, *Kobach Turns to Controversial Scholar As Witness in Voting Rights Trial*, KANSAS CITY STAR (Mar. 9, 2018), <http://www.kansascity.com/news/politics-government/article204422539.html> (noting that “von Spakovsky testified that even a small number of non-citizens on voter rolls ‘could make the difference in a race that’s decided by a small number of votes,’ but during cross-examination acknowledged that he could not name a specific federal election that was decided by non-citizen votes.”).

⁷⁰⁶ *Fish*, 309 F. Supp. 3d at 1082, <https://www.aclu.org/legal-document/fish-v-kobach-findings-fact-and-conclusions-law>.

⁷⁰⁷ Associated Press, *Expert Defends Estimates of Noncitizens in Kansas*, ASSOCIATED PRESS (Mar. 13, 2018) <https://apnews.com/dcbcc68e68304db98200c568a582392d>.

Richman said yes. Ho told him Murguia is a federal judge in the courthouse where the trial is occurring.⁷⁰⁸

The federal court found this methodology to be so troubling that it needed no further explanation.⁷⁰⁹

Current Voter Registration Issues

New voter registration barriers enacted to counter the above allegations may have a disparate impact on voters of color. The uniquely U.S. requirement to register before voting can itself be an obstacle to some eligible citizens. Studies have shown that the very requirement to register to vote reduces turnout and primarily impacts the poor.⁷¹⁰ In his written statement submitted to the Commission, the Director of Elections for the State of Colorado, Judd Choate, stated that “the greatest impediment to voting is not polling place restrictions, it is voter registration.”⁷¹¹ Moreover, according to the National Association of Latino Elected Officials (NALEO):

Racial and ethnic disparities in civic participation and representation begin at registration. Nationwide, according to the 2012 Current Population Survey (CPS) Voting and Registration report, just 58.7% of adult Latino citizens were registered to vote, compared to 73.7% of whites. 2012 CPS data also showed that *6.1% of Latino non-voters and 6.7% of African American non-voters reported that registration problems were the reason why they had not voted in 2012, compared to just 5.2% of whites.*⁷¹²

All states except North Dakota require registration in order to vote, but some states make it easier than others.⁷¹³ While most states require voter registration by a deadline in advance of Election Day, 15 states and the District of Columbia have same-day registration, where voters can register

⁷⁰⁸ *Id.*

⁷⁰⁹ *Fish*, 309 F. Supp. 3d at 1093.

⁷¹⁰ *Id.* at 1054 n.4 (citing Steven J. Rosenstone & Raymond E. Wolfinger, *The Effect of Registration Laws on Voter Turnout*, 72 AM. POL. SCI. REV. 22 (Mar. 1978); see also G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17 (Mar. 1986); see also Stephen Ansolabehere & David M. Konisky, *The Introduction of Voter Registration and Its Effect on Turnout*, 14 POL. ANALYSIS 83 (Winter 2006); see also James M. Avery & Mark Peffley, *Voter Registration Requirements, Voter Turnout, and Welfare Eligibility Policy: Class Bias Matters*, 5 STATE POL. & POL’Y Q. 47 (Spring 2005)).

⁷¹¹ Jude Choate, Director of Elections, Colorado Department of State, Written Testimony for the U.S. Comm’n on Civil Rights, Feb. 2, 2018 at 2 [*hereinafter* Choate, Written Testimony].

⁷¹² NALEO Educational Fund, *Latino Voters At Risk: Assessing the Impact of Restrictive Voting Changes in Election 2016*, NALEO EDUCATIONAL FUND 10 (2016), https://d3n8a8pro7vhm.cloudfront.net/naleo/pages/233/attachments/original/1462976324/Latino_Voters_at_Risk_7.pdf (emphasis added).

⁷¹³ Nat’l. Conf. of State Legislators, *Voter Registration*, NCSL (Sept. 27, 2016) <http://www.ncsl.org/research/elections-and-campaigns/voter-registration.aspx>.

on Election Day or in some cases, during early voting.⁷¹⁴ Only a few of the states with this positive measure were formerly covered for preclearance.⁷¹⁵ Hawaii has also recently enacted same-day registration, to be implemented in 2018.⁷¹⁶ But in the remaining majority of states across the nation, states must register voters who submit a valid voter registration form either 30 days in advance of Election Day or by any less stringent state deadline.⁷¹⁷ The Commission also notes that 11 states and the District of Columbia have recently enacted Automatic Voter Registration (AVR) laws, again showing that some states are enacting positive measures to expand access to the ballot. These states are: Alaska, California, Colorado, District of Columbia, Illinois, Maryland, New Jersey, Oregon, Rhode Island, Vermont, Washington, and West Virginia.⁷¹⁸ Alaska and California are the only formerly covered states with this measure that expands access to voter registration.⁷¹⁹ (For further information on AVR, see Appendix C.)

In contrast with positive measures in some states, during the time covered by the Commission's current study, since the 2006 VRA Reauthorization and the June 2013 *Shelby County* decision, other types of changes to voter registration procedures have been adopted that generally create new barriers to the ballot. These include: (1) requiring discriminatory forms of documentary proof of citizenship in order to register to vote; (2) challenges to voter eligibility; and (3) aggressive types of voter list maintenance or purges of voters from the rolls, each of which is discussed below. Even though they are generally governed by the NVRA, these types of voter registration issue are actionable under the VRA.

Prior to *Shelby County*, changes in voter registration procedures were subject to preclearance under Section 5 of the Voting Rights Act. In 1997, in *Young v. Fordice*, the Supreme Court held that changes in voting that fell under the NVRA had to be precleared and reviewed to determine whether they would be discriminatory, before they could be enacted.⁷²⁰ Potential Section 2 issues

⁷¹⁴ States with same-day registration, including on Election Day, are: CA, CO, CT, DC, IA, ID, IA, IL, ME, MN, MT, NH, WI, WI, VT; while Maryland and North Carolina only offer SDR during Early Voting. Nat'l. Conf. of State Legislators, *Same Day Voter Registration (SDR)*, NCSL, at 4 (Oct. 12, 2017) <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

⁷¹⁵ *Id.* and *Cf.* Map of Formerly Covered Jurisdictions, Chapter 2, Figure 2, *supra* note 245.

⁷¹⁶ *Id.*

⁷¹⁷ 52 U.S.C. § 20507(a)(1)(D).

⁷¹⁸ *See, e.g.*, Nat'l. Conf. of State Legislators, *Automatic Voter Registration*, NCSL

<http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> (last accessed Aug. 2, 2018).

⁷¹⁹ *See* Map of Formerly Covered Jurisdictions, Chapter 2, Figure 2.

⁷²⁰ *Fordice*, 520 U.S. 273 at 281-82. The history of this case explains the application of the VRA to changes in voter registration procedures. When Mississippi first implemented the NVRA after its enactment in 1993, it did not properly seek preclearance, but the Supreme Court found that the state's implementation of the NVRA's new voter registration procedures were within the definition of voting changes that had to be submitted for preclearance under Section 5. *Id.* The Court also noted that the NVRA makes clear that it doesn't create a conflict with the VRA and explicitly states that it does not limit the VRA's application. *Id.* (citing NVRA provisions 42 U.S.C. § 1973gg-9(d)(2), § 1973gg-9(d)(1)) (transferred to 52 U.S.C. § 20510(d)(1)-(2)) (“[T]he NVRA does not forbid application of the VRA's requirements. To the contrary, it says “[n]othing in this subchapter [of the NVRA] authorizes or requires conduct that is prohibited by the VRA.” And it adds that “neither the rights and remedies established by this section

may also arise if changes to voter registration rules are racially discriminatory. For example, in 1987, a federal court found that Mississippi's dual registration requiring separate registration for federal and local elections had a racially discriminatory effect and violated Section 2,⁷²¹ due to the persistence of severe socioeconomic disparities for black citizens in Mississippi.⁷²² The state was also forced to end another set of dual registration procedures it had created after implementing new federal NVRA requirements to register voters at state agencies that receive federal funding. Mississippi voters who wanted to also vote in state elections would have had to fill out a separate state form,⁷²³ but this regime was never implemented because preclearance was denied under Section 5.⁷²⁴ The DOJ found that more than half the people who had registered to vote in Mississippi under the new federal NVRA rules (30,000 people) had not separately registered for state elections, with a clear disproportionate impact on black voters, "preventing them, to a greater extent than white citizens, from voting in state and local elections."⁷²⁵ Moreover, based on the

nor any other provision of this subchapter [of the NVRA] shall supersede, restrict, or limit the application of the VRA.").

⁷²¹ Among other legal challenges, a voter registration group challenged the state's dual registration requirement under Section 2 of the VRA, and prevailed in its Section 2 claim regarding illegal discriminatory effects. *Mississippi State Chapter Operation, PUSH v. Allain*, 674 F. Supp. 1260, 1268 (N.D. Miss. 1987).

⁷²² *Id.* This issue was originally addressed under Section 2 because the practice was a century old, and therefore there was no change in voting procedures that would have had to be subject to preclearance under Section 5. (Section 5 prohibits a State with a specified history of voting discrimination, such as Mississippi, from "enact[ing] or seek[ing] to administer any voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting *different from that in force or effect on November 1, 1964*," unless and until the State obtains preclearance from the United States Attorney General (Attorney General) or the United States District Court for the District of Columbia. 52 U.S.C. § 10304 (emphasis added)).

⁷²³ *Fordice*, 520 U.S. at 280.

⁷²⁴ *Id.* This was yet another change involving NVRA implementation, and the Court held that these types of subsequent changes in implementation of the NVRA requirements were also subject to preclearance. *Id.* at 284 (reasoning that: "This Court has made clear that minor, as well as major, changes require preclearance. *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-569, 89 S.Ct. 817, 832-834, 22 L.Ed.2d 1 (1969) (discussing minor changes, including a change from paper ballots to voting machines); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 175-177, 105 S.Ct. 1128, 1133-1135, 84 L.Ed.2d 124 (1985) (election date relative to filing deadline); *Perkins, supra*, at 387, 91 S. Ct. at 436 (location of polling places).); *see also* 28 C.F.R. § 51.12 (1996) (requiring preclearance of "[a]ny change affecting voting, even though it appears to be minor or indirect . . ."). This is true even where, as here, the changes are made in an effort to comply with federal law, so long as those changes reflect policy choices made by state or local officials. *Allen, supra*, at 565, n. 29, 89 S.Ct., at 831, n. 29 (requiring State to preclear changes made in an effort to comply with § 2 of the VRA, 42 U.S.C. § 1973); *McDaniel v. Sanchez*, 452 U.S. 130, 153, 101 S.Ct. 2224, 2238, 68 L.Ed.2d 724 (1981) (requiring preclearance of voting changes submitted to a federal court because the VRA "requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable"); *Lopez v. Monterey County*, 519 U.S. 9, 22, 117 S.Ct. 340, 348, 136 L.Ed.2d 273 (1996) (quoting *McDaniel* and emphasizing the need to preclear changes reflecting policy choices); *Hampton County Election Comm'n*, at 179-180, 105 S.Ct., at 1135-1136 (requiring preclearance of change in election date although change was made in an effort to comply with § 5).").

⁷²⁵ U.S. Dep't of Justice, Voting Determination Letter from Acting Assistant Attorney General Isabelle Katz Pinzler to Mississippi Special Assistant Attorney General Sandra M. Shelton (Sept. 22, 1997) <https://www.justice.gov/crt/voting-determination-letter-22>. The DOJ found that: "Thus, the State's federal-election-only implementation of the NVRA has a disproportionate impact on black citizens, preventing them, to a greater

historical record, the discriminatory impact of dual registration was “predictable,” and “the fact that the State has implemented these voting changes without preclearance for more than two and a half years *has led to the full realization of the discriminatory potential of these changes.*”⁷²⁶ In 1980, the DOJ also objected to dual registration procedures in Berrien City, Georgia, which would have required that voters register in both county and city elections, if they wanted to vote in both county and municipal elections.⁷²⁷ As will be shown below, dual registration is at issue again in several states.

This section also discusses discriminatory voter challenges, which have also been held to be actionable under Section 2 of the VRA,⁷²⁸ and discriminatory removal or purges of voters from the rolls, which are actionable under the Sections 2 and 5. Changes in voter registration list maintenance procedures were subject to preclearance under Section 5, and in 1973, in *Toney v. White*, the Fifth Circuit Court of Appeals affirmed that list maintenance procedures that disparately targeted minority voters could be enjoined under Section 2.⁷²⁹ As discussed herein, while these issues have not gone to trial again recently, Section 2 claims regarding discriminatory purges have been favorably settled in the time covered by this report.⁷³⁰

The materiality provision of the VRA is also applicable to some of the recent voter registration restrictions discussed herein. It provides that no person shall be denied the right to vote “because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.”⁷³¹ The Commission now turns to examining the main types of recent restrictions to voters getting and staying on the voter registration rolls and thereby being able to vote.

extent than white citizens, from voting in state and local elections. This has the overall impact of hampering the ability of black persons to participate in the political process.” *Id.* at 3. Moreover, there was discriminatory intent in the legislative history. *Id.*

⁷²⁶ *Id.* (emphasis added).

⁷²⁷ U.S. Dep’t of Justice, *Voting Determination Letters for Georgia* (last updated Aug. 7, 2015)

<https://www.justice.gov/crt/voting-determination-letters-georgia> [*hereinafter* DOJ, *Georgia Voting Determination Letters*].

⁷²⁸ See *Allen*, 393 U.S. at 567 (describing the broad scope of Section 2 claims, “Congress expanded the language in the final version of s 2 to include any ‘voting qualifications or prerequisite to voting, or standard, practice, or procedure’”).

⁷²⁹ 476 F.2d 203, 209 (5th Cir. 1973) (citing cases); *Cf. Ortiz v. Phila. Office of City Comm’rs Voter Registration Division*, 28 F.3d 306, 312-13 (3rd Cir. 1994) (asserting that a Section 2 violation was not established per se by discriminatory impact alone, in jurisdiction where there was insufficient evidence of historical discrimination or inability to elect candidates of choice).

⁷³⁰ See Stipulation of Dismissal as to Counts I, II, and parts of IV, *Arcia v. Detzner*, No. 1:12-CV-22282 (Sept. 12, 2012).

⁷³¹ *Fla. State Conference of N.A.A.C.P. v. Browning*, 569 F. Supp. 2d 1237, 1241 n.3 (N.D. Fl. 2007) (citing 42 U.S.C. § 1971(a)(2)(B) (transferred to 52 U.S.C. § 10101(a)(2)(B))).

Documentary Proof of Citizenship

Under these new types of state voter registration laws, documentary proof of citizenship is limited to U.S. birth certificates (including tribal certificates), passports, or naturalization or citizenship certificates. These requirements may also be met by unexpired state-issued drivers' licenses or state photo IDs from the 31 states that require the same type of underlying documentary proof of citizenship through their implementation of the federal REAL ID Act, as long as the state IDs also have the voter's current legal name and address.⁷³²

Federal courts have found that the costs associated with replacing a birth certificate can have a disparate impact on black and Latino voters.⁷³³ For example, elderly African-American citizens born in the South are less likely to have birth certificates, as under Jim Crow laws, their mothers were not permitted to give birth in hospitals.⁷³⁴ A 1950 study concluded that 94.0 percent of white births were registered nationwide, whereas only 81.5 percent of non-white births were

⁷³² See, e.g., ARIZ. REV. STAT. ANN. § 16-152(A). In Arizona, the voter registration form must contain a "statement that the applicant shall submit evidence of United States citizenship with the application and that the registrar shall reject the application if no evidence of citizenship is attached." ARIZ. REV. STAT. ANN. § 16-152(A)(23). The following documents satisfy Arizona's documentary proof of citizenship law:

- (1) The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States *if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.*
- (2) A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.
- (3) A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.
- (4) A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.
- (5) Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.
- (6) The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number. ARIZ. REV. STAT. ANN. § 16-166(F) (emphasis added); see also U.S. Dep't of Homeland Security, "REAL ID," <https://www.dhs.gov/real-id-enforcement-brief#> (last updated Jan. 25, 2018) (19 states and all 4 U.S. territories are not yet fully compliant with REAL ID).

⁷³³ See, e.g., *Veasey*, 71 F. Supp. 3d at 665 (citing testimony from witness Sammie Louise Bates, who stated at trial that she could not afford the \$42 it would have cost her to obtain a birth certificate because she needed the money to meet her family's basic living expenses).

⁷³⁴ See, e.g., *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 915 (W.D. Wis. 2016).

registered.⁷³⁵ Because of name changes, women may also have increased difficulty in showing documentary proof of citizenship that matches current records.⁷³⁶

As of 2010, Puerto Rican birth certificates have been declared invalid and are therefore not accepted as proof of citizenship in REAL ID states (or in states with voter ID laws).⁷³⁷ Because of this, a federal court in Wisconsin found that “[t]he lack of a valid birth record correlated strikingly, yet predictably, with minority status.”⁷³⁸ And in Pennsylvania, procuring replacement Puerto Rican birth certificates for persons born before 2010 was already problematic as it was associated with additional procedures and a processing fee.⁷³⁹ These same issues arise in states requiring documentary proof of citizenship to register to vote, and after Hurricane María, which devastated the island,⁷⁴⁰ it is unlikely that the Puerto Rican government will be able to provide replacement birth certificates in a timely and cost-effective manner.

⁷³⁵ S. Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4 POPULATION STUDIES: A JOURNAL OF DEMOGRAPHY 86, 98-99 (1950). “Registration completeness figures based on matched infant cards and death records were 94.0 percent for the white race and 82.0 percent for the non-white.” *Id.* at 98 n.2.

⁷³⁶ See, e.g., *McCrorry*, 182 F. Supp. 3d at 361 (internal citations omitted). The trial court discussed the difficulties of Rosanell Eaton, a 93-year-old African American woman:

Because the name on her birth certificate (Rosanell Johnson) did not match the name on her social security card, federal law prohibited the DMV from issuing her a driver’s license. Ms. Eaton testified that the DMV told her she needed to get her SSN changed. Presumably, she was actually told to get the name on her social security card changed so it matched the name she sought to use at the DMV, but here, too, the record is not clear. In any event, Ms. Eaton says the DMV refused to take further action until she made changes at the social security office. It took her ten trips (and two tanks of gas) back-and-forth between the DMV and the social security office before she got her license on January 26, 2015. Ms. Eaton is confident now that she will be able to vote using her new license.

Ms. Eaton’s testimony does not make clear why her ordeal was so involved, but it is troubling that any individual could be subjected to such a bureaucratic hassle. *Id.*

⁷³⁷ *One Wisconsin Inst.*, 198 F. Supp. 3d at 915 (“The evidence at trial demonstrated that Puerto Rico, Cook County, Illinois, and states with a history of *de jure* segregation have systematic deficiencies in their vital records systems. Voters born in those places were commonly unable to confirm their identities under the DMV’s standards. And many of the state’s Latino residents were born in Puerto Rico.”); P.R. LAWS ANN. tit. 24, § 1325; see also Government of Puerto Rico, *Puerto Rico’s New Birth Certificate Law (Law 191 of 2009—As Amended)* <http://www2.pr.gov/prgovEN/Pages/BirthCertificateInfo.aspx> (last accessed Aug. 6, 2018).

⁷³⁸ *One Wisconsin Inst.*, 198 F. Supp. 3d at 915; see also Wisconsin Dep’t of Motor Vehicles, *Acceptable Documents For Proof of Citizenship or Legal Status in the United States*, <http://wisconsin.gov/Pages/dmv/license-drivs/how-to-apply/citizen-leg-pres.aspx> (last accessed June 4, 2018) (“Wisconsin will not accept Puerto Rican birth certificates issued before July 1, 2010, in line with Puerto Rico’s law as of October 30, 2010. More information available at pr.gov.”).

⁷³⁹ See Expert Report of Dr. Matt Barreto, *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, WL 3332376 (Pa. Commw. Ct. 2012), at 26-27, <https://www.aclupa.org/files/2513/7960/9091/Barreto.pdf>.

⁷⁴⁰ See, e.g., Danica Coto, *Needs Go Unmet 6 Months After Maria Hit Puerto Rico*, ASSOCIATED PRESS (Mar. 30, 2018), https://www.apnews.com/de367742d0c440de85e4b6cb107973d4/Needs-go-unmet-6-months-after-Maria-hit-Puerto-Rico?utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP (describing inability to provide for health, education, and welfare 6 months after “[t]he storm caused an estimated \$100 billion in damage, killed dozens of people and damaged or destroyed nearly 400,000 homes, according to Puerto Rico’s government.”).

The current statutory cost for replacing a naturalization certificate is \$555.00.⁷⁴¹ The current statutory cost for procuring a citizenship certificate is \$1,170.00,⁷⁴² and for replacement, \$555.00.⁷⁴³ Naturalization certificates are issued to persons who become citizens through naturalization, and citizenship certificates may be issued to persons with “derivative citizenship” who are born abroad to a U.S. parent. In 2016, an estimated 8.8 percent of eligible voters were naturalized citizens, and their numbers are growing.⁷⁴⁴ About 32 percent of naturalized citizens are Latino, another 32 percent are Asian, and 9.8 percent are black.⁷⁴⁵

Possible Dual Registration Issues in Arizona and Kansas

Currently, in states with documentary proof of citizenship laws, documentary proof of citizenship cannot be required for the federal voter registration forms (“Federal Form”). Therefore, citizens who register to vote without documentary proof of citizenship may be legally limited to voting in only federal elections, and may not be equally entitled to exercise their right to vote for state representatives or their local school board, or in any other state or local election.⁷⁴⁶ They also sometimes have to vote on separate, federal-only ballots, whereas other citizens may vote complete or unified ballots.⁷⁴⁷ This may implicate discriminatory dual registration procedures. As discussed further below, in 2014 and 2016, Arizona and Kansas litigated and lost their attempts to have the federal Election Assistance Commission put their states’ documentary proof of citizenship requirements on the Federal Form,⁷⁴⁸ but they did not remove the requirement from their state voter registration rules, resulting in dual registration procedures.⁷⁴⁹

⁷⁴¹ U.S. Citizenship and Immigration Services, *N-565, Application for Replacement Naturalization/Citizenship Document*, USCIS, <https://www.uscis.gov/n-565> (last updated June 4, 2018).

⁷⁴² U.S. Citizenship and Immigration Services, *N-600, Application for Certificate of Citizenship*, USCIS, <https://www.uscis.gov/n-600> (last updated Apr. 11, 2018) (noting that: “This fee applies even if you are filing as an adopted child or as a child of a veteran or member of the U.S. armed forces.”).

⁷⁴³ USCIS, *N-565*, *supra* note 741.

⁷⁴⁴ Manuel Pastor, Justin Scoggins, and Magaly N. López, *Rock the (Naturalized) Vote II: The Size and Location of the Recently Naturalized Voting Age Citizen Population*, 4, U. S. CAL. DORNSIFE: CENTER FOR STUDY OF IMMIGRANT INTEGRATION (Sept. 2016), http://dornsife.usc.edu/assets/sites/731/docs/rtnv2016_report_final_v4.pdf (using Census data).

⁷⁴⁵ U.S. Census Bureau, *2010-14 American Community Survey*, CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0501&prodType=table (last accessed Aug. 7, 2018).

⁷⁴⁶ *See, e.g.*, Re: Voter Registration, Ariz. Op. Att’y Gen. No. I13-011 at *1 (Oct. 7, 2013) (stating that “registrants who used the Federal Form and did not provide sufficient evidence of citizenship are not eligible to vote for state and local races”).

⁷⁴⁷ *See Belenky v. Kobach*, No. 2013-CV-1331, 2016 WL 8293871 (D. Kan. 2016) (granting the plaintiffs’ motion for summary judgment), <https://www.aclu.org/legal-document/belenky-v-kobach-summary-judgment>.

⁷⁴⁸ *See* Discussion and Cases cited at notes 775 and 778-81, *infra*.

⁷⁴⁹ *Belenky*, 2016 WL 8293871, <https://www.aclu.org/legal-document/belenky-v-kobach-summary-judgment> (describing Kansas’ dual registration system); Ariz. Op. Att’y Gen. No. I13-011 at *1 (Oct. 7, 2013) (stating that “registrants who used the Federal Form and did not provide sufficient evidence of citizenship are not eligible to vote for state and local races”).

Arizona

Under Arizona's documentary proof of citizenship law, only limited types of documents were accepted.⁷⁵⁰ Moreover, while copies of passports and birth certificates could be submitted by mail, naturalization papers had to be the original papers, and were required to be presented in person, or they would be verified with the federal government.⁷⁵¹ Arizona submitted its documentary proof of citizenship rules for preclearance under Section 5, and in 2005, the Attorney General precleared them.⁷⁵² Arizona was immediately subject to litigation under Section 2, and a preliminary injunction was issued, but that was overturned by the Supreme Court in October 2016.⁷⁵³ The Section 2 claim was also ultimately unsuccessful on the merits.⁷⁵⁴ Therefore, although Arizona was later blocked from including documentary proof of citizenship on the Federal Form through separate litigation,⁷⁵⁵ it was allowed to keep the rules on the state form.

Arizona recently reached a settlement agreement in another case regarding the dual registration procedure that resulted from the above. In *LULAC v. Reagan*, plaintiffs alleged that the dual registration system violated the 1st and 14th Amendments, and on June 4, 2018, the parties filed a joint motion for the federal court to enter into a Consent Decree resolving the claims.⁷⁵⁶ Arizona agreed that its documentary proof of citizenship law would no longer remain in force for the state's upcoming August 2018 primary elections,⁷⁵⁷ and agreed to treat State Forms the same as Federal Forms, so any voter who submits either form without documentary proof of citizenship will still be registered to vote so long as the Motor Vehicles Department (MVD) has documentary proof of

⁷⁵⁰ Arizona's documentary proof of citizenship law was enacted as part of a package of laws targeting immigrants, such as criminalizing immigration status under state law and requiring local officials and employers to enforce federal civil immigration laws; the majority of these measures were overturned as unconstitutional due to federal preemption in *Arizona v. United States*, 567 U.S. 387, 416 (2012). The context is important to Latino citizens who may feel intimidated and fear voting when their right to vote is targeted in a state with an anti-immigrant climate. See, e.g., Ana Henderson, *Citizenship Verification, Obstacle to Voter Registration and Participation*, NEW POL. SPACES 19(1) (2012), <http://www.reimagineerpe.org/19-1/henderson> [hereinafter Henderson, *Citizenship Verification, Obstacle to Voter Registration and Participation*]; see also Advancement Project, *Segregating American Citizenship: Latino Voter Disenfranchisement in 2012*, ADVANCEMENT PROJECT 4 (Sept. 24, 2012), https://b3cdn.net/advancement/18ff5be68ab53f752b_0tm6vjgsj.pdf (discussing the impact of documentary proof of citizenship laws on Latino voters in mixed-status families and communities). The Commission discussed Arizona's anti-immigrant measures in a 2012 briefing, and the transcript is available here: http://www.usccr.gov/calendar/trnscrpt/Transcript_08-17-12.pdf.

⁷⁵¹ Henderson, *Citizenship Verification, Obstacle to Voter Registration and Participation*, *supra* note 750, at 1083.

⁷⁵² *Purcell*, 549 U.S. at 6.

⁷⁵³ *Id.*

⁷⁵⁴ *Gonzalez*, 677 F.3d at 407.

⁷⁵⁵ Arizona could not require documentary proof of citizenship on the Federal Form as such a requirement is precluded by the National Voter Registration Act. *Inter Tribal Council*, 570 U.S. at 20.

⁷⁵⁶ Joint Motion for Consent Decree at 4, *League of Latin Am. Citizens Arizona v. Reagan*, No. 2:17-CV-04102 (D. Ariz. June 4, 2018),

http://www.campaignlegalcenter.org/sites/default/files/Joint%20Motion%20for%20Entry%20of%20Consent%20Decree_0.pdf.

⁷⁵⁷ *Id.*

citizenship on file.⁷⁵⁸ Arizona made no concession that its law was unconstitutional, but noted that current technology allows the state to provide necessary safeguards against registration fraud by automatically checking MVD's database, while making it easier for citizens to register to vote, such that a documentary proof of citizenship law was no longer necessary.⁷⁵⁹ The Commission notes that the settlement effectively still requires documentary proof of citizenship in order to be registered to vote.⁷⁶⁰

The Commission's Arizona SAC heard testimony about the dual registration system and its complications at the SAC's briefing on voter access in March 2018. One county recorder testified that the dual registration system is "very complicated and confusing" and she believes "it's preventing many people, citizens in my county, from being able to participate in voting in state and local elections."⁷⁶¹

⁷⁵⁸ *Id.* at 2.

⁷⁵⁹ *Id.*

⁷⁶⁰ See, e.g., Robert Warren and Donald Kerwin, *The US Eligible-to-Naturalize Population: Detailed Social and Economic Characteristics*, 3 J. ON MIGRATION AND HUM. SECURITY 306, 312-13 (2015). Here is one Latino naturalized citizen's story, as told to NALEO and recounted in an amicus brief before the Supreme Court:

In 2004, when Arizona implemented a requirement that voters provide documentary proof of their U.S. citizenship at the time of voter registration, Jesus Gonzalez of Yuma, Arizona became a United States citizen. After his naturalization ceremony, he immediately completed a voter registration form and submitted the number of his Certificate of Naturalization to satisfy the state's new requirement. Even though the law as originally devised listed this as one of the approved methods of proving citizenship at registration, Mr. Gonzalez's application was rejected because there was no mechanism by which Arizonan authorities could verify the validity of an applicant's Certificate of Naturalization number with federal officials (and no mechanism has yet been developed for this verification). When he received notice, Mr. Gonzalez completed a second new registration application, this time providing his Arizona driver's license number, another approved method for proving citizenship. However, his application was rejected a second time. As a long-time legal permanent resident, Mr. Gonzalez had obtained his driver's license before 1996, before Arizona began tracking residents' citizenship status in DMV records; therefore, his license was not acceptable as proof of citizenship. It further came to light that in Arizona, residents with driver's licenses or state IDs who were legal immigrants, but not yet U.S. citizens, were identified in DMV records by an "F" marker, and any voter registrants who provided state ID numbers corresponding to records marked "F" would have their applications rejected. Many or most such registrants were, however—like Mr. Gonzalez—people who had naturalized but not yet renewed or otherwise updated their state ID records since becoming U.S. citizens. In Arizona, there are approximately 210,000 legal permanent residents immediately eligible for naturalization, and a majority of them are Latinos of Mexican origin. Many will become vulnerable to the same barriers that Mr. Gonzalez encountered if and when they naturalize and seek to participate in Arizona elections. Brief for Amici Curiae LatinoJustice PRLDEF, et al., in Support of Respondents, *Inter Tribal Council*, 570 U.S. at 10-11.

The above story shows that a Legal Permanent Resident who was legally entitled to receive a driver's license and later naturalized would have to provide documentary proof of citizenship before he could vote. It also shows that list maintenance to check for documentary proof of citizenship could result from the settlement.

⁷⁶¹ Arizona State Advisory Committee to the U.S. Comm'n on Civil Rights, *Briefing Transcript* at 23.

Kansas

Testimony critiquing documentary proof of citizenship also arose during the Commission's Kansas SAC briefing on voting rights in 2016.⁷⁶² The Committee heard from Kansas citizens arguing that many voters felt disenfranchised due to “(1) inconsistencies in implementation and training of the state's documentary proof of citizenship law; (2) insufficient voter education efforts; (3) the level of burden for citizens to obtain required documentation; and (4) a lack of provision for those born out of state to obtain free documentation.”⁷⁶³ The Committee ultimately determined that despite the fact that the IDs can be acquired from the state agency for free, in practice many citizens ended up paying for their documents, and they equated this payment to an unconstitutional poll tax.⁷⁶⁴ The Committee also found that eligible voters have been turned away because poll workers were unaware that the identification that was given to them was acceptable. In addition, the Committee found a lack of voter education surrounding the law and that Kansas' proof of citizenship and voter ID requirements were the “strictest in the nation.”⁷⁶⁵ Many of the panelists suggested the state's documentary proof of citizenship law may have been written “with improper, discriminatory intent.”⁷⁶⁶

Regarding the burden on eligible voters in Kansas, nationally recognized voting rights scholar Michael McDonald submitted an expert report and testified at a recent federal trial⁷⁶⁷ that from January 2013 to December 2015, approximately 35,314 registrants were suspended for failure to submit documentary proof of citizenship. After being suspended, unless they produced documentary proof of citizenship, they could not vote in state or local elections.⁷⁶⁸ McDonald found that nearly all were eligible citizens,⁷⁶⁹ representing “more than 14 percent of the 247,663 new registrants,” and that 22,814 registrants were later purged and were “*prevented from voting* due to the documentary proof of citizenship requirement.”⁷⁷⁰ Moreover, there was a disparate impact on young voters, who were three times more likely to be put on the suspended list.⁷⁷¹ Eligible voters who testified at the federal trial say they were disenfranchised by Kansas'

⁷⁶² See Appendix D for a summary of Kansas State Advisory Committee briefing.

⁷⁶³ KANSAS STATE ADVISORY COMMITTEE TO THE U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS AND THE KANSAS SECURE AND FAIR ELECTIONS ACT, 11 (Mar. 2017), <http://www.usccr.gov/pubs/KS-Voting-Rights-Report.pdf>; see also *Fish*, 309 F. Supp. 3d at 1119 (permanently enjoining the law), <https://www.aclu.org/legal-document/fish-v-kobach-findings-fact-and-conclusions-law>.

⁷⁶⁴ *Id.* at 38.

⁷⁶⁵ *Id.* at 39.

⁷⁶⁶ *Id.*

⁷⁶⁷ *Fish*, 189 F. Supp 3d 1107 at 1145 n.155.

⁷⁶⁸ Ex. 1, Expert Report of Dr. Michael P. McDonald, *Fish*, 189 F. Supp 3d 1107, at 2-3, https://www.aclukansas.org/sites/default/files/field_documents/fish_v_kobach_-_expert_report_of_dr_michael_mcdonald.pdf [*hereinafter* McDonald Expert Report].

⁷⁶⁹ *Id.*; see also Ian Vandewalker, *Analysis: The Effects of Documentary Proof of Citizenship*, THE BRENNAN CENT. FOR JUSTICE (July 19, 2017) <https://www.brennancenter.org/analysis/evidence-impact-documentary-proof-citizenship-requirements> (discussing McDonald study).

⁷⁷⁰ McDonald Expert Report, *supra* note 768 (emphasis added).

⁷⁷¹ *Id.* at 3.

documentary proof of citizenship law as they were unable to vote.⁷⁷² On June 18, 2018, a federal judge agreed that their testimony was credible and struck down Kansas’ restrictions on voter registration.⁷⁷³

Alabama

Alabama’s documentary proof of citizenship law was enacted in 2011 and submitted for preclearance in 2012, and groups like the ACLU urged the DOJ not to preclear it because it would have a “disproportionate impact on racial minorities, particularly African Americans and Latinos, in Alabama.”⁷⁷⁴ After the *Shelby County* decision, the submission was withdrawn, as Alabama was no longer subject to preclearance.⁷⁷⁵ During a briefing on Access to Voting in Alabama held on February 22, 2018 conducted by the Commission’s Alabama SAC, John Merrill confirmed that the state’s documentary proof of citizenship law is still on the books—but he testified that it is not being enforced.⁷⁷⁶ He also testified that the federal Election Assistance Commission (EAC) said that Alabama could enforce it.⁷⁷⁷

⁷⁷² Plaintiff Donna Bucci, a 59-year old who works at the Kansas Department of Corrections, testified that she sought to register to vote in 2014 when she was renewing her driver’s license. She left the motor vehicle office believing that she had registered to vote, but later received a letter saying that she needed to show a birth certificate or passport. Donna has never left the county and does not have a U.S. passport. She also did not have the money to spend on ordering a birth certificate from the state of Maryland, where she was born. See Amrit Chang, *The Trial Against Kobach Kicks Off*, MEDIUM, ACLU (Mar. 7, 2018), <https://medium.com/aclu/the-trial-against-kobach-kicks-off-heres-what-you-should-know-c70685fcf636>. Also, 90-year-old Army Air Corps veteran Marvin Brown registered to vote by submitting a complete federal form. He was later told that while he could vote in federal elections, he was prohibited from voting in state and local elections unless he showed additional documentary proof of citizenship. See Press Release, American Civil Liberties Union, *ACLU Sues Kansas Over Dual Registration System*, ACLU (July 19, 2016), <https://www.aclu.org/news/aclu-sues-kansas-over-dual-voter-registration-system>. Current lead plaintiff Steven Fish reportedly testified in federal court on March 8, 2018: “Fish attempted to register to vote in August 2014, at the DMV. Upon leaving the DMV, Fish believed he was registered to vote but was informed via mail a month later that he must provide documentary proof of citizenship in order to complete his registration. Not possessing a birth certificate or other documentation at the time, he was unable to complete his registration.” See Zachary Mueller, *Fish v. Kobach Trial—Day 2*, IREHR Institute for Research and Education on Human Rights (Mar. 7, 2018) <https://www.irehr.org/2018/03/07/fish-v-kobach-trial-day-two/>.

⁷⁷³ *Fish*, 309 F. Supp. 3d, <https://www.aclu.org/legal-document/fish-v-kobach-findings-fact-and-conclusions-law>.

⁷⁷⁴ Jon Sherman, Katie O’Connor, and Olivia Turner, *Letter from Jon Sherman and Olivia Turner, Executive Director ACLU of Alabama, to Christian Herren, Chief of Voting Section*, ACLU, 3 (May 18, 2013), <http://www.interfaithmissionservice.org/wp-content/uploads/2012/02/Section-5-Comment-Letter-re-Submission-No.-2011-537-Alabama-Proof-of-Citizenship.pdf>.

⁷⁷⁵ *Shelby Cty.*, 570 U.S. 529. Also, just after the *Shelby County* decision, Alabama enacted its voter ID law. See Sherrilyn Ifill, Written Testimony for the U.S. Comm’n on Civil Rights, Feb. 2, 2018 at 3, 6-8 [*hereinafter* Ifill, Written Testimony].

⁷⁷⁶ When asked by USCCR Alabama Advisory Chair Jenny Carroll whether Alabama’s documentary proof of citizenship law was being enforced, Secretary Merrill stated that: “We’ve not enforced that law, even though in February of 2016, the Election Assistance Commission had indicated that we could ask that question.” Merrill, Alabama SAC, Briefing, *supra* note 589, at 18.

⁷⁷⁷ *Id.* Secretary Merrill added that:

As a matter of fact, I got a call from a secretary in another state that told me before the ruling was actually made public, you need to go ahead and start implementing this. And I said, I don’t think I’ll do that. I

In a 2014 case, Alabama and Georgia filed an amicus (friend of the court) brief in support of Arizona and Kansas, seeking to have their states' documentary proof of citizenship requirements put onto the Federal Form that would be used in their states.⁷⁷⁸ The Tenth Circuit held that their request was "plainly in conflict with the Supreme Court's decision in *Inter-Tribal Council of Arizona*."⁷⁷⁹ Writing for the majority of the Court in *Inter-Tribal Council*, the late Justice Scalia took into account that the NVRA does not require documentary proof of citizenship on the Federal Form, but instead only required attestation of citizenship under penalty of perjury.⁷⁸⁰ And in 2015, the Supreme Court declined to take up the case that Alabama and Georgia had supported, so the states were not authorized to include a documentary proof of citizenship requirement for their Federal Forms at that time.⁷⁸¹

But in 2016, Alabama joined Georgia and Kansas in again requesting that the language of the Federal Form be changed to accommodate their states' documentary proof of citizenship requirements. According to the Associated Press, in February 2016:

Alabama Secretary of State John Merrill said in a statement he requested the language change, which says "an applicant may not be registered until the applicant has provided satisfactory evidence of United States citizenship." The statement said Merrill was "very excited and most enthusiastic" about the change. "The Office of the Secretary of State will begin working towards implementation now that we have received permission from the Election Assistance Commission [EAC], as well as

said, we're three weeks from our election, which was the SEC primary, that we had passed legislation in order to get to that point. And I said, I don't want to cause any confusion for anybody. We're going to continue to do what we've been doing, which is what we have been doing, and we continue to do that to this point forward. And that's where we're continuing to move at this time. *Id.* at 18.

⁷⁷⁸ *Kobach v. U.S. Election Assistance Com'n.*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied* 135 S. Ct. 2891 (2015). Brief of Amici Curiae States of Georgia and Alabama in Support of Appellees and Affirmance of the District Court's Decision, 2014 WL 3556145, at *1 (C.A.10) (Appellate Brief). The stated interests of Alabama and Georgia on July 7, 2014 were as follows:

The Georgia and Alabama legislatures, like the legislatures of Kansas, Arizona, and other states, have passed laws requiring documentary proof of citizenship from those seeking to register to vote. *See* O.C.G.A. §21-2-216(g); Ala. Code § 31-13-28(c). The Georgia and Alabama laws are materially identical to the Kansas and Arizona laws at issue in this case. Like all sovereign states, Georgia and Alabama have an interest in enforcing their duly enacted laws. Georgia, for example, has requested that the Elections Assistance Commission ("Commission" or "EAC") update the state-specific instructions attached to the Federal Form required by the National Voter Registration Act ("NVRA"), 42 U.S.C. §1973gg *et seq.*, so that those instructions accurately describe Georgia law. The Commission denied Georgia's request, after initially stating that it could not make a determination on the request because it lacked a quorum of commissioners. *Id.*

⁷⁷⁹ *Kobach*, 772 F.3d at 1188.

⁷⁸⁰ *Inter Tribal Council*, 570 U.S. at 4-5.

⁷⁸¹ *Kobach*, 135 S. Ct. 2891.

conducting outreach campaigns to let the public know when this will go into effect,” the statement said.⁷⁸²

The League of Women Voters sued, and in September 2016, a federal court preliminarily enjoined and prohibited the EAC from changing the Federal Form to put the states’ documentary proof of citizenship requirements on it.⁷⁸³ Next, EAC was ordered to make a decision on this issue according to proper federal procedures, but EAC Commissioners were split in their opinions and could not come to a decision;⁷⁸⁴ therefore, the preliminary injunction stands and documentary proof of citizenship is currently not on the Federal Form in these states.⁷⁸⁵

Commission staff verified that documentary proof of citizenship is currently not on the Alabama state voter registration form; however, persons without a state drivers’ license or state photo ID cannot register to vote online and must use a paper form instead.⁷⁸⁶ The documentary proof of citizenship law is still on the books and applies to every voter registration in Alabama except those who registered prior to September 1, 2011.⁷⁸⁷ Moreover, since the law applies to county registrars, it could be enforced during voter registration verification procedures at the county level.⁷⁸⁸

⁷⁸² Roxana Hegeman, *Official: In Alabama, Georgia, Kansas, Voters Need Citizenship Proof*, MONTGOMERY ADVERTISER (Feb. 6, 2016), <https://www.montgomeryadvertiser.com/story/news/2016/02/05/fed-official-those-alabama-georgia-kansas-need-citizenship-proof-vote/79896934/>.

⁷⁸³ *League of Women Voters of United States v. Newby*, 838 F.3d 1, 14-15 (D.C. Cir. 2016).

⁷⁸⁴ In its 2014 decision originally rejecting a similar petition from Arizona, Georgia and Kansas, the EAC considered that in enacting the NVRA, Congress had rejected requiring documentary proof of citizenship, and that in 1994, the Federal Election Commission also rejected this, finding that:

The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words “For U.S. Citizens Only” will appear in prominent type on the front cover of the national mail voter registration form. For these reasons, the final rules do not include th[e] additional requirement [that the Federal Form collect naturalization information]. 59 Fed. Reg. at 32316.

U.S. ELECTION ASSISTANCE COMM’N, Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form, Docket No. EAC 2013-0004, 21 (Jan. 17, 2014),

<https://www.eac.gov/assets/1/28/20140117%20EAC%20Final%20Decision%20on%20Proof%20of%20Citizenship%20Requests%20-%20FINAL.pdf>.

⁷⁸⁵ See, e.g., The Brennan Center for Justice, *League of Women Voters v. Newby*, THE BRENNAN CENT. FOR JUSTICE (Sept. 6, 2017), <https://www.brennancenter.org/legal-work/league-women-voters-v-newby>.

⁷⁸⁶ See Alabama Secretary of State, Online Services, Electronic Voter Registration Application, AL SOS https://www.alabamainteractive.org/sos/voter_registration/voterRegistrationWelcome.action (last accessed May 21, 2018).

⁷⁸⁷ ALA. CODE § 31-13-28(c) (2012) (“The county board of registrars shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship. Satisfactory evidence of United States citizenship shall be provided in person at the time of filing the application for registration or by including, with a mailed registration application, a photocopy of one of the documents listed as evidence of United States citizenship in subsection (k) [requiring documentary proof of citizenship or an affidavit that the applicant does not possess any of the relevant documents].”).

⁷⁸⁸ ALA. CODE § 31-13-28(c)-(j).

Georgia

Georgia passed a law requiring documentary proof of citizenship to be verified for all new registrants, which the DOJ precleared after protracted litigation in 2010.⁷⁸⁹ The law had been opposed by black and Latino voting rights groups in the state.⁷⁹⁰ Georgia's documentary proof of citizenship law requires state and county election officials to verify the eligibility of any new registrant by comparing his or her information to information in various databases; in the case of persons who have not provided documentary proof of citizenship to the DMV (because they don't have a driver's license or state photo ID, or because they procured their license before naturalization), the state or county may ask them to provide documentary proof of citizenship.⁷⁹¹ Although the state says the law is currently unenforced, in a recent settlement agreement regarding allegedly discriminatory voter registration verification procedures, the parties agreed that there was no waiver of rights to challenge the documentary proof of citizenship statute or its implementation.⁷⁹²

Tennessee

Tennessee's voter ID law, enacted in 2011, requires documentary proof of citizenship to get the types of IDs required to vote, including "free" voter ID issued by the state.⁷⁹³ In 2011, Tennessee also passed a voter verification law that essentially requires documentary proof of citizenship. The law requires that the statewide voter rolls be cross-referenced with other state and federal databases to identify potential noncitizens registered to vote. The limits and inaccuracies inherent in such data are the same as in other states discussed in depth below.⁷⁹⁴ In Tennessee, when cross references raise a question about a voter's citizenship status, county election officials must send the flagged voter a notice requiring the voter to produce proof of citizenship within 30 days or be removed from the voter rolls. Acceptable proof of citizenship includes a birth certificate, passport, naturalization papers, or other documentation accepted by the Immigration Control and Reform

⁷⁸⁹ *Georgia v. Holder*, 748 F. Supp. 2d 16 (D.D.C. 2010).

⁷⁹⁰ See, e.g., First Amended Complaint for Declaratory Judgement, *Georgia v. Holder*, 2010 WL 3481380 ¶ 23 (D.D.C. 2010).

⁷⁹¹ *Id.* at ¶¶ 50-61.

⁷⁹² Settlement Agreement, *Georgia State Conference of the NAACP v. Kemp*, No. 2:16-CV-219, at 2 (N.D. Ga. 2016), <http://www.projectvote.org/wp-content/uploads/Settlement-Agreement-NAACP-v.-Kemp-2.9.17-1.pdf> (pending stipulated settlement filing with the court).

⁷⁹³ See Discussion and Sources cited at notes 516 and 522, *supra* (and note that the law was amended to make it even stricter in 2013); see, e.g., Tennessee Dep't of Safety & Homeland Security, *Voter Photo ID*, TN.GOV <https://www.tn.gov/safety/driver-services/photoids.html> (last accessed Aug. 8, 2018) ("If you are a registered voter and do not have a government-issued photo ID, the Department of Safety and Homeland Security will provide you with a photo ID at no charge.

- Under the new voter ID law, in order to get a photo ID for voting purposes, voters must show the following documentation to a Driver Service Center examiner:
 - Proof of citizenship (such as a birth certificate); and
 - Two proofs of Tennessee residency (such as a copy of a utility bill, vehicle registration/title, or bank statement)."

⁷⁹⁴ See Discussion and Sources cited at notes 873-86 (discussing SAVE database), *infra*.

Act of 1986. As previously shown, these documents are expensive and not all U.S. citizens have them, which creates a significant barrier to voter registration with a disparate impact on minority voters.⁷⁹⁵ In addition, “[u]nlike the laws in Arizona, Kansas and Georgia [which only apply to new registrants], the Tennessee law will check citizenship of all registered voters.”⁷⁹⁶

Challenges of Voters on the Rolls

Challenges to a voter’s eligibility may be brought under various state laws by either other voters or election officials, at the polls or prior to Election Day; however, in all cases, it is election officials who make the decision about whether to remove a person from the rolls based on a challenge. A 2012 Brennan Center for Justice study on voter challengers states:

Twenty-four states allow private citizens to challenge a voter at the polls without offering any documentation to show that the voter is actually ineligible. This leaves even lawful voters vulnerable to frivolous or discriminatory challenges. Illinois, for example, currently permits any legal voter to contest another voter’s qualifications at the polls but does not require the challenger to offer any proof to substantiate his or her allegations. The challenged voter, in turn, must provide two forms of identification (or a witness known to the election judges) to establish her qualifications before she can vote. Challengers can exploit these unequal evidentiary burdens to intimidate or delay voters on Election Day.⁷⁹⁷

The 2012 national study also found that, “Of the 39 states that allow polling place challenges, only 15 states require poll challengers to provide some documentation to support their claim that the challenged voter is ineligible. Some states, like South Carolina and Virginia, even allow citizens to make poll challenges based on the mere suspicion that a voter might be unqualified.”⁷⁹⁸ As of 2012, while states like Montana and North Carolina required affirmative evidence of the voter’s alleged ineligibility for a challenge, 13 states merely required an affidavit from the challenger that he or she believes his or her challenge is valid, without any evidence whatsoever except for the challenger’s word.⁷⁹⁹ These 13 states are: Arkansas, Colorado, Florida, Indiana, Iowa, Kentucky,

⁷⁹⁵ *Id.*

⁷⁹⁶ Henderson, *Citizenship Verification, Obstacle to Voter Registration and Participation*, *supra* note 750; *see also* Tennessee Voter Identification Act, TENN. CODE ANN. § 2-7-112.

⁷⁹⁷ Nicolas Riley, *Voter Challengers*, THE BRENNAN CENT. FOR JUSTICE, 1 (2012) https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf (citing state challenge laws) [*hereinafter* Riley, *Voter Challengers*].

⁷⁹⁸ *Id.* at 16 (emphasis in original) (citing state laws).

⁷⁹⁹ *Id.* at 36 n.134. Two states—Montana and North Carolina—require the poll challenger to produce actual affirmative evidence of the voter’s ineligibility. *See* MONT. CODE ANN. § 13-13-301(1) & MONT. ADMIN. R. 44.3.2109(2) (requiring challenges to be rejected unless the challenger has proven that a voter is ineligible by a “preponderance of the evidence”); N.C. GEN. STAT. ANN. § 163A-918(b) (“No challenge shall be sustained unless the challenge is substantiated by affirmative proof. In the absence of such proof, the presumption shall be that the voter is properly registered or affiliated.”).

Maine, Maryland, Minnesota, New Hampshire, New Jersey, Nevada, and Virginia.⁸⁰⁰ Moreover, the day after the *Shelby County* decision, in HB 589, North Carolina changed its rules to permit Election Day challenges of voters who do not present photo ID.⁸⁰¹ This change was not litigated as part of *NC NAACP v. McCrory*'s claims against other provisions of HB 589, discussed in depth in Chapter 2 above; however, there is current, ongoing litigation regarding discriminatory implementation and other aspects of North Carolina's challenge laws.⁸⁰²

Moreover, a nationwide consent decree protecting voters from the discriminatory use of voter challenge practices expired in December 2017.⁸⁰³ The consent decree,⁸⁰⁴ with its prohibitions against discriminatory voter challenges and intimidating measures aimed at minority voters,⁸⁰⁵ was subsequently enforced in several states.⁸⁰⁶

⁸⁰⁰ *Id.* ("Thirteen other states require the challenger to produce an affidavit but do not require any additional proof from the poll challenger beyond his or her word that the challenge is valid. See ARK. CODE ANN. § 7-5-312(h); COLO. REV. STAT. § 1-9-202; FLA. STAT. ANN. § 101.111(1); IND. CODE ANN. § 3-11-8-21; IOWA CODE ANN. § 49.79; KY. REV. STAT. ANN. §§ 117.245(2), 117.316(2); ME. REV. STAT. ANN. tit. 21-A, § 673(1); MD. CODE, ELEC. LAW, § 10-312; MINN. STAT. ANN. § 204C.12(2); N.H. REV. STAT. ANN. § 659:27-a; N.J. STAT. ANN. § 19:15-18.2; NEV. REV. STAT. ANN. § 293.303(1); VA. CODE ANN. § 24.2-651.").

⁸⁰¹ H.R. 589, § 163-87, 2013-2014 Gen. Assemb. (N.C. 2013), <https://www.ncleg.net/Sessions/2013/Bills/House/PDF/H589v0.pdf> (challenges allowed on day of primary or election).

⁸⁰² See Discussion of *N. Carolina State Conference of the NAACP v. N. Carolina State Bd. of Elections*, No. 1:16-CV-1274, 2016 WL 6581284 (M.D.N.C. Nov. 4, 2016) *infra* notes 841-46.

⁸⁰³ *Democratic National Committee v. Republican National Committee* ("*DNC v. RNC*"), No. 2:81-CV-03876 (D.N.J. 2009) (requiring the expiration of the consent decree on Dec. 1, 2017), <https://www.brennancenter.org/page/-/Democracy/DNC%20v%20RNC%20-%20Order.pdf> at 3.

⁸⁰⁴ The consent decree originated after a complaint was filed alleging that approximately 45,000 voters were wrongfully challenged in predominantly black and Latino precincts in New Jersey in 1982; it alleged violations of the VRA and the U.S. Constitution. Complaint, *DNC v. RNC*, No. 2:81-CV-03876, ¶¶ 35-40 (D.N.J. 2009) (alleging violations of the 14th and 15th Amendments, and Sections 2 and 11(b) of the VRA).

⁸⁰⁵ The resulting consent decree settled the constitutional and VRA claims and the prohibited discriminatory voter challenges. Among other provisions, the consent decree required that both major political parties ensure that state challenge laws would be implemented in a fair and nondiscriminatory manner, and that individual poll watchers (appointed by the parties) would not harass or discriminate against voters at the polls. Settlement Stipulation and Order of Dismissal, *DNC v. RNC*, No. 2:81-CV-03876 (D.N.J. 1987), <https://www.brennancenter.org/page/-/Democracy/dnc.v.rnc/1987%20consent%20decree.pdf>; Consent Order, *DNC v. RNC*, No. 2:81-CV-03876 (D.N.J. Nov. 1, 1982), <https://www.brennancenter.org/page/-/Democracy/dnc.v.rnc/1982%20consent%20decree.pdf>. In 1987, after extensive allegations of voter caging and discriminatory challenges in several states, and "more than 50 depositions taken and thousands of documents examined," the DNC and the RNC agreed to make their agreement nationwide, and the court therefore entered a nationwide consent decree. Settlement Stipulation and Order of Dismissal, *DNC v. RNC*, No. 2:81-CV-03876 (D.N.J. 1987), <https://www.brennancenter.org/page/-/Democracy/dnc.v.rnc/1987%20consent%20decree.pdf>.

⁸⁰⁶ In 2012, the U.S. Court of Appeals for the Third Circuit noted that:

In Louisiana during the 1986 Congressional elections, the RNC allegedly created a voter challenge list by mailing letters to African-American voters and, then, including individuals whose letters were returned as undeliverable on a list of voters to challenge. A number of voters on the challenge list brought a suit against the RNC in Louisiana state court. In response to a discovery request made in that suit, the RNC produced a memorandum in which its Midwest Political Director stated to its Southern Political

A nationwide review of state challenge laws is beyond the scope of this report. Yet as discussed below, there is evidence that current conditions include discriminatory challenge provisions in several states across the nation.⁸⁰⁷ The evidence collected and analyzed below demonstrates that such challenges may be used to intimidate voters of color.⁸⁰⁸

The DOJ objected to discriminatory challenge procedures under Section 5.⁸⁰⁹ Moreover, the historical origins of challenge laws show that they were originally intended to suppress the political participation of people of color,⁸¹⁰ and that they were part of the “first-generation” restrictions to

Director that “this program will eliminate at least 60,000-80,000 folks from the rolls If it’s a close race . . . which I’m assuming it is, this could keep the black vote down considerably.” *Democratic Nat. Comm. v. Republican Nat. Comm.*, 673 F.3d 192, 197 (3d Cir. 2012).

⁸⁰⁷ See Discussion and Sources cited below, *infra* notes 821-28 (Georgia); 830-32 (New York); 835-43 (North Carolina); and 847-850 (Ohio).

⁸⁰⁸ *Id.*

⁸⁰⁹ For example, the DOJ objected to changes in challenge and voter removal procedures in Alabama in 1981 and 1984. See U.S. Dep’t of Justice, *Letter from Bradford Reynolds, Asst. Att’y Gen., Dept. of Justice Civil Rights Division, to Hon. Floyd R. Cook, Chairman Perry County Court Commission* (Sept. 25, 1981), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AL-1450.pdf> (DOJ denying proposed county purge and re-identification of voters); see also U.S. Dep’t of Justice, *Letter from Bradford Reynolds, Asst. Att’y Gen., Dept. of Justice Civil Rights Division, to Hon. F.R. Albritton Jr., Probate Judge* (Oct. 26, 1981), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AL-1480.pdf> (DOJ denying proposed county purge and re-identification of voters). The DOJ intervened under the provisions of Section 5 on behalf of a Vietnamese fishing community in Bayou Le Batre, Alabama in 2004, where for the first time, an Asian-American candidate ran for mayor. Many Asian-American citizens had their ballots challenged, and “[n]early 50 of them were forced to fill out paper ballots and have another registered voter vouch for them.” See also DeWayne Wickham, *Why Renew the Voting Rights Act: Alabama Town Provides Answer*, USA TODAY (Feb. 22, 2006) http://usatoday30.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-act_x.htm (discussing Lawyer’s Committee for Civil Rights Under Law report) [*hereinafter* Wickham, *Why Renew*]. Vouchers are prohibited under the Voting Rights Act. 52 U.S.C. § 10501 provides that:

(a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

(b) As used in this section, the term “test or device” means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

The voter challenges came from supporters of the white mayoral candidate, and they alleged that Asian-American voters were criminals, were not residents, and were not citizens. Wickham, *Why Renew*, *supra*. One challenger told the press that “we figured if they couldn’t speak good English, they possibly weren’t American citizens.” *Id.* Although there were no changes to voting rights law that required preclearance under Section 5, the discriminatory abuse of existing law prompted the DOJ to send observers. *Id.* The observers were able to prevent further challenges and ensure that these citizens could exercise their right to vote inside the polls, despite the threat of racially discriminatory challenges. *Id.*

⁸¹⁰ See Riley, *Voter Challengers*, *supra* note 797, at 7 (“These origins cast doubt on whether challenger laws were always enacted to prevent election fraud. In some states, lawmakers first empowered private citizens to challenge voters at the polls only because they believed it would be an effective way to suppress voter turnout in black, Latino, or working-class communities. The legislative record in these states indicates that challenger laws were often enacted, amended, and used not for the purpose of preventing fraud but, rather, to disenfranchise voters of color. Even in states where challenger laws were not passed with an obviously discriminatory purpose, they were still often

access to the ballot that the VRA of 1965 was enacted to prevent going forward.⁸¹¹ But due to the current lack of preclearance as well as the lack of federal observers, this problem is harder to detect in the post-*Shelby County* era.⁸¹²

The Commission also notes that because challenges are made by private citizens, they are initiated by persons not subject to the same training as poll workers.⁸¹³ Also, letters are commonly issued when voters are challenged and/or purged.⁸¹⁴ As of 2012, 16 states had laws that required challenged voters to respond to the challenge letter *before* the challenge is vetted by election officials, and in seven of those states, challenged voters are required to provide an affirmation or come to a hearing regarding these unconfirmed challenges prior to or on Election Day.⁸¹⁵ At times, challenge letters have been threatening, implying that a person could be committing a felony.⁸¹⁶ Depending on state or local law and the type of challenge, challenged voters typically have to appear at a hearing, or provide documentary proof of their eligibility in person at their local boards of elections office within a short period of time, if they want to exercise their right to vote without being arrested.⁸¹⁷ If they do not have time or do not receive the notice, they are unlikely to be able

enacted in an era when voting qualifications were closely tied to physical characteristics, like race and sex, which private citizens could easily use to identify unqualified voters at the polls.”)

⁸¹¹ See, e.g., *Shelby Cty.*, 570 U.S. at 546-47 (discussing “first-generation” barriers or “tests and devices” regarding that the VRA was passed to address).

⁸¹² *Briefing Transcript*, *supra* note 234, at 42 (statement by Peyton McCrary) (noting that that one “dramatic consequence” of the lack of federal observers inside the polls since *Shelby County* is that DOJ is no longer able “to observe ways in which voters might be unable or challenged unlawfully in exercising their right to vote[.]”).

⁸¹³ See, e.g., Riley, *Voter Challengers*, *supra* note 797, at 1 (citing state challenge laws).

⁸¹⁴ See Discussion of *Arcia v. Detzner* litigation, *infra* notes 869-81.

⁸¹⁵ See, e.g., Riley, *Voter Challengers*, *supra* note 797, at 16.

⁸¹⁶ See Letter from Kathy Dent, *Sarasota County Supervisor of Elections* (Oct. 18, 2012) (on file), stamped with the word “fraud”, and stating that:

The Sarasota County Supervisor of Elections has received information from the Florida Division of Elections regarding your citizenship status, bringing into question your eligibility as a registered voter. Per Florida law, only U.S. Citizens are allowed to register to vote. In addition, registering to vote under fraudulent conditions or swearing a false oath are both third degree felonies in Florida. (Citations to Florida law omitted.)

⁸¹⁷ See, e.g., *id.* Letters sent in Florida in 2012 stated that:

If the information from the Florida Division of Elections is Inaccurate regarding your citizenship status or if your citizenship status has recently changed, please stop by our main office with any *original* documentation that demonstrates U.S. citizenship. Do not mail these documents. You may want to call us prior to visiting our main office. Also, you may request an administrative hearing with the Supervisor of Elections to prove U.S. citizenship.

You must complete the attached Voter Eligibility Form and return it to the Supervisor of Elections within 15 days of receipt. Failure to submit this form within 15 (15) days will result in the removal of your name from the voter registration rolls and you will no longer be eligible to vote. A nonregistered voter who casts a vote in the State of Florida may be subject to arrest, imprisonment, and/or other criminal sanctions. *Id.*

to vote on Election Day. When they arrive at the polls, they are subjected to the challenge and may be unprepared. Recent examples of these types of practices in several states are summarized below.

Georgia

Prior to the *Shelby County* decision, there were no known objections under Section 5 regarding voter challenge procedures in Georgia.⁸¹⁸ The Department of Justice brought a Section 2 VRA enforcement action against Georgia regarding discriminatory challenges in which Latino voters were required to attend a hearing and prove their citizenship, which was settled by consent decree⁸¹⁹ in February 2006.⁸²⁰

At the Commission's briefing, Ezra Rosenberg testified that since the *Shelby County* decision, in 2015:

Hancock County, Georgia changed its process to initiate a series of "challenge proceedings" to voters, all but two of whom were African American that resulted in the removal of 53 voters from the register. Later that year, the Lawyers' Committee for Civil Rights Under Law, 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 VRA and the National Voter Registration Act (NVRA), and obtained a preliminary injunction, which resulted in the ordering of the wrongfully removed voters back on the register.⁸²¹

After litigation, plaintiffs and Hancock County entered into a consent decree subjecting the County to judicial monitoring of its compliance for five years. In the consent decree, defendants "strenuously deny" that the challenge practices targeted African-American voters, but they do acknowledge a conflict between the NVRA's requirements that voters may not be removed from the rolls without notice and due process, and Georgia's state laws allowing challenged voters to

⁸¹⁸ DOJ, *Georgia Voting Determination Letters*, *supra* note 727.

⁸¹⁹ Wex Legal Dictionary defines a consent decree as: "A court order to which all parties have agreed. It is often done after a settlement between the parties that is subject to approval by the court." *See* Wex Legal Dictionary, *Consent Decree*, CORNELL L. S. https://www.law.cornell.edu/wex/consent_decree (last accessed Aug. 3, 2018).

⁸²⁰ *United States v. Long Cty.*, No. 2:06-CV-00040 (S.D. Ga. 2006), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/long_cd.pdf (last accessed Aug. 3, 2018).

⁸²¹ Rosenberg, Written Testimony, *supra* note 651, at 3 (discussing Complaint, *Georgia State Conference of NAACP v. Hancock Cty. Bd. of Elections & Registration*, No. 5:15-CV-00414 (M.D. Ga. 2015) (*see* ¶ 1, challenging improper and racially biased challenges preceding the City of Sparta's municipal election of Nov. 3, 2015 as violating the VRA, the Civil Rights Act of 1964, and the U.S. Constitution, <https://lawyerscommittee.org/wp-content/uploads/2016/01/Hancock-Co-Complaint.pdf>)).

be removed immediately.⁸²² Specifically, the Hancock County Board of Elections (BOER) recognized the supremacy of federal law⁸²³ and agreed that:

Any actions taken to implement the BOER's [new, formally adopted] procedures and guidelines [for conducting voter challenges and list maintenance activities] must comply with state and federal law, including but not limited to . . . the Voting Rights Act of 1965, the National Voter Registration Act of 1993, the Civil Rights Act of 1964, and the Constitutions of the United States and the State of Georgia.⁸²⁴

The Consent Decree included numerous other provisions to ensure that challenges should be nondiscriminatory and that voters who have moved within their precinct or within the county, or who simply did not respond to a mailing, should not be removed from the rolls.⁸²⁵ Section 5 preclearance procedures could have stopped Georgia's recent challenge and voter removal procedures, if the DOJ or a federal court found that they had a retrogressive, discriminatory effect. Because the Section 2 claim was settled and the state "strenuously denied" that their practices targeted African-American voters, it is impossible to state whether the procedures were racially discriminatory or not.⁸²⁶ Still, all but two voters who were challenged in Hancock County were black,⁸²⁷ and the Consent Decree and subsequent federal court approval of attorneys' fees indicate that steps were needed to ensure compliance with federal voting rights law.⁸²⁸ Prior to the *Shelby County* decision, if these challenge procedures were not precleared, the challenged voters would have never received the challenge letters and would all have been able to vote. Of course, if the jurisdiction did have a legal reason to challenge a voter's eligibility, the NVRA and VRA provide for list maintenance and removal of ineligible voters. However, federal law requires that it should not be done without adequate civil rights protections.⁸²⁹

New York

According to the New York State Attorney General, in 2015, in Orange County, New York, thirty Chinese Americans, many of whom were college students, had their registration challenged and were removed from the voting rolls, and the state Attorney General entered into an agreement to resolve their complaint of discriminatory treatment and harassment. An individual had challenged the citizenship and residency of these voters without any basis, yet under a state challenge law that

⁸²² Consent Decree, *Georgia State Conference of NAACP v. Hancock Cty.*, No. 5:15-CV-00414 (M.D. Ga. 2017); Order on Joint Motion for Entry of Consent Order and Plaintiff's Motion for Attorneys' Fees, *Georgia State Conference of NAACP v. Hancock Cty.*, No. 5:15-CV-00414, 2018 WL 1583160 (granting joint motion for entry of consent order and approving attorneys' fees).

⁸²³ *Id.* at *1.

⁸²⁴ Consent Decree, *Georgia State Conference of NAACP*, 2018 WL 1583160 at ¶¶ 16-17.

⁸²⁵ *Id.* (passim.)

⁸²⁶ *Id.* at *1.

⁸²⁷ Order on Joint Motion, *Georgia State Conference of NAACP*, 2018 WL 1583160 at 2.

⁸²⁸ Consent Decree, *Georgia State Conference of NAACP v. Hancock Cty.*, 2018 WL 1583160S.

⁸²⁹ See Discussion and Sources cited at notes 729-31, *supra*, and notes 855, 862 and 870-71, *infra*.

requires a reason be provided.⁸³⁰ The County Board of Elections subsequently removed these U.S. citizen voters from the rolls after the Orange County Sheriff's Office incorrectly stated the students were not citizens.⁸³¹ Moreover, according to the State Attorney General,

the Board failed to provide the students with notice and opportunity for hearing, as required by New York election law. The Board also placed undue burdens on a number of the other students, advising them to bring their passports to the polls on Election Day to demonstrate their eligibility to vote, even though the law does not permit the Board to require passports as proof of identity or eligibility.⁸³²

North Carolina

Prior to the *Shelby County* decision, there were no DOJ objections regarding challenge procedures in North Carolina.⁸³³

Jay Delancy, partner and principal director of North Carolina's Voter Integrity Project, shared during the North Carolina briefing public comment period that:

In 2012, we . . . presented evidence of 147 people who voted in two or more states in the 2012 general elections. Besides a paltry three felony prosecutions, the only award election officials gave us for this groundbreaking research was to bog down on the published data. This way nobody could ever embarrass them again.

On another occasion we challenged more than five hundred Wake County voters who were disqualified from jury duty after telling the Court they were not Wake County citizens. The only vote we got from election officials was to deny our evidence and deny our challenges. This was after the DMV had confirmed the

⁸³⁰ Press Release, *N.Y. State Att'y. General, A.G. Schneiderman Secures Agreement With Orange County Board Of Elections To Ensure Equal Access To The Ballot Box For Minority And Student Voters* (Oct. 29, 2015), <https://ag.ny.gov/press-release/ag-schneiderman-secures-agreement-orange-county-board-elections-ensure-equal-access>.

⁸³¹ *Id.*

⁸³² *Id.* Han Ye, one of the impacted students, stated that:

I am a twenty-one year old college student. This was my first time voting in an election. I was shocked and confused when my voter registration was challenged, because I am an American citizen. Like some of the other students whose voter registrations were challenged, my family came to America to escape discrimination and persecution in China. Some of our family and friends were put in jail or killed because they practiced the Falun Dafa religion. I did not expect to see discrimination like this in America. The whole experience was really hurtful. I am relieved that the Office of the Attorney General is working on this and that the voter challenges are resolved. I do not want this to happen again to anyone like me who just wants to vote. *Id.*

⁸³³ See U.S. Dep't of Justice, *Voting Determination Letters for North Carolina*, <https://www.justice.gov/crt/voting-determination-letters-north-carolina> (last updated Aug. 7, 2015).

accuracy from our cases. The courts reinvented new rules to prevent our further research in this area.⁸³⁴

At the briefing, Al McSurely commented during the public comment period that the allegations made by Delancy were false and that they had been challenged in a lawsuit alleging violations of Section 2 of the VRA.⁸³⁵ Notwithstanding Delancy's charge that North Carolina county officials were nonresponsive to such challenges, the lawsuit's records reflect that in Beaufort County, one individual challenged 138 registered voters, of whom 59 were active voters; this challenge resulted in 63 voters being purged from the rolls, including an elderly man who had moved to a nursing home and a 100-year-old woman who does not have a mailbox at her house.⁸³⁶ Similarly, the lawsuit records show that in Moore County, North Carolina, an individual challenged about 400 registered voters, and in Cumberland County, "one individual challenged the voter registration of approximately 4,000 voters after mailings by this private individual were returned undeliverable."⁸³⁷

Under North Carolina law, any registered voter of a county may make challenges within 25 days of a primary, general, or special election.⁸³⁸ Moreover, under North Carolina law: "The presentation of a letter mailed by returnable first-class mail to the voter at the address listed on the voter registration card and returned because the person does not live at the address shall constitute prima facie evidence that the person no longer resides in the precinct."⁸³⁹ North Carolina challenge law provides that every voter who is challenged must attend a hearing, or the voter will be removed from the voting rolls.⁸⁴⁰

In 2016, the North Carolina NAACP brought a Section 2 VRA suit in federal court regarding these very challenge procedures, after the Voter Integrity Project and private individuals sent mail correspondence to voters, asking them to verify their address.⁸⁴¹ The NAACP sued the State Board of Elections on behalf of voters who did not return the postcard verifying their address, who had been purged from the voting rolls after these private parties had sought their removal, and election officials felt they were legally obliged to remove them.⁸⁴²

⁸³⁴ *Briefing Transcript*, *supra* note 234, at 267-68 (statement by Jay Delancy).

⁸³⁵ *Briefing Transcript*, *supra* note 234, at 318-19 (statement by Al McSurely).

⁸³⁶ *N. Carolina State Conference of the NAACP v. N. Carolina State Bd. of Elections*, 106 U.S. Dist. LEXIS 153249, No. 1:16-CV-1274 (M.D.N.C. 2016) at 3-4.

⁸³⁷ *Id.* at 4-5.

⁸³⁸ N.C. GEN. STAT. § 163A-911(a).

⁸³⁹ N.C. GEN. STAT. § 163A-911(e).

⁸⁴⁰ N.C. GEN. STAT. § 163A-911(d) ("When a challenge is made, the county board of election shall schedule a preliminary hearing on the challenge, and shall take such testimony under oath and receive such other evidence proffered by the challenger as may be offered. The burden of proof shall be on the challenger, and if no testimony is presented, the board shall dismiss the challenge. If the challenger presents evidence and if the board finds that probable cause exists that the person challenged is not qualified to vote, then the board shall schedule a hearing on the challenge.").

⁸⁴¹ *N. Carolina State Conference of the NAACP*, No. 1:16-CV-1274 at 1-3; *see also* N.C. GEN. STAT. § 163A-911.

⁸⁴² *N. Carolina State Conference of the NAACP*, No. 1:16-CV-1274 at 1-3.

Just four days before the November 2016 presidential election, the North Carolina NAACP won a preliminary injunction against the State Board of Elections to stop their removals of voters based on the above-described challenged procedures.⁸⁴³ *Associated Press* reported that presiding Judge Loretta Biggs commented that, “This sounds like something that was put together in 1901.”⁸⁴⁴ North Carolina county boards of election since argued for a motion to dismiss the claims based on lack of standing, which was denied in September 2017, and a hearing on the merits regarding whether the challenge practices violated Section 2 of the VRA, the 14th Amendment, and the list maintenance rules of the NVRA, is currently pending.⁸⁴⁵

During the public comment period of the briefing in North Carolina, the Commission heard from NAACP branch president Olinda Watkins, who spoke about the intimidation the black community has felt from voter challenges over the years, and spoke of the story of one plaintiff, 100-year-old Grace Bail Hardison; Watkins said that “I will share just one voter suppression story out of the many.”⁸⁴⁶

Ohio

In 2012, in Ohio, Teresa Sharp, an African-American homemaker who has voted for over 30 years, received a letter stating, “You are hereby notified that your right to vote has been challenged by a qualified elector under RC 3503.243505.19.”⁸⁴⁷ Her husband, children, and elderly aunt, who all reside at the same address, received similar letters from the Hamilton County Board of Elections—the letters were prompted by the Ohio Integrity Project, an affiliate of True the Vote.⁸⁴⁸ True the Vote’s founder, Catherine Engelbrecht, reportedly “conceded that the group’s software program flags addresses with a high number of registered voters. When asked if the system was biased against people who live in multi-generational homes, she said, ‘That’s the way we segment data just because it is an all-volunteer group that has only limited time.’”⁸⁴⁹

Census data analyzed by the PEW Research Center show that relatively more people of color live in multi-generational households:

⁸⁴³ *Id.* at 9-18 (preliminary injunction was issued on November 4, 2016, based on the likelihood that the State Elections Board practices violated the NVRA’s prohibitions against systemic removal of voters within 90 days of any federal election, as well as its requirements that before removing any voter, they must be provided with adequate notice and an opportunity to respond, and that they may not be permanently removed until two federal election cycles have passed.).

⁸⁴⁴ Martha Waggoner and Jonathan Drew, *Judge: North Carolina voter challenge process seems ‘insane,’* ASSOCIATED PRESS (Nov. 2, 2016), <https://apnews.com/dcb7fbc3538547559c1c9a5cd6586b11>.

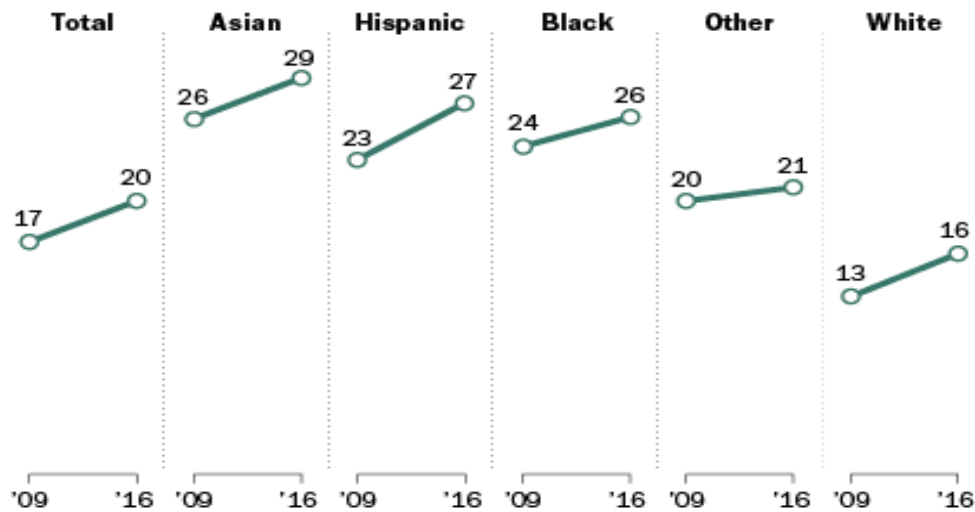
⁸⁴⁵ *N. Carolina State Conference of NAACP v. N. Carolina State Bd. of Elections*, 283 F. Supp. 3d 393, 403 (M.D.N.C. 2017).

⁸⁴⁶ *Briefing Transcript, supra* note 234, at 294-95 (statement by Olinda Watkins).

⁸⁴⁷ Dan Harris and Melia Patria, *Is True the Vote Intimidating Minority Voters From Going to the Polls?*, ABC NEWS (Nov. 2, 2012), <https://abcnews.go.com/Politics/true-vote-intimidating-minority-voters-polls/story?id=17618823>.

⁸⁴⁸ *Id.*

⁸⁴⁹ *Id.*

Figure 7: Multigenerational Households by Race, 2009-2016⁸⁵⁰**Whites less likely than other racial and ethnic groups to live in multigenerational households***% of population in multigenerational households*

Note: Multigenerational households include at least two adult generations or grandparents and grandchildren younger than 25. Hispanics are of any race. Asians include Pacific Islanders. Whites, blacks and Asians are single-race only and include only non-Hispanics. "Other" includes non-Hispanics in remaining single-race groups or multiracial groups.

Source: Pew Research Center (analysis of the 2009 and 2016 American Community Surveys).

Purges of Voters From the Rolls

Due to allegations of ineligible voters being on the voting rolls, voter list maintenance⁸⁵¹ has been the subject of heightened debate in recent years. This section will examine removal procedures or “purges” of voters from the rolls that have a negative impact on minority voters in the current era. In August 2016, News21 conducted an analysis of voter “lists of nearly 50 million registered voters from a dozen states, and 7 million more who were removed over the last year,” and found no pattern of discriminatory impact on a national level.⁸⁵² However, the nature of purges in certain

⁸⁵⁰ D’Vera Cohn & Jeffrey S. Passel, *A Record 64 Million American Lives in Multigenerational Households*, PEW RESEARCH CENTER (Apr. 5, 2018), <http://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/> (last accessed May 25, 2018).

⁸⁵¹ List maintenance is the general practice of removing registered voters from the voter rolls for known, alleged, or suspected ineligibility. 52 U.S.C. § 20507.

⁸⁵² Sean Holstege, *America Scrubs Millions From the Rolls. Is It Fair?*, NEWS21 (Aug. 20, 2016) <http://votingwars.news21.com/america-scrubs-millions-from-the-voter-rolls-is-it-fair/>.

states discussed below shows that discriminatory purges may occur on the local level.⁸⁵³ The Commission examined recent voter purges in Florida, Georgia, North Carolina, Ohio, and Pennsylvania, and threats of using inaccurate data about citizenship that disparately targets voters of color in Arkansas, Colorado, and Iowa. The Commission also notes that Kansas and the 26 other states that are party to its “Crosscheck” system, which was described and examined in detail above, risk discriminatory purging of eligible voters from the rolls.⁸⁵⁴

The cases and types of voter purges discussed herein may negatively impact the ability of minority voters to participate in the political process, implicating Section 2 and Section 5 issues, as well as the materiality provision of the VRA.⁸⁵⁵

Purging Based on Alleged Voter Ineligibility (Florida)

From 2000-2012, Florida was repeatedly charged with allegations that it engaged in systemic purges impacting voters of color. This is a subject that the Commission examined in the 2000 report *Voting Irregularities in Florida During the 2000 Presidential Election*,⁸⁵⁶ which after careful examination of purges of voters in Florida found that both the method of the purge and its outcome directly and negatively impacted black voters. Moreover, the Commission found credible evidence that “the human consequences” of Florida’s 2000 voter purge program, which was based on inaccurate data about alleged felony convictions, were severe and disparately impacted black voters.⁸⁵⁷

⁸⁵³ *Id.* (noting that the “data did show that purges disproportionately affected minority or low-income voters in certain communities, and white voters in others.”).

⁸⁵⁴ See Discussion and Sources cited at notes 648-59, *supra* (including data regarding discriminatory impacts).

⁸⁵⁵ *Browning*, 569 F. Supp. 2d at 1241 n.3 (citing 42 U.S.C. § 1971(a)(2)(B)) (transferred to 52 U.S.C. § 10101(a)(2)(B)).

⁸⁵⁶ U.S. COMM’N ON CIVIL RIGHTS, (2001) VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION: CH. 5 THE REALITY OF LIST MAINTENANCE, <http://www.usccr.gov/pubs/vote2000/report/ch5.htm> (last accessed Aug. 7, 2018).

⁸⁵⁷ *Id.* In addition:

Professor Darryl Paulson testified that the Hillsborough County supervisor of elections estimated that 15 percent of those purged were purged in error and they were disproportionately African American. According to Professor Paulson, another source estimated that 7,000 voters, mostly African Americans and registered Democrats, were removed from the list.

According to news reports, even those who had received a full pardon for their offenses were listed on DBT’s exclusion list.

Reverend Willie Dixon, a Tampa resident, received a full pardon for drug offenses in 1985, and has since become a youth leader, a bible preacher, and a “pillar of the Tampa African American community who has voted in every presidential election.” But despite his 15 years of voting status, Pam Iorio, the supervisor of elections for Hillsborough County, sent Reverend Dixon a letter informing him that he had been removed from the rolls because of a prior conviction. Eventually, Reverend Dixon was able to verify his status as a registered voter.

The Commission also found that most voters who were removed were in fact eligible, that “countless” Floridians were denied their right to vote, and that “disenfranchisement of Florida voters fell most harshly on the shoulders of African Americans.”⁸⁵⁸ In the next presidential election cycle, in 2004, Florida conducted an extremely similar purge targeting persons with felony convictions with a reported discriminatory impact on black voters.⁸⁵⁹

In 2007, Florida passed a new law requiring that a voter registration applicant’s driver’s license or Social Security Number be verified with an exact match to the voter’s name, before the voter could be registered. Implementation of this new law, challengers of the law alleged, that its implementation resulted in more than 11,000 citizens whose registration was kept from the rolls in 2008, with “a substantial differential impact on minority citizens.”⁸⁶⁰ A Complaint also alleged that under the exact match system:

A citizen registering as “Bill” might not “match” if his Social Security number is issued under “William.” A woman’s married name might not match against a database where she is listed under her maiden name. Haitian-American and other Latino citizens who use compound names like “Jean-Robert Martin” or “Gabriel García Márquez” may find themselves with part of their first or last name listed as a middle name and unable to be matched.⁸⁶¹

Media accounts also captured the impact of list maintenance activities and the frustration they caused for Florida voters.

Wallace McDonald, in 1959, was convicted of a misdemeanor, vagrancy, for falling asleep on a bench in Tampa while he waited for a bus. In 2000, Mr. McDonald received a letter from Ms. Iorio informing him that as an ex-felon, his name had been removed from the rolls. Despite the efforts of his attorney to correct the problem, Mr. Wallace was not allowed to vote. Mr. McDonald stated:
I could not believe it, after voting all these years since the 50s, without a problem . . . I knew something was unfair about that. To be able to vote all your life then to have somebody reach in a bag and take some technicality that you can’t vote. Why now? Something’s wrong. *Id.*

⁸⁵⁸ U.S. COMM’N ON CIVIL RIGHTS, (2001) VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION: CH. 9 FINDINGS AND RECOMMENDATIONS, <http://www.usccr.gov/pubs/vote2000/report/ch9.htm> (last accessed Aug. 7, 2018).

⁸⁵⁹ Ford Fessedon, *Florida List for Purge of Voters Proves Flawed*, N.Y. TIMES (July 10, 2004), <http://www.nytimes.com/2004/07/10/us/florida-list-for-purge-of-voters-proves-flawed.html>. In 2004:

Of nearly 48,000 Florida residents on the felon list, only 61 are Hispanic. By contrast, more than 22,000 are African-American. About 8 percent of Florida voters describe themselves as Hispanic, and about 11 percent as black. In a presidential-election battleground state that decided the 2000 race by giving George W. Bush a margin of only 537 votes, the effect could be significant: black voters are overwhelmingly Democratic, while Hispanics in Florida tend to vote Republican[.]

A spokeswoman for the Florida Department of Law Enforcement, Kristen Perezluha, said the felon database used F.B.I. criteria for judging race and so never listed Hispanic. *Id.*

⁸⁶⁰ The Brennan Center for Justice, *Florida NAACP v. Browning*, THE BRENNAN CENT. FOR JUSTICE (Oct. 23, 2008), <https://www.brennancenter.org/legal-work/florida-naACP-v-browning> [*hereinafter* Brennan Cent., *Florida NAACP*].

⁸⁶¹ *Id.*

In December 2007, a federal district court issued a preliminary injunction under the 1st and 14th Amendments of the U.S. Constitution, as well as HAVA, NVRA, and the materiality provision of the VRA, under which no person shall be denied the right to vote “because of an error or omission on any record or paper relating to any application . . . not material in determining whether such individual is qualified under State law to vote in such election.”⁸⁶² The court granted the state’s motion to dismiss the Section 2 claim,⁸⁶³ and over 14,000 otherwise eligible citizens were put back on the rolls prior to the presidential primary, while the Eleventh Circuit Court of Appeals then reversed the lower court’s preliminary injunction in April 2008.⁸⁶⁴ The law was later amended, and based on the more accessible new procedures, the parties dismissed the case.⁸⁶⁵

In 2012, Florida attempted to purge thousands of voters of color—the majority of whom were Latino—based on inaccurate allegations that they were not citizens. The state initially created a list of 182,000 alleged noncitizens by comparing the voting rolls to drivers’ license databases, which is an extremely faulty method as drivers’ license databases do not reflect citizenship, then cut it back to approximately 2,600.⁸⁶⁶ Litigation in the case of *Mi Familia Vota v. Detzner* showed that this change in voting procedures should have been submitted for preclearance as a statewide change impacting formerly covered counties in Florida under Section 5.⁸⁶⁷ The court rejected a motion to dismiss, explaining that Florida’s use of the database to discover noncitizens was “done in connection with its efforts to maintain voter registration rolls;” however, the case was dismissed a year later, after *Shelby County* suspended preclearance.⁸⁶⁸

The great majority of voters on Florida’s 2012 purge list were people of color. The data in a federal complaint alleging Section 2 violations (based on Florida voter registration data) showed that 87 percent were voters of color: 61 percent were Hispanic (whereas 14 percent of all registered voters in Florida were Hispanic); 16 percent were black (whereas 14 percent of all registered voters were

⁸⁶² *Browning*, 569 F. Supp. 2d 1237 at 1241 n.3 (citing 42 U.S.C. § 1971(a)(2)(B)) (transferred to 52 U.S.C. § 10101(a)(2)(B)).

⁸⁶³ See *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008).

⁸⁶⁴ *Id.*

⁸⁶⁵ Brennan Cent., *Florida NAACP*, *supra* note 860 (discussing amendment and dismissal).

⁸⁶⁶ See Answer at 20, *United States v. Florida*, No. 4:12-CV-00285 (N.D. Fla. July 3, 2012); Answer at 24, 43, *Arcia v. Detzner*, No. 1:12-CV-22282 (S.D. Fla. July 12, 2012). Florida developed a list of more than 180,000 potential noncitizen voters by comparing data from its motor vehicle agency with the state voter file. As acknowledged by the state, many individuals who presented legal immigration documents in the past (*e.g.*, when first obtaining a driver’s license) may have since become citizens and are thus properly registered to vote. Florida then went ahead and sent an initial 2,600 voters from its purge list to county Supervisors of Elections with instructions on how to investigate and remove them from the rolls within a short period of time. Evidence quickly showed that the methods used by state officials were flawed and some county supervisors from both political parties refused to implement the purge.

⁸⁶⁷ *Mi Familia Vota Educ. Fund v. Detzner*, 891 F. Supp. 2d 1326, 1332-34 (M.D. Fla. 2012), <https://www.clearinghouse.net/chDocs/public/VR-FL-0168-0008.pdf>; see also *Allen*, 393 U.S. at 565, 567 (1969) (recognizing that Congress intended to give the VRA the “broadest possible scope” and that Section 5 reaches “subtle, as well as obvious” state laws that have the effect of or intent to disenfranchise minority voters); *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 501 (1992) (reaffirming *Allen* and stating that “all changes in voting must be precleared” and that the “sphere” of Section 5 includes “all changes to rules governing voting”).

⁸⁶⁸ *Detzner*, 891 F. Supp. 2d at 1333.

black); 16 percent were white (whereas 70 percent of registered voters were white); and 5 percent were Asian American (whereas only 2 percent of registered voters were Asian).⁸⁶⁹ Shortly after the complaint alleging violations of Section 2 of the VRA was filed, the state settled the Section 2 claim and stipulated to the settlement before a federal court.⁸⁷⁰ Florida also stopped this method of purge before Election Day, but it went on to try a different method prior to November, and plaintiffs went on to successfully litigate further claims under the NVRA.⁸⁷¹

As alleged by the plaintiffs in their pleadings, Karla Vanessa Arcia and Melande Antoine, U.S. citizens originally from Nicaragua and Haiti, were among those erroneously placed on Florida's purge list, having already taken the oath of citizenship and completed all legal requirements to become naturalized citizens. Others like Bill Internicola, a 91-year-old World War II veteran born in Brooklyn, N.Y., and a number of Puerto Ricans living in Florida, also found themselves on the state's flawed purge list. They received letters saying they had to prove their citizenship within 30 days or they could not vote.⁸⁷² Arcia and Antoine became plaintiffs and despite the state's next steps, continued to appeal to the Eleventh Circuit, which eventually ruled in their favor in the case of *Arcia v. Detzner* in 2014.

In the meantime, prior to November, Florida changed its method of purging, by beginning to run the list of alleged noncitizens through the Department of Homeland Security's (DHS) Systematic Alien Verification for Entitlements (SAVE) database.⁸⁷³ Plaintiffs filed an amended complaint, but even as the case became more complex because of standing issues, Arcia and Antoine were able to prove that they were continually subject to harm.⁸⁷⁴ This is in part because SAVE is not a comprehensive list of U.S. citizens.⁸⁷⁵ It is not updated to include all naturalized citizens, and it does not include derivative citizens born to U.S. parents outside the country. In fact, there is no list of U.S. citizens.⁸⁷⁶ In July 2012, 13 states, led by Colorado, petitioned the DHS for access to

⁸⁶⁹ Complaint, *Arcia v. Detzner*, No. 1:12-CV-22282, ¶ 26 at 10 (S.D. Fla. 2012), http://moritzlaw.osu.edu/electionlaw/litigation/documents/VoterPurgeComplaint_000.pdf.

⁸⁷⁰ See Stipulation of Dismissal as to Counts I, II and parts of IV, *Arcia v. Detzner*, No. 1:12-CV-22282 (Sept. 12, 2012), http://latinojustice.org/briefing_room/press_releases/Florida_Agreement_091212.pdf ("Plaintiffs will dismiss all of their claims in the Litigation other than the claim under section 8(c)(2)(A) of the NVRA").

⁸⁷¹ *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014).

⁸⁷² Complaint, *Detzner*, No. 1:12-CV-22282 at ¶¶ 4-5, 39; see also Greg Allen, *World War II Vet Caught Up In Florida's Voter Purge Controversy*, NPR (May 31, 2012), <https://www.npr.org/sections/itsallpolitics/2012/05/31/154020289/world-war-ii-vet-caught-up-in-floridas-voter-purge-controversy>.

⁸⁷³ *Arcia*, 772 F.3d at 1339.

⁸⁷⁴ *Id.* at 1341.

⁸⁷⁵ U.S. Dep't of Justice, Letter from Thomas E. Perez, Assist. Att'y Gen., U.S. Dep't of Justice, to Hon. Ken Detzner, Florida Secretary of State (June 11, 2012), <https://assets.documentcloud.org/documents/805150/us-dep-of-justice-save-letter-1.pdf>.

⁸⁷⁶ See John Suthers, Letter from John W. Suthers, Att'y Gen. for the State of Colorado, to Hon. Janet Napolitano, Secretary of U.S. Dep't of Homeland Security, at 3 (July 5, 2012), <https://www.sos.state.co.us/pubs/newsRoom/issueFiles/2012/20120705MemoDHS.pdf>.

SAVE to identify possible noncitizens to purge from voter rolls.⁸⁷⁷ But by 2016, many states dropped their agreements, and while election officials in Florida, Colorado, Georgia, North Carolina, Virginia, and several Arizona counties still have agreements with DHS to use SAVE, they are not necessarily active users.⁸⁷⁸ This may be because in Florida, the Eleventh Circuit found that:

*Because Ms. Arcia and Ms. Antoine were naturalized U.S. citizens from Nicaragua and Haiti respectively, there was a realistic probability that they would be misidentified due to unintentional mistakes in the Secretary’s data-matching process[.] . . . based on the potential errors that could occur when the Secretary attempted to confirm their immigration status in various state and federal databases[.]*⁸⁷⁹

The court of appeals also concluded that Florida had violated the NVRA’s prohibition against systemic voter list maintenance conducted in the 90 days before any federal election.⁸⁸⁰ It determined that the NVRA prohibits purging in this window because voters would not have time to correct errors, and “that is when the risk of disenfranchising eligible voters is the greatest.”⁸⁸¹ This would have also been subject to preclearance prior to *Shelby County*.⁸⁸²

This case was discussed by panelists at the February 2, 2018 briefing. John Park criticized the DOJ because its litigation allegedly stopped the state from purging alleged noncitizens from the voting rolls.⁸⁸³ But referencing the *Arcia* case brought by Advancement Project and Latino Justice PRLDEF on behalf of black and Latino voters in Florida, Dale Ho responded that the Florida purge “actually represents a cautionary tale about inaccurate and overzealous purging,”⁸⁸⁴ and described the disparate impact of these types of purges on naturalized citizens, most of whom are people of color.⁸⁸⁵ However, PILF recently sent letters to 248 jurisdictions across the United States alleging noncompliance with the NVRA’s list maintenance requirements and threatening litigation; the letters also requested information about “any records indicating the use of citizenship or

⁸⁷⁷ Scott Gessler, Letter from Scott Gessler, Colorado Secretary of State, to Janet Napolitano, Secretary of U.S. Dep’t of Homeland Security (July 9, 2012), <http://www.scribd.com/doc/99815699/SOS-Sec-NapolitanoLtr-7-9-12-FINAL>.

⁸⁷⁸ See U.S. Citizenship and Immigration Services, *SAVE Agency Search Tool*, USCIS, https://www.uscis.gov/save/save-agency-search-tool?topic_id=&agency_zip_code=&benefit_category%5B%5D=17&items_per_page=50, (listing current SAVE users for Voter Registration); see also Amy Sherman, *Trump’s Commission Vice Chair Kris Kobach Says Immigration Data Not Bounced Against Aoter Rolls*, POLITIFACT: FLORIDA (May 23, 2017), <http://www.politifact.com/florida/statements/2017/may/23/kris-kobach/trumps-election-commission-chair-kris-kobach-says/>.

⁸⁷⁹ *Arcia*, 772 F.3d at 1341 (emphasis added).

⁸⁸⁰ *Id.* at 1346.

⁸⁸¹ *Id.*

⁸⁸² See, e.g., *Fordice*, 520 U.S. 273.

⁸⁸³ *Briefing Transcript*, *supra* note 234, at 203 (statement by John Park).

⁸⁸⁴ *Briefing Transcript*, *supra* note 234, at 213-315 (statement by Dale Ho).

⁸⁸⁵ *Id.* at 171.

immigration status for list maintenance activities, including but not limited to the Systematic Alien Verification for Entitlements (SAVE) Program database.”⁸⁸⁶

Purging for Minor Discrepancies (Georgia)

The DOJ objected to several changes in voter registration rules in Georgia during the time period covered by this report.⁸⁸⁷ In 2009, then-Acting Assistant Attorney General Loretta Lynch objected to Georgia’s voter verification system, and notified the state that:

We have considered the accuracy of the state’s verification process. Our analysis shows that the state’s process does not produce accurate and reliable information, and that thousands of citizens who are in fact eligible to vote under Georgia law have been flagged . . . Perhaps the most telling statistic concerns the effect of the verification process on native-born citizens. Of those persons erroneously identified as non-citizens, 14.9 percent, more than 1 in 7, established eligibility with a birth certificate, showing they were born in this country. Another 45.7 percent provided

⁸⁸⁶ See PILF, *Sample NVRA Violation*, *supra* note 633, at 2.

⁸⁸⁷ See Robert A. Kengle, *Voting Rights in Georgia: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 367, 375 (2008), Table 1: Section 5 Objections by Type, 1982—2006. The various types of voting changes that were subject to objections, or that were withdrawn or continued (rather than being precleared) are set forth in the table below:

	Objections	Withdrawn	Continued
Method of Election	32	1	6
Redistricting	26	2	1
State Judicial	6	2	1
Annexation	5	2	1
Districting	4	0	1
Election Schedule	4	0	0
Candidate Qualification	3	0	1
Voter Registration	3	0	0
Consolidation	2	0	0
Polling Place	2	0	0
Referendum Procedures	2	0	0
Elected to Appointive	1	0	1
Deannexation	1	0	0
Total	91	7	12

⁸⁸⁷ U.S. Dep’t of Justice, Letter from Loretta King, Asst. Att’y Gen., U.S. Dep’t of Justice Civil Rights Division, to Hon. Thurbert E. Baker, Attorney General of Georgia, at 1-4 (May 29, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090529.pdf (emphasis added).

proof that they were naturalized citizens, suggesting that the driver's license database is not current for recently naturalized citizens. *The impact of these errors falls disproportionately on minority voters . . . Applicants [for voter registration] who are Hispanic, Asian or African American are more likely than white applicants, to statistically significant degrees, to be flagged for additional scrutiny.*⁸⁸⁸

Two cases were recently brought in Georgia challenging county voter list maintenance procedures under Section 2 of the VRA; these cases also included claims under the NVRA. The first is the Hancock County challenger case discussed above, which resulted in systemic removal of voters, virtually all of whom were African American. Hancock County entered into a court-ordered consent decree that includes protections against discriminatory list maintenance procedures going forward.⁸⁸⁹

The second case was brought in September 2016 against the Secretary of State's implementation of Georgia's "exact match" process, and the complaint alleged the process resulted in the cancellation of tens of thousands of voter registration applications and disparately impacted black, Latino, and Asian-American voters.⁸⁹⁰ The Georgia NAACP, Asian Americans Advancing Justice, and the Georgia Coalition for the Peoples' Agenda's allegations of violations of Section 2 of the VRA and the 1st and 14th Amendment of the U.S. Constitution were not settled until after the 2016 presidential election, on February 8, 2017.⁸⁹¹

According to the allegations in plaintiff's complaint, Georgia's match process was implemented through comparing the names on voter registration applications against drivers' license and social security databases.⁸⁹² All of the letters and numbers of the applicant's name, date of birth, driver's license number, and last four digits of the Social Security number had to match the same letters

⁸⁸⁸ *Id.*

⁸⁸⁹ See Consent Decree, *Georgia State Conference of NAACP*, 2018 WL 1583160.

⁸⁹⁰ Complaint for Injunctive and Declaratory Relief, *Georgia State Conference of the NAACP v. Kemp*, No. 2:16-CV-219, 149-65 (M.D. Ga. 2016), <https://lawyerscommittee.org/wp-content/uploads/2016/09/2016-09-13-GA-NAACP-Kemp-Complaint-FINAL.pdf>.

⁸⁹¹ Settlement Agreement, *Georgia State Conference of the NAACP v. Kemp*, 2017 WL 2492361, No. 2:16-CV-219 (M.D. Ga. 2016), <http://www.projectvote.org/wp-content/uploads/Settlement-Agreement-NAACP-v.-Kemp-2.9.17-1.pdf> (like most settlement agreements, this one specifically did not include any admissions of liability). *Id.* at *10.

⁸⁹² See Complaint, *Georgia State Conference of the NAACP*, No. 2:16-CV-219 at ¶¶ 27-29 ("The Georgia voter registration verification protocol was created in 2010 via administrative policy by Secretary of State Kemp pursuant to Ga. Code Ann. § 21-2-216(g)(7). The matching protocol is not codified in any statute or regulation. The verification protocol relies upon an algorithm to compare information on a first-time applicant's voter registration form to information in the DDS or SSA databases, once the information from the form is entered into ENET. If applicants provide their driver's license number on their registration form, the algorithm makes the comparison to information in the DDS database. If applicants provide the last four digits of their social security number, the algorithm makes the comparison to information in the SSA HAVV database. The protocol requires that the information on an unregistered applicant's voter registration form exactly match corresponding fields in the applicant's record contained in the DDS or SSA databases.").

and numbers presented in the state Department of Driver Services or federal Social Security Administration databases.⁸⁹³ Election officials:

consider a voter registration application “incomplete” pursuant to Ga. Code Ann. § 21-2-220(d) if any information does not match *exactly* with all of the corresponding data fields in the DDS or SSA databases. Therefore, under this protocol, complete applications submitted with accurate identifying information by eligible voters are routinely marked incomplete and the applicants are not added to the voter registration list. The result is disenfranchisement.⁸⁹⁴

Moreover, the plaintiffs alleged that voters were given extremely unclear notice about what information was needed to correct any discrepancies, and they had to respond within less than 40 days.⁸⁹⁵ If they could not navigate that “Kafkaesque” and time-consuming process,⁸⁹⁶ their voter registration application would be rejected and the only way they could vote would be by presenting additional documentary proof of identification or citizenship before a “40-day clock” had expired.⁸⁹⁷ The complaint further alleged that “a conservative estimate indicate[d] that more than 42,500 voter registration applications ha[d] been suspended or rejected due to the verification protocol.”⁸⁹⁸

An expert study submitted by plaintiffs found that black voters comprised 63.6 percent of cancelled applicants, although they made up only 29.4 percent of the population, and that Latino voters comprised 7.9 percent of cancelled applicants, although they made up only 3.6 percent of the population; while white voters made up 13.6 percent of the cancellations but constituted 47.2 percent of the population.⁸⁹⁹ Moreover, applicants who failed the exact match tended to live in poorer communities and have lower high school graduation rates, which would make correction of the cancellations or resolution of the discrepancies more challenging.⁹⁰⁰ The complaint also alleged that the history of discrimination in voting in Georgia, along with ongoing discrimination in the form of socioeconomic disparities that interact with the procedures, resulted in significant racial disparities in access to voter registration.⁹⁰¹

⁸⁹³ *Id.*

⁸⁹⁴ *Id.* at ¶ 41 (emphasis added).

⁸⁹⁵ *Id.* at ¶¶ 45-58.

⁸⁹⁶ *Id.* at ¶ 65; *see also id.* at ¶¶ 65-80 (detailing individual voters of color experiences).

⁸⁹⁷ *Id.* at ¶¶ 45-58.

⁸⁹⁸ *Id.* at ¶ 7 (emphasis added).

⁸⁹⁹ Declaration of Christopher Brill, filed in *Georgia State Conference of the NAACP*, No. 2:16-CV-219 (N.D. Ga. 2016), ECF Doc. No. 3-19 at ¶ 7 (Sept. 14, 2016) (on file).

⁹⁰⁰ Declaration of Michael McDonald, filed in *Georgia State Conference of the NAACP*, No. 2:16-CV-219 (N.D. Ga. 2016), ECF Doc. No. 3-19 at ¶¶ 38-51 (Sept. 14, 2016).

⁹⁰¹ Complaint, *Georgia State Conference of the NAACP*, No. 2:16-CV-219 at ¶¶ 122-23 (“The rate at which [voter registration] applicants have been placed in cancelled or pending status between July 2013 and July 2016 due to failing the first or last name match varies significantly by race. This is true even when considering the presence of special characters in applicants’ names (spaces, hyphens, and apostrophes). For example, White applicants whose names contain special characters both fail the name match and remain in cancelled or pending status at a rate of 1.7

The federal district court held a hearing on the preliminary injunction,⁹⁰² and all claims were settled in February 2017.⁹⁰³ The parties agreed that voter registration applicants whose information fails to match will be placed in pending status, and permitted to vote if they show acceptable identification or proof of citizenship.⁹⁰⁴ The Georgia settlement permits types of documentary proof of citizenship are more expansive than in other states with stricter laws such as Kansas; they include more than only birth, naturalization, or citizenship certificates, and voters may also provide affidavits signed under penalty of perjury of two U.S. citizens who are not related to the applicant, along with an affidavit as to why the documents are not available.⁹⁰⁵ Finally, the settlement agreement provides that all voter registration applicants that were cancelled on or after October 1, 2013 due to the match process would be moved to pending status and sent notification letters regarding their right to vote.⁹⁰⁶ The settlement agreement also provided that Plaintiffs, which are voter registration groups, would be given the data regarding the cancelled, pending, and rejected voters who had wanted to register and participate in Georgia's upcoming elections.⁹⁰⁷

Additionally, Georgia has been purging voters for “inactivity,” a practice discussed in further detail below.⁹⁰⁸ Under the Supreme Court's ruling in *Young v. Fordice*,⁹⁰⁹ all of these procedures would have had to be precleared under Section 5.⁹¹⁰

percent. The corresponding rate for similarly situated Black applicants is 3.9 percent. That rate is 4.4 percent for Latinos and 12.9 percent for Asian-Americans.”)

⁹⁰² Lawyers' Committee for Civil Rights Under Law, *Georgia State Conference of the NAACP, et al. v. Brian Kemp*, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, <https://lawyerscommittee.org/project/voting-rights-project/litigation/georgia-state-conference-naacp-et-al-v-brian-kemp/> (last accessed Aug. 2, 2018).

⁹⁰³ Settlement Agreement, *Georgia State Conference of the NAACP*, No. 2:16-CV-219 (pending stipulated settlement filing with the court).

⁹⁰⁴ *Id.* at ¶ 1.b (and See Exhibit 1 regarding list of acceptable forms of identification and proof of citizenship, which are broader than previous requirements).

⁹⁰⁵ *Id.* at Ex. 1.

⁹⁰⁶ *Id.* at ¶ 1.d-e.

⁹⁰⁷ *Id.* at ¶ 1.m.

⁹⁰⁸ A lawsuit alleges that Georgia's practice of removal for inactivity violates the NVRA's provisions against removal for inactivity as well as the 1st Amendment of the U.S. Constitution. The federal district court dismissed the case, but on appeal, the Eleventh Circuit vacated the dismissal and remanded the case pending the outcome of the Supreme Court's decision regarding similar practices in Ohio in *Husted v. A. Philip Randolph Inst. See Common Cause v. Kemp*, 714 F. App'x 990 (11th Cir. 2018),

<http://moritzlaw.osu.edu/electionlaw/litigation/documents/CommonCauseGeorgia-Opinion031218.pdf>. On June 11, 2018, the Supreme Court ruled that Ohio's removal practices did not violate the NVRA. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018). See Discussion and Sources cited at notes 915-28, *infra*.

⁹⁰⁹ 520 U.S. 273 (1997).

⁹¹⁰ Prior iterations of the voter verification match procedures were subject to preclearance in 2010. See Chapter 5, at note 1393, *infra*, discussing *Georgia v. Holder*, 748 F. Supp. 2d. 16 (D.D.C. 2010) (dismissed, subsequent change reviewed administratively).

Purging Based on Voter Challenges by Private Parties (North Carolina)

North Carolina's ongoing issues with allegedly discriminatory purges were discussed in the previous section, regarding voter challenges that led to removals of voters from the rolls.⁹¹¹ That section also includes public comments the Commission heard regarding such practices.⁹¹²

Purging for Inactivity (Georgia, New York, Ohio)

Purges for inactivity may disparately impact minority voters in ways that could potentially violate the VRA. In 1993, the NVRA prohibited removing voters for inactivity.⁹¹³ This prohibition was enacted after such procedures were found to be unfair and in at least one case, racially discriminatory and in violation of Section 2 of the VRA.⁹¹⁴ “Critics further pointed out that the poor and minority groups were disproportionately affected by these purges both because they voted less frequently and because they had greater difficulty navigating reregistration once their registrations were purged.”⁹¹⁵ The 1993 NVRA therefore enacted a prohibition against purging for inactivity, and requires notice and due process procedures for any removal of a registered voter.⁹¹⁶

On June 11, 2018, the Supreme Court ruled that Ohio could purge voters for inactivity—but only if voters do not respond to a mail notice, and only after two general election cycles have passed.⁹¹⁷ The decision was based on the NVRA,⁹¹⁸ and did not address any possible claims regarding Section

⁹¹¹ See Discussion and Sources cited in notes 83-46, *supra*.

⁹¹² *Id.*

⁹¹³ 52 U.S.C. § 20507(b)(2) (“Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote[.]”).

⁹¹⁴ *Toney v. White*, 476 F.2d 203, 205-06, 208 (5th Cir. 1973), *vacated in part on reh’g*, 488 F.2d 310 (5th Cir. 1973). Courts have recognized that purging laws could potentially violate Section 2, but require not only that the plaintiffs show a disparate impact of the law, but also that the purging law is the main source or cause of the discriminatory effect. See *Ortiz*, 28 F.3d at 313 (explaining that plaintiffs failed to show that Pennsylvania’s “purge law [was] the dispositive force in depriving voters of equal access to the political process in violation of § 2”); *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (explaining that the disparate impact of Tennessee’s felony conviction purge law on black voters was not a result of the purge law, and thus did not violate the VRA).

⁹¹⁵ Brief for American History Professors as Amici Curiae in Support of Respondents, *Husted v. A. Philip Randolph Inst.*, No. 16-980 at *13 (Sept. 22, 2017). Congress was also concerned about the disparate impact of purging and re-registration requirements, finding that: “Such processes must be structured to prevent abuse which has a disparate impact on minority communities. Unfortunately, there is a long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens.” S. REP. NO. 103-6, at 17-18 (1993-1994).

⁹¹⁶ 52 U.S.C. § 20507. The NVRA also mandated that: “any State program or activity designed to ensure the maintenance of accurate and current registration rolls, shall be uniform, nondiscriminatory, and in compliance with the provisions of the Voting Rights Act of 1965.” 52 U.S.C. § 20507(b)(1).

⁹¹⁷ *Husted*, 138 S. Ct. at 1847-48, https://www.supremecourt.gov/opinions/17pdf/16-980_f2q3.pdf.

⁹¹⁸ The Court upheld Ohio’s procedure for removing voters from its rolls, holding that the state’s process follows NVRA’s requirements to give notice to voters and let two federal election cycles pass before removal, “to the letter.” *Id.* at 1842. See also OHIO REV. CODE ANN. § 3503.21. The five-justice majority explained that the NVRA only prohibited using the failure to vote “as the sole criterion for removing a” registered voter and that Ohio only removes voters “if they have failed to vote *and* have failed to respond to a notice.” *Husted*, 138 S. Ct. at 1843

2 of the VRA.⁹¹⁹ The majority opinion goes so far as to point out that a discrimination claim was not brought.⁹²⁰ This case was discussed by various panelists at the Commission’s briefing who raised concern that the DOJ reversed its position in the matter after the presidential administration changed in January 2017. In 2017, the Sixth Circuit Court of Appeals had held that the state’s use of failure to vote as a trigger to confirmation of address proceedings that could lead to removal of voters from the rolls was “perhaps the plainest possible example of a process that results in removal of a voter from the rolls by reason of his or her failure to vote.”⁹²¹ The DOJ filed an amicus and agreed with Plaintiffs over the course of the litigation,⁹²² until after the presidential election, when it took the opposite position.⁹²³

The Supreme Court’s decision in this case may serve as a catalyst for other states to enact similar laws.⁹²⁴ Ohio Secretary of State John Husted praised the Supreme Court’s decision and hopes that states will now use Ohio’s law as a “model” moving forward.⁹²⁵ Georgia,⁹²⁶ Hawaii, Oklahoma, and Tennessee already have similar laws that purge voters for inactivity.⁹²⁷

Justice Sotomayor cited the NAACP’s amicus brief in her dissent to show the disparate impact of Ohio’s purges, explaining that “American-majority neighborhoods in downtown Cincinnati had 10 percent of their voters removed due to inactivity, compared to only 4 percent of voters in a suburban, majority-white neighborhood.”⁹²⁸ Some voting rights advocates argue that a Section 2

(emphasis in original). The Court went on to say that dissenting Justices simply “have a policy disagreement” with the decision because the NVRA, the majority argues, stands for Congress’s “judgment” that the failure to send back the mail notice paired with nonvoting was sufficient evidence that a voter changed address and, thus, enough to remove a voter from the rolls. *Id.* at 1848.

⁹¹⁹ *Id.* at 1865.

⁹²⁰ *Id.* at 1848 (“The NVRA prohibits state programs that are discriminatory, see §20507(b)(1), but respondents did not assert a claim under that provision”).

⁹²¹ *A. Philip Randolph Institute v. Husted*, 838 F.3d 699, 712 (6th Cir. 2016).

⁹²² Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants and Urging Reversal, *A. Philip Randolph Institute v. Husted*, <https://www.justice.gov/crt/file/881821/download>.

⁹²³ After the 2016 presidential election, the DOJ changed its position in this case through a brief filed in Aug. 2017, signed by no career staff. Brief for the United States as Amicus Curiae in Support of Petitioner-Defendant, *Husted v. A. Philip Randolph Inst.*, https://www.justice.gov/sites/default/files/briefs/2017/08/07/16-980_husted_v_randolph_institute_ac_merits.pdf. In the meantime, 17 former DOJ leaders including former Attorney

General Eric Holder and career voting rights attorneys filed an amicus before the Supreme Court, arguing that the NVRA protects the right to vote and the right not to vote, and clearly prohibits removals for inactivity, noting that “from 1994 until the Solicitor General’s brief in this case, the DOJ had repeatedly interpreted the NVRA to prohibit a state from using a registrant’s failure to vote as the basis for initiating the Section 8(d) voter-purge process.” Brief for Eric Holder et al. as Amici Curiae in Support of Respondents, *Husted v. A. Philip Randolph Inst.* at 31.

⁹²⁴ Sam Levine, *Supreme Court Gives Green Light to Ohio’s Voter Purges*, HUFFINGTON POST (June 11, 2018), https://www.huffingtonpost.com/entry/ohio-voter-purge-law-upheld-by-supreme-court_us_5af5e4e1e4b032b10bfa8964.

⁹²⁵ *Id.*

⁹²⁶ Georgia has actually enacted these procedures. See Discussion and Sources cited in note 908, *supra*.

⁹²⁷ Brief for NAACP and the Ohio State Conference of the NAACP as Amici Curiae in Support of Respondents-Plaintiffs, *Husted v. A. Philip Randolph Inst.*

⁹²⁸ *Husted*, 138 S. Ct. at 1864 (Sotomayor, J., dissenting) (quoting brief for NAACP).

claim could be brought to enjoin purges for inactivity.⁹²⁹ According to the Ezra Rosenberg, considering that voter registration and participation rates remain lower among voters of color as compared to whites, removals based on inactivity are likely to further disparately impact communities of color, particularly those with the lowest participation rates.⁹³⁰

In 2014 and 2015, the New York City Elections Board purged more than 110,000 Brooklyn voters because they had not voted since 2008.⁹³¹ Another 100,000 registered voters were removed from the rolls because they had allegedly changed their address; their removals occurred with no public announcement.⁹³² This resulted in thousands coming to the polls during the 2016 primaries and being unable to vote. 117,000 voters were put back on the rolls after litigation by voting rights groups in which the DOJ intervened,⁹³³ but they had already lost their right to vote in 2016.⁹³⁴ Brooklyn is one of the four boroughs in New York City that used to be covered for preclearance prior to the *Shelby County* decision, so it is possible that with preclearance, these purges could have been stopped prior to the election.⁹³⁵ Furthermore, a local news outlet conducted a surname analysis of the purge list and found that it disparately impacted Latinos and Asian Americans.⁹³⁶

⁹²⁹ Richard L. Hasen, *Sonia Sotomayor's Dissent in the Big Voter-Purge Case Points to How the Law Might Still Be Struck Down*, SLATE (June 11, 2018), <https://slate.com/news-and-politics/2018/06/sonia-sotomayors-husted-dissent-points-the-way-forward-on-racist-voter-purge-laws.html>.

⁹³⁰ See Figure 11, Voter Registration by Race and Ethnicity and Year, and Figure 15, Voter Turnout by Race/Ethnicity, 2000-2016, *infra*. Attorney Ezra Rosenberg submitted a statement commenting that:

Under Ohio's Supplemental Process, infrequent voters who receive a confirmation notice will be removed from the rolls unless they do something to halt the removal process. Similarly, prior to the litigation in the Georgia exact match matter, those whose applications were cancelled were sent letters asking them to take additional steps to insure their registration.

Even modest administrative requirements have been shown to reduce "take up" or participation rates in a variety of public programs. When it enacted the NVRA, Congress implicitly recognized that administrative requirements could be a barrier to voter participation when it eliminated reregistration requirements. Ezra Rosenberg, Supplemental Written Statement for the U.S. Comm'n on Civil Rights, Marc. 19, 2018, at 9-10 (*see* note 31) [*hereinafter* Rosenberg, Written Statement] (citing sources including the Congressional record) (on file).

⁹³¹ Complaint in Intervention, *Common Cause of N.Y. v. New York Bd. of Elections*, No. 1:16-CV-06122 at *7 (E.D.N.Y. 2017), https://ag.ny.gov/sites/default/files/2017-1-26_nyag_proposed_complaint_in_intervention.pdf; Consent Decree, *Common Cause of N.Y. v. New York Bd. of Elections*, No. 1:16-CV-06122 (E.D.N.Y. 2017), <https://lawyerscommittee.org/wp-content/uploads/2017/10/Consent-Decree-Final-Draft-updated-caption-sign-block.pdf>.

⁹³² *Id.* at *8.

⁹³³ *Id.* at *13.

⁹³⁴ See Carl Campinile, *New York City Elections Board Admits to Purging Voters from the Rolls*, NEW YORK POST (Oct. 25, 2017), <https://nypost.com/2017/10/25/nyc-elections-board-admits-to-purging-voters-from-rolls/>.

⁹³⁵ *Fordice*, 520 U.S. at 280.

⁹³⁶ Brigidet Bergin, John Keefe & Jenny Ye, *Brooklyn Voter Purge Hit Hispanics Hardest*, WNYC NEWS (June 21, 2016), <https://www.wnyc.org/story/brooklyn-voter-purge-hit-hispanics-hardest/>. These types of surname analyses are typically accepted by federal courts as evidence that is statistically reliable to indicate ethnicity. *See U.S. v. Berks Cty.*, 250 F. Supp. 2d 525, 529 (E.D. Penn. 2003).

Purging Based on Felony Conviction (Florida, Pennsylvania)

In 2016, the ACRU sued the City of Philadelphia, alleging that the City's failure to purge persons with felony convictions from its voter rolls violated the list maintenance provisions of Section 8 of the NVRA.⁹³⁷ On April 27, 2017, the Third Circuit Court of Appeals held that the NVRA permits—but does not require—states to make an effort to remove those with criminal convictions and those declared mentally incompetent.⁹³⁸ Furthermore, the Third Circuit held that “contrary to the ACRU’s assertions, the text of Section 8(a)(3) [of the NVRA] places no affirmative obligations on states (or voting commissions) to remove voters from the rolls. As its text makes clear, NVRA was intended as a shield to protect the right to vote, not as a sword to pierce it.”⁹³⁹ As discussed above, Florida has also conducted voter purges based on alleged felony convictions, with a discriminatory impact.⁹⁴⁰

During its national briefing, the Commission heard testimony regarding the racially discriminatory impact of state laws that restrict the voting rights of persons with felony convictions.⁹⁴¹ This issue also arose in briefings on voting rights held by the Commission’s SACs in Florida and Kentucky.⁹⁴² Although a full review of the impact of these disparities is beyond the scope of this report,⁹⁴³ it is notable that some conservative groups are calling for aggressive purges of persons with felony convictions.⁹⁴⁴ However, not all conservatives agree. On April 6, 2018, George F. Will wrote that there is no good reason that persons with felony convictions should not be able to vote.⁹⁴⁵

In addition to voter ID laws and the above three types of emerging restrictions on getting and staying on the voting rolls, as will be discussed below, cuts to early voting have also had a discriminatory impact on minority voters.

⁹³⁷ See *Am. Civil Rights Union v. Philadelphia City Comm'rs*, 872 F.3d 175 (3rd Cir. 2017).

⁹³⁸ See 52 U.S.C. §20507(a)(3)(b).

⁹³⁹ *Am. Civil Rights Union*, 872 F. 3d at 182.

⁹⁴⁰ See Discussion and Sources cited at notes 856-59, *supra*.

⁹⁴¹ *Briefing Transcript, supra* note 234, at 164 (statement by Anita Earls); see also *Briefing Transcript, supra* note 234, at 127-29 (statement by Sherrilyn Ifill).

⁹⁴² See Appendix D.

⁹⁴³ This issue is addressed in the Commission’s upcoming report on the collateral consequences of incarceration. See U.S. COMM’N ON CIVIL RIGHTS, FORTHCOMING COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES (2018) [forthcoming]; see also U.S. Comm’n on Civil Rights, Commission Briefing: Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities, Final Transcript, May 19, 2017, <https://www.usccr.gov/calendar/trnscrpt/Commission-Business-Meeting-Transcript-05-19-17.pdf>.

⁹⁴⁴ See Public Interest Legal Foundation, *24 States Show Corrupted Voter Rolls*, PILF (Sept. 25, 2016) (linking to notice letters sent to 248 counties), <https://publicinterestlegal.org/blog/248-counties-registered-voters-live-adults/>.

⁹⁴⁵ George F. Will, *There’s No Good Reason to Stop Felons From Voting*, WASH. POST (April 6, 2018), https://www.washingtonpost.com/opinions/theres-no-good-reason-to-stop-felons-from-voting/2018/04/06/88484076-3905-11e8-8fd2-49fe3c675a89_story.html?noredirect=on&utm_term=.9825691b0de0.

Cuts to Early Voting

Early voting⁹⁴⁶ has been a very popular method of voting. In 2016, 23,024,146 Americans used in-person early voting.⁹⁴⁷ About 65.9 percent of early votes were cast by white voters, about 25.3 percent by black voters, and about 1.5 percent by Latino voters.⁹⁴⁸ Currently, 37 states and the District of Columbia offer early voting, and of these, 21 states and the District of Columbia allow some weekend early voting.⁹⁴⁹ Some of these states effectively offer early voting through permitting absentee ballots with no excuse required, prior to Election Day.⁹⁵⁰ Figure 8 shows the range of early voting options available in 35 states:

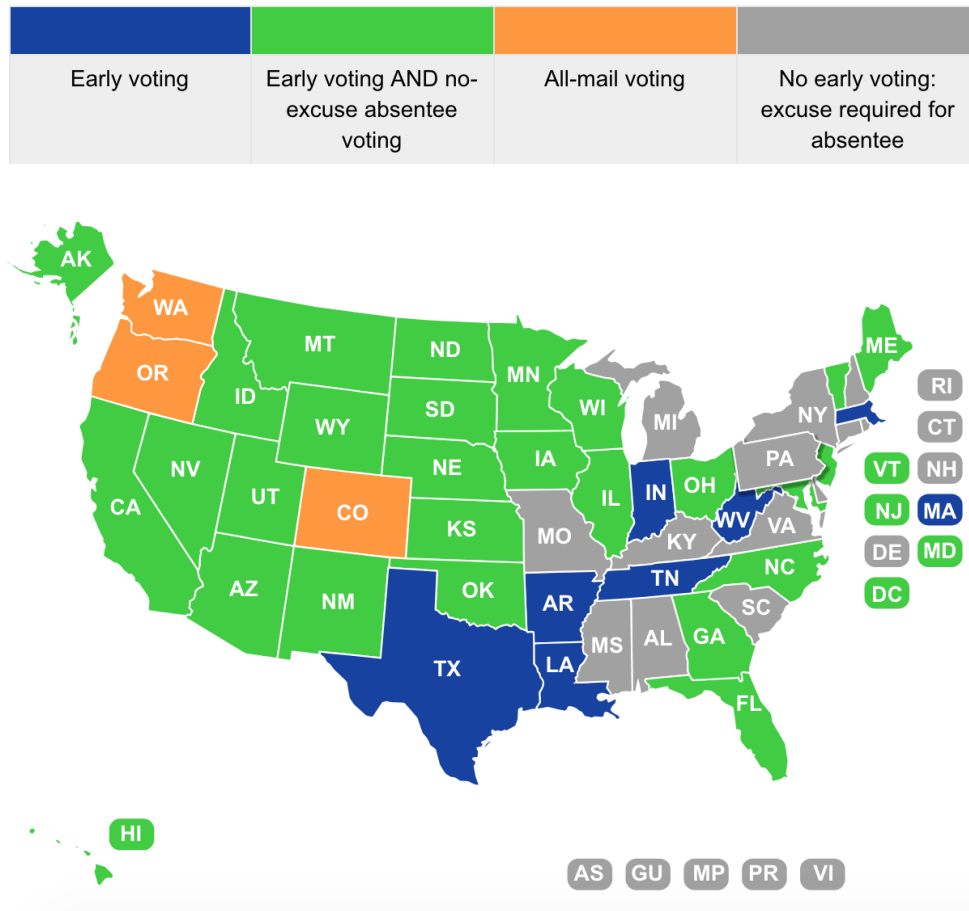
⁹⁴⁶ Early voting was a concept created in order to provide greater access to the polls to voters who are unable to vote on Election Day. Prior to the advent of early voting in the United States, the polls were only open Tuesdays, for limited hours. During the Civil War era, absentee voting could only be done with an excuse, and it could not be done in person. Olivia B. Waxman, *This is How Early Voting Became a Thing*, TIME MAGAZINE (Oct. 25, 2016), <http://time.com/4539862/early-voting-history-first-states/>.

⁹⁴⁷ Dr. Michael McDonald, *2016 November General Election Early Voting*, U.S. ELECTION PROJECT, http://www.electproject.org/early_2016 (last accessed Aug. 2, 2018).

⁹⁴⁸ *Id.*

⁹⁴⁹ Nat'l. Conf. of State Legislators, *Absentee and Early Voting*, NCSL (Aug. 17, 2017), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#early> [*hereinafter* NCSL, *Absentee and Early Voting*].

⁹⁵⁰ *Id.*

Figure 8: Absentee and Early Voting

Source: National Conference of State Legislatures⁹⁵¹

But recently (since 2010), the following states have reduced early voting hours or days: Florida, Georgia,⁹⁵² Indiana, Nebraska, North Carolina, Ohio, Tennessee, and Wisconsin.⁹⁵³ Only three of these eight states—Florida, Georgia, and North Carolina—were formerly covered under Section 5.

Cuts to early voting can cause long lines with a disparate impact on voters of color. In response to this problem during the 2012 elections, on March 28, 2013, the bipartisan Presidential Commission

⁹⁵¹ NCSL, *Absentee and Early Voting*, *supra* note 949.

⁹⁵² Currently proposed Georgia Senate Bill 363 would amend the state code so that counties would only be able to offer early voting during weekdays and only one weekend day, rather than both Saturday and Sunday. See R.J. Rico, *Georgia Democrats Outraged Over Push to Limit Weekend Voting*, ASSOCIATED PRESS (Mar. 22, 2018), <https://www.usnews.com/news/best-states/georgia/articles/2018-03-22/georgia-democrats-outraged-over-push-to-limit-weekend-voting>.

⁹⁵³ Brennan, *New Voting Restrictions in America*, *supra* note 462.

on Election Administration (PCEA) was established by Executive Order.⁹⁵⁴ The PCEA held a series of hearings, starting in Florida, and received expert testimony, based upon which it presented “unanimous recommendations, together with an array of best practices in election administration.”⁹⁵⁵ Regarding long lines, the PCEA found that:

The image of voters waiting for six or more hours to vote on Election Day 2012, as in the two previous Presidential contests, spurred the call for reform that led to creation of this Commission. Research suggests that, although a limited number of jurisdictions experienced long wait times, over five million voters in 2012 experienced wait times exceeding one hour and an additional five million waited between a half hour and an hour. In some jurisdictions, the problem has recurred for several presidential elections, while in others, a particular confluence of factors led to unprecedented lines in 2012. It became clear to the [PCEA] Commission as it investigated this problem that there is no single cause for long lines and there is no single solution. *But the problem is solvable.*⁹⁵⁶

The PCEA found a variety of factors contribute to long lines, and among these factors: “of course, the more limited the opportunities to vote, the greater will be the number of voters who will vote during the constricted hours of a single Election Day.”⁹⁵⁷ Moreover, the PCEA recommended that no voter should have to wait more than 30 minutes in order to exercise the fundamental right to vote.⁹⁵⁸ The PCEA found that: “There is much that states and localities can do to reduce wait times. Most obviously, increasing the number of voters who vote before Election Day can relieve Election Day traffic.”⁹⁵⁹ Other PCEA recommendations included formulas to determine the need for adequate polling places and polling place resources, providing language access, and taking steps towards modernizing voter registration, such as automatic voter registration.⁹⁶⁰

Focusing on the civil rights implications, the following section of the U.S. Civil Rights Commission’s report reviews the reduction of early voting in the states where this issue has been addressed under the VRA following the 2006 Reauthorization and in the post-*Shelby County* era. These are: Florida, Indiana, North Carolina, Ohio, and Wisconsin. This section also discusses data that reflect that during the time it currently takes to litigate cases against cuts to early voting, voters experience long lines and other forms of decreased access to the ballot. Moreover, although jurisdictions argued that cuts to early voting were justified to save costs, or to protect against voter

⁹⁵⁴ See U.S. Election Assistance Commission, *Presidential Commission on Election Administration*, EAC (last visited June 5, 2018), <https://www.eac.gov/election-officials/pcea/>.

⁹⁵⁵ PCEA Report, *supra* note 663.

⁹⁵⁶ *Id.* at 13 (emphasis added).

⁹⁵⁷ *Id.* at 14.

⁹⁵⁸ *Id.*

⁹⁵⁹ *Id.* at 40, n.119 (citing “Ken Detzner, Florida Secretary of State, PCEA Hearing Testimony, Miami, FL, at 2 (June 28, 2013); Bill Cowles, Orange County Supervisor of Elections, PCEA Hearing Testimony, Miami, FL, at 16 (June 28, 2013); Robert M. Stein, Professor of Political Science, Rice University, PCEA Hearing Testimony, Philadelphia, PA, at 28 (Sept. 4, 2013).”).

⁹⁶⁰ See PCEA Report, *supra* note 663, at 22-70.

fraud, federal courts found these arguments did not justify measures that resulted in racial discrimination prohibited under Section 2.⁹⁶¹

Florida

In Florida, cuts to early voting have been challenged under both Section 2 and Section 5 of the VRA. Until the *Shelby County* decision, five counties in Florida were covered under Section 5; therefore any statewide voting changes that impacted those counties were subject to preclearance.⁹⁶² In 2011, a sweeping set of voting reforms were signed into law, including significant cuts to mandatory early voting days and hours. The former Chair of the Florida Republican Party later said that suppression of the minority vote was the reason for the cuts to early voting.⁹⁶³ In 2012, a federal court enjoined other provisions of the same law, which had restricted community-based voter registration drives, due to likely violations of the NVRA and the U.S. Constitution.⁹⁶⁴ The cuts to early voting were submitted to the federal court of the District of Columbia for preclearance under Section 5 of the VRA, and they were not precleared.⁹⁶⁵ Even

⁹⁶¹ See, e.g., Discussion and Sources cited at notes 362-65 (North Carolina), *supra* and 993-94 (Ohio), *infra*.

⁹⁶² 52 U.S.C. § 10301(b) (“A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”). *But Cf. Husted*, 768 F.3d at 557 (“The district court did not improperly engage in a retrogression analysis in considering the opportunities available to African Americans to vote EIP under the prior law as part of the “totality of circumstances” inquiry. To be sure, Congress intended—and the Court has read—Section 2 and Section 5 not to have exactly the same scope. Procedurally, Section 5 requires that covered states obtain preclearance from the Attorney General or the District Court for the District of Columbia before they change a voting “qualification, prerequisite, standard, practice, or procedure.” 42 U.S.C. § 1973c. Section 2 applies to all states and includes no preclearance requirement. “[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976). In other words, “§ 5 prevents nothing but backsliding,” whereas Section 2 is aimed at combatting “discrimination more generally.” *Bossier II*, 528 U.S. at 334-35, 120 S.Ct. 866. At the same time, however, no case explicitly holds that prior laws or practices cannot be considered in the Section 2 “totality of circumstances” analysis.”).

⁹⁶³ Dara Kam, *Former Florida GOP Leaders Say Voter Suppression Was Reason They Pushed New Election Law*, PALM BEACH POST (Nov. 25, 2012), <https://www.palmbeachpost.com/news/state--regional-govt--politics/former-florida-gop-leaders-say-voter-suppression-was-reason-they-pushed-new-election-law/R9iQlcYqCBY3k1u4k5XdLP/>.

⁹⁶⁴ *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012) (A preliminary injunction was granted against harsh and unconstitutional restrictions of community-based voter registration groups and teachers, on May 31, 2012. “The statute and rule impose a harsh and impractical 48-hour deadline for an organization to deliver applications to a voter-registration office and effectively prohibit an organization from mailing applications in. And the statute and rule impose burdensome record-keeping and reporting requirements that serve little if any purpose, thus rendering them unconstitutional even to the extent they do not violate the NVRA.”). This was followed by a permanent injunction against these restrictions on Aug. 30, 2012. *League of Women Voters of Fla. v. Detzner*, No. 4:11-CV-628-RH/WCS, 2012 WL 12810507 (N.D. Fla. 2012).

⁹⁶⁵ *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012) (Florida failed to meet its burden of showing retrogression would not occur if it reduced early voting days from 12 to 8 while also reducing early voting hours from 96 to 48).

after the federal court ruled that Florida could not reduce early voting days and hours as it had originally envisioned, Florida's 67 county Supervisors of Elections had wide discretion, but after the five covered counties agreed to restore some (but not all) of the early voting days that were cut, the DOJ agreed to end its challenge.⁹⁶⁶ In 2013, the state legislature also partially restored early voting; thereafter, a case brought by Congresswoman Corrine Brown alleging violations of Section 2 and the U.S. and Florida constitutions seeking to restore early voting on behalf of black voters in Duval County⁹⁶⁷ was also dismissed.⁹⁶⁸

In the meantime, in 2012, the state legislature's reduction of the number of mandatory early voting days from 14 to eight and elimination of in-person voting on the final Sunday before Election Day was still the law.⁹⁶⁹ What remained was a patchwork of 67 counties' discretion, with a significant negative impact on voters in Florida.⁹⁷⁰

Up until the weekend before Election Day, advocates scrambled to urge counties to add early voting days and hours.⁹⁷¹ The Florida Democratic Party also filed suit, resulting in a settlement for extended early voting hours in the largest counties.⁹⁷² Not all requests were granted, nor were all days and hours restored in the largest counties, and voters waited up to 7 hours in many precincts.⁹⁷³ A study of wait time data at the precinct level covering 92 percent of Florida's 3.7 million voters in 2012 found that precincts with higher concentrations of Hispanic voters closed later on Election Day, and that "in Miami-Dade County, early voting polling stations with the

⁹⁶⁶ See, e.g., Warren Richie, *Early Voting: Why Justice Dropped Its Challenge of Florida Plan*, CHRISTIAN SCI. MONITOR (Sept. 13, 2012), <https://www.csmonitor.com/USA/Elections/2012/0913/Early-voting-Why-Justice-dropped-its-challenge-of-Florida-plan> (The five covered counties were Collier, Hardee, Hendry, Hillsborough, and Monroe.); see also Notice of Administrative Preclearance, *Brown v. Detzner*, No. 3:12-CV-00852 (M.D. Fla. 2012), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NoticeofAdministrativePreclearance.pdf> (preclearance determination that cuts to mandatory early voting were not enacted with discriminatory purpose and were not retrogressive).

⁹⁶⁷ Complaint, *Brown v. Detzner*, 3:12-CV-00852 (M.D. Fla. 2013), http://moritzlaw.osu.edu/electionlaw/litigation/documents/Complaint_003.pdf.

⁹⁶⁸ Order of Dismissal, *Brown v. Detzner*, 3:12-CV-00852 (M.D. Fla. 2013), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/DismissalOrder.pdf>.

⁹⁶⁹ Daniel A. Smith, *When Florida Rolled Back Early Voting, Minorities Were Especially Affected*, SCHOLARS STRATEGY NETWORK (Mar. 2014), <http://www.scholarsstrategynetwork.org/brief/when-florida-rolled-back-early-voting-minorities-were-especially-affected>.

⁹⁷⁰ *Id.*; see also Michael C. Herron and Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, POL. RESEARCH QUARTERLY (2014) [*hereinafter* Herron & Smith, *Race, Party, and the Consequences*].

⁹⁷¹ Amanda Terkel, *Florida Early Voting Fiasco: Voters Wait For Hours At Polls As Rick Scott Refuses To Budge*, HUFFINGTON POST (Nov. 2012), https://www.huffingtonpost.com/2012/11/04/florida-early-voting_n_2073119.html.

⁹⁷² See Nat'l. Commission on Voting Rights, Florida State Hearing, Univ. Miami (Mar. 31, 2014), <http://votingrightstoday.org/LiteratureRetrieve.aspx?ID=125049>; *Florida Democratic Party v. Detzner*, No. 1:12-CV-24000 (S.D. Fla. 2016) (last accessed Aug. 1, 2018).

⁹⁷³ Michael C. Herron and Daniel A. Smith, *Precinct Closing Times in Florida during the 2012 General Election* (Oct. 2014), <http://www.dartmouth.edu/~herron/closingtimes.pdf>.

greatest concentrations of Hispanic and Black voters had disproportionately long wait times at both the start and close of polls each day, especially on the final Saturday of early voting.”⁹⁷⁴

Professor Theodore Allen found that at least 201,000 voters did not cast a ballot in Florida in 2012 because of the long lines, which, according to county election officials, were caused by the cuts to early voting.⁹⁷⁵ His analysis of voting data obtained by the *Orlando Sentinel* from county elections supervisors showed that, “nearly 2 million registered voters live in precincts that stayed open at least 90 minutes past the scheduled 7 p.m. closing time.... Of those, 561,000 voters live in precincts that stayed open three extra hours or longer.”⁹⁷⁶ Moreover, “according to Allen's analysis of the data, the lengthy lines lowered actual turnout by roughly 2.3 percent per hour of delay.”⁹⁷⁷

In addition, Professors Daniel Smith and Michael Herron found that “[e]arly voting by minorities went down in 2012, and voters who had cast ballots on the final Sunday of early voting in 2008 ended up with especially low participation in the 2012 general election.”⁹⁷⁸ Data regarding the use of the longer early voting period in 2008 compared to data regarding the shortened early voting period in 2012 showed that:

- Black Floridians are heavy users of the early voting option. Black people made up about 13 percent of Florida’s registered voter pool in 2008 and almost 14 percent in 2012, yet in both elections they made up about 22 percent of the early voters.
- The percentage of all voters who used early voting dropped more sharply for minorities than for white voters from 2008 to 2012. For black voters, the early voting share dropped from 35.7 percent to 31.6 percent; and for Hispanic voters, the early voting share dropped from 19.9 percent to 15.3 percent. But for white voters, the early voting share went down only slightly from 18.5 percent to 17.6 percent.⁹⁷⁹

For those who did vote, the impact of the cuts led to exceedingly long lines. For example, news reports emerged that a 102-year-old Haitian-American voter, Desiline Victor, was told she had to wait 6 hours, and ended up waiting a full three hours, to cast her ballot at her Miami polling place during the limited early voting hours remaining the weekend before Election Day.⁹⁸⁰ Her story and many others who waited on the long lines during early voting in 2012 in Florida prompted the

⁹⁷⁴ Michael C. Herron and Daniel A. Smith, *Congestion at the Polls: A Study of Florida Precincts in the 2012 General Election*, ADVANCEMENT PROJECT, Executive Summary (June 24, 2013), http://b3cdn.net/advancement/f5d1203189ce2a2abfc_14m6vzttt.pdf [hereinafter Herron & Smith, *Congestion at the Polls*].

⁹⁷⁵ Scott Powers & David Damron, *Analysis: 201,000 in Florida didn't vote because of long lines*, ORLANDO SENTINEL (Jan. 19, 2013), http://articles.orlandosentinel.com/2013-01-29/business/os-voter-lines-statewide-20130118_1_long-lines-sentinel-analysis-state-ken-detzner.

⁹⁷⁶ *Id.*

⁹⁷⁷ *Id.*

⁹⁷⁸ Herron & Smith, *Race, Party, and the Consequences*, *supra* note 970.

⁹⁷⁹ *Id.*

⁹⁸⁰ Ryan J. Reilly, *Desiline Victor Gets Standing Ovation at State of the Union Address*, HUFFINGTON POST (Feb. 13, 2013), https://www.huffingtonpost.com/2013/02/12/desiline-victor-state-of-the-union_n_2674160.html (discussing subsequent creation of PCEA).

creation of the PCEA, discussed above, which found that cuts to early voting were a significant factor in increased wait times.

North Carolina See Discussion of related Section 2 litigation in Chapter 2, *supra*.

Ohio

Compared to Florida and North Carolina, the record regarding discriminatory impact of cuts to early voting is not as clear in Ohio. The state enacted early voting following long lines in urban counties with higher levels of minority voters in 2004, and the state settled related constitutional Equal Protection and Due Process claims after protracted litigation in the case of *League of Women Voters v. Brunner*.⁹⁸¹ Allegations included that voters waited for many hours because of inadequate polling place resources in various counties, which also caused 10,000 voters in Columbus to be unable to vote.⁹⁸² In 2004:

Voters were forced to wait from two to 12 hours to vote because of inadequate allocation of voting machines. Voting machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others. At least one polling place, voting was not completed until 4:00 a.m. on the day following [E]lection [D]ay. Long wait times caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities or because a physical disability prevented them from standing in line. Poll workers received inadequate training, causing them to provide incorrect instructions and leading to the discounting of votes. In some counties, poll workers misdirected voters to the wrong polling place, forcing them to attempt to vote multiple times and delaying them by up to six hours.⁹⁸³

Although no racial discrimination claim was brought, the Equal Protection claims indicated that the longest lines were in Ohio's largest counties, with high levels of minority voters. After the long lines of 2004, the Ohio legislature adopted a broad in-person early voting regime that permitted voters to cast early ballots up to the Monday before Election Day. Federal courts later noted that early voting was enacted "to remedy these problems [of long lines],"⁹⁸⁴ through "no-fault early voting, eliminating the requirement that Ohio voters had to provide an excuse for not being able to vote on Election Day in order to vote early."⁹⁸⁵

Early voting has become very popular in Ohio. At the Commission's Ohio SAC briefing on voting rights, the Director of the Franklin County Board of Elections (where Columbus is located)

⁹⁸¹ Order Enforcing Settlement Agreement, *League of Women Voters v. Brunner*, 3:05-CV-07309 (S.D. Ohio 2009), <https://lawyerscommittee.org/wp-content/uploads/2015/06/00421.pdf>.

⁹⁸² *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 468 (6th Cir. 2008); see also Settlement Agreement, *League of Women Voters v. Brunner*, 3:05-CV-07309, ¶ B (S.D. Ohio 2009).

⁹⁸³ *Husted*, 768 F.3d at 531 (6th Cir. 2014) (quoting *League of Women Voters of Ohio*, 548 F.3d at 477-78).

⁹⁸⁴ *Husted*, 768 F.3d at 531.

⁹⁸⁵ *Id.*

testified that in 2016, about 40 percent of all Franklin County citizens who voted in the 2016 presidential election did so through early voting.⁹⁸⁶

However, Ohio's early voting days and hours were reduced through several amendments in 2011, and litigation ensued in a case brought by the Democratic Party. A preliminary injunction was granted in August 2012,⁹⁸⁷ and plaintiffs' motion for summary judgment was granted by the Sixth Circuit Court of Appeals in June 2014.⁹⁸⁸ But later in 2014, Ohio cut the last three days of early voting. At that point, a claim involving racial discrimination was brought in *Ohio NAACP v. Husted*, alleging violations of the Constitution and Section 2 of the VRA. A federal district court of Ohio issued a preliminary injunction in September 2014,⁹⁸⁹ which the Sixth Circuit affirmed later that same month.⁹⁹⁰ The Sixth Circuit found no clear error in the district court's findings, recognizing that:

After assessing each [expert opinion], the district court credited [expert witness] Smith's conclusion that, based on his statistical analysis, African Americans will be disproportionately and negatively affected by the reductions in early voting The district court also accepted [another expert] Roscigno's "undisputed" findings that disparities in employment and in residential, transportation, and childcare options between African American and white voters significantly increased the cost of casting a vote for African American voters.⁹⁹¹

Ohio experts also testified about research indicating that African-American voters disproportionately use early voting in many states, and shortening the early vote period negatively impacted turnout among African Americans.⁹⁹² Moreover, the Sixth Circuit affirmed that the state's interests in preventing fraud or cutting costs did not justify discriminatory results of cuts to early voting. It concluded that the district court "properly identified that the specific concern Defendants expressed regarding voter fraud—that the vote of an EIP [early in-person] voter would be counted before his or her registration could be verified—was *not logically linked* to concerns with voting and registering on the same day."⁹⁹³ Further, there was no evidence that county boards of election were struggling with the costs of early voting.⁹⁹⁴

Regarding the Section 2 claim, the Sixth Circuit considered "statistical evidence that African Americans use EIP voting at higher rates than others," and "evidence in the record that African

⁹⁸⁶ Ohio State Advisory Committee to the U.S. Comm'n on Civil Rights, Voting Rights in Ohio Briefing Transcript, Mar. 9, 2018, at 4, <https://facadatabase.gov/committee/meetingdocuments.aspx?flr=155584&cid=268> [*hereinafter* Ohio SAC, *Voting Rights Briefing*].

⁹⁸⁷ *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 910 (S.D. Ohio) *aff'd*, 697 F.3d 423 (6th Cir. 2012).

⁹⁸⁸ *Obama for Am. v. Husted*, 2014 WL 2611316, No. 2:12-CV-636 (S.D. Ohio 2014).

⁹⁸⁹ *Ohio State Conference of N.A.A.C.P. v. Husted*, 43 F. Supp. 3d 808, 852 (S.D. Ohio 2014).

⁹⁹⁰ *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 561 (6th Cir. 2014).

⁹⁹¹ *Id.* at 533 (internal citations omitted).

⁹⁹² *Id.*

⁹⁹³ *Id.* at 547 (emphasis added).

⁹⁹⁴ *Id.* at 549.

Americans ‘tend to disproportionately make up the groups that benefit the most from same-day registration: the poor and the homeless.’⁹⁹⁵ Moreover, the court concluded that “the provision of only one Sunday of EIP voting burdens the voting rights of African Americans by arbitrarily limiting Souls to the Polls voting initiatives; and that, because African Americans are more likely to be of lower-socioeconomic status, they tend to work hourly jobs and can find it difficult to find time to vote during normal business hours.”⁹⁹⁶ Considering these factors and the totality of circumstances, the court of appeals affirmed that plaintiffs were likely to succeed on the merits of their Section 2 vote denial claim, and affirmed the preliminary injunction.⁹⁹⁷ However, the state argued to the Supreme Court that the injunction was issued too close to Election Day, so it would be burdensome and confusing. On September 29, the Supreme Court stayed the injunction, and the 2014 cuts to early voting were therefore allowed to proceed for the 2014 election cycle.⁹⁹⁸

The issue of whether the cuts to early voting were racially discriminatory was never adjudicated on the merits, as the case was settled in April 2015, when Ohio Secretary of State Husted agreed in a settlement stipulated to the federal court to set uniform early voting days and hours that every county must provide.⁹⁹⁹ In particular, the settlement restores early voting on Sundays and it restores evening hours the week before Election Day.¹⁰⁰⁰

Wisconsin

In 2016, a Wisconsin federal court found in *One Wisconsin Institute, Inc. v. Thomsen* that the state’s limits to early voting, including eliminating weekend voting and providing for only one early voting location per county, violated Section 2.¹⁰⁰¹ This was because:

Wisconsin’s rules for in-person absentee voting all but guarantee that voters will have different experiences with in-person absentee voting depending on where they live: voters in large cities will have to crowd into one location to cast a ballot, while voters in smaller municipalities will breeze through the process. And because most of Wisconsin’s African American population lives in Milwaukee, the state’s largest

⁹⁹⁵ *Id.* at 551.

⁹⁹⁶ *Id.*

⁹⁹⁷ *Id.* at 560.

⁹⁹⁸ *Husted v. Ohio State Conference of N.A.A.C.P.*, 135 S. Ct. 42 (2014) (granting stay pending writ of certiorari).

⁹⁹⁹ For example, prior to any Presidential General Election, each county board was required to provide for in-person absentee (early) voting as follows: “Weeks One and Two of Voting (beginning with the day after the close of registration for the election except any holiday established by state law) 8:00 a.m. to 5:00 p.m. on each weekday (Monday through Friday) Week Three of Voting 8:00 a.m. to 6:00 p.m. on each weekday (Monday through Friday) 8:00 a.m. to 4:00 p.m. on Saturday 1:00 p.m. to 5:00 p.m. on Sunday Week Four of Voting 8:00 a.m. to 7:00 p.m. on each weekday (Monday through Friday) 8:00 a.m. to 4:00 p.m. on the Saturday before election day 1:00 p.m. to 5:00 p.m. on the Sunday before election day Week of Election Day 8:00 a.m. to 2:00 p.m. on the Monday before election day.” 10(a), Settlement Agreement, *Ohio State Conference of The Nat. Ass’n For The Advancement of Colored People v. Husted*, No. 2:14-CV-00404 (S.D. Ohio 2015), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NAACP111-2.pdf>.

¹⁰⁰⁰ *Id.*

¹⁰⁰¹ *One Wisconsin Inst.*, 198 F. Supp. 3d at 956.

city, the in-person absentee voting provisions necessarily produce racially disparate burdens. Moreover, plaintiffs have demonstrated that minorities actually use the extended hours for in-person absentee voting that were available to them under the old laws.

The court concludes that the in-person absentee voting provisions disparately burden African Americans and Latinos.¹⁰⁰²

Polling Place and Other Accessibility Issues

American history is full of examples of people facing violence and risking death for basic access to the fundamental right to vote. When men and women marched across the Edmund Pettus Bridge in 1965 in Selma, Alabama, access to the polls was a key issue.¹⁰⁰³ While current conditions are less violent, the Commission heard testimony and reviewed information showing that access to the polls remains a key issue at the state and local level since the 2006 VRA Reauthorization and in the post-*Shelby County* era.¹⁰⁰⁴

The testimony and information received by the Commission is complemented by a data-based study by the Leadership Conference on Civil and Human Rights, as well as the Commission's independent research of other available sources. This section discusses states where such data were available. The Commission notes that the widespread nature of this problem indicates that there are likely other instances of polling place accessibility issues in other states.¹⁰⁰⁵

¹⁰⁰² *Id.*

¹⁰⁰³ See e.g., *Shelby Cty.*, 570 U.S. at 546, 549; Kousser, *Protecting the Right to Vote*, *supra* note 95 (“[M]any people believe it was violence, not laws, that disfranchised African Americans, and that few Southern blacks continued to vote after the Compromise of 1877, which resulted in the withdrawal of U.S. troops and the collapse of the last Reconstruction Republican state governments. But, in fact, large proportions of African Americans somehow managed to vote in the next election in two-thirds of the counties where the most horrific Reconstruction violence took place. Black turnout in the South in the 1880s was actually higher than it often is today, and many African Americans continued to win elections for local and state offices and Congress through the 1890s. Disfranchisement was accomplished by law, not by force . . . Some scholars also have failed to notice that disfranchisement was an incremental process, taking place over many years and involving many types of actions. First, violence and intimidation, most intense during the 1860s and 1870s, killed or ran off many Republican leaders and gave Democrats control of election boards. Then Democratic election officials perpetrated the largest election frauds in U.S. history, which reduced the number of their political opponents but did not eliminate them. With majorities in state legislatures, Democrats passed changes in statutes that included gerrymandering election districts, substituting at-large for district elections in majority-white areas to deny opponents any offices at all, making it much more difficult to register to vote, or mandating secret ballots to disfranchise the illiterate. Finally, by the 1890s and early 1900s, with the electorate and the number of partisan opposition officials reduced, with the ability to falsify election returns and with the option to use violence if needed, Democrats were able to move on to state constitutional disfranchisement with literacy tests and especially poll taxes.”)

¹⁰⁰⁴ See Discussion and Sources cited in this section herein.

¹⁰⁰⁵ See Discussion and Sources cited in this section herein.

Moving or Eliminating Polling Places

Moving a polling place or closing a polling place may not always be discriminatory, but sometimes it is.¹⁰⁰⁶ Prior to *Shelby County*, most changes in polling places (including changes in polling place resources) were approved by the DOJ, but some were found to be discriminatory and therefore not precleared.¹⁰⁰⁷ Since 1965 and particularly after 1982, the rate of objections to polling place moves decreased over time. Yet there were always instances of polling places being reduced, moved away from communities of color, and made less accessible.¹⁰⁰⁸ Some of these discriminatory voting changes were stopped by preclearance.

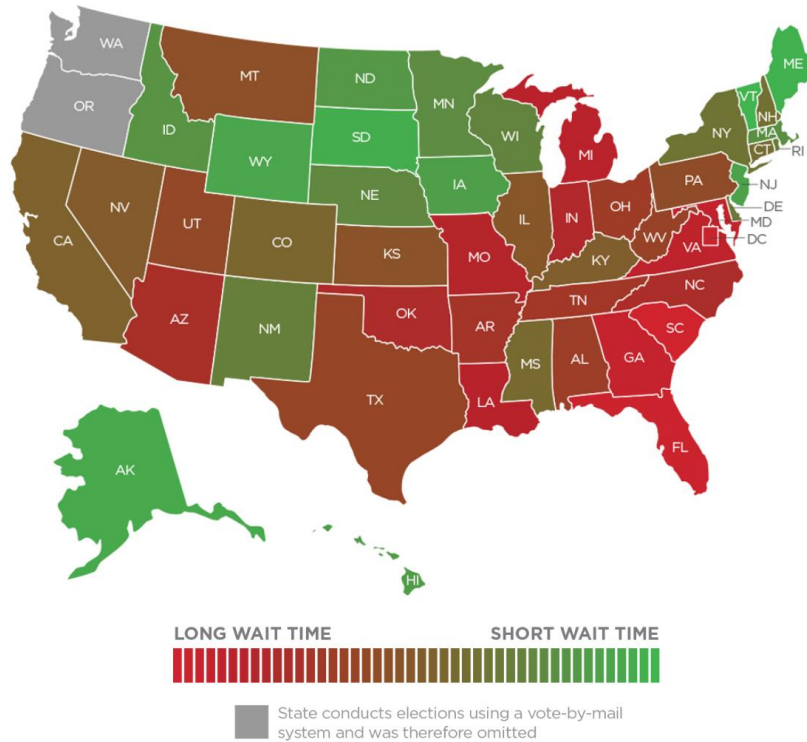
Along with cuts to early voting, reducing polling place access can lead to long lines. After such cuts led to long lines in Ohio and Florida in 2008 and 2012, a Massachusetts Institute of Technology (MIT) study found that lines were significantly longer in some states than others.¹⁰⁰⁹ Figure 9 reproduces a map of the results of MIT's national study:

¹⁰⁰⁶ See, e.g., *Briefing Transcript*, *supra* note 234, at 258-59 (statement by Dale Ho).

¹⁰⁰⁷ See, e.g., U.S. Dep't of Justice, *Voting Determination Letters for Texas* (last updated Aug. 7, 2015), <https://www.justice.gov/crt/voting-determination-letters-texas> (showing 16 letters based on polling place changes, with 7 occurring after 1982); see also U.S. Dep't of Justice, *Voting Determination Letters for Mississippi*, <https://www.justice.gov/crt/voting-determination-letters-mississippi> (last updated Aug. 7, 2015) [*hereinafter* DOJ, *Voting Determination Letters in MS*] (showing 9 letters based on polling place changes, with 4 occurring after 1982).

¹⁰⁰⁸ *Id.*

¹⁰⁰⁹ Charles Stewart III, *Waiting to Vote in 2012*, 15 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243630 (as prepared for the conference on "The Voting Wars: Elections and the Law from Registration to Inauguration," University of Virginia Law School, Mar. 23, 2013, Charlottesville, Virginia).

Figure 9: Voting Wait Time, 2008 and 2012

Source: Health of State Democracies¹⁰¹⁰

It shows that lines were longer in the formerly covered jurisdictions.

As discussed above, preclearance was conducted by jurisdictions providing Census data about the racial impact of reductions or changes in polling place locations, as well as DOJ interviewing minority community leaders about the impact of the change.¹⁰¹¹ This method took into account not only the most recent local Census data, but also factors such as whether there was adequate public transportation, whether the proposed polling place location was in a Sheriff's office, whether it was moved from a school,¹⁰¹² church, or community center, or whether it was no longer in an area safe for walking.¹⁰¹³ Section 5 also effectively required public notice of changes in polling place locations.¹⁰¹⁴ The Leadership Conference explains that:

¹⁰¹⁰ Health of State Democracies, *Voting Wait Times, 2008 and 2012*, HSD

<https://healthofstatedemocracies.org/factors/waittime.html> (last accessed June 11, 2018),

¹⁰¹¹ See Discussion of Section 5 preclearance procedures and Sources cited in notes 224-34, *supra*.

¹⁰¹² PCEA Report, *supra* note 663, at 33 (PCEA found that schools are ideal polling place locations, as they are community-based and familiar).

¹⁰¹³ See, e.g., Discussion and Sources cited at notes 1046-58, *infra*.

¹⁰¹⁴ See The Leadership Conference Education Fund (LCEF), *The Great Poll Closure*, LCEF 1 (Nov. 2016), <http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf> [*hereinafter* Leadership Conference Education Fund, *The Great Poll Closure*] ("Pre-Shelby [County], jurisdictions were required to give substantial

Post-*Shelby* [*County*], voters have to rely on news reports and anecdotes from local advocates who attend city and county commission meetings or legislative sessions where these changes are contemplated to identify potentially discriminatory polling place location and precinct changes. In the vast majority of instances, closures have gone unnoticed, unreported, and unchallenged.¹⁰¹⁵

In its 2016 study of 381 counties in formerly covered jurisdictions, the Leadership Conference found that 165 (43 percent) of these formerly covered counties had reduced the number of polling places since the *Shelby County* decision, leaving voters with fewer places to vote.¹⁰¹⁶ According to the Leadership Conference report, even with limitations in the data available in Alabama, Mississippi, and Texas, in 2016, public records showed a high number of polling places closed since the *Shelby County* decision in some of the formerly covered states, as follows:¹⁰¹⁷

Alabama—66 (polling places closed)
Arizona—212
Louisiana—103
Mississippi—44

North Carolina—27
South Carolina—12
Texas—40

notice to voters about any planned polling place closures. And they were required to consult with the minority community to ensure that any proposed voting change was not discriminatory.”).

¹⁰¹⁵ *Id.*

¹⁰¹⁶ *Id.* at 4. There is insufficient public information to determine or corroborate whether these closures were racially discriminatory.

¹⁰¹⁷ *Id.* at 5.

The public records reviewed by the Leadership Conference also indicate that, in some instances, the percent of polling places closed was substantial. For example, some counties in Arizona and Texas reduced their number of polling places by more than 50 percent.¹⁰¹⁸ While the rationale for reducing the number of polling places may be to save money, at least in some instances, when taken too far, the rationale led to extremely long lines¹⁰¹⁹ or other discriminatory impacts that illustrate how the loss of preclearance of these changes may have led to discriminatory results.¹⁰²⁰

The following section is organized to illustrate regional trends impacting different groups of minority voters.

Arizona

The impact of *Shelby County* was felt in the closure of polling places in Arizona prior to the state's presidential preference primary of March 2016. Arizona had been subject to preclearance since the 1975 VRA reauthorization, which expanded Section 5 to more fully include "language minority" populations (Latino, Asian, and Native Americans).¹⁰²¹ The Leadership Conference's examination of public records regarding closure of polling places in 2016 found that:

By sheer numbers and scale, Arizona is the leading closer of polling places in the aftermath of *Shelby* [County]. Almost every Arizona county reduced polling places in advance of the 2016 election and most on a massive scale—leading to 212 fewer voting locations. Arizona counties are the leaders in our study for both numbers of polling places closed and percentage of polling places. Pima County is the nation's biggest closer of polling places by number with 62 fewer voting locations in 2016 than 2012. Cochise County is the nation's biggest closer by percentage with its 63 percent reduction.¹⁰²²

In the state's largest county, Maricopa, the number of polling places was reduced from 200 to 60 in 2016. During discussions on reducing the number of Maricopa County polling centers, County Supervisor Steve Gallardo questioned whether 60 polling centers would be sufficient. The County Recorder and Elections Director both responded that 60 would be enough as the County was

¹⁰¹⁸ *Id.* at 7, 11-12.

¹⁰¹⁹ See, e.g., Discussion and Sources cited in notes 1022-27, *infra* (regarding Arizona).

¹⁰²⁰ See, e.g., Kristina Torres, *Cost-Cutting Moves Spur Fears About Reducing Access to Georgia Voters*, THE ATLANTA JOURNAL-CONSTITUTION (Oct. 11, 2016), <https://politics.myajc.com/news/state--regional-govt--politics/cost-cutting-moves-spur-fears-about-reducing-access-georgia-voters/qu9llnbKd6dSl6yblbB68M/>; see Discussion and Sources cited in notes 1045-49, *infra* (regarding Georgia).

¹⁰²¹ See Discussion of 1975 VRA Amendments and Sources cited therein at notes 162-67, *supra*; see also Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L. J. 201, 210-11 (2005); see also *Voting Rights: Hearings on H.R. Doc. No. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong., 1st Sess. 508-17 (1965) (statements of Latino community leaders regarding racial discrimination in voting impacting Latinos in New York and Texas).

¹⁰²² Leadership Conference Education Fund, *The Great Poll Closure*, *supra* note 1014, at 7.

implementing a new system that allowed voters to vote at any polling center, and as they expected 95 percent of all voters to vote via mail rather than in-person.¹⁰²³

But instead, due to the polling place closures, according to an *Arizona Republic* survey, voters reported that they were forced to wait in line for hours during the 2016 primary.¹⁰²⁴ County officials estimated they saved over \$1 million, but four polling places were overwhelmed with over 3,000 voters each.¹⁰²⁵ The *Arizona Republic* mapped the closure of polling places in Maricopa County, compared the results to Census data, and found that:

While both rich and poor areas were hurt by a lack of polling sites this year, a wide swath of predominantly minority and lower-income areas in west Phoenix and east Glendale, along with south Phoenix, were particularly lacking in polling sites compared with 2012. Poorer areas of east and west Mesa lacked polling sites as well, as did south Avondale and much of Goodyear.¹⁰²⁶

Similarly, Brennan Center's analysis of data provided by Maricopa County found that:

- On average, vote centers across the county [of Maricopa] closed more than 4 hours late. Vote centers in Phoenix closed, on average, more than 4 hours late.
- Latino voters faced disproportionately long wait times. Across heavily Latino census tracts, the average wait time at the closest voting center was more than 4 hours.
- Vote centers with longer wait times tended to have fewer resources, such as poll workers and electronic poll books, per voter.¹⁰²⁷

Litigation was brought under Section 2, alleging disparate impact and discriminatory effects for voters of color during the 2016 primary,¹⁰²⁸ but that case was settled after polling places were re-

¹⁰²³ Recording: Maricopa County Board of Supervisors Formal Meeting at 55:09 (Feb. 17, 2016), <http://video2.siretech.net/SIRE/MaricopaCounty/Formal/2870/2870.mp4>; see also Rob O'Dell, Yvonne Wingett Sanchez, and Caitlin McGlade, *Lack of polling sites, not independents, caused Maricopa election chaos*, ARIZ. REPUBLIC (Mar. 23, 2016) <https://www.azcentral.com/story/news/politics/elections/2016/03/23/maricopa-county-presidential-primary-election-chaos-arizona/82174876/>.

¹⁰²⁴ Yvonne Wingett Sanchez, *While Others Waited to Vote, 1 Maricopa County Site Had 21 Voters*, ARIZ. REPUBLIC (Mar. 25, 2016), <https://www.azcentral.com/story/news/politics/elections/2016/03/25/one-maricopa-county-polling-site-had-21-voters/82269370/> [*hereinafter* Sanchez, *While Others Waited Hours to Vote*]. The Arizona State Advisory Committee also held a hearing regarding voting rights in Arizona and received significant testimony regarding polling place closures. U.S. Comm'n on Civil Rights, *Voting Rights in Arizona*, Jul. 2018, at 2, <https://www.usccr.gov/pubs/2018/07-25-AZ-Voting-Rights.pdf>. This report was voted upon June 15, 2018. *Id.* at 1.

¹⁰²⁵ *Id.*

¹⁰²⁶ Rob O'Dell & Caitlin McGlade, *Map: Areas Hit Hardest By Slim Polling Options*, ARIZ. REPUBLIC (July 7, 2016), <https://www.azcentral.com/story/news/politics/elections/2016/03/27/slim-polling-options-maricopa-county/82278474/>.

¹⁰²⁷ Christopher Famighetti, *Long Voting Lines: Explained*, THE BRENNAN CENTER FOR JUSTICE (Nov. 4, 2016), http://www.brennancenter.org/analysis/long-voting-lines-explained#_ftn1.

¹⁰²⁸ Complaint, *Feldman v. Arizona*, No. 2:16-CV-01065, (D. Ariz. Apr. 15, 2016), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Complaint041516.pdf>.

opened in Maricopa County prior to the 2016 general election.¹⁰²⁹ However, other counties that had significant reductions in the number of polling places were not part of the settlement. These include: Cochise County (63 percent reduction), where there are high levels of Spanish-speaking voters and in 2006, a DOJ consent decree regarding the language requirements of the VRA,¹⁰³⁰ Pima County (22 percent reduction), which is 35 percent Latino; and Mohave County (46 percent) and Navajo County (25 percent), both of which have large Native American populations.¹⁰³¹

These polling place closures would have been subject to preclearance under Section 5, to determine whether they were intentionally discriminatory or retrogressively reduced access for minority voters. Moreover, the state would have had to provide racial impact data, and members of impacted minority groups would have had the opportunity to provide input,¹⁰³² enabling the DOJ to analyze the likely impact of the polling place closures with much greater precision than the procedures described above.¹⁰³³

Alabama

There may be heightened concerns about reductions in access to the polls in southern states like Alabama, where according to the 2010 Census, 26.8 percent of the population is black, and their numbers increased by 9.6 percent between 2000 and 2010.¹⁰³⁴ Regarding the region in general, the greatest percentage of black residents in the U.S. live in the South. In 2010, 55 percent of black residents in the U.S. lived in the South (an increase from 53.6 percent in 2000).¹⁰³⁵ Moreover, the U.S. Department of Transportation (DOT) and Alabama settled claims alleging that Alabama's closure of 31 Department of Motor Vehicle offices (which provide access to the identification now needed to vote) disparately occurred in the state's "Black Belt" region and disproportionately impacted black and Latino voters in Alabama and violated the Civil Rights Act.¹⁰³⁶ The DOT's

¹⁰²⁹ See Joint Notice of Settlement, *Feldman v. Arizona*, No. 2:16-CV-01065, at 2 (D. Ariz. Sept. 9, 2016), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Feldman-JointNoticeOfSettlement090916.pdf> (settling claim "regarding polling location allocation in Maricopa County").

¹⁰³⁰ See Consent Decree, Order and Judgment, *United States v. Cochise Cty.*, No. 4:06-CV-00304 (D. Ariz. Jun. 16, 2006); see also U.S. Dep't of Justice, *Cases Raising Claims Under the Language Minority Provisions of the VRA* (last updated Oct. 16, 2015), <https://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act> ("The complaint alleged that Cochise County violated Section 203 requirements by failing to provide an adequate number of bilingual poll workers trained to assist Spanish-speaking voters on election day and by failing to publicize effectively election information in Spanish.").

¹⁰³¹ See Adam DeRose, *Arizona Has Fewer Polling Places Than 2012*, CRONKITE NEWS (Nov. 7, 2016), https://www.gvnews.com/election/arizona-has-fewer-polling-places-than/article_1d70b6de-a545-11e6-8d46-a7280220fbc3.html.

¹⁰³² See Discussion and Sources cited in Chapter 2, notes 220-34, *supra* (discussing preclearance procedures including public notice, data required with submission, and minority community input).

¹⁰³³ Cf. Discussion and Sources cited at note 1023, *supra* (regarding county board meeting discussion of proposal).

¹⁰³⁴ U.S. Census Bureau, *The Black Population: 2010*, U.S. CENSUS BUREAU, 8 (Sept. 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (describing the Black or African American alone or in combination population) [*hereinafter* U.S. Census Bureau, *The Black Population*].

¹⁰³⁵ *Id.* at 7 (Figure 2) (describing the Black or African American alone or in combination population).

¹⁰³⁶ See, e.g., Keith Lang, *Feds to Investigate Alabama DMV Closures*, THE HILL (Dec. 9, 2015), <http://thehill.com/policy/transportation/312055-feds-closing-driver-license-offices-in-alabama-violates-civil-rights>.

investigation had found that “African-Americans in the Black Belt region are disproportionately underserved by . . . [the state’s] driver’s licensing services, causing ‘a disparate and adverse impact on the basis of race, in violation of Title VI.’”¹⁰³⁷

The Leadership Conference study of polling places indicated that 12 of the 18 (67 percent) of Alabama counties that provided data eliminated a total of 66 locations to vote.¹⁰³⁸ At the Commission’s briefing, Alabama Secretary of State John Merrill testified that because of the *Shelby County* decision “moving polling places, annexation, and even de-annexation of territory by municipalities” could now be enacted without review.¹⁰³⁹ The Commission notes that due to the loss of preclearance, limited data are available to determine whether the recent closures of polling place in the state had a discriminatory effect on minority voters in Alabama and throughout the South.¹⁰⁴⁰

Florida

While reducing early voting hours as described in the above Cuts to Early Voting section of this report, Florida concurrently reduced the number of polling places open during early voting hours.¹⁰⁴¹ Moreover, data showed that the long lines in Florida in 2012 were also concurrent with fewer voting machines and poll workers, which disparately impacted black and Latino voters and caused them to wait longer than white voters.¹⁰⁴² The harshest disparate impact and longest wait times to vote correlated with lack of sufficient poll workers in polling places with higher portions of Latino voters.¹⁰⁴³ Additionally, in 2016, the Election Protection hotline run by the Lawyers’ Committee for Civil Rights Under law received “multiple” complaints by voters about “aggressive, intimidating behavior” by individuals at polling places in Florida.¹⁰⁴⁴

Georgia

Georgia is another formerly covered jurisdiction with ongoing problems regarding access to polling places. Ezra Rosenberg testified about the post-*Shelby County* move of a polling place to

¹⁰³⁷ *Id.*

¹⁰³⁸ Leadership Conference Education Fund, *The Great Poll Closure*, *supra* note 1014, at 4.

¹⁰³⁹ John Merrill, Written Testimony for the U.S. Comm’n on Civil Rights, Feb. 2, 2018 [*hereinafter* Merrill, Written Testimony].

¹⁰⁴⁰ *Cf.* Discussion of Preclearance Procedures and Sources cited in Chapter 2, at notes 220-34, *supra*.

¹⁰⁴¹ *See* Discussion and Sources cited at notes 962-80, *supra*.

¹⁰⁴² *See* Herron & Smith, *Congestion at the Polls*, *supra* note 974, at 15-16 (analyzing precinct closing times and Florida voter registration data by race in 5,194 Florida precincts representing 92 percent of the 3.7 million Floridians who voted, and finding racial disparities); *see also* Christopher Famighetti, Amanda Melillo, & Myrna Pérez, ELECTION DAY LONG LINES: RESOURCE ALLOCATION 16, THE BRENNAN CENT. FOR JUSTICE (2014), <http://www.brennancenter.org/sites/default/files/publications/ElectionDayLongLines-ResourceAllocation.pdf> (citing survey-based studies on voter wait times) [*hereinafter* Famighetti et al., *Election Day Long Lines*].

¹⁰⁴³ Famighetti et al., *Election Day Long Lines*, *supra* note 1042.

¹⁰⁴⁴ William Wan, *Voting Issues in Florida: Intimidation Reported at Polling Places*, WASH. POST (Nov. 8, 2016), https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-updates-on-the-2016-election-voting-and-race-results/voting-issues-in-florida-intimidation-reported-at-polling-places/?utm_term=.4d955dee4e63.

a Sheriff's office in Macon-Bibb County.¹⁰⁴⁵ Using the Sheriff's office as a polling place can be intimidating, especially considering the history of violence by local law enforcement at the polls during the Jim Crow era.¹⁰⁴⁶ Moreover, in modern times, "the president of the Macon-Bibb NAACP chapter . . . said it sent 'the wrong message' among residents who had raised concerns about local law enforcement in recent years."¹⁰⁴⁷

In order to defeat the measure to move the polling place to the Sheriff's office, the county NAACP collected signatures from 20 percent of registered, active voters in the county.¹⁰⁴⁸ Gwen Westbrooks, president of the Macon-Bibb County chapter of the NAACP, commented that, "We're looking at some of the same issues from the 1960s in 2016."¹⁰⁴⁹

Indiana

In April 2018, an Indiana federal district court held that Marion County's reduction of the number of early voting sites was likely to violate Section 2 of the VRA, and it therefore issued a preliminary injunction requiring the county to reestablish two additional satellite early voting offices for the November 2018 general election.¹⁰⁵⁰ The federal court took into account that the county had introduced experimental satellite offices for early voting in 2008,¹⁰⁵¹ and there were no administrative or staffing issues.¹⁰⁵² However, the board voted not to re-open the satellite offices in 2016, leaving Marion County, one of Indiana's largest counties, with only one location for early voting.¹⁰⁵³ The court also took into account that the only place for early voting was the City-County building, which resulted in long commutes and long wait times,¹⁰⁵⁴ forcing some to not participate in early voting.¹⁰⁵⁵ The court concluded that the action "impose[d] only a limited

¹⁰⁴⁵ Rosenberg, Written Testimony, *supra* note 651, at 4 (noting that "While we were fortunate to have partners on the ground that alerted us to the problems that could be stopped, an effective Section 5 would have placed the burden on these jurisdictions to have provided notice of these changes in their voting practices and policies before they took effect.").

¹⁰⁴⁶ See, e.g., U.S. COMM'N ON CIVIL RIGHTS VOTING 1961, *supra* note 62, at 67 (describing how black voters who went to register to vote in Louisiana in July 1960 "were referred to the sheriff—a not-too-subtle form of intimidation" and, in another instance, a sheriff warned a black resident, who had planned a meeting with the NAACP to discuss voter registration, not to "say anything about voting.").

¹⁰⁴⁷ Kristina Torres, *Cost-Cutting Move Spurs Fears About Reducing Access to Georgia Voters*, THE ATLANTA JOURNAL-CONSTITUTION (Oct. 11, 2016), <https://politics.myajc.com/news/state--regional-govt--politics/cost-cutting-moves-spur-fears-about-reducing-access-georgia-voters/qu9lInbKd6dSl6yblbB68M/>.

¹⁰⁴⁸ Stanley Dunlap, *Macon-Bibb Polling Location OK'd After Sheriff's Precinct Nixed*, THE TELEGRAPH (May 16, 2016), <http://www.macon.com/news/local/article77920442.html>.

¹⁰⁴⁹ *Id.*

¹⁰⁵⁰ *Common Cause Indiana v. Marion Cty. Election Bd.*, 311 F. Supp. 3d 949, 977 (S.D. Ind. 2018). However, the court denied the plaintiff's motion, in part, electing not to enjoin the defendants to establish the satellite offices for the May 2018 Primary Election. *Id.*

¹⁰⁵¹ *Id.* at 955-56.

¹⁰⁵² *Id.*

¹⁰⁵³ *Id.* at 958-59.

¹⁰⁵⁴ *Id.* (One "77-year-old mother had wanted to cast an EIP vote as well but she 'did not want to go downtown as she has trouble walking and normally uses a cane or walker.'").

¹⁰⁵⁵ *Id.*

burden,”¹⁰⁵⁶ yet it had a disparate impact on those “who lack financial means or flexible schedules.”¹⁰⁵⁷ The court also took note of the disproportionate negative impact of the cuts to early voting on black voters, citing the greater decline in African-American absentee voters compared to white voters in the 2012 and 2016 elections that occurred after the cuts following the 2008 elections.¹⁰⁵⁸

Louisiana

Based on a history of discrimination in voting, Louisiana had been covered under Section 5 since 1965.¹⁰⁵⁹ The Leadership Conference found that since the *Shelby County* decision, 61 percent of Louisiana parishes have closed a total of 103 polling places.¹⁰⁶⁰ At the Commission’s Louisiana SAC briefing on voting rights, Jhacova Williams, Ph.D. Candidate in the Economics Department at Louisiana State University, presented her research finding that “a negative and statistically significant association with the percent [of] black [residents] and the number of polling places indicating that census tracts that have higher percentages of black residents have fewer polling places . . . for a 10 percentage point increase in black residents there are 1.2 percent fewer polling places within a census tract.”¹⁰⁶¹ She also found “a positive and statistically significant relationship between income and the number of polling places,”¹⁰⁶² and that “[i]t is also the case that the proportion of black residents and income per capita are negatively correlated.”¹⁰⁶³

Mississippi

There may be heightened concerns about reductions in access to the polls in states like Mississippi, which has the highest percentage of black residents of any state.¹⁰⁶⁴ Widespread, flagrant, and rampant discrimination against black voters in Mississippi led to the enactment of the 1965 VRA.¹⁰⁶⁵ Prior to *Shelby County*, Mississippi had been covered since 1965, and even though there has not been successful post-*Shelby County* litigation in the state, a pattern of objections from 2006 to 2013 showed that it continued to be one of the states with the highest level of VRA violations in recent years.¹⁰⁶⁶ Also prior to *Shelby County*, the DOJ had sent observers to monitor elections

¹⁰⁵⁶ *Id.* at 969 (quoting *Crawford*, 553 U.S. at 202).

¹⁰⁵⁷ *Id.*

¹⁰⁵⁸ *Id.*

¹⁰⁵⁹ See, e.g., U.S. Dep’t of Justice, *Voting Determination Letters for Louisiana*, <https://www.justice.gov/crt/voting-determination-letters-louisiana> (last updated Aug. 7, 2015) (including 10 objections since 2000).

¹⁰⁶⁰ Leadership Conference Education Fund, *The Great Poll Closure*, *supra* note 1014, at 8.

¹⁰⁶¹ Louisiana State Advisory Committee to the U.S. Comm’n on Civil Rights, *Public Meeting: Civil Rights and Barriers to Voting in Louisiana* 16 (Dec. 6, 2017).

¹⁰⁶² *Id.*

¹⁰⁶³ *Id.*

¹⁰⁶⁴ U.S. Census Bureau, *The Black Population*, *supra* note 1034, at 8.

¹⁰⁶⁵ See Discussion and Sources cited in *History of Minority Voter Suppression*, *supra* notes 40-43; see also Robert McDuff, *The Voting Rights Act and Mississippi: 1965-2006*, 17 U. OF S. CAL. REV. OF L. AND SOC. JUST. 475 (2008), https://gould.usc.edu/students/journals/rlsj/issues/assets/docs/issue_17/05_Mississippi_Macro.pdf.

¹⁰⁶⁶ See, e.g., DOJ, *Voting Determination Letters in MS*, *supra* note 1007; Figure 23, DOJ Objection Letters by State (2006-2013).

in Mississippi on a regular basis.¹⁰⁶⁷ Observers were sent to Mississippi when DOJ believed there was a need to protect against potential discrimination in voting, based on pre-election investigations. Against this backdrop, there have been significant closures of polling places in the state.

In its 2016 study, the Leadership Conference located public records from 59 of Mississippi's 82 counties, and found that 20 of those 59 counties (34 percent) had reduced the number of polling places since the *Shelby County* decision.¹⁰⁶⁸ The impact of the loss of preclearance of changes in polling places is illustrated by the following:

In 2012, the majority-White Lauderdale County Election Commission established precincts that were backed by a \$65,000 voter impact study, and precleared as non-discriminatory by the Justice Department. The next year, a hard fought mayoral race in the 62 percent Black city of Meridian resulted in the election of the city's first Black mayor, Percy Bland, even though a noose was hung outside of his business during the campaign. Less than one month later, the *Shelby [County]* decision gutted the Voting Rights Act and set off a chain of events that allowed the election commission to eliminate six of the county's 48 polling places without preclearance.

In 2015, the election commission proposed a plan to move several of Meridian's municipal election polling places out of Black churches, including Mt. Olive Baptist, an iconic church with a legacy of voting rights activism. Despite the fact that Mt. Olive's pastor and Mayor Bland both opposed the plan—which also broke up a major Black precinct—the county implemented the moves without a study of its impact on voters.¹⁰⁶⁹

Although this case has not been litigated, and the Commission does not have relevant data regarding discriminatory impacts, it raises several issues showing the negative impacts of loss of preclearance. First, “whether political campaigns have been characterized by overt or subtle racial appeals,” like the noose hung outside the black candidate's business in this instance, are taken into account in Section 2 cases.¹⁰⁷⁰ Second, in places with high levels of racially polarized voting such as Mississippi, redistricting that is no longer subject to preclearance may dilute minority voting rights, leading to voters of color no longer being able to elect candidates of their choice.¹⁰⁷¹ This may happen when minority precincts are split, as was done in 2015 in Meridian, Mississippi. All of this intersects with the issue of moving polling places when district lines are redrawn. Whether

¹⁰⁶⁷ See Discussion and Sources cited at note 1493, *infra*; Appendix G: Federal Observers by Year, State and County and Appendix H: DOJ Election Monitors by Year, State, and County.

¹⁰⁶⁸ Leadership Conference Education Fund, *The Great Poll Closure*, *supra* note 1014, at 9 (footnotes omitted).

¹⁰⁶⁹ *Id.* at 9.

¹⁰⁷⁰ *Gingles*, 478 U.S. at 37.

¹⁰⁷¹ *Id.* at 56; see also Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L. J. 867 (2016), *passim* [hereinafter Cain & Zhang, *Blurred Lines*].

or not a VRA violation would be found in this particular case, it illustrates the myriad of issues that would have been taken into account under the former preclearance regime.

North Carolina

Public records reviewed by the Leadership Conference reportedly show that of the 40 formerly covered counties in North Carolina, in the post-*Shelby County* era, 12 counties had closed a total of 27 polling places by 2016.¹⁰⁷² For example, Cleveland County went from having 26 polling places in 2012, to 21 in 2016. In the city of Shelby County, North Carolina (40 percent black), five polling places were merged into two.¹⁰⁷³ Further research would be needed to determine whether these polling place closures had a racially discriminatory effect; such research would seek to determine if the fact that half of the county's polling places that closed were in the part of the county that has a higher black population was retrogressive.¹⁰⁷⁴ This is the type of information that was routinely submitted and reviewed under the former Section 5 preclearance procedures.¹⁰⁷⁵

Pennsylvania

Allegations in Section 2 VRA litigation in Pennsylvania illustrate concerns about problems with access to the polls on Historically Black Colleges and Universities (HBCUs). According to a Section 2 complaint, in 2008, students at Lincoln University, an HBCU in Chester, Pennsylvania petitioned to have a polling place on campus, to avoid long lines at the much smaller space located off campus.¹⁰⁷⁶ The allegations also include that the county denied the request and students were forced to wait 6 to 8 hours to vote on Election Day, while in the meantime, poll watchers inside the polls challenged student voters.¹⁰⁷⁷ This allegedly led to the district having the lowest turnout of any election district in the county.¹⁰⁷⁸ After civil rights groups sued under Section 2, the county settled and opened a polling place on Lincoln University campus.¹⁰⁷⁹

Alaska

The Native American Rights Fund (NARF) has pointed out one particularly egregious example in Alaska, where a polling place was moved away from a village, and thereafter, Native Alaskan voters could only access their polling place by plane.¹⁰⁸⁰ At the Commission's briefing, NARF's

¹⁰⁷² Leadership Conference Education Fund, *The Great Poll Closure*, *supra* note 1014, at 10.

¹⁰⁷³ *Id.*

¹⁰⁷⁴ See Chapter 2, discussing preclearance procedures, at notes 220-34, *supra*.

¹⁰⁷⁵ *Id.* (discussing preclearance procedures including public notice, data required with submission, and minority community input).

¹⁰⁷⁶ Complaint, *English v. Chester Cty.*, No. 2:10-CV-00244 (E.D. Pa. Jan. 20, 2010), https://www.aclupa.org/download_file/view_inline/591/214/.

¹⁰⁷⁷ *Id.* at ¶¶ 11, 34, 44, 66, 72.

¹⁰⁷⁸ *Id.* at ¶ 83.

¹⁰⁷⁹ Settlement Agreement, *English v. Chester Cty.*, No. 2:10-CV-00244 (E.D. Pa. July 2010), https://www.aclupa.org/download_file/view_inline/639/214/.

¹⁰⁸⁰ Natalie Landreth, *Why Should Some Native Americans Have to Drive 163 Miles to Vote?*, THE GUARDIAN, (June 10, 2015), <https://www.theguardian.com/commentisfree/2015/jun/10/native-americans-voting-rights> (“[I]magine if you had to take a plane flight to the nearest polling place because you cannot get to it by road, which was the

senior attorney Natalie Landreth testified that issues of this type have continued in the post-*Shelby County* era in Alaska and in other states with high Native populations.¹⁰⁸¹

In May 2015, after consulting with tribal leaders across the nation, the DOJ found that Native Americans had to travel farther distances compared to white voters in a number of states.¹⁰⁸² This finding led the DOJ to propose post-*Shelby County* legislation requiring jurisdictions “whose territory includes part or all of an Indian reservation, an Alaska Native village, or other tribal lands to locate at least one polling place in a venue selected by the tribal government,” and requiring an equal number of resources at those polling sites.¹⁰⁸³ Senators Tester (D-MT), Heitkamp (D-ND), Udall (D-NM), and Franken (D-MN) introduced a version of the DOJ draft bill as the Native American Voting Rights Act of 2015, which would require establishment of polling places on reservations at the request of tribes, including during early voting, and direct state election officials to mail absentee ballots to all registered voters if requested by the tribe.¹⁰⁸⁴ The bill, however, has not yet received a hearing in Congress.¹⁰⁸⁵

Montana

The Montana case of *Wandering Medicine v. McCulloch* illustrates the discriminatory effect of closing polling places in Native American communities.¹⁰⁸⁶ The DOJ filed a Statement of Interest in this case, arguing that plaintiffs were likely to succeed, as Section 2 of the VRA prohibits unequal access to voter registration sites.¹⁰⁸⁷ In its brief, the DOJ cited a number of cases showing that unequal access to voter registration and voting sites violated the rights of black and Native

case for several Native communities in 2008, when the state of Alaska attempted a “district realignment” to eliminate polling places in their villages. And that’s just half the trip”).

¹⁰⁸¹ *Briefing Transcript, supra* note 234, at 98-100 (statement by Natalie Landreth).

¹⁰⁸² U.S. Dep’t of Justice, Tribal Justice and Safety, *DOJ Proposes Legislation to Improve Access to Voting for American Indians and Alaskan Natives* (last updated May 15, 2015), <https://www.justice.gov/tribal/departments-justice-proposes-legislation-improve-access-voting-american-indians-and-alaska> (last accessed Aug. 9, 2019) [*hereinafter* DOJ, *DOJ Proposes Legislation to Improve Access to Voting for American Indians and Alaskan Natives*]; see also U.S. Dep’t of Justice, Tribal Justice and Safety, *Draft Legislation: Tribal Equal Access to Voting Act of 2015*, <https://www.justice.gov/file/440986/download> (last accessed Aug. 9, 2019) [*hereinafter* DOJ, *Tribal Justice and Safety, Draft Legislation*].

¹⁰⁸³ DOJ, *DOJ Proposes Legislation to Improve Access to Voting for American Indians and Alaskan Natives, supra* note 1082; see DOJ, *Tribal Justice and Safety, Draft Legislation, supra* note 1082.

¹⁰⁸⁴ See Discussion of S.1912 (2015), in Appendix B: Congressional Responses to the *Shelby County* Decision.

¹⁰⁸⁵ *Id.*

¹⁰⁸⁶ *Mark Wandering Med. v. McCulloch*, No. CV-12-135-BLG-DWM, 2014 WL 12588302 (D. Mont. 2014).

¹⁰⁸⁷ Statement of Interest of the United States, *Mark Wandering Med. v. McCulloch*, No. 1:12-CV-135-RFC (D. Mont. Oct. 23, 2012), <https://www.justice.gov/crt/case-document/si-wandering-medicine-v-mcculloch-2012>. The DOJ later filed an amicus brief in support of the plaintiff-appellants when the plaintiffs appealed the district court’s denial of a preliminary injunction, again arguing that the plaintiffs were likely to succeed on a Section 2 claim and that the district court erred in interpreting the necessary elements of such a claim. Brief for the United States as Amici Curiae Supporting Plaintiff-Appellant, *Mark Wandering Med. v. McCulloch*, 544 Fed. App’x 699 (9th Cir. 2013) (No. 12-35926), 2013 WL 1452760.

American voters.¹⁰⁸⁸ Moreover, an expert study showed that Native Americans were forced to travel 189 percent further than white voters in Big Horn County, 322 percent further in Blaine County, and 267 percent further in Rosebud County.¹⁰⁸⁹ In Rosebud County, the round trip to the county seat is 120 miles, which is a two-hour drive that takes even longer for those getting rides or using public transportation, making it much more difficult for impacted communities to vote.¹⁰⁹⁰ The DOJ also stated that in 2012, the locations for the sites for in-person late registration and early voting in Big Horn, Blaine, and Rosebud counties discriminated against Native American voters in violation of Section 2 of the VRA.¹⁰⁹¹ Montana law permits late registration and early voting at the county seat, but also permits counties to create satellite locations for these purposes.¹⁰⁹² As the counties are geographically large and sparsely populated, the location of satellite late registration and early voting locations is critical—and none were located on Native American Reservations. In June 2014, state and county election officials agreed to settle the case by establishing satellite offices on reservations twice a week through Election Day.¹⁰⁹³

North Dakota

In 2010, a federal district court in North Dakota issued a preliminary injunction enjoining closure of polling places on the Spirit Lake Tribe's reservation in North Dakota.¹⁰⁹⁴ This case explained how historic discrimination that leads to ongoing disparities may currently impact access to the polls. The federal court found that:

The historic pattern of discrimination suffered by members of the Spirit Lake Tribe is well-documented. The North Dakota Supreme Court found evidence of Benson County's discrimination against the Spirit Lake Tribe in 1897. In 2000, following a dispute over the method of electing members of the Benson County Commission, this Court approved a consent decree, which stated:

Native American Citizens within Benson County have suffered from a history of official racial discrimination in voting and other areas, such as education, employment, and housing. Native American citizens in Benson County continue to bear the effects of this past discrimination, reflected in their markedly lower socioeconomic status compared to the white population. These factors hinder Native Americans' present-day ability to participate effectively in the political process.

¹⁰⁸⁸ *Id.* at 5 (citing *Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom.*, *Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991), and unequal access to voting sites, see *Spirit Lake Tribe*, 2010 WL 4226614; *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982)). See also *Jacksonville Coalition for Voter Protection v. Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004) (unequal access to early voting sites); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968) (unequal access to absentee voting opportunities).

¹⁰⁸⁹ Cain & Zhang, *Blurred Lines*, *supra* note 1071, at 872-74.

¹⁰⁹⁰ Editorial, *Make Voting Easy for Native Americans on Reservations*, GREAT FALLS TRIB. (Oct. 24, 2015), <https://www.greatfallstribune.com/story/opinion/2015/10/24/voting-easier-native-americans/74340666/>.

¹⁰⁹¹ See Statement of Interest of the United States, *Mark Wandering Med.*, *supra* note 1087.

¹⁰⁹² *Id.* at 4.

¹⁰⁹³ Settlement Agreement, *Mark Wandering Med.*, No. 1:12-CV-00135 (D. Mont. 2014); <https://www.aclumontana.org/en/cases/wandering-medicine-v-montana-secretary-state>.

¹⁰⁹⁴ *Spirit Lake Tribe v. Benson Cty.*, 2010 WL 4226614 (D.N.D. 2010).

This pervasive discrimination is alleged by the Tribe to be a significant factor contributing to the entrenched problems of poverty, alcoholism, illiteracy, and homelessness.

The Tribe has provided evidence that the closure of the voting places on the reservation will have a disparate impact on members of the Spirit Lake Tribe because a significant percentage of the population will be unable to get to the voting places in Minnewauken to vote. According to a survey conducted by Immogene Belgrade, 46 percent of those polled said they would be unable to find transportation to Minnewauken and thus would be unable to vote in person on Election Day. A number of factors contribute to this problem: (1) road closures due to construction and flooding around Devils Lake; (2) the lack of reliable vehicles; (3) the lack of sufficient buses to transport voters to Minnewauken; (4) a lack of sufficient funds to pay for transportation; and (5) the sheer distance between the more remote areas of the reservation and Minnewauken.¹⁰⁹⁵

Based upon this evidence, the federal court granted a preliminary injunction re-opening two of the closed polling places.¹⁰⁹⁶

Oregon

Native American leaders in Oregon and Washington State, both of which have converted entirely to vote-by-mail, also voiced concerns about lack of access to polling places.¹⁰⁹⁷ In these states, there are no more polling places, but there may be ballot drop-off boxes.¹⁰⁹⁸ At the Commission's briefing, Natalie Landreth testified that:

In 2015, NARF was able to create the Native American Voting Rights Coalition. It was a direct response to *Shelby County*. We decided we should gather into one room every person and organization that litigates voting rights cases in Indian Country . . . There were more than 100 [types of allegations of voting problems], ranging from polling places where the county sheriffs are known to stand in the door of the polling place, armed, weapon visible, to a general sense that there were fewer polling places on reservations than there used to be.¹⁰⁹⁹

In a Native American Voting Rights Coalition forum record submitted to the Commission, Carina Miller from the Confederated Tribes of Warm Springs in Oregon spoke in her native language, commenting that voting by mail exacerbates language barriers as the ballots are mailed in English-

¹⁰⁹⁵ *Id.* at *3 (internal citations omitted).

¹⁰⁹⁶ *Id.* at *6.

¹⁰⁹⁷ See, e.g., Transcript of Proceedings, Pacific Northwest Hearing, Native American Voting Rights Coalition in Portland, Oregon (Jan. 24, 2018) [*hereinafter Portland Transcript*] at 121 (Washington), 174 (Oregon).

¹⁰⁹⁸ *Id.* at 154.

¹⁰⁹⁹ Natalie A. Landreth, Written Testimony for the U.S. Commission on Civil Rights, Feb. 2, 2018 at 4 [*hereinafter Landreth, Written Testimony*].

only.¹¹⁰⁰ Members of other tribes in Oregon said they have to drive up to 45 to 50 miles, or about 45 minutes, to vote.¹¹⁰¹ Another community leader added that a significant Native American homeless persons in Oregon are not mailed ballots, making voting “virtually impossible.”¹¹⁰²

Washington State

During a January 2018 Native American Voting Rights Coalition’s Pacific Northwest briefing, community members and tribal leaders discussed problems with the vote-by-mail system in their communities.¹¹⁰³ In Washington State, relevant problems raised by community members included:

- Getting ballots to the correct address; for instance, in one development with 400 rental units, 40 percent of the tenants move every month;¹¹⁰⁴
- An inability to update addresses online due to less access to Internet¹¹⁰⁵
- The cost of a new driver’s license, \$89, and a renewal license, \$54, is a barrier as well;¹¹⁰⁶
- Problems with receiving and dropping off mail-in ballots in rural and isolated communities;¹¹⁰⁷ state, federal, and county offices only open during limited, staggered hours;¹¹⁰⁸
- Historical trauma leading to apathy or distrust of the federal government;¹¹⁰⁹ and
- To receive a mail ballot, a voter’s address must to be certified as “physically deliverable,” leaving out many voters.¹¹¹⁰

Other community leaders stated that due to the Washington Secretary of State’s guidelines, the Okanogan County Auditor did not fulfill a tribe’s request for drop-off box at a tribal government center.¹¹¹¹ Councilwoman Norma Sanchez commented that:

Tribal members live 20, 30, 40, 50 miles away from the post office, and we don't have rural [post office] boxes They go to the post office to get their mail and to mail their letters, so many of them are not going to drive that distance just to mail a ballot and it’s also going to cost them also to put a stamp on it, and many of our tribal members cannot afford gas sometimes to even make it to the post office.¹¹¹²

¹¹⁰⁰ See Miller Testimony, *Portland Transcript*, *supra* note 1097, at 173-74.

¹¹⁰¹ *Id.* at 160 and 206.

¹¹⁰² *Id.* at 210.

¹¹⁰³ See, e.g., *id.* at 121.

¹¹⁰⁴ *Id.* at 21-22 and 51.

¹¹⁰⁵ *Id.* at 51.

¹¹⁰⁶ *Id.* at 124.

¹¹⁰⁷ *Id.* at 77.

¹¹⁰⁸ *Id.*

¹¹⁰⁹ *Id.* at 95-97.

¹¹¹⁰ *Id.* at 122.

¹¹¹¹ *Id.* at 123.

¹¹¹² *Id.* at 140.

Theresa Sheldon of the Board of Directors of the Tulalip Tribe said that her tribe used to have a polling place, but under the new rules they can only vote absentee (by mail). The tribe has been asking for a drop-off box on the reservation for over ten years, but this repeated request has been refused and voters now have to drive to a Starbucks in the nearest town to vote.¹¹¹³

Language Access Issues

The U.S. is home to millions of citizens with limited-English proficiency who can only vote with limited understanding if voting and voter registration materials and oral assistance are not provided in languages in which they are fluent. Asian Americans Advancing Justice, a national affiliation of five Asian American and Pacific Islander civil rights organizations, submitted written testimony documenting that:

Of approximately 291 million people in the United States over the age of five, 60 million people, or just over 20%, speak a language other than English at home. Among those other languages, the top two categories are Spanish and Asian languages, at 37 million and 11.8 million people, respectively. This means, nationally, about 3 out of every 4 Asian Americans speak a language other than English at home and a third of the population is Limited English proficient (LEP), that is, has some difficulty with the English language.¹¹¹⁴

Given the rich language diversity among Americans, federal law—including the language access provisions of the VRA, as well as Executive Order 13166, requiring language assistance in federally funded services under Title VI of the Civil Rights Act, which prohibits national origin discrimination—is quite clear that language support is federally required for voters who need it.¹¹¹⁵ Sections 4(e), 4(f)(4), and 203 are the VRA’s “language minority” or “language access” provisions.¹¹¹⁶ They require that voters who are limited-English proficient (LEP) be provided access to voting in their native languages. The term “language minorities” or “language minority group” is defined as persons who are American Indian, Asian American, Alaska Natives, or of Spanish heritage.¹¹¹⁷ Persons of African or Caribbean heritage are not included in the statutory definition of “language minority groups” under the VRA, so languages such as Haitian Creole are not covered under Section 203. Additionally, scholars have argued that Arab Americans should

¹¹¹³ *Id.* at 163-64.

¹¹¹⁴ Asian Americans Advancing Justice, Written Testimony for the U.S. Comm’n on the Civil Rights, Mar. 19, 2018, at 3 [*hereinafter* Asian Americans Advancing Justice, Written Testimony]; *see also* Bernard L. Fraga & Julie Lee Merseth, *Examining the Causal Impact of the Voting Rights Act Language Minority Provisions*, 1 J. OF RACE, ETHNICITY AND POL., 31, 32 (2016) [*hereinafter* Fraga & Merseth, *Examining the Causal Impact*] (“roughly one in four Asian Americans who are eligible to vote are LEP and reside in a county or municipality required to provide election materials in the citizen’s native language”).

¹¹¹⁵ Limited English Proficiency, *Executive Order 13166* (last updated Mar. 28, 2018), <https://www.lep.gov/13166/eo13166.html>.

¹¹¹⁶ DOJ Response to USCCR Interrogatory No. 25, at 6; Copies of the Commission’s Interrogatories and Document Requests may be found in Appendix J.

¹¹¹⁷ 52 USC § 10310(c)(3).

have their languages covered under Section 203.¹¹¹⁸ Although these communities' language rights can be and have been protected by other VRA provisions,¹¹¹⁹ because Section 203 is a strict liability provision requiring language access in jurisdictions where the threshold is met,¹¹²⁰ the omission of these languages in the VRA statutory definition leaves a gap in language access protection for these voters.¹¹²¹

The Commission received testimony and conducted research showing that enforcing the VRA's language access provisions is crucial to providing equal access to the right to vote; yet the DOJ has drastically reduced its level of enforcement of the rules that election materials, including ballots and voter registration forms, as well as oral assistance, be provided bilingually.¹¹²²

As various experts told the Commission, there are millions of LEP voters whose numbers are growing, but due to widespread noncompliance with the language access provisions of the VRA, their voting rights are at risk.¹¹²³ The Commission also reviewed arguments against language access, including that it encourages balkanization, increases fraud, and wastes government resources.¹¹²⁴ The type of voter fraud alleged is noncitizen voter fraud, but the Commission's

¹¹¹⁸ See, e.g., Brenda Fathy Abdelall, Note, *Not Enough of a Minority?: Arab Americans and the Language Assistance Provisions (Section 203) of the Voting Rights Act*, 38 U. MICH. J.L. REFORM 911, 913 (2005).

¹¹¹⁹ Theoretically, the language access rights of voters who are not in groups that are covered under Section 203 may be protected in more limited circumstances, under Sections 2 or 208 of the VRA. See, e.g., Consent Order, *United States v. Miami-Dade Cty.*, No. 02-CV-21698 (S.D. Fla. 2002) (DOJ litigated to protect Creole-speaking Haitian-American voters in Miami-Dade County who were prevented from receiving assistance), <https://justice.gov/crt84>; Consent Order, *United States v. Salem Cty.*, No. 1:08-CV-03276 (D.N.J. 2008) (language access-related violations of Section 2, showing that Section 2 applies to and can be used to protect language access rights); Consent Order and Decree, *United States v. City of Hamtramck*, No. 00-CV-73541 (E.D. Mich. 2000) (discriminatory treatment at the polls included asking only Arab Americans for documentary proof of citizenship; consent order included requirements to appoint Arabic and Bengali-speaking election inspectors), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/hamtramck_cd.pdf; First Amended Consent Order and Decree, and Second Amended Consent Order, *United States v. City of Hamtramck*, No. 00-CV-73541 (E.D. Mich. 2003 and 2004) (extending requirements for federal observers and bilingual election inspectors through Jan. 31, 2006), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/hamtramck_cd03.pdf and https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/hamtramck_cd04.pdf.

¹¹²⁰ 52 U.S.C. § 10503(b)(2)(A).

¹¹²¹ The above-cited cases show that in order to have these protections apply, either Section 2 or Section 208 claims must be proven, while the broad protections of Section 203 are unavailable unless Congress were to expand the statute to apply to other citizens who are LEP whose predominant language is not Spanish, Asian, or Native American. See, e.g., First Amended Consent Order and Decree, and Second Amended Consent Order, *United States v. City of Hamtramck*, No. 00-CV-73541 (E.D. Mich. 2003 and 2004) (extending requirements for federal observers and bilingual election inspectors through Jan. 31, 2006), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/hamtramck_cd03.pdf and https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/hamtramck_cd04.pdf.

¹¹²² See Chapter 5, Documentation of DOJ's Language Access Enforcement and Sources cited therein at notes 1437-1459, *infra*.

¹¹²³ *Id.*

¹¹²⁴ See, e.g., Roger Clegg, *Should the Feds Require U.S. Ballots to be Printed in Foreign Languages?*, CENTER FOR EQUAL OPPORTUNITY, (May 24, 2017), <http://www.ceousa.org/voting/voting-news/voting-issues/1108-should-the-feds-require-u-s-ballots-to-be-printed-in-foreign-languages>.

review of that issue shows that there are sufficient legal protections against noncitizen voting and that incidences are exceedingly rare.¹¹²⁵ Regarding cost, James Tucker, Of Counsel with Wilson Elser and member of the Native American Voting Rights Coalition, found that the actual cost of bilingual ballots is less than expected, and the cost of bilingual poll workers is negligible, considering that they are members of the community and every jurisdiction already has to hire poll workers.¹¹²⁶ Regarding balkanization, José Enrique Idler of the American Enterprise Institute argues that although the VRA requires multilingual ballots for LEP voters, “[t]he notion, however, that the nation is going down a slippery slope and will soon become a multilingual republic is exaggerated. The dominant language is, and will be for a very long time, English.”¹¹²⁷ Moreover, the Commission received credible testimony citing reports showing that when language access rights are enforced, participation of LEP voters increases,¹¹²⁸ and civic participation certainly indicates a form integration into American democracy.

Each of the VRA’s language access provisions is discussed in turn below.

Section 4(e) of the VRA provides specific rights for U.S. citizens educated in “American-flag schools” in languages other than English, meaning Puerto Ricans educated in public schools on the Island. Under Section 4(e) jurisdictions may not “condition” Puerto Ricans’ voting rights on ability to speak English.¹¹²⁹ Puerto Ricans are U.S. citizens by birthright.¹¹³⁰ With hundreds of thousands having recently fled Puerto Rico after Hurricane María, states and counties on the mainland should not be remiss in their duties to provide bilingual ballots, poll workers, and election materials, including voter registration forms and instructions, to Puerto Ricans protected under Section 4(e).¹¹³¹ The recent diaspora only adds to current unmet needs. On the Island, the official government language is Spanish, public education is conducted in Spanish, and over 78 percent of adults are limited-English proficient.¹¹³² The diaspora’s needs span many states, but the need is most urgent in Florida, where over 200,000 evacuees have arrived since María of Puerto Rico and

¹¹²⁵ See Chapter 3, Voter Fraud and Other Arguments, at notes 669-709 *supra*, and sources cited therein.

¹¹²⁶ Tucker, *Enfranchising Language Minority Citizens*, *supra* note 152.

¹¹²⁷ Jose Enrique Idler, *En Ingles, Por Favor*, NAT’L REV. (Mar. 8, 2006), <http://www.aei.org/publication/en-ingles-por-favor/>.

¹¹²⁸ Asian Americans Advancing Justice, Written Testimony, *supra* note 1114, at 15 (examples of turnout increasing by 40-50 percent); see also Melissa J. Marschall & Amanda Rutherford, *Voting Rights for Whom? Examining the Effects of the Voting Rights Act on Latino Political Incorporation*, 60 AMERICAN J. POL. SCI., 590 (July 2016) (finding increasing Latino representation on school boards correlating with 203 compliance) [*hereinafter* Marschall & Rutherford, *Voting Rights for Whom?*]; see also Fraga & Merseth, *Examining the Causal Impact*, *supra* note 1114 (“analysis attributes a significant increase in Latino voter registration and Asian American turnout to coverage under [Section 203 of] the VRA”).

¹¹²⁹ 52 U.S.C. §10303(e)(1).

¹¹³⁰ *Puerto Rican Org. for Political Action v. Kusper*, 350 F. Supp. 606, 609 (N.D. Ill. 1972) (citing the provisions of the Immigration & Nationality Act amended by the Jones Act of 1917, which retroactively clarified that Puerto Ricans are U.S. citizens by birthright).

¹¹³¹ See e.g., *Briefing Transcript*, *supra* note 234, at 267 (statement by Juliana Cabrales).

¹¹³² Generated by Commission staff, using American FactFinder. See U.S. Census Bureau, American Community Survey 2011-2015 selected Population Tables: Age, by Language Spoken at Home, by Ability to Speak English for the Population 5 Years and Over, U.S. CENSUS BUREAU, <https://factfinder.census.gov>.

over a dozen counties with high levels of Puerto Ricans—such as Brevard, Duvall, and Pasco counties, which were each already home to over 20,000 Puerto Ricans—still conduct their elections either in English only or mainly in English.¹¹³³

Section 203 was added to the VRA in 1975, based upon Congressional findings that:

[V]oting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. . . The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.¹¹³⁴

Section 203 applies when a two-pronged threshold is met showing that: (1) the inherent need of voters is evidenced by more than 5 percent or 10,000 citizens of voting age in the language minority group being LEP, or in Indian Reservations where a whole or part of the population meets the 5 percent threshold;¹¹³⁵ and (2) “the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.”¹¹³⁶ The legal definition of LEP is those persons who are “unable to speak or understand English adequately enough to participate in the electoral

¹¹³³ See 2011-2016 ACS Census Table B03001. For example, Duval County Letter from Demos and LatinoJustice PRLDEF to Mike Hogan, Duval County Supervisor of Elections at 2 (Apr. 3, 2018), <http://www.demos.org/sites/default/files/imce/Letter%20to%20Florida%204E%20Counties-Duval.pdf>. The Letter in part states:

For example, your website, which provides extensive voter information, including a linked to the voter registration form, is in English-only. And while Google Translate is offered for limited voter information, the translation offered by this service is inadequate to ensure voters can obtain the information they need and does not satisfy Duval County’s legal obligations. Critically, the county’s voter guide, sample ballots, and candidate information are not available in Spanish at all.

See also Duval County, Register to Vote, <https://www.duval elections.com/Voter-Information/Register-to-Vote-Update-Address-Name-Party#register> (last accessed June 12, 2018); see also Florida Voter Registration Form, <https://www.duval elections.com/Portals/Duval/Documents/Voter%20Registration%20Form/webappform.pdf> (showing that the Registration form is only available online in English and that those who desire a form in Spanish have to call the Election Supervisor in their county).

¹¹³⁴ 52 U.S.C. § 10303(f)(1).

¹¹³⁵ Section 203 applies in jurisdictions in which more than 5 percent of citizens of voting age are members of a single language minority group and are LEP; in which over 10,000 citizens of voting age meet the same criteria; and in Indian Reservations in which a whole or part of the population meets the 5 percent threshold. 52 U.S.C. § 10503(b)(2)(A)(i).

¹¹³⁶ 52 U.S.C. § 10503(b)(2)(A)(ii).

process.”¹¹³⁷ The U.S. Census Bureau makes determinations of which jurisdictions are covered by Section 203 every 5 years.¹¹³⁸ In December 2016, the Census Bureau found that 263 jurisdictions across the country met the threshold for coverage under Section 203 of the VRA.¹¹³⁹ The Census found “68,800,641 eligible voting-age citizens in the covered jurisdictions, or 31.3% of the total U.S. citizen voting-age population.”¹¹⁴⁰ Moreover, 16,621,136 Latino, 4,760,782 Asian, and 357,409 American Indian and Alaska Native voting-age citizens live in the covered jurisdictions.¹¹⁴¹ These jurisdictions are found on the following map:

¹¹³⁷ 52 U.S.C. § 10503(b)(3)(B).

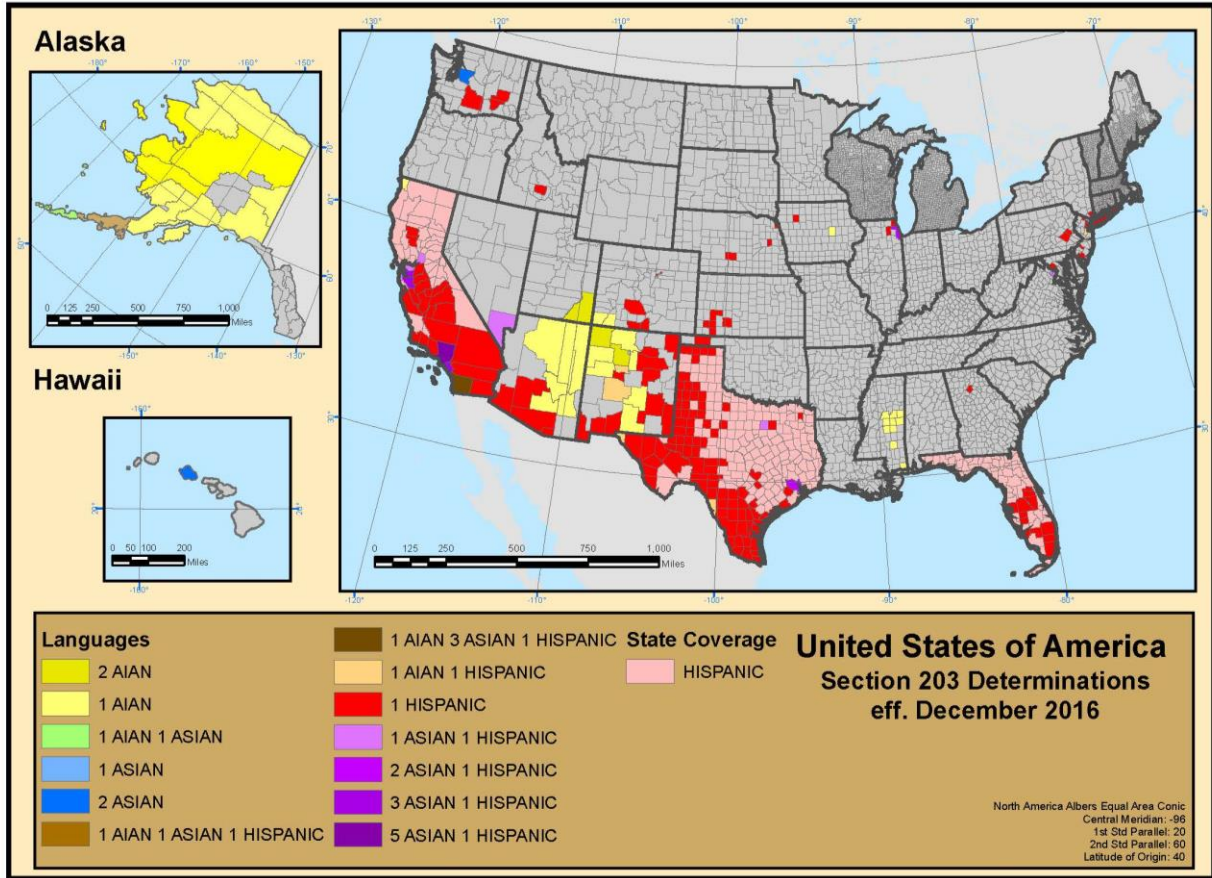
¹¹³⁸ *See, e.g.*, Vol. 81, No. 233 Fed. Reg. 87532.

¹¹³⁹ Press Release, U.S. Census Bureau, *Census Bureau Releases 2016 Determinations for Section 203 of the Voting Rights Act* (Dec. 5, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-205.html>.

¹¹⁴⁰ *Id.*

¹¹⁴¹ *Id.*

Figure 10: Section 203 Determinations, Effective December 2016¹¹⁴²



These jurisdictions must provide “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots”¹¹⁴³—and oral assistance in the covered languages.¹¹⁴⁴ The covered language communities are as follows:¹¹⁴⁵

Alaskan Athabascan
Aleut
American Indian (All other
American Indian Tribes)
American Indian (Apache)
American Indian (Choctaw)

American Indian (Navajo)
American Indian (Pueblo)
American Indian (Ute)
Asian Indian
Bangladeshi
Cambodian

¹¹⁴² U.S. Census Bureau, United States Section 203 Determinations Coverage eff. December 2016, Reference Map, <https://www2.census.gov/programs-surveys/decennial/rdo/reference-maps/2016/8c-section203map2016.pdf> [hereinafter U.S. Census Bureau, *Section 203 Determinations Coverage*].

¹¹⁴³ 52 U.S.C. § 10503(b)(3)(A).

¹¹⁴⁴ 52 U.S.C. § 10503(c) (oral assistance required in addition to written translation). Oral assistance is also required as the primary means of language access when “the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and Americans Indians, if the predominant language is historically unwritten.” 52 U.S.C. § 10503(c).

¹¹⁴⁵ U.S. Census Bureau, *Section 203 Determinations Coverage*, *supra* note 1142.

Chinese (including Taiwanese)
Filipino

Inupiat
Korean
Spanish
Vietnamese
Yup'ik

Table 6: Number and Percent of Covered Jurisdictions by Minority Language Group (December 2016)¹¹⁴⁶

Language minority group	Number of Covered Jurisdictions	Percent
Asian Languages/API	45	14.1%
Native Languages	57	17.9%
Spanish	217	68.0%
Total	319	100%

In a 2012 post-election survey, 63 percent of Asian-American voters said language assistance would be helpful for them.¹¹⁴⁷ Moreover, when language assistance rights are enforced, turnout among Asian-American voters has been documented to increase fairly significantly,¹¹⁴⁸ and the ability to elect Asian-American candidates to represent the community has also been documented to increase when LEP voters are provided with federally required language assistance so that they can fully understand the ballot and voting procedures.¹¹⁴⁹ However, compliance with the language access requirements of the VRA has been lacking.

Advancing Justice submitted a statement to the Commission discussing the rapid growth of the Asian-American population in recent years,¹¹⁵⁰ with “a parallel increase among Asian-American voters, from 2 million voters in 2000 to over 5 million in 2012,” and “an average increase of 747,500 voters per presidential election cycle from 2000 to 2016.”¹¹⁵¹ Advancing Justice then documented widespread failure across the country to provide language access as required by the minority language provisions of the VRA, with a sizeable impact.¹¹⁵²

¹¹⁴⁶ Calculated by Commission staff based on U.S. Census Bureau Section 203 Determinations. *Id.*

¹¹⁴⁷ Asian Americans Advancing Justice, Written Testimony, *supra* note 1114, at 2.

¹¹⁴⁸ *Id.* at 15 (examples of turnout increasing by 40-50 percent).

¹¹⁴⁹ *Id.* at 16.

¹¹⁵⁰ *Id.* at 2.

¹¹⁵¹ *Id.*

¹¹⁵² *Id.* at 9-10. See also Marschall & Rutherford, *Voting Rights for Whom?*, *supra* note 1128, at 594-95 (explaining that 80 percent of surveyed, covered jurisdictions’ election practices fell short of full compliance with language assistance requirements, the effect of which is evidenced by the fact that Latino turnout significantly increases after DOJ enforcement actions are brought in some of those previously nonconforming jurisdictions); see also Fraga &

In 2012, the organization’s poll monitoring in over 900 precincts serving Asian Americans¹¹⁵³ found that:

- Poll workers were often unaware of the availability of translated materials, did not properly display the translated materials (with one-third of all polling sites monitored having low visibility or no display of materials), and exhibited an unwillingness to display translated materials when requested.
- Polling sites did not provide adequate notice of assistance available, including inadequate translated directional signs outside to guide voters to polling sites and poor or no display of “we speak” or “we can assist you” signs indicating language assistance available at the location.
- In almost all the jurisdictions monitored, there was a lack of bilingual poll workers. Almost half of the polling sites that did have bilingual poll workers failed to provide identification of bilingual poll workers and those bilingual poll workers failed to proactively approach voters needing language assistance.
- Poll workers lacked knowledge about language assistance requirements and other voting laws, such as whether voters must present photo identification.¹¹⁵⁴

The Commission received a similar post-briefing statement from the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund. NALEO’s North Carolina Director, Juliana Cabrales, also provided oral public comments at the briefing. On the basis of what NALEO learned from their election protection hotline fielding reports from poll observers and partnerships with peer organizations at the polls in North Carolina, Cabrales is “most acutely concerned that election officials do not have a good understanding of their obligation to provide language assistance protections in polling places.”¹¹⁵⁵ Without appropriate training, poll workers simply do not provide or even allow LEP voters to receive translation.¹¹⁵⁶ In addition, NALEO states that:

Nationwide, there are more than 11 million adult U.S. citizens who are not yet fully fluent in English and may need language assistance with registering to vote and casting ballots. In North Carolina, more than 65,000 eligible voters are Spanish-speakers who may not be able to vote using English-language materials, and an additional 60,000 speak some other language but are not yet fully fluent in English.

Merseth, *Examining the Causal Impact*, *supra* note 1114, at 34 (demonstrating that compliance with VRA language assistance requirements is lower than reported by the Government Accountability Office).

¹¹⁵³ Many jurisdictions cite the difficult undertaking of complying with language access requirements for a wide range of different languages given a lack of resources. For example, the Alaska State Advisory Committee received testimony regarding the difficulty of providing sufficient resources and trained poll workers to comply with language access requirements due to the range of languages and various dialects for certain languages. James Tucker, Testimony, Hearing before Alaska State Advisory Committee to the U.S. Comm’n on Civil Rights, Mar. 1, 2018, Transcript at 69, 71, <https://facadatabase.gov/committee/meetingdocuments.aspx?flr=155497&cid=234>.

¹¹⁵⁴ Asian Americans Advancing Justice, Written Testimony, *supra* note 1114, at 9-10.

¹¹⁵⁵ NALEO, Written Testimony for the U.S. Comm’n on Civil Rights, Feb. 2, 2018, at 2.

¹¹⁵⁶ *Id.* at 2.

In light of demographic and social changes, including the trend of Puerto Ricans moving to the mainland, these numbers will increase. Thus, it is critical that everyone engaged in administering elections is aware of VRA provisions concerning language assistance with voting. We have received reports of incidents that indicate that some North Carolina election administrators may not fully understand or have taken appropriate action to implement their obligations under Sections 4(e) and 208 of the VRA to ensure that Americans are able to cast informed ballots regardless of their ability to speak English.¹¹⁵⁷

Section 203 requires bilingual ballots, assistance, and election materials for Spanish-speakers in 217 of the 263 (82.5 percent) jurisdictions that were determined to fall under its coverage formula in December 2016. But historically and in recent years, there has been widespread noncompliance and under-compliance.¹¹⁵⁸ At the Commission's Texas SAC briefing on voting rights, MALDEF's Ernest Herrera stated that in 2016, MALDEF found that many counties in Texas failed to provide election information in Spanish.¹¹⁵⁹ As shown above, under Section 203 of the VRA, the state of Texas is required to provide bilingual election materials and assistance.¹¹⁶⁰

Prior to *Shelby County*, Section 4(f)(4) and Section 5 of the VRA clearly required preclearance of any changes in the provision of language access in the formerly covered jurisdictions. After the *Shelby County* decision, the DOJ stated that it believed that it could no longer require preclearance of any changes in language materials in these jurisdictions. In testimony before the Commission's Texas SAC, AALDEF's Jerry Vattamala stated that the loss of preclearance impacted language access, because formerly covered jurisdictions no longer have to submit language assistance plans or any changes to them for DOJ review to determine if the changes would be retrogressive. He added that the post-*Shelby County* loss of federal observers impacts language access compliance as well.¹¹⁶¹

And at the Commission's national briefing, Vattamala testified that the *Shelby County* decision has negatively impacted language access for Asian-American voters. Prior to *Shelby County*, the preclearance rules enabled AALDEF to enforce the rights of LEP voters in New York City, which is a formerly covered jurisdiction.¹¹⁶² He added important context about current conditions, as follows:

¹¹⁵⁷ *Id.* at 1-2.

¹¹⁵⁸ See, e.g., Matthew Higgins, Note, *Language Accommodations and Section 203 of the Voting Rights Act*, 67 STANFORD L. REV. 917 (April 2015), <http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/04/67-Stan-L-Rev-917-Higgins.pdf> ("Section 203's provisions, however, are often critically misunderstood and only partially implemented.").

¹¹⁵⁹ Texas State Advisory Committee to the U.S. Comm'n on Civil Rights Transcript, Voting Rights in Texas, Mar. 3, 2018, at 64, <https://facadatabase.gov/committee/meetingdocuments.aspx?flr=155615&cid=276> [*hereinafter* Texas SAC, *Voting Rights Transcript*].

¹¹⁶⁰ See Figure 10, Section 203 Determinations, Dec. 2016, *supra*.

¹¹⁶¹ Texas SAC, *Voting Rights Transcript*, *supra* note 1159, at 7-8.

¹¹⁶² Vattamala, Written Testimony, *supra* note 454, at 5-6 ("Section 203 of the Voting Rights Act, requires some jurisdictions, including New York City, to provide translated ballots and voting materials as well as oral language

Racist sentiment towards Asian Americans is not a passing adversity but a continuing reality, fueled in recent years by reactionary post-9/11 prejudice and a growing backlash against immigrants. Numerous hate crimes have been directed against Asian Americans either because of their minority group status or because they are perceived as unwanted immigrants.

Incidents of discrimination and racism like these perpetuate the misperception that Asian American citizens are foreigners, and have the real effect of denying Asian Americans the right to fully participate in the electoral process. These barriers will only increase as the Asian American population continues to grow. Asian Americans have become the fastest growing minority group in the United States. While the total population in the United States rose 10 percent between 2000 and 2010, the Asian American population increased 43 percent during that same time span.

The fastest population growth occurred in the South, where the Asian American population increased by 69 percent. With the coverage formula struck and no current Section 5 coverage for these states, Asian Americans are susceptible to extensive discrimination, both in voting and other arenas. When groups of minorities move into or outpace general population growth in an area, reactions to the influx of outsiders can result in racial tension.¹¹⁶³

Alaska had been covered under Section 5 since 1975. The Commission heard testimony regarding repeated VRA violations constricting Native Americans' voting rights in Alaska over a period of years, particularly regarding language access, and notwithstanding repeated litigation over the same points already litigated and resolved in court but then with persisting state noncompliance following those resolutions. NARF's Natalie Landreth testified before the Commission that she believes that Alaska was properly covered under Section 5, due primarily to language access violations and lack of accessible polling places for indigenous communities.¹¹⁶⁴ Alaska was one of the last states to have a literacy test, as its literacy test was only abolished in 1972.¹¹⁶⁵ NARF disagrees with the conclusion of the DC Court of Appeals that "states like Alaska" were "swept in" to the VRA coverage formula based on "little or no evidence of current problems."¹¹⁶⁶ NARF

assistance for voters with limited English proficiency. Three counties of New York City—New York, Kings, and the Bronx—were also covered by Section 5. When jurisdictions were covered under both Section 5 and Section 203, the combined provisions formed a powerful tool to ensure that language minorities had full access to political participation. In 1994, AALDEF asked the Justice Department to deny preclearance of New York City's Chinese Language Assistance Program, which failed to include candidate names in Chinese on the voting machine ballots. As a result, New York City was forced to provide fully translated bilingual ballots, affecting 55,000 Chinese-American voters.”)

¹¹⁶³ Vattamala, Written Testimony, *supra* note 454, at 7 (footnotes omitted).

¹¹⁶⁴ Landreth, Written Testimony, *supra* note 1099, at 2-4.

¹¹⁶⁵ *Id.* at 1.

¹¹⁶⁶ *Id.* (quoting *Shelby Cty.*, 679 F.3d at 881, *rev'd*, 570 U.S. 529).

points instead to case after case of current and ongoing language access violations in Alaska.¹¹⁶⁷ Despite NARF's victories in expensive and time-consuming litigation in the state of Alaska, the state of Alaska has refused to comply with Section 203 and NARF has had to sue repeatedly.¹¹⁶⁸

At its briefing on voting rights in March 2018, the Commission's Arizona SAC also received testimony on language access for Native American voters.¹¹⁶⁹ A county recorder testified in support of cost-efficient measures like ballot-by-mail elections but said that "strict requirements" were needed for counties with Native American populations.¹¹⁷⁰ In particular, she pointed out that some Native American languages are not traditionally written, and could not be handled with a written ballot sent to an interpreter.¹¹⁷¹ Instead, there needed to be a physical polling place "so those voters that need the language assistance can come and get the [oral] assistance they need."¹¹⁷²

Accessibility Issues for Voters with Disabilities

As will be discussed below, widespread problems with inaccessibility for voters with disabilities are evident from the testimony and underlying data received by the Commission. Section 208 of the VRA, which provides for rights to assistance, has not been well-utilized to protect the rights of every voter who "requires assistance to vote by reason of blindness, disability, or inability to read or write."¹¹⁷³

During the Commission's national briefing, Michelle Bishop, Policy Director of the National Disability Rights Network (NDRN), testified that many of America's polling places are not accessible to people with disabilities: according to one study, only 40 percent of nearly 200 polling places examined had no barriers for voters with disabilities.¹¹⁷⁴ Bishop also testified that "closure of polling places bears a significant impact on voter access for people with disabilities following the *Shelby County* decision."¹¹⁷⁵ Current Population Survey data from the 2016 election support this testimony, with a sizable percentage of survey respondents stating that lack of disability access prevented their voting.¹¹⁷⁶ Bishop also testified that 35.4 million persons with disabilities were

¹¹⁶⁷ *Id.* at 1-2

¹¹⁶⁸ *Id.* at 3-4.

¹¹⁶⁹ Arizona State Advisory Committee to the U.S. Comm'n on Civil Rights, Briefing, Mar. 9, 2018, *Transcript* at 27-28.

¹¹⁷⁰ *Id.*

¹¹⁷¹ *Id.*

¹¹⁷² *Id.*

¹¹⁷³ 52 U.S.C. § 10508.

¹¹⁷⁴ *Briefing Transcript, supra* note 234, at 141 (statement by Michelle Bishop, Disability Advocacy Specialist for Voting Rights, National Disability Rights Network (NDRN)) (citing Government Accountability Office, *Voters with Disabilities: Observations on Polling Place Accessibility and Related Federal Guidance* (Dec. 2017), <https://www.gao.gov/products/GAO-18-4>).

¹¹⁷⁵ Barber, *Written Testimony, supra* note 392, at 3.

¹¹⁷⁶ U.S. Census Bureau, *Voting and Registration in the Election of November 2016: Reasons for Not Voting, by Selected Characteristics*, U.S. CENSUS BUREAU (last updated Apr. 25, 2018), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html> (showing that 11.7 percent of surveyed people who did not vote cited an illness or disability as a reason for not voting).

eligible to vote in 2016, and that persons with disabilities were disproportionately lower income and had less access to voter ID, transportation, and funds.¹¹⁷⁷

Information gathered at the Commission's SAC briefings on voting rights underscored these concerns. The California SAC issued a voting rights report in 2017, specifically noting that "disabled voters face unnecessary obstacles" to voting in that state.¹¹⁷⁸ The report quotes a disability rights advocate who told the SAC that "parking and pathway situations frequently deter the voter with disabilities from access, i.e. long walks after parking, obstructions, and inadequate lighting."¹¹⁷⁹ The Illinois SAC likewise noted particular impacts on voters with disabilities: after a local group conducted voting access surveys, they found that voters with disabilities "were asked to wait up to 30 minutes while judges or other volunteers attempted to get the accessible machines working," and other times, "voters with disabilities were told to come back and vote at another time because a technician had to be called in to repair or set up the accessible voting system."¹¹⁸⁰

Similarly, during its recent voting rights briefing, the Ohio SAC received testimony regarding misperceptions of people with disabilities that can impede access to voting. Some of the biggest misconceptions identified during the Ohio briefing are that a person with a disability cannot vote because the person has a guardian, that a person cannot understand how to vote because the person cannot verbally communicate, and that a person who is blind cannot complete a ballot.¹¹⁸¹ The Committee also received testimony that there is a limited amount of data regarding voters with disabilities, which negatively impacts the capacity of poll workers who may require more information to understand how to work with people with disabilities.¹¹⁸² Lack of adequate accessible transportation, and the discriminatory impact of absentee paper ballots on people with disabilities, are two more issues that voters with disabilities in Ohio face. Kerstin Sjoberg-Witt, the Director of Advocacy and the Assistant Executive Director at Disability Rights Ohio, advocated for alternatives to designating the power of attorney for voting, especially due to the disproportionate number of people with disabilities who are low income and live in poverty, which makes it harder for them to pay for a photo ID, afford public transportation to get to the polls, or may result in a loss of housing that could then result in swift voter purging.¹¹⁸³ She noted that the voter hotline that Disability Rights Ohio runs has been "pretty successful," receiving 60 calls in the last election alone.¹¹⁸⁴

¹¹⁷⁷ Barber, Written Testimony, *supra* note 392, at 2; see also Lisa Schur & Douglas Kruse, *Projecting the Number of Eligible Voters with Disabilities in the November 2016 Elections*, Rutgers Univ., (Sept. 8, 2016), https://smlr.rutgers.edu/sites/default/files/documents/faculty_staff_docs/Kruse%20and%20Schur_Disability%20electorate%20projections%202016_9-8-16.pdf.

¹¹⁷⁸ Cal. Advisory Committee to the U.S. Comm'n on Civil Rights, *Voting Integrity in California: Issues and Concerns in the 21st Century* 5 (June 2017), <http://www.usccr.gov/pubs/07-24-Voting-Integrity-in-CA.pdf>.

¹¹⁷⁹ *Id.* at 38.

¹¹⁸⁰ Illinois State Advisory Committee to the U.S. Comm'n on Civil Rights, *Civil Rights and Voting in Illinois* 42 (Feb. 2018), <http://www.usccr.gov/pubs/2018/IL-Voting-Rights.pdf>.

¹¹⁸¹ Ohio SAC, *Voting Rights Briefing*, *supra* note 986, at 15-16 (statement by Kerstin Sjoberg-Witt).

¹¹⁸² *Id.*

¹¹⁸³ *Id.* at 18.

¹¹⁸⁴ *Id.*

The New Hampshire SAC received testimony that some polling locations still have physical barriers to access, and that some poll workers are not receptive to people with disabilities.¹¹⁸⁵ The SAC reported that in 2013, none of the New Hampshire polling locations had set up an accessible voting system, and therefore in municipal elections that year 100 percent of disabled voters were unable to vote privately and independently.¹¹⁸⁶

Polling place access for persons with disabilities is protected by the Americans with Disabilities Act (ADA), HAVA, NVRA, and the Voting Accessibility for the Elderly and Handicapped Act,¹¹⁸⁷ however, while those statutory protections are important and the above testimony indicates that they may be under-enforced, this report is limited to evaluation of VRA issues.

At the Commission's national briefing, Bishop testified that Section 208 of the Voting Rights Act, which allows voters to be assisted by a person of their choice, should be used to ensure accessibility for persons with disabilities.¹¹⁸⁸ Section 208 provides that:

*Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.*¹¹⁸⁹

Following the briefing, Bishop supplemented her testimony with further information about how Section 208 would operate in regard to accessibility issues she testified about. She explained that:

Voters who are blind, have another type of disability, experience difficulty with English, or experience difficulty with reading and writing should, first and foremost, be provided with the proper tools and accommodations to be able to vote with complete privacy and independence, as guaranteed by the Help America Vote Act (HAVA).¹¹⁹⁰ The ability to provide an electronic interface and audio ballots to voters with disabilities has drastically increased the number of voters with disabilities who are able to vote. Providing ballots and supplementary materials to voters that are accessibly designed and use plain language, as described by www.plainlanguage.gov, would also enhance progress made toward providing a private and independent ballot for all eligible Americans.

Yet as we work actively toward realizing the full promise of HAVA and ensuring a private and independent ballot for all eligible voters, people with disabilities rely on the protections of Voting Rights Act Section 208 to participate in the electoral

¹¹⁸⁵ Woolpert, N.H. 2014 Transcript, at 37.

¹¹⁸⁶ New Hampshire SAC, Voting Rights Report, *supra* note 5.

¹¹⁸⁷ 42 U.S.C. §§ 12101-12213 (ADA); 52 U.S.C. §§ 20910-21145 (HAVA); 52 U.S.C. §§ 20501-20511 (NVRA); 52 U.S.C. §§ 20101-20107 (Voting Accessibility for the Elderly and Handicapped Act).

¹¹⁸⁸ *Briefing Transcript, supra* note 234, at 184 (statement by Michelle Bishop, Disability Advocacy Specialist for Voting Rights, National Disability Rights Network (NDRN)).

¹¹⁸⁹ 52 U.S.C. § 10508 (emphasis added).

¹¹⁹⁰ 52 U.S.C. § 21081(a)(3)(A) *et seq.*

process. Section 208 is and will always be a vital piece of our democracy, by allowing voters to bring a person of their choosing (excluding the voter's employer or union representative) to assist him or her in casting a ballot. This right is critical for voters who are taking a leap of faith by trusting another to cast their ballot as intended and should not have to put that faith in strangers. Further, it eases the strain on election workers and prevents issues with long lines by reducing the number of instances in which two election workers, of differing parties, must stop their other duties to provide direct assistance to a voter. Section 208 protections are a key component in boosting voter confidence while ensuring that Election Day runs smoothly.¹¹⁹¹

Bishop added that the DOJ should provide additional guidance clarifying how Section 208 should and should not be interpreted by the states.¹¹⁹² She argues that states should be prevented from passing additional language that restricts who can use Section 208 assistance.¹¹⁹³

The Commission's review of Section 208 litigation indicates that DOJ appears to have limited its enforcement of Section 208 to language access cases;¹¹⁹⁴ however, the statutory language quoted above clearly shows that Section 208 applies to persons with disabilities.¹¹⁹⁵

Also, in five known cases, private parties enforced Section 208 to protect the rights of voters with disabilities. Below is a chart of all known Section 208 cases since 1985, which includes the five known Section 208 cases that were brought on behalf of persons with disabilities. None of these cases were brought by DOJ.

Table 7: Analysis of Cases Filed Under Section 208 of the VRA Since 1985:

Case Name	Year Filed	Filed By	Claim made on behalf of persons with disabilities?	Language Access claim?
<i>OCA-Greater Houston v. Texas</i>	2017	Organization for Chinese Americans	No	Yes
<i>United States v. Fort Bend County, TX</i>	2009	DOJ	No	Yes
<i>United States v. Salem County and the Borough of Penns Grove, NJ, et al</i>	2008	DOJ	No	Yes
<i>Ray v. Texas</i>	2008	Willie Ray, Jamillah Johnson and others	Yes	No

¹¹⁹¹ Michelle Bishop, Supplemental Written Testimony for the U.S. Comm'n on Civil Rights, Mar. 19, 2018 at 1.

¹¹⁹² *Id.* at 2.

¹¹⁹³ *Id.*

¹¹⁹⁴ See Table 7, and Discussion and Sources cited at notes 1464-65, *infra*.

¹¹⁹⁵ 52 U.S.C. § 10508.

Case Name	Year Filed	Filed By	Claim made on behalf of persons with disabilities?	Language Access claim?
<i>United States v. Kane County, IL</i>	2007	DOJ	No	Yes
<i>United States v. Hale County, TX</i>	2006	DOJ	No	Yes
<i>United States v. Brazos County</i>	2006	DOJ	No ¹¹⁹⁶	Yes
<i>United States v. City of Springfield, MA</i>	2006	DOJ	No	Yes
<i>United States v. City of Philadelphia, PA</i>	2006	DOJ	No	Yes
<i>Qualkinbus v. Skuhisz</i>	2004	Michelle Markiewicz Qualkinbush (mayor)	No	No
<i>American Association of People with Disabilities v. Hood</i>	2003	American Association of People with Disabilities	Yes	No
<i>United States v. Berks County</i>	2003	DOJ	No	Yes
<i>United States v. Osceola County</i>	2002	DOJ	No	Yes
<i>United States v. Miami-Dade County</i>	2002	DOJ	No	Yes
<i>United States v. Orange County</i>	2002	DOJ	No	Yes
<i>United States v. Passaic County</i>	1999	DOJ	No	Yes
<i>Holton v. Hollingsworth</i>	1999	Buddy Holton (losing mayoral candidate)	No	No
<i>Nelson v. Miller</i>	1996	King Nelson, Karla Hudson, Charles Austin, Walter R. Saumier,	Yes	No

¹¹⁹⁶ U.S. Dep't of Justice, *Cases Raising Claims Under the Minority Provisions of the Voting Rights Act*, <https://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act#brazos> (last updated Oct. 16, 2015). Although the DOJ summary of the case states that, "The United States also alleged that Brazos County violated Section 208 by failing to ensure that voters who were disabled, blind, or illiterate were allowed to use their chosen assistors," the complaint does not make that entirely clear; furthermore, the consent decree limits the 208 remedies to Spanish-speaking voters, by only requiring that:

3. Defendants shall ensure that Spanish-speaking voters are permitted assistance from persons of the voters' choice, other than the voters' employers or agents of those employers or officers or agents of the voters' unions, and that such assistance shall include assistance in the voting booth, including reading or interpreting the ballot and instructing voters on how to select the voters' preferred candidates.

4. Defendants shall ensure that in cases where a poll official is a Spanish-speaking voter's assistor of choice, all poll officials shall make certain that the voter can receive such assistance from a trained bilingual poll official who can speak Spanish fluently. Consent Decree, *Brazos Cty.*, No. 4:06-CV-02165, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/brazos_cd.pdf.

Case Name	Year Filed	Filed By	Claim made on behalf of persons with disabilities?	Language Access claim?
		Charlotte Czarniecki, Kyle Austin		
<i>DiPietrae v. City of Philadelphia</i>	1995	Judge of Elections Patricia DiPietrae & disabled electors Bernard Bukowski, Mary Boice, Marina Domit & Maryanne Hildenberger	Yes	No
<i>Jacobs v. Philadelphia County Board of Elections</i>	1995	Disabled in Action of Pennsylvania	Yes	No
<i>Cruz v. Ysleta Del Sur Tribal Council</i>	1993	Lionel and Rebecca Cruz (Tigua Indian Tribe members)	No	No
<i>Thirteen Ballots Cast in 1985 General Election in Burlington County</i>	1985	N/A	Unclear	No

Source: Internal Legal Research (based on DOJ website and Westlaw search)

CHAPTER 4: EXAMINING THE DATA

This chapter examines and analyzes relevant voter registration, turnout, and trends in litigation brought to enforce Section 2 of the Voting Rights Act (VRA), in terms of whether these data points measure discrimination. The first part of this chapter examines and analyzes voter registration and turnout in recent presidential elections (2000-2016), and the second part examines VRA litigation trends, with a focus on successful Section 2 VRA cases from 2006 to present.¹¹⁹⁷ As discussed below, the data show ongoing indicia of discrimination in various categories.

Voter Registration and Turnout Statistics

In all states except North Dakota, voters must first register before they can vote.¹¹⁹⁸ This two-step process arguably helps ensure eligibility, but it can also lead to significant barriers to the ballot, and voter registration rules vary widely from state to state.¹¹⁹⁹ Eligible voters often cite voter registration or registration problems as one of the reasons they did not turn out to vote.¹²⁰⁰

According to a 2016 study by Nonprofit VOTE, more than 25 percent of eligible voters are not registered to vote.¹²⁰¹ Figure 11 illustrates the trend of voter registration rates by race and ethnicity from 2000 to 2016.

¹¹⁹⁷ The term “successful” is defined in note 1306, *infra*.

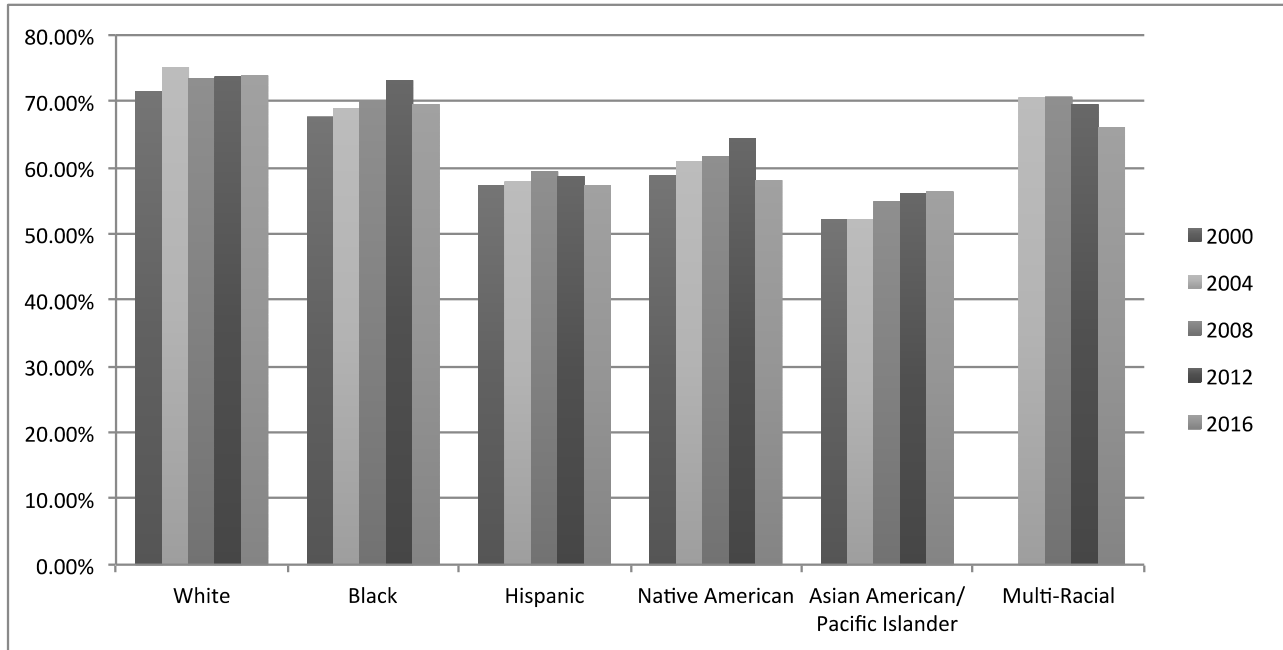
¹¹⁹⁸ DMV.org, *Voter Registration in North Dakota*, DMV.ORG, <https://www.dmv.org/nd-north-dakota/voter-registration.php> (last accessed June 6, 2018) (“North Dakota bears the unique distinction that it does not require voters to register prior to Election Day. You may simply bring acceptable proof of ID and residency to the polls in order to vote (see below). Each precinct is responsible for governing its own election process, and the Secretary of State has a “central voter file” in which all county auditors share their precinct’s voter list.”); *see also* Discussion and Sources cited in notes 710-31 *supra* (overview of voter registration rules and issues).

¹¹⁹⁹ *See* notes 710-18 *supra* (discussing voter registration procedures ranging from same-day registration in some states to much stricter rules in other states, their impact on voters of color, and at note 712, according to NALEO “[r]acial and ethnic disparities in civic participation begin at registration.”).

¹²⁰⁰ *See* Table 8 (analyzing data from the Current Population Survey that asked potential voters why did not turn out to vote in the recent presidential election).

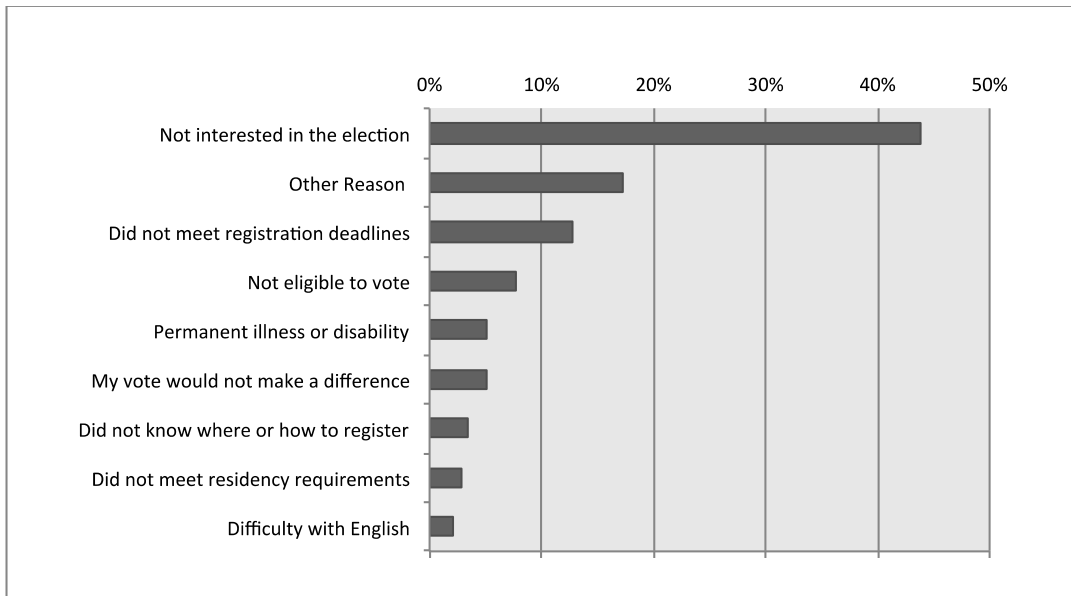
¹²⁰¹ Nonprofit VOTE & U.S. Elections Project, *America Goes to the Polls 2016: a Report on Voter Turnout in the 2016 Election*, NONPROFIT VOTE & U.S. ELECTIONS PROJECT (2016), 19 <http://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf> [*hereinafter* Nonprofit VOTE & U.S. Elections Project, *America Goes to the Polls 2016*].

Figure 11: Voter Registration by Race and Ethnicity and Year



Source: Figure created by Commission staff using Current Population Survey data

Figure 12: Which of the following was the MAIN reason you did not register to vote?



Source: Figure created by Commission staff using Current Population Survey data

Figure 12 illustrates the (self-reported) main reasons potential voters did not vote. The Commission also analyzed Current Population Survey data¹²⁰² to examine whether the reasons potential voters stated that they did not register to vote in the 2016 election differed by their self-reported racial group. Table 8 illustrates that across all groups, disinterest in the election or politics was the primary reason why potential voters did not register to vote, but the percentage reporting this reason was slightly higher for potential white voters. Potential racial minority voters also reported a higher percentage of ineligibility compared to potential white voters. In addition, 4 percent of Latino potential voters and 10 percent of Asian-American or Pacific Islander potential voters reported language concerns as the main reason for not registering to vote, while this reason was only 1 percent or less for other groups.

¹²⁰² U.S. Bureau of Labor Statistics & U.S. Census Bureau, *History of the Current Population Survey*, CENSUS BUREAU (2006), <https://www.census.gov/prod/2006pubs/tp-66.pdf> [*hereinafter* Census Bureau, *History of the CPS*].

Table 8: Which of the following was the MAIN reason you did not *register* to vote?

Race	Did not meet registration deadlines	Did not know where to register	Did not meet residency requirements	Permanent illness or disability	Difficulty with English	Not interested in the election or not involved in politics	My vote would not make a difference	Not eligible to vote	Other Reason	Total
White	12%	3%	2%	6%	1%	47%	6%	5%	18%	100%
Black	14%	3%	2%	7%	1%	39%	5%	12%	17%	100%
Latino	13%	5%	4%	4%	4%	39%	5%	13%	13%	100%
Native American	18%	4%	2%	4%	0%	34%	3%	9%	26%	100%
Asian American/ Pacific Islander	12%	4%	5%	2%	10%	38%	3%	11%	14%	100%
Multiracial	12%	3%	6%	6%	–	38%	5%	3%	28%	100%

Source: Figure created by Commission staff using Current Population Survey data

Perspectives on Voter Turnout as a Measure of Discrimination

There are multiple views as to whether voter turnout is an appropriate measure of discrimination, and how voter turnout data should be evaluated by courts in VRA litigation. In the *Shelby County* decision, in looking at the preclearance formula, the Supreme Court stated that disparities in turnout between African-American and white voters have been nearly eliminated.¹²⁰³ As discussed below, the Supreme Court's decision did not compare the turnout rates of other races. There is also a circuit split among the courts of appeals as to whether decreasing voter turnout is needed to prove a violation of Section 2 of the VRA in the post-*Shelby County* era. The Sixth Circuit has suggested that evidence of turnout disparities along racial lines is necessary to prove a Section 2 violation in vote denial cases.¹²⁰⁴ Similarly, the Seventh Circuit held that the failure to show evidence that a voter ID law resulted in a reduction of voter turnout levels was fatal to the plaintiffs' case.¹²⁰⁵ But the Fourth Circuit held that discrimination against black voters occurred even though black turnout increased in 2014, stating that, "No law implicated here—neither the Fourteenth Amendment nor § 2 [of the VRA]—requires such an onerous showing [of a decrease in voter turnout]."¹²⁰⁶ More specifically, the Fourth Circuit reasoned that in North Carolina:

[A]lthough aggregate African American turnout increased by 1.8% in 2014, many African American votes went uncounted . . . which would have been counted absent [the voting change]. And thousands of African Americans were disenfranchised because they registered during what would have been the same-day registration period but because of [the voting change] could not then vote. Furthermore, the district court failed to acknowledge that a 1.8% increase in voting actually represents a significant decrease in the rate of change. For example, in the prior four-year period, African American midterm voting had increased by 12.2%.¹²⁰⁷

Additionally, in the Fifth Circuit's evaluation of Texas' strict voter ID law, the State had argued that reduced turnout is needed to show a Section 2 violation. Specifically, Texas argued literacy tests would be struck down under Section 2, "only if plaintiffs could show a resulting 'denial of equal opportunity,' i.e., a 'voter turnout disparity.'"¹²⁰⁸ But in response, the Fifth Circuit stated that: "We decline to cripple the Voting Rights Act by using the State's proposed analysis."¹²⁰⁹ It reasoned that "[a]n election law may keep some voters from going to the polls, but in the same election, turnout by different voters might increase for some other reason. That does not mean the

¹²⁰³ See *Shelby Cty.*, 570 U.S. at 548 (including the chart of black/white turnout gaps reproduced in the Court's opinion).

¹²⁰⁴ See *Ohio Democratic Party v. Husted*, 834 F.3d 620, 639 (6th Cir. 2016) (rejecting a challenge to early voting reduction, where the cutbacks went into effect and African-American participation was at least equal to that of white voters).

¹²⁰⁵ See *Frank*, 768 F.3d at 747.

¹²⁰⁶ *McCrary*, 831 F.3d at 232.

¹²⁰⁷ *Id.* (emphasis in original) (internal citations omitted).

¹²⁰⁸ *Veasey*, 830 F.3d at 260.

¹²⁰⁹ *Id.* at 261.

voters kept away were any less disenfranchised;”¹²¹⁰ and so the Fifth Circuit concluded that “while evidence of decreased turnout is relevant, it is not required to prove a Section 2 claim.”¹²¹¹

During the Commission’s briefing, voting rights experts testified that turnout alone is not necessarily an appropriate measure of whether there is ongoing discrimination in voting.¹²¹² For example, Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, told the Commission that the legal test of whether a voting system is discriminatory should not be turnout, but rather whether voters of color do not have equal access to political participation.¹²¹³ This is also shown by the statutory language of Section 2 of the VRA, which prohibits not only denial of the right to vote, or being unable to vote, but also abridgment of equal access to the ballot.¹²¹⁴ The Director-Counsel also stated:

¹²¹⁰ *Id.* at 260.

¹²¹¹ *Id.* at 261.

¹²¹² *E.g.*, *Briefing Transcript, supra* note 234, at 134-136 (statement by Sherrilyn Ifill).

¹²¹³ *Id.*

¹²¹⁴ *See* 52 U.S.C. § 10301(a) (Section 2 is titled “Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites” and subsection (a) provides that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States on account of race or color or [membership in a language minority group]”); *see also* § 10301(b) (“A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to public office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”). *See also Gingles*, 478 U.S. at 36-37: “The Senate Judiciary Committee majority Report accompanying the bill that amended § 2, elaborates on the circumstances that might be probative of a § 2 violation, noting the following ‘typical factors:’

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs’ evidence to establish a violation are:

[T]he harm is not about a number on the sheet, as to whether turnout went up or whether turnout went down. If a law is created, particularly for the purpose... if a legislature meets and passes a law for the purpose of suppressing the votes of a particular group or if a law is passed knowing that it's going to have the affect it's going to have, or as Ms. Landreth described, simply not knowing because you haven't taken the time to figure out the fact that this polling place is not connected to another polling place by land. That's a problem of democratic governance.¹²¹⁵

The Director-Counsel added that turnout is not the only measure of whether there is discrimination in voting, as voters of color work hard to overcome structural impediments to voting such as, historically, poll taxes or recently, waiting longer in line on Election Day. Other panelists agreed strongly with this assessment.¹²¹⁶ Rosenberg emphasized that, “using voter turnout is a very, very weak metric. . . . [W]e know that in Texas for example 600,000 Texans, predominantly black and Hispanic voters, did not have the required ID. It was two to three times more difficult for them to get the ID.”¹²¹⁷

In contrast, others argued that increasing turnout affirmatively shows decreasing discrimination. Cleta Mitchell of Foley & Lardner LLP stated that there is “no evidence” that changes to state election laws since the *Shelby County* decision have resulted in denying anyone the right to vote.¹²¹⁸ The panelist further argued that statements claiming that the *Shelby County* decision had an effect on minority voter turnout are “weak at best and likely non-existent,”¹²¹⁹ citing data from the Heritage Foundation and arguing that African-American voter turnout increased in North Carolina after voting law changes in 2013.¹²²⁰ According to these data, the percentage of voting age population of African-American voters in North Carolina who voted in the 2014 election was 41.1 percent, up from 38.5 percent in 2010. Based on these data, this panelist posits that the *Shelby County* decision had “nothing to do” with voter turnout in 2014 and 2016.¹²²¹ Similarly, von

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.”

Id. (quoting S. REP. NO. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07). The above “typical” factors specify what Congress considered evidence that is not dispositive, but legally significant in establishing a Section 2 violation, and they do not include turnout.

¹²¹⁵ *Briefing Transcript, supra* note 234, at 135 (statement by Sherrilyn Ifill).

¹²¹⁶ *Id.* at 132-33 (statement by Ezra Rosenberg); *Briefing Transcript, supra* note 234, at 131-32 (statement by Natalie Landreth); *Briefing Transcript, supra* note 234, at 209-10 (statement by Dale Ho).

¹²¹⁷ *Id.* at 138 (statement by Ezra Rosenberg).

¹²¹⁸ Mitchell, Written Testimony, *supra* note 574.

¹²¹⁹ *Id.*

¹²²⁰ *Id.* (citing Hans A. von Spakovsky, *Election Reform in North Carolina and the Myth of Voter Suppression*, THE HERITAGE FOUNDATION (July 2015), <https://www.heritage.org/election-integrity/report/election-reform-north-carolina-and-the-myth-voter-suppression>).

¹²²¹ Mitchell, Written Testimony, *supra* note 574, at 3.

Spakovsky also agreed that increases in black turnout suggest that preclearance is no longer needed because higher turnout suggests that racial discrimination in voting is rare.¹²²²

With the above in mind, the Commission reviewed voter turnout data from 2000 to 2016. These data show that while black turnout has generally increased during this time period, it dipped in 2016,¹²²³ and moreover, the prior increases occurred in spite of ongoing discrimination in voting. For example, in Florida in 2012, black voters waited longer than others, but their turnout was still relatively high.¹²²⁴ In fact, as black turnout was increasing and expected to be high in 2012, early voting was cut, causing congestion at the polls in 2012.¹²²⁵ Among those who were able to wait for many hours to vote,¹²²⁶ their stories reflected a strong commitment to exercise the right to vote.¹²²⁷ Furthermore, black voter turnout in Florida could have been even higher without the long lines, as some were not able to wait many hours to vote.¹²²⁸ Barber testified to similar facts in

¹²²² *Briefing Transcript, supra* note 234, at 63-64 (statement by Hans A. von Spakovsky) (“If they were going to renew [preclearance], [Congress] had to base it on current conditions, and the reason they didn’t base it on current conditions in 2006 was because, as the Census itself has reported, registration and turnout in the covered states was on parity with, and in some places black turnout actually exceeded that of white turnout.”). In addition, von Spakovsky also suggested that racial discrimination in voting is rare as evidenced by the downward trend in the number of VRA enforcement actions that the Justice Department has pursued over the last eight years. *See supra*, Chapter 5 for further discussion on the Department’s VRA enforcement.

¹²²³ *See infra*, Figure 15, which demonstrates that African-American voter turnout went from about 66 percent in 2012 Presidential Election to just under 60 percent in 2016 Presidential Election.

¹²²⁴ Herron & Smith, *Congestion at the Polls, supra* note 974, at 9, 53.

¹²²⁵ *Id.* at 3; *see also* Herron and Smith, *Florida’s 2012 General Election under HB 1355: Early Voting, Provisional Ballots, and Absentee Ballots*, at 1, <http://electionsmith.files.wordpress.com/2013/01/lwv-pr-herron-smith.pdf>.

¹²²⁶ Herron & Smith, *Congestion at the Polls, supra* note 974, at 16 (Seven counties (Miami-Dade, Orange, Lee, Volusia, Pasco, St. Lucie, and Collier) reported having at least one precinct that did not close until after midnight); *see also* Terkel, *supra* note 971 (reporting that many voters waited for up upwards of 6 hours); *see also* Lauren Pastrana, *M-D Early Voters: I Waited “Over Six” Hours to Vote*, CBS MIAMI (Nov. 3, 2012), <http://miami.cbslocal.com/2012/11/03/last-day-of-early-voting-opens-in-miami-dade/> (in Miami-Dade on the final Saturday of early voting, lines were 4-6 hours, according to the Supervisor of Elections website, and voters interviewed at the Coral Reef Library polling place said “it was exhausting,” that voters had brought chairs, water, and umbrellas to shield them from the sun on a hot day, while a woman with an oxygen tank waited 4 hours, and another who had voted in 2008 said he wasn’t planning to vote due to the lines being 5.5 hours long during early voting, which is “supposed to be early”).

¹²²⁷ *See, e.g.*, Advancement Project, Public Comment Submitted to the Presidential Commission on Election Administration for its public meeting in Miami, Florida, ADVANCEMENT PROJECT 10 (2013), http://b3cdn.net/advancement/c6b7b9897418a7c930_o2m6iv5v1.pdf (last accessed June 7, 2018) (“Despite the long lines, Florida citizens showed up for early voting in record numbers. We saw it in the determination of voters like Desiline Victor. Victor, who at 102, due to fatigue, had to leave her polling place at North Miami Library after waiting in line for three hours, only to insist on returning later with members of our staff to cast her ballot. When she emerged from the polling place wearing her “I voted” sticker after casting her ballot, hoping this is not the last time she will do so, the crowds still waiting to vote erupted in applause. We saw when Florida poll workers closed their doors on an unexpectedly massive crowd of early voters, only to be met with chants of “We want to vote! We want to vote!” We saw it in black church leaders who, in response to Florida’s elimination of the last Sunday of early voting, set a new date for their community’s popular “Souls to the Polls” voter mobilization campaign—and made history with a larger-than-ever early voting turnout.”).

¹²²⁸ *See, e.g.*, Scott Powers & David Damron, *Analysis: 201,000 in Florida didn’t vote because of long lines*, ORLANDO SENTINEL (Jan. 29, 2013), <http://articles.orlandosentinel.com/2013-01-29/business/os-voter-lines->

North Carolina, where community organizing and a strong sense of civic duty, based on history, contributed to the fact that black turnout did not significantly decrease, despite the community facing measures that “surgically” targeted the ways that African Americans vote in his state.¹²²⁹ In sum, racial disparities in voter turnout may be, in the totality of circumstances, evidence or indicia of discrimination,¹²³⁰ but increasing minority turnout does not necessarily mean that racial discrimination in voting has disappeared.

Recent Voter Turnout and Registration Patterns

This section details the demographics of the American electorate in the most recent presidential election. Using the Census Bureau’s Voting and Registration Supplement of the Current Population Survey (CPS), this section also illustrates how political participation has varied for different members of the voting eligible population across several presidential elections. The CPS is performed every two years and involves approximately 60,000 households, which are selected with the purpose of being representative of the U.S. population.¹²³¹ The Census interviews individuals who are U.S. citizens and over 18 years of age, on matters regarding voting and registration. Using descriptive and summary Census statistics, this section highlights demographic characteristics and trends in the composition of the American electorate over the past several presidential elections.¹²³²

Voter Turnout

The voter turnout rate, measured as persons who voted as a percent of those registered, was approximately 61.38 percent in the 2016 Presidential Election.¹²³³ This figure decreased only slightly from the previous presidential election, but was over 2 percentage points lower than the 2004 and 2008 Presidential Elections (see Figure 13).

[statewide-20130118_1_long-lines-sentinelanalysis-state-ken-detzner](#) (discussing the research of Ohio State University Professor Theodore Allen, whose estimate was “based on the Sentinel’s analysis of voter patterns and precinct-closing times in Florida’s 25 largest counties”).

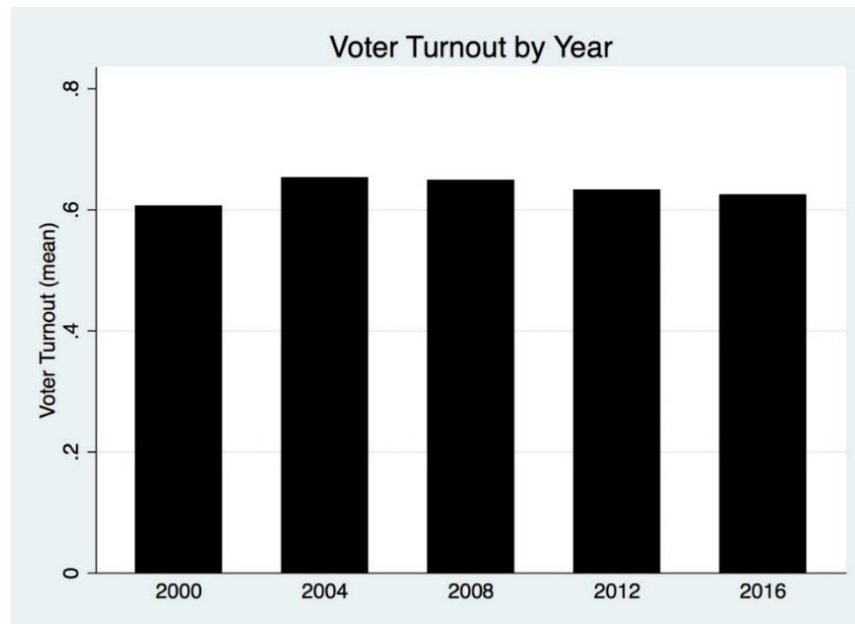
¹²²⁹ *Briefing Transcript*, *supra* note 234, at 49 (statement by Bishop Dr. William Barber II).

¹²³⁰ *See, e.g., Gingles*, 478 U.S. at 87.

¹²³¹ Census Bureau, *History of the CPS*, *supra* note 1202.

¹²³² *Id.*

¹²³³ Commission staff calculated this figure and the subsequent data referenced in this section using Current Population Survey data. For further information on the dataset, *see* note 1266, *infra*.

Figure 13: Voter Turnout by Presidential Election, 2000- 2016

Source: Figure created by Commission staff using Current Population Survey data

Figure 14 shows U.S. states ranked by the rate of voter turnout in the most recent election in descending order. According to these data, four states—Colorado, Maine, New Hampshire, and Wisconsin—and Washington, D.C. had the highest voter turnout rates in the 2016 Presidential Election. States that have relatively high voter registration and turnout rates often have several commonalities, such as: competitive elections¹²³⁴ with large amounts of money spent on campaigning,¹²³⁵ higher incomes among the electorate,¹²³⁶ and populations with high levels of educational attainment.¹²³⁷ Many of these states have policies that have simplified the registration and voting process. In fact, many of the highest-ranking states for registration and turnout—Colorado, Iowa, Maine, Minnesota, New Hampshire, and Wisconsin—offered same-day voter registration, allowing citizens to register to vote and to address a registration issue on Election Day or during the early voting period.¹²³⁸ In addition, in states that have same-day voter registration, voter turnout was 7 percentage points higher than in states without this registration option.¹²³⁹

¹²³⁴ Nonprofit VOTE & U.S. Elections Project, *America Goes to the Polls 2016*, *supra* note 1201, at 7.

¹²³⁵ Andrew Prokop, *40 Charts That Explain Money in Politics*, VOX (Jul. 30, 2014),

<https://www.vox.com/2014/7/30/5949581/money-in-politics-charts-explain>.

¹²³⁶ Sean McElwee, *The Income Gap at the Polls: The Rich Aren't Just Megadonors. They're Also Dominating the Voting Booth*, POLITICO (Jan. 7, 2015), <https://www.politico.com/magazine/story/2015/01/income-gap-at-the-polls-113997>.

¹²³⁷ Huffington Post, *States With The Highest (And Lowest) Voter Turnout*, HUFFINGTON POST (Oct. 28, 2016), https://www.huffingtonpost.com/entry/states-with-the-highest-and-lowest-voter-turnout_us_5813a3c5e4b096e87069653a.

¹²³⁸ Nonprofit VOTE & U.S. Elections Project, *America Goes to the Polls 2016*, *supra* note 1201, at 6.

¹²³⁹ *Id.*

Minnesota Secretary of State Mark Ritchie said same-day voter registration is a “critical factor” and the most effective policy in increasing voter turnout.¹²⁴⁰ In addition, Colorado, Oregon, and Washington State are “All Vote by Mail” states¹²⁴¹ and had higher than average voter turnout rates in the recent presidential election.¹²⁴²

According to the data in Figure 14, the following states had the five lowest voter turnout rates: Hawaii, New Mexico, Tennessee, Texas, and West Virginia. Several of these states had voter registration deadlines that were three to four weeks before Election Day.¹²⁴³ Arkansas, Hawaii, Tennessee, Texas, and West Virginia have had the lowest voter turnout rates in the last three presidential elections.¹²⁴⁴ Hawaii has ranked last in voter turnout in the last five presidential elections, which may be related to the distance of the state from the mainland, along with the realities that the state receives little attention from presidential candidates, and has only three electoral votes that usually go to the Democratic Party.¹²⁴⁵ Also, California, New York, and Texas represent 25 percent of the eligible U.S. voting population, but all had lower than average voter turnout rates.¹²⁴⁶

¹²⁴⁰ Allison Terry, *Voter Turnout: The 6 States That Rank Highest, and Why*, CHRISTIAN SCI. MONITOR (Nov. 6, 2012), <https://www.csmonitor.com/USA/Elections/2012/1106/Voter-turnout-the-6-states-that-rank-highest-and-why/Minnesota>.

¹²⁴¹ Nonprofit VOTE & U.S. Elections Project, *America Goes to the Polls 2016*, *supra* note 1201, at 9 (in “All Vote by Mail” states every registered voter receives a ballot in the mail before the election and may return the ballot via U.S. postal mail or a local drop box). *But see* discussion in Chapter 3 regarding difficulties that particular Native American communities experience in “All Vote By Mail” states such as Washington and Oregon.

¹²⁴² *Id.*

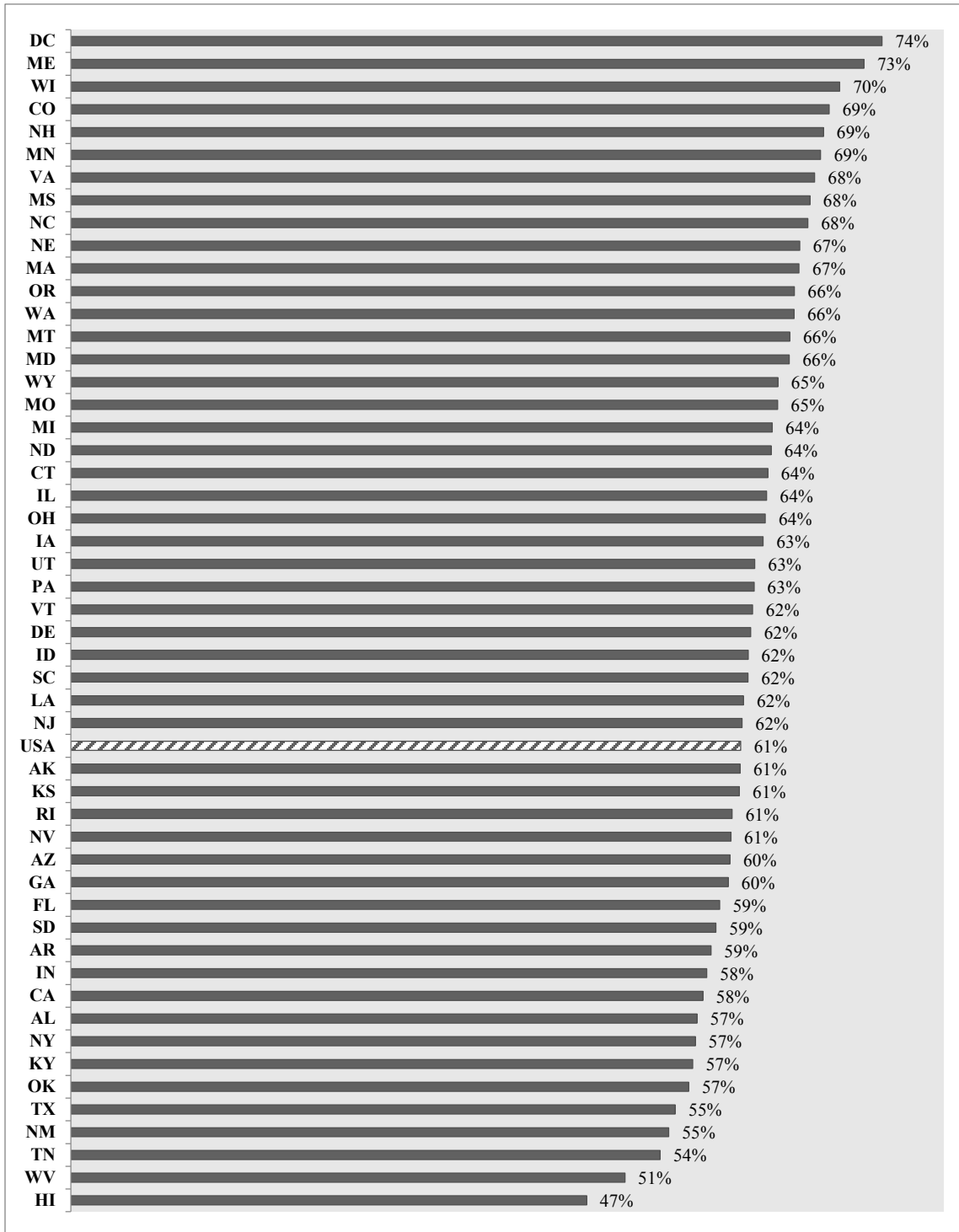
¹²⁴³ *Id.* at 7 (noting that Hawaii, West Virginia, Texas, and Tennessee all “cut off the ability to register or update a registration three to four weeks before Election Day”).

¹²⁴⁴ *Id.* at 10.

¹²⁴⁵ *Id.*

¹²⁴⁶ *Id.*

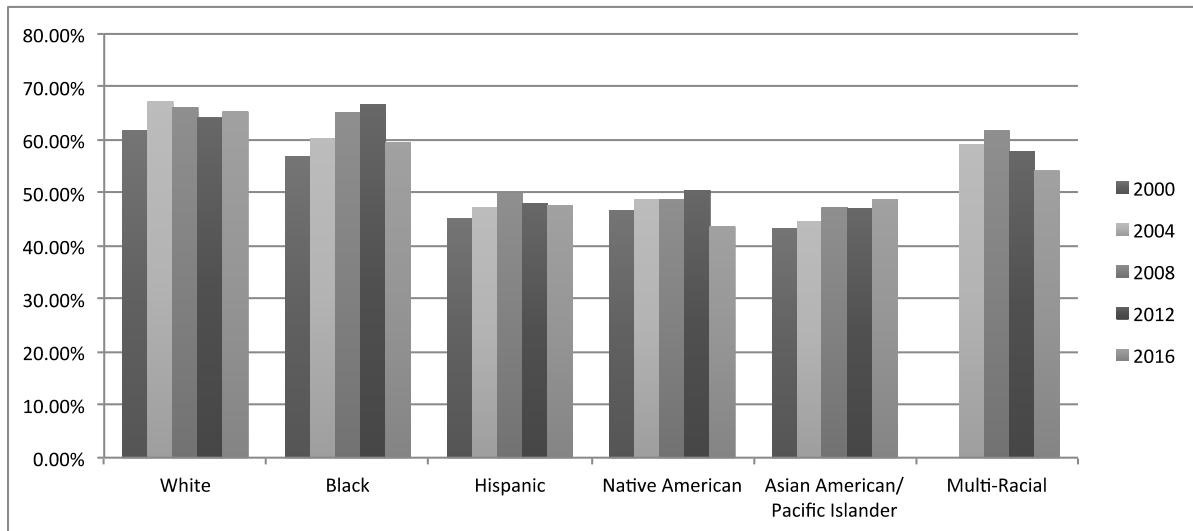
Figure 14: Voter Turnout in the 2016 Presidential Election by State



Source: Figure created by Commission staff using Current Population Survey data

Figure 15 illustrates trends in voter turnout rate by race and ethnicity from 2000 to 2016. Figure 15 shows that white, black, and multiracial voter turnout ranked the highest amongst racial groups since 2000. White voter turnout outperformed other racial and ethnic groups across three of the four presidential elections under study, but in 2012 black voter turnout was 66.64 percent while white voter turnout was 64.14 percent.¹²⁴⁷ At the same time, voter turnout rates for Asian/Pacific Islander, Latino, and Native American registrants were almost all under 50 percent across all five presidential elections under study.¹²⁴⁸

Figure 15: Voter Turnout by Race/Ethnicity, 2000- 2016



Source: Figure created by Commission staff using Current Population Survey data

According to the Census data in Figure 15, black voter turnout drastically decreased between 2012 and 2016; it decreased by over 7 percentage points, which is the lowest turnout rate for black citizens since the 2000 Presidential Election.¹²⁴⁹ During the same period, there was a significant decrease in Native American and multiracial voter turnout rates. The estimated voter turnout rate for Latino registrants decreased by 0.4 percentage points between 2012 and 2016, while the voter turnout rate for Asian/Pacific Islanders increased by almost 2 percentage points (see Figure 15).¹²⁵⁰

¹²⁴⁷ Commission staff calculated these figures using Current Population Survey data. See also Jens Manuel Krogstad & Mark Hugo Lopez, *Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots*, PEW RESEARCH CENTER (May 12, 2017), <http://www.pewresearch.org/fact-tank/2017/05/12/black-voter-turnout-fell-in-2016-even-as-a-record-number-of-americans-cast-ballots/>.

¹²⁴⁸ However, Native American voter turnout in 2012 was estimated at 50.53 percent.

¹²⁴⁹ Commission staff calculated this figure using Current Population Survey data. See also William H. Frey, *Census Shows Pervasive Decline in 2016 Minority Voter Turnout*, BROOKINGS INSTITUTION (May 18, 2017), <https://www.brookings.edu/blog/the-avenue/2017/05/18/census-shows-pervasive-decline-in-2016-minority-voter-turnout/> [hereinafter Frey, *Census Shows Pervasive Decline*].

¹²⁵⁰ Commission staff calculated these figures using 2016 Current Population Survey data.

Despite Latino and Asian/Pacific Islander citizens being the fastest growing groups of eligible voters, overall turnout for these groups is still low when compared to black and white voter turnout rates (see Figure 15).¹²⁵¹ In fact, according to a 2015 study published by the Joint Center for Political and Economic Studies, for over 35 years, Latino and Asian/Pacific Islander voter turnout has consistently been 10 to 15 percentage points lower than black voter turnout, and 15 to 20 percentage points lower than white voter turnout.¹²⁵² The authors of the 2015 study attribute the gap in voter turnout among these groups as being related to a lack of effective language accommodations, discrimination at the ballot box, and tepid mobilization on the part of political parties and candidates.¹²⁵³ Also, Latino and Asian/Pacific Islander voters as a group are younger than black and white voters, and generally voter turnout increases with age.¹²⁵⁴

Figure 16 demonstrates that from 2000 to 2016, while white voter turnout increased by over 1 percent overall, minority voter turnout decreased overall by more than 3 percentage points.¹²⁵⁵ According to a 2017 Brookings study, in 2016, black turnout declined while white turnout rose in six states (Florida, Michigan, North Carolina, Ohio, Pennsylvania, and Wisconsin); the authors refer to this as an increase in “white-black turnout differential” in the 2016 Presidential Election.¹²⁵⁶ In addition, the study shows that while in 2012, overall black voter turnout surpassed white voter turnout, in 2016, overall minority turnout declined in 33 states.¹²⁵⁷

¹²⁵¹ Khalilah Brown-Dean, Zoltan Hajnal, Christina Rivers, & Ismail White, *50 Years of the Voting Rights Act: The State of Race in Politics*, JOINT CENTER FOR POLITICAL AND ECONOMICS STUDIES 13 (2015), <http://jointcenter.org/sites/default/files/VRA%20report%2C%208.5.15%20%28540%20pm%29%28updated%29.pdf> (last accessed July 30, 2018).

¹²⁵² *Id.* at 13-14.

¹²⁵³ *Id.* at 14.

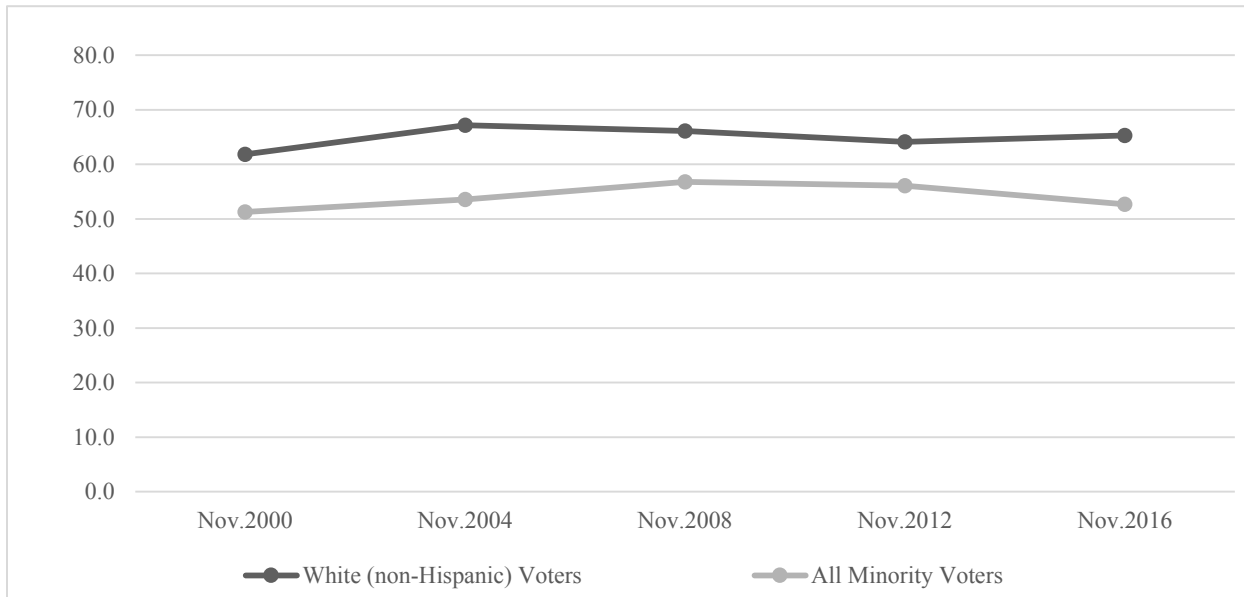
¹²⁵⁴ *Id.*

¹²⁵⁵ Commission staff calculated these figures using 2016 Current Population Survey data.

¹²⁵⁶ Frey, *Census Shows Pervasive Decline*, *supra* note 1249.

¹²⁵⁷ *Id.*

Figure 16: Voter Turnout Rate by Presidential Election, White (non-Latino) and Minority Voters



Source: Figure created by Commission staff using Current Population Survey data

Reasons Why Registered Voters Do Not Vote

According to Current Population Survey data, in the last five presidential elections, between 7 to 10 percent of registered voters did not turn out to vote (see Table 9). The Census Bureau asked registered voters who did not vote in the 2016 election why they chose not to vote, and over 25 percent of respondents said that they did not like available candidates or campaign issues (see Figure 17).¹²⁵⁸ Over 15 percent of registered voters did not participate because they were not interested or felt that their vote would not make a difference; and approximately 15 percent of respondents said they were too busy. Lastly, over 10 percent of registered voters said they did not vote due to a personal or familial illness or disability (see Figure 17).

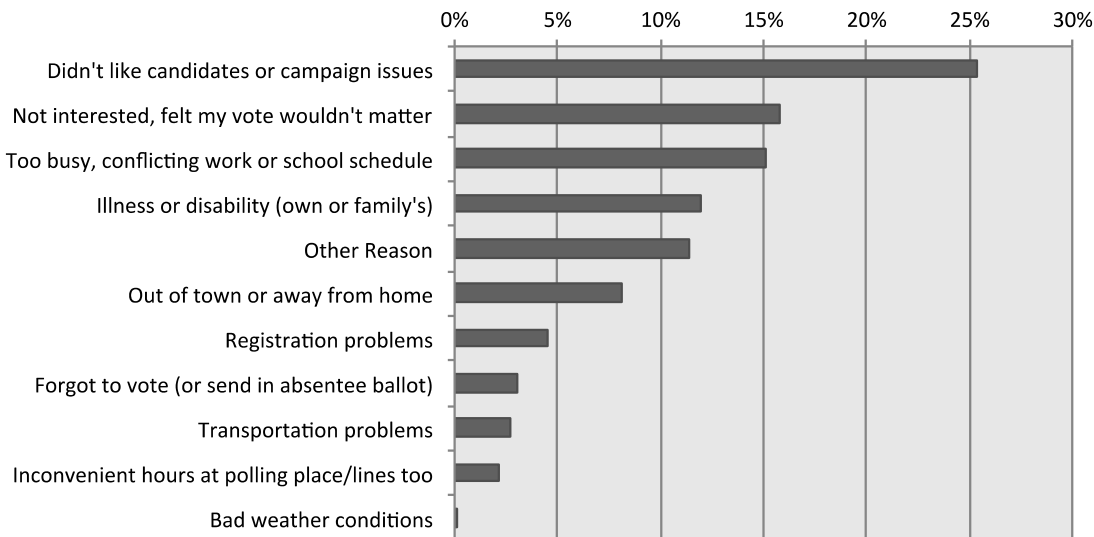
Table 9: Registered Voters Who Did Not Vote by Presidential Election

	2000	2004	2008	2012	2016
Not Registered	30%	28%	29%	29%	30%
Registered, Non-Voters	10%	8%	7%	9%	9%
Voted	59%	64%	64%	62%	61%
Total	100%	100%	100%	100%	100%

Source: Table created by Commission staff using Current Population Survey data

¹²⁵⁸ Commission staff calculated these figures using 2016 Current Population Survey data.

Figure 17: Which of the following was the MAIN reason you did not vote (if registered)?¹²⁵⁹



Source: Figure created by Commission staff using Current Population Survey data

Moreover, since the 2000 Presidential Election, the percentage of registered voters who said they did not vote because they disliked the candidates or campaign issues had been generally decreasing—this figure was only 13 percent during the 2008 and 2012 Presidential Elections and considerably less during the 2000 and 2004 Presidential Elections—but it increased again in 2016.¹²⁶⁰ During previous elections, registered voters who did not participate highlighted apathy and scheduling conflicts as the top reasons for not participating.¹²⁶¹

Disaggregation of Racial Disparities in Turnout

In addition to noting the complexities previously discussed in examining turnout by registered black voters, Commission staff have examined relevant Census data and found large disparities for other minority groups. The nation has undergone changing demographics with rapid expansion

¹²⁵⁹ Another analysis of the Current Population Survey data conducted by the Pew Research Center found very similar results, but some of the percentages are slightly different, which is due to rounding and different statistical weighs. See Lopez and Flores, *Dislike of Candidates*, *supra* note 561.

¹²⁶⁰ *Id.*

¹²⁶¹ *Id.*

in numbers of Latino and Asian-American/Pacific Islander citizens, but wide disparities in turnout have persisted and are likely to persist for these groups.¹²⁶²

There are only 13 states where overall minority registration rates (including all voters of color) are higher than white registration rates. These are: Georgia, Illinois, Indiana, Kentucky, Mississippi, Missouri, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, and Wisconsin.¹²⁶³ Section 5 previously covered six of these 13 states. Moreover, data also show a gap between the turnout of Latino and Asian-American/Pacific Islander voters as compared to white voters.¹²⁶⁴ The largest racial disparities in turnout between Latino and Asian-American/Pacific Islanders are found in the Plains States and along the Pacific Rim and the Mountain West: Colorado, Hawaii, Idaho, Iowa, Kansas, Utah, and Wyoming in particular.¹²⁶⁵ Unfortunately, Native American turnout data was not included in this set of localized Census data, so the Commission cannot analyze or report on the comparative rate of advantage or disadvantage for Native American voters. Data on Native American turnout are only available on a national level.

¹²⁶² See, e.g., Rob Griffin, Ruy Teixeira, and John Halpin, *Voter Trends in 2016: A Final Examination*, CENTER FOR AMERICAN PROGRESS (Nov. 1, 2017).

<https://www.americanprogress.org/issues/democracy/reports/2017/11/01/441926/voter-trends-in-2016/>.

¹²⁶³ Bullock, Gaddie, and Wert, *Rise*, *supra* note 55, at 177.

¹²⁶⁴ *Id.* at 178.

¹²⁶⁵ *Id.* at 180.

The following chart shows turnout data from 2000-2016 for all major racial groups.

Table 10: Voting by Race/Ethnicity and Year

Race/Ethnicity	Year:				
	2000	2004	2008	2012	2016
White	61.82%	67.2%	66.11%	64.14%	65.3%
Black	56.89%	60.35%	65.20%	66.64%	59.57%
Latino	45.10%	47.16%	49.88%	47.96%	47.57%
Native American	46.72%	48.68%	48.79%	50.53%	43.59%
Asian American/ Pacific Islander	43.25%	44.63%	47.2%	47.07%	48.81%

Source: Census Bureau's Voting and Registration Supplement of the Current Population Survey¹²⁶⁶

The above data show that Asian-American/Pacific Islander, Latino, and Native American voters are experiencing wide turnout gaps. On a national level, the currently low turnout rates among these minority citizen groups are as low as the less than 50 percent turnout of eligible black voters that formed the basis for the initial preclearance formula in Section 5 at the time of the 1964 Presidential Election. As a reminder, Congress took into account the following in enacting the 1965 VRA preclearance formula: the 1965 VRA applied Section 5 preclearance rules

in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect

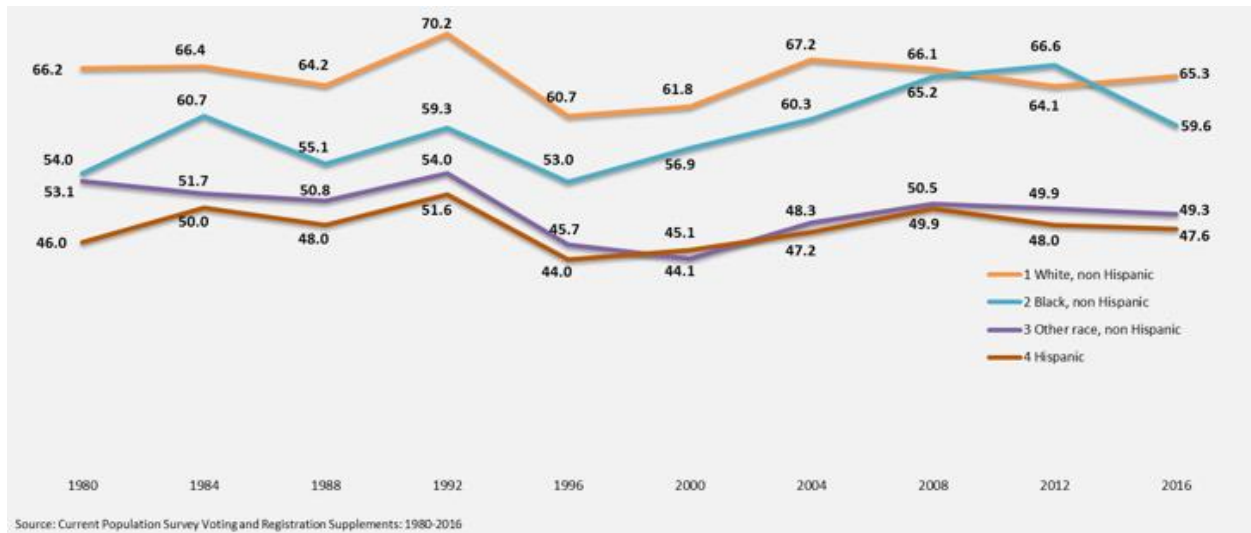
¹²⁶⁶ The data were compiled by Commission staff from the U.S. Census Bureau Voting and Registration Supplement's post-election surveys of the Voting Eligible Population (who are citizens of voting age). Commission staff note that voting estimates from the Current Population Survey and other sample surveys have historically differed from those based on administrative data, such as the official results reported by each state and disseminated collectively by the Clerk of U.S. House of Representatives and the Federal Election Commission. In general, voting rates from the sample surveys such as the Current Population Survey are *higher* than official results (such that the low turnout rates reported here may be over-estimates). Potential explanations for this difference include item nonresponse, vote misreporting, problems with memory or knowledge of others' voting behavior, and methodological issues related to question wording and survey administration. Despite these issues, the Census Bureau's November (post-election survey) supplement to the Current Population Survey remains the most comprehensive data source available for examining the social and demographic composition of the electorate in federal elections, particularly when examining broad historical trends for subpopulations. See U.S. Census Bureau, *Voting in America: A Look at the 2016 Presidential Election*, 2017, https://www.census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html [*hereinafter* Census Bureau, *Voting in America*].

to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, *or that less than 50 per centum of such persons voted in the presidential election of November 1964.*¹²⁶⁷

This formula was updated in subsequent VRA reauthorizations, based on turnout data from the 1968 and 1972 presidential elections.¹²⁶⁸

Using these metrics, the above data show that Asian-American/Pacific Islander, Latino, and Native American turnout rates were under 50 percent of eligible voters, on a national level. According to past VRA formulas, these turnout rates are consistent with what Congress has considered to indicate discrimination in voting.¹²⁶⁹ Also, data from 1980 to the present show that these turnout gaps may be persistent. The following graph is reproduced from the U.S. Census.¹²⁷⁰

Figure 18: Reported Voting Rates by Race, 1980- 2016



Source: Current Population Voting and Registration Supplemental: 1980- 2016

While turnout is not the only indicator of ongoing discrimination in voting, considering the changing demographics of the nation, ongoing gaps in minority turnout may be one of various factors or indicators to evaluate current conditions.

¹²⁶⁷ 52 U.S.C. § 10304(a).

¹²⁶⁸ *Id.* See also Discussion and Sources cited in Chapter 1, note 151, *supra*.

¹²⁶⁹ See, e.g., *Katzenbach*, 383 U.S. at 330, 339, *abrogated by Shelby Cty.*, 570 U.S. 529.

¹²⁷⁰ Census Bureau, *Voting in America*, *supra* note 1266.

Voting Rights Act Litigation Trends Pre- and Post-*Shelby County*

Before examining whether litigation trends show current conditions of discrimination in voting, and the key question of whether the litigation trends show more or less VRA litigation in formerly covered jurisdictions, some premises underlying such an evaluation should be examined. Although the *Shelby County* decision indicates that current conditions should be the basis of any future preclearance formula, and that there should not be any discrimination among the states,¹²⁷¹ the Court did not factually examine the premise that formerly covered jurisdictions were not the location of more incidents of voting rights violations. Historian and voting rights expert J. Morgan Kousser has criticized this part of the *Shelby County* decision as follows: “Neither the Chief Justice nor any scholars or civil rights proponents or opponents have systematically examined the evidence on the entire pattern of proven voting rights violations over time and space.”¹²⁷²

Trends in Incidents of Discrimination

In 2015, Kousser published a study of over 4,100 incidents of discrimination in voting in the United States from 1957 to 2014, using a consistent methodology across all states, and found that nearly 83 percent of voting rights violations occurred in formerly covered jurisdictions.¹²⁷³ His study calls into question whether the Supreme Court’s reasoning that preclearance was no longer justified in formerly covered jurisdictions as compared to other states is supported by any data, even in the relatively recent period of 1982 to 2006.¹²⁷⁴ Kousser’s 4,173 incidents came from a broader dataset than just the VRA cases that the Commission examines below.¹²⁷⁵

The Commission also notes that litigation alone is not a complete measure of the problem of discrimination in voting.¹²⁷⁶ For example, in the pre-*Shelby County* era, in the process of reviewing submissions of voting changes, DOJ requests for further information that led to the prevention or modification of a discriminatory voting change (which are part of Kousser’s dataset), may be

¹²⁷¹ See *Shelby Cty.*, 570 U.S. at 557.

¹²⁷² Kousser, *Facts of Voting Rights*, *supra* note 249.

¹²⁷³ *Id.* at 17.

¹²⁷⁴ *Id.*

¹²⁷⁵ *Id.* at 3. The methodology for collection of Kousser’s data set is as follows:

Drawn largely from lists of cases and other actions compiled by civil rights organizations, individual attorneys, and the DOJ, the database has been supplemented by ferreting out details and following case citations from published cases, from PACER, and from newspaper articles. The events include any successful or unsuccessful case, published or not, decided or settled; Section 5 objections and “more information requests” by the DOJ; and election law changes that manifestly took place as a result of the threat or reality of legal challenges . . . it is far larger than any of the single sources that were presented to Congress during the process of renewing the VRA in 2006 and that were scrutinized in the district and appeals court opinions in *Shelby County*. For example, Prof. Ellen Katz’s database of Section 2 cases, discussed extensively during the 2006 congressional Briefings and included in my database with Katz’s kind permission, contains 324 cases. The total number of cases and other events in which the minority side was successful contained in my database is currently 4173. *Id.*

¹²⁷⁶ See, e.g., Levitt, Written Testimony, *supra* note 304, at 2.

valuable indicia that discrimination was prevented, or that preclearance was effective.¹²⁷⁷ During the 2006 VRA Reauthorization, Congress received empirical studies about DOJ's requests for more information and their substantial effect on covered jurisdictions' behavior.¹²⁷⁸ Another example of a meaningful nonlitigation event is the removal of a barrier to access for minority voters, defined as "election law changes that manifestly took place as a result of the threat or reality of legal challenges."¹²⁷⁹ Kousser argues that these types of incidents, as well as successful litigation under relevant U.S. and state constitutional and statutory protections, are also indicia of discrimination in voting.¹²⁸⁰

Kousser mapped his database of incidents of discrimination in all 48 contiguous states, and showed a correlation of higher levels of discrimination in voting in the formerly covered jurisdictions. His map reproduced below codes all places with no incidents of discrimination in blue, then illustrates higher levels of incidents in the following three-dimensional figure with color coding, according to the legend below. There were also ongoing incidents in Alaska, which unfortunately, could not be included in the map below.¹²⁸¹ But Commission staff reviewed Kousser's dataset and independently confirmed that during this time period, among the VRA violations, none were reported in Hawaii, while three Section 5 cases (in 1995, 2003, and 2009) and one case of VRA language access violations (in 2014) occurred in Alaska.¹²⁸²

¹²⁷⁷ See H. R. REP. NO. 109-478, at 40-41.4 (2006) (in addition to 700 DOJ objections under Section 5, over 800 proposed voting changes were withdrawn or amended after the DOJ requested more information from the submitting jurisdiction).

¹²⁷⁸ See *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 11 (2006), transcript available at http://commdocs.house.gov/committees/judiciary/hju26411.000/hju26411_0f.htm (noting the submission of materials like Luis Ricardo Fraga & Maria Lizet Ocampo, *The Deterrent Effect of Section 5 of the Voting Rights Act: The Role of More Information Requests*, updated version available at https://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf); Kousser, *Facts of Voting Rights*, *supra* note 249, at 3, 20.

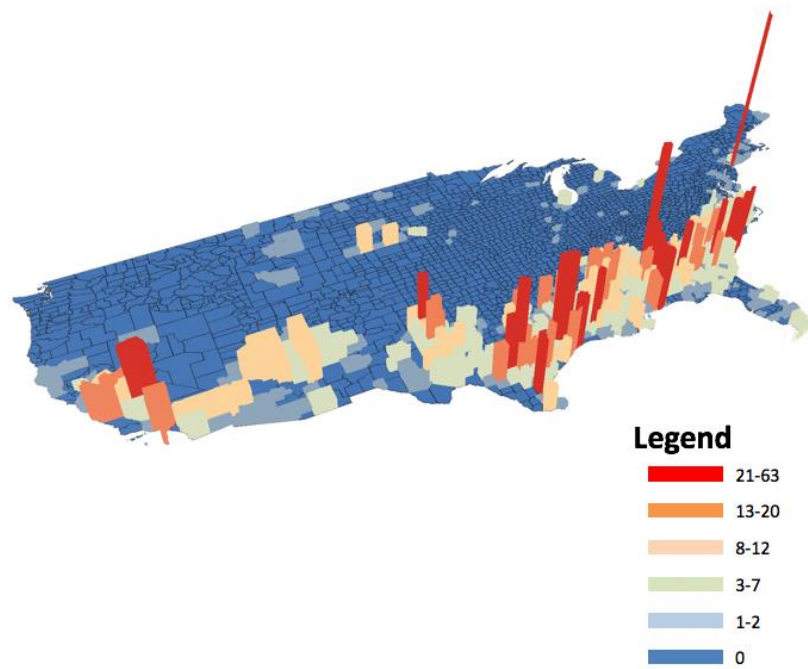
¹²⁷⁹ Kousser, *Facts of Voting Rights*, *supra* note 249, at 3.

¹²⁸⁰ *Id.* at 6 (for example, Kousser includes enforcement actions brought under the California Voting Rights Act, which is state legislation prohibiting discrimination in voting, with different standards for vote dilution cases than the VRA).

¹²⁸¹ *Id.* at n.10. Kousser explains that: "Alaska is so large that including it in anything like its proportional size reduces the detail of the lower-48 states far too much for clarity."

¹²⁸² The Section 5 cases were: *Native Vill. of Barrow v. City of Barrow*, 2BA-95-117 (D. Alaska 1995); *Luper v. Municipality of Anchorage*, 268 F. Supp. 2d 1110 (D. Alaska 2003); *Nick v. Bethel, Alaska*, 2010 WL 4225563 (D. Alaska 2010); and the VRA language access case was *Toyukak v. Treadwell*, 3-13-CV-00137-SLG (D. Alaska 2014) (ongoing violations of Sections 203 and 208). For more information about language access, see Chapter 3, Language Access Issues, *supra* notes 1114-72.

Figure 19: Voting Rights Events by County, 1957-2014¹²⁸³



Compared to the map of jurisdictions that were covered for preclearance prior to the *Shelby County* decision (see Chapter 2, Figure 2), the pattern of much higher levels of voting rights incidents in the formerly covered jurisdictions is apparent.¹²⁸⁴

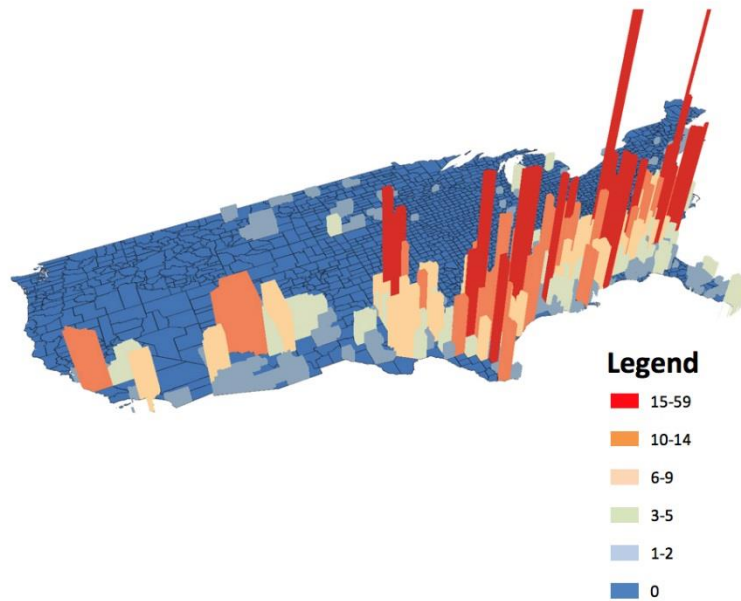
Moreover, as Figure 20 illustrates, the data showed that even in the more recent period of 1982 to 2005, voting rights incidents were still concentrated in formerly covered jurisdictions.¹²⁸⁵

¹²⁸³ Kousser, *Facts of Voting Rights*, *supra* note 249, at 6.

¹²⁸⁴ *Id.*

¹²⁸⁵ *Id.* at 8.

Figure 20: Voting Rights Incidents Still Concentrated in the South and Southwest, 1982-2005¹²⁸⁶



Trends in Section 2 and Section 5 Voting Rights Act Enforcement Actions

The Commission now turns to analysis of the more limited dataset of VRA enforcement actions under Sections 2 and 5, starting with a key point from Kousser’s research documenting that trends in Section 2 litigation correlate with Supreme Court decisions interpreting the law.¹²⁸⁷ This is another factor showing that using only litigation successes as a metric does not demonstrate the entirety of current conditions. For example, Supreme Court precedents that narrowed the interpretation of the statutory protections of Section 2 in 1980,¹²⁸⁸ 1993,¹²⁸⁹ and 1995¹²⁹⁰ resulted in a negative quantitative impact in the number of Section 2 cases won.¹²⁹¹

Similarly, Section 2 cases became easier to win after the 1982 VRA amendments clarifying that intent is not required to prove a Section 2 violation, particularly after the subsequent Supreme Court decision in *Thornburg v. Gingles* clarifying the standards for showing a Section 2 violation based on a totality of circumstances and factors that do not include intent.¹²⁹² After the 1982 VRA amendments, Section 2 provided that:

- (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results

¹²⁸⁶ *Id.* at 8.

¹²⁸⁷ *Id.* at 18-20.

¹²⁸⁸ *Id.* at 11 (citing *Mobile*, 446 U.S. 55).

¹²⁸⁹ *Id.* (citing *Shaw*, 509 U.S. 630).

¹²⁹⁰ *Id.* (citing *Miller v. Johnson*, 515 U.S. 900 (1995)).

¹²⁹¹ See *infra* Figure 21.

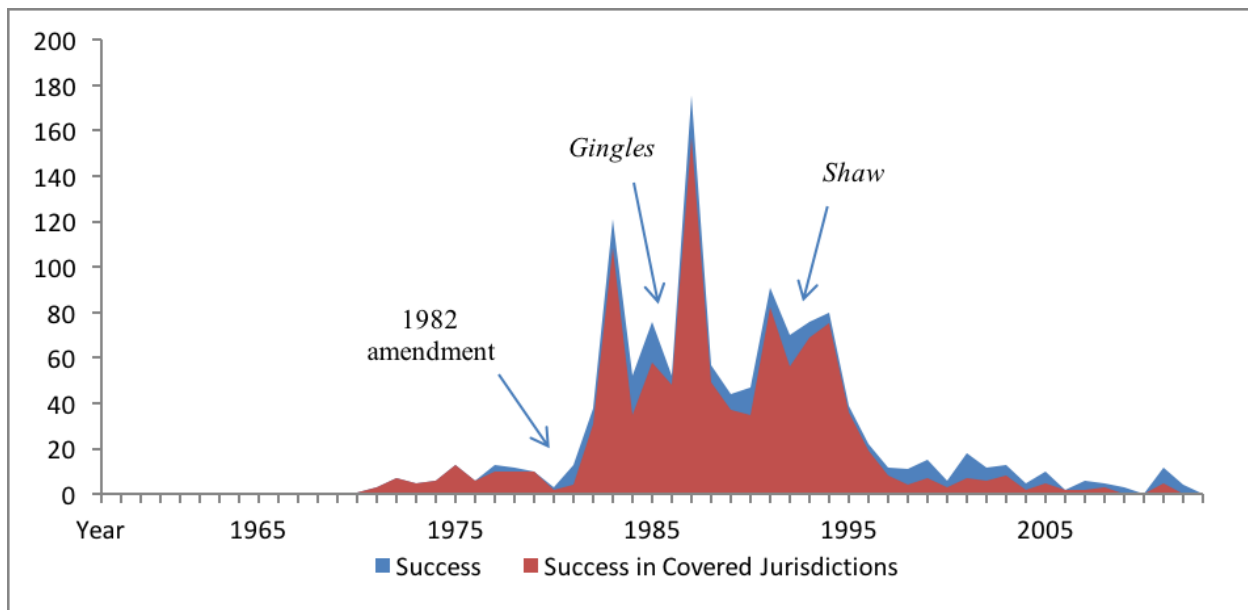
¹²⁹² Kousser, *Facts of Voting Rights*, *supra* note 249, at 18-20 (citing *Gingles*, 478 U.S. 30).

in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) [the language minority provisions] of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.¹²⁹³

The graph reproduced below shows that the level of successful¹²⁹⁴ Section 2 cases tends to ebb and flow depending on how the Supreme Court interprets the statute.

Figure 21: Successful Section 2 Cases in Covered and Non-Covered Jurisdictions, 1957-2014¹²⁹⁵



¹²⁹³ 52 U.S.C. § 10301.

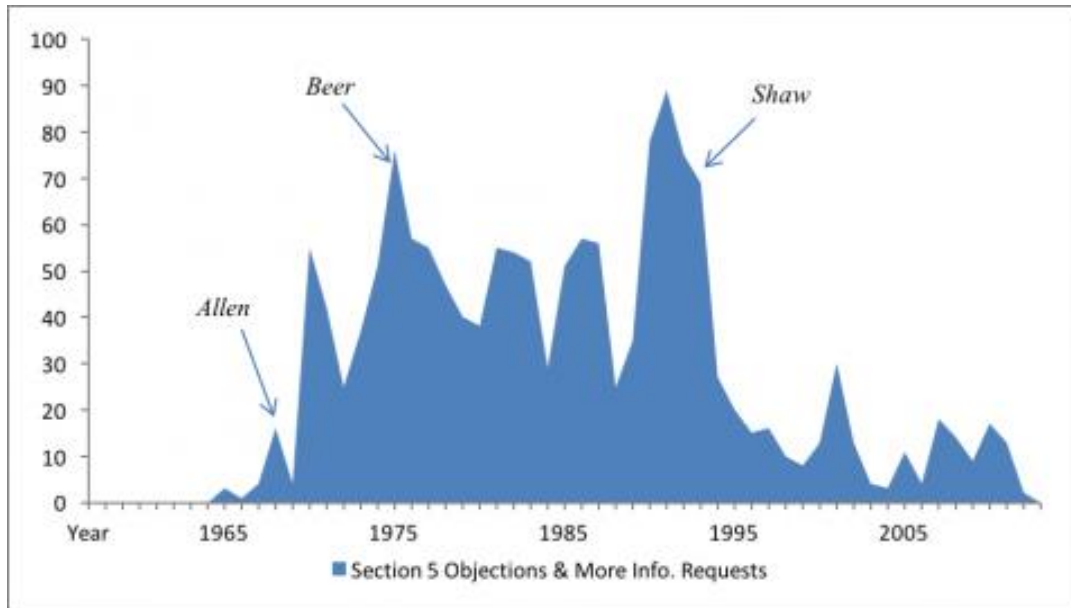
¹²⁹⁴ Professor Kousser and the Commission use the same definition of successful throughout this report, which is based on the VRA Reauthorization's metric and is also set forth in the Written Testimony of Dale Ho, at his note 42, borrowing from Professor Ellen Katz's definition of a "successful" Section 2 case, which was cited by Congress during the 2006 Reauthorization. See further Discussion and Sources cited at note 1306-7, *infra*. By using the same metric, which Commission staff have independently repeated in this chapter of the report, trends will be shown.

¹²⁹⁵ Kousser, *Facts of Voting Rights*, *supra* note 249, at 17.

The above compilation of successful Section 2 cases also shows that the great majority were brought in formerly covered jurisdictions. In the years Kousser reviewed for the above graph, five out of six (82.7 percent) successful Section 2 cases were won in formerly covered jurisdictions.¹²⁹⁶

As discussed in Chapter 1, the VRA (including Section 5) was reauthorized a number of times. The most recent reauthorization was in 2006. Kousser's compilation of Section 2 cases summarized above shows that although there were fewer Section 2 cases before the 2006 reauthorization, they evidenced ongoing discrimination in voting and they were highly concentrated in formerly covered jurisdictions.¹²⁹⁷ Ongoing discrimination in voting was also evidenced by objections under Section 5 that stopped discriminatory voting changes, requests for more information that resulted in the originally proposed change being altered in order to pass preclearance, and litigation under Section 5 that stopped discriminatory voting changes.¹²⁹⁸ Trends in these successful Section 5 enforcement actions are summarized in the graph reproduced below.

Figure 22: Section 5 Objections and Cases, 1957-2014¹²⁹⁹



This graph shows successful Section 5 enforcement preceding the 2006 VRA Reauthorization. The data also indicate that Section 5 enforcement was influenced by the Supreme Court's decisions in 1969,¹³⁰⁰ expanding its interpretation, and by subsequent Supreme Court decisions that limited its scope in 1976¹³⁰¹ and 1993.¹³⁰² The data also show that although there was a lower rate of

¹²⁹⁶ *Id.*

¹²⁹⁷ See *supra* note 1286, Figure 20.

¹²⁹⁸ Kousser, *Facts of Voting Rights*, *supra* note 249, at 17.

¹²⁹⁹ *Id.*

¹³⁰⁰ *Id.* at 11-12 (citing *Allen*, 393 U.S. 544).

¹³⁰¹ *Id.* at 12 (citing *Beer*, 425 U.S. 130).

¹³⁰² *Id.* at 11 (citing *Shaw*, 509 U.S. 630).

objections over time, objections continued into recent years, and there was a slight uptick just prior to the *Shelby County* decision.¹³⁰³

After *Shelby County*, the ground for Section 2 cases shifted dramatically as Section 5 was no longer operational. As discussed in Chapter 2 of this report, jurisdictions no longer had to provide notice of voting changes, nor racial impact data, and voting changes that were previously frozen by the preclearance process could be put into effect in elections immediately.¹³⁰⁴ Section 2 is one of the remaining provisions of the VRA that the *Shelby County* decision did not rule upon, with the Court stating: “Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.”¹³⁰⁵

Successful Section 2 Litigation Between the 2006 Voting Rights Act Reauthorization and Shelby County Decision

The Commission’s research shows that as compared to the prior period, there were relatively fewer successful Section 2 cases since the 2006 VRA Reauthorization and prior to the *Shelby County* decision. The methodology identifying these cases is based on a Westlaw legal database search, and the definition of successful is also consistent with that used in the 2006 VRA Reauthorization, as follows:

Suits coded as a successful plaintiff outcome include both those lawsuits where a court determined, or the parties stipulated, that Section 2 was violated, and a category of lawsuits where the only published opinion indirectly documented plaintiff success, including decisions where a court granted a preliminary injunction, considered a remedy or settlement, or decided whether to grant attorneys’ fees after a prior unpublished determination of a Section 2 violation.¹³⁰⁶

¹³⁰³ *Id.* at 11-12.

¹³⁰⁴ See Chapter 2, The Impact of *Shelby County* on Federal VRA Enforcement, at notes 301-310, *supra*.

¹³⁰⁵ *Shelby Cty.*, 570 U.S. at 557.

¹³⁰⁶ See Ho, Written Testimony, *supra* note 42:

I borrow Professor Ellen Katz’s definition of a “successful” Section 2 case. See Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643, 653-54 n.35 (2006) (“Suits coded as a successful plaintiff outcome include both those lawsuits where a court determined, or the parties stipulated, that Section 2 was violated, and a category of lawsuits where the only published opinion indirectly documented plaintiff success,” including decisions where a court “granted a preliminary injunction, considered a remedy or settlement, or decided whether to grant attorneys’ fees after a prior unpublished determination of a Section 2 violation.”).

Professor Katz’s study was cited by Congress during the 2006 Voting Rights Act reauthorization and in Justice Ginsberg’s dissent in *Shelby County*. See *Shelby County*, 133 S.Ct. at 2642 (Ginsberg, J., dissenting) (citing *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong., 1st Sess.,

The Commission also used this definition in identifying the successful Section 2 cases identified below, and this same definition is used consistently throughout this report.¹³⁰⁷ Analysis of the fact patterns in this report should also take into account that during the time after the 2006 VRA Reauthorization and prior to the *Shelby County* decision, Section 5 was also in operation. Therefore, in addition to the above successful Section 2 cases showing VRA violations, there were a number of objections along with successful litigation under Section 5. (See Figure 22.)

Moreover, numerous panelists testified and provided data showing that Section 2 litigation is more difficult, expensive, and time-consuming than Section 5 procedures.¹³⁰⁸ During the 2006 VRA Reauthorization, Congress also found Section 2 litigation to be more difficult, expensive, and time-consuming than Section 5 procedures.¹³⁰⁹ The VRA's statutory language also shows that Section 5 is proactive and the burden of proof is on the jurisdiction, and in contrast, Section 2 requires mounting an affirmative lawsuit by either the DOJ or individual voters.¹³¹⁰

Due to the statutory language and the elements that must be proven in federal court to establish a Section 2 violation,¹³¹¹ the cases below indicate ongoing discrimination in voting in the period just prior to *Shelby County*.

pp. 964-1124 (2005)). The categorization of settled cases as “successful” may result in some over-inclusivity.

The Commission agrees with Ho in this caveat, while noting that by using the same metric over time, which Commission staff has independently repeated in this chapter of the report, trends will be shown.

¹³⁰⁷ Kousser used the same definition of “successful” VRA cases, but he did not rely only on the Westlaw legal database, and therefore he has identified more cases than documented below. Kousser, *Facts of Voting Rights*, *supra* note 249, at 3. Commission staff chose the Westlaw method in order to be consistent in comparing the number of successful cases over time (as unreported cases are more difficult to find in the type of consistent manner that Kousser used over many years of research, through asking persons in the field to send him unreported decisions). Commission staff also consistently identified the decision date as the date of a case, as this information is more reliably available than the date the lawsuit was filed.

¹³⁰⁸ *Briefing Transcript*, *supra* note 234, at 211 (statement by Dale Ho) (“Successful Section 2 litigation has been a ray of light in states like Texas and North Carolina but these cases put in stark relief which has been lost with the demise in the preclearance system. Litigation has been costly and has taken years, and in the meantime, despite motions for preliminary injunctions, in these cases, several of which were actually granted, multiple elections were held in these states under rules that courts ultimately determined were intentionally discriminatory and thus unconstitutional. So simply put, since the *Shelby County* decision we have a record of constitutional violations necessitating a congressional remedy.”); see also NAACP LDF, *The Cost (in Time, Money, and Burden) of Section 2 Voting Rights Act Litigation*, http://www.naacpldf.org/files/case_issue/Section%20%20costs%2010.25.17.pdf (discussing data regarding time and costs).

¹³⁰⁹ *Voting Rights Act: Evidence of Continued Need: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 97 (2006). An illegal scheme might be in place for several election cycles before a § 2 plaintiff can gather sufficient evidence to challenge it. *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (2006). Litigation also includes a “heavy financial burden on minority voters.” *Id.* at 84.

¹³¹⁰ Compare 52 U.S.C. § 10304 (Section 5) with 52 U.S.C. § 10301 (Section 2).

¹³¹¹ 52 U.S.C. § 10301.

Table 11: Successful Section 2 Cases Decided Post-2006 Reauthorization and Prior to *Shelby County* (July 27, 2006-June 25, 2013)

Section 2 Case	Citation (year)	State	Type of claim	Community impacted
<i>United States v. Osceola Cty., Fla.</i>	475 F. Supp. 2d 1220 (M.D. Fla. 2006)	FL	Dilution	Latino
<i>Bone Shirt v. Hazeltine</i>	461 F.3d 1011 (8th Cir. 2006)	SD	Dilution	Native American
<i>United States v. City of Euclid</i>	580 F. Supp. 2d 584 (N.D. Ohio 2008)	OH	Dilution	African American
<i>Jamison v. Tupelo, Mississippi</i>	471 F. Supp. 2d 706 (N.D. Miss. 2007)	MS	Dilution	African American
<i>United States v. Brown</i>	561 F.3d 420 (5th Cir. 2009)	MS	Denial (episodic)	White voters
<i>Spirit Lake Tribe v. Benson Cty.</i>	2010 WL 4226614, No. 2:10-CV-095 (D.N.D. 2010) (preliminary injunction)	ND	Denial (access to polls)	Native American
<i>Large v. Fremont Cty., Wyoming</i>	709 F. Supp. 2d 1176 (D. Wyo. 2010)	WY	Dilution	Native American
<i>U.S. v. Vill. of Port Chester</i>	704 F. Supp. 2d 411 (S.D.N.Y. 2010)	NY	Dilution	Latino
<i>Fabela v. City of Farmers Branch</i>	2012 WL 3135545, No. 3:10-CV-1425-D (N.D. Tex. 2012)	TX	Dilution	Latino

Successful Section 2 Litigation After the Shelby County Decision

The next set of data research is found in Table 12 below, and illustrates some of the key facts about Section 2 litigation during the 5 years since the *Shelby County* decision of June 25, 2013, as compared with the 5 years prior.¹³¹² Commission staff analyzed these two 5-year time periods, in order to quantitatively compare the data within equal time periods.¹³¹³ The research included details about the date of each successful Section 2 decision in the post-*Shelby County* era, the state where the Section 2 violation occurred, the date the case was filed, whether a preliminary injunction or other interim remedy was issued to halt implementation during elections, the type of Section 2 claim, and the community impacted. These details also provide a snapshot of the

¹³¹² *Shelby Cty.*, 570 U.S. 529.

¹³¹³ The data are generated from a Westlaw legal research database search for successful Section 2 cases, and the analysis of these cases by Commission staff. The definition of successful remains consistent with that used in the 2006 VRA Reauthorization, which was also used by Kousser in his data summarized above. *See supra* notes 1306-1307 for definition of “Successful” Cases and Discussion of Methodologies.

functionality of and any limits to the effectiveness of Section 2 in preventing racial discrimination in voting in the post-*Shelby County* era. Staff research found that:

- Twenty-three successful Section 2 cases have been decided¹³¹⁴ since the *Shelby County* decision.¹³¹⁵
 - In comparison, there were only five successful Section 2 cases in the five years preceding the *Shelby County* decision.¹³¹⁶
 - In the five years since the *Shelby County* decision (as compared to the five years before the decision), the number of successful Section 2 cases has more than quadrupled.
- Preliminary injunctions or other interim remedies were only issued in 9 of the 23 successful post-*Shelby County* Section 2 cases filed, or fewer than 39.1 percent (9/23) of the successful cases. Preliminary injunctions were sought by voting rights advocates in various cases, but in most cases, they were denied or overturned.
 - Two of the nine preliminary injunctions were stayed by the Supreme Court, based on the reasoning that minority voters and their advocates asked for changes too close to Election Day. As discussed above, this is a relatively new precedent that has emerged since preclearance has been removed.¹³¹⁷

¹³¹⁴ This analysis considers the litigation regarding voter ID in Texas to be two separate cases, because it has involved two separate voter ID laws (SB 14 and the amended SB 5) with two separate decision points—whereas the claims regarding SB 14 were successful, the claims regarding the amended SB 5 are currently not successful. There are four main decisions regarding voter ID in Texas: (1) *Texas*, 888 F. Supp. 2d at 144-45 (D.D.C. 2012), *vacated and remanded*, *Texas*, 570 U.S. 928 (remanded on June 27, 2013, based on *Shelby County*, after which SB 14 was immediately put back into effect); (2) *Veasey*, 71 F. Supp. 3d 627 (SB 14 was preliminarily enjoined on basis of likelihood of success on the merits for intentional discrimination and with regard to Section 2’s prohibition of discriminatory effects), but this was stayed upon appeal (*see Veasey*, 769 F.3d 890, 135 S. Ct. 9 (denying motion to vacate stay)); (3) *Veasey*, 830 F.3d 216 (finding SB 14 intentionally racially discriminatory, remanding to district court on equal protection claim and on remedies); in the interim, Texas amended SB 14 and introduced SB 5, which provided for new exceptions to the strict voter ID bill, including a “reasonable impediment procedure,” as well as expanding the list of acceptable identifications. SB 5 was also found to be intentionally discriminatory in (4) *Veasey*, 248 F. Supp. 3d 833 (holding that SB 5 must be invalidated as tainted fruit of intentional discrimination), but after the Fifth Circuit (en banc) affirmed the relevant decision and remanded the remedies issue, on remand, on April 27, 2018, a three-judge panel of the Fifth Circuit concurred to strike down the en banc ruling of the full Fifth Circuit, based on the theory that Texas’ appeal was not moot and that SB 5 should be independently evaluated. *Veasey*, 888 F.3d 792, 2018 WL 1995517 (5th Cir. 2018). In this latest ruling, in the 2-1 decision, of the three judges, one ruled that the lower court’s opinion was based on inequitable remedies because SB 5 was not “tainted” by prior discrimination and that the state’s appeal was moot, *id.* at 801-02, the second agreed with overturning the permanent injunction because it was moot as the legislature should be allowed to solve problems, *id.* at 804-05, and the third judge that it was still “tainted.” *Id.* at 823.

¹³¹⁵ *See* Table 12, *infra*.

¹³¹⁶ These are: *Large*, 709 F. Supp. 2d 1176 (at-large elections diluting voting rights of Native American); *Vill. of Port Chester*, 704 F. Supp. 2d 411 (method of election diluted Latino voting rights); *Brown*, 561 F.3d 420 (vote denial case on behalf of white voters, based on episodic practices); *Fabela v. City of Farmers Branch*, 2012 WL 3135545, No. 3:10-CV-1425-D (N.D. Tex. 2012); and *Spirit Lake Tribe*, 2010 WL 4226614 (preliminary injunction against closing polling places on Spirit Lake Tribe Reservation).

¹³¹⁷ *See supra* notes 347-51.

- Moreover, the great majority of elections that occurred in the interim were conducted with voting measures that were later found to be racially discriminatory.
- In contrast, for those cases that occurred in formerly covered jurisdictions, all of these cases involving voting changes would have been frozen during the preclearance process—unless and until the jurisdiction could prove that any changes they sought to implement, such as a new redistricting plan or voter ID law, were not retrogressive to minority voters.¹³¹⁸
- Twelve of the 23 successful post-*Shelby County* Section 2 cases occurred in formerly covered jurisdictions.
 - In the years just prior to *Shelby County* (2006-2013), only 9 of 50 states (18 percent) were previously subject to preclearance under Section 5.
 - In the successful Section 2 cases brought in the five years prior to *Shelby County* (when Section 5 was in place) two out of five (40 percent) successful cases were brought in formerly covered jurisdictions.
 - In comparison, in the five years after *Shelby County*, 12 out of 23 (52.2 percent) occurred in formerly covered jurisdictions. These data show that the rate of concentration in formerly covered jurisdictions is increasing.
- Only one of the post-*Shelby County* cases was brought on behalf of Asian Americans/Pacific Islanders. Sixteen included claims on behalf of black voters, 11 included claims on behalf of Latino Americans, and three were brought on behalf of Native Americans.
- A judicial preclearance remedy was only granted in 2 of the 23 cases below.¹³¹⁹ Judicial preclearance was not granted even in some cases involving intentional discrimination.¹³²⁰
- Fourteen of the 23 successful cases (60.9 percent) involved or included vote dilution claims, and nine (39.1 percent) involved or included vote denial or abridgement.
 - In the five years prior to *Shelby County*, three of the five of successful Section 2 cases (60.0 percent) involved vote dilution, and two out of the five (40.0 percent) involved vote denial.

The following chart summarizes the successful cases Commission staff identified and researched, with additional information about whether or not they occurred in jurisdictions that were covered by preclearance prior to the *Shelby County* decision, whether or not a preliminary injunction to halt implementation during the course of the litigation was granted, the type of Section 2 claim, and the community impacted.¹³²¹

¹³¹⁸ See 52 U.S.C. § 10304.

¹³¹⁹ See *City of Evergreen*, 2014 WL 12607819; *Patino*, 230 F. Supp. 3d 667.

¹³²⁰ See, e.g., *McCrary*, 831 F.3d 204.

¹³²¹ The data are generated from Westlaw legal research database search for successful Section 2 cases, and the analysis of these cases by Commission staff. The definition of successful remains consistent with other datasets in this report. See *supra* note 1306, for definition of “successful” cases, and notes 1306, 1321-22 for discussion of Commission staff research methodologies.

Table 12: Successful Post-*Shelby County* Section 2 Cases (per Westlaw)¹³²²

Case	Formerly covered? ¹³²³	Preliminary Injunction (PI)? (as per WL)	Type of Section 2 claim & community impacted
1. Consent Order, <i>Allen v. City of Evergreen, Ala.</i> , 2014 WL 12607819, No. 13-0107 (S.D. Ala., Jan. 1, 2014).	YES (AL)	No—but case filed before <i>Shelby County</i> , and under Section 5 election changes were enjoined unless and until precleared.	Dilution and denial of black voters' rights: City redistricting plan and changed system of voter eligibility challenged under Sections 2 and 5; parties agreed to judicial preclearance and federal observers under Section 3.
2. <i>Luna v. Kern Cty.</i> , 291 F. Supp. 3d 1088 (E.D. Cal. 2018).	NO (Kern Cty. CA)	No—plaintiff's motion for partial summary judgement denied. ¹³²⁴	Dilution of Latino voting power through county redistricting plan.
3. <i>Ga. NAACP v. Fayette Cty.</i> , 118 F. Supp. 3d 1338 (N.D. Ga., Aug. 3, 2015).	YES (GA)	Yes , on remand, covering special election, August 10, 2015-October 13, 2015.	Dilution of black voters' rights: At-large county and school board districts.
4. <i>Wright v. Sumter Cty. Bd. of Elections & Registration</i> , 301 F. Supp. 3d 1297 (M.D. Ga. 2018).	YES (GA)	No—the court allows elected officials the opportunity to remedy the districting plan.	Dilution of black voting power: At-large districts of Sumter County Board of Education diluted African-American voting strength.
5. <i>Terrebonne Parish La. NAACP v. Jindal</i> , 274 F. Supp. 3d 395 (M.D. La. Aug. 17, 2017).	YES (LA)	No.	Dilution of black voters' rights: At-large elections for judges.
6. <i>Mich. APRI v. Johnson</i> , 833 F.3d 656 (6th Cir. Aug. 17, 2016).	YES (MI)	Yes , granted July 21, 2016.	Denial of black voters' rights: Elimination of straight-ticket voting.
7. <i>Missouri NAACP v. Ferguson-Florrisant S.D.</i> , 201 F. Supp. 3d 1006 (E.D. Mo., Aug. 22, 2016).	No (MO)	No.	Dilution of black voters' rights: Method of school board election.
8. <i>Sanchez v. Cegavske</i> , 214 F. Supp. 3d 961 (D. Nev., Oct. 7, 2016).	No (NV)	Yes, granted in part 10/7/16 as to additional in-person early voting and Election Day polling places in two counties.	Denial of Native American voting rights: PI issued regarding polling places (PI denied regarding voter registration sites).

¹³²² The definition of a successful Section 2 case falling within the “post-*Shelby County*” time period means that the published decision falls within this time period (event noted on Westlaw after June 25, 2013). This is the same definition as used in the equivalent pre-*Shelby County* time period (the five years prior to *Shelby County*), so that comparisons are between equal criteria.

¹³²³ For a map of formerly covered states and subdivisions, see Chapter 2, Figure 2. Also note that statewide changes impacting the formerly covered townships and counties had to be precleared.

¹³²⁴ 291 F. Supp. 3d 1088, 1097 (referring to the decision at litigation Doc. No. 97).

Case	Formerly covered? ¹³²³	Preliminary Injunction (PI)? (as per WL)	Type of Section 2 claim & community impacted
9. <i>Favors v. Cuomo</i> , 2012 WL 928216 *9 (E.D.N.Y., Mar. 12, 2012), 39 F. Supp. 3d 276 (E.D.N.Y., Aug. 14, 2014).	YES (NY)	No.	Dilution of voting rights of blacks, Asian Americans/Pacific Islanders, and Latinos: NY Congressional redistricting plan was precleared but then litigated under Section 2, after which the state adopted a new plan to come into compliance.
10. <i>Molina v. Cty. of Orange, NY</i> , 2013 WL 3009716, No. 13-CIV-3018 (S.D.N.Y., June 14, 2013).	No (Orange Cty. NY)	Yes, 5/6/13—6/14/13.	Dilution of black and Latino voting rights: County redistricting case, Special Master's plan adopted in time for Nov. 2013 county elections.
11. <i>Pope v. Cty. of Albany, NY</i> , 94 F. Supp. 3d 302 (N.D.N.Y., Mar. 24, 2015).	No (Albany NY)	No, PI denied, 2011 WL 3651114; <i>aff'd</i> . 687 F.3d 565 (2nd. Cir. 2012).	Dilution of black and Latino voters' rights: County redistricting case.
12. <i>NC NAACP v. McCrory</i> , 831 F.3d 204 (4th Cir., July 29, 2016).	YES (NC)	Yes, partially, but stayed by Supreme Court ¹³²⁵ —a PI was issued only for one week (and only same day registration and out-of-precinct voting (and not for voter ID or cuts to early voting, pre-registration)), October 1, 2014–October 8, 2014.	Denial of black voters' rights: Photo ID law and cuts to same-day registration, early voting, out-of-precinct voting, and pre-registration.
13. <i>Brakebill v. Jaeger</i> , 2016 WL 7118548, 1:16-CV-008 (D.N.D., Aug. 1, 2016).	No (ND)	Yes, granted August 1, 2016, 2nd PI regarding amended voter ID law granted April 6, 2018, 2018 WL 1612190.	Denial of Native American and others' voting rights: PI issued regarding fail-safe, affidavit provisions of voter ID law; after amendments, a second PI was issued.
14. <i>Ohio NAACP v. Husted</i> , 768 F.3d 524 (6th Cir., Sept. 24, 2014).	No (OH)	Yes, but stayed by Supreme Court, 135 S. Ct. 42 (2014), so PI was only from 9/4/14–9/29/14.	Denial of black voting rights: Cuts to early in-person voting.
15. <i>Bear v. Cty. of Jackson, SD</i> , 2017 WL 52575, No. 5:14-CV-05059 (D.S.D., Jan. 4, 2017).	No (Jackson Cty. SD)	No—PI was requested, then parties resolved PI issues in settlement conference, 2015 WL 1969760.	Denial of Native American voting rights: Failure to establish satellite office for voter registration and in-person absentee voting on Indian Reservation.
16. <i>Benavidez v. Irving S.D., TX</i> , 2014 WL 4055366, No. 3:13-CV-0087 (N.D. Tex., Aug. 15, 2014).	YES (TX)	No.	Dilution of Latino voting rights: School district system with no effective Latino citizen district while district as a whole had rapidly growing Latino majority.

¹³²⁵ A preliminary injunction was granted by the Fourth Circuit in *League of Women Voters of N. Carolina*, 769 F.3d 224, but stayed by the Supreme Court, *North Carolina*, 135 S. Ct. 6.

Case	Formerly covered? ¹³²³	Preliminary Injunction (PI)? (as per WL)	Type of Section 2 claim & community impacted
17. <i>Patino v. City of Pasadena, TX</i> , 230 F. Supp. 3d 667 (S.D. Tex., Jan. 6, 2017).	YES (TX)	No.	Dilution of Latino voting rights: Post- <i>Shelby County</i> conversion of City's districts to add two at-large districts; judicial preclearance under Section 3 was granted through 2021 and could possibly be extended.
18. <i>Perez v. Abbott (I)</i> , 253 F. Supp. 3d 864 (W.D. Tex., May 2, 2017) (TX Congressional).	YES (TX)	No, PI denied 2015 WL 6829596, No. 11-CA-360 (W.D. Tex., Nov. 6, 2015).	Dilution of black and Latino voting rights: State legislature passed Congressional redistricting scheme intentionally diluted by packing and cracking.
19. <i>Perez v. Abbott (II)</i> , 2017 WL 3495922 (TX State Legislative districts).	YES (TX)	Yes, but it was pre-<i>Shelby County</i> —An interim map was adopted for the 2012 election, 274 F. Supp. 3d 624, n.42.	Dilution of black and Latino voting rights: Various redistricting plans adopted by state legislature were not precleared, but bills were signed by the Gov. the day after the <i>Shelby County</i> decision.
20. <i>Veasey v. Abbott</i> , 830 F.3d 216 (5th Cir., July 20, 2016) (TX voter ID law SB 14). ¹³²⁶	YES (TX)	Yes , parties agreed to interim remedy for the 2016 election, 265 F. Supp. 3d 684, 687.	Denial of black and Latino voters' rights: Strict photo voter ID law.
21. <i>Montes v. City of Yakima, WA</i> , 2015 WL 11120966, 12-CV-3108 (E.D. Wash., June 19, 2015).	No (WA)	No, but Plaintiffs' proposed remedial plan ordered as part of injunction issued Feb. 17, 2015. 2015 WL 11120966 at *1.	Dilution of Latino voting rights: City redistricting plan prevented Latinos from meaningful participation.
22. <i>One Wisconsin Inst. v. Thomsen</i> , 198 F. Supp. 3d 896 (W.D. Wis., July 29, 2016).	No (WI)	No.	Denial of black and Latino voting rights: Cuts to early voting (in-person absentee).
23. <i>Common Cause Indiana v. Marion Cty. Election Bd.</i> , 2018 WL 1940300, at *1 (S.D. Ind. Apr. 25, 2018).	No (IN)	Yes , court granted Plaintiffs' motion for a preliminary injunction as it relates to November 2018 general election.	Denial of black voting rights: Limited early voting locations had a disparate impact on black voters.

¹³²⁶ In contrast, the ongoing litigation regarding the amended Texas voter ID law, SB 5, is currently not successful (as of June 25, 2018). See Discussion and Sources cited *supra*, notes 434-59.

Two other factors are important: (1) these are not all the cases illustrating discrimination in voting in the post-*Shelby County* era, as there are Section 2 cases not reported on Westlaw, nor does this include state and other federal cases involving racial discrimination in voting;¹³²⁷ and (2) as illustrated by the Kousser research discussed above, “enforcement is neither driven nor responsibly measured by the raw number of filed cases, alone.”¹³²⁸ Therefore, it is important to note that the successful Section 2 cases are likely to be an undercount of the actual number of incidents of discrimination in voting. In addition, the underlying factors influencing the need, desire, and ability to file and win Section 2 claims may be very different from era to era. For example, prior to *Shelby County*, Section 2 cases were complementary or in addition to the protections of Section 5. But in the post-*Shelby County* era, communities facing discrimination in voting in the formerly covered jurisdictions can no longer rely on Section 5, and so they are forced to rely more extensively on Section 2 and any other tools at their disposal. Finally, in the current era, because Section 2 claims are so complex, long-term, and expensive, some voting rights advocates are instead turning to state court or are using other federal statutes to stop potentially discriminatory voting measures.¹³²⁹

On the other hand, at the Commission’s briefing, some panelists felt that the increase in post-*Shelby County* voting rights advocacy does not reflect the current state of discrimination, with panelist Cleta Mitchell referring to it as “the grievance industry.”¹³³⁰ Panelist Christian Adams testified that recent Section 2 litigation was based on partisan motives.¹³³¹ Most post-*Shelby*

¹³²⁷ Example of successes in recent Section 2 federal court cases not reported on Westlaw include: Consent Order, *Georgia State Conference of NAACP*, 2018 WL 1583160 (challenges of black voters); Settlement Agreement, *Georgia State Conference of NAACP v. Kemp*, No. 11-CV-1849 (M.D. Ga. 2018), <http://www.projectvote.org/wp-content/uploads/Settlement-Agreement-NAACP-v.-Kemp-2.9.17-1.pdf> (exact match process under which minority voters were eight times more likely to be rejected); see also Ho, Written Testimony, *supra* note 446 at Appendix B, Other Section 2 Cases Since *Shelby County* (In addition, ACLU’s Dale Ho listed 12 recent Section 2 cases in which defendants’ motions to dismiss, for preliminary judgment or stays, were denied, or in which plaintiffs won a case that had included a Section 2 claim on other grounds.).

¹³²⁸ Levitt, Written Testimony, *supra* note 304, at 2 (“Any given case may be big or small, warranted or unwarranted, rushed to filing or meticulously prepared—and each of those possibilities may have a very different value. Factual research is vital for public policy, and quantitative analysis is a vital component of accurate factual research, but it is important to acknowledge and remember the inherent limitations of the quantitative analysis in question when attempting to discern broader meaning from the data.”); see also Discussion and Sources cited at notes 1276-1304, *supra*.

¹³²⁹ Ho, Written Testimony, *supra* note 446, at 13 (“F]ocusing only on Section 2 litigation understates the amount of discrimination in the formerly covered jurisdictions (and elsewhere), because it omits voting rights violations adjudicated under different legal theories, many of which have been found in the formerly covered jurisdictions.” Ho goes on to document successful cases against racial gerrymandering in Alabama, North Carolina, and Virginia, interference with language assistance in Texas, and the notorious voter purge program stopped by the NVRA litigation in *Arcia v. Detzner*) (the Commission notes that a Section 2 claim was settled in *Arcia*).

¹³³⁰ *Briefing Transcript*, *supra* note 234, at 147-48 (statement by Cleta Mitchell, characterizing voting rights litigation as “the grievance industry”).

¹³³¹ *Briefing Transcript*, *supra* note 234, at 84-86 (statement by Christian Adams).

County voting rights litigation has been conducted by nonpartisan voting rights groups.¹³³² However, Adams stated that:

[R]easonable state election laws have been challenged under the Voting Rights Act in a concerted effort by lawyers representing partisan interests. Right now, for example, there is a challenge to the very existence of recall elections in Nevada using the Voting Rights Act . . . The Public Interest Legal Foundation is a defendant-intervenor on the side of Nevada defending the state recall elections against this partisan use of Section 2 of the Voting Rights Act.¹³³³

The issue is complicated because discrimination in voting may often take place for partisan gain. Professor Levitt pointed out that “often the discrimination [in voting] may not be based on actions but is instead based on perceived partisan [gain], nevertheless using individuals’ race or ethnicity as a proxy for achieving [it].”¹³³⁴ The Supreme Court held that if the totality of circumstances show so, using partisanship as a proxy for racial discrimination may also violate the prohibition against discriminatory results in Section 2.¹³³⁵ For example, if a minority group is on the cusp of being able to exercise political power, and “the State took away their political power because they were about to exercise it,” targeting their potential political power through racially discriminatory methods is clearly illegal.¹³³⁶

The Commission also received testimony from other experts who stated that voting rights advocates sought to protect against racial discrimination in voting for nonpartisan reasons, and cited data showing that both major U.S. political parties were guilty of discrimination in voting.¹³³⁷

¹³³² See Figure 26: Successful Private Section 2 Litigation Compared to DOJ Section 2 Cases Filed and Litigated Since the *Shelby County* Decision.

¹³³³ Adams, Written Testimony, *supra* note 669, at 3-4 (referring to *Luna v. Cegavske*, No. 2:17-CV-02666 (D. Nev. 2017)). The complaint in *Luna* was brought by Attorney Marc Elias, who has represented the Democratic Party in other voting rights cases. This Section 2 VRA complaint was brought on behalf of individual black and Latino voters who were allegedly less able or not able to vote due to the date of the recall election. It also alleges more than disparate impact. *Id.* at ¶¶ 9-13.

¹³³⁴ *Briefing Transcript*, *supra* note 234, at 60 (statement by Justin Levitt).

¹³³⁵ *League of United Latin Am. Citizens*, 548 U.S. at 440 (“Even if we accept the District Court’s finding that the State’s action was taken primarily for political, not racial, reasons . . . the redrawing of the district lines was damaging to the Latinos in District 23.”).

¹³³⁶ *Id.* at 403; *McCrory*, 831 F.3d at 238:

[T]he array of electoral “reforms” the General Assembly pursued in SL 2013-381 were not tailored to achieve its purported justifications, a number of which were in all events insubstantial. In many ways, the challenged provisions in SL 2013-381 constitute solutions in search of a problem. The only clear factor linking these various “reforms” is their impact on African American voters. The record thus makes obvious that the “problem” the majority in the General Assembly sought to remedy was emerging support for the minority party. Identifying and restricting the ways African Americans vote was an easy and effective way to do so. We therefore must conclude that race constituted a but-for cause of SL 2013-381, in violation of the Constitution and statutory prohibitions against intentional discrimination [in the VRA].

¹³³⁷ See *supra* notes 371-72, 377, 395, 615-17, and Table 12.

Summary of Current Conditions

The above research demonstrates that in the five years since the *Shelby County* decision, the number of successful Section 2 cases has quadrupled. There is also a higher rate of vote denial cases, and a concentration of successful Section 2 litigation in the formerly covered jurisdictions. As discussed, the above cases do not reflect the entirety of current conditions.¹³³⁸

The Section 2 cases also do not capture the ongoing, repetitive nature of discrimination in voting in some states. In states like Alaska, Florida, North Carolina, and Texas, these are not the only cases at issue. Research in Chapters 2 and 3 of this report show the repeated and challenging nature of ongoing discrimination in voting in these and other states, along with some emerging national patterns of voter registration and election administration practices that have a suppressive impact on minority voters such as cuts to early voting, voter purging, stricter voter ID and registration requirements, and lack of accessibility.¹³³⁹

Moreover, as Natalie Landreth of NARF testified during the Commission’s briefing, since the *Shelby County* decision, “gains can be ephemeral.”¹³⁴⁰ Dale Ho of the ACLU, Sherrilyn Iffil of LDF, as well as Vanita Gupta and Justin Levitt, both former DOJ leaders, also testified that in the current era, after significant successes in Section 2 cases, new iterations of the original form of discrimination in voting are emerging in their wake.¹³⁴¹ For example, Landreth testified that in Arizona, state legislators are passing restrictions impacting Native Americans that had previously been abandoned under preclearance procedures, after the DOJ had requested further information regarding whether the measures would be discriminatory.¹³⁴² Similarly, North Carolina, which at the time of the *Shelby County* decision did not have many recent Section 2 cases, has experienced a comprehensive voter suppression bill that has discriminated against minority voters in a series

¹³³⁸ See, e.g., *supra* notes 1327 and 1329, discussing other post-*Shelby County* voting rights cases.

¹³³⁹ See Appendix E: Charts of Voting Rights Issues by State, Comparing Formerly Covered With Noncovered Jurisdictions.

¹³⁴⁰ Landreth, Written Testimony, *supra* note 1099, at 5.

¹³⁴¹ *Briefing Transcript*, *supra* note 234, at 218 (statement by Dale Ho) (“Successful Section 2 litigation has been a ray of light in states like Texas and North Carolina but these cases but in stark relief which has been lost with the demise in the preclearance system. Litigation has been costly and has taken years, and in the meantime, despite motions for preliminary injunctions, in these cases, several of which were actually granted, multiple elections were held in these states under rules that courts ultimately determined were intentionally discriminatory and thus unconstitutional. So simply put, since the *Shelby County* decision we have a record of constitutional violations necessitating a congressional remedy.”); *Briefing Transcript supra* note 234, at 24-25 (statement by Vanita Gupta) (“One is that the loss of preclearance means that the Justice Department must now use Section 2 to affirmatively sue jurisdictions that engage in discriminatory election practices. Litigation is slow. It is enormously time-intensive. It ties up very precious resources. It can take years for a case to make its way through the courts, as exemplified by both North Carolina and Texas litigations and all while elections are happening and harm is being done to the public as a result of discriminatory laws being in place. Preclearance of course was designed to stop discrimination before the discriminatory rules went into effect. And now the harm is ongoing and the statewide litigation challenges that the Justice Department has been engaged in North Carolina and Texas ate up a really significant amount of the Justice Department attorney resources and time.”).

¹³⁴² Landreth, Written Testimony, *supra* note 1099, at 5.

of elections.¹³⁴³ The litigation to stop it took more than several years, was complemented by extensive on-the-ground advocacy and organizing—and the comprehensive voter suppression bill was not the only form of discrimination in voting in the state.¹³⁴⁴ Both North Carolinians and Texans experienced the real and constant threat of racially discriminatory redistricting and other forms of discriminatory vote dilution, while also experiencing abridgment and more minor but still concerning problems of eliminating polling places and discriminatory voter challenges and purges.¹³⁴⁵

In sum, both the Kousser data and the pre- and post-*Shelby County* data about successful Section 2 VRA violations generated and reviewed by the Commission illustrate higher incidents of discrimination in voting in the formerly covered jurisdictions in recent years. The pattern illustrated by the Section 2 cases reviewed above also shows that current conditions include discrimination in voting in states like Ohio, Pennsylvania, and Wisconsin, which were not formerly covered. Notably, these Section 2 cases show that the types of discrimination in voting in the post-*Shelby County* era include higher levels of vote denial and abridgment issues, and a re-emergence of “first-generation” types of discrimination in voting.¹³⁴⁶ This mirrors the extensive evidence of new barriers to registering to vote and staying on the rolls as documented in Chapter 3.¹³⁴⁷ In addition, the overwhelming majority of the 33 written public comments the Commission received expressed concern about new restrictions on voter access in the post-*Shelby County* era.¹³⁴⁸

Current conditions also very clearly include complex litigation lasting for many years, with difficulties in procuring preliminary injunctions or judicial preclearance, even in cases where intentional discrimination is found. Preliminary injunctions were only issued in 39 percent of successful Section 2 cases. This rate means that many elections were held with racially discriminatory rules in place, in sharp contrast to pre-*Shelby County* conditions, during which changes in voting procedures could not be implemented until they were shown to be nondiscriminatory. In this regard, the umbrella of protection has been taken down, and voters are being drenched in jurisdictions that have attempted (and temporarily succeeded) to discriminate in their election procedures.

In addition to the above quantitative data, at the Commission’s briefing, various voting rights experts, many of whom are experienced VRA litigators, testified that the protections of Section 2 are insufficient, and that they therefore believe that the preclearance provisions of Section 5 should be restored through new legislation covering jurisdictions with ongoing discrimination in

¹³⁴³ See *supra* notes 316-17 (discussion of voter suppression in NC in earlier chapter); *Cf. supra*, Table 11.

¹³⁴⁴ See *supra* notes 374-76, 384-403 (various methods of discrimination; repeated patterns of minority vote dilution and denial in North Carolina).

¹³⁴⁵ See *id.* and *supra* notes 449-54, and Table 12 (patterns of high levels of ongoing discrimination and new types of discriminatory methods in Texas).

¹³⁴⁶ See *supra* Table 12.

¹³⁴⁷ See *supra* Chapter 3, Current Voter Registration Issues, at notes 711-945, *supra*. (discussing documentary proof of citizenship, challenges and purges of voters on the rolls).

¹³⁴⁸ See *Briefing Transcript, supra* note 234, at 253-310 (comments orally provided to the Commission from members of the public in Raleigh, NC).

voting.¹³⁴⁹ Some also testified that the states with the worst current conditions of discrimination in voting are in sharp contrast to other states that are adopting positive measures such as automatic voter registration, with the goal of making voting easier and more accessible.¹³⁵⁰ However, AVR has only been enacted in two of the formerly covered jurisdictions, Alaska and California,¹³⁵¹ and those states' records are mixed.¹³⁵² The Commission also notes that nonprofit voting rights groups formed a National Commission on Voting Rights, which documented an over-concentration of recent restrictive voting measures in the formerly covered jurisdictions.¹³⁵³ LDF's Sherrilyn Ifill

¹³⁴⁹ *Briefing Transcript, supra* note 234, at 126-27 (statement by Sherrilyn Ifill) (“The Shelby County decision was wrong. We knew it was wrong on the day but if you thought maybe it wasn’t wrong, what we have seen in the years since the Shelby County decision has borne out that it was in fact wrong. We established that we can’t keep up with the kinds of voting changes. We’ve established that the litigation takes too long. We’ve finally established that hundreds of thousands, perhaps millions of people, are being barred from participating in electing individuals who control their lives and who control their communities.”); Rosenberg Testimony, *Briefing Transcript* at 126-27 (stating that “The loss of protections afforded by the preclearance provisions of Section 5 had a certain nuance aspect, and that is a lack of notice now that we have that, discriminatory practices are about to go into effect. We can only fight that which we know about and too often there are discriminatory practices that take root and bear fruit before they can be stopped. We’ve seen many forms in which these sorts of practices take. They range from the consolidation of polling places, which make it more difficult for minorities to vote, to the curtailment of early voting, which makes it more difficult for hourly wage workers to vote, to the purging of minority voters from voting lists under the pretext of list maintenance.”).

¹³⁵⁰ *Briefing Transcript, supra* note 234, at 216 (“[automatic voter registration] would take care of the lion’s share of voter registration problems that we have in the United States and it would help to increase the number of people who are registered to vote. Colorado has the highest rate of voter registration in its eligible population in the country—almost 90 percent; 89.4 percent. One of the reasons why is because we do [automatic voter registration].”); Pitts Testimony, *Briefing Transcript*, at 151-52 (“My recommendation is that the Justice Department establish what I call a Local Redistricting Taskforce for the 2020 redistricting cycle. The Justice Department, undoubtedly, has an archive of just about every local redistricting plan that adopted during the 2010 cycle. The Department can and should systematically monitor and request redistricting plans adopted by local jurisdictions after the 2020 Census. And the Justice Department can and should compare what the old and new plans do to minority voting strength. And let me all emphasized that this should all be done in a highly visible and systematic manner. I think there would be two principle benefits to such a “Local Redistricting Taskforce.” First, local governments who know that the Department has its eye on local redistricting would be much less likely to engage in vote dilution because they know they are being monitored. It’s a bit of the observer effect; knowledge of the act of observation will impact behavior. Indeed, it’s what Section 5 did to accomplish over the years—deterring the adoption of discriminatory changes before they even got off the ground. Second, the Local Redistricting Task Force will be able to, when necessary and appropriate, use litigation to ensure that vote dilution does not occur on the local level and that important gains made by Section 5 are maintained going forward.”).

¹³⁵¹ See Appendix C (listing AVR states and dates of enactment).

¹³⁵² See, e.g., cases summarized in Table 12, *supra*.

¹³⁵³ See National Commission on Voting Rights, “Protecting Minority Voters: Our Work is Not Done” (2014) <http://votingrightstoday.org/ncvr/resources/discriminationreport> (last accessed June 5, 2018). After a series of filed briefings, the nonpartisan, nonprofit National Commission on Voting Rights investigated types of voting restrictions impacting minority voters in a 2014 report. The report found that voting discrimination geographically concentrated in Florida, Georgia, Louisiana, Mississippi, South Dakota, and Texas, all of which are formerly covered jurisdictions. The report concluded that:

- About 90 percent of voting changes proposed between 1995 and 2014 that were stopped by Section 5 involved a discriminatory effect with “respect to African-American voters.” *Id.* at 13.

testified that, “We need structural solutions to structural problems in our country.”¹³⁵⁴ She posits that the framers of the VRA created preclearance because they recognized that racism was a long-standing impediment in society that was likely to continue to exist well into the future. In a report that she references as demonstrating the need to restore preclearance, her organization examined the formerly covered jurisdictions and assembled a compendium of voting changes that LDF believes are negatively impacting minority voters in those states.¹³⁵⁵

On the other hand, panelist and Alabama Secretary of State John Merrill expressed his frustration with the preclearance process. He testified that it created a “two party process” in which states had to get the approval of the federal government before they could make any new changes.¹³⁵⁶ He also noted that this process was “long and complicated” and may unnecessarily burden cities, counties, and states.¹³⁵⁷ In Merrill’s opinion, the *Shelby County* decision gave Alabama the sovereignty to administer its own elections, free of the restrictive arm of the federal government. This sovereignty is guaranteed to states in the Constitution, according to Merrill, and was correctly given to the states and should not have been taken away in the first place.¹³⁵⁸ Similarly, panelist Clela Mitchell argued that prior voting legislation was a “flagrant abuse” of federal power,¹³⁵⁹ and that “there is no evidence that changes to state election laws or procedures enacted since 2013 resulted in denying any person the right to vote.”¹³⁶⁰ She also testified that in the *Shelby County* decision, the Supreme Court struck down a “bizarre, haphazard and outdated triggering scheme for federal oversight.”¹³⁶¹

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- About two-thirds of the cases involving discrimination in voting against African Americans have occurred in the previously covered districts, which is primarily concentrated in Mississippi, Louisiana, and Georgia. *Id.* at 75.
 - Evidence has shown that “increasingly stringent” voter identification requirements disproportionately affect African Americans’ ability to vote as compared to white voters, across the country. *Id.* at 76.

¹³⁵⁴ *Briefing Transcript, supra* note 234, at 100 (statement by Sherrilyn Ifill).

¹³⁵⁵ Some common changes that the report identifies as disparately impacting minority voters include photo ID requirements, voucher requirements, racially motivated redistricting, voter purges, polling place closings, cutting early voting, and changing the timing of elections. See NAACP LDF, *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder* (2018) http://www.naacpldf.org/files/case_issue/Democracy_Diminished_State_And_Local_Voting_Changes_post_Shelby_V_Holder_4_18_2018.pdf (last accessed June 7, 2018), at 7-19.

¹³⁵⁶ Merrill, Written Testimony, *supra* note 1039.

¹³⁵⁷ *Id.*

¹³⁵⁸ *Id.*

¹³⁵⁹ Mitchell, Written Testimony, *supra* note 574, at 2, 4.

¹³⁶⁰ *Id.* at 2.

¹³⁶¹ *Id.* at 5.

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CHAPTER 5: EVALUATION OF THE DEPARTMENT OF JUSTICE'S ENFORCEMENT EFFORTS SINCE THE 2006 VRA REAUTHORIZATION AND THE 2013 *SHELBY COUNTY* DECISION

This chapter evaluates DOJ VRA enforcement efforts during the time period from the 2006 VRA Reauthorization on July 27, 2006, which was effective immediately, to the present, while also demarking the period before and in the 5 years after the June 25, 2013 *Shelby County* decision. The Commission bases the evaluation on information from DOJ responses to the Commission's interrogatories and document requests,¹³⁶² testimony received at the Commission's national voting rights briefing and at SAC briefings,¹³⁶³ and independent Commission staff research.

The data below examine various DOJ enforcement actions and other tools it had available to enforce the protections of the VRA during the time period studied. Primarily, the DOJ is empowered under federal law to bring lawsuits¹³⁶⁴ in federal court,¹³⁶⁵ in the performance of its duty to enforce the VRA.¹³⁶⁶ Its VRA enforcement tools include affirmative litigation, through bringing a lawsuit in federal court to enforce any of the VRA provisions, which may lead to a court opinion or a judge-ordered consent decree settling the claims. DOJ's VRA enforcement actions may also lead to an out-of-court settlement or "letter agreement" or "memorandum agreement." The DOJ may also file Statements of Interest and amicus (friend of the court) briefs with federal courts in cases where it believes it has an interest in doing so.

Also, prior to the *Shelby County* decision, the DOJ was charged under Section 5 with administrative preclearance review of voting changes in formerly covered jurisdictions, to determine whether they would be retrogressive or not. Under Section 5, DOJ had the power to use key tools such as requests for more information from jurisdictions, and it could object to and block changes that the DOJ found would be retrogressive to minority voters.¹³⁶⁷ The DOJ was also charged with litigating cases involving bailouts from the preclearance provisions of the VRA,¹³⁶⁸ and it defended constitutional challenges to the VRA.¹³⁶⁹

¹³⁶² DOJ Response to USCCR Interrogatory No. 21; Copies of the Commission's Interrogatories and Document Requests may be found in Appendix J. The Commission regrets the unjustifiably limited information DOJ provided in response to these Interrogatories and Document Requests but the Commission draws conclusions from available information nonetheless, consistent with Congress' charge to the Commission.

¹³⁶³ The Commission record can be found here: <https://www.usccr.gov/calendar/trnscript/Voting-Rights-Briefing-Transcript-02-22-18.pdf>; for summaries of and links to relevant SAC briefings, see Appendix D.

¹³⁶⁴ 52 U.S.C. § 10308(d).

¹³⁶⁵ 52 U.S.C. § 10308(e).

¹³⁶⁶ 52 U.S.C. § 10101(c); see also U.S. Dep't of Justice, Civil Rights Division, Voting Section, *Statutes Enforced by the Voting Section*.

¹³⁶⁷ See Figure 2, Map of Formerly Covered Jurisdictions; see also 52 U.S.C. § 10304.

¹³⁶⁸ 52 U.S.C. § 10303(a)(3).

¹³⁶⁹ See *Hanover Cty. v. Holder*, No. 1:13-CV-00625 (D.D.C.), filed 05/02/2013; *Linda Cty. Fire Protection Dist. v. Holder*, No. 1:13-CV-00485 (D.D.C.), filed 04/10/2013; *Yuba Water Dist. v. Holder*, No. 1:13-CV-00407 (D.D.C.),

Another major VRA enforcement tool of the DOJ is election monitoring. The VRA includes statutory provisions allowing the Attorney General to send federal observers to monitor elections inside the polls, and this has been complemented by the practice of sending DOJ staff to monitor elections outside the polls. Quantitative data regarding each of the above tools in the pre- and post-*Shelby County* eras are set forth in detail below (see Table 13 for a summary).

During this time, the DOJ also enforced voting rights under the Americans with Disabilities Act, the HAVA, the NVRA, and the Uniformed and Overseas Citizen Absentee Voting Act.¹³⁷⁰ This work is critically important, however, the scope of the current evaluation and report is limited to the Commission's review of the DOJ's enforcement of the VRA.¹³⁷¹

In addition to the data herein, the qualitative legal context is also important to consider. As discussed in prior chapters, the Supreme Court's ruling in *Shelby County* ushered in significant changes in the legal ability of the DOJ to enforce protections for minority voters under the VRA. Prior to *Shelby County*, jurisdictions that were covered for preclearance had to submit any changes in voting to the DOJ or a federal court, to prove that they would not be retrogressive. In 1969, the Supreme Court held that coverage of Section 5 was to be given broad interpretation, such that

any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to

filed 03/29/2013; *Linda Cty. Water District v. Holder*, No. 1:13-CV-00363 (D.D.C.), filed 03/21/2013; *Yuba Cty. Water Agency v. Holder*, No. 1:13-CV-00352 (D.D.C.), filed 03/19/2013; *City of Falls Church v. Holder*, No. 1:13-CV-00201 (D.D.C.), filed 02/15/2013; *City of Wheatland v. Holder*, No. 1:13-CV-00054 (D.D.C.), filed 01/14/2013; *N.H. v. Holder*, No. 1:12-CV-01854 (D.D.C.), filed 11/15/2012; *Browns Valley Irrigation Dist. v. Holder*, No. 1:12-CV-01597 (D.D.C.), filed 09/26/2012; *Craig Cty. v. Holder*, No. 1:12-CV-01179 (D.D.C.), filed 07/18/2012; *Carroll Cty. v. Holder*, No. 1:12-CV-01166 (D.D.C.), filed 07/17/2012; *Wythe Cty. v. Holder*, No. 1:12-CV-00719 (D.D.C.), filed 05/03/2012; *Grayson Cty. v. Holder*, No. 1:12-CV-00718 (D.D.C.), filed 05/03/2012; *Merced Cty. v. Holder*, No. 1:12-CV-00354 (D.D.C.), filed 03/06/2012; *City of Pinson v. Holder*, No. 1:12-CV-00255 (D.D.C.), filed 02/15/2012; *Prince William Cty. v. Holder*, No. 1:12-CV-00014 (D.D.C.), filed 01/06/2012; *King George Cty. v. Holder*, No. 1:11-CV-02164 (D.D.C.), filed 12/07/2011; *Culpepper Cty. v. Holder*, No. 1:11-CV-01477 (D.D.C.), filed 08/16/2011; *James City Cty. v. Holder*, No. 1:11-CV-01425 (D.D.C.), filed 08/05/2011; *City of Williamsburg v. Holder*, No. 1:11-CV-1415 (D.D.C.), filed 08/04/2011; *Rappahannock Cty. v. Holder*, No. 1:11-CV-01123 (D.D.C.), filed 06/17/2011; *Alta Irrigation Dist. v. Holder*, No. 1:11-CV-00758 (D.D.C.), filed 04/20/2011; *City of Manassas Park v. Holder*, No. 1:11-CV-00749 (D.D.C.), filed 04/19/2011; *Bedford Cty. v. Holder*, No. 1:11-CV-00499 (D.D.C.), filed 03/08/2011; *City of Bedford v. Holder*, No. 1:11-CV-00473 (D.D.C.), filed 03/04/2011; *Jefferson Cty. Drainage Dist. No. 7 v. Holder*, No. 1:11-CV-00461 (D.D.C.), filed 03/02/2011; *City of Sandy Springs v. Holder*, No. 1:10-CV-01502 (D.D.C.), filed 09/07/2010; *City of Kings Mountain v. Holder*, No. 1:10-CV-01153 (D.D.C.), filed 07/08/2010; *Page Cty. v. Mukasey*, No. 1:08-CV-01113 (D.D.C.), filed 06/27/2008; *Washington Cty. v. Mukasey*, No. 1:08-CV-01112 (D.D.C.), filed 06/27/2008; *Amherst Cty. v. Mukasey*, No. 1:08-CV-00780 (D.D.C.), filed 05/06/2008; *Middlesex Cty. v. Gonzales*, No. 1:07-CV-01485 (D.D.C.), filed 08/17/2007; *Essex Cty. v. Gonzales*, No. 1:06-CV-01631 (D.D.C.), filed 09/21/2006; *Northwest Austin Mun. Util. Dist. No. One v. Gonzales*, No. 1:06-CV-01384 (D.D.C.), filed 08/04/2006.

¹³⁷⁰ For some examples of recent enforcement of this kind, see, e.g., *Common Cause of N.Y.*, No. 1:16-CV-06122-NGG-RML (NVRA); *United States v. Harris Cty.*, No. 4:16-CV-02331 (S.D. Tex. 2016) (ADA); *United States v. State of Ill.*, No. 1:15-CV-02997 (N.D. Ill. 2015) (UOCAVA); *Fort Bend Cty.*, No. 4:09-CV-1058 (HAVA).

¹³⁷¹ See Discussion and Sources cited in the Executive Summary at notes 2-4, *supra*.

remove the elements that caused objection by the Attorney General to a prior submitted change, is subject to the Section 5 review requirement.¹³⁷²

This meant that the DOJ could ensure that any voting changes had to be submitted for preclearance,¹³⁷³ the changes were blocked from implementation during the preclearance review process (of 60 days),¹³⁷⁴ and if they were retrogressive, DOJ could object to them and they would be permanently blocked.¹³⁷⁵ At times this was done through a federal court, but in the great majority of instances, the DOJ was able to enforce Section 5 through administrative procedures alone.¹³⁷⁶ As discussed in Chapter 2, after the *Shelby County* decision, there were additional impacts with regard to DOJ enforcement tools in the formerly covered jurisdictions as follows:

1. Voting changes go into effect immediately, without being frozen as they were under Section 5 (unless litigation successfully secures a preliminary injunction under the remaining provisions of the VRA, the Constitution, or another federal law);
2. DOJ no longer sends federal observers to formerly covered jurisdictions (unless they are separately ordered by a court after successful litigation under one of the remaining provisions of the VRA);

¹³⁷² U.S. Dep't of Justice, *Section 5 of the Voting Rights Act*, <https://www.justice.gov/crt/what-must-be-submitted-under-section-5> (last accessed June 19, 2018) (citing *Allen*, 393 U.S. at 565).

¹³⁷³ According to federal regulation 28 C.F.R. § 51.13, Example of Changes:

Changes affecting voting include, but are not limited to, the following examples: (a) Any change in qualifications or eligibility for voting. (b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting. (c) Any change with respect to the use of a language other than English in any aspect of the electoral process. (d) Any change in the boundaries of voting precincts or in the location of polling places. (e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, dissolution, merger, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections). (f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system). (g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices. (h) Any change in the eligibility and qualification procedures for independent candidates. (i) Any change in the term of an elective office or an elected official, or any change in the offices that are elective (e.g., by shortening or extending the term of an office; changing from election to appointment; transferring authority from an elected to an appointed official that, in law or in fact, eliminates the elected official's office; or staggering the terms of offices). (j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum. (k) Any change affecting the right or ability of persons to participate in preelection activities, such as political campaigns. (l) Any change that transfers or alters the authority of any official or governmental entity regarding who may enact or seek to implement a voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting. [52 FR 490, Jan. 6, 1987, as amended by Order 3262-2011, 76 FR 21244, Apr. 15, 2011].

¹³⁷⁴ 28 C.F.R. § 51.9.

¹³⁷⁵ 52 U.S.C. § 10304(a).

¹³⁷⁶ See Discussion and Sources cited at notes 1383-1400, *infra*.

3. DOJ no longer believes that previously covered jurisdictions have to provide language access under Section 4(f)(4);
4. DOJ no longer has the right to receive notice of changes in voting procedures (so it cannot share this information with voters);¹³⁷⁷
5. Section 5's rule against retrogression, or determining the impact of voting changes on minority voters as compared to a prior benchmark, is no longer in operation;
6. Formerly covered jurisdictions no longer have to provide the DOJ or the public information or notice about the racial impact of their voting changes; and
7. DOJ is no longer required to regularly reach out to members of impacted communities.¹³⁷⁸

The Commission analyzed the DOJ's various VRA enforcement tools through the lens of data regarding their level of use during the time covered by this report. Below are two charts summarizing the data, which compares the formerly covered and non-formerly covered jurisdictions in the pre- and post-*Shelby County* eras.

¹³⁷⁷ This means that voting rights groups have had to set up their own monitoring programs to try to keep track of changes in voting procedures at the state and local level. *See, e.g.*, Democracy North Carolina, *Election Board Monitoring*, <https://democracync.org/take-action/board-of-elections-monitoring/> (last accessed June 6, 2018); Go Vote Georgia, *Election Board Monitoring* (2017), <https://www.govotega.org/current-issues/election-board-monitoring/> (last accessed June 6, 2018); Common Cause Georgia, *Help Wanted: Sign Up to Monitor Local Board of Elections for Voter Suppression*, <https://159georgiatogether.org/159-civic-engagement/2017/9/10/help-wanted-sign-up-to-monitor-local-board-of-elections-for-voter-suppression> (last accessed June 6, 2018); Jennifer L. Patin, *Voting Rights Communication Pipelines in Georgia after Shelby County v. Holder*, June 21, 2016, <https://lawyerscommittee.org/georgiavra2016/> (last accessed June 6, 2018). *See also* Lopez, Written Testimony, *supra* note 309 (Lopez states that “Since 2013, Democracy North Carolina has: Established a program monitoring the activities of county-level boards of elections (CBOEs), which determine critical ballot access policies; Established a poll monitoring program to document the impact of changes to state voting rules in H589 on voters and the voting experience; Engaged in substantial public education efforts to inform the general public about changes in state and local voting rules, including those relating to H589 and related litigation; and Participated as plaintiffs in litigation to remedy voting rights violations”).

¹³⁷⁸ *See, e.g.*, 28 C.F.R. §§ 51.33-51.50 ([DOJ] Processing of [Section 5] Submissions, covering notice, release of information to public, consideration, obtaining information from submitting authority, supplemental information and related submissions, judicial review, and record of decisions.).

Table 13: DOJ VRA Enforcement Actions in the Post-2006 VRA Reauthorization Pre- and Post-Shelby County Eras, in Formerly Covered and Non-formerly Covered Jurisdictions

Enforcement Tool Use in Formerly Covered Jurisdictions	Pre-Shelby County	Post-Shelby County
Objections under Section 5	30	0
Requests for More Information under Section 5	144	0
DOJ Section 2 Cases Filed	1	3
Language Access cases by DOJ	8	0
Right to Assistance cases by DOJ	1	0
Statement of Interests and Amici	9	9
Observers	52	0
Monitors	37	30
(Successful Section 2 cases by private parties (NOT DOJ actions) ¹³⁷⁹	4	12

Enforcement Tool Use in NOT Formerly Covered Jurisdictions	Pre-Shelby County	Post-Shelby County
DOJ Section 2 Cases Filed	6	1
Language Access cases by DOJ	12	1
Right to Assistance cases by DOJ	4	0
Statement of Interests and Amici	3	7
Observers	21	0
Monitors	99	65
(Successful Section 2 cases by private parties (NOT DOJ actions) ¹³⁸⁰	5	11

Source: DOJ Answers to Interrogatories and Commission Staff Research

This data and the methodology used to produce them are described in further detail below. Data regarding DOJ enforcement actions under VRA Section 5, under Section 2's nationwide ban on discrimination, the VRA's language minority provisions, the right to assistance under Section 208, Statements of Interest and Amicus briefs, and DOJ observers and monitors are each evaluated in turn below. The chapter ends with a summary of relevant testimony about DOJ's VRA enforcement efforts, and a very brief summary of the data from the entirety of this report.

¹³⁷⁹ These are not DOJ actions but are included for comparative reference of trends.

¹³⁸⁰ These are not DOJ actions but are included for comparative reference of trends.

DOJ Section 5 Preclearance Efforts (in formerly covered jurisdictions) (2006-2013)

DOJ ended its preclearance process immediately after the *Shelby County* decision. After the *Shelby County* decision, the DOJ issued a *Fact Sheet on Justice Department's Enforcement Efforts Following Shelby County Decision*, stating that,

In the areas covered by the Section 4(b) [preclearance] formula, the department used to be able to block discriminatory changes to election rules and practices before they took effect . . . One of the impacts of *Shelby County* is that now, those discriminatory changes can go into and remain in effect while the department pursues litigation.¹³⁸¹

As discussed above, prior to *Shelby County*, under Section 5, any voting changes in any covered jurisdiction had to be pre-cleared and approved by the federal government before they could be implemented.¹³⁸² The Commission notes that the vast majority of voting changes—indeed, 99 percent—were submitted to the DOJ for its administrative review.¹³⁸³ Of the small fraction that were instead submitted to a federal court, the DOJ was named as defendant and charged with litigating the matter.¹³⁸⁴ During the time period in question, the DOJ's Office of Inspector General reported that the DOJ received between 4,000-7,000 submissions per year.¹³⁸⁵ The activity was especially intense during the period of redistricting required after each decennial census, which prior to *Shelby County* always led to numerous changes in district lines that had to be precleared.¹³⁸⁶

DOJ Objections Under Section 5

From 2006-2013, DOJ issued 30 total objection letters to voting changes, and they were sent to most, but not all, of the states covered.¹³⁸⁷ The following chart illustrates the relevant data. In particular, it shows that reportedly, since the 2006 Reauthorization, no objections were issued in Alaska, Arizona, California, Florida, New Hampshire, New York, or Virginia.¹³⁸⁸

¹³⁸¹ DOJ Fact Sheet, *supra* note 12; *see also* Discussion and Sources cited in Chapter 2, notes 301-07, *supra* (regarding the Fact Sheet).

¹³⁸² *See* Chapter 2, The Impact of *Shelby County* on Federal VRA Enforcement and Sources cited at notes 301-10, *supra*.

¹³⁸³ *See, e.g.*, U.S. Dep't of Justice, Office of Inspector General, *A Review of the Operations of the Voting Section of the Civil Rights Division* (2013) 13, <https://oig.justice.gov/reports/2013/s1303.pdf>; *see also* 52 U.S.C. § 10304(a) (last accessed Aug. 6, 2018).

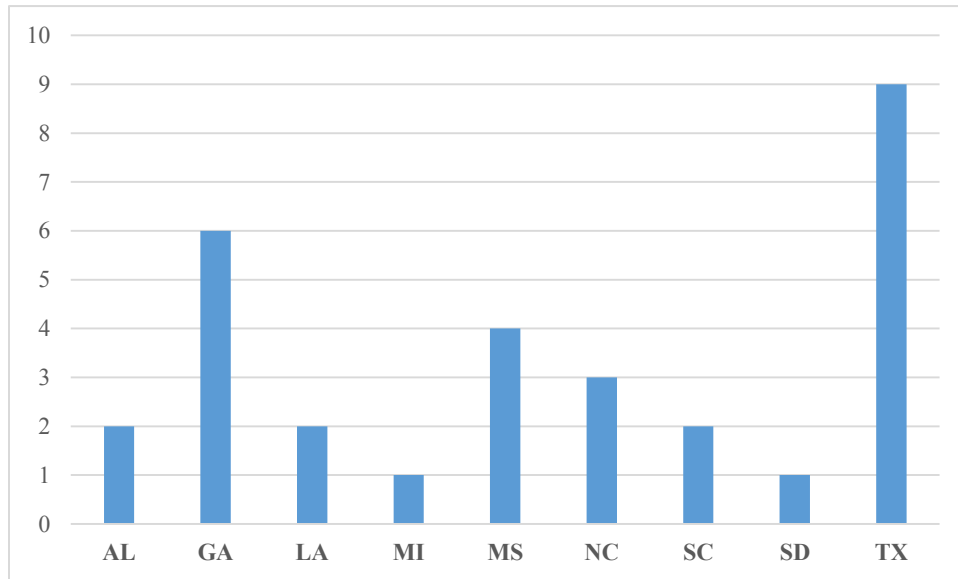
¹³⁸⁴ 52 U.S.C. § 10304 (authorizes suits in D.C. district court as alternative to preclearance); Michael E. Solimine, *Rethinking District of Columbia Venue in Voting Rights Preclearance Actions*, 103 GEO. L.J. ONLINE 29, 30-2 (2014) (background on history of statute and use of lawsuits in D.C. district court as alternative to preclearance).

¹³⁸⁵ U.S. Dep't of Justice, Office of Inspector General, *supra* note 1383, at 81.

¹³⁸⁶ *See, e.g.*, U.S. Dep't of Justice, *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act* (Feb. 9, 2011) 7470, <https://www.justice.gov/sites/default/files/crt/legacy/2011/02/17/sec5guidance2011.pdf> (“Following release of the 2010 Census data, the DOJ expects to receive several thousand submissions of redistricting plans for review pursuant to Section 5 of the Voting Rights Act.”).

¹³⁸⁷ DOJ Response to USCCR Interrogatory No. 22.

¹³⁸⁸ *Cf.* Figure 2, Map of Formerly Covered Jurisdictions.

Figure 23: DOJ Objection Letters by State (2006-2013)

Source: Analysis of DOJ Responses to USCCR Interrogatories¹³⁸⁹

Requests for Further Information

DOJ also sent 144 “letters to jurisdictions informing them that the information provided in the initial submission was insufficient for the Attorney General to make a determination and requesting additional information.”¹³⁹⁰ These letters concerned 601 different voting changes.¹³⁹¹ During the national briefing, the Commission heard testimony about how the preclearance process, and particularly these letters asking for more information forced jurisdictions to amend proposed voting changes that would have been discriminatory.¹³⁹²

Declaratory Judgements (Non-Objections)

During the period studied, in 25 cases, the DOJ did not object to the voting changes that were submitted to a federal court, and the federal court therefore ordered a Declaratory Judgment

¹³⁸⁹ DOJ Response to USCCR Interrogatory No. 21.

¹³⁹⁰ DOJ Response to USCCR Interrogatory No. 22.

¹³⁹¹ *Id.*

¹³⁹² *Briefing Transcript, supra* note 234, at 106-07 (statement by Natalie Landreth) (regarding Alaska).

showing that the DOJ consented to the voting change.¹³⁹³ These Declaratory Judgments include prior DOJ objections that were later invalidated by *Shelby County*.¹³⁹⁴

Litigation Under Section 5

There are various types of litigation that the DOJ participated in under Section 5. According to DOJ's responses to the Commission's Interrogatories, since the 2006 Reauthorization, the DOJ

¹³⁹³ The DOJ provided the following cases in which a Declaratory Judgment was issued:

- (1) *Georgia v. Holder*, 748 F. Supp. 2d. 16 (D.D.C. 2010) (dismissed, subsequent change reviewed administratively) (voter registration verification);
- (2) *Georgia v. Holder*, No. 1:10-CV-01970 (D.D.C. 2011) (dismissed, no objections to the changes after administrative review) (documentary proof of citizenship);
- (3) *Louisiana v. Holder*, No. 1:11-CV-00770 (D.D.C. 2011) (dismissed, no objection to the change after administrative review) (Congressional redistricting);
- (4) *Virginia v. Holder*, No. 1:11-CV-00885 (D.D.C. June 20, 2011) (dismissed, no objection to the changes after administrative review) (state legislative redistricting); (dismissed, remaining claims after administrative review of subsequent change in early voting);
- (5) *South Carolina v. United States*, No. 1:11-CV-1454 (D.D.C. 2011) (dismissed, no objection to the change after administrative review) (Congressional redistricting);
- (6) *South Carolina v. United States*, No. 1:11-CV-01566 (D.D.C. 2011) (dismissed, no objection to the change after administrative review) (Congressional and legislative redistricting);
- (7) *North Carolina v. United States*, No. 1:11-CV-01592 (D.D.C. 2011) (dismissed, no objection to the change after administrative review) (Congressional and legislative redistricting);
- (8) *Alabama v. Holder*, No. 1:11-CV-01628 (D.D.C. 2011) (dismissed, no objection to the changes after administrative review) (Congressional and Board of Education redistricting);
- (9) *Georgia v. Holder*, No. 1:11-CV-01788 (D.D.C. 2011) (dismissed, subsequent change reviewed administratively) (Congressional and legislative redistricting);
- (10) *McConnell v. United States*, No. 1:11-CV-01794 (D.D.C. 2011) (dismissed, no objection to the change after administrative review) (Senate redistricting);
- (11) *Williamson Cty. v. United States*, No. 1:11-CV-01836 (D.D.C. 2011) (dismissed, no objection to the change after administrative review) (redistricting);
- (12) *Michigan v. United States*, No. 1:11-CV-01938 (D.D.C. 2012) (granted) (Congressional and legislative redistricting);
- (13) *Virginia v. Holder*, No. 1:12-CV-00148 (D.D.C. 2012) (dismissed, no objection to the change after administrative review) (Congressional redistricting);
- (14) *Florida v. United States*, No. 1:12-CV-0380 (D.D.C. 2012) (dismissed, no objection to the change after administrative review) (Congressional and legislative redistricting);
- (15) *New York v. United States*, No. 1:12-CV-0413 (D.D.C. 2012) (dismissed, no objection to the change after administrative review) (state senate redistricting);
- (16) *New York v. United States*, No. 1:12-CV-01232 (D.D.C. 2012) (dismissed, no objection to the change after administrative review) (state assembly redistricting); and
- (17) *Alabama v. Holder*, No. 1:12-CV-01232 (D.D.C. 2012) (dismissed, no objection to the change after administrative review) (state legislative redistricting).

DOJ Response to USCCR Interrogatory No. 21.

¹³⁹⁴ Data generated from DOJ Response to USCCR Interrogatory No. 22.

affirmatively litigated three Section 5 cases about whether certain voting changes had to be submitted.¹³⁹⁵

Another type of Section 5 litigation is that brought by jurisdictions which sought preclearance through a federal court, as the statute enabled them to choose to submit through court rather than the DOJ.¹³⁹⁶ These cases involved jurisdictions seeking a Declaratory Judgment to determine whether changes in voting procedures were (or were not) retrogressive or were (or were not) enacted with discriminatory intent.¹³⁹⁷ The United States was named as defendant and the DOJ litigated these cases. From the time of the 2006 VRA Reauthorization to the present, in 13 such cases, DOJ litigated important issues such as cuts to early voting and access to voter registration in Florida; voter registration verification procedures in Georgia; South Carolina's and Texas' photo voter ID laws; and redistricting during the 2010 redistricting cycle (especially in Texas).¹³⁹⁸

¹³⁹⁵ These are: (1) *United States v. City of Calera*, No. 2:08-CV-01982 (N.D. Ala. 2008); (2) *United States v. Waller Cty.*, No. 4:08-CV-03022 (S.D. Tex. 2008); and (3) *United States v. North Harris Montgomery Sch. Dist.*, No. 4:06-CV-02488 (S.D. Tex. 2006). DOJ Response to USCCR Interrogatory No. 21.

¹³⁹⁶ 52 U.S.C. § 10304(a) (“State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure[.]”).

¹³⁹⁷ *Id.*

¹³⁹⁸ See, e.g., (1) *Beaumont Indep. Sch. Dist.*, 944 F. Supp. 2d 23 (redistricting); (2) *Perry v. Perez*, 565 U.S. 388 (2012) (redistricting); (3) *Texas*, 888 F. Supp. 2d 113 (voter ID); (4) *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012) (granted as to board of education; denied as to the other three plans) (redistricting), *vacated and remanded*, *Texas*, 570 U.S. 928 (2013) (redistricting); (5) *Galveston Cty. v. United States*, No. 1:11-CV-01837 (D.D.C. 2012) (dismissed, subsequent change reviewed administratively) (redistricting of commissioner's court); (6) *Nueces Cty. v. United States*, No. 1:11-CV-01784 (D.D.C. 2012) (dismissed, as to justice of the peace and constable plans after no objection to changes after administrative review) (dismissed, as to commissioner's court after no objection to subsequent change in administrative review) (redistricting); (7) *Texas v. United States*, 831 F. Supp. 2d 244 (D.D.C. 2011) (redistricting); (8) *South Carolina*, 898 F. Supp. 2d 30 (denied in part; granted in part) (voter ID); (9) *Florida*, 885 F. Supp. 2d 299 (granted as to cross county moves) (dismissed without prejudice after retrogression finding on early voting claim) (dismissed, no objection to subsequent change in third party registration rules after administrative review); (10) *Arizona v. Holder*, 839 F. Supp. 2d 36 (D.D.C. 2012) (dismissed, challenge to being subject to preclearance); and (11) *Georgia*, 748 F. Supp. 2d 16 (voter registration verification).

Also, a 2009 Government Accountability Office (GAO) report covered federal civil rights enforcement from 2001 to 2007 and listed five cases in which the Department was a defendant in a motion for a Declaratory Judgment by a jurisdiction seeking preclearance under Section 5. GAO-10-75, *Report to Congressional Requestors*, 2009, 144-45, <https://www.gao.gov/assets/300/297337.pdf>. All five of the cases involved redistricting plans. *Id.* And in another four cases during that time period, plaintiffs brought suit to challenge the Department's preclearance determinations under Section 5. *Id.* at 142-45.

Additionally, at least four constitutional challenges were filed against the United States' authority to enforce Section 5.¹³⁹⁹ In nine other cases, constitutional challenges also arose in the context of other Section 5 matters that the Department defended.¹⁴⁰⁰

Finally, when jurisdictions sought to bail out of the preclearance requirements of the VRA by showing that they had not discriminated in voting for 10 years, the DOJ was charged with investigating their application and then filing either a proposed agreement in federal court or litigating against the bailout petition.¹⁴⁰¹

All of these above cases occurred prior to the *Shelby County* decision.

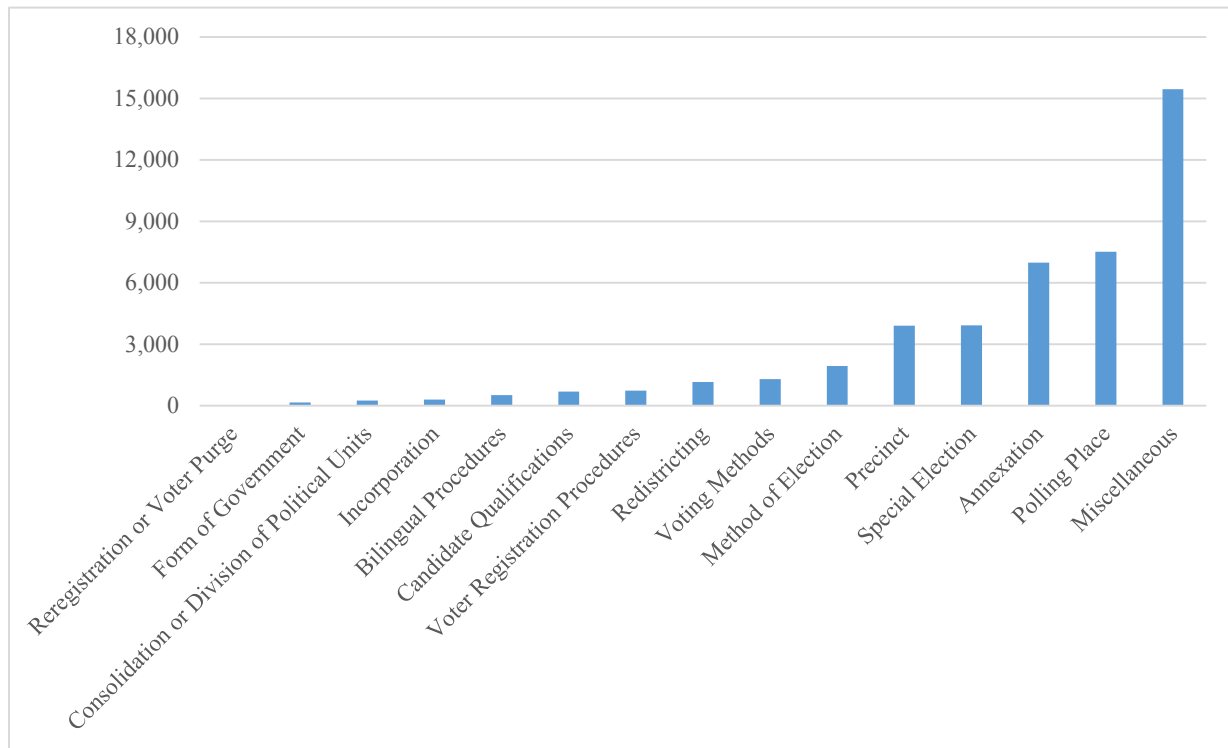
Types of Voting Changes Submitted

DOJ did not provide yearly data regarding the types of voting changes submitted since the 2006 VRA Reauthorization. Instead, they provided data regarding types of changes submitted since 1965, by decade. Therefore, only information from 2010-2013 is summarized below.

¹³⁹⁹ *Alaska v. Holder*, No. 1:12-CV-01376 (D.D.C.), filed 08/21/2012; *Arizona v. Holder*, No. 1:11-CV-01559 (D.D.C.), filed 08/30/2011; *Shelby Cty. v. Holder*, C.A. No. 10-0651 (D.D.C.), filed 04/27/2010; *LaRoque v. Holder*, C.A. No. 10-0561 (D.D.C.), filed 04/07/2010.

¹⁴⁰⁰ *Beaumont Indep. Sch. Dist. v. United States*, No. 1:13-CV-00401 (D.D.C.), filed 03/27/13; *Alabama v. Holder*, No. 1:12-CV-01232 (D.D.C.), filed 07/26/12; *Florida v. United States*, No. 1:12-CV-00380 (D.D.C.), filed 03/12/12; *Texas v. Holder*, No. 1:12-CV-00128 (D.D.C.), filed 01/24/12; *Georgia v. Holder*, No. 1:11-CV-01788 (D.D.C.), filed 10/06/11; *Florida v. United States*, No. 1:11-CV-1428 (D.D.C.), filed 08/01/11; *Georgia v. Holder*, No. 1:10-CV-01970 (D.D.C.), filed 11/15/10; *Georgia v. Holder*, No. 1:10-CV-01062 (D.D.C.), filed 06/22/10. One of these cases proceeded through full argument and decision by the Supreme Court. *Northwest Austin Municipal Util. Dist. No. One v. Gonzales*, No. 1:06-CV-01384 (D.D.C.), filed 08/04/2006.

¹⁴⁰¹ 52 U.S.C. § 10303(a)(1).

Figure 24: Types of Voting Changes Submitted to DOJ for Preclearance, 2010-2013

Source: Analysis of DOJ Responses to USCCR Interrogatories¹⁴⁰²

The data show a wide variety of types of voting changes submitted from the formerly covered jurisdictions, reflecting the fact that the Supreme Court held that coverage of Section 5 “was to be given broad interpretation,” such that any change in voting procedures had to be submitted for preclearance.¹⁴⁰³ Also, overall data show that there have been over 3,000 changes submitted due to redistricting in every 10-year cycle since the 1965 VRA was enacted.¹⁴⁰⁴ The Commission also notes that “Miscellaneous” changes are defined as anything falling outside the categories listed above. Based on the list of Examples of Changes published in the Code of Federal Regulations in 1987 and updated in 2011, these other types of voting changes could include: changes in

¹⁴⁰² DOJ Response to USCCR Interrogatory No. 22 (Section 5 Changes by Type and Year).

¹⁴⁰³ U.S. Dep’t of Justice, Section 5 of the Voting Rights Act, *supra* note 1372, citing *Allen*, 393 U.S. at 565, *abrogation recognized by Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); see also U.S. Dep’t of Justice, *Voting Changes Enacted or Administered by Any State Official Require Section 5 Review*, <https://www.justice.gov/crt/what-must-be-submitted-under-section-5> (last accessed June 11, 2018); see also Examples of Voting Changes, 28 C.F.R. § 51.13.

¹⁴⁰⁴ U.S. Dep’t of Justice, *Voting Changes Enacted or Administered by Any State Official Require Section 5 Review*, <https://www.justice.gov/crt/what-must-be-submitted-under-section-5> (There were 3,846 redistricting changes submitted from 1965-89, 3,456 from 1990-99, and 3,141 from 2000-09.).

qualifications or eligibility for voting; changes in term of office; changes in rules for ballot issues, measures, or propositions; or transfers or alterations of authority of election officials.¹⁴⁰⁵

Non-Section 5 DOJ VRA Lawsuits and Litigation-Based Enforcement Actions

Because litigation is so central to the role of the DOJ in enforcing our nation's laws prohibiting discrimination in voting, it is an important element of analyzing relevant federal civil rights enforcement efforts under the Commission's statutory mandate, 42 U.S.C. § 1975a(c)(1). As discussed above, litigation can be a component of Section 5 enforcement, but Section 5 also included mandatory administrative review, and in practice, preclearance involved much more administrative action than litigation. In contrast, the other provisions of the VRA (which are summarized in Chapter 1),¹⁴⁰⁶ such as Section 2's nationwide prohibition against discrimination in voting, do not have mandatory administrative review components and so must be enforced by affirmative litigation.¹⁴⁰⁷

Accordingly, this section compiles and analyzes the data regarding DOJ litigation under the VRA, from the time of the 2006 Reauthorization, and since the June 25, 2013 *Shelby County* decision. The data below show that DOJ has brought fewer actions to enforce the non-preclearance provisions of the VRA over time (see Figure 25), and that private parties have been bringing a higher number of actions to enforce the national prohibition against racial discrimination in voting found in Section 2 (see Figure 26). The data also show a sharp decline in the number of language access cases filed by DOJ (see Figure 27), as well as a recent failure to file any cases to enforce Section 208 of the VRA, which provides for voters' rights to assistance, including for voters with disabilities and limited-English proficiency (see Figure 28).

Section 2 Cases

Since the 2006 VRA Reauthorization (July 27, 2006), the DOJ filed 11 Section 2 cases.¹⁴⁰⁸ These are:

1. *United States v. City of Philadelphia*, No. 06-4592 (E.D. Pa. 2006) (failure to provide Spanish-language access impacting Latino voters);
2. *United States v. Village of Port Chester*, No. 06-CIV-15173 (S.D.N.Y. 2006) (dilution of Latino voting rights);
3. *United States v. Georgetown County School District*, No. 2:08-CV-00889-DCN (D.S.C. 2008) (dilution of black voting rights);

¹⁴⁰⁵ See 28 C.F.R. § 51.13.

¹⁴⁰⁶ See Chapter 1, Summary of Major VRA Provisions, and Sources cited at notes 101-37, *supra*.

¹⁴⁰⁷ *Id.* at notes 138-48 (The Relationship Between Sections 2 and 5); *see, e.g.*, 52 U.S.C. § 10301 (Section 2).

¹⁴⁰⁸ The Commission notes that DOJ litigation of Section 2 cases initiated prior to the 2006 Reauthorization also occurred during this time period. *See Long Cty.*, 2:06-CV-00040 (complaint filed and settled prior to Reauthorization); *United States v. City of Euclid*, No. 1:06-CV-01652-KMO (N.D. Ohio 2006) (complaint filed prior to Reauthorization and settled after).

4. *United States v. School Board of Osceola County*, No. 6:08-CV-582-ORL-18DAB (M.D. Fla. 2008) (dilution of Latino voting rights);
5. *United States v. Salem County and the Borough of Penns Grove*, No. 1:08-CV-03276 (D.N.J. 2008) (denial of Latino voting rights);
6. *United States v. Euclid City School Board District Board of Education*, No. 1:08-CV-02932 (N.D. Ohio 2008) (dilution of black voting rights);
7. *United States v. Town of Lake Park*, No. 9:09-CV-80507 (S.D. Fla. 2009) (dilution of black voting rights);
8. *United States v. Texas*, No. 2:13-CV-00263 (S.D. Tex. 2013) (intervention regarding Texas' strict voter ID law) (denial of black and Latino voting rights);
9. *United States v. Texas*, No. 5:11-CV-00360 (W.D. Tex. 2013) (intervention regarding statewide redistricting plans for the State House and U.S. House of Representatives);
10. *United States v. North Carolina*, No. 1:13-CV-00861 (M.D.N.C. 2013) (denial of black voting rights); and
11. *United States v. Eastpointe*, No. 2:17-CV-10079 (E.D. Mich. 2017) (dilution of black voting rights).¹⁴⁰⁹

Seven of these 11 cases were brought prior to *Shelby County*, and four were initiated in the five years since the June 25, 2013 *Shelby County* decision. Several of the DOJ's post-*Shelby County* Section 2 cases were first brought by private groups who sued jurisdictions, after which the DOJ intervened.¹⁴¹⁰ Of the seven post-2006 VRA Reauthorization cases brought prior to the *Shelby County* decision, only one was brought in a formerly covered jurisdiction (South Carolina).¹⁴¹¹ Of the four brought after the *Shelby County* decision, three were brought in formerly covered jurisdictions (and two were brought in Texas alone).¹⁴¹²

And as discussed in Chapter 4, of the successful private Section 2 cases won since *Shelby County*, 12 out of 23 occurred in the formerly covered jurisdictions.¹⁴¹³

¹⁴⁰⁹ DOJ Response of USCCR Interrogatory No. 18; Internal Legal Research.

¹⁴¹⁰ In addition to the DOJ's intervention in the Texas redistricting case brought by private parties, the case brought by the DOJ in *United States v. North Carolina* was joined with the original case filed by impacted individuals and community groups in *McCrory*, 831 F.3d 204. See, e.g., United States' Motion to Consolidate Cases, *N. Carolina State Conference of NAACP v. McCrory*, No. 1:13-CV-658 (M.D.N.C. 2013), http://moritzlaw.osu.edu/electionlaw/litigation/documents/US-MotionToConsolidate_000.pdf. Also, *United States v. Texas*, No. 2:13-CV-00263 (S.D. Tex. 2013) was joined with the original case filed by impacted individuals and community groups in *Veasey*, 830 F.3d 216. See Unopposed Motion to Consolidate, *Veasey v. Abbott and United States v. Texas*, 2:13-CV-00193 (S.D. Tex. 2013), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VeaseyUnopMot2Consolidate.pdf>.

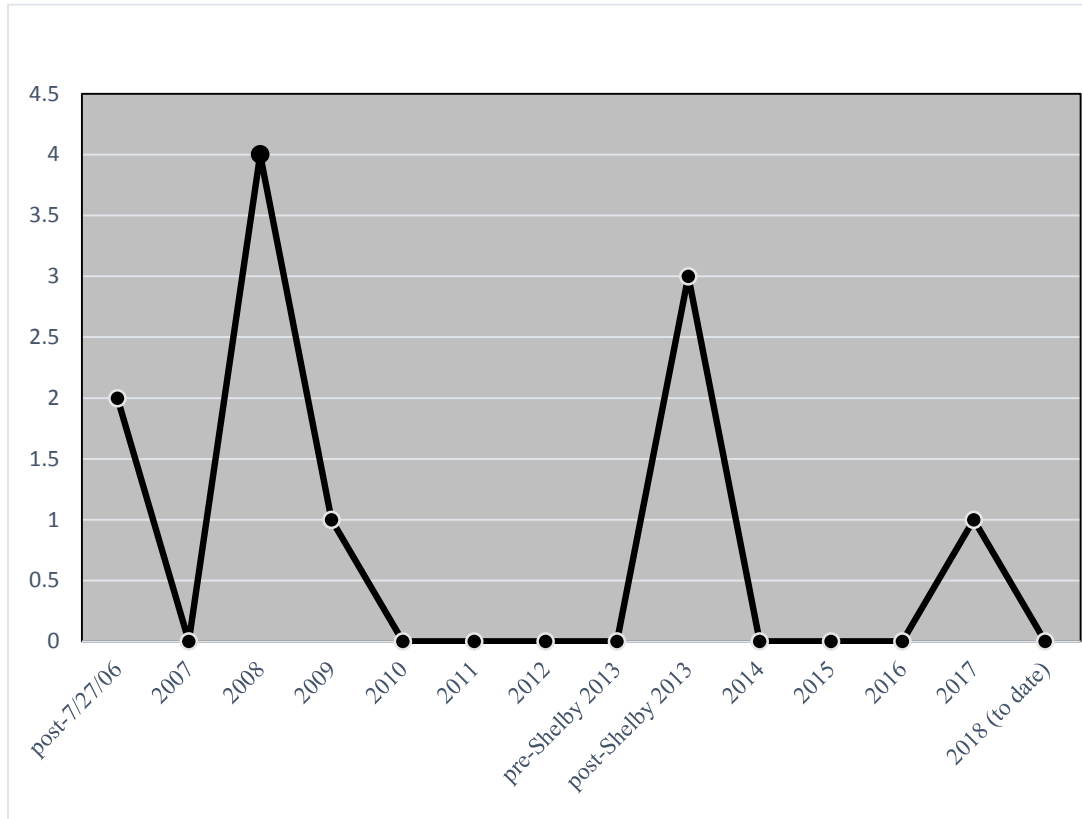
¹⁴¹¹ See Chapter 2, Figure 2: Map of Section 5 Formerly Covered Jurisdictions, DOJ Section 5.

¹⁴¹² See Chapter 4, Table 12. (The pattern illustrated by private litigation shows a meaningful concentration of Section 2 enforcement in the formerly covered jurisdictions.)

¹⁴¹³ *Id.*

Returning to the quantitative analysis of DOJ's VRA enforcement efforts, the following chart shows how DOJ's Section 2 cases initiated since the 2006 Reauthorization were spread out over the dates in question.

Figure 25: DOJ Section 2 Cases Filed Since the 2006 VRA Reauthorization—2018



Source: Analysis of DOJ Responses to USCCR Interrogatories (by date of case filings)¹⁴¹⁴

The above data show some unevenness and an overall decline in Section 2 cases filed by the DOJ prior to the *Shelby County* decision, with a clearer decline in the five years since the *Shelby County* decision.

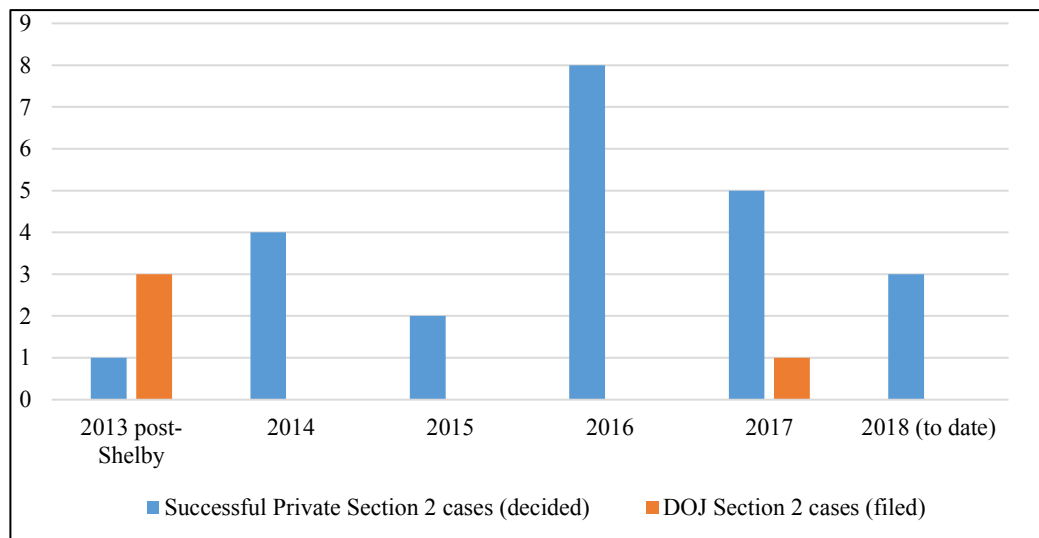
For further analysis of DOJ Section 2 litigation in the post-*Shelby County* era, the Commission continues to the next data set and chart. To compare DOJ's enforcement work with that of private groups, the Commission examined data about the number of successful Section 2 cases brought by private groups in the post-*Shelby County* era to date. This methodology and the nature of the Section 2 cases brought by private voting rights lawyers on behalf of minority voters were

¹⁴¹⁴ DOJ Response to USCCR Interrogatory No. 18; U.S. Dep't of Justice, *Cases Raising Claims Under Section 2 of the Voting Rights Act* (see complaints and date of filing), <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0#long>.

discussed in Chapter 4.¹⁴¹⁵ Moreover, the Commission compares the number of successful Section 2 cases brought by private groups, compared to only those filed by the DOJ. This methodology was chosen mainly because of the relatively low number of DOJ cases filed, and also because litigation of several of the DOJ cases is still ongoing. Specifically, the DOJ participated in the successful litigation of *NC NAACP v. McCrory*,¹⁴¹⁶ regarding North Carolina's omnibus restrictions in voting that were struck down by the Fourth Circuit, but the other three post-*Shelby County* DOJ Section 2 cases are all still ongoing.¹⁴¹⁷

Even using this quantitative methodology that results in conservative estimates of DOJ Section 2 litigation as compared with private Section 2 litigation, the difference in the number of successful cases brought by private groups in comparison to cases filed and litigated by the DOJ is significant. This disparity is illustrated by the following bar graph:

Figure 26: Successful Private Section 2 Litigation Compared to DOJ Section 2 Cases Filed and Litigated Since the *Shelby County* Decision



Source: Internal Legal Research & Analysis¹⁴¹⁸

¹⁴¹⁵ See Discussion and Sources cited in Chapter 4, Table 12, *supra*. As discussed in Chapter 4, while this method accounts for all DOJ Section 2 cases, the method leaves out some Section 2 decisions that are not reported on Westlaw, so the private Section 2 cases could be an undercount. Ho, Written Testimony, *supra* note 446 at Appendix B, Other Section 2 Cases Since *Shelby County* (in addition, ACLU's Dale Ho listed 12 recent Section 2 cases in which defendants' motions to dismiss, for preliminary judgment or stays, were denied, or in which plaintiffs won a case that had included a Section 2 claim on other grounds).

¹⁴¹⁶ *McCrory*, 831 F.3d 204.

¹⁴¹⁷ DOJ Response to USCCR Interrogatory No. 18, at 6; Internal Legal Research; *United States v. Texas*, No. 2:13-CV-00263; *United States v. Texas*, No. 5:11-CV-00360 (W.D. Tex. 2013); *United States v. Eastpointe*, No. 2:17-CV-10079 (E.D. Mich. 2017).

¹⁴¹⁸ The following chart summarizes the tally of cases compiled from Westlaw-identified and DOJ cases (to date):

Notably, the DOJ has statutory authority to affirmatively enforce the provisions of the VRA on its own, and is not dependent on receiving a complaint from an individual plaintiff.¹⁴¹⁹ The VRA also specifically authorizes federal appropriations for the Department’s VRA enforcement work.¹⁴²⁰ Because of this statutory authority, the DOJ’s path is more direct and less cumbersome than the level of proof that impacted individuals and community groups must meet to demonstrate legal standing to enforce the VRA.¹⁴²¹ The DOJ also has substantial investigatory resources, including social science experts on staff, who support Section 2 investigations.¹⁴²² However, of all the post-*Shelby County* Section 2 cases examined, the DOJ has brought only a small fraction—four out of 23 (17.4 percent, including only Westlaw-reported, successful Section 2 cases).

At the national briefing, the Commission heard testimony from voting rights experts, including litigators, who acknowledged the positive impact of the DOJ’s work in bringing Section 2 litigation in North Carolina and Texas in the post-*Shelby County* era.¹⁴²³ Testimony included a recognition that DOJ dedicated its resource and expertise to these precedential cases.¹⁴²⁴ The Commission notes that in the U.S. common law system, law is established through the Constitution, by

DATE	Successful Private Section 2 cases (on Westlaw) (decided)	DOJ Section 2 cases (filed)
2013 post- <i>Shelby County</i>	1	3
2014	4	0
2015	2	0
2016	8	0
2017	5	1
2018 (to date)	1	0

¹⁴¹⁹ 52 U.S.C. § 10308(d) (The Voting Rights Act authorizes the Attorney General to file a civil action on behalf of the United States of America seeking injunctive, preventive, and permanent relief for violations of Section 2 of the Act).

¹⁴²⁰ 52 U.S.C. § 10312 (“There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of chapters 103 to 107 of this title.”).

¹⁴²¹ See *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) (holding that a nonprofit organization whose sole purpose is to protect voter rights must still demonstrate an injury in fact to have standing in an article III court); *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1340 (11th Cir. 2014) (noting that to have standing in a voting rights action an individual must demonstrate an injury in fact is identifiable, concrete, and actual or imminent); *Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348 (4th Cir. 2009) (holding that an individual did not have standing where she failed to allege that she was a member of a minority group and that her right to vote was abridged based on her race or color); *Roberts v. Wamser*, 883 F.2d 617 (8th Cir. 1989) (holding that an individual must demonstrate that her voting rights have been denied or impaired to have standing under the Voting Rights Act).

¹⁴²² U.S. Dep’t of Justice, *A Review of the Operations of the Voting Section of the Civil Rights Division*, 9, <https://oig.justice.gov/reports/2013/s1303.pdf> (last accessed June 13, 2018); see also McCrary, Written Testimony, *supra* note 445, at 3-4 (DOJ undertakes quantitative analysis in Section 2 cases; but note that staff analysis is necessarily complemented by expert witnesses for complex litigation).

¹⁴²³ *Briefing Transcript, supra* note 234, at 219-20 (statement by Dale Ho); see also *Briefing Transcript, supra* note 234, at 220 (statement by Ezra Rosenberg).

¹⁴²⁴ *Briefing Transcript, supra* note 234, at 24 (statement by Vanita Gupta).

legislation such as the VRA, and also by judges setting legal precedents through their decisions, which are considered to be binding and generally must be followed in their jurisdictions in the future.¹⁴²⁵

At the Commission's briefing, however, experts also testified that the DOJ should be doing more to fight ongoing discrimination in voting.¹⁴²⁶ For example, remarking on the post-*Shelby County* Section 2 cases, Dale Ho noted that "of these 21¹⁴²⁷ successful Section 2 cases nationwide since *Shelby County*, the ACLU has been counsel in 5 (or nearly one-quarter) of them. The United States Department of Justice, with its considerable resources, has been counsel in 4 of the 21 successful

¹⁴²⁵ See, e.g., Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 661-62 (1999) (explaining the doctrine of stare decisis, which is law made through judicial decisions); see also Hon. John M. Walker, Jr., Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit, "The Role of Precedent in the United States," *Stanford Law School China Guiding Cases Project, Commentary No. 15*, 2016, 1 ("A prior case must meet two requirements to be considered binding precedent. First, as compared with the present matter before the judge, the prior case must address the same legal questions as applied to similar facts. The higher the degree of factual similarity, the more weight the judge gives the prior case when deciding the present matter. The degree of similarity of a prior case is therefore often a point of contention between parties to a litigation. Litigants compare and contrast prior cases with their own in briefs submitted to the court. The judge reviews and weighs these arguments but also may conduct his own research into, and analysis of, prior cases. The second requirement for a case to be considered binding precedent is that it must have been decided by the same court or a superior court within the hierarchy to which the court considering the case belongs. The American federal court system has three tiers: the district courts, the courts of appeals (divided into "circuits" with distinct geographic boundaries), and the U.S. Supreme Court. Each state also has a multi-tiered court system and, if certain jurisdictional requirements are met, the U.S. Supreme Court may review the decisions of the highest court in each state. Each district court thus follows precedents handed down by the Supreme Court and by the court of appeals in the circuit encompassing the district court. Each court of appeals follows its own precedents and precedents handed down by the Supreme Court, but it need not adhere to decisions of courts of appeals in other circuits. A court may consider decisions by other, non-superior courts to be persuasive precedent, however, and follow them if they are well-reasoned and if there is no binding precedent that conflicts."). See also *Briefing Transcript*, *supra* note 234, at 101-02 (statement by Natalie Landreth) (stating that DOJ not bringing its own litigation but instead focusing on amicus briefs and Statements of Interest, "[t]hrough important, it doesn't compare to the impact of them [DOJ] bringing their own case.").

¹⁴²⁶ *Briefing Transcript*, *supra* note 234, at 220-21 (statement by Dale Ho) ("Now, in the meantime, DOJ has engaged in some commendable work to enforce Section 2, but it could have been doing and could be doing more in that regard. Its voting section dwarfs the ACLU's voting rights project, which I direct, but it has brought fewer Section 2 cases since *Shelby County* than we have. And unfortunately there are signs that DOJ may be turning away from its historic mission of promoting voter access. Now, in addition, to abandoning its positions in Voting Rights litigation out of Texas and Ohio, last year DOJ requesting information on list-maintenance practices from 44 states, a sweeping inquiry that the former head of the DOJ's civil rights who testified, Vanita Gupta, described as virtually unprecedented.").

¹⁴²⁷ Among other cases, Commission staff identified another case that was decided on February 23, 2018, after Ho's Written Testimony and accompanying research was submitted on February 2, 2018. *Luna*, 291 F. Supp. 3d 1088. Staff also deleted one case in which research showed the Section 2 claim was not successful. *Jackson v. Bd. of Trustees of Wolf Point, Mont.*, 2014 WL 1794551, No. CV-13-65-GF-BMM-RKS, at *1, *3 (D. Mont. Apr. 21, 2014), report and recommendation adopted as modified sub nom., *Jackson v. Bd. of Trustees of Wolf Point, Mont.*, Sch. Dist. No. 45-45A, 2014 WL 1791229, No. CV-13-65-GF-BMM-RKS (D. Mont. May 6, 2014); Cf. Ho, Written Statement, *supra* note 446, at 12.

Section 2 cases.”¹⁴²⁸ Ho and others stated that due to the complexity of these cases and the resources needed, the federal government should be doing more.¹⁴²⁹ In contrast, Hans von Spakovsky believes that the Department’s low number of recent Section 2 cases mean that current conditions do not evidence ongoing discrimination in voting.¹⁴³⁰ He also expressed concern about the low number of cases brought during the Obama Administration,¹⁴³¹ while concluding: “But, in summary I would say that the Voting Rights Act remains a powerful statute whose remedies are more than sufficient to stop those rare instances of voting discrimination when they occur.”¹⁴³²

Several panelists also expressed deep concern that in their view, the DOJ had reversed its position in the Texas voter ID Section 2 litigation.¹⁴³³ In Congressional testimony, the DOJ expressed another view, and stated that the change was due to Texas’ enacting an amended voter ID law with exceptions for voters with reasonable impediments to being able to secure current, state-issued photo ID.¹⁴³⁴ The legal and factual issues surrounding the DOJ’s position in this case over time are discussed in Chapter 2.¹⁴³⁵

Language Access Cases and Enforcement Efforts in the Pre- and Post-Shelby County Era

Since the 2006 VRA Reauthorization, the DOJ filed a number of cases to enforce Sections 4(e), 4(f)(4), and 203 of the VRA (collectively the “language minority” or “language access” provisions).¹⁴³⁶ The data show a decreasing level of enforcement of the language access provisions of the VRA (see Figure 27, after the following explanation of language access). Under the VRA, the term “language minorities” or “language minority group” means persons who are American Indian, Asian American, Alaska Natives, or of Spanish heritage.¹⁴³⁷

As discussed in previous chapters, Section 203 applies when a certain threshold showing the inherent need of voters with limited-English proficiency (LEP) has been met,¹⁴³⁸ and that voters

¹⁴²⁸ Ho, Written Testimony, *supra* note 446, at 12 (citations omitted). See Discussion and Sources cited in Chapter 4, Voting Rights Act Litigation Trends at notes 1340-41, *supra*.

¹⁴²⁹ See Discussion and Sources cited in Chapter 4, Successful Section 2 Litigation After the *Shelby County* Decision, at note 1329, and Summary of Current Conditions, at notes 1340-42, *supra*.

¹⁴³⁰ von Spakovsky, Written Testimony, *supra* note 325, at 2-3.

¹⁴³¹ *Briefing Transcript*, *supra* note 234, at 29-30 (statement by Hans A. von Spakovsky).

¹⁴³² *Id.* at 28.

¹⁴³³ *Briefing Transcript*, *supra* note 234, at 114 (statement by Nina Perales); see also *Briefing Transcript*, *supra* note 234, at 27 (statement by Vanita Gupta).

¹⁴³⁴ John Gore, Acting Assistant Att’y Gen. Civil Rights Division, *2020 Census Project Report: Hearing Before the H. Comm. on Oversight and Government Reform, 115th Cong.*, C-SPAN video (May 18, 2018 at 1:27-1:28), <https://www.c-span.org/video/?445756-1/justice-department-official-progress-report-2020-census&start=4984>.

¹⁴³⁵ See Discussion and Sources cited in Chapter 2, Texs, at notes 433-39, *supra*.

¹⁴³⁶ DOJ Response to USCCR Interrogatory No. 25.

¹⁴³⁷ 52 U.S.C. § 10310(c)(3).

¹⁴³⁸ Section 203 applies in jurisdictions in which more than 5 percent of citizens of voting age are members of a single language minority group and are LEP; in which over 10,000 citizens of voting age meet the same criteria; and

from that language minority experience higher than average illiteracy rates.¹⁴³⁹ The definition of LEP is persons who do not “speak or understand English adequately enough to participate in the electoral process,” according to Census data.¹⁴⁴⁰ Determinations of which jurisdictions meet the threshold and are covered by Section 203 are made by the Census every five years.¹⁴⁴¹ Figure 10 in the Language Access Issues section of Chapter 3 shows a Census Bureau map of the 263 jurisdictions covered after the most recent determinations, of December 2016.¹⁴⁴²

In its responses to the Commission's Interrogatories, DOJ reported that:

Following the [December 2016] determinations [under Section 203], the Department undertook an extensive program of outreach to covered jurisdictions. The Department sent letters to all of the covered jurisdictions, including tailored letters for jurisdictions covered for the first time and jurisdictions covered for new or additional languages. The letters advised them of their Section 203 responsibilities, provided guidelines and best practices for developing a successful language program, and a contact for additional assistance. In the weeks and months following the determinations, the Department has continued outreach to election officials and members of minority language communities, focusing particularly on jurisdictions with new Section 203 obligations. The Department has also monitored elections in the field in a number of covered jurisdictions since the 2016 determinations.¹⁴⁴³

As discussed in Chapter 3, in addition to Section 203, Section 4(e) of the VRA protects the rights of Puerto Ricans educated in Spanish,¹⁴⁴⁴ whether or not they reside in a jurisdiction covered under the threshold formula of Section 203. Despite the need of Puerto Ricans in jurisdictions that conduct elections in English-only, particularly after Hurricane María displaced hundreds of thousands to the mainland in September 2017,¹⁴⁴⁵ DOJ has not brought a case under Section 4(e) since 2012.¹⁴⁴⁶

in Indian Reservations in which a whole or part of the population meets the 5 percent threshold. 52 U.S.C. § 10503(b)(2)(A)(i).

¹⁴³⁹ 52 U.S.C. § 10503(b)(2)(A)(ii).

¹⁴⁴⁰ 52 U.S.C. § 10503(b)(2)(A)(i).

¹⁴⁴¹ See, e.g., Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81, Fed. Reg. 87532.

¹⁴⁴² See Figure 10; see also U.S. Census Bureau, *United States Section 203 Determinations Coverage eff. December 2016*, 2016, <https://www.census.gov/geographies/reference-maps/2016/dec/rdo/section-203-determinations.html>.

¹⁴⁴³ DOJ Response to USCCR Interrogatory No. 28 at 19.

¹⁴⁴⁴ See Discussion and Sources cited in Chapter 3, *supra* notes 1129-31 (discussing 52 U.S.C. § 10303(a)(4)(e)); see also *Arroyo v. Tucker*, 372 F. Supp. 764, 766-67 (E.D. Pa. 1974); *Torres v. Sachs*, 381 F. Supp. 309, 311-12 (S.D.N.Y. 1974); *Berks Cty.*, 277 F. Supp. 2d at 579 (decision also included findings of violations of Sections 2 and 208 of the VRA).

¹⁴⁴⁵ See Discussion and Sources cited in Chapter 3 *supra* notes 1132-33.

¹⁴⁴⁶ See List of DOJ Language Cases *supra* note 1447.

The DOJ pursued 21 language access enforcement efforts in the time period covered by this report,¹⁴⁴⁷ but as illustrated in the graph below, only one was filed in the post-*Shelby County* era.

Of the 21 language enforcement efforts, 18 were to enforce the rights of Spanish-speaking voters alone, while one in California was on behalf of Chinese- and Korean-speaking voters, another in California was on behalf of Chinese- and Spanish-speaking voters, and an out-of-court settlement was entered into in South Dakota on behalf of Lakota-speaking voters.¹⁴⁴⁸

Eight out of the 21 language access cases were brought in jurisdictions that were formerly covered under Section 5, prior to the *Shelby County* decision.¹⁴⁴⁹

The great majority of these cases were resolved by court-ordered consent decrees, under which the DOJ may send observers and monitor bilingual election procedures for several years after the

¹⁴⁴⁷ These are:

1. *United States v. Napa Cty.*, see Memorandum of Agreement (N.D. Cal. 2016) (Spanish), <https://www.justice.gov/crt/case-document/napa-county-memorandum-agreement>;
2. *United States v. Orange Cty.*, No. 7:12-CV-03071 (S.D.N.Y. 2012) (Spanish);
3. *United States v. Colfax Cty.*, No. 8:12-CV-00084 (D. Neb. 2012) (Spanish);
4. *United States v. Lorain Cty.*, No. 1:11-CV-02122 (N.D. Ohio 2011) (Spanish);
5. *United States v. Alameda Cty.*, No. 3:11-CV-03262 (N.D. Cal. 2011) (Spanish and Chinese);
6. *United States v. Cuyahoga Cty.*, No. 1:10-CV-01949 (N.D. Ohio 2011) (Spanish);
7. *United States v. Shannon Cty., S. Dakota*, see Memorandum of Agreement (D.S.D. 2010) (Lakota Language); https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/shannon_moa.pdf (a formerly covered jurisdiction, see Jurisdictions Previously Covered Under Section 5, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>);
8. *United States v. Riverside Cty.*, No. 2:10-CV-01059 (C.D. Cal. 2010) (Spanish);
9. *United States v. Fort Bend Cty.*, No. 4:09-CV-1058 (S.D. Tex. 2009) (Spanish) (Texas was a formerly covered state, see Jurisdictions Previously Covered Under Section 5, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>);
10. *United States and Commw. of Mass., Regarding City of Worcester*, see Memorandum of Understanding (Sept. 22, 2008) (Spanish), <https://www.justice.gov/crt/memorandum-understanding>;
11. *United States v. Salem Cty. and the Bor. of Penns Grove*, No. 1:08-CV-03276 (D.N.J. 2008) (Spanish);
12. *United States v. Kane Cty.*, No. 1:07-CV-045105 (N.D. Ill. 2007) (Spanish);
13. *United States v. City of Earth*, No. 5:07-CV-00144 (N.D. Tex. 2007) (Spanish) (in formerly covered state);
14. *United States v. Littlefield ISD*, No. 5:07-CV-00145 (N.D. Tex. 2007) (Spanish) (in formerly covered state);
15. *United States v. Post ISD*, No. 5:07-CV-00146 (N.D. Tex. 2007) (Spanish) (in formerly covered state);
16. *United States v. Seagraves ISD*, No. 5:07-CV-00147 (N.D. Tex. 2007) (Spanish) (in formerly covered state);
17. *United States v. Smyer ISD*, No. 5:07-CV-00148 (N.D. Tex. 2007) (Spanish) (in formerly covered state);
18. *United States v. Galveston Cty.*, No. 3:07-CV-00377 (S.D. Tex. 2007) (Spanish) (in formerly covered state);
19. *United States v. City of Walnut*, No. 2:07-CV-02437 (C.D. Cal. 2007) (Chinese and Korean);
20. *United States v. City of Philadelphia*, No. 2:06-CV-45920-45924592 (E.D. Pa. 2006) (Spanish); and
21. *United States v. City of Springfield*, No. 3:06-CV-30123 (D. Mass. 2006) (Spanish).

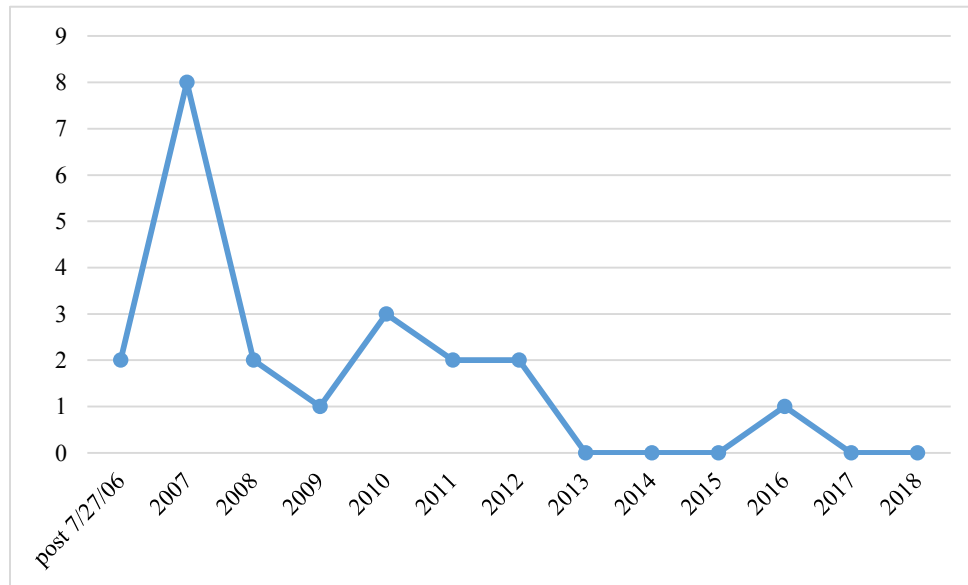
Source: DOJ Response to Interrogatory No. 25); Internal Legal Research.

¹⁴⁴⁸ *Id.*

¹⁴⁴⁹ *Id.*

Consent Decree is signed, to ensure compliance.¹⁴⁵⁰ But 3 of the 21 were resolved by out-of-court agreements.¹⁴⁵¹

Figure 27: DOJ Language Cases Brought Since the 2006 VRA Reauthorization



Source: Analysis of DOJ Response to USCCR Interrogatories¹⁴⁵²

In light of the testimony the Commission received during the national briefing, as well as the Commission's independent, internal research showing ongoing violations of the rights of LEP voters to language access,¹⁴⁵³ DOJ's filing of only one language case since the *Shelby County* decision is in contrast to an ongoing need for language access protections.¹⁴⁵⁴ The data in Figure

¹⁴⁵⁰ U.S. Dep't of Justice, *Cases Raising Claims under Language Minority Provisions of the Voting Rights Act*, <https://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act#cochise> (last accessed June 13, 2018).

¹⁴⁵¹ These are: (1) *United States v. Napa Cty.*, Memorandum of Agreement (N.D. Cal. 2016) (Spanish) (Section 203); (2) *United States v. Shannon Cty., S. Dakota*, Memorandum of Agreement (D.S.D. 2010) (Lakota Language) (Section 203); and (3) *United States and Commw. of Mass., Regarding City of Worcester*, Memorandum of Understanding (Sept. 22, 2008) (Spanish) (Section 4(e)).

¹⁴⁵² DOJ Response to USCCR Interrogatory No. 25 supplemented by internal research.

¹⁴⁵³ See Discussion and Sources cited in Chapter 3, *supra* notes 1114-28, 1132-33, 1147-72.

¹⁴⁵⁴ As discussed in Chapter 3:

Of approximately 291 million people in the United States over the age of five, 60 million people, or just over 20 percent, speak a language other than English at home. Among those other languages, the top two categories are Spanish and Asian languages, at 37 million and 11.8 million people, respectively. This means, nationally, about 3 out of every 4 Asian Americans speak a language other than English at home and a third of the population is Limited English proficient (LEP), that is, has some difficulty with the English language. Voting can be intimidating and complex, even for native English speakers. It becomes that much more difficult for citizens whose first language is not English. Voting materials are written for a twelfth grade level of comprehension,

27 clearly show that the DOJ was much more active in this area in previous years. As various experts told the Commission, there are millions of LEP voters, their numbers are growing, and due to widespread noncompliance with the language access provisions of the VRA, their voting rights are at risk.¹⁴⁵⁵

Moreover, the Commission received credible testimony citing reports showing that when language access rights are enforced, participation of LEP voters increases,¹⁴⁵⁶ and civic participation certainly indicates a form of integration into American democracy. After the DOJ's enforcement action in Napa County, California which resulted in an out-of-court agreement with the DOJ to come into compliance with Section 203 of the VRA, the county Registrar of Voters stated that: "One of the reasons for Napa County's excellent, 82.28 percent turnout [in 2016] was the participation of Spanish language voters."¹⁴⁵⁷ In 2007, NARF brought litigation in Alaska regarding widespread language access violations under Sections 5, 203, and 208 of the VRA. Natalie Landreth testified that:

[I'd] like to point out that at no time did the Department of Justice intervene or assist at all. In fact, in Indian country the DOJ has not brought a case on behalf of Native Americans in almost 20 years. The last one was South Dakota in 2000 and before that Wayne County in 1999. Their involvement has been limited to filing amicus briefs¹⁴⁵⁸ or statements of interest. Though important, it doesn't compare to the impact of them bringing their own case.¹⁴⁵⁹

Section 208 Cases—The Right to Assistance

Section 208 of the VRA provides for a right to assistance, which applies to LEP voters and voters with disabilities.¹⁴⁶⁰ The statutory language clearly protects the rights of these voters to bring persons of their choice into the voting booth to assist them, including family members or

which is much greater than that required for purposes of naturalization, making voting more challenging for voters with language barriers.

Asian Americans Advancing Justice, Written Testimony, *supra* note 1114, at 3 (citations omitted).

¹⁴⁵⁵ *Id.*

¹⁴⁵⁶ *Id.* at 15 (examples of registration increasing by 40-50 percent; turnout among Vietnamese eligible voters doubled in Harris County, Texas); *see also* Marschall & Rutherford, *Voting Rights for Whom?*, *supra* note 1128, at 590; *see also* Fraga & Merseth, *Examining the Causal Impact*, *supra* note 1114, at 31 ("analysis attributes a significant increase in Latino voter registration and Asian-American turnout to coverage under [Section 203 of] the VRA").

¹⁴⁵⁷ Press Release, John Tuteur, *News Release: NAPA County Released From DOJ Oversight* (Dec. 7, 2016), <https://www.countyofnapa.org/DocumentCenter/View/847>.

¹⁴⁵⁸ Frequently, a person or group who is not a party to an action, but has a strong interest in the matter, will petition the court for permission to submit a brief in the action with the intent of influencing the court's decision. Such briefs are called "amicus briefs." *See, e.g.*, Amicus Curiae, Wex Legal Dictionary, https://www.law.cornell.edu/wex/amicus_curiae.

¹⁴⁵⁹ *Briefing Transcript*, *supra* note 234, at 96 (statement by Natalie Landreth).

¹⁴⁶⁰ 52 U.S.C. § 10508.

volunteers, as long as the assistor is not their employer or union agent.¹⁴⁶¹ Added to the VRA as part of the 1982 amendments, Section 208 provides for the right to vote with meaningful access and understanding, without literacy issues or other barriers that voters may have.¹⁴⁶² It provides that: “Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”¹⁴⁶³ This text applies to LEP voters, other voters with difficulty reading or writing English, as well as voters with disabilities or impairments.

Since the reauthorization of July 27, 2006, DOJ has brought five cases to enforce Section 208 of the VRA, all before the *Shelby County* decision.¹⁴⁶⁴ As discussed earlier in this report, all known Section 208 enforcement actions undertaken by the DOJ were language access cases. In contrast, only private groups have used Section 208 to enforce the rights to assistance for voters with disabilities.¹⁴⁶⁵ Also, only one of DOJ’s Section 208 cases was brought in a formerly covered jurisdiction (in Fort Bend County, Texas, in 2009).¹⁴⁶⁶

The relatively small and declining number of DOJ enforcement actions under Section 208 (all of which were brought for LEP voters) is illustrated by the following graph.

¹⁴⁶¹ See, e.g., DOJ Cases cited in note 1464, *infra*.

¹⁴⁶² See, e.g., Proceedings and Debates of the 97th Congress, Voting Rights Act Amendments of 1982 (S.1992), 128 Cong. Rec. S. 6497-6561 (daily ed. June 9, 1982) at 344-45 (remarks of Sen. Stevens (R-WV)).

¹⁴⁶³ 52 U.S.C. § 10508.

¹⁴⁶⁴ These are:

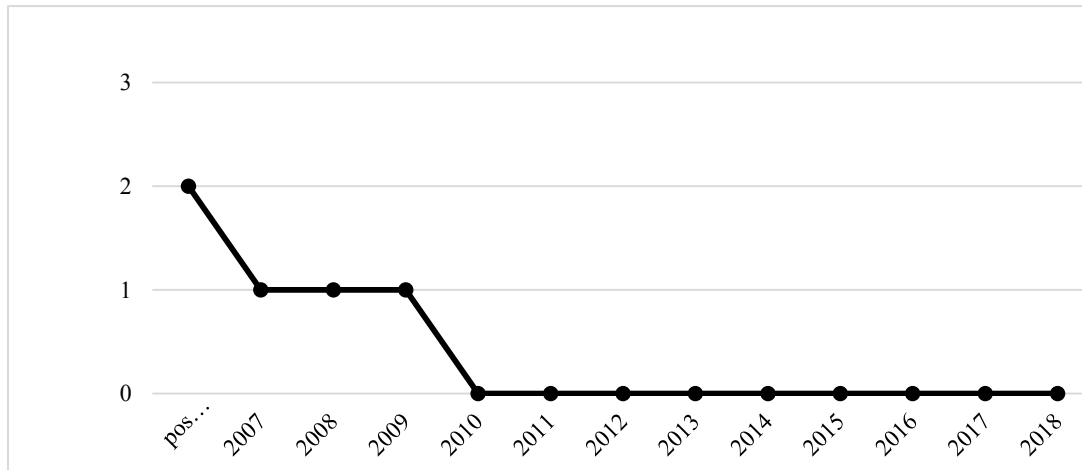
1. *United States v. Fort Bend Cty.*, No. 4:09-CV-01058 (S.D. Tex. 2009) (in a formerly covered state, see DOJ Section 5, *supra* note 226.);
2. *United States v. Salem Cty. and the Bor. of Penns Grove*, No. 1:08-CV-03276 (D.N.J. 2008);
3. *United States v. Kane Cty.*, No. 1:07-CV-0451 (N.D. Ill. 2007);
4. *United States v. City of Philadelphia*, No. 2:06-CV-4592 (E.D. Pa. 2006); and
5. *United States v. City of Springfield*, No. 3:06-CV-30123 (D. Mass. 2006).

Source: DOJ Response to USCCR Interrogatory No. 29, at 6; Internal Legal Research.

¹⁴⁶⁵ See Discussion and Sources cited in Chapter 3, Accessibility Issues for Voters with Disabilities.

¹⁴⁶⁶ See Sources cited at note 1468, *supra*.

Figure 28: DOJ Section 208 Right to Assistance Cases Brought Since the 2006 VRA Reauthorization



Source: DOJ Responses to USCCR Interrogatories¹⁴⁶⁷

The Commission also notes that there have been no DOJ actions to enforce the VRA right to assistance since the *Shelby County* decision.

During the national briefing, the Commission heard testimony from AALDEF’s Jerry Vattamala about the need to protect the right to assistance for LEP voters to assistors.¹⁴⁶⁸ This testimony was echoed by written testimony received from NALEO, detailing examples of North Carolina election officials who were unaware of the VRA’s right to assistance and interfered with LEP voters’ rights to receive it.¹⁴⁶⁹ Furthermore, NDRN’s Michelle Bishop testified about and submitted a post-briefing statement regarding the need for DOJ to enforce Section 208 for voters with disabilities.¹⁴⁷⁰ Although beyond the scope of this report, the Commission notes that the DOJ has undertaken efforts to enforce the protections of the ADA for voters with disabilities.¹⁴⁷¹

¹⁴⁶⁷ See cases listed in note 1464, *supra*.

¹⁴⁶⁸ *Briefing Transcript, supra* note 234, at 225-26 (statement by Jerry Vattamala); see also Vattamala, Written Testimony, *supra* note 454, at 10 (discussing Section 208 of the VRA).

¹⁴⁶⁹ NALEO, Written Testimony for the U.S. Comm’n on Civil Rights, for the record of Voting Rights Briefing, North Carolina (Feb. 2, 2018), at 1. During the public comment period of the Commission’s national briefing, Eliazar Posada also stated that growing up in south Texas, his mother was never advised of her right to receive assistance to vote in Spanish, despite the fact that his mother visibly struggled to understand the ballot and voting process. See *Briefing Transcript, supra* note 234, at 299-301 (statement by Eliazar Posada).

¹⁴⁷⁰ See Discussion and Sources cited in Chapter 3, Accessibility for Voters with Disabilities, at notes 1174-77, *supra*.

¹⁴⁷¹ The DOJ provided information about launching the ADA Voting Initiative and reaching settlement agreements with jurisdictions “to ensure that people with disabilities can access and use all their voting facilities.” The most recent agreements were in Coconino County, Arizona (2018); Monroe County, Illinois (2018); Isabella County, Michigan (2017); Chicago, Illinois (2017); Chesapeake, Virginia (2017); and Richland County, South Carolina (2017).

Amici & Statements of Interest

DOJ filed 27 amicus briefs and Statements of Interest since the 2006 VRA Reauthorization.¹⁴⁷² Due to the significant expertise and resources of the DOJ, these briefs can be influential.¹⁴⁷³

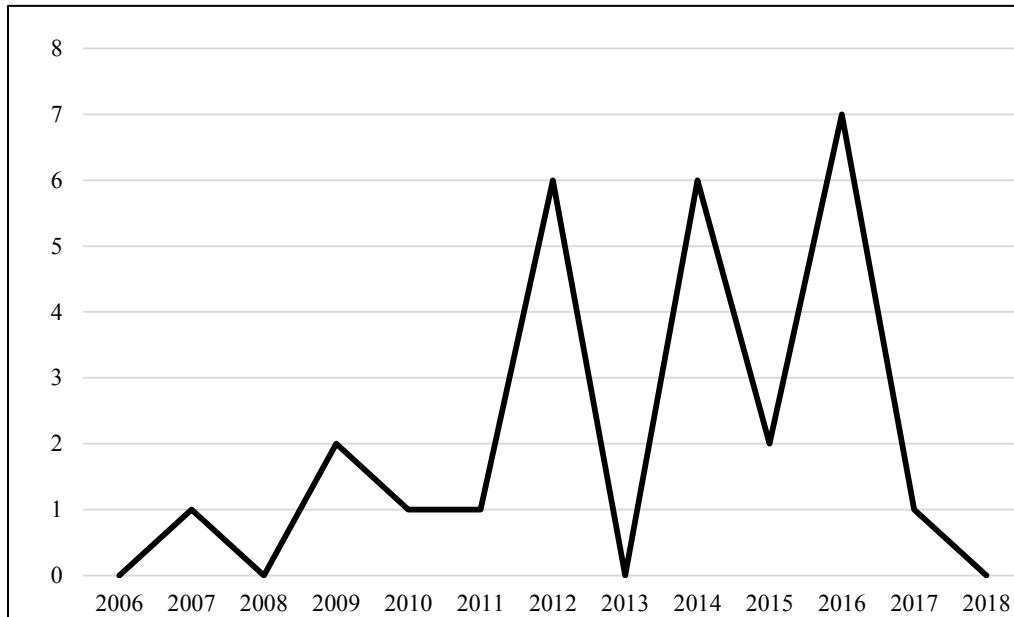
¹⁴⁷² These are:

1. *OCA-Greater Houston v. Texas*, No. 16-51126 (5th Cir. 2017) (Section 208) (in a formerly covered state (TX); see Jurisdictions Previously Covered Under Section 5, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>);
2. *McCrary v. Harris*, No. 15-1262 (S. Ct. 2016) (redistricting) (formerly covered (NC));
3. *Bethune-Hill v. Virginia State Bd. Elections*, No. 15-680 (S. Ct. 2016) (redistricting) (formerly covered (VA));
4. *Brakebill v. Jaeger*, No. 1:16-CV-00008 (D.N.D. 2016) (voter ID);
5. *Wittman v. Pesonhuballah*, No. 14-1504 (S. Ct. 2016) (Virginia redistricting) (formerly covered);
6. *Sanchez v. Cegavske*, No. 3:16-CV-00523 (D. Nev. 2016) (NVRA, Section 5);
7. *Greater Birmingham Ministries v. Alabama*, No. 2:15-CV-02193 (N.D. Ala. 2016) (voter ID) (formerly covered);
8. *Poor Bear v. Jackson Cty.*, No. 5:14-CV-05059 (D.S.D. 2016) (insufficient polling locations);
9. *Harris v. Arizona Indep. Redistricting Comm.*, No. 14-232 (S. Ct. 2015) (redistricting) (formerly covered (AZ));
10. *Evenwel v. Abbott*, No. 14-940 (S. Ct. 2015) (redistricting metrics; one-person/one-vote) (formerly covered (TX));
11. *Ohio NAACP v. DeWine*, No. 14-3877 (6th Cir. 2014) (cuts to early voting);
12. *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conf. v. Alabama*, Nos. 13-895 and 13-1138 (S. Ct. 2014) (redistricting) (formerly covered (AL));
13. *Frank v. Walker* and *League of United Latin Am. Citizens v. Deininger*, Nos. 14-2058 and 14-2059 (7th Cir. 2014) (voter ID) (formerly covered (TX));
14. *Montes v. City of Yakima*, No. 2:12-CV-03108 (E.D. Wash. 2014) (vote dilution);
15. *Ohio State Conference of The Nat. Ass'n For The Advancement of Colored People v. Husted*, No. 2:14-CV-00404 (S.D. Ohio 2014) (cuts to early voting);
16. *Toyukak v. Treadwell*, No. 3:13-CV-00137 (D. Alaska 2014) (formerly covered (AK));
17. *Mark Wandering Med. v. McCulloch*, No. 1:12-CV-00135 (D. Mt. 2012 and 2014) (insufficient polling places) (2 Statement of Interests filed; one pre-*Shelby County* (Oct. 2, 2012) and one post-*Shelby County* (April 25, 2014));
18. *Mi Familia Vota v. Detzner*, No. 812-CV-01294 (M.D. Fla. 2012) (voter purge) (formerly covered (FL));
19. *Samuelson v. Treadwell*, No. 3:12-CV-00118 (D. Alaska 2012) (formerly covered (AK));
20. *Petteway v. Galveston Cty.*, No. 3:11-CV-00511 (S.D. Tex. 2012) (formerly covered (TX));
21. *Perez v. Perry*, No. 5:11-CV-00360 (W.D. Tex. 2011, 2012, 2013); Nos. 11-713, 11-714, and 11-715 (S. Ct. 2011) (redistricting) (formerly covered (TX));
22. *State of Florida v. United States*, No. 4:12-MC-00003 (N.D. Fla. 2012) (cuts to early voting) (formerly covered (FL));
23. *Lepak v. City of Irving*, No. 3:10-CV-00277 (N.D. Tex. 2010); No. 11-101094 (5th Cir. 2011) (vote dilution) (formerly covered (TX));
24. *Simmons v. Galvin*, No. 09-920 (S. Ct. 2010) (felony disenfranchisement in Massachusetts);
25. *Pérez-Santiago v. Volusia Cty.*, No. 6:08-CV-01868 (M.D. Fla. 2009) (Section 4(e));
26. *Morales v. Handel*, No. 1:08-CV-03172 (N.D. Ga. 2008, 2009) (documentary proof of citizenship) (formerly covered (GA)); and
27. *Myers v. City of McComb*, No. 3:05-CV-00481 (S.D. Miss. 2007) (formerly covered (MS)).

Source: DOJ Response to USCCR Interrogatory No. 32 (with case descriptions based on internal research). Commission staff notes that other voting cases in which the DOJ filed a Statement of Interest were listed on the Voting Section website, but left off the list of cases sent in response to USCCR Interrogatories, which in turn included other cases not on the Voting Section website. See U.S. Dep't of Justice, *Voting Section Litigation, Amicus Briefs and Statements of Interest*, <https://www.justice.gov/crt/voting-section-litigation> (listing for example: *N. Carolina NAACP v. North Carolina State Bd. Elections*, No. 1:16-CV-1274 (M.D.N.C. 2016), <https://www.justice.gov/crt/case-document/nc-naACP-v-nc-st-bd-elections> (DOJ Statement of Interest regarding

Statements of interests are powerful tools used by the DOJ to explain the interests of the United States to the court and to clarify and interpret the law.¹⁴⁷⁴ Moreover, eight of the 27 (29.6 percent) were filed with the Supreme Court, where the most precedential, impactful cases are generally decided.¹⁴⁷⁵ The following chart illustrates the level of DOJ efforts in this regard in recent years.

Figure 29: DOJ Amicus Briefs and Statements of Interest, 2006-2018



Source: DOJ Responses to USCCR Interrogatories¹⁴⁷⁶

This is an area in which the DOJ activity evidences ongoing voting challenges in the post-*Shelby County* era.

Testimony Regarding DOJ Performance and Priorities

During its national briefing, the Commission received expert testimony lamenting the low rate of DOJ enforcement of the remaining provisions of the VRA in the post-*Shelby County* era, especially considering DOJ's decreasing workload under Section 5. On the other hand, the Commission also

discriminatory voter challenges); *A. Philip Randolph Inst. v. Husted*, 2:16-CV-303 (S.D. Ohio 2016), <https://www.justice.gov/crt/case-document/si-randolph-institute-v-husted> (Statement of Interest against removal of voters for inactivity)).

¹⁴⁷³ See Victor Zapanta, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, HARV. C.R.-C.L. L. REV. 227, 228 (2017).

¹⁴⁷⁴ *Id.* at 228.

¹⁴⁷⁵ *Id.*

¹⁴⁷⁶ DOJ Response to USCCR Interrogatory No. 32.

heard testimony stating that the decreased level of DOJ VRA litigation was a sign that conditions had improved, while another panelist sharply criticized the DOJ for misusing its resources.

Former DOJ Voting Section Deputy Chief Gerry Hebert, who has litigated over 100 voting rights cases, submitted written testimony stating that,

In the best of circumstances, the Department would have used all of the resources previously allocated to Section 5 preclearance to create robust enforcement under Section 2 . . . Without the protection of preclearance, states and localities have enacted discriminatory voting laws at a frightening rate, but the Department simply has been unwilling or unable to police them.¹⁴⁷⁷

Hebert added: "I was asked to discuss my suggestion of best practices for the Department of Justice in bringing VRA claims. My suggestion is simply this: bring them."¹⁴⁷⁸

These sentiments were echoed by Ezra Rosenberg, who testified that his organization, with much more limited resources than the DOJ, was doing more to enforce the VRA than the DOJ:

Since *Shelby* [County], the Department of Justice has filed three suits against jurisdictions regarding voting changes that would have required preclearance under Section 5. By way of comparison, the Lawyers' Committee for Civil Rights Under Law, which has a fraction of the resources of the Department, has filed five such suits. *Of even greater concern is that since January 20, 2017, the Department has not filed a single suit under the Voting Rights Act.* Again, by way of comparison, the Lawyers' Committee for Civil Rights Under Law has filed three lawsuits during that same period, adding to an existing case docket of five other Section 2 cases filed since November 2015. Two of the Section 2 cases filed by the Lawyers' Committee for Civil Rights Under Law, one of which was filed this year, settled relatively quickly with the establishment of majority-minority election districts in Emanuel County, Georgia and Jones County, North Carolina, demonstrating how vigilant enforcement of the voting rights laws can lead to immediate relief for minority populations.¹⁴⁷⁹

As discussed above, ACLU's Dale Ho succinctly noted that his organization is counsel in five of the successful post-*Shelby County* Section 2 cases, whereas the DOJ, "with its considerable resources," has been counsel in only four.¹⁴⁸⁰ When asked if private groups like the ACLU have similar resources to the DOJ, Ho answered:

¹⁴⁷⁷ J. Gerald Hebert, Senior Director, Voting Rights and Redistricting, Campaign Legal Center, Written Testimony for the U.S. Comm'n on Civil Rights, at 3-4 (internal citation omitted).

¹⁴⁷⁸ *Id.* at 6.

¹⁴⁷⁹ Rosenberg, Written Testimony, *supra* note 651, at 4-5 (citing cases) (some emphasis added).

¹⁴⁸⁰ Ho, Written Testimony, *supra* note 446, at 12 (citing cases).

Not at all—[v]oting rights cases are very expensive. We've heard this numerous times. Particularly Section 2 require[s] testimony from multiple experts. These cases easily run into six figures in terms of expert expenses, so for a private citizen to bear that cost, it's essentially impossible. For that to happen the private organizations like the ACLU, like the NAACP, Legal Defense Fund, [and] NARF, can bring some cases but we do not have the resources either in terms of the financial resources or the personnel power that the Department of Justice does and I think it speaks volumes in terms of how aggressive DOJ has been in protecting voting rights when an organization like mine has brought four more Section 2 cases than DOJ has in the last five years.¹⁴⁸¹

NARF's Natalie Landreth expressed deep concern that "the DOJ has not brought a case on behalf of Native Americans in almost 20 years."¹⁴⁸² And regarding the resources of the DOJ, Professor Levitt testified that:

Private attorneys may also enforce the provisions of the Voting Rights Act and other statutes designed to combat racial and ethnic discrimination in the election process, but at most a handful of attorneys within any given state, and a handful of national organizations with a few voting rights specialists, can match the institutional expertise of the Department of Justice. Perhaps none can match the Department's resources. Data-intensive cases like voting rights cases also often rely heavily on the analysis of expert witnesses, whose time is also limited. Private entities with developed expertise in voting rights litigation may be able to muster a challenge to at most a few policies at a time, and often no more than one. They could not be expected to deliver justice everywhere that it was warranted even in a regime with the deterrence of preclearance, much less in a new world without.¹⁴⁸³

On the other hand, some advocates believe that the lack of enforcement is either a symptom of management or competency issues in the DOJ Voting Section, or a sign that current conditions do not evidence ongoing discrimination in voting. The Commission received testimony from former Voting Section Attorney Christian Adams with his opinion. Adams testified that:

Many argue that after *Shelby [County]*, state election laws that violate the Voting Rights Act were passed suddenly by state legislatures in a conspiratorial effort to block minority voting. Yet, inexplicably, the Department of Justice dramatically reduced enforcement activity under Section 2 and 203 of the Voting Rights Act after January 20, 2009. If it was such a target rich environment, why wasn't the Department of Justice shooting at targets. Resource issues are a fake excuse. The Voting Section had excess capacity and lawyers who were idling with no work. Indeed, I brought one of the last cases the Department filed to challenge at-large elections in a jurisdiction—almost a decade ago.¹⁴⁸⁴

¹⁴⁸¹ *Briefing Transcript, supra* note 234, at 195-96 (statement by Dale Ho).

¹⁴⁸² Landreth, Written Testimony, *supra* note 1099, at 2.

¹⁴⁸³ Levitt, Written Testimony, *supra* note at 304, at 12-13 (citations omitted).

¹⁴⁸⁴ Adams, Written Testimony, *supra* note 669, at 5.

Similarly, former DOJ official Hans von Spakovsky believes that the *Shelby County* decision did not impact enforcement trends. He testified that:

A review of the litigation record of the Voting Section during the administrations of George W. Bush and Barack Obama shows a sharp, overall downward trends in the number of enforcement actions filed by the Justice Department under the various provisions of the VRA from 2001 to 2016, including after 2013, the year of the *Shelby County* was decided.¹⁴⁸⁵

The above data are consistent with this observation, but the downward trend in VRA litigation by the DOJ may be due to other factors.

The data in this report show a high level of recent, successful Section 2 cases brought by private parties, and an overall trend of discrimination in voting continuing during recent years.¹⁴⁸⁶ This data could also indicate that DOJ was much more effective when preclearance was in place, prior to *Shelby County*. Although Section 2 cases have been decreasing, prior to *Shelby County*, the DOJ was effective in stopping discrimination in voting through its objections under Section 5, and through active Section 5 enforcement actions in federal court.¹⁴⁸⁷

Still, the above data show that DOJ's overall enforcement of VRA Section 2, the language access provisions, and Section 208's guarantees of right to assistance, has been decreasing since 2008. Section 2 litigation was brought immediately after *Shelby County* in North Carolina, and in three cases in Texas (although there has been a change of position in Texas). Nonetheless, a current or past lack of performance in bringing VRA cases does not mean that the DOJ should not now or in the future be more actively addressing ongoing discrimination in voting.

The Commission's SAC reports and recommendations regarding voting rights underscore this need for DOJ to do more voting rights enforcement work. For example, the Commission's Kansas SAC recommended that the Commission advise DOJ to review the state's documentary proof of citizenship act, following concerns about the lawfulness of that act raised in the Kansas SAC review. The Kansas and Illinois SACs also both asked the Commission to advise DOJ to analyze each state's respective implementation of the the HAVA, the NVRA, and VRA.¹⁴⁸⁸ The Alaska SAC recommended that the Commission ask DOJ to enforce Section 203 and send federal observers to Alaska.¹⁴⁸⁹

¹⁴⁸⁵ von Spakovsky, Written Testimony, *supra* note 325, at 2-3.

¹⁴⁸⁶ See Discussion and Sources cited at Figure 26 (relatively higher level of private Section 2 cases); U.S. Dep't of Justice, Civil Rights Division, *Voting Section Litigation*, <https://www.justice.gov/crt/voting-section-litigation> (high level of VRA enforcement, especially in Section 2 cases, in the 1980s and 1990s) (last updated Dec. 4, 2017); Chapter 3, *supra* (overall trend of restrictions that negatively impact minority voters).

¹⁴⁸⁷ See Discussion and Sources cited at notes 1385-1400, *supra* (Section 5 objections and litigation since the 2006 VRA Reauthorization).

¹⁴⁸⁸ See Summaries of Kansas and Illinois State Advisory Committee reports, Appendix D.

¹⁴⁸⁹ Advisory Memorandum, The Alaska Advisory Committee to the U.S. Comm'n on Civil Rights (Mar. 27, 2018), <http://www.usccr.gov/pubs/2018/05-25-AK-Voting-Rights.pdf>.

The Role of Federal Election Observers and Monitors

This Section summarizes and analyzes testimony and evidence gathered regarding the role of federal observers and monitors in the 2016 Presidential Election, which was the first presidential election held since the *Shelby County* decision. Since the enactment of the VRA in 1965, the DOJ has been able to monitor elections in several ways. First, they can send their own personnel to monitor elections, and if the local jurisdiction agrees, they may be able to enter the polls—but entering the polls depends on the consent of the local jurisdiction. Second, the VRA clearly permits the Attorney General to certify the sending of federal observers to monitor elections inside the polls, in the formerly covered jurisdictions. Third, the DOJ must send federal observers if a court so orders.¹⁴⁹⁰ In many instances, court orders for observers were the result of consent decrees.¹⁴⁹¹

The use of federal observers has been an important tool in protecting minority voting rights. As Representative John Lewis wrote in 2005, the ability of the Attorney General to send federal observers to jurisdictions with a history of discrimination in voting has been “essential to curtailing discrimination.”¹⁴⁹² Observers have been frequently sent to states in the South such as Mississippi, where their presence reportedly curbed discrimination in voting.¹⁴⁹³ Federal observer deployment was a key VRA provision repeatedly reauthorized by Congress and signed into law by Republican presidents since 1965.¹⁴⁹⁴

Under Section 8 of the VRA, federal observers could be sent to all formerly covered jurisdictions when the Attorney General certified the need according to the statutory standards.¹⁴⁹⁵ Observers

¹⁴⁹⁰ See, e.g., DOJ Fact Sheet, *supra* note 12 (regarding monitors); see also 52 U.S.C. § 10305(a) (regarding observers).

¹⁴⁹¹ See Discussion and Sources cited at notes 135-37 and 324-28, *supra* (regarding judicial preclearance and ability to order observers under Section 3 of the VRA; and discussing related DOJ Consent Decrees).

¹⁴⁹² Rep. John Lewis, “The Voting Rights Act: Ensuring Dignity and Democracy,” *Human Rights Magazine*, Vol. 32, No. 2 (2005),

https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol32_2005/spring2005/hr_spring05_act.html.

¹⁴⁹³ Tony Pugh, *Change to Voting Rights Act Makes It Harder to Monitor U.S. Election*, MCCLATCHY, Oct. 21, 2016, <http://www.mcclatchydc.com/news/politics-government/election/article109642487.html>. (“In recent years, local Mississippi elections have been a frequent target of that Justice Department scrutiny. From June 2009 to September 2013 the department sent election observers to 31 jurisdictions in the state following complaints of possible discrimination ‘To know the tricks that have been played here in Mississippi—for instance, people posing as federal agents and asking individuals to identify themselves, challenging voters’ eligibility and using intimidation tactics to dissuade individuals from voting. This causes me a lot of concern that we won’t have the kind of backup that’s desperately needed’ from the observers, said Constance Slaughter-Harvey, a Democrat who served as Mississippi’s assistant secretary of state for elections from 1984 to 1996.”)

¹⁴⁹⁴ See Discussion and Sources at notes 135-36, 181 and 1699.

¹⁴⁹⁵ 52 U.S.C. § 10305(a)(2) of the VRA provides that: “Whenever—

1. a court has authorized the appointment of observers under section 10302(a) of this title for a political subdivision; or
2. the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 10303(b) . . . that—

could also be sent under federal court orders in cases where there are findings of repeated, intentional discrimination, or through Consent Decrees.¹⁴⁹⁶ Moreover, under the clear statutory language of the VRA, federal observers could enter the polls:

Observers shall be authorized to—(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.¹⁴⁹⁷

Although the *Shelby County* decision did not directly address the issue of federal observers, DOJ has interpreted *Shelby County* to mean that DOJ may no longer deploy federal observers to the jurisdictions formerly covered under Section 5, except under the limited circumstances of a court order.¹⁴⁹⁸ The Fact Sheet that DOJ issued after the *Shelby County* decision set forth its

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- (A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title are likely to occur; or
- (B) in the Attorney General's judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to the Attorney General to be reasonably attributable to violations of the 14th or 15th amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the 14th or 15th amendment), the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment;

the Director of the Office of Personnel Management shall assign as many observers for such subdivision as the Director may deem appropriate.”

¹⁴⁹⁶ See Discussion of Judicial Preclearance and Sources cited therein at notes 380-83, *supra* (noting that judicial orders regarding preclearance and observers are subject to the statutory language of Section 3 of the VRA, requiring intentional discrimination, and that federal courts have been reticent to order remedies under Section 3, with the exception of those agreed to in Consent Decrees); see also U.S. Dep't of Justice, Civil Rights Division, *About Federal Observers and Election Monitoring*, <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring> (last updated Mar. 15, 2017); 52 U.S.C. § 10302(a). Proceeding to enforce the right to vote, Authorization by court for appointment of Federal observers:

Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the 14th or 15th amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the Director of the Office of Personnel Management in accordance with section 1973d¹ of title 42 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the 14th or 15th amendment (1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the 14th or 15th amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

¹⁴⁹⁷ 52 U.S.C. § 10305(d).

¹⁴⁹⁸ DOJ Fact Sheet, *supra* note 12.

determination that federal observers may no longer be sent by the Attorney General to monitor elections inside the polls in previously covered jurisdictions.¹⁴⁹⁹ DOJ explained that when it sent observers to the formerly covered jurisdictions, it did so “based in part on the Section 4(b) [preclearance] coverage formula. In light of the *Shelby [County]* decision, the department is not relying on the Section 4(b) coverage formula as a way to identify jurisdictions for election monitoring.”¹⁵⁰⁰

It is at least arguable that DOJ has been overly cautious in determining the strictures of *Shelby County*. Writing for the majority of the Supreme Court, Chief Justice Roberts stated that: “Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula.”¹⁵⁰¹ Under this precedent, the provisions of the VRA regarding observers could be considered one of the remaining provisions, as the language of *Shelby County* is limited to “the coverage formula,” in relation to Section 5,¹⁵⁰² while observers fall under Section 8.¹⁵⁰³

On the other hand, the certification required to send observers could be implicitly dependent on what Justice Roberts termed “the coverage formula.”¹⁵⁰⁴ Section 8 of the VRA states that the “assignment” of observers is permitted: “whenever . . . the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under Section 10303(b) [originally Section 4(b)] of this title,” that they have received “meritorious complaints” showing that discrimination in voting is likely to occur, or if “in the Attorney General’s judgement the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment[.]”¹⁵⁰⁵ The DOJ’s post-*Shelby County* Fact Sheet stating that the use of observers was “based in part on the Section 4(b) [preclearance] coverage formula” references this statutory language. However, the fact that the precise language of the *Shelby County* decision only struck down the “coverage formula” in relation to Section 5 demonstrates that it the DOJ may be avoiding risk by interpreting *Shelby County* cautiously, because the Court did not strike down the observer provisions of the VRA.¹⁵⁰⁶

The DOJ has been able to and can continue to send its own staff to monitor elections, but they can only enter the polls if they have permission from the local jurisdiction. DOJ informed the Commission that: “In most instances, the Department has continued to work very successfully and productively with election officials as part of this [election] monitoring work [by Department

¹⁴⁹⁹ See Discussion and Sources cited in Chapter 2, at notes 301-07, *supra*.

¹⁵⁰⁰ DOJ Fact Sheet, *supra* note 12, at 1.

¹⁵⁰¹ *Shelby Cty.*, 570 U.S. at 557.

¹⁵⁰² *Id.*

¹⁵⁰³ 52 U.S.C. § 10305(a)(2) (Section 8, regarding observers); *Cf.* 52 U.S.C. § 10304 (Section 5, regarding preclearance of voting changes).

¹⁵⁰⁴ *Shelby Cty.*, 570 U.S. at 546.

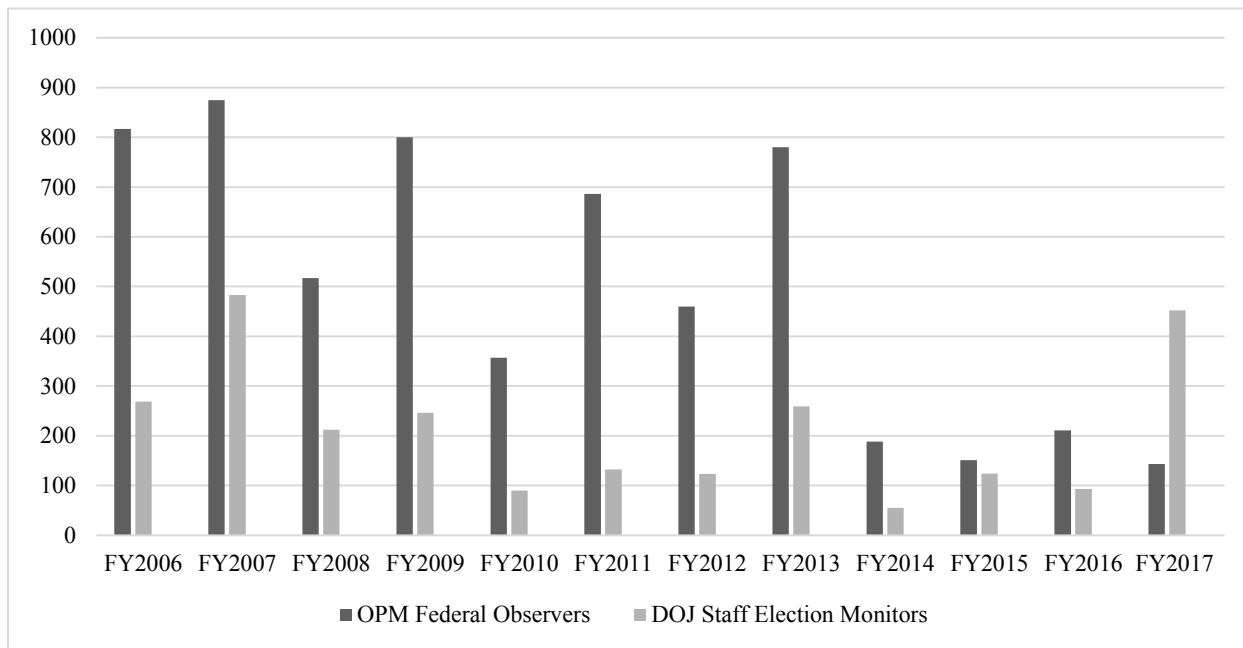
¹⁵⁰⁵ 52 U.S.C. § 10305(a)(2).

¹⁵⁰⁶ See Discussion and Sources cited at note 297 (quoting the precise holding of *Shelby County*), *supra*.

attorney and non-attorney staff]. The Department's monitoring work remains a very useful aspect of its overall enforcement program."¹⁵⁰⁷

The figure below details how the number of federal observers and monitors has changed since 2006.¹⁵⁰⁸

**Figure 30: DOJ Election Monitoring—Federal Observers and Department Staff
Fiscal Year 2006 to Fiscal Year 2017**

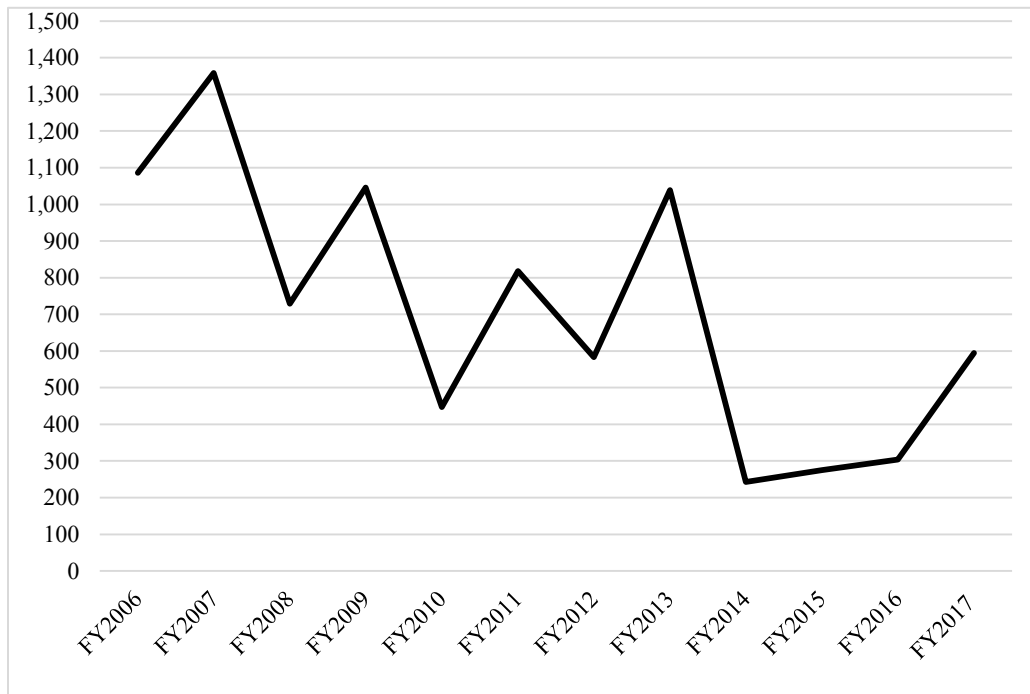


Source: DOJ Responses to USCCR Interrogatories¹⁵⁰⁹

¹⁵⁰⁷ Correspondence from DOJ, at 11.

¹⁵⁰⁸ DOJ Responses to USCCR Interrogatories 12 and 13.

¹⁵⁰⁹ *Id.*

Figure 31: Total (OPM Federal Observers & DOJ Staff Election Monitors), 2006-2017

Source: DOJ Responses to USCCR Interrogatories¹⁵¹⁰

Appendices G and H of this report provide charts and information about the jurisdictions where federal observers and election monitors were placed since 2006.

The above data demonstrate a sharp decline immediately after the 2013 *Shelby County* decision, in both the federal observer and election monitoring programs. While the Department sent over 780 federal observers and 259 election monitors to 51 jurisdictions in 23 states in 2012,¹⁵¹¹ by 2014, DOJ “conduct[ed] in-person monitoring of polling place activities” in only 28 jurisdictions in 18 states.¹⁵¹² From 2012 to 2014, the number of federal observers decreased by 592 and the number of election monitors decreased by 204. The number of election monitors increased since then, but it did not rise to the level of previous presidential elections during the earlier part of the time period studied. Moreover, the totals in the above chart show that when taking into account the decline in observers, between 2006 and 2017, the overall number of federal personnel at the polls declined by 45.2 percent.

¹⁵¹⁰ *Id.*

¹⁵¹¹ U.S. Dep’t of Justice, *Justice Department to Monitor Polls in 23 States on Election Day*, Nov. 2, 2012, <https://www.justice.gov/opa/pr/justice-department-monitor-polls-23-states-election-day>.

¹⁵¹² U.S. Dep’t of Justice, *Justice Department Announces On-the-Ground Monitoring at Polling Places in 18 States on Election Day*, Nov. 3, 2014, <https://www.justice.gov/opa/pr/justice-department-announces-ground-monitoring-polling-places-18-states-election-day-0>.

The Commission received testimony from former DOJ official Vanita Gupta concerning the difference between federal observing and election monitoring. Gupta explained that “observers were allocated in significant numbers pursuant to the Section 4b [preclearance] formula and had much greater power to be inside of the polling site in ways that the monitors are not.”¹⁵¹³ In addition, according to Gupta, there was a specific stream of funding for a high number of observers in all of the polling sites covered by preclearance.¹⁵¹⁴ She also testified that when the DOJ was making decisions about the allocation of election monitors in 2016, the Department chose to send hundreds fewer DOJ trained monitors, who could only be outside of the polls, to polling places during that election. She believes that this diminished number of monitors grossly inhibited the kind of information and evidence collection that can happen when monitors are not allowed to be physically inside of polling sites to observe ways in which voters might be unlawfully challenged to exercise their right to vote.¹⁵¹⁵ Moreover, the decrease in observers has had a dramatic negative consequence on DOJ's ability to collect evidence and bring some VRA cases.¹⁵¹⁶

Similarly, LDF's Sherrilyn Ifill stated that election monitors are not a substitute for federal observers because observers are in a unique position to identify barriers to voting that violate federal voting rights laws, as they are able to gain a first-hand observation of the implementation of voting procedures and overall treatment of voters inside polling places.¹⁵¹⁷ However, Ifill added that the Department should still deploy monitors to help protect against voting rights violations.¹⁵¹⁸

Two Views of DOJ's Observers Deployment Power Post-Shelby County

In addition to the legal dilemma discussed above about whether DOJ was required to stop sending observers in formerly covered jurisdictions,¹⁵¹⁹ there are two main bodies of thought regarding the Justice Department's decision to interpret *Shelby County* as meaning it can no longer send observers to the formerly covered jurisdictions. The first is that federal observers are costly and unnecessary because the rate of reports of discriminatory actions has decreased. The second school of thought argues that federal observers are integral to preventing discrimination at the polls, that *Shelby County* did not require them to be restricted, and that observers should continue to be deployed in full force to election polling places.

One set of arguments is that observers might not be necessary since the *Shelby County* decision has had little impact on the Department's enforcement strategies, and because evidence of discrimination has decreased. Former DOJ official Hans von Spakovsky said that this was because

¹⁵¹³ *Briefing Transcript, supra* note 234, at 43 (statement by Vanita Gupta).

¹⁵¹⁴ *Id.* at 44-45.

¹⁵¹⁵ *Id.* at 45.

¹⁵¹⁶ *Id.*

¹⁵¹⁷ Sherrilyn Ifill, Supplemental Written Testimony for the U.S. Commission on Civil Rights, Mar. 22, 2018, at 1.

¹⁵¹⁸ *Id.*

¹⁵¹⁹ See Discussion and Sources cited at notes 1498-1506, *supra*.

“widespread discrimination” against African-American voters in the U.S. has “long since disappeared.”¹⁵²⁰

An opposing argument about the value of federal observers inside polling locations is that observers “serve as the eyes and ears of the Justice Department” and are therefore indispensable.¹⁵²¹ Voting rights expert James Tucker believes that federal observers are “critical” to eliminate disenfranchisement and that they can help to “prevent” and “remedy” voting discrimination.¹⁵²² Tucker has argued that even if federal observers do not directly deter discrimination from occurring at the polls, the information that they gather and their first-hand accounts are used by the DOJ to retroactively end discrimination.¹⁵²³

During the Commission’s national briefing, other former DOJ officials disagreed. Vanita Gupta testified that the lack of observers “had a very significant impact on the ability to gather evidence of problems, particularly in Section 203 and 208 cases, which often depend on direct observations” of activity at poll sites on Election Day.¹⁵²⁴ Also during the national briefing, Justin Levitt argued that the *Shelby County* decision made it “significantly more difficult” for the federal government to monitor the polls and collect evidence of discriminatory actions.¹⁵²⁵ Levitt believes that observers are one of the DOJ’s “best sources of firsthand information” about on-the-ground compliance with Section 2 of the VRA.¹⁵²⁶ He strongly believes that Congress should restore the observer process to reinstate this important mechanism to defending against discrimination in voting.

Additionally, NARF’s Natalie Landreth of told the Commission that federal observers provide “unparalleled” first-hand information about the realities of actions at the polls, and that they have a “prophylactic effect.”¹⁵²⁷ She said that observers are “critically important,” supporting the arguments of Gupta, Ho, Levitt, and others.¹⁵²⁸ Describing the intersection of observers with enforcing the VRA, Landreth also argued that the DOJ assigned federal observers to Alaska who have had a positive impact on the state, but failed to intervene in NARF’s cases to enforce language access any time between 2006 and 2010.¹⁵²⁹ In 2013, for the first time, the DOJ clarified the law under Section 203 and ruled that if voting materials were in English they must be in the covered languages.¹⁵³⁰ This change resulted in voter turnout increases in many Alaska Native villages that ranged from increases of 8 to 22 percent.¹⁵³¹ Landreth testified that after *Shelby County*, all of the

¹⁵²⁰ von Spakovsky, Written Testimony, *supra* note 325, at 6.

¹⁵²¹ James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. OF RACE & LAW, 223, 233 (2007).

¹⁵²² *Id.* at 275.

¹⁵²³ *Id.* at 231.

¹⁵²⁴ *Briefing Transcript, supra* note 234, at 25 (statement by Vanita Gupta).

¹⁵²⁵ Levitt, Written Testimony, *supra* note 304, at 15.

¹⁵²⁶ *Id.* at 16.

¹⁵²⁷ Landreth, Written Testimony, *supra* note 1099, at 3.

¹⁵²⁸ *Id.*

¹⁵²⁹ *Id.* at 2-3.

¹⁵³⁰ *Id.* at 3.

¹⁵³¹ *Id.* at 4.

work done to enforce language access became more difficult, due in part to the DOJ no longer sending observers. She added that, “Preclearance was the only way to protect voters.”¹⁵³² AALDEF's Jerry Vattamala agreed that observers play a critical role in enforcing the VRA. He also advocated for “statutory authority” that would empower the DOJ to continue to send observers to specific jurisdictions to enforce the language minority provisions of the VRA.¹⁵³³ These experts all believe that it is necessary to deploy federal observers to polling places during federal elections, to deter possible discriminatory actions.

Independent reporting also stressed that DOJ's sending observers to only five states during the 2016 presidential election was concerning because 17 states had tightened voting restrictions.¹⁵³⁴ *Reuters* reported that the 2016 presidential election observer deployment was “among the smallest deployments since the Voting Rights Act was passed in 1965 to end racial discrimination at the ballot box.”¹⁵³⁵ Gerry Hebert told *Reuters* that relying on DOJ personnel (rather than observers) to monitor elections is “a far cry” from deploying federal observers who are statutorily authorized to be inside the polling place.¹⁵³⁶ Former Deputy Assistant Attorney General Anita Earls also explained to *Reuters* that federal observers being stationed inside polling places makes them “more effective than Justice Department staff at catching voter suppression.”¹⁵³⁷

Summary of Current Conditions

In sum, this chapter demonstrates that not only have Section 5 preclearance procedures halted, but also that DOJ VRA enforcement actions, including affirmative litigation of other provisions of the VRA protecting minority voting rights, as well as sending observers and election monitors, have generally declined during the time period studied, particularly since the *Shelby County* decision.

Data from Chapter 3 showed that current conditions include new types of potentially discriminatory voting practices arising in various states across the nation, and Chapter 4 showed ongoing discrimination in voting through an increasing number of successful Section 2 cases brought by private groups' litigation on behalf of impacted minority voters. Both Chapters 3 and 4 showed an over-concentration of these trends in the jurisdictions formerly covered for preclearance under Section 5.¹⁵³⁸

The totality of this report shows that despite the DOJ's diminishing enforcement actions, there is ongoing discrimination in voting that would merit increased VRA enforcement on the part of the DOJ. The report also provides data to consider in any debate about whether and how preclearance procedures could be restructured to protect minority voting rights based on current conditions.

¹⁵³² *Briefing Transcript, supra* note 234, at 280 (statement by Natalie Landreth).

¹⁵³³ Vattamala, Written Testimony, *supra* note 454, at 10.

¹⁵³⁴ See Julia Harte, *Exclusive: U.S. Curtails Federal Election Observers*, REUTERS (July 17, 2016), <https://www.reuters.com/article/us-usa-election-voting-observers-exclusi/exclusive-u-s-curtails-federal-election-observers-idUSKCN0ZX0QR> (quoting Dale Ho).

¹⁵³⁵ *Id.*

¹⁵³⁶ *Id.*

¹⁵³⁷ *Id.*

¹⁵³⁸ See Appendix E: Charts of Voting Rights Issues by State, Comparing Formerly Covered with Noncovered Jurisdictions; and Table 12: Successful Post-*Shelby County* Section 2 Cases.

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CHAPTER 6: FINDINGS AND RECOMMENDATIONS

After reviewing the testimony and briefing materials the Commission received in the course of this investigation, the Commission makes the following findings and recommendations:

FINDINGS

Access to the Ballot

- The right to vote is the bedrock of American democracy. It is, however, a right that has proven fragile and in need of both Constitutional and robust statutory protections. Racial discrimination in voting has proven to be a particularly pernicious and enduring American problem. Voter access issues, discrimination, and barriers to equal access for voters with disabilities and for voters with limited-English proficiency continue today.
- For nearly one hundred years after the passage of the Reconstruction Amendments, racial discrimination in voting became deeply embedded in many parts of the country. The federal government only began to successfully address flagrant voting discrimination once the Voting Rights Act of 1965 (VRA) was passed. Earlier legislative measures proved inadequate.
- In 1975, Congress amended the VRA to increase protection for language minorities who are Asian American, Latino, Alaska Native, and American Indian, finding that denial of the right to vote of such minority group citizens is ordinarily directly related to high illiteracy.
- The VRA works to dislodge and deter the construction of barriers by state and local jurisdictions that block or abridge the right to vote of minority citizens.
- The VRA is necessary to protect minority populations across the nation but different provisions play a special role in certain parts of the nation—for example, some communities substantially rely on limited-English proficiency protections, while other communities rely primarily upon the other VRA provisions to prevent jurisdictions from enforcing discriminatory voting changes.

Ongoing Voting Discrimination

- In *Shelby County*, the Supreme Court acknowledged ongoing voting discrimination and noted that Congress may draft new coverage criteria for preclearance based on current conditions that does not treat states unequally based on past conditions of discrimination.
- Voting discrimination continues to be more concentrated and persistent in some states and jurisdictions than in others.
 - Some jurisdictions have been found to use racially polarized voting patterns to fashion laws and procedures to adversely affect minority voters and weaken the impact of their votes.
- Overall voter turnout is most strongly correlated with factors unrelated to voting procedures, such as the competitiveness of elections, attractiveness of candidates, campaign spending, community investment in voter registration and get out the vote efforts, and the population's education levels. Accordingly, while voter turnout may be one

measure of voter access, an increase in turnout should be viewed in the context of all other factors and is not necessarily proof of the absence of discrimination in voting.

- Voter turnout alone is an imperfect indicator of ongoing discrimination in voting. Nonetheless, persistent gaps in minority turnout may further indicate that minority citizens face greater burdens in voting.
- On a national level, the currently low turnout rates among Asian/Pacific Islander, Latino, and Native American voters are as low as the less than 50 percent turnout of eligible black voters that formed the basis for the initial preclearance formula in Section 5 at the time of the 1964 Presidential Election.
- Without Section 5 preclearance, the DOJ has not been able to object to prevent enactment of laws that courts later determined to have been specifically intended to limit black Americans' and Latino Americans' right to vote.
- Strict voter ID laws typically produce the greatest burden for African-American and Latino-American communities.
- Significant voting rights barriers persist that are specific to Native-American voters and Native-American communities, including long distances to travel to polling places particularly for those living on reservations without physically deliverable mailing addresses, and lack of access to ballots resulting from the failure of state and local election officials to place voter registration and poll sites on the reservations.
- Widespread problems with inaccessibility for voters with disabilities are evident from the testimony and underlying data received by the Commission. The vast majority of polling places studied by the Government Accountability Office (GAO) in 2016 were inaccessible to people with disabilities: only 40 percent of polling places had no barriers to people with disabilities. There are problems with physical barriers to get into polling sites as well as lack of working accessible voting equipment and lack of sufficiently trained staff to assist in operating the equipment.
- Closure of polling places has a significant impact on voter access for people with disabilities. Current Population Survey data from the 2016 election showed a sizable percentage of survey respondents stating that disability access prevented their voting.
- Persons with disabilities are disproportionately lower income and have less access, compared to voters without disability, to voter ID, transportation, and funds.
- Polling place changes can be used to impose barriers on minority voters.
- Voter roll purges often disproportionately affect African-American or Latino-American voters.

Preclearance and *Shelby County*

- After decades of resistance and overt discriminatory actions on the part of officials in several states and local jurisdictions, the Section 5 “preclearance” provisions of the VRA proved necessary to deal with persistent and adaptive voting discrimination, because litigation was slow and ineffective in stopping racially discriminatory election practices until after an election had taken place.
- The narrowness of other mechanisms to halt discriminatory election procedures before they are instituted has resulted in elections with discriminatory voting measures in place.
- After an election with discriminatory voting measures in place, it is often impossible to adequately remedy the violation even if the election procedures are subsequently

overturned as discriminatory. Officeholders chosen under discriminatory election rules have lawmaking power, as well as the benefits of incumbency to continue those rules to perpetuate their continued election.

- Preclearance proved a strong deterrent against state and local officials seeking to suppress the electoral power of growing minority communities through the enactment of policies and procedures that violated the protection of the Voting Rights Act.
- Preclearance resulted in the DOJ making 490 objections to covered jurisdictions' voting changes from 1965-1982, and 626 objections from 1982 to 2004 (in both time ranges, the DOJ made about 28.5 objections per year), substantiating the effectiveness of the provisions in preventing violations of the VRA.
- In *Shelby County*, the Supreme Court struck down the geographic scope criteria for the VRA's preclearance provision, effectively halting heightened federal scrutiny in advance of voting changes in jurisdictions with a history of discrimination in voting.
- The impacts of the *Shelby County* decision in formerly covered jurisdictions include:
 - The burden of proving voting discrimination now lies with a plaintiff and not the jurisdiction proposing the change even though the jurisdiction has easier access to data and analysis regarding the impact of a particular change and evidence of discriminatory intent;
 - Voting changes go into effect immediately, unless post-implementation or post-enactment litigation is brought that secures a preliminary injunction under the remaining provisions of the VRA, the Constitution, or another state or federal law, which have proven difficult to obtain close to elections;
 - Section 5's rule against retrogression—that is, preventing voting changes that worsen the position of minority voters as compared to the prior voting law or practice or “benchmark” in covered jurisdictions—is no longer in operation;
 - Neither the DOJ nor voters have the right to receive notice of changes in voting procedures, shifting the burden of monitoring election changes to voting rights groups, and imposing a large burden on communities, who must now stretch limited resources to track changes themselves in the absence of government transparency;
 - The DOJ no longer has the obligation to reach out to members of impacted communities to hear their point of view about the impact of proposed voting changes;
 - Under its interpretation, the DOJ is no longer able to send federal observers (unless they are separately ordered by a court) which makes it much more difficult to determine compliance with the VRA; and
 - Under the DOJ's interpretation of Section 4(f)(4), the VRA no longer provides for language access in some of the previously covered jurisdictions.
- The *Shelby County* decision had the practical effect of signaling a loss of federal supervision in voting rights enforcement to states and local jurisdictions.
- The voting laws implemented in North Carolina and Texas immediately following the *Shelby County* decision are examples of the immediate impact of the decision on the behavior of state and local officials. In both states, the changes were eventually found, after prolonged litigation, to be discriminatory. A review of these voting changes and the litigation challenging them show:
 - Changes that were previously not cleared by the federal government under Section 5 in covered states were immediately implemented;

- Federal courts held that the laws were motivated by an intent to discriminate against minority voters, in one case, “with surgical precision;”
 - These voting changes remained in place through several elections, though courts eventually found that the changes were motivated by racial discrimination and/or had discriminatory effects; and
 - Statewide discriminatory voting changes adversely impacted the rights of large numbers of eligible voters; and future judicial preclearance or “bail in” was not ordered by the courts in the wake of findings of intentionally racially discriminatory election changes.
- Even after a ruling striking down the North Carolina voter ID provision as discriminatory, strong legislative support for a proposed state constitutional amendment in North Carolina calling for photo identification before voting in person reflects risk for minority voters who no longer enjoy preclearance protection.

Section 2 Enforcement

- In the face of ongoing discrimination in voting procedures enacted by states across the country, enforcement and litigation under Section 2 of the VRA is an inadequate, costly, and often slow method for protecting voting rights.
- The number of successful Section 2 cases since the Supreme Court decided *Shelby County* has quadrupled. That persistence and increase in judicial findings of race discrimination involving voting practices illustrates that racial discrimination in voting continues.
- Preliminary injunctions or other effective interim remedies were rarely issued in post-*Shelby County* Section 2 cases filed, sometimes because of judicial concerns over disrupting imminent elections. Preliminary injunctions were in most cases denied, and where they were issued, were then overturned. For the cases in which a Section 2 claim was ultimately declared meritorious—months or years later—this pattern means that the elections that occurred in the interim were conducted with racially discriminatory voting measures. It means that the voting rights were actually violated, without any remedy for the injured candidates or communities.

Language Minority Protections

- Sections 4(e), 4(f)(4), 203, and 208 are the “language minority” provisions of the Voting Rights Act. Section 203 requires that the Census Bureau identify jurisdictions that contain language minority voters who are limited in their English proficiency (LEP). These jurisdictions across the country must provide bilingual written voting materials and voting assistance in the minority languages covered by the VRA. Jurisdictions covered include both those provided under Section 4(f)(4) and those under Section 203. These sections mandate that bilingual election materials be provided where the number of United States citizens of voting age is a single language group within the jurisdiction and LEP members of that group either make up more than 10,000 or more than 5 percent of all voting age citizens, and the illiteracy rate is higher than the national rate; or within an Indian reservation the population exceeds 5 percent of all reservation residents. Section 4(e) prohibits conditioning the voting rights of citizens educated in Puerto Rico in Spanish on their ability to read and understand the ballot in English.

- Failure to provide or make available legally required language access voting materials and to comply with Section 208's requirement that allows voters to bring an assistant of their choosing imposes unnecessary barriers to voting for limited-English proficient Asian, Latino, and Native American voters.
- Despite Native American Rights Fund's (NARF) victories in expensive and time-consuming litigation in the state of Alaska, the state of Alaska has refused to comply with Section 203 and NARF has had to sue repeatedly. The Alaska SAC recommended that the Commission ask the DOJ to enforce Section 203 and send federal observers to Alaska.
- The DOJ has been enforcing a decreasing number of Section 203 and related language access cases. The DOJ filed 20 language access cases from the 2006 VRA authorization until *Shelby County*, and only 1 language access case after *Shelby County*.
- In 2013, for the first time, the DOJ clarified the law under Section 203 in Alaska and ruled that if voting materials were in English they must also be in the covered languages. This change resulted in voter turnout increases in many Alaska Native villages that ranged from increases of 8 percent to 22 percent.

Protections for Voters with Disabilities

- Section 208 of the VRA mandates that voters who require assistance to vote be provided assistance of the voter's choice. Whether by reason of blindness, disability, or inability to read or write, a voter may be provided assistance by a person of their choosing, other than an employer, an agent of an employer, or an officer or agent of the voter's union. The ability to have assistance of the voter's choice eases the strain on election workers and prevents issues with long lines by reducing the number of instances in which two election workers, of differing parties, must stop their other duties to provide direct assistance to a voter.
- Section 208 of the VRA has not been well-utilized or enforced. The DOJ appears to have limited its enforcement of Section 208 to language access cases, and failed to provide adequate guidance or enforcement for compliance in support of voters with disabilities.

The DOJ Efforts

- The DOJ's enforcement power is hampered by loss of preclearance.
 - Under Section 5, the DOJ requests for information alone caused a significant increase in local jurisdictions protecting minority voting rights.
- The Commission's research shows that there is a need for increased DOJ VRA enforcement efforts.
- The DOJ has done minimal Section 2, post-*Shelby County* litigation. Similarly, since the 2006 VRA reauthorization, the DOJ has only brought seven Section 2 cases.
- Due to high expenses and slow pace, private litigation under Section 2 cannot replace the DOJ enforcement efforts under the suspended Section 5 provision—but private litigation has far outpaced the DOJ efforts.
- The data in this report show a high level of recent, successful Section 2 cases brought by private parties, a historically much higher level of Section 2 cases brought by the DOJ Voting Section lawyers, and an overall trend of discrimination in voting emerging during recent years.

- The DOJ does not send federal observers into formerly covered jurisdictions unless there has been a court finding of discrimination and a court order for federal monitoring.
 - There has been a sharp decline in federal observer and election monitoring programs from the DOJ since *Shelby County*. While the Department sent over 780 federal observers and 259 election monitors to 51 jurisdictions in 23 states in 2012, by 2014, the DOJ “conduct[ed] in-person monitoring of polling place activities” in only 28 jurisdictions in 18 states. Between 2006 and 2017, the overall number of federal personnel at the polls declined by 45.2 percent.
- The dearth of the DOJ language access or assistance enforcement has left too many citizens without the access or ability to vote and undermined the ability to exercise their right to vote.
 - The DOJ’s filing of only one language case since the *Shelby County* decision is in contrast to an ongoing need for language access protections.
- The DOJ litigation or intervention in litigation can be “a powerful statement, but very rarely used for the benefit of Native Americans.”¹⁵³⁹
 - The DOJ has not brought a case on behalf of Native American voters in nearly 20 years, leaving the burden on Native American voters to defend their own rights. The DOJ has participated in litigation regarding Native American voting rights only through amicus briefs and statements of interest.

Recent Changes in Voting Procedures

- Because of the nature of voting rules being broadly applicable to all eligible voters, a single change in law, procedure, or practice can disproportionately affect large numbers of eligible voters and possibly discriminate against certain groups of people whose voting rights are protected by the VRA.
- Public confidence in elections is important. Measures to ensure public trust and confidence need to balance the weight of legitimate and verifiable risks regarding election integrity and the effects on voters’ fundamental ability to exercise their votes without unnecessary burdens on participating in American democracy.
- Study after study, including from the Republican National Lawyers Association and a News21 analysis, confirm that voter fraud is extremely rare in the United States.
- In states across the country, voting procedures that wrongly prevent some citizens from voting have been enacted and have a disparate impact on voters of color and poor citizens, including but not limited to: voter ID laws, voter roll purges, proof of citizenship measures, challenges to voter eligibility, and polling places moves or closings.
- As applied, “strict” voter ID laws that limit the acceptable forms of proof of identity to a narrow list of documents correlate with an increased turnout gap between white and minority citizens.

¹⁵³⁹ Landreth, Written Testimony, *supra* note 1099, at 3.

- Aggressive purges of voter rolls, particularly when based on flawed systems like Crosscheck, will improperly remove many voters and may improperly remove a disparate amount of minority voters.
- When states cut early voting, they can create unduly long lines and limit minority citizens' access to voting. In some places where early voting was reduced, minority citizens had disproportionately utilized early voting.
- In some states, cuts to polling places resulted in decreased minority voter access and influence.
- Documentary proof of citizenship voter registration requirements disparately prevent people of color from registering to vote. Moreover, because these requirements force some citizens to pay fees to replace lost proof-of-citizenship documents, documentary proof of citizenship requirements impose a disparate cost on people of color.
- There is significant evidence that some methods of identifying voters registered in more than one jurisdiction, such as the Crosscheck system, produce an extremely high number of false positives. Overreliance on such a system has led to inappropriate challenges to the legitimate registration of voters who share a name and birthdate with voters elsewhere.
- Vote by mail in many jurisdictions appears to have increased voter turnout, but there must be other options for voters in rural areas who do not have a reliable mail service or who do not have a street address or who have mailboxes that are long distances from their home and work.

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RECOMMENDATIONS

Because of the depth of voting discrimination that continues across the nation today, citizens need strong, proactive federal protections—in statute and in enforcement—for the right to vote.

Congress

- Congress should amend the VRA to restore and/or expand protections against voting discrimination that are more streamlined and efficient than Section 2 of the VRA.
 - In establishing the reach of an amended VRA coverage provision, Congress should include current evidence of voting discrimination as required by *Shelby County*, as well as evidence of historical and persisting patterns of discrimination. A new coverage provision should account for evidence that voting discrimination tends to recur in certain parts of the country. It also should take account of the reality that voting discrimination may arise in jurisdictions that do not have extensive histories of discrimination since minority population shift and efforts to impose voting impediments may follow.
 - Congress should invoke its powers under the Reconstruction Amendments and the Elections Clause to ground the new provisions upon the strong federal interest in protecting the right to vote in federal elections.
 - Congress should consider but not exclusively base any new coverage provision for Section 5 on turnout or registration statistics for various demographic groups.
- Congress should provide a streamlined remedy to review certain changes with known risks of discrimination before they take effect—not after potentially tainted elections.
- Congress should require greater transparency and effective public notice, including web-based disclosure of voting changes affecting federal elections, sufficiently in advance of elections so that voters are less likely to be surprised by changes and able to challenge those that have a discriminatory impact that would violate voting rights and election-related laws.
- Congress should take account of the range and geographic dispersion of racial and language minorities in any new geography-based coverage rule, for example, by adding elements that identify certain practices that may require closer preclearance scrutiny nationwide if a threshold showing of potential voting discrimination can be made.
- Congress should evaluate whether Section 203 should be amended to include coverage of black and Arab-American language minorities.
- In amending the VRA, Congress should take account of the variety of measures that can impede minority voter access, and that many facially neutral measures can impose substantial disparities on minority communities and are sometimes intended to do so. Relatedly, small voting changes to polling place locations without notice and temporally close to an election are an example of a seemingly small change with a potentially far-reaching impact.
- Congress should not exempt voter ID laws from review in any amendment to the VRA. Rather, those measures should be evaluated under the legal framework of available voting statutes to determine whether the law or application imposes any discriminatory effect or intent.

- Congress should expand the ability of the DOJ to use observers to monitor all potentially discriminatory practices, particularly for language access compliance, and lower the threshold for the DOJ to deploy election observers where there are risks of voting discrimination.

The DOJ

- Private litigants play a vital role as “private attorneys general” enforcing the VRA; however, litigation, particularly without Section 5, requires significant resources that only the federal government is able to expend. The DOJ should pursue more Voting Rights Act enforcement in order to address the aggressive efforts by state and local officials to limit the vote of minority citizens and the many new efforts to limit access to the ballot in the post-*Shelby County* landscape.
- The DOJ should reinvigorate its efforts to protect voting rights through heightened enforcement activity of all of the provisions of the VRA.
- The DOJ should remind jurisdictions of their obligations under the language minority provisions, and increase its monitoring of compliance and bring cases to enforce them.
- The DOJ should significantly increase Section 208 enforcement initiatives and litigation. The DOJ should provide additional guidance clarifying how Section 208 should and should not be interpreted by the states, including guidance regarding voters with disabilities. States should be prevented from passing additional language that restricts who can use Section 208 assistance.
- The DOJ should increase its Section 2 enforcement. The number of successful Section 2 lawsuits brought by private parties post-*Shelby County* is indicative of continued voting rights violations by jurisdictions. The DOJ, rather than private litigants, is best positioned to pursue these costly, complex Section 2 cases and should increase its enforcement presence.
- The DOJ should file amicus briefs and statements of interest in voting rights litigation that vindicate the purposes of the VRA to protect the franchise of all citizens.
- The DOJ should dedicate additional resources to ensure voter access for disabled persons, and work with other relevant agencies to enforce laws mandating accessibility of polling places and voting machines.
- The DOJ should increase its Voting Rights Act enforcement activity to address the needs of underserved minority populations including but not limited to Native American and Alaska Native communities.

COMMISSIONERS' STATEMENTS

Chair Catherine E. Lhamon Statement, in which Vice Chair Patricia Timmons-Goodson Concurs

As this report reflects, citizens in the United States—across our many states, not limited only to some parts of the country—continue to suffer significant, and profoundly unequal, limitations on their ability to vote. That stark reality denigrates our democracy and diminishes our ideals. This level of ongoing discrimination confirms what was true before 1965, when the Voting Rights Act became law, and has remained true since 1965: Americans need strong and effective federal protections to guarantee that ours is a real democracy.

The investigations of the Commission and its State Advisory Committees lowlight the painful contemporary truth of that need, for example, in New Hampshire where 100 percent of polling places were physically inaccessible to people with disabilities in a recent municipal election.¹ The Commission's Advisory Committees in Ohio,² Illinois,³ and Texas⁴ reported that voters of color recently and repeatedly suffered sometimes physical intimidation when they attempted to vote in multiple recent elections. The Commission's Kansas Advisory Committee documented Native American tribal ID rejection at polling sites, even though tribal IDs are a legal form of voter ID in the state.⁵ In New York just three years ago, baseless racially identifiable citizenship challenges impeded Americans from voting.⁶ In Alaska, the Commission's Advisory Committee reported that voters could not access voting materials in the languages they speak during the most recent elections.⁷ In North Carolina we heard testimony about a voter over 90 years of age who had to

¹ New Hampshire Advisory Committee to the U.S. Comm'n on Civil Rights, *Voting Rights in New Hampshire*, (Mar. 2018), at 16, <https://www.usccr.gov/pubs/2018/05-16-NH-Voting-Rights.pdf> <https://www.usccr.gov/pubs/2018/05-16-NH-Voting-Rights.pdf>.

² Ohio State Advisory Committee to the U.S. Comm'n on Civil Rights, *Voting Rights in Ohio*, May 2018, at 13, <https://www.usccr.gov/pubs/2018/06-27-OH-Voting-Rights.pdf>.

³ Illinois State Advisory Committee to the U.S. Comm'n on Civil Rights, *Civil Rights and Voting in Illinois*, Feb. 2018, at 20, <https://www.usccr.gov/pubs/2018/IL-Voting-Rights.pdf>.

⁴ Texas State Advisory Committee to the U.S. Comm'n on Civil Rights Briefing Transcript 60-61 (2018), <https://facadatabase.gov/committee/meetingdocuments.aspx?flr=155615&cid=276>.

⁵ Kansas State Advisory Committee to the U.S. Comm'n on Civil Rights, *Voting Rights and the Kansas Secure and Fair Elections Act*, Mar. 2017, at 12, <https://www.usccr.gov/pubs/docs/KS-Voting-Rights-Report.pdf> (citing O'Toole Testimony, Transcript, at 79-80).

⁶ Report at 140-41.

⁷ Alaska State Advisory Committee to the U.S. Comm'n on Civil Rights, *Alaska Native Voting Rights*, Mar. 2018, at 5, <https://www.usccr.gov/pubs/2018/05-25-AK-Voting-Rights.pdf> (citing James Tucker, Co-Counsel, Wilson, Elser, Moskowitz, Edelman, & Dicker LLP, written testimony submitted to the Alaska State Advisory Committee to the U.S. Comm'n on Civil Rights Briefing Transcript, at 4 (2017), <https://facadatabase.gov/committee/meetingdocuments.aspx?flr=155497&cid=234>), <https://www.usccr.gov/pubs/2018/05-25-AK-Voting-Rights.pdf> (citing James Tucker, Co-Counsel, Wilson, Elser, Moskowitz, Edelman, & Dicker LLP, written testimony submitted to the Alaska State Advisory Committee to the

make 11 trips to different state agencies and institutions to try and obtain the correct paperwork because her voter registration card did not match the name on her license.⁸ In recent elections in Arizona⁹ and Indiana,¹⁰ as documented by the Commission’s Advisory Committees in those states, even though polling locations had accessible technology, poll workers were not trained in how to use it, leaving voters with disabilities without a way to vote. In Georgia a legislator openly stated that he does not want early voting because of the type of people—voters of color—who will use it.¹¹

In these among so many circumstances still proliferating across the United States, we have let our voters down, compromising the integrity of our American self-concept. This report excavates, in sometimes exhausting detail, the ongoing, repetitive, and unfortunately predictable nature of voting discrimination in varying forms that persists with insufficient legal deterrents and often delayed or entirely absent remedies. That excavation confirms the need for effective federal policy responsive to the likelihood of voter discrimination and sufficient to deter such discrimination and timely remedy it when it does occur.

Because our existing federal statutory protections for the right to vote fail actually to ensure that each eligible voter may in fact exercise that right in every election in every state every time, I join my fellow Commissioners in calling on Congress urgently to correct the gap in our existing civil rights protections to ensure that each among us may participate fairly in democratic citizenship.

U.S. Comm’n on Civil Rights Briefing Transcript, at 4 (2017), <https://facadatabase.gov/committee/meetingdocuments.aspx?flr=155497&cid=234>).

⁸ *Briefing Transcript*, *supra* note 234, at 303-04 (statement by Bishop Dr. William Barber II, President and Senior Lecturer of Repairers of the Breach).

⁹ Testimony of Renaldo Fowler, Senior Staff Advocate, Arizona Center for Disability Law, at the Briefing before the Arizona Advisory Committee to the U.S. Comm’n on Civil Rights, briefing transcript at 83 (2018) (on file).

¹⁰ Testimony of Dawn Adams, Executive Director, Indiana Disability Rights, at the Briefing before the Indiana Advisory Committee to the U.S. Comm’n on Civil Rights, briefing transcript in Carmel, Indiana at 69 (2018) (on file).

¹¹ While considering legislation on weekend voting availability in that state, a Georgia state legislator expressed his opposition “because Black and other voters of color take advantage of these voting opportunities disproportionately, explaining that he ‘prefer[s] more educated voters than a greater increase in the number of voters.’” Written Testimony of Sherrilyn Ifill, President and Director-Counsel, NAACP Legal Defense and Education Fund, Inc. to the U.S. Comm’n on Civil Rights, Feb. 2, 2018, at 8 (on file).

Vice Chair Patricia Timmons-Goodson Statement, in which Chair Catherine E. Lhamon Concurs¹

Introduction

As a proud North Carolinian, I was honored that the Commission chose to hold the briefing, “An Assessment of Minority Voting Rights Access in the United States,” in my home state. I have lived in North Carolina for my adult life and served in its judiciary for 28 years. I am proud of my state and its accomplishments, and always look forward to “showing it off” to visitors.

However, I also understood that the Commission’s decision to come to North Carolina for the voting rights briefing reflected its thinking that North Carolina was the epicenter of the post-*Shelby County* election world. Given North Carolina’s history of voting discrimination,² “significant legislation, litigation, and statewide discussion of voting rights issues”³ filled the television airwaves and newspapers pre- and post-*Shelby County*.

Just as the Civil War revolutionized the expectations of former slaves, the Voting Rights Act revolutionized the expectations and lives of African Americans throughout the South. After its passage, we were imbued with hope, promise, and a spirit of determination. As a result, the number of African-American voters and African-American elected officials increased.

Voter Suppression in North Carolina

Unfortunately, that progress and the increasing level of voter participation are imperiled following the decision in *Shelby County*. When the Supreme Court issued *Shelby County* in 2013, Republicans controlled the North Carolina legislature and governorship—but Democrats had won other statewide offices and demographics suggested that North Carolina would become increasingly blue.⁴

As the Commission Report discusses, North Carolina Republicans then passed a new election bill that reduced early voting, cut polling places, and required voter ID.⁵ The report collects evidence indicating that those changes have had a discriminatory impact on poor and minority voters.⁶ Recently, Republican leaders have admitted they had a discriminatory intent—to prevent

¹ Chair Lhamon concurs in the spirit and substance of the Vice Chair’s statement while acknowledging that her observations as a former judge reflect her unique professional judgments and experiences regarding the special importance of the issues addressed in this report.

² U.S. COMM. ON CIV. RIGHTS, *An Assessment of Minority Voting Rights Access in the United States*, at 58-69 (2018) [*hereinafter* Commission Report].

³ Commission Report at 58.

⁴ *See, e.g.*, Julie Ajinkya and Rachel Wilf, *Toward 2050 in North Carolina*, CENTER FOR AMERICAN PROGRESS (MAY 8, 2012, 9:00 AM), <https://www.americanprogress.org/issues/race/reports/2012/05/08/11543/toward-2050-in-north-carolina/>.

⁵ Commission Report at 58-59.

⁶ *See generally*, Commission Report at 61-69.

Democrats, who are disproportionately African American, from voting.⁷ In other words, North Carolina Republicans changed voting laws to keep poor and black Democrats from voting.

As the federal government did not need to preclear any changes after *Shelby County*, a court threw out the changes because they targeted African Americans “with almost surgical precision”⁸—but only after years of litigation. The Supreme Court did not deny review and finalize the case until May 2017.⁹ In the meantime, North Carolina had two rounds of elections for its State Senate; two rounds of elections for its State House; two (close) Senate elections; 26 United States House elections; a (very close) gubernatorial election; a round of state executive elections; and a (close) presidential election. During those elections, North Carolina Republicans politicized the right to vote: they entrenched their own power by suppressing the voice of the poor and people of color.

Full of Potential Force: Overcoming Voter Suppression

During the Commission’s briefing, Bishop Dr. William J. Barber II, President and Senior Lecturer of Repairers of the Breach,¹⁰ asserted as follows:

Without the protection of the Voting Rights Act preclearance provisions, Jim Crow era voter suppression efforts are reappearing in North Carolina and in too many other states across the country. The wave of voter suppression, which has disproportionately impacted voters of color, imperils the confidence of all voters of good will and strikes to the very heart of our democracy.¹¹

As Bishop Barber intimates, the U.S. Supreme Court’s decision in *Shelby County* will reverberate in North Carolina for years to come. I share Bishop Barber’s concern that African Americans in particular will lose the confidence that we have slowly rebuilt after losing our voting rights during the era of Jim Crow.

However, suppressive acts are not new to African Americans in North Carolina. At the turn of the 20th century, a state constitutional amendment disenfranchised black voters.¹² Prior to that time, in Wilmington, NC, for example, black people had public jobs and were elected to several public

⁷ William Wan, *Inside the Republican creation of the North Carolina voting bill dubbed the ‘monster’ law*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html?noredirect=on&utm_term=.264fe87d6481.

⁸ *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

⁹ *North Carolina NAACP v. McCrory (Amicus Brief)*, BRENNAN CENTER FOR JUSTICE (May 15, 2017), <https://www.brennancenter.org/legal-work/north-carolina-naACP-v-mccrory-amicus-brief>.

¹⁰ Repairers of the Breach is a not-for-profit organization with a moral agenda focused on “how our society treats the poor, women, LGBTQ people, children, workers, immigrants, communities of color, and the sick.” See <https://www.breachrepairers.org/>.

¹¹ *Briefing Transcript*, *supra* note 234, at 41-42 (statement by Bishop Dr. William Barber II).

¹² Vann R. Newkirk II, *The Battle for North Carolina: Politics, social, and demographic forces in the battleground of North Carolina promise a reckoning with its Jim Crow past*, THE ATLANTIC (Oct. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/10/the-battle-for-north-carolina/501257/>.

offices: aldermen, policemen, and firemen.¹³ Throughout the state, black people had been politically engaged. But growing resentment and white supremacy foreclosed continued black advancement. In response to their disenfranchisement, Representative George Henry White, the last black congressman elected before the era of Jim Crow, stated:

This, Mr. Chairman, is perhaps the Negroes' temporary farewell to the American Congress, but let me say, Phoenix-like he will rise up someday and come again. These parting words are in behalf of an outraged, heart-broken, bruised, and bleeding, but God-fearing people, faithful, industrious, loyal people—rising people, fully of potential force.¹⁴

During the era of Jim Crow, suppressive efforts included literacy tests,¹⁵ grandfather clauses, and poll taxes. However, the Voting Rights Act helped increase African-American participation as it outlawed those suppressive methods.

As the Commission's Report discusses, suppressive efforts continue today. Bishop Barber enumerated some of the voter suppression tactics in North Carolina which include reduced polling places and the "visible presence of KKK members and swastikas on streets near pro-voting marches as well as derogatory comments from bystanders."¹⁶ Other suppressive tactics include ending early voting on Sundays, ending same-day registration, and ending polling places on college campuses.

Yet, African Americans in North Carolina are still "full of [the] potential force" to which George Henry White spoke. Reverend Barber testified that "community organizing and a strong sense of civic duty, based on history, contributed to the fact that black turnout did not significantly decrease, despite the communit[y] facing measures that 'surgically targeted' the ways that African Americans vote in North Carolina."¹⁷

In response to suppressive efforts, African Americans have increased their commitment to voting—leading to voting rates similar to the general population. But, this equal rate of voting masks the unequal efforts required for African Americans to vote, and falsely allows people to claim voting equality due to African Americans' disproportionate efforts.

¹³ William Alexander Mabry, *The Negro in North Carolina Politics Since Reconstruction*, 52 (Duke University Press, 1940).

¹⁴ Vann R. Newkirk II, The Battle for North Carolina: Politics, social, and demographic forces in the battleground of North Carolina promise a reckoning with its Jim Crow past, *THE ATLANTIC* (Oct. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/10/the-battle-for-north-carolina/501257/>.

¹⁵ Joel A. Thompson, *The Voting Rights Act in North Carolina: An Evaluation*, 16 *PUBLIUS*, 139, 139-53 (noting that the Voting Rights Act of 1965 suspended literacy tests and other discriminatory voter registration tests and requirements that were practiced in 40 North Carolina counties).

¹⁶ Commission Report at 68.

¹⁷ Commission Report at 203-04.

In practice, this commitment looks like hundreds standing in line to cast their vote on a Sunday in spite of Sunday voting cutbacks.¹⁸ This commitment looks like Souls to the Polls, a tradition aimed at getting African American churchgoers to vote after a Sunday church service.¹⁹ This commitment looks like Chief Justice Henry Frye, North Carolina's first African American elected official to the General Assembly and later first African American Supreme Court justice. Frye was turned away from registering to vote in the 1950s when he did not pass the literacy test,²⁰ but the first bill he introduced was a constitutional amendment abolishing the literacy test.²¹ The commitment also looks like Rosanell Eaton, a longtime voting activist who on two occasions had to prove her eligibility to vote. On the first occasion, in 1942, Eaton successfully registered to vote after Louisburg courthouse registrars required her to “put her hands by her side, stare straight ahead, and recite the Preamble to the Constitution.”²² On the second occasion, in 2013 and at 92 years old, Eaton traveled hundreds of miles and visited almost a dozen agencies and banks to reconcile her license and registration to prove her eligibility to vote.²³

Conclusion

Without federal oversight, Republicans have incentives to make voting more difficult for African-American voters in North Carolina and other states. While African Americans have a history of overcoming these relentless voter suppression tactics, in 2018 we should not have to continue to “overcome.” Instead, the federal government should protect our voter rights.

While I fully support all Findings and Recommendations in the Commission's Report, I highlight a few that are relevant to the voting injustices in North Carolina:

Findings

- Strict voter ID laws typically produce the greatest burden for African-American and Latino communities.
- Voter roll purges often disproportionately affect African-American or Latino voters.

Recommendations

- In amending the VRA, Congress should take account of the variety of measures that can impede minority voter access and that many facially neutral measures can impose

¹⁸ Sean Gallitz, *Democrats Try for Black Turnout with “Souls to the Polls” Events in NC*, CBS NEWS (Oct. 25, 2016 5:53 AM), <https://www.cbsnews.com/news/democrats-try-for-black-turnout-with-souls-to-the-polls-events-in-nc/>.

¹⁹ Julienne Gage, North Carolina Churches Sending ‘Souls to the Polls’: Black churches continue to play a role in the US state’s civil rights movement, marching together to voting centres, ALJAZEERA (Oct. 24, 2016), <https://www.aljazeera.com/indepth/features/2016/10/north-carolina-souls-polls-161024190219349.html>.

²⁰ Nancy McLaughlin, *Civil Rights Icon Henry Frye Introduces Obama, Tells a Story*, Oct. 11, 2016, https://www.greensboro.com/blogs/mclaughlin_faith_matters/civil-rights-icon-henry-frye-introduces-obama-tells-a-story/article_aeb0d4a6-d38c-5924-8985-6df2d3b5901f.html.

²¹ *Henry Frye: First African-American on the N.C. Supreme Court*, NC Department of Natural and Cultural Resources, <https://www.ncdcr.gov/blog/2017/02/03/henry-frye-first-african-american-on-the-n-c-supreme-court>.

²² Vann R. Newkirk II, The Battle for North Carolina: Politics, social, and demographic forces in the battleground of North Carolina promise a reckoning with its Jim Crow past, THE ATLANTIC (Oct. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/10/the-battle-for-north-carolina/501257/>.

²³ *Id.*

substantial disparities on minority communities and are sometimes intended to do so. Relatedly, small voting changes to polling places without notice and close in time to an election are an example of a seemingly small change with a potentially far-reaching impact.

- Congress should not exempt voter ID laws from review in any amendment to the VRA. Rather, those measures should be evaluated under the legal framework of available voting statutes to determine whether the law or application imposes any discriminatory effect or intent.

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Commissioner Debo P. Adegbile Statement, in which Chair Catherine E. Lhamon, Vice-Chair Patricia Timmons-Goodson, and Commissioner David Kladney Concur

Democracy depends upon people expressing their voices freely through their votes. Our commitment to this deceptively simple proposition is essential to the American conception of liberty and freedom. Votes are the voice of the people collectively expressed, and we are a free society because we have both the right and power to vote, to select our leaders, and express our preferences at the ballot box.

This is the essence of self-government. And, framed at this level of generality it captures shared values that define us—this is who we are and who we want to be. Our history and experience, however, teach us that democratic principles are not self-executing. For most of our history there was an intolerable and democracy-offending gap between our high democratic promises and our low anti-democratic practices. Most notably, for nearly a hundred years after the passage of the Fifteenth Amendment, our constitutional promise of the right to vote free from racial discrimination was honored more in the breach than in observance in too many places.

As this report explains, the federal government only began to successfully address flagrant voting discrimination once the Voting Rights Act of 1965 was passed. Earlier legislative measures had proven inadequate.

The path to passage of the Voting Rights Act was slow and arduous. Over time, change came as the direct result of bravery and sacrifice, including civil rights protests and activism, legal challenges, Presidential leadership, and landmark Congressional legislation. **The Voting Rights Act of 1965 was signed on August 6, 1965 and it is now recognized as one the most important Congressional enactments of any kind.**¹

How and why?

How? The Voting Rights Act is one of a small number of federal laws that some Americans literally died to achieve. Our predecessors knew that we really could not be the America we aspire to be if the Constitution was brazenly ignored and Jim Crow made our system of elections undemocratic. Military veteran Jimmy Lee Jackson in Alabama died for the right to vote, a brutal killing that directly gave rise to the history-altering march from Selma to Montgomery, a key catalyst for the passage of the Voting Rights Act. Americans observing the intolerable injustice traveled to join the protests, and Viola Liuzzo, a 39-year-old mother of 5 from Detroit, Michigan was murdered in 1965 for our right to vote in Alabama. Andrew Goodman, 20, and Mickey Schwerner, 24, from New York together with Mississippian James Earl Chaney, 21, in Neshoba County of his home state, were murdered by the KKK because the three were brave enough to advocate for equal voting rights. Minister James Reeb, whose ministry took him from his Kansas

¹ *Ten Bills That Really Mattered*, ROLLCALL (May 2, 2005, 2:25 PM), <http://www.rollcall.com/news/-9110-1.html>.

roots, to Philadelphia, right here to Washington D.C., to Boston, Massachusetts, and fatefully to Selma, Alabama, was beaten to death there because he stood up for our right to vote.

The violence captured on the Edmund Pettus Bridge in Selma, a town in which a major Civil War battle had been fought exactly one hundred years prior², was a modern-day, televised, brutal assault on men, women, and children but also on our democracy itself. The Edmund Pettus Bridge proved to be a bridge that provided passage not only for cars and marchers but also for a nation that needed to travel the distance from its systematic and unabashedly racist voting exclusion to a more inclusive and true democracy predicated on equality and inclusion.

The events in Selma moved President Lyndon Johnson of Texas to deliver what many believe to be **one the best and most significant civil rights speeches ever delivered before a joint session of Congress**.³ The speech urged the nation to end voting discrimination and to keep its long broken constitutional promise to its citizens. It should be assigned for viewing in every high school history class. The speech reportedly caused civil rights leaders to weep in recognition of the significance of hearing the President, a son of the south, calling with urgency for a federal voting law and using the words of the Civil Rights Movement in doing so.

But it is worth noting that the murders did not stop once the Voting Rights Act was passed. Voting advocate Vernon Dahmer died for the right to vote in Mississippi in 1966—the year I was born. He was targeted and his home burned down by the KKK—because he was a passionate advocate for black voter registration. It was a signal that our democracy would continue to be contested and that even the landmark Voting Rights Act could not dislodge the discrimination by itself.

The U.S. Commission on Civil Rights has witnessed history and helped make it. We have recorded the experience regarding voting exclusion across the nation and the work continues with this report and the investigations conducted by our State Advisory Committees. Since its creation in 1957 the Commission has conducted field hearings that supported the passage of the VRA and played an important role by documenting voting discrimination, its impacts, and the need for federal responses.

Why is the Voting Rights Act regarded as one of the most important federal laws of any kind?

The Act is revered because it was and is transformational. It literally allowed the nation to deliver on “a dream deferred”—on a promise broken—and to commit meaningfully to self-government by the people. In tangible ways it gave access to the full measure of citizenship, it allowed long-excluded voters to register, vote, and have their votes count equally. It brought the power of the United States to bear to enforce the Constitution and guarantee equal voting rights. It expanded electorates and helped legislative bodies and elected courts become more representative. It barred invidious tools of voter exclusion and shifted the burdens of “time and inertia”⁴ from the victims

² *Selma 1865—The First “March to Freedom* Alabama Public Radio (Aug 3, 2016), <http://apr.org/post/selma-1865-first-march-freedom#stream/0>.

³ LBJ Library, *President Johnson’s Special Message to the Congress: The American Promise*, LBJ PRESIDENTIAL LIBRARY (March 15, 1965), <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise>.

⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

of voting discrimination to the perpetrators with a preclearance provision that created a system of federal oversight of voting changes in places with histories of voting discrimination.

Stated simply, the Voting Rights Act made a minority inclusion principle part of American federal law and provided effective tools for ensuring it.

The Voting Rights Act of 1965 was later expanded and extended to states, like Texas, that urgently required minority voter protections, against practices that made it difficult for eligible voters to overcome language and other barriers to vote. The Act embraces the important notion that disabilities should not impose unacceptable barriers to voter access.

The right to vote is the bedrock of American democracy. It is, however, a right that has proven fragile and in need of both Constitutional and robust statutory protections. In his award-winning history of voting in America, Alexander Keyssar explains that American democracy is contested. He traces the history of the vote from the revolutionary period to the contemporary period and shows that our nation, conceived in democratic ideals, has expanded the franchise only gradually and through the concerted efforts of those demanding access to the vote, and through it, to meaningful inclusion within the nation's political life.

Congress reauthorized and President Bush signed a Voting Rights Act extension in 2006. It renewed and strengthened Section 5 preclearance for 25 years and other special provisions representing the nation's enduring commitment to minority inclusion in our democracy. In *Shelby County v. Holder*, the United States Supreme Court struck down the provision that gave effect to the federal preclearance provision in many places where voting discrimination has proven persistent and adaptive. The Court recognized, as it must, that voting discrimination persists but noted that preclearance must be grounded on contemporary evidence of voting discrimination. The dissenters noted that the Court was suspending important minority voter protections which were still vitally needed, and that the Constitution did not require the Court to second-guess Congress in this way.

The Commission's 2018 Report, "An Assessment of Minority Voting Rights Access in the United States," focuses on an assessment of the U.S. Department of Justice's enforcement of the VRA in the years since the last reauthorization in 2006. Because it begins at that point, it examines enforcement efforts before and after the *Shelby County* decision. One observation is that voting changes that would have never had the force of law when there was Section 5 preclearance have now gone into effect and adversely affected minority voters. Voting discrimination persists in some of the states where Section 5 did important work. Some of these measures have been statewide laws that have far-reaching impact and continue during years of complex and costly litigation in ways that can impact election outcomes.

The report notes that there are many measures that impede minority voters that are based on tenuous justifications, such as some very strict voter ID laws.

The problem of voting discrimination persists in ways that are not simply "black and white," indeed, history teaches that it was never just that way. Native American and Alaska Native voters face barriers to access, including language and ballot access challenges that many are not aware of.

Latino voters also face challenges to voter access: seemingly small voting changes affecting polling places or large statewide measures are sometimes intended or have the impact of discriminating against them. In *LULAC v. Perry*, Justice Kennedy observed that the State of Texas manipulated voting laws to take away the ability of Latino voters to have an electoral impact precisely at the time when they were prepared to do so.⁵ This is one pattern of voting discrimination—that discriminatory measures are put in place when minority communities are on the precipice of exercising their political power, or sometimes in response to that new power, as we have seen more recently in North Carolina, where an appellate court noted that the discriminatory statewide law was enacted with surgical precision to discriminate.

The report also examines the important role of “private attorneys general”—private litigants—that continue to play a vital role in voting rights enforcement. Voting litigators and organizations with expertise in this area advised that the resources and weight of DOJ enforcement call for DOJ to become more active in its enforcement efforts.

In support of this notion, and in a post-preclearance world, complex, expensive, and slow litigation is the best, if uncertain, route to attack voting discrimination and DOJ is uniquely situated to do it.

After an election with discriminatory voting measures in place, it is often impossible to adequately remedy the violation even if the election procedures are subsequently overturned as discriminatory. Officeholders chosen under discriminatory election rules have lawmaking power, and the benefits of incumbency to continue those rules and perpetuate their continued election.

The report also notes that not only was a powerful and efficient enforcement tool lost with the *Shelby County* ruling, but also a transparent and a prophylactic mechanism that required jurisdictions to report their voting changes so that they could invite scrutiny and ensure that the burdens of potentially discriminatory changes were not imposed immediately or at all. Preclearance thus blocked voting changes, shed light on them, and provided significant deterrence in covered jurisdictions.

The impact of the *Shelby County* decision was tangible and removed important voter protection tools. But significantly it also sent a signal, clearly received by some states and jurisdictions that the nation was in a retreat regarding federal minority voting rights enforcement. Both results are undesirable.

As the report explains, voting discrimination continues to be more concentrated and persistent in some states and jurisdictions than in others.

Without the preclearance remedy, Section 2 of the VRA is the core remedy for minority voter discrimination. As the report notes, however, enforcement and litigation under Section 2 of the VRA is an inadequate, costly, and often slow method for protecting voting rights.

The number of successful Section 2 cases since the Supreme Court decided *Shelby County* has quadrupled, but that remedy is not always adequate to the threat to voters. Accordingly, we call upon Congress to act to improve voter protections in ways that account for historic and persisting

⁵ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428-41 (2006).

threats to minority voters, but also in ways that account for the tendency of voting discrimination to be directed at burgeoning communities of minority voting power. Congress has the power and we hope that it will soon embrace its longstanding bipartisan support for the Voting Rights Act to amend the Act in a way that provides additional minority protection tools consistent with the Constitution.

In the time since the Commission voted unanimously to approve this report calling for greater DOJ enforcement and Congressional action, reports⁶ detailing and cautioning about the impact of widespread purging of voters have been released, and a federal Judge found that Florida's early voting restrictions evidence "a stark pattern of discrimination" at state college and university campuses. Students like John Lewis and many others were brutally beaten on the Edmund Pettus Bridge more than 50 years ago, and today voting measures intended to suppress student and minority votes persist.

Racial discrimination in voting has proven to be a particularly pernicious and enduring American problem. The pattern that Keyssar so carefully documented, our contested democracy characterized more by ebbs and flows than by unidirectional progress, persists. It is time for the nation, however, urged by this Commission and the American people, to call upon Congress and DOJ to move away, once again, from the ebb and let democracy flow. There are two ways to win elections—to mobilize more voters or suppress your opponent's voters. Sadly, both methods can prove effective, but only a choice to allow all eligible votes to be cast is consistent with the finest traditions of our nation and we should again make that choice. America's minority voter inclusion principle embodied in the VRA helps to define us and we must recommit ourselves to expanding it. The vote is the most powerful tool in a democracy. To harness its full power however, voting must be accessible, protected, broadly exercised, and an amended Voting Rights Act and more DOJ enforcement would enhance the power of the vote.

In Selma, Alabama in 1965 the Reverend CT Vivian led a group of African Americans to the courthouse steps to register to vote. Vivian made a clear and unyielding case for their right to vote but was met by Sheriff Jim Clark, the same man who later led the assault on the peaceful marchers on the Edmund Pettus Bridge. Rev. Vivian was told to yield and then, with television cameras rolling, punched in the mouth by Sheriff Clark, drawing blood. Rev. Vivian responded by explaining that they were "willing to be beaten for democracy."⁷ Today we hope that we have moved past the need to be beaten or to bleed for democracy, but we just as assuredly know that we must continue to fight for it.

⁶ See, e.g., Jonathan Brater, Kevin Morris, Myrna Pérez, and Christopher Deluzio, *Purges: A Growing Threat to the Right to Vote*, THE BRENNAN CENTER (July 20, 2018), <https://www.brennancenter.org/publication/purges-growing-threat-right-vote>.

⁷ Eyes on the Prize, "Bridge to Freedom," PBS (Feb. 25, 1987), <https://www.youtube.com/watch?v=nQT7S8fuzGc>.

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Commissioner Karen K. Narasaki Statement, in which Chair Catherine E. Lhamon, Vice-Chair Patricia Timmons-Goodson, and Commissioner David Kladney Concur

In striking down the Voting Rights Act's Section 4 coverage formula, the Supreme Court majority opinion in *Shelby County v. Holder* reasoned that such "extraordinary legislation,"¹ subjecting some states to disparate scrutiny based on their history of racial discrimination, was no longer justified because, in their view, "'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination,"² no longer existed in these states. In dissent, Justice Ruth Bader Ginsberg observed that the Voting Rights Act "surely has not eliminated all vestiges of discrimination," as evidenced by the large numbers of proposed changes submitted by covered jurisdictions that continued to be struck down as discriminatory.³ The ongoing necessity of rejecting these jurisdictions' desired changes demonstrated "that barriers to minority voting would quickly resurface were the preclearance remedy eliminated."⁴

As this report⁵ documents, the majority's belief was misplaced and Justice Bader Ginsberg's observation proved prescient. Unleashed by the 5-4 decision, previously covered states and counties rushed to enact or enforce laws that had been or would clearly have been prevented by the Department of Justice under the Voting Rights Act. Several elections later, there is ample evidence that some states and jurisdictions merit additional scrutiny and oversight because they persist in taking actions that make it more difficult for minority citizens to register, to vote, and to have their votes be counted.⁶ Voting discrimination has merely assumed seemingly benign, modern forms enacted often with discriminatory intent in the guise of election integrity, just as was happening before the passage of the Voting Rights Act over 50 years ago.

The facts show that in the face of our nation's changing demographics, there are elected officials who rather than work to win their vote are choosing instead to cling to power through claims of voter fraud. Conservative jurist Judge Richard Posner, who initially⁷ accepted these claims, now

¹ 570 U.S. 529 at 552 (2013).

² *Id.* at 554.

³ *Id.* at 563 (Ginsburg, J., dissenting).

⁴ *Id.*

⁵ I would like to thank the Commission's Office of the Staff Director, Office of Management and its respective Divisions, Regional Programs Coordination Unit, Office of Civil Rights Evaluation, Office of the General Counsel, and State Advisory Committees, as well as our Special Assistants for their contributions in organizing and staffing the North Carolina briefing, SAC briefings, and for their work researching, drafting, and revising this report. I would also like to thank my law clerk Aime Joo from Harvard Law School for her work on this report and statement.

⁶ U.S. COMM. ON CIV. RIGHTS, *An Assessment of Minority Voting Rights Access in the United States*, at 274. (findings) (2018) ("Voting discrimination continues to be more concentrated and persistent in some states and jurisdictions than in others.") [hereinafter Report]. Please note page citations to the Report may be slightly off due to the final formatting of the Report.

⁷ *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007). Judge Posner, writing the opinion, framed the disproportionate impact Indiana's contested voter ID laws may have on people of lower socioeconomic status as a political, rather than discriminatory, problem. The new restrictions merely "compell[ed] the [Democratic Party] to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the

believes that they are “a mere fig leaf” to conceal the driving motivation of “disenfranchis[ing] voters likely to vote for the political party that does not control the state government.”⁸ Just as before the Voting Rights Act, rather than allowing minority voters to choose who will best address their needs and concerns, these politicians are manipulating the system to choose their voters instead.

It is no surprise that the overly stringent voter ID laws studied in our report are all largely enacted by conservative-controlled states,⁹ where the voters blocked by these rules are largely minority groups, who are “on the cusp of being able to exercise political power,”¹⁰ and are believed to lean Democratic.¹¹ It does not matter if these more stringent voting restrictions are implemented for “partisan gain,” and not to explicitly disfranchise minorities.¹² As closely intertwined as race and political affiliation increasingly are, the use of “partisanship as a proxy for [race]” may itself be intentional discrimination.¹³ Thus, this is not “politics as usual.”¹⁴ This is history repeating itself through the targeting of minorities with “almost surgical precision”¹⁵ to prevent them from voting for the other political party.¹⁶ This is what racial discrimination looks like in the 21st century.¹⁷

Sadly, more than 50 years after the passage of the VRA, its full force is still needed. True, first generation forms of vote suppression have been eliminated,¹⁸ but by no means has discrimination disappeared.¹⁹ Like a hydra, it has simply grown new heads and assumed new forms to replace the manifestations that have been struck down.²⁰ Literacy tests that arbitrarily bar minority voter

new law from bothering to vote.” *Id.* Any cost to the Democratic Party by the law “inducing eligible voters to disfranchise themselves,” *id.* at 952, was offset by the legislature’s legitimate interest in “enact[ing] reasonable regulations . . . to reduce election—and campaign—related disorder.” *Id.* at 954.

⁸ *Frank v. Walker*, 773 F.3d 783, 788 (7th Cir. 2014). Seven years after his *Crawford* opinion, Posner recognized the discriminatory impact, if not intent, of voter ID laws in Wisconsin. He rejected his earlier statements that legislatures were empowered to pass election regulations that disparately impacted minority voters in the name of election integrity.

⁹ *Id.* at 790-91. *See also* Report at 82.

¹⁰ Report at 230. *See also* *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 238 (4th Cir. 2016) (“The only clear factor linking these various “reforms” is their impact on African American voters. The record thus makes obvious that the “problem” the majority in the General Assembly sought to remedy was emerging support for the minority party. Identifying and restricting the ways African Americans vote was an easy and effective way to do so.”).

¹¹ *Frank*, 773 F.3d at 791.

¹² Report at 230.

¹³ *Id.*

¹⁴ *Frank*, 773 F.3d at 791.

¹⁵ Report at 58 (quoting *McCrory*, 831 F.3d at 214).

¹⁶ *Id.* at 68.

¹⁷ *Id.* at 66 (quoting *McCrory*, 831 F.3d at 233) (“Even if done for partisan ends, that constituted racial discrimination”).

¹⁸ *Id.* at 17-19.

¹⁹ *Id.* at 275 (findings) (“After decades of resistance and overt discriminatory actions on the part of officials in several states and local jurisdictions, the Section 5 ‘preclearance’ provisions of the VRA proved necessary to deal with persistent and adaptive voting discrimination, because litigation was slow and ineffective in stopping racially discriminatory election practices until after an election had taken place.”).

²⁰ *Shelby Cty.*, 570 U.S. at 560 (Ginsburg, J., dissenting).

registration are gone, but challenges to voters on the rolls still permit voters—likely to be easily identifiable minorities—to be purged or denied registration, in some instances even without proof that the challenge against them is valid.²¹ Poll taxes are unconstitutional, but voter ID laws still force minority voters, who are more likely to be poor and to lack a government-issued ID or the documents needed to obtain one, to expend time and money that many cannot afford.²² These difficulties are exacerbated by aggressive voter purges that rely on problematic systems like Crosscheck, which flag people simply by comparing full names and birthdays of registered voters across states, disproportionately removing citizens of color who are more likely to share common names.²³

“[T]he 15th Amendment guaranteed all U.S. citizens the right to vote regardless of ‘race, color, or previous condition of servitude,’”²⁴ but practices like requiring documentary proof of citizenship,²⁵ cutting early voting,²⁶ purging voters for inactivity,²⁷ closing polling places without notice,²⁸ and denying language assistance²⁹ all make exercising that Constitutional right much more difficult for minority voters.

And, what is more, the Supreme Court has gutted the federal government’s ability to protect voters of color from the states with a continuing history of discrimination by eviscerating the enforcement of Section 5 of the VRA, the solution “uniquely tailored to [the] unique problem” of voter discrimination.³⁰ The *Shelby* majority was correct that Section 5 was “extraordinary legislation” needed to correct an extraordinary fault.³¹ They were profoundly incorrect that the need for such extraordinary measures has passed.

²¹ Report at 132-41 (discussing challenges of voters to the rolls).

²² *Id.* at 77-99. The cost of obtaining a government-issued ID can range from \$75-\$175, which is greater than the cost of the original poll tax after adjusting for inflation. *See id.* at 89.

²³ *Id.* at 280 (findings) (“Aggressive purges of voter rolls, particularly when based on flawed systems like Crosscheck, will improperly remove many voters and may improperly remove a disparate amount of minority voters.”). *See also id.* at 107-10. In at least one survey of suspended voters in Kansas, people with foreign sounding names were more likely to be flagged as ineligible voters, potentially requiring them to produce documentary proof of citizenship to avoid being purged. *Id.* at 117-18.

²⁴ *Id.* at 10.

²⁵ *Id.* at 122-32.

²⁶ *Id.* at 155-64.

²⁷ *Id.* at 151-54.

²⁸ *Id.* at 165-80.

²⁹ *Id.* at 180-90.

³⁰ *Briefing Transcript, supra* note 234, at 33 (statement by Justin Levitt, Professor, Loyola L. Sch). *See also* Report at 275 (findings) (“After decades of resistance and overt discriminatory actions on the part of officials in several states and local jurisdictions, the Section 5 ‘preclearance’ provisions of the VRA proved necessary to deal with persistent and adaptive voting discrimination, because litigation was slow and ineffective in stopping racially discriminatory election practices until after an election had taken place.”).

³¹ *Shelby Cty.*, 570 U.S. at 552.

It is simply untrue that other provisions of the VRA are adequate to ensure their rights are safeguarded.³² Section 5 held a unique prophylactic power absent from other VRA protections.³³ By requiring jurisdictions to defend their desired changes, preclearance not only forced states to think through the consequences of their actions, but also provided officials the leverage needed to deny discriminatory proposals in the face of powerful political pressure.³⁴ Ironically, some witnesses cite to the fact that voter turnout did not suffer as much as expected,³⁵ ignoring the enormous investment made necessary by *Shelby* in volunteer and staff time by community-based organizations and civil rights legal groups to monitor and challenge what county and other local voting officials were doing; lawsuits that forced legislators to modify their initial legislation; and intensive outreach to educate and assist minority voters because the federal government could no longer adequately protect their right to vote.³⁶

The further genius of Section 5 was the understanding that some jurisdictions are chronic offenders,³⁷ and that the harm from vote suppression is irreparable and cannot be remedied post-hoc. Unlike other harms that may be rectified through the courts by compensating plaintiffs with monetary damages, real remedies are unavailable when it comes to violated voting rights. As we observed³⁸, once an election has been held—fairly or not—the result cannot be undone.³⁹ Litigation takes too long to stop the discriminatory measures from going into effect, and preliminary injunctions are seldom granted.⁴⁰ Those officials who seek to subvert democracy have incentive to act even knowing that their actions violate the Constitution or what is left of the Voting Rights Act because they know that the election will not be undone and they will be able to hold

³² Report at 277 (findings) (“In the face of ongoing discrimination in voting procedures enacted by states across the country, enforcement and litigation under Section 2 of the VRA is an inadequate, costly, and often slow method for protecting voting rights.”). Opponents of reviving Section 5 contend that even after the *Shelby* decision, the VRA “remains a powerful statute whose remedies are more than sufficient” to combat voting discrimination. *See* von Spakovsky Testimony, *Briefing Transcript, supra* note 234, at 27.

³³ Report at 40-42.

³⁴ *See* Report at 215-16 (“DOJ requests for further information that led to the prevention or modification of a discriminatory voting change . . . may be valuable indicia that discrimination was prevented, or that preclearance was effective.”).

³⁵ Report at 200-10.

³⁶ *Id.* at 54 (*Shelby* “shift[ed] the burden of monitoring election changes to voting rights groups, and impos[ed] a large burden on communities, who must now stretch limited resources to track changes themselves in the absence of government transparency”); *see also* footnote 309 (summarizing litigation and various election board monitoring and education programs).

³⁷ *Id.* at 40-45. Section 2 litigation after *Shelby* illustrates that formerly covered jurisdictions are still some of the worst culprits of voter discrimination, with more than half of all successful Section 2 litigation occurring in these historical offender states. *Id.* at 223-28.

³⁸ Report at 56 (“In both North Carolina and Texas, multiple elections were held, during which practices were applied that federal courts determined to have been intentionally racially discriminatory and in violation of longstanding constitutional and federal law.”)

³⁹ *Briefing Transcript, supra* note 234, at 33 (statement by Justin Levitt).

⁴⁰ Report at 231-34. Not only is voting rights litigation notoriously cumbersome, it also burdens the victims with a large informational disadvantage. *See id.* at 276 (findings) (“The burden of proving voting discrimination now lies with a plaintiff and not the jurisdiction proposing the change even though the jurisdiction has easier access to data and analysis regarding the impact of a particular change and evidence of discriminatory intent.”).

onto office and move their agenda for several years while litigation is pending. Moreover, the harm from vote suppression is twofold. Not only is the will of the people subverted, but also each individual's inherent right to vote is transgressed. Even if the suppressive rules would have failed to change election outcomes, an injury has nonetheless occurred. Section 5 was specifically designed to be an “extraordinary remedy,”⁴¹ precisely because Congress recognized that people willing to suppress votes to stay in power will always be seeking new ways to accomplish that goal,⁴² and once their schemes were successful, its victims will have suffered an irreversible harm.

This was true in 1965, remains true today, and will be true in the foreseeable future. Congress can and should correct the Supreme Court's mistake. It is abundantly clear that “the most fundamental right in our democratic system”⁴³—the right to a fair and equal vote—is under siege in several states and jurisdictions, and given that reality state sovereignty is not an inviolable right.

For the vast majority of Americans, voting is a fairly easy process, and so it is easy to miss the fact that there are barriers for others. Some states have realized that their process for registration and voting is not easy for *all* Americans, and these jurisdictions are rightfully working on increasing access to the ballot for those marginalized voters.⁴⁴ Unfortunately, other states are perpetuating the illusion that voting is simple for all citizens, while quietly raising the barriers for low-income and minority voters to cast their ballots. Regardless of why the increased obstacles to the right to vote are implemented, these measures inevitably result in voter discrimination.

Our recommendations lay out guiding principles the Commission believes are essential for stopping persistent practices of voter suppression and discrimination. They also follow this Commission's long history since its inception in 1957 of investigating voting rights violations and advising Congress and the Executive on ways to address these problems, including solutions incorporated into the Voting Rights Act.⁴⁵ The recommendations made in this report are just as needed for consideration and adoption as those we have made in the past.

As President Lyndon B. Johnson asserted in his Special Message to Congress supporting the Voting Rights Act, guaranteeing each citizen's equal right to vote involves “no constitutional issue . . . no moral issue . . . [and] no issue of States rights or national rights. There is only the struggle for human rights.”⁴⁶ And while marginalized communities are sadly—as they too often are—the canaries in a coal mine, and thus suffer the most immediately and significantly from voter

⁴¹ Ari Berman, *Give Us The Ballot: The Modern Struggle For Voting Rights In America* (2015) (New York: Picador), at 171 (stating that Justice Marshall, in his *City of Rome v. United States* decision, held that Section 5 did not require finding discriminatory purpose, because it was designed to combat “persistent and intractable voting discrimination” and an intent requirement would undermine this objective).

⁴² Report at 39-40.

⁴³ *Shelby County*, 570 U.S. at 556 (Ginsburg, J., dissenting).

⁴⁴ See Appendix C, Automatic Voter Registration.

⁴⁵ See Appendix A (discussing the Commission's 1961 report's impact on the VRA).

⁴⁶ President Lyndon B. Johnson, “Special Message to Congress: The American Promise,” March 15, 1965, <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise>.

suppression, we as a nation must recognize that this is not simply a minority problem. It is “an American problem.”⁴⁷

This country has made progress since the Voting Rights Act was passed, and that progress should rightly be celebrated and acknowledged. But we have yet to fully “overcome the crippling legacy of bigotry and injustice.”⁴⁸ The continued protections of Section 5 and a new preclearance coverage formula are essential if we are to accomplish that goal. Over 50 years ago, our leaders recognized the critical and systemic threat of vote suppression to a fair and strong democracy and took action. The same leadership and resolve is needed again. Fifty years from now, the court of history will judge this pivotal moment as one in which our leaders chose decisively to act, or one in which they failed to live up to our nation’s sacred ideals of democracy. I hope that we will all be able to celebrate that today’s leaders made the right choice.

⁴⁷ *Id.*

⁴⁸ *Id.*

Commissioner Michael Yaki Statement, in which Chair Catherine E. Lhamon Concurs

If there is a *sine qua non* of the U.S. Commission of Civil Rights, it is the right to vote. One of the early achievements of the Commission—in 1961—was its report on voting rights¹, which became the factual predicate for the legislation that became the Voting Rights Act of 1965.

In recent years, this Commission has fallen short of its historic charter. In 2006, under a conservative majority, the Commission refused to even endorse the reauthorization of Section 5, which had received overwhelming support in the Congress.² In 2012, with the Commission split evenly on ideological lines, the Commission's milquetoast analysis of the Census and Section 5 fell flat.³ Both, in their own deficiencies, seemed to portend the seismic shift—parroting, in many ways, on the flawed logic of both reports, the decision in *Shelby*.⁴

Shelby is a stain on the fabric of civil rights in this country. It has given license to the same forces and constituencies that obstructed and diminished the rights of minority voters, albeit through more creative but no less onerous means. As the record in this report shows, racial gerrymandering⁵, voter registration purges⁶, restrictive voter ID laws⁷, the termination of early voting⁸ and decreasing access to the polls⁹ have been unleashed because of the loss of the preclearance protections of Section 5 of the Voting Rights Act.

This Report rectifies the research and analytical flaws of our recent past, but in many ways it is a pyrrhic victory. Even more sad, we saw this coming. Beginning with the *Bossier II* decision in 2000¹⁰, a majority of the Supreme Court has steadily weakened the commitment to enforce the right to vote. We see our judicial system being filled with jurists cut from the same philosophical cloth, who belong to or are given a seal of approval by the Federalist Society and the like for the sole purpose of tearing down the precedents on race set since the 1954 Brown decision. Most recently, many of these same organizations were proclaiming that the election of President Obama brought about a “post-racial” society while at the same time they used this as a justification to dismantle the structural elements that brought down the barriers and provided access to many voters of color to the polls in 2008 and 2012.

The ability of state and local governments and governmental officials to flout the Voting Rights Act, knowing that litigation under Section 2 is costly and time-consuming, makes it impossible to provide comprehensive coverage to every jurisdiction engaged in voter suppression and

¹ U.S. Comm'n on Civil Rights (USCCR), U.S. Comm'n on Civil Rights Report, Book 1: Voting, 1961.

² U.S. Comm'n on Civil Rights (USCCR), Voting Rights Enforcement & Reauthorization (2006), at 91, dissent of Commissioner Yaki and Commissioner Melendez.

³ U.S. Comm'n on Civil Rights (USCCR), Redistricting and the 2010 Census: Enforcing Section 5 of the Voting Rights Act—2012 Statutory Report, 2012, at 137, Statement of Commissioner Yaki and Commissioner Kladney.

⁴ 570 U.S. 529 (2013).

⁵ Report at 229, footnote 1329.

⁶ Report at 141-55.

⁷ Report at 74-99.

⁸ Report at 155-64.

⁹ Report at 164-95.

¹⁰ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

oppression. *Shelby* has turned the concept of voting rights on its head, where officials now work to restrict, and not expand, the franchise. Worse, there is little attempt to conceal the racial animus underlying these actions or the transparency of their actions to block the franchise and empowerment of minorities. In this way, there is a direct line from *Shelby* to Charlottesville, where alt-right, neo-Nazi, and hate groups, in their putsch-filled delusions, believe they can turn back the clock and preserve the supremacy of their self-defined racial purity. When government is acting under the color of law to enact the legal equivalent, it becomes a distinction without a difference.

Our nation is breaking, and there is precious little time to heal the wounds that are tearing the fabric of our democracy asunder. This Report, for all its factual evidence that the Voting Rights Act is being rendered a hollow shell of its former self, only has meaning if the Congress and the President act upon its findings and recommendations. Enacting a rejuvenated and re-invigorated Section 5 is one step; appointing judges who believe that the 14th Amendment gives Congress the authority to enact it is another. This is not a question of liberal and conservative—those are discussions that can and should be fought at the ballot box, and in the chambers and under the domes of the Congress and state legislatures throughout this country. But there should not be any debate, any discussion, any disagreement that every person, regardless of race, color, creed, language, or disability, should be given every opportunity to cast a ballot in our country. Having a nation whose government is voted upon and governed by the broadest and fullest spectrum of our populace is a necessary first step towards achieving our more perfect union.

We would be wise to remember—as we should every day—the words of Dr. King:

So long as I do not firmly and irrevocably possess the right to vote I do not possess myself. I cannot make up my mind—it is made up for me. I cannot live as a democratic citizen, observing the laws I have helped to enact—I can only submit to the edict of others.¹¹

¹¹ Martin Luther King, Jr., *Give Us the Ballot, We Will Transform the South*, PBS, <http://www.pbs.org/pov/pov2008/election/wvote/king.html>.

Commissioner Gail Heriot Statement and Rebuttal

I found this report somewhat stronger than some recent Commission reports. It contains some useful information. Nevertheless, it suffers from some substantial flaws. Consequently, I could support neither the staff-generated part of the report nor the accompanying findings and recommendations.¹

I will try not to get into the minutiae of what I see as the report's shortcomings—though some of my disagreement comes from its treatment of *Shelby County v. Holder*² and (in particular) the way in which it touches on the possibility of post-*Shelby County* legislation. Chief Justice Roberts has already ably explained the reasons for the Supreme Court's decision. Others have defended the position that additional legislation is not warranted at this time.³ Since this is not my area of expertise, there is little I can add to the debate. Instead, I would like to make a few more general (and somewhat scattered) points about voting rights and the enforcement of those rights. On some of these points I suspect there will be substantial agreement.

THE IMPORTANCE OF VOTING RIGHTS

A good way to illustrate the importance of voting rights is to examine the behavior of actual politicians: Most of them will work hard to gain the goodwill of their constituents. By and large, that is a good thing. Non-voters, on the other hand, usually get less attention—except, as in the case of children, when actual voters have very strong desire to benefit them.⁴

¹ Because of a death in my family, I was unable to attend the telephonic meeting at which Commissioners voted on the report. For the record, I would have voted no. My understanding is that the report was adopted by a vote of 6 to 0. All of those voting were appointed by Democratic office holders.

² 570 U.S. 529 (2013).

³ See, e.g., Ilya Shapiro, *Don't Use MLK to Push Harmful Election Laws*, Forbes (January 22, 2014), <https://www.forbes.com/sites/ilyashapiro/2014/01/22/dont-use-mlk-to-push-harmful-election-laws/#26b47492750a>. Although there have been proposals, no additional legislation has been enacted. Congressional leaders may have adopted something akin to Shapiro's position at least for the time being. That could, of course, change in the future.

⁴ Whether the lack of voting rights is a problem in need of a solution will depend on the nature of the case. These days it would be difficult to find Americans willing to defend the concept of excluding voters based on their race. But other reasons for denying a group the vote are much more defensible. For example, children are a large non-voting population, but since parents almost always view themselves as protectors of their children rather than antagonists or competitors, this is rightly not viewed as a problem. The number of 8-year-olds with the maturity to exercise the franchise responsibly is certainly verging on zero if it is not actually zero. Another non-voting population is non-citizens. For most people, this is in essence by definition. A citizen is a member of the polity; a non-citizen is not. There are various rights and responsibilities that follow from that. One could argue that resident non-citizens are "affected" by the decisions made by voting citizens and their representatives. That's true. But it's also true of non-resident citizens. We live in an inter-connected world. Our nation's policies on foreign aid, immigration, and trade often have a profound effect on individuals around the world. Yet (so far) no one has argued that non-resident, non-citizens should have a say in the political decision-making of a country. (Indeed, the current investigation into whether Russia attempted to influence the 2016 election demonstrates the general consensus that non-resident, non-citizens should have no right to influence elections.)

Consider the case of Senator Thomas E. Watson of Georgia (1856-1922), whose political (and journalism) career spanned many decades, beginning prior to the disfranchisement movement in the South and concluding after disfranchisement was a fait accompli. The Tom Watson of the 1880s was a passionate fusion populist, seeking to unite poor whites and poor African Americans in order to gain what he saw as their fair share of the South's then-meager resources.⁵ For reasons

Where a polity chooses to draw the line (or, put differently, how it chooses to define "citizen" for the purposes of the franchise) may vary. But the fact that politicians will, all other things being equal, pay more attention to the citizen than to the non-citizen is considered by most to be a feature and not a bug. Once a non-citizen becomes a citizen, the commitment of the polity to him or her increases significantly, and so does his or her commitment to the polity. Note that some American municipalities allow non-U.S. citizens to vote in municipal elections. Rachel Chason, *Non-Citizens Can Now Vote in College Park, Md.*, Wash. Post (September 13, 2017). These municipalities are essentially defining "citizen" for municipal purposes differently from the federal government. There is no inherent reason that this cannot be done. Whether such an expansion of the electorate is permissible under the law in any particular state or locality is a subject beyond the scope of this report. I can offer only the observation that there are conflicts of interest between elected officials and existing voters in these matters. A requirement that such matters be put directly to the voters or a requirement that they secure a supermajority of the members of the municipal legislature would therefore hardly come as a surprise.

A third population that is sometimes disfranchised is felons. In part this is an element of the felon's punishment (and in part the motivation for it stems from a lack of confidence in the felon's wisdom and from doubt that his or her interests are compatible with the polity's). In an era that increasingly shrinks from incarceration, fines, and many other forms of punishment, stigmatizing felons by denying them the franchise is one of the milder punishments remaining. Objections come not so much from penologists as from political parties and activists who perceive, rightly or wrongly, that "the felon vote" will go to their coalition.

If the reason for felon disfranchisement were to deny as many African Americans the vote as possible rather than to deny felons the vote, this should be viewed as a Constitutional violation (even though Section 2 of the Fourteenth Amendment obviously anticipates that felons will be disfranchised in some states and that this will be permissible). See Const. amend. XV; Const. amend. XIV, § 2. But the argument that felon disfranchisement is simply a clever way to deny African Americans the vote without appearing to do so is weak. The first ten states to disfranchise felons were Kentucky (1792), Vermont (1793), Ohio (1802), Louisiana (1812), Indiana (1816), Mississippi (1817), Connecticut (1818), Alabama (1819), Missouri (1820), and New York (1821). There is no discernible pattern here. Some have questioned why these states took so long to disfranchise felons. If the states were not motivated by the existence of large populations of free African Americans in their midst, what was motivating them? Why didn't they disfranchise felons a century earlier? The answer here lies in the 18th century conception of felonies: They were punishable by death. Consequently, it was seldom necessary to consider whether felons should be disfranchised. Dead men, regardless of race, don't vote. See William Blackstone, IV *Commentaries on the Laws of England* 98 (University of Chicago 1st ed. Facsimile 1979) ("The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform"). Moreover, prior to the ratification of the Fifteenth Amendment, a state that wanted to disfranchise African Americans could do so without resorting to an extraordinarily weak and clumsy proxy.

⁵ The one Southern state in which fusion populism (in the form of an alliance of the Republican and Populist Parties) briefly took control of government was North Carolina. Unlike states in the Deep South, North Carolina had an African-American population of only about 35% in 1890. In addition, western North Carolina had a large population of small white farmers whose sympathies had been with the Union and who generally voted Republican. Together with members of the Populist Party, the group took control of North Carolina in the mid-1890s. Those who favored African-American disfranchisement usually saw it specifically as a way to defeat that coalition. See Michael Perman, *Struggle for Mastery: Disfranchisement in the South 1888-1908* 148-72 (2001). By contrast, in South Carolina, disfranchisement was spearheaded by Governor "Pitchfork" Ben Tillman, a Democrat with a strong populist streak, who feared the African-American vote would form an alliance with the "conservative" vote (i.e. what Tillman viewed as the Low Country landowning and commercial elite). See *id.* at 91-115.

beyond Watson's control, within a few years, African Americans had been effectively disfranchised in Georgia.⁶ Attempting to appeal to the African-American vote was therefore no longer a useful strategy for an ambitious office seeker like Watson. At that point, he began to voice his approval of disfranchisement.⁷ By the 1910s and 1920s, Watson had morphed into one of the most virulent racists one could ever encounter.⁸ Referring to "the Negro," he remarked, "*In the South, we have to lynch him occasionally, and flog him, now and then, to keep him from blaspheming the Almighty, by his conduct, on account of his smell and his color.*"⁹

Compare Watson's career with that of Alabama Governor George Corley Wallace (1919-1998). Wallace straddled the other end of the history of African-American disfranchisement. After being elected governor for the first time, he said the following in his January 14, 1963 inaugural address:

That contrast illustrates the differing political currents leading to African-American disfranchisement in each state. See generally id. But if there is one unifying theme, it may be this: Political alliances were so fluid in the South during the 1890s that no one could state with certainty how they would turn out. Would African Americans and poor whites living in the Appalachian Mountains form an alliance? Or would the alliance be African Americans and the landowning and commercial elites of the Tidewater/Low Country/Black Belt counties? Or would alliances be formed on the basis of race? We all know that in the end it was the last of these alternatives. But that was by no means obvious in the politically and economically turbulent turn-of-the-century South. See generally Michael Perman, *Struggle for Mastery: Disfranchisement in the South 1888-1908* 148-72 (2001); J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South 1880-1910* (1974).⁶ The Disfranchisement Movement in the South was a pivotal moment in American History. It began in earnest in about 1888, and came to head in each state in the South at different times. By the early 1900s, it had been mostly accomplished. See Michael Perman, *Struggle for Mastery: Disfranchisement in the South 1888-1908* (2001). A few non-obvious things are worth noting here: (1) In many locations in the South (including Watson's Georgia), the African-American vote had already been severely depressed on account of extra-legal violence and fraud (as well as laws that made that violence and fraud possible); this ultimately made things easier for the Disfranchisement Movement, which made disfranchisement an explicit part of state constitutions; (2) Many of those who advocated African-American disfranchisement would have preferred to disfranchise not just African Americans (most of whom were illiterate at the time), but also illiterate whites (of which there were many); they did not, however, always have the political clout to accomplish that end as to illiterate whites (though sometimes they did); (3) The movement was in part a reaction to the populism (and in particular fusion populism) of the late 19th century, in part a Progressive reaction to election fraud, and in part an effort to weaken the Republican party both locally and nationally; and (4) While raw racism was certainly part of the motivation for many, almost never did the laws relating to disfranchisement explicitly refer to race and some states (e.g., Arkansas and Tennessee) accomplished disfranchisement of African Americans mainly through the mechanism of the poll tax, which tended to depress the white vote too. See Perman at 5, 11-12, 19, 177; J. Morgan Kousser, *Shaping of Southern Politics* 250-57 (1974). Also see Sheldon Hackney, *Populism to Progressivism in Alabama* 147 (1969); Jack Temple Kirby, *Darkness at the Dawning: Race and Reform in the Progressive Party* 4 (1972); Dewey W. Grantham, *Southern Progressivism: The Reconciliation of Progress and Tradition* (1983).

⁷ Thomas E. Watson, *The New Georgia Encyclopedia*, <http://www.georgiaencyclopedia.org/articles/history-archaeology/thomas-e-watson-1856-1922>.

⁸ For those who regard the Soviet Union and Nazi Germany as representing opposite ends of the political spectrum, Watson's transformation from class-based to race-based fanaticism may seem surprising. For those who regard the two as close cousins, his transformation seems far less remarkable.

⁹ Michael Newton, *White Robes and Burning Crosses: A History of the Ku Klux Klan from 1866* 38 (2014) (italics added).

In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny, and *I say segregation now, segregation tomorrow, segregation forever.*¹⁰

But that was before the success of the Voting Rights Act of 1965. In just a few short years, African-American voter registration had skyrocketed in Alabama. By the 1970s, he was asking forgiveness for his past sins.¹¹ And, in a remarkable turn of events, he largely received it. He was re-elected to a third term as governor in 1982 with a huge share (90%) of African-American votes.¹²

Colman McCarthy was among those who thought Wallace's transformation to be sincere. He wrote in 1995:

In the annals of religious and political conversions, few shiftings were as unlikely as George Wallace's. In Montgomery, Ala., last week, the once irrepressible governor—now 75, infirm, pain-wracked and in a wheelchair since his 1972 shooting—held hands with black southerners and sang “We Shall Overcome.”

What Wallace overcame is his past hatred that made him both the symbol and enforcer of anti-black racism in the 1960s. On March 10, Wallace went to St. Jude's church to be with some 200 others marking the 30th anniversary of the Selma-to-Montgomery civil rights march.

It was a reaching-out moment of reconciliation, of Wallace's asking for—and receiving—forgiveness. In a statement read for him—he was too ill to speak—Wallace told those in the crowd who had marched 30 years ago: “Much has transpired since those days. A great deal has been lost and a great deal gained, and here we are. My message to you today is, welcome to Montgomery. May your message be heard. May your lessons never be forgotten.”

In gracious and spiritual words, Joseph Lowery, a leader in the original march and now the president of the Southern Christian Leadership Conference, thanked the former separatist “for coming out of your sickness to meet us. You are a different George Wallace today. We both serve a God who can make the desert bloom. We ask God's blessing on you.”¹³

McCarthy wrote that Wallace “was using his waning political power to bond with those he once scorned.” And maybe he was right about Wallace's sincerity. But whether Wallace was sincere or

¹⁰ *George Wallace's 1963 Inaugural Address*, Wikipedia,

https://en.wikipedia.org/wiki/George_Wallace%27s_1963_Inaugural_Address (italics added).

¹¹ George C. Edwards, Martin P. Wattenberg & Robert Lineberry, *Government in America: People, Politics and Policy* 80 (14th ed. 2009)(Wallace stated in 1979 in connection with his infamous stand in the schoolhouse door, “I was wrong. Those days are over, and they ought to be over.”).

¹² *Id.*

¹³ Colman McCarthy, *George Wallace—From the Heart*, Washington Post (March 17, 1995), <https://www.washingtonpost.com/wp-srv/politics/daily/sept98/wallace031795.htm?noredirect=on>.

insincere, there is a simpler point: In a reasonably well-functioning democratic republic, successful politicians spend a lot of time trying to please voters; they seldom spend as much time trying to please non-voters. In Wallace's final term as governor, he appointed more than 160 blacks to state governing boards. He worked to double the number of black voter registrars in Alabama's 67 counties and hired African Americans as staff members.¹⁴ In that sense at least, he was a changed man.¹⁵

The lesson? At least from the standpoint of discrete and insular groups that are sufficiently large to matter on Election Day, the right to vote may well be our most important right.¹⁶ Without it, everything else will be in jeopardy.¹⁷ The Jim Crow Era in Watson's Georgia and Wallace's Alabama, with its unhinged devotion to racial segregation, would have been unthinkable without disfranchisement.¹⁸ Many of the Deep South's laws designed to keep African Americans working on the plantation (instead of migrating north where their prospects were often better) would have been similarly impossible.¹⁹

¹⁴ *Id.*

¹⁵ In some ways this was a return to Wallace's early career as a judge on the Third Judicial Circuit of Alabama. There, interestingly enough, he had a reputation for being fair regardless of the race of the litigants before him and for being courteous to African-American attorneys. As a result, in his initial (failed) run for governor in 1958, he was endorsed by the NAACP. It is said that he attributed his loss to the perception that he was "liberal" relative to his opponent on race issues (although he put it in much cruder terms). It is further said that he vowed not to let that perception stand in the way of his election again. See https://en.wikipedia.org/wiki/George_Wallace.

¹⁶ The group need not be large. American political parties are coalitions (although the coalitions are constantly changing and re-organizing themselves). Even a small group, especially if it is well-organized and cohesive, can be the difference between victory and defeat, and hence courting such a group can be well worth a politician's or a party's time.

¹⁷ Indeed, in a nation like ours, where government has its fingers in all sorts of pies, the franchise can be important not just to protect rights, but also to protect patronage. Members of a disfranchised group are less likely to get government jobs or contracts. Government projects—from parks to roads to utilities—are less likely to be located or improved upon in the areas where those members will benefit from them.

¹⁸ It is interesting to compare African-American disfranchisement with the era prior to the enfranchisement of women. Unlike African Americans at the time, women as a class could not be described as "insular." Most women lived in families that included both men and women. The argument against women's suffrage was frequently that husbands, fathers and sons could be trusted to look after the interests of women outside the home, while women looked after the interests of their menfolk inside the home. Yet it is hard to avoid noticing that legislation that purported to protect working women from strenuous work or long hours was often advocated by men-only unions whose members were in competition with women for jobs and that women themselves were in no position to vote. See *Muller v. Oregon*, 208 U.S. 412 (1908). Of course, Progressive women often supported such legislation too. But those lobbying for such legislation were seldom working women; more often, they were members of the upper-middle class. See Suzanne LaFollette, *Concerning Women* (1926). Whether women are well served by protectionist legislation has been a major theme in feminist literature of the 20th century. My point here is simply that the heyday of such legislation was during a period that women were unable to vote in many parts of the country.

¹⁹ These laws were at least as destructive as the Jim Crow laws. But they get considerably less attention today. See, e.g., *Williams v. Fears*, 179 U.S. 270 (1900) (upholding an 1898 prohibitive tax on labor recruiters in Georgia); David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 *Tex. L. Rev.* 781 (1998).

See also Benno Schmidt, Jr., *Peonage* in *The Oxford Companion to the Supreme Court of the United States* 729 (Kermit Hall, et al., eds. 2005). In order to abolish peonage, the laws that made peonage possible had to be

The right to cast a ballot must therefore be guarded with great care. That will come as a surprise to no one. Unfortunately, it doesn't answer any of the hard questions: For example, *what constitutes great care in this context?* Along with the right to the ballot is the right to have one's ballot count, which requires the exclusion of those who are not entitled to a ballot.²⁰ Policies that are intended to facilitate the right to cast a ballot—like early voting and requirements that election officials take the voter's word for his or her identity—can increase the likelihood of voter fraud. We know there have been problems in North Carolina—the state that received the most attention in this report. One election had to be run again in order to ensure its integrity.²¹

dismantled one by one—a task that involved multiple trips to the Supreme Court by both the United States and private litigants. See *Pollock v. Williams*, 322 U.S. 4 (1944)(and cases cited therein).

²⁰ Opponents of voter ID laws frequently argue that cases of voter impersonation (the kind of fraud most obviously prevented by such laws) are very rare. While it is impossible to say for sure, I strongly suspect they are right. But even the fiercest critics of voter ID laws, like Justin Levitt, agree that some cases occur. See Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, Washington Post (August 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.e42a723f0d09.

On the other hand, otherwise qualified voters lacking in an ID are also uncommon. And those who cannot acquire one without unreasonable inconvenience are very rare indeed. Efforts to estimate the numbers of those without IDs by comparing voting rolls with driver's license and other ID lists are prone to over-estimation. Voting rolls are often heavy with individuals who have recently died, moved out of the jurisdiction, or become incapacitated. Driver's license lists are more up to date. The best solution for the cases of no ID that do exist may be for political activists in those jurisdictions that choose to have voter ID laws to assist them in securing an ID.

Moreover, opponents of voter ID laws should take into consideration the fact that voter ID laws help combat other kinds of voter fraud too. Consider the example of a felon in a jurisdiction where felons are not permitted to vote. He may be perfectly aware that he is not entitled to vote, but may be willing to chance it anyway, thinking that if he is caught after the fact he will simply deny that he was the person who showed up at the polling station. This is a lot riskier in a jurisdiction that requires the presentation of an ID. Prosecuting authorities are unlikely to believe the "It wasn't I" defense. The point holds true for other kinds of individuals (e.g., non-citizens) who manage to register but are not entitled to vote.

Unlike the case of voter impersonation, cases of felons voting in jurisdictions where they are not entitled to vote appear not to be rare at all. See Byron York, *When 1,099 Felons Vote in Race Won by 312 Ballots*, Washington Examiner (August 6, 2012) (referring to the 2008 Senate race in Minnesota), <https://www.washingtonexaminer.com/york-when-1-099-felons-vote-in-race-won-by-312-ballots>. See also John Fund & Hans von Spakovsky, *Who's Counting* (2012) (detailing various kinds of voter fraud and other kinds of election irregularities across the country).

²¹ See Mark Binker, *New Election Ordered in Pembroke*, WRAL (December 20, 2013), <https://www.wral.com/new-election-ordered-in-pembroke/13237755/>.

Commissioner Narasaki writes in her Statement that "once an election has been held—fairly or not—the result cannot be undone." I agree that running an election again is a rarely-invoked remedy (in part because the margin of victory for the winning candidate is rarely so small as to leave the proper outcome in doubt). But, as in the Pembroke case, it does happen. *Bell v. Southwell*, 376 F.2d 659 (1967), is an especially well-known example.

²¹ See, e.g., Tyler O'Neil, *Hillary Clinton Says Supreme Court Nominee Brett Kavanaugh Will Bring Back Slavery*, PJ Media (July 13, 2018) ("I used to worry that they [the Republicans] wanted to turn the clock back to the 1950s. Now I worry they want to turn it back to the 1850s."); *Biden Tells African-American Audience GOP Ticket Would Put Them "Back in Chains"*, CBS News (August 14, 2012), <https://www.cbsnews.com/news/biden-tells-african-american-audience-gop-ticket-would-put-them-back-in-chains/>.

On the other hand, requirements that voters present an ID can exclude the occasional voter who does not have an ID and cannot get one except at great inconvenience. How do we reconcile those two competing considerations? It isn't always easy, and intemperate statements about the motives of members of the opposing party don't make it any easier.²² As Thomas Sowell is fond of saying, "There are no solutions. There are only trade-offs."²³ For what it's worth, large majorities of

I should also mention in this context Commissioner Yaki's ill-considered statement about the Federalist Society for Law and Public Policy. The Federalist Society is an organization of conservative, libertarian and classically liberal lawyers, law students and law professors. It has about 65,000 members, including many of the nation's most distinguished jurists. It also happens to include both Commissioner Kirsanow and me as well as most center-right attorneys of my acquaintance. Not only do its members not fit the description Commissioner Yaki gives them, the organization has been described in quite positive terms by individuals usually viewed as left of center. For example:

"For over a decade, I have been privileged to be involved in Federalist Society events, and it's a really interesting thing that they have seen fit to invite me even though I generally don't think like them on a lot of things, and the quality of the speakers and the free-for-all discussion is unparalleled, so it's really been a privilege."—Neal Katyal, Acting Solicitor General (Obama Administration).

"I think one thing your organization has definitely done is to contribute to free speech, free debate, and most importantly, public understanding of, awareness of, and appreciation of the Constitution. So that's a marvelous contribution, and . . . in a way I must say I'm jealous at how the Federalist Society has thrived in law schools."—Nadine Strossen, Professor of Law, New York Law School & Former President, American Civil Liberties Union.

"[T]he Federalist Society has brought to campus the commitment to real, honest, vigorous, and open discussion. It is a result of the works of the Federalist Society to create a wonderful environment for discussing social, political, legal and constitutional issues."—Paul Brest, Professor of Law & Former Dean, Stanford Law School.

The Federalist Society's programs are not held in secret; even Commissioner Yaki is welcome. It is one of the most open organizations I have ever known. And it strives to include speakers from across the ideological spectrum in its panel discussions. I can recall only one occasion when a panel on which I was a speaker was not balanced (only because the liberal speaker failed to show up). Although, as a speaker, I had already given my own view on the topic (which was a more conservative view), I spontaneously got up and gave the liberal point of view too, just to make sure that the Federalist Society maintained its tradition of presenting the many sides of each issue.

By contrast, I once witnessed an official of the supposedly "mainstream" Association of American Law Schools aggressively bar a conservative staff member of this Commission from attending one of its programs. The official who did so made it clear she believed that the staff member was somehow there to spy on the speakers (every last one of whom was so far to the left that the average American would need a telescope to see them). In fact, the staff member, who had traveled from Washington to New York for the event, was there to scout out left-of-center speakers to invite to the Commission's September 15, 2010 national conference. Like the Federalist Society, but unlike the AALS, the Commission's Chairman at the time, Gerald Reynolds, although a conservative himself, strongly preferred for the conference to include speakers with an array of viewpoints.

The AALS is also famous for having brought in over 20 speakers to discuss the then-recent passage of California's Proposition 209 (which prohibited discrimination or preferential treatment on the basis of race, sex, or ethnicity in public employment, public contracting and public education). Every last one of the speakers opposed the initiative; not a single supporter was invited to speak, despite the fact that several law professors who had worked on the campaign, including me (the campaign's statewide co-chair), were present at the meeting). See also Charles Fried, "*Diversity*": *From Left to Far Left*, Washington Post (January 3, 2000)(comparing the AALS's lack of viewpoint diversity in panel presentations to the Federalist Society's strong viewpoint diversity). Something has happened to organizations that are supposedly mainstream in the last 25 years. And it isn't good.

²³ Fox News Interview of Thomas Sowell, https://www.youtube.com/watch?v=3_EtIWmja-4&feature=youtu.be. The extent to which the various Statements of my Commission colleagues fail to address these tradeoffs is disheartening. The soaring rhetoric they employ makes it all sound so easy: If only nice people were in charge of

Americans think that both voter ID requirements *and* early voting are reasonable methods of conducting elections.²⁴

It's not just first-order questions that are difficult: Exactly who should have the power to protect the right to cast a ballot? Who should decide which trade-offs to make?²⁵ If too much power is

the nation, everything would be fine. Alas, it's not that easy. I like soaring rhetoric as much as the next person ... well almost as much. But sooner or later one must get down the job of conducting fair and free elections, which requires reconciling oneself to the imperfect world we live in.

William Blackstone famously said, "it is better that ten guilty persons escape than that one innocent suffer." He is did not say that is better for 100,000 guilty persons go free rather than one innocent suffer imprisonment, and I would venture to say he would not have been willing to put such a large thumb on the side of innocence. What is the right tradeoff between the inclusion of eligible voters and the exclusion of fraudulent votes? I don't know the answer to that question. But at least I acknowledge that it's a real question.

My colleagues are apparently of the view that serious election fraud is fairly rare in this country. And I am inclined to believe they are right about that. May it ever be so. But as Americans we are lucky in this respect. Fraudulent elections in other parts of the globe are the rule rather than the exception. See, e.g., Bernd Beber & Alexander Scacco, *The Devil Is in the Digits: Evidence that Iran's Election Was Rigged*, Washington Post (June 20, 2009); Dany Bahar, *A Fraudulent Election Means Even More Problems for Venezuela*, Brookings Institute Podcast (May 22, 2018); Kim Sengupta, *Zimbabwe Elections: Opposition Politician Arrested Amid Allegations of Voting Fraud: Senior Official in MDC is Seeking Political Asylum, After Claiming Poll Results Were Rigged*, The Independent (August 8, 2017).

Moreover, election fraud was once common here too. See, e.g., John F. Reynolds, *A Symbiotic Relationship: Vote Fraud and Electoral Reform in the Gilded Age*, 17 Soc. Sci. Hist. 227 (1993); Denis Tilden Lynch, "Boss" Tweed: The Story of a Grim Generation (2017); Pamela Colloff, *What Happened to the Ballot Box that Saved Lyndon Johnson's Career?*, Texas Monthly (November 1998); Robert A. Caro, *Means of Ascent: The Years of Lyndon Johnson* (1990); T. Harry Williams, *Huey Long* (1969); Mike Royko, *Boss: Richard J. Daley of Chicago* (1971).

It feels like my colleagues want it both ways. On the one hand, even though the racially-motivated voter exclusion and voter intimidation they fear is now rare, they refer back to a period before some of them were born as proof we must be ever-vigilant. And, yes, we must. But, on the other hand, they scoff at the notion that we must be vigilant about election fraud too, even though that is also part of our history. And like racism, election corruption has never been entirely eradicated.

²⁴ See, e.g., *Four in Five Americans Support Voter ID, Early Voting*, Gallup Poll (August 22, 2016), <https://news.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx>.

²⁵ The North Carolina ID case may be an example of how partisanship may, whether consciously or unconsciously, affect one's perceptions. The North Carolina legislature is majority Republican and was accused by the plaintiffs in that case (led by the North Carolina NAACP) of targeting racial and ethnic minorities. Okay, maybe. Since I have not carefully read through the record in that case, I am not in a good position to judge.

Here's what I can say: The trial judge (appointed by George W. Bush) found no such intent. The appellate judges (two appointed by Barack Obama and one by William Jefferson Clinton), not only found such an intent, they stated that the statute targeted racial and ethnic minorities "with almost surgical precision." None of that is comforting. The Supreme Court declined to take the case and hence neither agreed nor disagreed with the decision of the Court of Appeals. In retrospect, I am glad the Supreme Court denied the petition for certiorari. If it had taken the case and issued one of the 5-4 decisions for which it has become famous, reversing the Court of Appeals, it would have meant that *every* judge involved in the case voted along party lines. The issue isn't worth the appearance of that kind of partisanship.

But here is what I find troubling about the case: While I do not think I or my colleagues have enough information to second-guess the differing results in the case, I do know enough to say the Court of Appeals is engaged in serious hyperbole in saying that the statute targeted minorities "with almost surgical precision." It's a highly quotable turn of phrase, but it happens not to be true. Even the NAACP's own expert witness (whose numbers I believe were

concentrated in the hands of a single authority (whether it is the federal government or a local registrar, an executive officer or a judicial one), abuses are sure to follow.²⁶ This, I believe, is one of the shortcomings of this report. The assumption lurking behind some of its conclusions is that all would be well if the federal government (in the form of the Voting Section of the Civil Rights Division of the U.S. Department of Justice) were the primary arbiter of what is appropriate and what is not.²⁷ But is it true? Are state and local authorities really the only ones that act out of partisan or other inappropriate motives? What if it's also the attorneys at the Voting Section of the Civil Rights Division who need to be watched carefully?²⁸

inflated) estimated that African-American voters without IDs number about 6% while white voters without ID number about 2.5%. If that's considered anything close to surgical precision in the Fourth Circuit, I intend to make sure my loved ones never undergo surgery there.

Note that this report quotes the "almost surgical precision" language three times and paraphrases it once and that three of the Commissioners appointed by Democrats quote it in their Commissioners' statements. Note also that only Commissioners appointed by Democrats voted to approve this report. See *supra* at note 1.

²⁶ Some have argued that Congress should pass legislation re-establishing preclearance at least for selected jurisdictions they regard as high-risk for efforts to disfranchise minority groups. They argue (not irrationally) that state and local governments, out of partisan motives, may in the future make changes in election procedures that unreasonably interfere with the right to vote, and challenging those changes in court in the traditional manner will sometimes be unwieldy and time consuming. Preclearance would help eliminate that problem. Fine. That's true. *But what if it is the Department of Justice's Civil Rights Division or other federal institutions that are acting unreasonably out of partisan motives? That is not an irrational fear either.* See *infra* at note 29 (discussing the Civil Rights Division's effort to overrule the voters of Kinston, North Carolina, who had voted by a ratio of 2 to 1 to make their local elections non-partisan). Just as challenging a state or local government's decision in court can be unwieldy and time consuming, so too can challenging an action of the Civil Rights Division.

²⁷ The various statements of my colleagues also contain a touch of this. For example, Commissioner Narasaki writes, "It is abundantly clear that ... the right to a fair and equal vote ... is under siege in several states and jurisdictions, and given that reality *state sovereignty is not an inviolable right.*" (Italics added). In the same vein, Chair Lhamon writes, "Americans need strong and effective *federal* protections to guarantee that ours is a real democracy." (Italics added.) (Note that both of them are long-time inside-the-Beltway denizens.) The tragedy here is that my colleagues don't seem to understand that many Americans trust the attorneys in the Voting Section of the Civil Rights Division at the U.S. Department of Justice even less than they trust the politicians and bureaucrats of their own state and locality. And it's not just because the attorneys in the Voting Section are overwhelmingly left of center. See *infra* at note 28. It is also because those attorneys have proven themselves unwilling to protect Americans from voter fraud and voter intimidation in an even-handed manner. See Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, *Race Neutral Enforcement of the Law?: DOJ and the New Black Panther Party Litigation 125* (2010)(discussing *United States v. New Black Panther Party* and *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009)).

²⁸ These days I don't think anyone would bother to deny that career employees of the federal bureaucracy—particularly at the higher levels—tend to be disproportionately ideologically left of center. See, e.g., Mike Causey, *Are Feds Democrats or Republicans? Follow the Money Trail!*, Federal News Radio (April 3, 2017), <https://federalnewsradio.com/mike-causey-federal-report/2017/04/are-feds-democrats-or-republicans-follow-the-money-trail/>. It is also well-established that high-level career employees tend to self-select into agencies whose mission they regard as compatible with their ideological perspective. Consequently, agencies like the National Labor Relations Board have particularly high concentrations of left-of-center career employees while the Department of Defense has particularly high concentrations of right-of-center employees. See Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents and Congress*, 56 Am. J. Polit. Sci. 341 (2011).

I believe that, in the end, any search for a single, disinterested institution that can always be trusted to protect us all from the abuses of others will be in vain.²⁹ Ambition must be made to counteract ambition.³⁰ There is no other way.

Finally, there is the problem that no Washington insider likes to mention: As a nation, we lavish resources on protecting the right to cast a ballot and making it as convenient as possible. And, in general, that is a good thing. This report itself is an example of that concern. But we need to keep in mind why are we doing this. If the point is to choose our policymakers by democratic means (and surely that is the point), the system isn't working nearly as well as it should.³¹ Increasingly, real policy is made not by elected officials, but by bureaucrats who are virtually unaccountable to

I have no data showing the political or ideological affiliations of *all* attorneys in Voting Section of the Civil Rights Division of the Department of Justice. On the other hand, Hans von Spakovsky has reported that he obtained through the Freedom of Information Act the resumes of the 16 attorneys hired into the Voting Section during the first several years of the Obama Administration. His description of their resumes made it clear that they were decidedly left of center, one and all. Some were well left of center. *See* Hans von Spakovsky, *Every Single One: The Politicized Hiring of Eric Holder's Voting Section* (August 15, 2011), <https://www.heritage.org/civil-society/commentary/every-single-one-the-politicized-hiring-eric-holders-voting-section>.

Moreover, research conducted at my direction found that other civil rights agencies (for which we do have figures) show extraordinary one-sidedness in partisan or ideological balance. For example, of the 844 entries going back to 1991 for political donors who listed "EEOC" as their employer on Opensecrets.org, 38 (4.5%) went to Republicans or Republican or conservative affiliated groups. All of the others (95.5%) went to Democrats or Democratic or liberal/progressive affiliated groups. (No one listed "Equal Employment Opportunity Commission" as employer.) Similarly, I directed my staff to determine who, from a list of 565 employees of the Office for Civil Rights at the U.S. Department of Education, had made political contributions recorded on Opensecrets.org. Of the 43 donors found, 41 (95.3%) had given to Democrats or Democratic or liberal/progressive affiliated groups, and 2 (4.7%) had given to Republicans or Republican or conservative affiliated groups. There are few, if any, state legislatures as one-sided.

Especially given the von Spakovsky data, it would be surprising if the Voting Section at the Civil Rights Division were significantly different from OCR or the EEOC. *See* also Ralph R. Smith, *Which Party Receives the Most in Political Contributions from Federal Employees?*, FedSmith.com: For the Informed Fed (May 19, 2016)(finding that \$137,603 worth of political contributions are made to Democrats by Department of Justice employees, while \$14,939 worth of political contributions are made to Republicans), <https://www.fedsmith.com/2016/05/19/which-party-receives-the-most-in-political-contributions-from-federal-employees/>.

²⁹ Partisan and other inappropriate motives, sometimes conscious, but more often unconscious, exist at all levels of government. A case worth examining in this regard involves Kinston, North Carolina. Kinston is a town of less than 25,000 residents in the eastern part of the state. African Americans make up almost two thirds of its population. Voters in Kinston voted by a 2 to 1 margin to have its local elections conducted in a non-partisan manner. There is nothing unusual about this; many local jurisdictions conduct elections without listing on the ballot the party affiliations (if any) of the candidates. It is as common as dust.

As common as it is, in 2009, the Obama-Era Civil Rights Division refused to tolerate it. Put differently, it refused to allow the voters of Kinston, very much including the African-American voters, the dignity of deciding how to conduct their own local elections. It insisted the words "DEMOCRAT" or "REPUBLICAN" appear on the ballot for local officials. It is hard not to wonder whether the Civil Rights Division was motivated by a desire to defend the right of African Americans to vote (on everything except whether their elections will be non-partisan) or a desire to benefit the Democratic Party.

³⁰ Federalist 51.

³¹ *See* generally Philip Hamburger, *Is Administrative Law Unlawful?* (2015). For a view that the unaccountable career bureaucracy is a good thing, *see* Eugene Robinson, *God Bless the "Deep State,"* WASH. POST (July 19, 2018).

voters.³² While concern over the right to cast a ballot and the integrity of that ballot is certainly a good thing, we need to spare a thought for elections' *raison d'être* too. Are we seeing the level of self-governance to which a free people should be entitled? It is getting increasingly difficult to answer that question positively.³³ And surely those who argue most energetically for federal agencies to supervise elections are often the ones who argue federal agencies to supervise our daily lives.

A FEW THOUGHTS ON SAFEGUARDING THE RIGHT TO CAST A BALLOT (AS WELL AS OTHER RIGHTS)

At the individual level, the right to vote can seem very unimportant. It is rare—to the point of being almost unheard of—for an election to be decided by a single vote. On Election Day, many Americans choose not to exercise their right to vote. Some view themselves as insufficiently informed about the candidates to cast a vote they can be proud of, and it is not uncommon for them to be right about that. Others find it distasteful or simply a waste of their time. They have jobs to do, families to tend to, and other activities that bring purpose to their lives.

But those who worry that this will cause basic voting rights to go undefended may be worrying unnecessarily. Unlike with some other rights, with voting rights, there are well-organized third parties with a strong and direct incentive to prevent abuse. Elected officials and political parties are the most obvious examples.³⁴ Their jobs depend on elections, and they are not about to let the voting strength of their political coalitions be reduced without a fight. Indeed, if anything, elected officials may be accused of spending a disproportionate amount of their time worrying about voting issues (and hence about their own re-election) to the detriment of issues that affect their constituents' lives in more direct ways.³⁵

³² This, of course, was a major tenet of the Progressive Movement: Out with elected mayors, in with city managers with “expertise” in administration; out with the election of local officials of many kinds, in with the “short ballot;” out with Presidential appointees to do the work of the executive branch, in with “civil servants;” out with separation of powers, in with delegation of rulemaking and adjudicatory authority to administrative agencies staffed with career bureaucrats; out with “politics,” in with “disinterested experts” who theoretically have the best interests of the country in mind.

³³ For the lighter side of this issue, see the BBC's *Yes, Minister* or its sequel *Yes, Prime Minister*. See https://en.wikipedia.org/wiki/Yes_Minister. Yes, I can still laugh at this problem now and then, but it's getting harder as time goes on.

³⁴ Elected officials and political parties are not the only ones with a motive to defend voting rights. There are many others, probably too many, whose fortunes rise and fall according to who occupies the White House, the governor's mansion, or the mayor's office or which party controls the legislative branch. That can include political appointees, aspiring political appointees, public contractors, aspiring public contractors, lobbyists, lawyers, businesses, unions and many others. All of them have a strong and direct incentive to ensure that members of their political coalition can vote. In addition, there are those whose interest in public policy is intense despite its having little direct effect on their lives or fortunes (though they may be rarer than we would all like to think).

³⁵ One way in which the interests of elected officials (as well as identity politics organizations) may diverge from their rank-and-file voters can be seen in the area of “vote dilution.” In theory, vote dilution can mean very different things. First, it can refer to apportionment such that much larger numbers of voters live in one district than in another. This has been prohibited since *Reynolds v. Sims*, 377 U.S. 533 (1964) and is rarely a genuine issue today.

To be sure, elected officials and political parties also have an incentive to make sure that members of the opposing political coalition *cannot* vote or that supporters of their coalition who are not entitled to vote get to do so anyway.³⁶ But one important limitation on such abuses is the American two-party system, which I believe is significantly better for this purpose than a multi-party system. There is almost always a large, well-financed coalition willing to push back against threats of disfranchisement (with African-American disfranchisement of the late 19th and early 20th centuries as the major exception).³⁷ Alas, the same cannot be said for many of our other rights.

Second (and more relevant to the present discussion), it can refer to apportionment such that the members of a particular group are distributed over several districts, rather than concentrated in one or more districts where they can form a majority. A variation on the latter theme can be this: It is also considered vote dilution to concentrate the votes of the minority such their votes are more than sufficient to elect the candidate of their choice (and hence votes are wasted that could have gone towards influencing elections in other districts).

Here is the problem with the second form of vote dilution: For rank-and-file voters in a particular minority group, it is seldom clear whether they will be better off having 10% of the vote in six of ten districts on the city council or 60% of the vote in one of ten districts. The 10% may not be enough to allow the group members to elect the candidate of their dreams, but it will sometimes be enough, through adept coalition building, to defeat the candidates of their nightmares. It is not obvious whether it is better for them to have six city council members (and hence a majority) who at least are not hostile to their interests or one city council member who can voice their position at city council meetings and attempt to drive deals with the other members. It may depend on the issues that come before the council, which are never completely foreseeable. It may also depend on the coalition-building talents of the particular person elected, which are difficult to gauge prior to that person's election. On the other hand (and here's the rub), the elected official or aspiring elected official from that minority group's protected district may flatter himself or herself into believing that the choice is indeed clear.

³⁶ Commissioner Narasaki makes a similar point when she writes that "people willing to suppress votes to stay in power will always be seeking new ways to accomplish that goal." The point she doesn't make, but which is also valid, is that people willing to engage in election fraud to stay in power will always be seeking new ways to accomplish *that* goal. See *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009). Again, we should avoid the temptation to believe that federal authorities are the only good guys and that state authorities cannot possibly be engaged in an effort to thwart local fraudsters when they say that is their intent.

³⁷ When elected officials from both major parties conspire together for the benefit of elected officials qua elected officials (i.e. when they act in a "bipartisan manner"), the protections offered by the two-party system break down. That's when the voters are in real trouble. See Jean Merl, *State's Redrawn Congressional Districts Protect Incumbents*, L.A. Times (February 9, 2002) ("In a rare burst of bipartisan cooperation, legislators did their best to make all districts either safely Democratic or safely Republican; thus they sharply curtailed the likelihood of competition this year"). Even so, the danger isn't that individual voters will be "disfranchised" in the strict sense. It's something more dangerous, since it may slip the notice of average voters, and even if it does not, punishing both parties is not an easy task.

This may be an example of the old joke: There are two parties in the American political system: The Stupid Party and the Evil Party. Now and then they get together and do something that is both stupid and evil. This is known as "bipartisanship."

In no other area of law and policy is there a greater incentive for elected officials to advocate for special interest legislation. The special interest is, of course, they themselves—the class of incumbent politicians. See, e.g., The Bipartisan Campaign Reform Act of 2002, Pub.L. 107-155, 116 Stat. 81, enacted March 27, 2002, popularly known as the McCain-Feingold Act, (generally making it more difficult for incumbent politicians to be challenged). See also *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (holding unconstitutional on First Amendment grounds the section of McCain-Feingold that made it illegal for a conservative non-profit to publicly show a film that was critical of Hillary Clinton shortly before the Presidential primaries in which she was a candidate).

One reason that large disfranchisements of existing voters have been extremely rare in history (again with one major exception) is the obvious one: *Voters don't like to be disfranchised*.³⁸ And as Ralph Waldo Emerson taught us, "When you strike at a king, you must kill him." I have sometimes told the story of the lead-in to Wyoming's entrance into the Union to my law students. Unlike any state at the time, the Wyoming Territory gave women the right to vote. Fearing that Wyoming's example would cause the women of other states to demand the vote, Congress initially balked at Wyoming's application for statehood, telling the Wyoming territorial legislature that it must disfranchise women first. But the Wyoming legislators stood their ground and cabled back to Congressional leaders, "We will remain out of the Union one hundred years rather than come in without the women." Eventually Congress relented.

I have looked at that story in the past as one in which the legislators stuck to their principles—that Wyoming women were equal partners in the settlement of the territory and that it would be morally wrong to deny them their right to participate. And I hope and trust that this was indeed the case for at least a number of the legislators. But, upon reflection, there's another way to look at the situation: Women already had the vote. The first legislator to suggest that he might be willing to disfranchise women had better hope and pray that his colleagues follow suit and that women are indeed disfranchised. Otherwise he will likely be angrily voted out of office at the next opportunity.³⁹

Almost no one argues that there is any significant chance that the African-American Disfranchisement will be repeated in the lifetime of anyone around today. The catastrophic circumstances in the South at that time have virtually no chance of recurring. We have plenty of problems to deal with. That isn't one of them.

That doesn't mean that smaller interferences with the right to vote won't happen. There may even be lots of them.⁴⁰ Indeed, there will probably be lots of

³⁸ Some states during the African-American Disfranchisement Movement considered the idea of continuing to allow African-American men and illiterate white men to vote, but allowing literate women and/or women of property (but not other women) to vote. Among the states to consider this approach were Alabama and Mississippi. See Michael Perman, *Struggle for Mastery: Disfranchisement in the South 1888-1908* (2001). It was believed such an approach would cause less resentment than disfranchisement.

³⁹ It's important to understand just how unusual the disfranchisement of a major group is, not just in American history, but in the history of Western democracy. Political scientist Richard Valelly wrote:

No major social group in Western history, other than African Americans, ever entered the electorate of an established democracy and then was extruded by nominally democratic means such as constitutional conventions and ballot referenda, forcing that group to start all over again. Disenfranchisements certainly took place in other nations, for example, in France, which experienced several during the nineteenth century. But such events occurred when the type of regime changed, not under formally democratic conditions. In Europe, Latin America, and elsewhere, liberal democracies never sponsored disfranchisement. Once previously excluded social groups came into any established democratic system, they stayed in.

Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement 2* (2004).

⁴⁰ There will also be lots of false alarms. Some of the cases mentioned by Chair Lhamon, in my opinion at least, are not quite what they appear to be on the surface. For example, she originally stated that "[i]n New York just three

years ago baseless racially identifiable citizenship challenges prevented Americans from voting” (in response to my statement, she has since changed “prevented” to “impeded”) and cites to the New York State Attorney General’s press release. But looking at a press release alone is not always the best way to understand what is baseless. In this case, accounts in the media present a different side of things: In Deerpark, New York, a town of a little under 8000, Town Supervisor Gary Spears filed a challenge to voter registrations by 30 persons with Chinese names. Spears said that the fact that all 30 individuals wrote down the same address raised red flags for him. It turns out that all of them are students at a small college, Fei Tian College, which is affiliated with the Falun Gong movement. While the residence is listed as a three-bedroom, single-family home in the town tax records, it is apparently functioning as a dormitory at this small college. Some of the registrants also apparently showed up on Facebook as having addresses in California. Only two registrations were cancelled. But as I understand the matter from news media accounts, they were added back to Deerpark’s voting rolls before any election had passed, meaning that nobody was ever actually denied the right to vote. See, e.g., Holly Kellum, Voting Registration of 30 Deerpark Citizens Cleared, *The Epoch Times* (October 14, 2015), https://www.theepochtimes.com/voting-registration-of-30-deerpark-citizens-cleared_1877222.html; Chris Fuchs, Chinese-American Students File Lawsuit Alleging Voter Intimidation, *NBC News* (October 27, 2015), <https://www.nbcnews.com/news/asian-america/chinese-american-students-file-lawsuit-alleging-voter-intimidation-n452166>. All in all, this seems to be a case of a reasonable challenge that turned out to be unfounded. No harm was done. It is one of life’s everyday misunderstandings blown out of proportion by our current polarized political culture.

Chair Lhamon also states that “[i]n North Carolina we heard testimony about a voter over 90 years of age who had to make eleven trips to different state agencies and institutions to try and obtain the correct paperwork because her voter registration card did not match the name on her license.”

That may sound terrible, but the real story turns out to be not so terrible. According to the transcript, the voter in question was then-92-year-old Rosanell Eaton, who was also one of the named plaintiffs in the North Carolina NAACP v. McCrory litigation. Mrs. Eaton was a heroine of the Civil Rights Movement. As a young woman in 1939, she was among the first African Americans to register in her county. To do so, she had to recite the preamble to the Constitution as proof of her literacy. She went on to be an assistant poll worker for 40 years and was responsible for registering more than 4000 people to vote.

It is telling that to challenge North Carolina’s voter ID law, the North Carolina NAACP had to use a plaintiff who actually did have an ID, in this case a driver’s license. The problem was simply a name discrepancy. Her driver’s license said “Rosanell Eaton” while her voter registration said “Rosanell Johnson Eaton,” which she apparently assumed would be a problem. Mrs. Eaton sued well before the North Carolina voter ID law had gone into effect (and hence before the procedures had been worked out). But in any event, it was clear right from the beginning that, she easily could have voted by absentee ballot even without an ID. Alternatively, if she preferred to vote in person, the procedure for reconciling one’s voter registration to one’s driver’s license (as opposed to the other way around) was easy and would have taken only five minutes. Even the procedure for reconciling one’s driver’s license to one’s voter registration is much easier than the eleven trips she and her daughter apparently took. See Sterling Beard, *The Left’s Faux Martyr*, *National Review Online* (August 19, 2013), <https://www.nationalreview.com/2013/08/lefts-faux-martyr-sterling-beard/>.

Finally, Chair Lhamon points to a Georgia legislator whom she describes as having “openly stated that he does not want early voting because of the type of people—voters of color—who will use it.” I agree with Chair Lhamon that parts of the statement of the legislator in question were problematic. But he appears to be motivated by purely partisan concerns, not race. He believed that early voting opportunities are disproportionately being located within easy distance of African-American mega-churches (whose members disproportionately vote Democratic) and wrongly believed this to be a violation of “the accepted principle of separation of church and state.” That’s silly. His main grievance appears to be that early voting opportunities within easy distance of large numbers of Republican voters were rarer (and hence election officials were not acting in a non-partisan manner). If he is right on that, he has a legitimate point. See Fran Millar, *Interim DeKalb CEO Honeymoon Over*, http://www.thecrier.net/our_columnists/article_a5bd6f90-37c0-11e4-a3e0-0019bb2963f4.html.

them.⁴¹ But I take some solace in the fact that, as a nation, we are better prepared to deal with voting rights issues than we are with issues arising out of a number of our

⁴¹ Commissioner Adebile points out that “successful” §2 cases (as defined in the staff-generated part of this report) have quadrupled in the years since *Shelby County* when compared to the same number of years immediately preceding that case. Part of this may be just timing. The census is always taken at the beginning of the decade. The work of redistricting takes place about two years later, so litigation over re-districting tends to be decided in 2013-2014 or so. But I suspect that he is right that the number of §2 challenges has grown or at least that it will grow. That should be expected. The upshot of *Shelby County* was that, unless Congress legislates further, the old preclearance system would be replaced by §2 litigation as the dominant method for dealing with these issues in all states instead of just in non-covered jurisdictions. That is not troubling in itself.

The important question is whether §2 litigation is somehow less effective at dealing with violations of the law than was the preclearance method in those jurisdictions where preclearance was previously required. Looking at the twenty-three §2 cases classified in this report as “successful,” I am not yet convinced that it is. Eleven out of the total took place in jurisdictions that weren’t covered in the first place, so the change in procedure wrought by *Shelby County* did not affect them. (Note that this lends some credence to the Supreme Court’s conclusion that Congress’s use of a 1975-vintage formula for determining which jurisdictions are high-risk for violations of the law was unfairly out of date. Moreover, it is evidence that §2 litigation has been sufficient to control abuses. If it hadn’t been, there would have been massive pressure to extend preclearance nationwide.)

The fear of those who would like to see preclearance restored was that in the formerly covered jurisdictions, §2 lawsuits would be too cumbersome a method for derailing proposals that violate the law. Those proposals would therefore be implemented before a court had an opportunity to make a decision and act. But that doesn’t seem to have happened. According to the chart on pages 226-28, of the 12 cases in covered jurisdictions, five resulted in preliminary injunctions (a standard tool for preventing likely violations that threaten to cause irreparable harm before they can be fully litigated).

I took a look at the remaining seven (i.e. the ones in which, according to the chart, no preliminary injunction had issued) to see if they involved a proposal that would have failed preclearance, but instead got implemented before the court had a chance to decide what to do. These cases are a jumble, and I do not claim to be an expert on their sometimes-complicated histories. In some cases it’s not even possible, based on the information available to me, to confirm whether the chart is right that no preliminary injunction was granted. Nevertheless, it is not certain that any are examples of what *Shelby County* critics feared—cases where proposals that *would have been derailed by preclearance* instead got implemented before a court had time to make a decision and act (although *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017), might be such a case). I discuss some of them *infra* at note 42.

other rights.⁴² Voting issues seldom slip by unnoticed.⁴³

⁴² Post-Shelby County cases in which the lack of the former preclearance procedures likely led to the implementation of an illegal voting procedure are at worst rare. According to the Report's chart on pages 221-4, there are seven "successful" §2 cases from formerly preclearance jurisdictions where no preliminary injunction issued. But that doesn't necessarily mean an illegal voting procedure was implemented that would have been prevented by a preclearance process. For example, in *Benavidez v. Irving School District*, No. 3:2013cv00087 (N.D. Tex. 2014), a continuing duty to preclear would not have yielded a different result. How do I know that? Because it was precleared. The plaintiff brought the case in spite of that and apparently won. And in *Terrebonne Parish NAACP v. Jindal*, 3:14-CV-00069-JJB-EWD (M.D. La. August 17, 2017), a preclearance process would not have changed things, since defendants had not changed election procedures in a way that would have triggered that process. Instead, plaintiffs were arguing that the defendants should change procedures that had been in place a long time.

Of the cases I was able to examine, *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017), may come the closest to being what preclearance supporters fear, see *supra* at note 41. No preliminary injunction appears to have issued there, so the City of Pasadena's re-districting plan for its city council went into effect for the 2015 election before being permanently enjoined for future elections by the court in 2016. But it appears that no preliminary injunction was requested, and nothing I found in the record explains why.

One thing we do know is that there were facts in dispute in *Patino* (since summary judgment was denied and a trial on the merits occurred). It is therefore possible that a preliminary injunction was not asked for, because the plaintiffs knew that until they had taken discovery and proven their case at a full trial, the balance of equities would be viewed by the court as not weighing in their favor.

The leads to the question whether it is a good thing or a bad thing that sometimes temporary restraining orders and/or preliminary injunctions won't issue in cases where the plaintiff is ultimately successful in proving his or her entitlement to a permanent injunction. That in turn becomes a question of the relative importance of the two different kinds of errors that can occur in the context of a particular case. It's not clear that the failure to grant a preliminary injunction that in hindsight *should* have been granted is always a more serious error than the issuance of a preliminary injunction that in hindsight *should not* have been granted. Sometimes standing in the way of a change to election procedures instituted by democratically elected officials on the ground that it is *possible*, but not especially likely, that the change will eventually be shown to be unlawful will be precisely the wrong thing to do. If so, the §2 litigation method may be superior to the preclearance method, because the courts are in a somewhat better position to balance the dangers of Type I and Type II errors. With preclearance, the Civil Rights Division ordinarily will either preclear or not preclear. The option of allowing a change to be implemented and then revoking preclearance after it has had the opportunity to consider the matter at greater length does not fit in well with the concept of preclearance. Unlike §2 litigation with its time-honored distinction among temporary restraining orders, preliminary injunctions, and permanent injunctions, the preclearance process is not structured to give the Civil Rights Division three distinct bites at the apple.

Note that in the case of *Patino*, the court ordered that in the future the City of Pasadena will be subject to preclearance. This is an option that courts have with jurisdictions that have violated the law. Under §3, they can be "bailed in" to the preclearance system. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 729-30 (S.D. Tex. 2017). The defendant in *Allen v. City of Evergreen*, 2014 WL 12607819 (S.D. Ala. 2014), was similarly "bailed in" under §3. It's important to remember that Shelby County did not do away with the preclearance process. If a court designates a jurisdiction under §3, that jurisdiction will be subject to preclearance.

For a discussion of *Perez v. Abbott* and the special case where the status quo ante is not an option, see *infra* at note 43.

⁴³ In cases in which the status quo ante is not an option, §2 litigation may be the superior method of dealing with illegal voting procedures. *Perez v. Abbott* may be a useful example.

The supposed virtue of the preclearance approach is that it prevents state and local governments from implementing a change in election procedure until that change has been thoroughly considered and approved. If the change doesn't

Consider, for example, *Shelby County v. Holder*. In that case, 48 amici curiae briefs were filed. Amici included by John Nix et al.; the Judicial Education Project; the Justice and Freedom Fund; the Mountain States Legal Foundation; the Southeastern Legal Foundation; the National Black Chamber of Commerce; Arizona; Georgia; South Carolina; South Dakota; the Pacific Legal Foundation; the Landmark Legal Foundation; Hans von Spakovsky, J. Christian Adams, Clint Bolick, Roger Clegg, Charles Cooper, Robert Driscoll, William Bradford Reynolds, Bradley Schlozman, the Abraham Lincoln Institute for Public Policy Research, the Center for Constitutional Jurisprudence, the Cato Institute, the State of Texas, Project 21, Alabama, Merced County, California, Alaska, American Unity Legal Defense Fund, Professor Patricia Broussard, National Bar Association, Rep. John Lewis, Rep. Frank Sensenbrenner, Dick Thornburgh,

get approved in time for an election, its proponent must default to the status quo ante. (See *supra* at note 42 for my thoughts on whether this is always the best approach.)

One of the problems with this approach is that sometimes the status quo ante is unworkable. So it was with Texas in *Perez v. Abbott* (Congressional re-districting case). After the 2010 census, Texas had been allotted four more seats in the U.S. House of Representatives. There was no way it could simply default to the re-districting map of the previous decade if its proposal failed preclearance (as it eventually did, just a bit before *Shelby County*).

Here's my understanding of what happened: After the 2010 census, the Texas legislature passed two newly re-districted maps, both of which became the subject of lengthy litigation—one for the U.S. House of Representatives and one for the Texas House of Representatives. Texas opted to submit them for preclearance to the U.S. District Court for the District of Columbia (as the Voting Rights Act permits it to do) rather than to the U.S. Department of Justice. See Carrie Johnson, *Could Texas' Redistricting Leave Latinos Behind?*, National Public Radio (September 19, 2011) (suggesting that Texas chose to submit its plans to the U.S. District Court for the District of Columbia, because it was leery of the Department of Justice's possible political motives).

But with the primary season fast approaching, no decision on preclearance had been forthcoming, and Texas therefore could not legally implement its plan. Things were starting to look bad. Luckily for Texas voters, parallel §2 litigation had been filed in federal court in Texas. See Complaint in *Perez v. Texas*, No. 5:11-CV-00360-OLG-JES-XR (W.D. Tex. filed May 9, 2011), and a three-judge panel had been convened. See 28 U. S. C. §2284. With the help of the parties, *that* court (not the U.S.D.C.D.C.) begun to devise (after one false start, see *Perry v. Perez*, 565 U.S. 388 (2012)) substitute plans. Ultimately, the U.S. District Court for the District of Columbia declined to preclear the original Texas plan. But was the §2 court that saved the day by devising the alternative map, not the preclearance court. That alternative map was implemented in time for the 2012 elections.

It seems to me that having the §2 court design the alternative will usually be a better method of dealing with the cases where the status quo ante is not an option. Nobody should want a court to be deciding how to re-district a state. It is an inherently political decision that, when possible, should be left to politicians, acting within the law. But sometimes judicial action may be necessary. I suspect most people would prefer a court to the lawyers in the Voting Section of the Civil Rights Division, especially given the lack of political and/or ideological diversity of the Voting Section (as discussed *supra* at note 28), courts will likely be seen as more legitimate. Spreading the responsibility out to federal courts across the country rather than concentrating that responsibility in just one court—the U.S. District Court for the District of Columbia—makes sense too. There is a season for this type of litigation. It comes once every ten years after the census. It is impossible to predict how many cases will reach litigation, so it is impossible for the U.S. District Court for the District of Columbia to gear up each decade to handle the cases. In addition, if a single federal court is seen as the arbiter of all such cases, judgeships on that court will be especially controversial and the court will be subject to special scrutiny and suspicions of political bias.

The litigation over Texas's Congressional re-districting continued for years after the 2012 elections. Eventually, the Texas legislature adopted (with only a few modifications) the re-districting plans the §2 court had devised. On March 10, 2017, however, the §2 court decided that the legislature's actions were "tainted" by its earlier actions and that further adjustments would therefore be necessary. *Perez v. Abbott*, No. 5:11-CV-00360-OLG-JES-XR (W.D. Tex. March 10, 2017). That decision was reversed by the Supreme Court in connection with the Texas map of Congressional districts. *Perez v. Abbott*, ___ U.S. ___ (June 25, 2018). That reversal occurred only one day before the chart in the staff-generated portion of this Report was adopted by the Commission. The reversal was therefore not reflected in that chart.

Brennan Center for Justice, Sen. Majority Leader Harry Reid, Veterans of the Mississippi Civil Rights Movement, Gabriel Chin, the Constitutional Accountability Center, Professor Richard Engstrom, The Leadership Conference on Civil and Human Rights and the Leadership Conference on Civil and Human Rights Education Fund, the Hon. Marcia Fudge, Professor Kareem Crayton et al., Jurisdictions that Have Bailed Out, the National Lawyers Guild, the American Bar Association, National Latino Organizations, Section 5 Litigation Intervenors, the Alabama Black Legislative Caucus and the Alabama Association of Black County Officials, New York, Senator C. Bradley Hutto, Navajo Nation et al., Joaquin Avila, Asian American public interest groups; a group of historians and social scientists; Ellen Katz and the Voting Rights Initiative; the Alaska Federation of Natives and Alaska Natives and Tribes; and the City of New York.

Similarly, in *Crawford v. Marion County Board of Elections*, there were 41 amicus briefs. The individuals and organizations filing include Prof. Richard Hasen, the League of Women Voters of Indiana, the League of Women Voters in Indianapolis, Congressman Keith Ellison, the Electronic Privacy Information Center, the Asian American Legal Defense and Education Fund, Rock the Vote, the National Black Law Students Association, the National Black Graduate Students Association, the Feminist Majority Foundation, the Student Association for Voter Empowerment, Charles Ogletree and a group of historians and scholars; Christopher Elmendorf and Daniel Tokaji; AARP and the National Senior Citizens Law Center; the National Law Center on Homelessness and Poverty; the Lawyers Committee for Civil Rights Under Law; Service Employees International Union; the American Federation of State, County, and Municipal Employees; Common Cause; the Jewish Council for Public Affairs; the National Council for Jewish Women; NAACP Legal Defense and Education Fund; the Cyber Privacy Project; Privacy Journal; Privacy Activism; Liberty Coalition; the U.S. Bill of Rights Foundation; Robbin Stewart; ACORN; Dr. Frederic Schaeffer et al.; Senator Dianne Feinstein; Representative Zoe Lofgren; Representative Robert Brady; the Rutherford Institute; the Asian American Justice Center; the Asian Law Caucus; the Asian American Legal Center of Southern California; the Asian American Institute; R. Michael Alvarez; Lonna Rae Atkinson; Deila Bailey; Thad E. Hall; Andrew D. Martin; National Congress of American Indians; Navajo Nation; Agnes Laughter; Brennan Center for Justice; Demos; Lorraine C. Minnite; Project Vote; People for the American Way Foundation; Pacific Legal Foundation; Karen Handel, then Georgia Secretary of State; Erwin Chemerinsky; Mountain States Legal Foundation; Doris Anne Sadler; Center for Equal Opportunity; Project 21; Senator Mitch McConnell; American Unity Legal Defense; Republican National Committee; Lawyers Democracy Fund; Texas, Alabama, Colorado, Hawaii, Michigan, Nebraska, Puerto Rico, South Dakota; Washington Legal Foundation; Evergreen Freedom Foundation; American Civil Rights Union; and the Conservative Party of New York State.

That is not to say that justice will always be done. It won't be. No nation is ever that lucky in any area of the law. But relative to other rights and other areas of human endeavor, this one at least gets plenty of attention.⁴⁴ That's something. Instead, my point is only that I wish elected officials

⁴⁴ At times there seems to be an over-sensitivity in this area, especially in efforts to combat voter intimidation, to go alongside occasional under-sensitivity. A few years ago, billboards with the message "Voter Fraud Is a Felony! Up to 3 ½ yrs & \$10,000 fine" led to a hullabaloo in Cleveland. The large corporation that owned and leased the

(and others interested in elections) spent as much time worrying about issues that have affected people's lives more directly.

The voter ID cases are interesting in this regard. The various state laws at issue in those cases get a lot of attention, not just in the courts, but from the press and from various organizations that purport to represent the interests of groups thought to be less likely to have an ID. Yet photo IDs are necessary for lots of activities, not just voting. According to Ashe Schow of the Washington Examiner, they are necessary to open a bank account; to apply for food stamps; to apply for public assistance; to apply for Medicaid or Social Security; to apply for a job; to apply for unemployment benefits; to rent or buy a home; to purchase alcohol, to purchase cigarettes, to drive, buy, or rent a car; to get on an airplane; to get married; to purchase a gun; to adopt a pet; to rent a hotel room; to apply for a hunting license; to apply for a fishing license; to purchase nail polish at CVS, and purchase certain cold medicines.⁴⁵ To that list I can add my experience has been (and the GSA web site confirms) that to enter federal buildings one must often present a photo ID.

Given how common photo ID requirements are, one must wonder why all the objections seem to concern voter ID laws. No effort that I am aware of (and certainly nothing like the monumental effort that has been put into combating voter ID legislation) has been put into softening ID laws and policies like those above. Getting a job, renting a home, opening a bank account, and many other things on the list are more important to how an *individual* is able to live his or her life than the ability to vote.⁴⁶

billboards—Clear Channel Outdoor Holdings, Inc.—came under pressure from local politicians and pressure groups to remove them. Buckling under that pressure, it agreed to do so. As penance, it further agreed to allow their billboards to carry the message, “Voting is a right. Not a Crime!” for free. Patrick O’Donnell, Voter Fraud Billboards that Drew Complaints of Racism and Intimidation Will Come Down, Clear Channel Says, Cleveland Plain Dealer (October 20, 2012), https://www.cleveland.com/metro/index.ssf/2012/10/voter_fraud_billboards_that_dr.html. It is, of course, a fact that voter fraud is criminal. I do not know for certain how common it is, but obviously outcries like the one in Cleveland serve to cause ordinary citizens to conclude it may be more common than they thought. “Why else would local politicians throw such a fit over a billboard that accurately states what the law is?” many will likely wonder.

Is an accurate statement of this kind protected by the First Amendment? It is a question worth considering. The Supreme Court recently issued an opinion finding that a state law designed to protect against voter intimidation went too far toward discouraging free speech. See *Minnesota Voters Alliance v. Mansky*, ___ U.S. ___ (June 14, 2018) (holding that a Minnesota law prohibiting individuals, including voters, from wearing a “political badge, political button, or other political insignia” inside a polling place is a violation of the First Amendment). What is curious is that some serious allegations of voter intimidation have drawn less attention from officials than the billboard case: Voter intimidation involving two men, standing shoulder-to-shoulder in front of the door to the polling place, wearing paramilitary clothing, hurling racial epithets at white voters and poll workers, with one wielding a night stick, caused far less concern at the Department of Justice almost a decade ago. See Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, *Race Neutral Enforcement of the Law?: DOJ and the New Black Panther Party Litigation* 125 (2010).

⁴⁵ Ashe Schow, 24 Things That Require a Photo ID, Washington Examiner (August 14, 2013).

⁴⁶ Even the things that look small on paper can turn out to be very important once you know the facts. For example, migraine sufferers whose headaches are triggered by sinus congestion (like me) consider few things as important as obtaining the decongestant pseudoephedrine (in over-the-counter drugs like Sudafed). Yet under federal law, it is apparently available only on presentation of a photo ID.

Once more for emphasis: I am not arguing that the political classes should pay less attention to voting rights issues. Even if I were arguing that, I would be barking at the moon. In our Era of Big Government, so many believe themselves to have a huge stake in the outcome of elections, it seems unlikely that I or anyone else will be able to persuade them not to worry. I am simply hoping that we can duplicate some of the energy that goes into voting rights elsewhere.

The area that is most troubling right now is free expression. The ACLU, once the nation's premier public interest law firm, has quietly backed away from its traditional position favoring robust protections for unpopular speech. Wendy Kaminer, a former ACLU Board Member, recently wrote in the Wall Street Journal:

[T]raditional free-speech values do not appeal to the ACLU's increasingly partisan progressive constituency—especially after the 2017 white-supremacist rally in Charlottesville. The Virginia ACLU affiliate rightly represented the rally's organizers when the city attempted to deny them a permit to assemble. Responding to intense post-Charlottesville criticism, last year the ACLU reconsidered its obligation to represent white-supremacist protesters.

The 2018 guidelines claim that “the ACLU is committed to defending speech rights without regard to whether the views expressed are consistent with or opposed to the ACLU's core values, priorities and goals.” But directly contradicting that assertion, they also cite as a reason to decline taking a free-speech case “the extent to which the speech may assist in advancing the goals of white supremacists *or others whose views are contrary to our values.*”⁴⁷

I am less optimistic about the nation's willingness to put effort into safeguarding the right to free expression than I am the right to vote. I hope I am worrying unnecessarily.

⁴⁷ See Wendy Kaminer, The ACLU Retreats from Free Expression: The Organization Declares that Speech It Doesn't Like Can “Inflict Serious Harms” and “Impede Progress,” Wall Street Journal (June 20, 2018)(emphasis added).

APPENDIX A: SUMMARY OF THE COMMISSION'S PAST VOTING RIGHTS BRIEFING REPORTS

Briefing Reports

1959—Report of the United States Commission on Civil Rights

The first USCCR report on voting rights was released in 1959, and the Commission based its findings on a two-year investigation.¹ The Commission established a team to receive voting complaints from around the country. These sworn complaints became the basis for a number of investigations into discrimination in voting in states such as Florida, Alabama, Mississippi, Louisiana, and Tennessee.² Due to the large number of voting complaints, the Commission held its first public hearing in Montgomery, Alabama on December 8, 1958, which lasted for two days.³ At this hearing, the Commission heard testimony from state officials, such as judges and registrars, and from citizens who had been denied the right to vote in Alabama.⁴

This report also collected statistical data on black and white registration rates in ten southern states and conducted field investigations of vote denial complaints in twenty-nine counties across ten states in the South.⁵ While most of these complaints came from the hearing held in Alabama, the Commission found more racial disparities in voting in Mississippi than any other state in the study.⁶ The Commission concluded with their findings and recommendations for Congress based on their field investigations and hearings. Some of the notable recommendations were that: (1) the Bureau of the Census needed to establish a nationwide compilation of registration and voting statistics;⁷ (2) Congress should require all state registration and voting records to be made public and preserved for a period of five years;⁸ and (3) the President should send federal registrars to states with high levels of discrimination in voting.⁹ The Commission also recommended a constitutional amendment that would establish universal suffrage based on standards of age and

¹ U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS XIII (1959), <https://www.law.umaryland.edu/marshall/usccr/documents/cr11959.pdf>, [*hereinafter* U.S. COMM'N ON CIVIL RIGHTS 1959]. The Commission's first report also covered housing and public education issues, but the research and findings related to voting is discussed on pages 19-146.

² *Id.* at 13.

³ *Id.* (noting that the Commission also held hearing in Louisiana voting in 1959 and other hearings and conferences on housing and education).

⁴ *Id.*

⁵ *Id.* at 41 (noting that these ten states included Alabama, Arkansas, Georgia, Florida, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia).

⁶ *Id.* at 55.

⁷ *Id.* at 136.

⁸ *Id.* at 138.

⁹ *Id.* at 138-39, 553-54.

residence. Three of the Commission's five recommendations were incorporated into the Civil Rights Act of 1960.¹⁰

1961—United States Commission on Civil Rights Report

The Commission released its second report in 1961, which followed up on the findings of the 1959 report, and examined the new controlling legislation (the Civil Rights Act of 1960).¹¹ During this time, the Commission relied on sworn complaints from across the country, testimony from field hearings, statistics of voting registration by race, and a broad examination of the state of civil rights regarding the right to vote in a number of southern counties where African Americans constituted a minority of voters. During this four-year period, the Commission received 382 sworn complaints, and all but three of these complaints were from southern states including Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.¹² And in 1960, 53 percent of the African American population resided in these 12 states.¹³

For this report, the Commission decided to have a field hearing in Louisiana with a similar format to the previous field hearing in Alabama. A significant portion of the briefing report was dedicated to the specific circumstances of Louisiana suppressing black voters. In addition, this report examined the impact of both the Civil Rights Act of 1957 and the Civil Rights Act of 1960, as well as recent and relevant federal litigation that could impact the state of voting rights around the country.¹⁴ As a part of a very comprehensive report, the Commission also included information and analysis on relevant racial gerrymandering issues.¹⁵

The Commission found that while voting discrimination did not exist everywhere across the country, there were numerous cases of such discrimination in about a hundred counties in the South.¹⁶ The most prevalent methods of discrimination were arbitrary registration procedures such as demanding that voters interpret various sections of the Constitution, or requiring a high level of precision and accuracy in filling out the application. The Commission recommended that: (1) Congress acknowledge that voter qualifications other than age, residence, confinement, and conviction of a crime have been used to deny citizens the right to vote based on race or color, and Congress should enact legislation providing that all citizens of the U.S. shall have a right to vote; and (2) Congress enact legislation making completion of six years of formal education sufficient to pass literacy tests. Aspects of these recommendations can be found in the Voting Rights Act of

¹⁰ U.S. COMM'N ON CIVIL RIGHTS, 1961 U.S. COMMISSION ON CIVIL RIGHTS REPORT BOOK 1: VOTING, (1961) 76-8, <http://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk1.pdf>, [hereinafter U.S. COMM'N ON CIVIL RIGHTS, VOTING 1961] (noting that three of the Commission's recommendations were incorporated into the Civil Rights Act of 1960).

¹¹ *Id.* at 76.

¹² *Id.* at 21.

¹³ *Id.*

¹⁴ *Id.* at 22.

¹⁵ *Id.* at 122.

¹⁶ *Id.* at 133.

1965, which prohibited the use of “test and devices,” and directly prohibited any form of literacy test.

1965—Voting Rights Act: The First Months

In 1965, the VRA was passed, which provided minority voters with protections against discriminatory voting practices that had historically suppressed the minority vote. That same year, the Commission released a report that analyzed the rollout of the VRA, and provided recommendations on how the VRA could better achieve its goals.¹⁷ Within weeks of the bill becoming federal law, staff attorneys at the Commission traveled to thirty-two southern counties and parishes to study the implementation of the legislation.¹⁸ They also consulted with state and county voting officers, as well as federal voting examiners and representatives of voter registration organizations. This report also looked at the implementation of federal examiners required under the VRA, and found that they faced a number of issues such as residency issues, illiteracy, and disqualification for criminal conviction.¹⁹

The Commission found that there was compliance with the VRA in many areas of the South, although several problems remained, such as the continued use of literacy tests in some counties, and limiting the number of citizens who could register to vote each day.²⁰ They also found that the Federal Examiner program was being effectively implemented, while recognizing that there would be no fully accurate test of the VRA’s effects until the 1966 primary and general elections.²¹ The Commission recommended that: (1) Federal examiners be appointed in all remaining jurisdictions covered by the Act; (2) the Civil Service Commission begin an information program designed to notify all unregistered persons of the process of registering; and (3) the responsible Federal officials effectively prepare for the possible invocation of all enforcement procedures available under the Act.²²

Voting in Mississippi from 1960-1965

The Commission’s 1961 report entitled “Voting in Mississippi” raised concerns about the ability of African-American citizens to register and vote in the state.²³ The Commission scheduled a field hearing in Mississippi in 1962, which was postponed at the request of the U.S. Attorney General.²⁴ The Commission continued its investigation regardless, and in 1963, found that there had been

¹⁷ U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ACT... THE FIRST MONTHS, (1965), <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12V942.pdf>, [hereinafter U.S. COMM’N ON CIVIL RIGHTS, THE FIRST MONTHS, 1965].

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.* at 41-46.

²³ U.S. COMM’N ON CIVIL RIGHTS, VOTING IN MISSISSIPPI (1959), <https://www.law.umaryland.edu/marshall/usccr/documents/cr12v94.pdf>, [hereinafter U.S. COMM’N ON CIVIL RIGHTS, MS 1965].

²⁴ *Id.*

“open and flagrant violation[s] of constitutional rights in Mississippi.”²⁵ In 1964, the Commission attorneys chose a number of counties where African Americans were not able to successfully register or vote and traveled to these counties to interview local African-American citizens, civil rights workers, and local registration and law enforcement officials.²⁶ In February 1965, the Commission was finally able to hold its field hearing in Mississippi.²⁷ At the hearing, the Commission heard from more than thirty witnesses, and it was widely attended and highly publicized.²⁸ The Commission found that two distinct practices led to the suppression of the African-American vote in Mississippi: the collection of poll taxes and registration tests that required persons to interpret a section of the state constitution.²⁹

Following the voting rights field hearing in Mississippi, the Commission issued a report detailing Mississippi's voting rights abuses. In light of such abuses, the Commission unanimously endorsed the voting rights bill then pending in Congress. Other details concerning this report, relevant hearings, and its impact can be found in the Executive Summary and Chapter 1.

1968—Political Participation

This report examined black participation in the South after the passage of the VRA of 1965.³⁰ Based on field investigations and analysis of the DOJ's files, the Commission found that the implementation of the VRA led to an expansion of black voter registration and turnout.³¹ The Commission recommended that the Attorney General send federal examiners and observers to enforce various sections of the VRA, and ensure that jurisdictions where test and devices were suspended were complying with provisions of the VRA, particularly, with a specific interest in observing jurisdictions under Section 5.³² The Commission also advised that sufficient funding be earmarked to properly enforce the aforementioned recommendations.³³

1975—Voting Rights Act: Ten Years After

The Commission set out to study the effects of the VRA and whether or not the promise of the Fifteenth Amendment had been fulfilled.³⁴ To conduct a comprehensive investigation, the Commission staff conducted over two hundred interviews with county clerks, registrars, minority

²⁵ *Id.* at V.

²⁶ *Id.*

²⁷ *Id.* at VI.

²⁸ *Id.*

²⁹ *Id.* at 13-14.

³⁰ U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION (1968), <http://www2.law.umaryland.edu/marshall/usecr/documents/cr12p753.pdf>, [*hereinafter* U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION].

³¹ *Id.*

³² *Id.* at 180-84.

³³ *Id.* at 185.

³⁴ U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHT ACT: TEN YEARS AFTER (1975), <http://www2.law.umaryland.edu/marshall/usecr/documents/cr12v943a.pdf>, [*hereinafter* U.S. COMM'N ON CIVIL RIGHTS, VRA TEN YEARS LATER].

candidates for office, and public officials in ten states covered for preclearance; examined court decisions; monitored primaries and general elections (in the same 10 states); and analyzed DOJ's files.³⁵ The counties that were chosen from the ten states were selected due to preliminary research that indicated that there were still issues with minority participation in the democratic process, and they represented both rural and urban areas.³⁶ The Commission found that while the VRA had helped the United States make substantial steps towards the goal of equal access to voting, there were still examples of abuses; therefore, the VRA should not be allowed to expire in August of 1975.³⁷

The Commission found that: (1) minority political participation in covered jurisdictions has increased substantially; (2) the failure of state governments in covered jurisdictions to maintain registration and turnout data by race hampered the ability to statistically evaluate progress; (3) enforcement of the VRA had not fully reached its potential; (4) few jurisdictions made any affirmative nonpartisan effort to register eligible persons; and (5) registration was still hampered in many jurisdictions that offered very limited times and places to register.³⁸

The Commission recommended that: (1) Congress extend the VRA for another 10 years; (2) Congress extend the national suspension of literacy tests for another 10 years; (3) Congress amend the VRA to levy civil penalties or damages against state and local officials who violate Section 5; (4) DOJ take action to ensure that minority language speaking citizens receive adequate materials in their language;³⁹ and (5) DOJ strengthen its enforcement of Section 5.⁴⁰ In 1975, when the VRA was reauthorized Congress reauthorized the VRA's temporary provisions for another seven years and established a permanent ban on literacy tests.

1981—Voting Rights Act: Unfulfilled Goals

In 1981, the Commission studied whether voting discrimination still existed in jurisdictions covered by the original preclearance provisions of the VRA that were under consideration for VRA extension in 1982.⁴¹ Commission staff examined court cases on voting between 1975 and 1980, as well as letters from the Justice Department to covered jurisdictions that objected to proposed voting changes due to DOJ's determination that they would be retrogressive and have a negative impact on minority voters.⁴² Staff also asked major civil rights organizations about instances or

³⁵ *Id.* at V-VI (noting that these ten states were Alabama, Arizona, California, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, and Virginia).

³⁶ *Id.*

³⁷ *Id.* at *Transmittal Letter*.

³⁸ *Id.* at 328.

³⁹ In 1975, Congress amended the VRA to add Section 203, which included protections for language minorities. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 203 and Pub. L. 94-73, § 301 (codified as amended at 52 U.S.C. § 10503).

⁴⁰ U.S. COMM'N ON CIVIL RIGHTS, VRA TEN YEARS LATER, *supra* note 34, at 336.

⁴¹ U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS (1981),

<http://www2.law.umaryland.edu/marshall/usccr/documents/cr12v944a.pdf>, [*hereinafter* U.S. COMM'N ON CIVIL RIGHTS, UNFULFILLED GOALS].

⁴² *Id.* at 64.

allegations of possible or actual denial of voting rights, and the Commission's regional offices and SACs provided information on reported voting problems and also made site visits to polling places. The Commission took an in-depth look at the jurisdictions that were subject to preclearance. It also examined whether there was any effective enforcement of the minority language provisions of the VRA, and found that there were none.⁴³

The Commission ultimately found that the preclearance provisions of the VRA should be extended for another ten years because racial and ethnic minorities in many covered jurisdictions still faced problems accessing the ballot box, that the Act was designed to, but had not yet, resolved. The 1981 report also found that while there had been considerable progress in the number of minorities holding elected office, minorities still constituted a small percentage of elected officials in all states covered by the preclearance provisions.⁴⁴ Further, there were still cases of voter intimidation in the form of discourteous or hostile voter registration officials, and polling places were often only located in predominantly white communities or areas not served by public transportation.⁴⁵

The Commission recommended that: (1) Congress extend the VRA for another 10 years; (2) Congress extend the minority language provisions for an additional 7 years; (3) Congress hold hearings to determine whether a nationwide federal election law providing minimum standards for registering and voting in Federal elections should be implemented; and (4) DOJ amend its guidelines on the implementation of the minority language provisions to include specific criteria for determining effective minority language.⁴⁶ In 1982, when the VRA was reauthorized, Congress reauthorized Section 5 of VRA for another 25 years and extended the bilingual language requirement for 10 years.

2001—Voting Irregularities in Florida During the 2000 Presidential Election

For the 2001 report, the Commission held public hearings in Tallahassee and Miami, to investigate allegations that Florida voters were prevented from casting ballots or that their ballots were not counted during the 2000 Presidential Election.⁴⁷ This investigation sought to determine whether isolated or systematic practices and/or policies by governmental entities denied eligible Florida citizens the right to vote, determine who made these decisions, why these decisions were made, and what communities were affected. The Commission heard testimony from more than 100 witnesses, including the governor, the secretary of state, the attorney general, the director of the

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 91.

⁴⁷ U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), <https://permanent.access.gpo.gov/lps13588/lps13588/main.htm>, [*hereinafter* U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES].

Florida Division of Elections, the general counsel of the Florida Elections Commission, and registered Florida voters, amongst others.⁴⁸

This report concluded that many eligible Florida citizens were denied their right to vote, with the disenfranchisement disproportionately affecting African Americans. In fact, black voters in Florida were almost 10 times more likely than white voters to have their ballots rejected in the 2000 Presidential Election.⁴⁹ This disenfranchisement was found to be a direct result of restrictive statutory provisions, wide-ranging errors, aggressive purging of voters from the rolls based on inaccurate data, and inadequate resources in the Florida election process.⁵⁰ The Commission recommended that Florida eliminate punch card voting, standardize voting technology and criteria, formalize the use of provisional balloting, and create automatic restoration of voting rights for persons with former felony convictions, amongst several other recommendations.⁵¹

2002—Voting Rights in Florida 2002: The Impact of the Commission’s Report and the Florida Election Reform Act of 2001

In 2002, the Commission released an update to the 2001 report on voting irregularities in Florida.⁵² Several members of Congress acknowledged the role that the Commission and its report had on bringing about election reform in the state of Florida and at the federal level.⁵³ The election law reform that passed in Florida addressed seven of the recommendations that the Commission had made in the previous report, but did not address the Commission’s recommendations for removing the burden for proving registration status from the voter, restoration of voting rights to persons with former felony convictions, or improving access for LEP citizens and persons with disabilities. The Commission held a second briefing in Florida during June 2002, to observe the implementation and effects of the new reforms. The Commission found that the reforms did not completely resolve the issues that surfaced in 2000, but that most of the recommendations provided in the 2001 report had been addressed.⁵⁴

2004—Is America Ready to Vote?

This report studied the state of the election system, specifically the implementation of the Help America Vote Act (HAVA) of 2002.⁵⁵ HAVA created a new mandatory minimum standard for

⁴⁸ *Id.* Information also available in *Executive Summary*, <http://www.usccr.gov/pubs/vote2000/report/exesum.htm> (last accessed Sept. 7, 2018).

⁴⁹ *Id.* at Chapter 9, <http://www.usccr.gov/pubs/vote2000/report/ch9.htm>.

⁵⁰ *Id.* at 38-39.

⁵¹ *Id.*

⁵² U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS IN FLORIDA 2002: THE IMPACT OF THE COMMISSION’S REPORT AND THE FLORIDA ELECTION REFORM ACT OF 2001, (2002), www.usccr.gov/pubs/vote2000/imp0602.htm, [*hereinafter* U.S. COMM’N ON CIVIL RIGHTS, VOTING IN FLORIDA 2002].

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 32 U.S.C., 56 U.S.C.). The Help America Vote Act of 2002 (HAVA) sets standards for rendering voting equipment, registration lists, and general election administration fair, accurate, and representative of the needs of

states to follow in certain areas of election administration, and called for all states to have a central computerized voter registration list.⁵⁶ The goals of HAVA were to replace and modernize voting machines, reform voter registration, provide better access to voting for the disabled, and provide better poll worker training.⁵⁷ In addition, HAVA established the federal Election Assistance Commission (EAC), which is an independent, bipartisan commission charged with developing guidance to meet HAVA requirements, adopt voting system guidelines, and serve as a national clearinghouse of information on election administration. The EAC also certifies voting systems and audits the use of HAVA funds.⁵⁸ While the HAVA legislation was promising at the time of its passing, implementation of the Act has been slow, and a large number of states have been granted waivers or extensions.⁵⁹

The Commission has consistently offered findings and recommendations in its numerous reports on how to ensure that the U.S. voting system is equitable for all citizens, and all citizens have the right to vote. Based on the 2001 investigation in Florida, the Commission provided 12 recommendations on how to enhance the country's readiness for the 2004 election, which included: (1) getting organized—states should create checklists of tasks that need to be completed before the election; (2) train poll workers—this should include making sure they are aware of the HAVA provisional ballot procedures, ID requirements, voting rights laws, and ensuring access to the ballot box for persons with disabilities and limited-English proficiency; (3) have at least one supervisory staff member at each polling place; (4) check registration lists for accuracy, and inform registrants whose voter eligibility might be in question; (5) test voting equipment; (6) develop ballots early for usability and send voters sample ballots before the election; (7) perform trial runs in precincts that have had voter access issues in the past; (8) develop voter instructional materials for their specific voting machines; (9) develop multiple language materials based on the requirements of the VRA and test these materials prior to the election for accuracy and usability; (10) examine polling places for accessibility prior to the election; (11) review felon lists; and (12) conduct registration drives.⁶⁰

2006—Reauthorization of the Temporary Provisions of the Voting Rights Act: An Examination of the Act's Section 5 Preclearance Provision

This report summarized expert testimony from the October 2005 briefing, which analyzed the effectiveness of Section 5, and offered recommendations to Congress on how to renew expiring

voters. *See also* HAVA of 2002, Pub. L. No. 107-252, <https://www.gpo.gov/fdsys/pkg/PLAW-107publ252/pdf/PLAW-107publ252.pdf> (last accessed June 11, 2018) for more information.

⁵⁶ U.S. Election Assistance Commission, *Help American Vote Act*, U.S. EAC, <https://www.eac.gov/about-the-useac/> (last accessed May 25, 2018) [*hereinafter*, U.S. EAC, HAVA].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* *See also* U.S. COMM'N ON CIVIL RIGHTS, VOTING IN FLORIDA 2002, *supra* note 52, at 24.

⁶⁰ U.S. COMM'N ON CIVIL RIGHTS, VOTING IN FLORIDA 2002, *supra* note 52, at 38-39.

sections of the VRA.⁶¹ Based on expert testimony and research, the Commission recommended that Congress conduct hearings and collect expert testimony on the progress that has been made in securing voting rights for minorities in covered and non-covered jurisdictions. Further, the Commission urged Congress to evaluate the Section 5 formula and possibly offer amendments that would withstand judicial scrutiny.

2006—Voting Rights Enforcement & Reauthorization

This report analyzed the DOJ's VRA enforcement efforts since 1965, in order to offer the President and Congress a factual record with which to consider the 2006 VRA reauthorization.⁶² The DOJ's Civil Rights Division had approved more than 99 percent of all preclearance submissions, and enforcement of the language minority requirements had greatly increased since the Commission's 1981 report, which found that this requirement was only minimally, if at all, enforced. This report found that DOJ objections to preclearance submissions had declined steadily over the VRA's 40-year existence, almost to the point that objections were nonexistent. This report provided data to Congress illustrating the successes of Section 5 and equipped them with the tools to decide how to proceed in deciding to reauthorize.⁶³ However, due to the lack of a majority vote of commissioners, this report was released without findings and recommendations.⁶⁴

2008—Voter Fraud and Voter Intimidation

On October 13, 2006 the Commission held a briefing on the topic of Voter Fraud and Voter Intimidation.⁶⁵ Based on the oral and written testimony by panelists at the briefing, the Commission created a list of findings and recommendations for Congress.⁶⁶ The report found flaws in the electoral process that caused both fear and doubt in the U.S. voting process.⁶⁷ Specifically, that both fraud and intimidation disenfranchise voters and weaken the overall political system.⁶⁸ Thus, the Commission found that achieving accurate voter rolls seems to be essential in assuring civilians that elections are accurate and have full participation of the voting public. The Commission also offered recommendations that state and municipal governments improve poll worker training, and that states adopt a photo ID requirement for both registration and voting.⁶⁹

⁶¹ U.S. COMM'N ON CIVIL RIGHTS, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT'S SECTION 5 PRECLEARANCE PROVISION, (2006), http://www2.law.umaryland.edu/marshall/usccr/documents/vrabriefingpaper_2-22-06.pdf.

⁶² U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION: THE DOJ'S RECORD OF ENFORCING THE TEMPORARY VOTING ACT PROVISIONS, (2006), <http://www2.law.umaryland.edu/marshall/usccr/documents/051006VRASatReport.pdf>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ U.S. COMM'N ON CIVIL RIGHTS, VOTER FRAUD AND VOTER INTIMIDATION, 1, (2008), <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12v962006.pdf>.

⁶⁶ *Id.*

⁶⁷ *Id.* at 16.

⁶⁸ *Id.*

⁶⁹ *Id.* at 17.

2009—DOJ Voting Rights Enforcement

On June 6, 2008, the Commission held a briefing to review the DOJ's plans to monitor voting rights enforcement in the 2008 U.S. Presidential election.⁷⁰ The report stated that both the Voting Section of the Civil Rights Division and the Public Integrity Section of the Criminal Division play an important role in enforcing voting rights, and found that ensuring the right to vote for overseas military personnel was still a serious problem.⁷¹ The recommendations included urging the DOJ to: (1) combat voter fraud and initiate action to prevent illegal voting, and (2) take aggressive steps to ensure that all states comply with HAVA's requirement that each state implement an official computerized voter registration list.⁷²

2012—Redistricting and the 2010 Census: Enforcing Section 5 of the Voting Rights Act

For this report, the Commission examined the DOJ's preclearance efforts during the 2011-2012 redistricting cycle, including their preclearance process since the 2006 amendments to the VRA.⁷³ This data included responses from state officials within jurisdictions covered under Section 5 of the VRA after the 2006 amendments.⁷⁴ These amendments included extending the VRA for another 25 years, extending the prohibition against the use of tests or devices, and extending the requirement for state and local governments to provide voting materials in multiple languages.⁷⁵ The 2006 law also amended the VRA regarding: (1) the use of election examiners and observers; (2) voting qualifications or standards intended to diminish, or with the effect of diminishing the ability of U.S. citizens on the basis of race or color to elect their preferred candidate; and (3) awarding attorney fees in enforcement proceedings to include expert fees and other reasonable litigation costs.⁷⁶ The DOJ then released guidelines on how to enforce the new amendments, and the effectiveness of the amendments were tested as state and local governments devised new redistricting plans utilizing population data from the 2010 Census.

During this process, the Commission: held a briefing on February 3, 2012; submitted extensive discovery requests to DOJ seeking records, answers to interrogatories, and data regarding the preclearance process; submitted requests for information and records to 10 states regarding their experiences in the preclearance process; reviewed all objections issued by DOJ since 2000; conducted legal and documentary research; and tracked DOJ's preclearance proceedings via

⁷⁰ U.S. COMM'N ON CIVIL RIGHTS, DEPARTMENT OF JUSTICE VOTING RIGHTS ENFORCEMENT FOR THE 2008 U.S. PRESIDENTIAL ELECTION (2009), <http://www2.law.umaryland.edu/marshall/usccr/documents/cr182d2009.pdf>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ U.S. COMM'N ON CIVIL RIGHTS, REDISTRICTING AND THE 2010 CENSUS: ENFORCING SECTION 5 OF THE VOTING RIGHTS ACT, (2012), https://www.usccr.gov/pubs/docs/2012_statutory.pdf.

⁷⁴ *Id.* at *Transmittal Letter*.

⁷⁵ Press, Release, The White House, President George W. Bush, Office of the Press Secretary, *Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006* (July 26, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html>.

⁷⁶ *Id.*

publicly accessible sources.⁷⁷ But due to the inability to garner a majority vote, the Commission released this report without specific findings and recommendations.

2016—Increasing Compliance with Section 7 of the National Voter Registration Act

The Commission's 2016 report examined state compliance with Section 7 of the National Voter Registration Act (NVRA)'s mandate to provide voter registration forms and assistance to those utilizing public assistance and disability agencies, and efforts by the DOJ and private citizens to enforce the mandate.⁷⁸ The report also looked at trends of voter registration modernization, including electronic and automatic registration, and the use of health benefit exchanges to register voters.⁷⁹ Some of the findings of this report stated that: providing voter registration at public assistance offices would increase the registration of racial minorities, citizens with disabilities, and those with limited-English proficiency, and that litigation is an effective tool to enforce state compliance with Section 7 of the NVRA.⁸⁰ Some of the recommendations included that: Congress should provide resources for states to learn about new voting technology and offer incentives to invest in technology that would streamline data processing in order to improve compliance with Section 7, and the EAC should encourage states to move to electronic voter registration systems.⁸¹ As a result, we could note more states are adopting Automatic Voter Registration.

Voting Rights—Related Educational Reports

Besides issuing reports with findings and recommendations to the President and Congress, the Commission has issued educational reports for general public consumption that would both inform and instruct the public on the complexities of voting rights laws. Below is a review of these aforementioned reports.

1971—Summary and Text of the VRA of 1965 as amended by the VRA of 1970

In September of 1971, the USCCR released a summary of the VRA detailing the changes that resulted from the 1970 VRA amendments.⁸² The Commission stated that the amended VRA of 1970: (1) prohibited the use of literacy tests for five years; (2) permitted 18-year-olds to vote in any general or primary election for federal office; (3) assured that residency requirements would no longer prevent citizens from voting for President and Vice President; (4) provided for the assignment of federal examiners to conduct registration, and of federal observers to observe voting in states or counties covered by the preclearance provisions of the Act; (5) required federal

⁷⁷ *Id.* at 4.

⁷⁸ U.S. COMM'N ON CIVIL RIGHTS, INCREASING COMPLIANCE WITH THE SECTION 7 OF THE NATIONAL VOTER REGISTRATION ACT, (2016), <https://www.usccr.gov/pubs/docs/NVRA-09-07-16.pdf>.

⁷⁹ *Id.*

⁸⁰ *Id.* at 45.

⁸¹ *Id.* However, since then, more states have moved to Automatic Voter Registration. *See* Appendix C.

⁸² U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: SUMMARY AND TEXT (1971), <http://www2.law.umaryland.edu/marshall/usccr/documents/cr11032.pdf>.

preclearance of new voting laws or procedures in covered states or counties; and (6) extended protections to qualified persons seeking to vote and to those who urge or aid others to vote.⁸³

1976—Using the Voting Rights Act

Released in April of 1976, this report detailed the VRA of 1965 by summarizing the Act, including both the general and special provisions, and providing the actual full text of the law.⁸⁴

1977—The Unfinished Business: Twenty Years Later

This report contains a summary of reports released by the Commission's SACs,⁸⁵ and all 51 of the SAC reports and appendices, and also contains a roster of the regional offices and a chart of SAC publications to date.⁸⁶ In these reports, the SACs identified prominent civil rights issues within their communities and described the current status of these issues in their historical context. In 1977, the Commission's summary showed that voting rights and the election of minority office holders was a recurring theme in a number of SAC reports⁸⁷

1983—State of Civil Rights

This report covered an array of civil rights issues that the Commission worked on since its inception, including but not limited to, voting rights, educational disparities, and housing discrimination.⁸⁸ This report was a summation of the Commission's accomplishments, and an assessment of civil rights progress in the 26 years of its existence. Specifically, the Commission noted that many of their recommendations had been enacted by Congress and resulted in significant progress in increasing the political participation of minority voters.⁸⁹

1984—Citizens Guide to Understanding the Voting Rights Act

Released in October of 1984, this report detailed the VRA of 1965's voter rights protections, and its subsequent amendments. This report was designed to educate the general public on the VRA's nuances, protections, and effects.⁹⁰

⁸³ *Id.*

⁸⁴ U.S. COMM'N ON CIVIL RIGHTS, USING THE VOTING RIGHTS ACT, (1976), <http://www2.law.umaryland.edu/marshall/usccr/documents/usingthevra.pdf>.

⁸⁵ Notably, SAC reports on voting rights continue to be very relevant to current conditions. See Appendix D.

⁸⁶ U.S. COMM'N ON CIVIL RIGHTS, THE UNFINISHED BUSINESS TWENTY YEARS LATER . . . (1977), <http://www2.law.umaryland.edu/marshall/usccr/documents/cr12un2.pdf>.

⁸⁷ *Id.*

⁸⁸ U.S. COMM'N ON CIVIL RIGHTS, STATE OF CIVIL RIGHTS 1957- 1983: THE FINAL REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, (1983), <http://www2.law.umaryland.edu/marshall/usccr/documents/stacivrifra.pdf>.

⁸⁹ *Id.* at 5.

⁹⁰ U.S. COMM'N ON CIVIL RIGHTS, A CITIZEN'S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT, (1984), <http://www2.law.umaryland.edu/marshall/usccr/documents/cr11084z.pdf>.

1992—Civil Rights Update

This publication was released as a short magazine of notable news stories providing a snapshot of the state of civil rights across the nation in 1992.⁹¹ Issues such as police brutality, enforcement of civil rights and equal opportunity laws, language assistance for voters, hate groups, and border control were all succinctly discussed in the eight pages of the report.⁹²

⁹¹ U.S. COMM’N ON CIVIL RIGHTS, CIVIL RIGHTS UPDATE, (1992), <http://www2.law.umaryland.edu/marshall/usccr/documents/cr1159924.pdf>.

⁹² *Id.*

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APPENDIX B: CONGRESSIONAL RESPONSES TO THE *SHELBY COUNTY* DECISION

The 113th Congress—The Sensenbrenner-Conyers-Leahy Trigger

On January 16, 2014, Senator Patrick Leahy (D-VT) and Congressmen Sensenbrenner (R-WI) and Conyers (D-MI) offered bipartisan legislation that included a new formula to replace the 2006 reauthorization formula. The Voting Rights Amendment Act (H.R. 3899/S. 1945) included a trigger that would cover:

- Any state within which there were five or more violations of the 14th or 15th Amendment, the VRA, or any other federal law that prohibits racial discrimination in voting, with at least one of the violations committed by the state itself (as opposed to a political subdivision within the state) during the previous 15 years;¹
- Any county or other political subdivision with three or more such violations, during the previous 15 years;² or
- Any county or other subdivision with at least one violation in the past 15 years, if the subdivision also had “extremely low minority turnout” during the same time period.³

As in the past, the covered states would have to submit subsequent electoral changes or election administration for federal preclearance under Section 5 before they could be implemented.⁴ When introduced in January 2014, the proposed trigger would have covered Georgia, Louisiana, Mississippi, and Texas.⁵ The updated formula was much more limited compared to the list of states that were previously covered for any voting changes—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas—along with counties in California, Florida, New York, North Carolina, South Dakota, and Virginia, where many statewide changes also had to be precleared if they were to be implemented in the covered counties.

The violations that trigger preclearance could be court orders or Attorney General objections to proposed changes found to be in violation of Section 5, but the coverage formula specifically excluded Attorney General objections to voting rights violations “based on the imposition of a requirement that a person provide a photo identification as a condition for receiving a ballot for voting in a Federal, State or local office.”⁶

The language of the proposed formula would not have counted as violations consent decrees or emerging ongoing litigation in major cases taking years to resolve, as the language would have

¹ H.R. 3899 §§ 2(a), 3(b)(1)(A), 113th Cong. (2013).

² H.R. 3899 § 3(b)(1)(B)(i), 113th Cong. (2013).

³ H.R. 3899 § 3(b)(1)(B)(ii), 113th Cong. (2013).

⁴ See H.R. 3899, 113th Cong. (2013); see also Charles S. Bullock III, Ronald Keith Gaddie, and Justin L. Wert, *The Rise and Fall of the Voting Rights Act 183* (2016) (Norman: University of Oklahoma Press) [hereinafter Bullock, Gaddie, and Wert, *Rise*].

⁵ Bullock, Gaddie, and Wert, *Rise*, *supra* note 4, at 184.

⁶ H.R. 3899 § 2(a), 113th Cong. (2013).

only counted “a final judgment (which has not been reversed on appeal), any court of the United States[.]”⁷ Also, the Voting Rights Amendment Act was offered at a time when major litigation regarding discriminatory voter ID laws had just begun in the post-*Shelby County* era and the issue of whether and how strict voter ID laws could violate the VRA was unclear—and the proposed formula would have specifically excluded Attorney General objections to discriminatory voter ID laws (but not any other Attorney General objections) as counting towards the coverage formula.⁸

The Amendment Act also included: (1) an amended Section 3(c) that would have expanded the types of violations that trigger a court to retain jurisdiction in a state or political subdivision, such that all VRA violations, and not only constitutional violations, could trigger judicial preclearance—permitting jurisdictions to be bailed into preclearance without having to prove intentional discrimination; (2) a requirement that states or covered jurisdictions provide public notice of changes in prerequisites, standards, practices, or procedures that were different from those in effect 180 days before the election, allowing grassroots organizations and observers to enjoin electoral changes that may have a discriminatory effect;⁹ (3) an option for the Attorney General to assign observers on a national basis to enforce the 14th and 15th Amendments, the VRA, and any other law to protect voting rights; and (4) a loosening of the requirements for preliminary injunctive relief to include: (a) not only constitutional violations but also more clearly with regard to all of the provisions of the VRA; and (b) granting the relief if the hardship imposed on the defendant would have been less than the hardship imposed on the plaintiff if relief were not granted.¹⁰

The Speaker of the House, Congressman John Boehner, and the Senate Minority Leader, Senator Mitch McConnell, declined to endorse the Amendment Act.¹¹ The bill’s sponsor, Senator Sensenbrenner of Wisconsin, emphasized the voter ID exception.¹² In addition, of the 177 cosponsors of H.R. 3899 only 11 were Republican.¹³ On the Senate side, S. 1945 had 12 cosponsors, none of whom were Republican.¹⁴

Besides the Senate Judiciary hearing, the bill underwent no further action during the 113th Congress.

⁷ H.R. 3899 § 3, 113th Cong. (2013).

⁸ H.R. 3899 § 2(a), 113th Cong. (2013).

⁹ Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CONG. RESEARCH SERV. 24 (2015), <https://fas.org/sgp/crs/misc/R43626.pdf> [hereinafter Coleman, *The Voting Rights Act of 1965*]; see also Bullock, Gaddie, and Wert, *Rise*, *supra* note 4, at 184.

¹⁰ H.R. 3899 *passim*, 113th Cong. (2013).

¹¹ Jim Rutenberg, *Nine Years Ago, Republicans Favored Voting Rights. What Happened?*, N.Y. TIMES (Aug. 12, 2015), <https://www.nytimes.com/2015/08/12/magazine/nine-years-ago-republicans-favored-voting-rights-what-happened.html>.

¹² See Carrie Johnson, *Lawmakers Roll Out Voting Rights Act Fix*, NATIONAL PUBLIC RADIO (Jan. 16, 2014), <https://www.npr.org/sections/itsallpolitics/2014/01/16/263113258/lawmakers-roll-out-voting-rights-act-fix>.

¹³ Cosponsors: H.R. 3899-113th Cong., <https://www.congress.gov/bill/113th-congress/house-bill/3899/cosponsors>.

¹⁴ *Id.*

The 114th Congress

In May 2015, after consulting with tribal leaders across the nation, DOJ found that effectively, Native Americans had to travel up to 100 miles in order to vote, and had to travel farther distances compared to whites in a number of states.¹⁵ This led the DOJ to produce Draft Legislation requiring jurisdictions “whose territory includes part or all of an Indian reservation, an Alaska Native village, or other tribal lands to locate at least one polling place in a venue selected by the tribal government,” and requiring an equal number of resources at those polling sites.¹⁶ Senators Tester (D-MT), Heitkamp (D-ND), Udall (D-NM), and Franken (D-MN) introduced a version of this draft as the Native American Voting Rights Act of 2015 (S. 1912), requiring the establishment of polling places on reservations at the request of tribes, including during early voting, and directing state election officials to mail absentee ballots to all registered voters if requested by the tribe.¹⁷ However, this bill was only referred to the Senate Judiciary Committee and never given a hearing.¹⁸

In June of 2015, Congressional Democrats introduced the Voting Rights Advancement Act of 2015.¹⁹ Congresswoman Terri Sewell, Senator Patrick Leahy, and leaders of the Congressional Black Caucus, Congressional Hispanic Caucus, and Congressional Asian Pacific American Caucus introduced it via companion bills H.R. 2867 and S. 1659.²⁰ As with the Voting Rights Amendment Act introduced in the 113th Congress, this bill struggled to obtain bipartisan support. All of the 107 House cosponsors of H.R. 2867 were Democrats.²¹ However, Senator Lisa Murkowski, a Republican from Alaska, endorsed the Voting Rights Advancement Act of 2015

¹⁵ Samantha Lachman, *Justice Department Voting Rights Proposal Could Make A Huge Difference For Native Americans*, HUFFINGTON POST (May 28, 2015), https://www.huffingtonpost.com/entry/voting-rights-native-americans-n_7463126.html.

¹⁶ Dept. of Justice, *Department of Justice Proposes Legislation to Improve Access to Voting for American Indians and Alaskan Natives*, (May 15, 2015), <https://www.justice.gov/opa/pr/department-justice-proposes-legislation-improve-access-voting-american-indians-and-alaska>; See also Dept. of Justice, *Tribal Equal Access to Voting Act of 2015 (Draft Legislation)*, <https://www.justice.gov/file/440986/download>.

¹⁷ S. 1912, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1912?q=%7B%22search%22%3A%5B%22%5C%22native+american+voting+rights+act%5C%22%22%5D%7D&r=1>.

¹⁸ *Id.*

¹⁹ S. 1659, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1659> (states with 15 violations over the past 25 years, or 10 violations if one was statewide, must submit future electoral changes for federal approval under Section 5); See also Athena Jones, *Congressional Democrats File Legislation to Update the Voting Rights Act*, CNN (June 25, 2015), <http://www.cnn.com/2015/06/24/politics/voting-rights-act-democrats-file-bill/>.

²⁰ S. 1659, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1659>; H.R. 2867, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/2867>.

²¹ Jesse H. Rhodes, *Ballot Blocked: the Political Erosion of the Voting Rights Act*, 177, (2017) (Stanford University Press).

reasoning that the Native American and other indigenous communities in her state faced significant ongoing barriers to voting rights.²²

The Advancement Act would restore Section 5 preclearance by requiring states with 15 voting violations over the past 25 years to submit their future election changes for federal approval to review whether they would be discriminatory before they could be implemented.²³ This coverage formula mimics the system that was in place under the pre-*Shelby County* VRA that sought to hold discriminatory jurisdictions accountable, with one critical difference: the new formula is “rolling,” such that jurisdictions automatically fall out of coverage if they no longer fall under the formula. For example, if a jurisdiction had 15 violations in the last 25 years, but one of those violations occurred in the first year of that 25-year period, then that jurisdiction would fall out of the coverage the next year unless there was a new violation. The proposed formula would have covered 13 states: Alabama, Arkansas, Arizona, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, Texas, and Virginia.²⁴ Unlike previous legislative proposals to the preclearance formula, the Advancement Act would not exclude Attorney General objections to discriminatory voter ID bills, nor would it exclude consent decrees, or determinations of voting rights violations based on non-VRA state or federal voting rights legislation (such as the NVRA).²⁵ The Advancement Act would also make it easier for federal courts to approve preliminary injunctions in VRA cases, and it would make the judicial preclearance remedy in Section 3(c) more accessible by eliminating the current requirement to prove intentional discrimination.²⁶

The Advancement Act would also be more clearly national and abide by the theory of equal state sovereignty, as it would require federal approval for certain types of election changes that have historically been found to be discriminatory no matter where they occurred in the nation and regardless of whether the jurisdiction had a history of discrimination in voting. Specifically, it would require preclearance of any of the following types of voting changes: more (but not less) restrictive voter ID laws, proof of citizenship requirements, changes to polling place locations including reduction in the number of polling places, and reductions in the accessibility of language materials (as covered by the minority language provisions of the VRA).²⁷ Moreover, changes that may involve racial gerrymandering would have to be precleared in any jurisdiction in the country with two or more racial or language minority groups in which one represents 20 percent of the

²² See Ari Berman, *Restoring the Voting Rights Act Now Has Bipartisan Support*, THE NATION (Sept. 10, 2015), <https://www.thenation.com/article/restoring-the-voting-rights-act-now-has-bipartisan-support/>.

²³ Coleman, *The Voting Rights Act of 1965*, *supra* note 9, at 25.

²⁴ *Id.* at 25. In the most recent Congress, the same version of the bill was introduced. See Voting Rights Advancement Act of 2017, H.R. 2978, 115th Cong. (2017), <https://www.congress.gov/bills/115/congress/house-bill/2978/cosponsors?q=%7B%22search%22%3A%5B%22hr2978%22%5D%7D&r=1>.

²⁵ See, e.g., Sen. Patrick Leahy, *Voting Rights Advancement Act of 2015, Section by Section*, <https://www.leahy.senate.gov/imo/media/doc/Voting%20Rights%20Advancement%20Act%20-%20Section%20by%20Section%20%286-24-15%29.pdf>.

²⁶ *Id.*; see also Discussion and Sources cited at *supra* notes 347-50 (difficulty of getting judicial preclearance shown in few 3(c) remedies have been granted) and notes 1314-18 (few preliminary injunctions awarded in successful VRA cases in the post-*Shelby County* era).

²⁷ *Id.* at § 5.

voting-age population, or any in which a single language minority group representing more than 20 percent of the voting-age population is located in whole or in part on an Indian reservation.²⁸

The 115th Congress

Congresswoman Terri Sewell and Senator Patrick Leahy most recently reintroduced their bill as the Voting Rights Advancement Act of 2017.²⁹ The House version of the bill obtained 180 cosponsors³⁰ while the Senate version of the bill had 48 cosponsors, most of whom were Democrats.³¹ As with the Advancement Act of 2015, this bill would nationalize preclearance by revising the coverage formula to apply to all states which demonstrate records of voting rights violations over the previous 25-year period, and it requires preclearance of certain forms of voting changes that have been discriminatory in the past, no matter where they occur.³² The House version was referred first to the Committee on the Judiciary then to the Subcommittee on the Constitution and Civil Justice. The Senate version was referred to the Committee on the Judiciary.³³

Similarly, the Sensenbrenner bill was reintroduced in the House as the Voting Rights Amendment Act of 2017, and referred to the Committee on the Judiciary, which then referred it to the Subcommittee on the Constitution and Civil Justice.³⁴ But it has not yet received a hearing.³⁵

²⁸ *Id.*

²⁹ S. 1419, 115th Cong. (2017); H.R. 3239, 115th Cong. (2017).

³⁰ Cosponsors - H.R. 3239, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/3239/cosponsors>.

³¹ Cosponsors - S. 1419, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1419/cosponsors>.

³² S. 1419, § 4(b)(1), 115th Cong. (2017).

³³ H.R. 2978, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/2978/related-bills?q=%7B%22search%22%3A%5B%22hr2978%22%5D%7D&r=1>.

³⁴ H.R. 3239, 115th Congress (2017), <https://www.congress.gov/bill/115th-congress/house-bill/3239>.

³⁵ *Id.*

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APPENDIX C: AUTOMATIC VOTER REGISTRATION

In 2014, 1.9 million Americans failed to register to vote because they did not know how to do so.¹ Strict and odd registration deadlines also led to 4.1 million Americans in 2014 not being able to vote.² Automatic Voter Registration (AVR) allows eligible citizens who interact with government agencies to automatically register to vote. Furthermore, these government agencies (such as the DMV) can transfer voter registration information to election officials so they know which citizens are registered. As the Brennan Center reported, this creates a “seamless process” that is convenient and less “error-prone” for not only voters but also government officials.³ Some voting rights scholars argue that AVR increases voter registration rates, “cleans up” the voter rolls, makes voting more convenient, and limits the prevalence of voter fraud.⁴

The introduction of AVR is relatively recent. The first AVR legislation was passed in Oregon in 2015. This specific law automatically registered eligible citizens who had a driver’s license. As a direct result of the new AVR law in Oregon, the state boosted the highest percentage of voting age citizens in Oregon’s history. Specifically, 70.4 percent of the state’s voting age population voted in November 2016.⁵ The new AVR law in Oregon is more colloquially known as the “Motor Voter Act.” It took effect in January 2016 and allows those who have “qualifying interactions” at the DMV to vote. These interactions consist of an interaction between an eligible unregistered voter and a DMV official for the purposes of applying for, renewing, or replacing an Oregon driver’s license, ID card, or permit.⁶ Residents are then sent an Oregon Motor Voter (OMV) card and have 21 days to respond and choose to decline to register to vote, choose a political party, or remain registered but not affiliated to any political party. Only 6 percent of citizens in Oregon chose to opt out of being automatically registered to vote.⁷ This allows any application for a driver’s license to serve as an application to register to vote, to update voter registration, and perform other functions.⁸ But one downside is that under the current Oregon model, only voters with a state

¹ Henry Kraemer, Liz Kennedy, Maggie Thompson, Danielle Root & Kyle Epstein, *Millennial Voters Win With Automatic Voter Registration* 6, CENTER FOR AMERICAN PROGRESS (July 19, 2017), at 6, <https://cdn.americanprogress.org/content/uploads/2017/07/18151441/MillennialAVR-report.pdf>.

² Liz Kennedy, Lew Daly & Brenda Wright, *Automatic Voter Registration: Finding America’s Missing Voters* 5, DEMOS (2015), at 9, http://www.demos.org/sites/default/files/publications/AVR_0.pdf.

³ BRENNAN CENT. FOR JUSTICE, *THE CASE FOR AUTOMATIC VOTER REGISTRATION*, 1, (2016), https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf [*hereinafter* BRENNAN, *Case for AVR*].

⁴ *Id.*

⁵ Betsy Hammond, *Oregon Voters Shattered Previous Participation Rates in November 2016*, OREGONIAN (Dec. 12, 2016), http://www.oregonlive.com/politics/index.ssf/2016/12/oregon_voters_shattered_previo.html.

⁶ State of Oregon, Secretary of State, *Oregon Motor Voter Act FAQ*, <http://sos.oregon.gov/voting/Pages/motor-voter-faq.aspx>.

⁷ Ari Berman, *Automatic Voter Registration in Oregon is Revolutionizing American Democracy*, THE NATION (May 16, 2016), <https://www.thenation.com/article/automatic-voter-registration-in-oregon-is-revolutionizing-american-democracy/>.

⁸ S. 1933, 100th Gen. Assemb. (Ill. 2017). <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1933&GAID=14&DocTypeID=SB&SessionID=91&GA=100>.

driver's license or state ID card will benefit from AVR; and there are inherent racial disparities in leaving out voters who interact with social services and other federally funded agencies that are required by the National Voter Registration Act (NVRA) to register voters.⁹

Following Oregon, California passed an AVR law in October of 2015 and Vermont followed with HB 458 in April of 2016.¹⁰ Table 14 below shows the states that have adapted some form of AVR, according to the National Conference of State Legislatures, as of April 18, 2018.

⁹ *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, INCREASING COMPLIANCE WITH SECTION 7 OF THE NATIONAL VOTER REGISTRATION ACT (Sept. 7, 2016) (2017) (including data show that increasing voter registration at NVRA agencies would benefit minority voters, who are disparately represented at such agencies), <http://www.usccr.gov/pubs/NVRA-09-07-16.pdf>; *see also* Discussion and Sources cited *supra* notes 356-361 (N.C.) and 406-26 (Tex.) (strict photo voter ID laws disparately impact black and Latino voters in North Carolina and Texas, as they are less likely to interact with the DMV, and DMV locations are less accessible due to ongoing socioeconomic disparities such as lack of time and transportation).

¹⁰ National Conference of State Legislatures, *Automatic Voter Registration*, NCSL, (Apr. 18, 2018), <http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>.

Table 14

STATES THAT HAVE ENACTED AUTOMATIC VOTER REGISTRATION*				
Note that this table includes only states that self-report that they have “automatic registration.”				
State	Year Enacted	Bill Number	Year Implemented	Type of Opt-Out
Alaska	2016	Measure 1	2017	Notification sent
California	2015	A 1461	n/a	During agency transaction
Colorado	2017	Done through Department of Motor Vehicles system	2017	During agency transaction
Connecticut	2016	Agreement between Secretary of State and Department of Motor Vehicles	n/a	During agency transaction
District of Columbia	2016	B21-0194	n/a	During agency transaction
Illinois	2017	SB 1933	n/a	During agency transaction
Maryland	2018	SB 1048	July 2019	During agency transaction
New Jersey	2018	AB 2014	n/a	During agency transaction
Oregon	2015	HB 2177	2016	Notification sent
Rhode Island	2017	HB 5702	n/a	During agency transaction
Vermont	2016	HB 458	2017	During agency transaction
Washington	2018	HB 2595	n/a	During agency transaction
West Virginia	2016	HB 4013	n/a	During agency transaction

Source: *Automatic Voter Registration*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 18, 2018), <http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>

Each state has adopted AVR in different ways. For example, in California, the law now allows the DMV to electronically transmit information to the California Secretary of State about eligible voters to be added to the voter rolls.¹¹ This is similar to the model in Oregon. The Illinois model does not limit AVR to register voters from the DMV database, but it is more expansive and allows AVR from social service agencies.

In addition to the AVR laws already enacted, 32 states have introduced AVR proposals in 2017.¹² The most recent states to pass AVR legislation are Maryland and New Jersey. Similar to the Illinois

¹¹ Cal. Elec. Code §§ 2260-2270.

¹² Brennan Cent. for Justice, *Voting Laws Roundup 2017*, BRENNAN CENT. FOR JUSTICE (May 10, 2017), <https://www.brennancenter.org/analysis/voting-laws-roundup-2017>.

model, Maryland's law allows citizens to be automatically registered to vote when they interact with the Motor Vehicle Administration as well as the Maryland Health Benefit Exchange and local departments, such as the Mobility Certification Office in the Maryland Transit Administration.¹³ In April, New Jersey enacted a similar AVR law, which reaches even more agencies, including parole and probation agencies.¹⁴

In a study of the impact of the AVR law in Oregon, the Center for American Progress (CAP) found that more than 272,000 people were added to the voter rolls in Oregon as a direct result of this new law.¹⁵ About 40 percent of AVR registrants were 30 years old or younger, even though the law itself was not designed to specifically target a younger population.¹⁶ In fact, the millennial generation (ages 18-29) are significantly affected by AVR laws. As CAP found, "by implementing AVR systems in states across the country, the political power of the millennial generation can be realized."¹⁷ Specifically, the number of millennials who registered from 2012 to 2013 increased by more than 100,000. Millennials often face significant barriers to voting that the AVR alleviates. Under current voter registration process, every time a citizen moves, they need to re-register. Young people are disproportionately affected by these restrictions because young people between the ages of 18-29 change their address at more than twice the annual rate of Americans ages 30 and older.¹⁸ AVR laws eliminate the requirement to re-register every time a voter moves. AVR in Oregon nearly quadrupled the rate of new registrations at the DMV and has increased the registration rate by almost 10 percent.¹⁹

Despite this, AVR has faced criticism from past NJ Governor Chris Christie who said that, "I reject this government-knows-best, backwards approach that would inconvenience citizens and waste government resources for no justifiable reason."²⁰ In addition, Hans von Spakovsky stated that, "I have yet to see an automatic voter registration bill that adequately addresses the problems of including ineligible voters, such as noncitizens—illegal and legal—or preventing duplicate registrations. Automatic voter registration won't solve the problem of low voter turnout. We know that from our experience with the NVRA—it increased registration but not turnout. People don't vote because of motivational factors, not because they have trouble registering."²¹ However, it has been shown that AVR laws remove barriers to registration for eligible voters, improve the accuracy

¹³ *Id.* and see S. 1048, 2018 Leg., Reg. Sess. (Md. 2018),

http://mgaleg.maryland.gov/2018RS/Chapters_noln/CH_19_sb1048t.pdf

¹⁴ A2014, 2018-2019 Leg., Reg. Sess. (N.J. 2018), <https://www.njleg.state.nj.us/bills/BillView.asp>.

¹⁵ Rob Griffin, Paul Gronke, Tova Wang & Liz Kennedy, *Who Votes with Automatic Voter Registration?*, CENTER FOR AMERICAN PROGRESS (June 7, 2017, 8:56 AM), <https://www.americanprogress.org/issues/democracy/reports/2017/06/07/433677/votes-automatic-voter-registration/>.

¹⁶ *Id.*

¹⁷ Kraemer et al., *Millennial Voters*, *supra* note 1.

¹⁸ *Id.*

¹⁹ Jonathan Brater, *Update: Oregon Keeps Adding New Voters at Torrid Pace*, BRENNAN CENTER FOR JUSTICE (Aug. 19, 2016), <https://www.brennancenter.org/analysis/update-oregon-keeps-adding-new-voters-torrid-pace>.

²⁰ Niraj Choski, *Automatic Voter Registration a 'Success' in Oregon*, N.Y. TIMES (Dec. 2, 2016), <https://www.nytimes.com/2016/12/02/us/politics/oregon-voter-registration.html>.

²¹ NATIONAL CONFERENCE ON STATE LEGISLATURES, *WHAT IS AUTOMATIC VOTER REGISTRATION ANYWAY? WHAT THE EXPERTS SAY*, NCSL, 2, (2016) http://www.ncsl.org/Documents/Elections/The_Canvass_JulyAugust_2016.pdf.

of voter rolls, reduce the costs of provisional ballots, and result in higher voter turnout rates.²² But since the 2016 Governor's race, New Jersey introduced and passed a new AVR bill, which will expand automatic registration to parole and social service agencies.²³

In addition to the effect that AVR laws have on millennials, these laws would also add up to 50 million eligible voters to the rolls.²⁴ The core tenets of these laws are that they are inexpensive, they allow people to still participate even if they move frequently, citizens have the choice to opt out, they are trustworthy, and they improve accuracy. Since AVR is done automatically, it reduces the "human error" such as the chance that a civil servant going through paper applications would make a typo that would invalidate someone from voting, losing a form, or other clerical errors.²⁵ Moving away from affirmatively requiring that each voter fill out a voter registration form and towards an automatic and convenient process has increased voter registration in every state that has implemented it.²⁶

²² BRENNAN, *Case for AVR*, *supra* note 3.

²³ See Matt Friedman, *New Jersey AVR Bill Would Allow Automatic Registration at Welfare, Parole Offices*, POLITICO (April 5, 2018), <https://www.politico.com/states/new-jersey/story/2018/04/05/change-to-motor-voter-bill-would-allow-automatic-voter-registration-at-welfare-agencies-parole-board-351203>).

²⁴ BRENNAN, *Case for AVR*, *supra* note 3, at 1.

²⁵ *Id.* at 10.

²⁶ *Id.* at 9.

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APPENDIX D: U.S. COMMISSION ON CIVIL RIGHTS STATE ADVISORY COMMITTEES (SACS) RECENT WORK ON VOTING RIGHTS

The Commission has SACs in each of the 50 states and the District of Columbia, consisting of citizens of the respective states who serve without pay and who advise the Commission and their states about civil rights issues in the states.¹ This Appendix is a general summary of the relevant SAC reports issued and briefings held between 2008 and June 2018, while the Commission notes that pertinent information is also found throughout the text of this national report.

Alabama

On February 22, 2018, the Alabama Advisory Committee heard testimony from several voting rights experts and Alabama Secretary of State John Merrill. The testimony included discussion of current voter registration and education efforts undertaken by the state and nonprofit groups, as well as obstacles to registration and casting a ballot. Many testified Alabama swiftly enacted voter restrictions after the preclearance requirement was lifted. Voters currently struggle to learn of election law changes, such as moving precinct boundaries, as no notice is required. Alabama's voter ID law received particular attention, with many stating the process of obtaining ID remains too cumbersome, including concerns about the closure or limited hours at several Department of Motor Vehicles offices and high costs associated with obtaining ID. Particular obstacles for voters of color were discussed. Concerns raised about the ability of voters to cast a ballot on Election Day included inaccurate designation of some voters as "inactive" when they had recently voted, precinct officials requiring more rigorous standards for ID than required by state law, insufficient staffing causing long lines, and inappropriate law enforcement presence at polling places.

Testimony also included extensive discussion of barriers to vote for formerly incarcerated people. Many noted the explicit racism in the history of disenfranchisement in Alabama based on criminal conviction, dating back to the original provision in 1901. Alabama has recently enacted a law clarifying the crimes for which conviction renders a person ineligible to vote and which do not. Experts expressed concern about a lack of education and efforts by the state to ensure those with convictions are aware of their eligibility status and the process to restore their right to vote. Concerns were also expressed that once an application for restoration is submitted, the process is lengthy and confusing, discouraging people from participating. Additionally, Alabama requires the payment of all fines and fees before vote restoration, and many expressed dismay that those living in poverty were therefore ineligible.

¹ 42 U.S.C. 1975a(d) §§ 703.1-704.

Alaska

On March 27, 2018 the Alaska SAC issued an Advisory Memorandum to the Commission regarding the state of Alaska Native voting rights.² This memorandum came after the Alaska SAC held a public meeting in August of 2017 to (1) determine the effectiveness of the implementation of the *Toyukak v. Mallott*³ settlement and (2) to determine the possible impact of mail-in voting on Alaska Native voters.⁴ The *Toyukak* Order requires language assistance and election materials, specifically in Yup'ik and Gwich'in in the Dillingham, Kusilvak, and Yukon-Koyukak Census Areas until 2020.⁵ The order ensured that translations were accurate and stipulated more intensive training for poll workers.⁶ The order gave translations and language assistance, glossaries of election terms in Native dialects, toll-free numbers for voter language assistance, and translated sample ballots and touch-screen voting machines.⁷ This order also mandates that other parts of Alaska fall under Section 203 language assistance program coverage.⁸ The covered language minority groups in Alaska include: Filipino, Hispanic, Yup'ik, Aleut, Inupiat, and Alaskan Athabascan.⁹

According to Alaska's SAC report, there was inadequate staffing of bilingual poll workers in recent elections in the covered areas which may have led to LEP voters not being able to cast their ballot.¹⁰ There was also a lack of voting materials that may have resulted from the inaccessibility of certain areas to the U.S. Postal Service as well as a lack of trained observers and monitors at the polls to disseminate this information.¹¹

In studying the feasibility of implementing a vote-by-mail system, the Alaska SAC found many challenges to implementing a system like this in Alaska. First, voters were concerned about the speed of Alaska's mail system because it can take up to two to three weeks to receive mail.¹² Since elections are typically held in October or November—two of the state's worst weather months—receiving mail could take even longer to arrive.¹³ Additionally, a recent study revealed that Native American voters have a low trust in mail-in voting. Native American voters often have irregular

² Advisory Memorandum, Alaska Advisory Committee to the U.S. Comm'n on Civil Rights, *Alaska Native Voting Rights*, (2018) <http://www.usccr.gov/pubs/2018/05-25-AK-Voting-Rights.pdf> at 1 [*hereinafter* Alaska SAC, *Voting Rights*].

³ 2015 WL 11120474 (D. Alaska 2015).

⁴ Alaska SAC, *Voting Rights*, *supra* note 2, at 1-3 (The *Toyukak* Order requires language assistance and election materials, specifically in Yup'ik and Gwich'in in the Dillingham, Kusilvak, and Yukon-Koyukak Census Areas until 2020.)

⁵ *Id.* at 2-3.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.* at 7.

¹³ *Id.*

mail and non-traditional home addresses.¹⁴ Rural residents often share P.O. boxes, and some members of the community fear that their neighbors would go through their mail.¹⁵ Furthermore, Alaska Native villages lack broadband access meaning that voters in the Native community have to go further out of their way to participate in the election process.¹⁶

The Alaska SAC issued five main recommendations to the Commission: (1) the Commission should ask the DOJ to enforce Section 203 of the VRA and send federal observers to Alaska; (2) the Commission should ask the U.S. Postal Service to require training of all Alaska postal service employees to ensure election mail is postmarked promptly—especially in rural areas, and prioritize election mail; (3) the Commission should ask Congress to give appropriations from Help America Vote Act (HAVA) to aid language assistance efforts in Alaska; (4) the Commission should ask the State of Alaska Legislature to give appropriations to fund the Division of Elections to assist in Section 203 compliance, possibly provide broadband service in rural areas of Alaska, and enact legislation similar to Title VI of the Civil Rights Act; and (5) the Commission should ask the Alaska Governor, Lieutenant Governor, and State of Alaska Division of Elections to analyze vote-by-mail systems, halt plans to move forward with a vote-be-mail system in covered areas from *Toyukak v. Mallott*, continue Section 203 coverage in certain areas, start a hybrid voting system that has early voting, in-person voting and vote-by-mail, continue panels on these issues, review Title VI stipulations, evaluate the role of pole workers, extend the *Toyukak* Order past 2020, and have alternative methods for receiving election materials in rural areas.¹⁷

California

In 2017 the California SAC issued a report to the Commission about voting integrity in California. A hearing was conducted in Los Angeles, California in 2015 about the compliance of California with the Help America Vote Act (HAVA). After hearing from expert witnesses and the public, the California SAC issued seven recommendations to the Commission: (1) train election officials and poll workers correctly; (2) provide expert citizen election integrity oversight; (3) make poll sites and poll workers more accessible to those voters with disabilities; (4) create a nonpartisan citizen election integrity and oversight organization to assess VoteCal and analyze the Secretary of State's process of verifying eligible voters; (5) follow HAVA's guide for distributing provisional ballots; (6) upgrade California's election codes; and (7) amend the Motor Voter law to establish oversight and create ongoing education for DMV personnel.¹⁸

¹⁴ *Id.* at 7-8.

¹⁵ *Id.* at 8.

¹⁶ *Id.*

¹⁷ *Id.* at 10-12.

¹⁸ California Advisory Committee to the U.S. Comm'n on Civil Rights, *Voting Integrity in California: Issues and Concerns in the 21st Century*, v-vii (2017), <http://www.usccr.gov/pubs/07-24-Voting-Integrity-in-CA.pdf> (please note that this report did not receive Commission Legal Sufficiency Review).

Florida

In 2008 the Florida SAC conducted a study of the voting rights of persons with former felony convictions in Florida.¹⁹ The Florida Constitution states that no person who is convicted of a felony in the state or in any other state will be allowed to vote or hold office until their civil rights are restored.²⁰ This restoration only comes from the Clemency Board. The assessment by the Florida SAC found that about 200,000 people lost the right to vote between 1995 and 2005 due to ex-felon disenfranchisement.²¹ This disenfranchisement disproportionately affected African-American men; men make up 90 percent of the prison population and African Americans make up half of the total prison population.²² In April of 2007, the state Clemency Board issued a revised set of Rules of Executive Clemency that would automatically restore the civil rights and voting rights to most felons upon release from prison.²³ The Florida SAC supported this change and subsequently recommended that Florida's Parole Commission create data collection systems that will allow future studies to be conducted about this.²⁴

Louisiana

The Louisiana Advisory Committee to the U.S. Commission on Civil Rights held a public meeting on December 6, 2017 to discuss civil rights and barriers to voting in Louisiana.²⁵ The committee heard several panels discuss voting challenges within the state.

Ph. D. Candidate at Louisiana State University, Jhacova Williams, conducted census data analysis and found that income and race within a Parish are significantly associated with the number of voting machines and polling places available.²⁶ “[I]ndividuals who live in richer areas or areas with higher percentages of whites have more polling places and more voting machines and thus have easier access to voting.²⁷” Senator Karen Carter Peterson discussed the disadvantages of the ABC voting machine that is still in use in Louisiana, citing the ease with which the machines can be hacked as a reason to decertify the machines in Louisiana.²⁸ Peterson also argued that there are

¹⁹ Florida Advisory Committee to the U.S. Comm'n on Civil Rights, *Ex-Felon Voting Rights in Florida: Revised Rules of Executive Clemency That Automatically Restore Civil Rights to Level-1 Offenders Is the Right Policy*, (2008), <http://www.usccr.gov/pubs/EX-FelonVRFL.pdf> [hereinafter Florida SAC, *Ex-Felon Voting Rights in Florida*].

²⁰ FLA. CONST. art. VI, § 4(a). *Id.* at i.

²¹ Florida SAC, *Ex-Felon Voting Rights in Florida*, *supra* note 19, at i.

²² *Id.*

²³ *Id.* at ii.

²⁴ *Id.*

²⁵ Louisiana Advisory Committee to the U.S. Comm'n on Civil Rights, *Civil Rights and Barriers to Voting in Louisiana* (Dec. 7, 2018) (transcript on file) at 1.

²⁶ *Id.* at 18-19.

²⁷ *Id.*

²⁸ *Id.* at 21.

far too few polling locations, forcing people to travel further and disproportionately impacting more impoverished voters.²⁹

Peterson also discussed a lack of accessibility at the polls, noting that assistance is only offered to those with a physical disability, and arguing that the statute discriminates against those who require assistance due to a mental disability or other reason.³⁰ Director of Policy and Community Engagement for the Advocacy Center of Louisiana, Susan Meyers, also discussed several accessibility issues. Most notably, that polling places that are not otherwise subject to disability laws—churches and private homes—do not make their facilities accessible to people with disabilities.³¹ The League of Women Voters asked that the city-Parish government comply with the ADA and the HAVA, after describing the lack of accessibility in parking, long lines, and stairs making it more challenging for elderly and disabled people to vote.³²

Kansas

The Kansas SAC issued a voting rights report in 2017 examining the Kansas Secure and Fair Elections Act (SAFE).³³ Kansas Governor Sam Brownback signed the SAFE Act (HB 2067) on April 18, 2011.³⁴ The SAFE Act requires that newly registered Kansas voters prove U.S. citizenship when registering to vote, voters must show photographic identification when casting an in-person vote, and voters must have their signature verified and provide a full Kansas driver's license or non-driver's ID number when voting by mail.³⁵ Under the SAFE Act, citizens can acquire a free, non-driver photo ID from the Kansas Division of Vehicles and a free copy of their birth certificate from the Kansas Office of Vital Statistics to prove their citizenship.³⁶ The Committee advised the DOJ to review the Kansas SAFE Act and determine if it follows federal law—specifically the VRA, the Help American Vote Act, and the National Voter Registration Act (NVRA).³⁷

Kentucky

The Kentucky SAC submitted a report in 2009 about voting rights in their state, specifically for persons with former felony convictions. The SAC concluded that persons with felony convictions

²⁹ *Id.* at 25-26.

³⁰ *Id.* at 23.

³¹ *Id.* at 70-71.

³² *Id.* at 75-76.

³³ KANSAS STATE ADVISORY COMMITTEE TO THE U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS AND THE KANSAS SECURE AND FAIR ELECTIONS ACT, 40-1 (Mar. 2017), <http://www.usccr.gov/pubs/KS-Voting-Rights-Report.pdf> [*hereinafter* KANSAS SAC, SAFE Act].

³⁴ Press Release, State of Kansas, Secretary of State, *Kansas Secure and Fair Elections (SAFE) Act Signed by Governor* (Apr. 18, 2011), https://www.kssos.org/other/news_releases/PR_2011/PR_2011-04-18_on_SAFE_Act_Signing.pdf.

³⁵ *Id.*

³⁶ KANSAS SAC, SAFE Act, *supra* note 33, at 10-11.

³⁷ *Id.* at 41.

should have the right to vote restored after serving their full sentence.³⁸ Despite the fact that the Governor can restore individual voting rights to former felons through executive pardon, the Kentucky SAC found that that process has become “politicized.” Moreover, Kentucky is one of only 12 states that bans voting indefinitely (for life), unless the Governor decides to pardon citizens who have served their time, one by one.³⁹ The SAC recommended automatically restoring the voting rights to persons with former felony convictions in the state of Kentucky.⁴⁰

Indiana

On February 12, 2018, the Indiana SAC held a conference call to hear testimony about voting rights in Indiana to determine if there are barriers to vote that exist in the state.⁴¹ The Indiana SAC followed up by holding community hearings in Evansville, Indianapolis, and Gary. Testimony included information about verifying voter registration information, voter ID requirements, and concerns regarding accessibility of the polls for the disabled, early voting, and procuring absentee ballots.⁴² The SAC also heard testimony about discriminatory behavior by poll workers and broken voting equipment, which are direct barriers to voting on Election Day at the polls.⁴³ There was also testimony about an Indiana state law that allows local election authorities to purge the registration of Indiana voters using the matching program known as Crosscheck.⁴⁴ Additionally, the SAC heard testimony that following the 2008 presidential election, early voting sites in Indianapolis were removed in an area where there was high African-American turnout while legislators decided to add an additional two early voting stations in primarily white Republican districts. The other main issue the SAC heard testimony about is the topic of voter photo ID requirements, with testimony that Indiana’s photo ID law is one of the most “stringent” in the nation and that 83.2 percent of white voters in Indiana have the correct photo ID while only 71.7 percent of African-American voters do.⁴⁵

Illinois

In 2018, the Illinois SAC submitted a report to the Commission about the state of voting rights in Illinois. The Illinois SAC held a public briefing in 2017 to hear expert and public testimony about

³⁸ KENTUCKY ADVISORY COMMITTEE TO THE U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS IN KENTUCKY: FELONS WHO HAVE COMPLETED THE FULL TERMS OF THEIR SENTENCES SHOULD HAVE THE RIGHT TO VOTE, 23 (SEPT. 2009), <http://www.usccr.gov/pubs/KYVotingRightsReport.pdf> [hereinafter KENTUCKY SAC, *Voting Rights in Kentucky*].

³⁹ National Conference of State Legislatures, *Felon Voting Rights*, NCSL, (Nov. 28, 2017), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

⁴⁰ KENTUCKY SAC, *Voting Rights in Kentucky*, *supra* note 38.

⁴¹ Indiana State Advisory Committee to the U.S. Comm’n on Civil Rights, *Civil Rights and Barriers to Voting in Louisiana* (Dec. 7, 2018) (transcript on file) [hereinafter Indiana SAC, *Meeting Transcript*] at 1.

⁴² *Id.* at 4, lines 28-39.

⁴³ *Id.* at 5, lines 4-12.

⁴⁴ *Id.* at 5-6. See also Fatima Hussein, *Indiana Secretary of State Accused of Violating Election Laws*, INDY STAR (Oct. 27, 2017), <https://www.indystar.com/story/news/2017/10/27/indiana-secretary-state-accused-violating-federal-election-laws/806825001/>.

⁴⁵ *Id.* at 7.

ways to improve access to voting in Illinois. The SAC issued four main recommendations to the Commission. First, they recommended that the Commission include an analysis of changes in voting laws following the *Shelby County* and *Citizens United v. Federal Election Commission* decisions, following the passage of the Automatic Voter Registration or Election Day Registration, and an analysis of allegations of voter fraud in the Commission's national study on voting rights.⁴⁶ Second, they recommended that the Commission advise Congress to create a working committee to study the impact of the *Shelby County* decision and update the preclearance formula in the VRA, the same recommendations that the Kansas SAC made.⁴⁷ Third, the Illinois SAC recommended that the Commission advise the DOJ to analyze Illinois' implementation of the VRA, HAVA, and NVRA.⁴⁸ Finally, the SAC asked that the Commission deliver a letter to the U.S. Election Assistance Commission (EAC), the Illinois Governor, and the Illinois Legislature about the findings of this report and further areas to investigate.⁴⁹

Maine

On March 21, 2018, the Maine SAC convened a briefing on voting rights in Maine.⁵⁰ This hearing centered on the dynamics of voter ID laws and the representation, or lack thereof, of certain voter demographics. All of the panelists agreed that Maine has some of the most inclusive and fair policies regarding voting rights and access, given that the state enacted same-day voting legislation and does not require voters to have identification at polling places.⁵¹ However, there have been numerous attempts to pass legislation that would enact voter ID laws; panelist Terry Brown of the Maine Heritage Policy Center argued that passing a voter ID law would protect elections from fraudulent voting, but panelist Ann Luther of the League of Women Voters contended that voter ID laws typically result in lower voter turnout, with turnout in states with ID laws typically falling by 2 or 3 percent.⁵² One of the most inclusive provisions of Maine's voting rights laws is the enfranchisement of convicted felons.⁵³ Maine is only one of two states that does not strip convicted criminals of their voting rights; individuals convicted of crimes can vote both while incarcerated and as soon as they have served their sentence.⁵⁴

Although very inclusive in some aspects, there has been some controversy in Maine regarding student voters and voters with disabilities. Students generally have more flexibility in regards to voting registration, given that permanent residency and temporary residency may differ, but legislation was recently proposed to require additional proof of residency for students residing in

⁴⁶ ILLINOIS STATE ADVISORY COMMITTEE TO THE U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS AND VOTING IN ILLINOIS 57-58 (FEB. 2018), <http://www.usccr.gov/pubs/2018/IL-Voting-Rights.pdf>.

⁴⁷ *Id.* at 58.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Maine State Advisory Committee to the U.S. Comm'n on Civil Rights, *Voting Rights in Maine*, (Mar. 21, 2018), (transcript on file).

⁵¹ *Id.* at 1 and 27.

⁵² *Id.* at 26 and 30.

⁵³ *Id.* at 27.

⁵⁴ *Id.*

university housing.⁵⁵ Such legislation was not passed, given that it would violate students' constitutional rights and equal protection to vote, but in 2011, the Secretary of State issued a letter to students who had recently registered to vote and attacked the accuracy of their registration, which discouraged those students from voting.⁵⁶ As for registered voters with disabilities, Richard Langley, the Deputy Director of Disability Rights Maine, spoke primarily on this issue.⁵⁷ The Help America Vote Act of 2002 established the need for accessibility for disabled people in voting, but did not allocate enough resources to ensure physical accessibility of voting locations.⁵⁸ Langley testified that many public polling places do not consistently provide the necessary equipment to make places accessible, such as ramps and accessible doorways.⁵⁹ According to Langley, there are approximately 3 million people with disabilities whose votes are not accounted for, which may be a result of not feeling welcome in the political sphere or, as Langley testified, may result from the physical challenges persons with disabilities face at polling places.⁶⁰

New Hampshire

In 2018, the New Hampshire SAC issued a report on the effects of its recent election laws and examined whether these laws had a disparate impact on voters of color. The report based its conclusions on a roundtable session held September 30, 2013 and a briefing held May 20, 2014.⁶¹ New Hampshire is a swing state and holds the first presidential primary election, garnering the state's elections a great deal of attention. Moreover, the state maintains high rates of voter turnout. In the 2012 Election, 70.9 percent of its eligible population voted, making it fourth in the country in voter turnout.⁶² Eight towns and two unincorporated areas in New Hampshire were subject to the VRA's preclearance requirement. Prior to the *Shelby County* decision, New Hampshire became the first and only state to bail out of its preclearance requirements before a three-judge panel.⁶³

The Assistant U.S. Attorney and election officer for the District of New Hampshire reported that in his 14 years with the U.S. Attorney's Office, he has not found a single violation of voting rights.⁶⁴ Caitlin Rollo, research director of the Granite State Progress Education Fund, testified that from 2000 to 2012, New Hampshire had only two documented cases of voter fraud, making the statewide percentage 0.0003.⁶⁵ Despite this record, in 2012 New Hampshire enacted a voter ID law to protect against voter impersonation fraud. The law requires voters to show an

⁵⁵ *Id.* at 22.

⁵⁶ *Id.* at 29.

⁵⁷ *Id.* at 37.

⁵⁸ *Id.* at 38.

⁵⁹ *Id.* at 38.

⁶⁰ *Id.*

⁶¹ NEW HAMPSHIRE STATE ADVISORY COMMITTEE TO THE U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS IN NEW HAMPSHIRE, (MAR. 2018), <https://www.usccr.gov/pubs/2018/05-16-NH-Voting-Rights.pdf>.

⁶² *Id.* at 6. (The requirement was likely placed on these areas because of literacy tests and low voter turnout during the 1960s.)

⁶³ *Id.* at 6.

⁶⁴ *Id.* at 8.

⁶⁵ *Id.* at 9.

“acceptable” form of identification when going to the polls.⁶⁶ The report finds that New Hampshire has one of the more flexible voter ID laws. It is up to the discretion of election officials whether or not to allow voters to use an ID that is not specified by the ID law. The League of Women Voters concluded that the voter ID law has increased wait times, which can dissuade citizens from voting; from 2008 to 2012 the average voter in New Hampshire had to wait 60 percent longer to vote.⁶⁷ However, the Secretary of State of New Hampshire contends that the voter ID laws have not had a substantial deterrent effect on turnout; turnout dropped 1.5 percent from 2008 to 2012.⁶⁸ Obtaining an ID that meets the specifications of the law can be challenging for disabled, homeless, or elderly people. Often, to acquire a government ID a person must already have two forms of ID and obtaining an ID can be costly with regard to notary fees or travel fare.⁶⁹ The report suggests that given the minor instances of the problem and the potential financial and social costs of enforcing the law, the voter ID law may be more burdensome than beneficial.

Some New Hampshire polling locations still have some barriers to physical access for people with disabilities and there are many with attitudinal barriers that discourage people with disabilities from voting.⁷⁰ Seven of the 94 voters with disabilities surveyed reported that they were unable to vote privately and independently in the 2012 Primary Election.⁷¹ In 2013 none of the polling locations had set up the accessible voting system. In municipal elections of that year 100 percent of disabled voters were unable to vote privately and independently.⁷²

Section 203 of the VRA mandates that states provide language assistance for any single language minority group if they comprise over 5 percent of voting age citizens.⁷³ As of the census of October of 2011, none of New Hampshire’s jurisdictions met this requirement.⁷⁴ The report cites a demographic shift in New Hampshire that suggests the need for greater language accommodation for non-English speakers.⁷⁵ If population trends continue, certain areas of New Hampshire will be subject to the VRA’s federal language assistance requirement by 2020.⁷⁶ The committee recommended that the Secretary of State of New Hampshire publish all voting informational materials in both English and Spanish.⁷⁷

⁶⁶ *Id.* (stating that the acceptable forms of identification include: a driver’s license, non-photo ID from a DMV, voting ID, passport, military ID, and certain types of student IDs).

⁶⁷ *Id.* at 10.

⁶⁸ *Id.*

⁶⁹ *Id.* at 13.

⁷⁰ *Id.* at 15.

⁷¹ *Id.*

⁷² *Id.* at 16.

⁷³ *Id.* at 21.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 22.

⁷⁷ *Id.* at 24.

Ohio

The Ohio SAC heard testimony March 2 and 9, 2018 regarding voting rights in Ohio.⁷⁸ Daniel Tokaji, Associate Dean at The Ohio State University Moritz College of Law⁷⁹ discussed the history of voting rights in Ohio, vote denial claims, and vote dilution.⁸⁰ He stated that there have been a number of claims of race discrimination in violation of Section 2 in Ohio over the past few years.⁸¹ Catherine Turcer, the Executive Director of Common Cause Ohio, referenced Ohio's voter ID law which is more lenient than other states because voters can use a usual license and a utility bill.⁸² Additionally, she referenced a practice called no fault absentee voting which one third of Ohio voters take advantage of and an early voting period that allows them to register to vote and update their voter registration information.⁸³ Turcer also said that Ohio has "truly bi-partisan" election administrations meaning that the votes are verified equally by members of both parties.⁸⁴ However, Ohio is one of the most "aggressive" states for voter purging,⁸⁵ with "tens of thousands" of voters, who were primarily African-American voters from urban areas, purged in advance of the 2016 presidential election.⁸⁶ In 2016, 13 percent of registered voters were labeled as "inactive" voters which equated to a loss of 1 million voters.⁸⁷

Kerstin Sjoberg-Witt testified to the experiences and issues that Ohio voters with disabilities face, including stereotypes, the potential for discrimination in the constitution, and misinformation about people with disabilities.⁸⁸ An example of archaic and inappropriate language in the Ohio state constitution is the line that reads, "No idiot or insane person shall be entitled to the privileges or an elector"⁸⁹ a line which Disability Rights Ohio has advocated to remove from the Ohio Constitution yet the change was not made.⁹⁰ The lack of adequate accessible transportation and the discriminatory impact of absentee paper ballots on people with disabilities are also two big issues that voters with disabilities in Ohio face.⁹¹ Sjoberg-Witt also advocates for alternative options besides designating the power of attorney for voting especially due to the disproportionate number of people with disabilities who are low income and live in poverty, which makes it harder for them

⁷⁸ Ohio State Advisory Committee to the U.S. Comm'n on Civil Rights, Voting Rights in Ohio, (Mar. 2, 2018), (transcript available at <https://facadatabase.gov/committee/meetingdocuments.aspx?flr=155584&cid=268>)

[*hereinafter* Ohio SAC, Voting Rights Transcript].

⁷⁹ *Id.* at 2.

⁸⁰ *Id.* at 3.

⁸¹ *Id.* at 5.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 10.

⁸⁶ *Id.*

⁸⁷ *Id.* at 11.

⁸⁸ *Id.* at 13.

⁸⁹ *Id.* at 14.

⁹⁰ *Id.*

⁹¹ *Id.* at 15-16.

to pay for a photo ID or afford public transportation to get to the polls, or may result in a loss of housing which could then result in swift voter purging.⁹²

Ed Leonard, the director of the Franklin County Board of Elections, testified to voting machine shortages, long lines on Election Day, and specific voter protections and poll worker training efforts.⁹³ He noted an uptick in the number of voting machines available and attributed shorter lines on Election Day to a switch from precinct-based voting to location-based voting and the introduction of no fault absentee (early vote) centers.⁹⁴ He also noted a high number of provisional ballots being ruled as invalid over the past few years and contrastingly an increase in the number of users of the online voter registration.⁹⁵

Recently, the American Civil Liberties Union filed a lawsuit challenging Ohio's congressional map as unconstitutional partisan gerrymandering.⁹⁶

Rhode Island

The Rhode Island SAC held a web conference call on May 29, 2018 to discuss voting access issues in Rhode Island. This SAC heard testimony from Steve Brown of the ACLU of Rhode Island, John Marion of Common Cause Rhode Island, and Jim Vincent from the Rhode Island NAACP who shared their expertise on voting rights.⁹⁷

Brown emphasized the discriminatory impact of the state's voter ID law and the lack of information provided to voters concerning the availability of provisional ballots when voters fail to provide adequate identification when voting.⁹⁸ Brown also noted that voters are not informed when their polling place locations change, resulting in the complete absence or disqualification of votes, especially since early voting is not an option in Rhode Island.⁹⁹

John Marion responded by highlighting both modern and antiquated aspects of the state's election administration.¹⁰⁰ Every polling place in the state has at least one AutoMARK vote-marking machine, which is critical for the representation of visually and hearing disabled voters. However, he noted that because this modern machinery often has technical issues, the Board of Elections must invest in providing at least two AutoMARK machines at heavily trafficked precincts to

⁹² *Id.* at 18.

⁹³ *Id.* at 3.

⁹⁴ *Id.*

⁹⁵ *Id.* at 6-7.

⁹⁶ Complaint, *Ohio A. Phillip Randolph Inst. v. Kasich*, No. 1:18-CV-00357-TSB (S.D. Ohio, May 23, 2018), https://www.aclu.org/sites/default/files/field_document/complaint_timestamped.pdf.

⁹⁷ Rhode Island State Advisory Committee to the U.S. Comm'n on Civil Rights, Voting Rights in Rhode Island, (May 29, 2018), (transcript on file) [*hereinafter* Rhode Island SAC, Voting Rights Transcript].

⁹⁸ *Id.* at 2. (The fail-safe provision allows voters to fill out provisional ballots that later are verified by the state's Board of Canvassers via cross-checking signatures with voter rolls.)

⁹⁹ *Id.* at 3, 7-8.

¹⁰⁰ *Id.* at 4.

ensure the representation of disabled persons.¹⁰¹ Marion also discussed the progressiveness of Rhode Island being only one of two states that has adopted policies that allow for automatic voter registration to occur at state agencies other than the DMV.¹⁰² However, he criticized the antiquity of the state's registration window, given that it is the longest window of any state. Rhode Island voters cannot register to vote within 30 days of an election, with the exception being presidential elections where unregistered voters can do same-day registration and cast a presidential/vice presidential-only ballot.¹⁰³ He also noted that the state's late primaries discriminate against registered voters overseas.¹⁰⁴

Jim Vincent closed the conversation by reiterating the points of the previous two panelists and sharing in their support for making voting "simpler and fairer and more efficient" in Rhode Island.¹⁰⁵

Texas

On March 13, 2018 the Texas SAC convened a public briefing on the state of voting rights in Texas and specifically the barriers to voting based on race, color, disability status, national origin, and other protected classes.¹⁰⁶ The Texas SAC wished to focus on three main potential barriers: (1) voter registration; (2) access to and administration of polling locations; and (3) language access.¹⁰⁷ The panelists were broken up into four sections—Academic, Advocacy Groups, Election Officials and Lawmakers, and Voters.

Rogelio Saenz from the University of Texas, San Antonio testified that Texas lags behind in voter registration, ranking 44th among the 50 states during the 2016 presidential election and ranking 47th for turnout.¹⁰⁸

Teddy Rave, Assistant Professor of Law at the University of Houston Law Center, testified that encouraging or suppressing voter turnout in any way has a "predictable partisan effect" on election outcomes and that historically, increased turnout has helped Democrats.¹⁰⁹ He believes that we can ameliorate the proliferation of partisanship in voting by amending the VRA so that claims of partisan manipulation carry the same weight as racial claims.¹¹⁰ He discussed the important role of preclearance in acting as an "external check" on partisan control over local decisions and the previous vigorous enforcement and oversight offered by the Justice Department.¹¹¹ He equated the

¹⁰¹ *Id.*

¹⁰² *Id.* at 5.

¹⁰³ *Id.* at 5-6.

¹⁰⁴ *Id.* at 6.

¹⁰⁵ *Id.* at 7.

¹⁰⁶ Texas State Advisory Committee to the U.S. Comm'n on Civil Rights, Voting Rights in Texas, (Mar. 13, 2018), (transcript on file).

¹⁰⁷ *Id.* at 1.

¹⁰⁸ *Id.* at 6.

¹⁰⁹ *Id.* at 24.

¹¹⁰ *Id.* at 29.

¹¹¹ *Id.* at 30.

loss of preclearance to turning partisans “loose” and “unsupervised” so that they can “meddle” with voting rules and procedures to positively impact their party.¹¹² Rave said that he would prefer to have nationwide coverage under Section 5, rather than just having targeted jurisdictions covered.¹¹³ Overall, he believes it is essential that nonpartisan institutions oversee elections and the creation of voting policies and procedures.

Ernest Herrera, a MALDEF Staff Attorney, testified that some Texas cities, towns, and counties have tried to limit Latinos’ access to the vote.¹¹⁴ MALDEF also found in 2016 that many counties in Texas were failing to provide any election information in Spanish.¹¹⁵ Jerry Vattamala from AALDEF testified that due to a loss of support from the Justice Department following the *Shelby County* decision, AALDEF often has to not only conduct exit polls but also act as poll monitors on Election Day to ensure that there is no discrimination against Asian Americans. AALDEF is currently monitoring Texas for any Section 208 violations.¹¹⁶ Finally Gary Bledsoe from the Texas NAACP testified that we are currently “fighting a battle” where the “old type” of voter suppression is present.¹¹⁷

Ann Harris Bennet, voter registrar/tax assessor in Harris County,¹¹⁸ testified that there was not a substantial threat of in-person voter fraud and that she would like to expand access for Texas citizens to make changes to their address online through an online voter registration system.¹¹⁹ She also helps people to cure their ballots, meaning that if voters do not have a valid form of ID on Election Day they could come to her office and go through the process, issuing the voter a receipt saying that they now had ballot ID.¹²⁰ The language training program that she discussed in her testimony will extend to Vietnamese as well as Spanish. Finally, she is working towards achieving a “good clean roll” which, in her opinion, means that everyone who is eligible to vote is on the roll, there are no felons on the roll, everyone is 18 or older, and they have not been declared “incompetent” by a court of law.¹²¹ She believes that the single biggest barrier voters face in passing a ballot is the voter registration process, which is why she is working to simplify it.¹²²

¹¹² *Id.* at 30-31.

¹¹³ *Id.* at 40.

¹¹⁴ *Id.* at 59.

¹¹⁵ *Id.* at 64.

¹¹⁶ *Id.* at 77.

¹¹⁷ *Id.* at 80.

¹¹⁸ *Id.* at 121.

¹¹⁹ *Id.* at 122.

¹²⁰ *Id.*

¹²¹ *Id.* at 142.

¹²² *Id.* at 143.

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APPENDIX E: CHARTS OF VOTING RIGHTS ISSUES BY STATE, COMPARING FORMERLY COVERED WITH NON-COVERED JURISDICTIONS

(1) Chart of Voting Rights Issues in Formerly Covered, by State (2006-present)

State	Voter ID Requirement	Documentary Proof of Citizenship	Purges of Voters from the Rolls	Cuts to Early Voting	Moving or Eliminating Polling Locations	TOTAL
Formerly Covered States (as a whole) Under Section 5						
ALABAMA	X	X			X	3
ALASKA					X	1
ARIZONA	X	X			X	3
GEORGIA	X	X	X	X	X	5
LOUISIANA	X				X	2
MISSISSIPPI	X				X	2
SOUTH CAROLINA	X				X	2
TEXAS	X				X	2
VIRGINIA	X					1
States with Formerly Covered Counties/Townships Under Section 5						
CALIFORNIA						
FLORIDA	X		X	X	X	4
NEW YORK			X			1
NORTH CAROLINA	X		X	X	X	4
SOUTH DAKOTA						
MICHIGAN	X					1
TOTAL FOR ABOVE 15 STATES	11	3	4	3	10	31
AVERAGE # OF ISSUES AMONG 15 FORMERLY COVERED STATES						2.1 issues/ state

State	Voter ID Requirement	Documentary Proof of Citizenship	Purges of Voters from the Rolls	Cuts to Early Voting	Moving or Eliminating Polling Locations	TOTAL
NATIONAL TOTAL (IN ALL STATES)	21	5	7	8	15	56
% OF NATIONAL TOTAL IN FORMERLY COVERED STATES	52.4 %	60%	57.1 %	37.5 %	66.7 %	55.4%

(2) Chart of Voting Rights Issues in Non-Formerly Covered, by State (2006-present)

State	Voter ID Requirement	Documentary Proof of Citizenship	Purges of Voters from the Rolls	Cuts to Early Voting	Moving or Eliminating Polling Locations	TOTAL
States Not Covered Under Section 5						
ARKANSAS	X					
COLORADO						
CONNECTICUT						
DELAWARE						
DISTRICT OF COLUMBIA						
HAWAII						
IDAHO	X					
ILLINOIS						
INDIANA	X		X		X	
IOWA						
KANSAS	X	X				
KENTUCKY						
MAINE						
MARYLAND						
MASSACHUSETTS						
MINNESOTA						
MISSOURI						
MONTANA					X	
NEBRASKA				X		
NEVADA						
NEW HAMPSHIRE						
NEW JERSEY						
NEW MEXICO						
NORTH DAKOTA	X				X	
OHIO	X		X	X		
OKLAHOMA						
OREGON					X	
PENNSYLVANIA	X		X		X	
RHODE ISLAND						
SOUTH DAKOTA	X					
TENNESSEE	X	X		X		
UTAH						
VERMONT						
WEST VIRGINIA						
WASHINGTON					X	
WISCONSIN	X			X		

State	Voter ID Requirement	Documentary Proof of Citizenship	Purges of Voters from the Rolls	Cuts to Early Voting	Moving or Eliminating Polling Locations	TOTAL
WYOMING						
TOTAL (IN 35 NOT FORMERLY COVERED STATES)	10	2	3	4	6	25
AVERAGE # ISSUES/STATE IN 35 NOT FORMERLY COVERED STATES						0.7 issues/state
% OF NATIONAL TOTAL IN NOT FORMERLY COVERED STATES	47.6%	40.0%	42.9%	50.0%	40.0%	44.6%
NATIONAL TOTAL (IN ALL STATES)	21	5	7	8	15	56

APPENDIX F: SECTION 2 CASES IN THE FIVE YEARS PRIOR TO *SHELBY COUNTY*

(June 25, 2008-June 25, 2013) Case Name	Citation	State	Covered?	Year	Dilution/ Denial	Practice challenged	Defendant	Success?
<i>Garcia v. 2011 Legislative Reapportionment Commission</i>	938 F. Supp. 2d 542	PA		2013	dilution	state redistricting		No
<i>Brown v. Detzner</i>	895 F. Supp. 2d 1236	FL	Yes	2012	denial	change in early voting	state	No
<i>Gonzalez v. Arizona</i>	677 F.3d 383	AZ	Yes	2012	denial	proof of identification at poll	state	No
<i>Crumly v. Cobb County Bd. Of Elections and Voter Registration</i>	892 F. Supp. 2d 1333	GA	Yes	2012	dilution	redistricting	county	No
<i>Lowery v. Deal</i>	850 F. Supp. 2d 1326	GA	Yes	2012	dilution	creation of municipalities	state	No
<i>Levy v. Lexington County, S.C. School District Three Bd. of Trustees</i>	2012 WL 1229511	SC	Yes	2012	dilution	at-large system	school district	No
<i>Fairley v. Hattiesburg, Miss.</i>	584 F.3d 660	MS	Yes	2009	dilution	redistricting	city	No
<i>Bartlett v. Strickland</i>	556 U.S. 1	NC	Yes	2009	dilution	Redistricting (Section 2 used as defense)	state	no
<i>Perry-Bey v. City of Norfolk, VA</i>	678 F. Supp. 2d 348	VA	Yes	2009	dilution	at-large election	city	No
<i>Gonzalez v. City of Aurora, Illinois</i>	535 F.3d 594	IL		2008	dilution	redistricting	city	no
<i>Emmanuelli v. Priebus</i>	2012 WL 6115994	FL		2012	denial	primary schedule	political party	no
<i>City of Newark v. Newark Ward Commission</i>	2012 WL 5986468	NJ		2012	dilution	redistricting	city	No
<i>Jeffers v. Beebe</i>	895 F. Supp. 2d 920	AR		2012	dilution	redistricting	state	No

(June 25, 2008-June 25, 2013) Case Name	Citation	State	Covered?	Year	Dilution/ Denial	Practice challenged	Defendant	Success?
<i>Fletcher v. Lamone</i>	831 F. Supp. 2d 887	MD		2011	dilution	redistricting	state	No
<i>Large v. Fremont County, Wyoming</i>	709 F. Supp. 2d 1176	WY		2010	dilution	at-large election	county	Yes
<i>U.S. v. Village of Port Chester</i>	704 F. Supp. 2d 411	NY		2010	dilution	at-large system	village	Yes
<i>United States v. Brown</i>	561 F.3d 420	MS	Yes	2009	dilution	episodic practices (on behalf of white voters)	County political party	Yes
<i>Fabela v. City of Farmers Branch, Texas</i>	2012 WL 3135545	TX	Yes	2012	dilution	at-large election	city	Yes
<i>Wright v. Louisville Metro Council</i>	2012 WL 2089529	KY		2012	dilution	redistricting	city	no
<i>NAACP v. Snyder</i>	879 F. Supp. 2d 662	MI	Yes	2012	dilution	redistricting	state	no
<i>Backus v. South Carolina</i>	857 F. Supp. 2d 553	SC	Yes	2012	dilution	redistricting	state	no
<i>Committee for a Fair and Balanced Map v. IL State Bd. Of Elections</i>	835 F. Supp. 2d 563	IL		2011	dilution	redistricting	state	no
<i>Alabama Democratic Conference v. Strange</i>	2011 WL 13233307	AL	Yes	2011	denial	campaign finance	state	no
<i>Radogno v. IL State Bd. of Elections</i>	836 F. Supp. 2d 759	IL		2011	dilution	redistricting	state	no
<i>Graves v. City of Montgomery</i>	807 F. Supp. 2d 1096	AL	Yes	2011	dilution	redistricting	city	no
<i>Spirit Lake Tribe v. Benson Cty., North Dakota</i>	2010 WL 4226614	ND		2010	denial	closure of polling places	county	Yes
<i>Farrahkhan v. Gregoire</i>	623 F.3d 990	WA		2010	denial	felon disenfranchisement	state	no

(June 25, 2008-June 25, 2013) Case Name	Citation	State	Covered?	Year	Dilution/ Denial	Practice challenged	Defendant	Success?
<i>Cottier v. City of Martin</i>	604 F.3d 553	SD		2010	dilution	configuration of city wards	city	no

Source: Internal Legal Research Performed on Westlaw, using the consistent definition of successful as set forth in the report at note 1306.

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APPENDIX G: FEDERAL OBSERVERS BY YEAR, STATE, AND COUNTY¹

(NOTE: Formerly covered jurisdictions are highlighted in red; other observers were sent under federal court orders specific to the jurisdictions)

	Nov. 2006 ²	Nov. 2008 ³	Nov. 2010 ⁴	Nov. 2012 ⁵
AK			-Bethel	
AL	-Chambers	-Perry	-Autauga	-Russell
AZ	-Apache -Navajo	-Apache -Cochise -Navajo	-Apache -Navajo	-Maricopa
CA			-Riverside	-Alameda -Riverside
GA			-Randolph	-Randolph
IL		-Kane	-Kane	
LA	-St. Landry Parish	-East Carroll Parish		-East Carroll Parish
MA		-Boston -Springfield		
MS	-Noxubee	-Bolivar -Jefferson Davis -Jones -Kemper -Leake -Neshoba -Newton -Noxubee -Washington -Wilkinson		-Panola

¹ DOJ Responses to USCCR Interrogatories 12 and 13.

² Press Release, U.S. Dep't of Justice, Justice Department Sends Election Observers to 22 States Across the Country in Unprecedented Monitoring Effort for a Midterm Election (Nov. 6, 2006), <https://www.justice.gov/archive/opa/pr/2006/November/06-crt-752.html>. Also, in this press release, it is not clear which jurisdictions received federal observers and which jurisdictions received election monitors. The Commission staff used a document (<https://www.justice.gov/crt/about-federal-observers-and-election-monitoring>) released by the Justice Department, which enumerates which jurisdictions historically received federal observers prior to Shelby County. If a jurisdiction was mentioned in the Nov. 2006 release, but not on the Justice Department list as having historically received federal observers, then we coded those jurisdictions as having received election monitors. See also U.S. Dep't of Justice, About Federal Observers and Election Monitoring, <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring>

³ Press Release, U.S. Dep't of Justice, *Department of Justice to Monitor Elections in 23 States Across the Nation on Election Day* (Oct. 30, 2008), <https://www.justice.gov/archive/opa/pr/2008/October/08-crt-973.html>.

⁴ Press Release, U.S. Dep't of Justice, *Department of Justice to Monitor Elections in 18 States Across the Nation on Election Day* (Oct. 29, 2010), <https://www.justice.gov/opa/pr/justice-department-monitor-polls-18-states-election-day>.

⁵ Press Release, U.S. Dep't of Justice, *Department of Justice to Monitor Elections in 23 States Across the Nation on Election Day* (Nov. 2, 2012), <https://www.justice.gov/opa/pr/justice-department-monitor-polls-23-states-election-day>.

	Nov. 2006 ²	Nov. 2008 ³	Nov. 2010 ⁴	Nov. 2012 ⁵
		-Winston		
NE				-Colfax
NJ		-Salem	-Salem	
NM		-Cibola -Sandoval	-Cibola -Sandoval	-Sandoval
NY	-Kings	-Brooklyn -Manhattan -Westchester County		-Orange
OH			-Cuyahoga	-Cuyahoga -Lorain
SC				-Williamsburg
SD		-Buffalo -Charles Mix	-Shannon	-Shannon
TX	-Fort Bend -Galveston -Medina -Wilson	-Dallas -Fort Bend -Galveston	-Dallas -Fort Bend -Galveston -Williamson	-Dallas -Fort Bend -Jefferson

APPENDIX H: DOJ ELECTION MONITORS BY YEAR, STATE, AND COUNTY¹

(NOTE: Formerly covered jurisdictions are highlighted in red; other observers were sent under federal court orders specific to the jurisdictions)

	Nov. 2006 ²	Nov. 2008 ³	Nov. 2010 ⁴	Nov. 2012 ⁵	Nov. 2014 ⁶	Nov. 2016 ⁷
AK						-Bethel Census Area -Dillingham Census Area -Kusilvak Census Area -Yukon-Koyukuk Census Area
AL	-Lee -Tuscaloosa			-Mobile		
AR	-Pulaski					
AZ	-Cochise -Maricopa -Pima	-Pima	-Maricopa	-Pima	-Maricopa	-Maricopa -Navajo
CA	-Alameda	-Alameda	-Alameda		-Alameda	-Alameda⁸

¹ DOJ Responses to USCCR Interrogatories 12 and 13.

² Press Release, U.S. Dep’t of Justice, *Justice Department Sends Election Observers to 22 States Across the Country in Unprecedented Monitoring Effort for a Midterm Election* (Nov. 6, 2006),

<https://www.justice.gov/archive/opa/pr/2006/November/06-crt-752.html>. Also, in this press release, it is not clear which jurisdictions received federal observers and which jurisdictions received election monitors. The Commission staff used a document released by the Justice Department, which enumerates which jurisdictions historically received federal observers prior to *Shelby County*. If a jurisdiction was mentioned in the Nov. 2006 release, but not on the Justice Department list as having historically received federal observers, then we coded those jurisdictions as having received election monitors. See also U.S. Dep’t of Justice, *About Federal Observers and Election Monitoring*, <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring>

³ Press Release, U.S. Dep’t of Justice, *Department of Justice to Monitor Elections in 23 States Across the Nation on Election Day* (Oct. 30, 2008), <https://www.justice.gov/archive/opa/pr/2008/October/08-crt-973.html>.

⁴ Press Release, U.S. Dep’t of Justice, *Department of Justice to Monitor Elections in 18 States Across the Nation on Election Day* (Oct. 29, 2010), <https://www.justice.gov/opa/pr/justice-department-monitor-polls-18-states-election-day>.

⁵ Press Release, U.S. Dep’t of Justice, *Department of Justice to Monitor Elections in 23 States Across the Nation on Election Day* (Nov. 2, 2012), <https://www.justice.gov/opa/pr/justice-department-monitor-polls-23-states-election-day>.

⁶ Press Release, U.S. Dep’t of Justice, *Justice Department Announces On-the-Ground Monitoring at Polling Places in 18 States on Election Day* (Nov. 3, 2014), <https://www.justice.gov/opa/pr/justice-department-announces-ground-monitoring-polling-places-18-states-election-day-0>.

⁷ Press Release, U.S. Dep’t of Justice, *Justice Department to Monitor Polls in 28 States on Election Day* (Nov. 7, 2016.), <https://www.justice.gov/opa/pr/justice-department-monitor-polls-28-states-election-day>.

⁸ *Id.* at 7. The monitors sent to Alameda County may potentially be observers due to court orders under the Voting Rights Act. Given the lack of clarification, this jurisdiction remains identified as having been monitored.

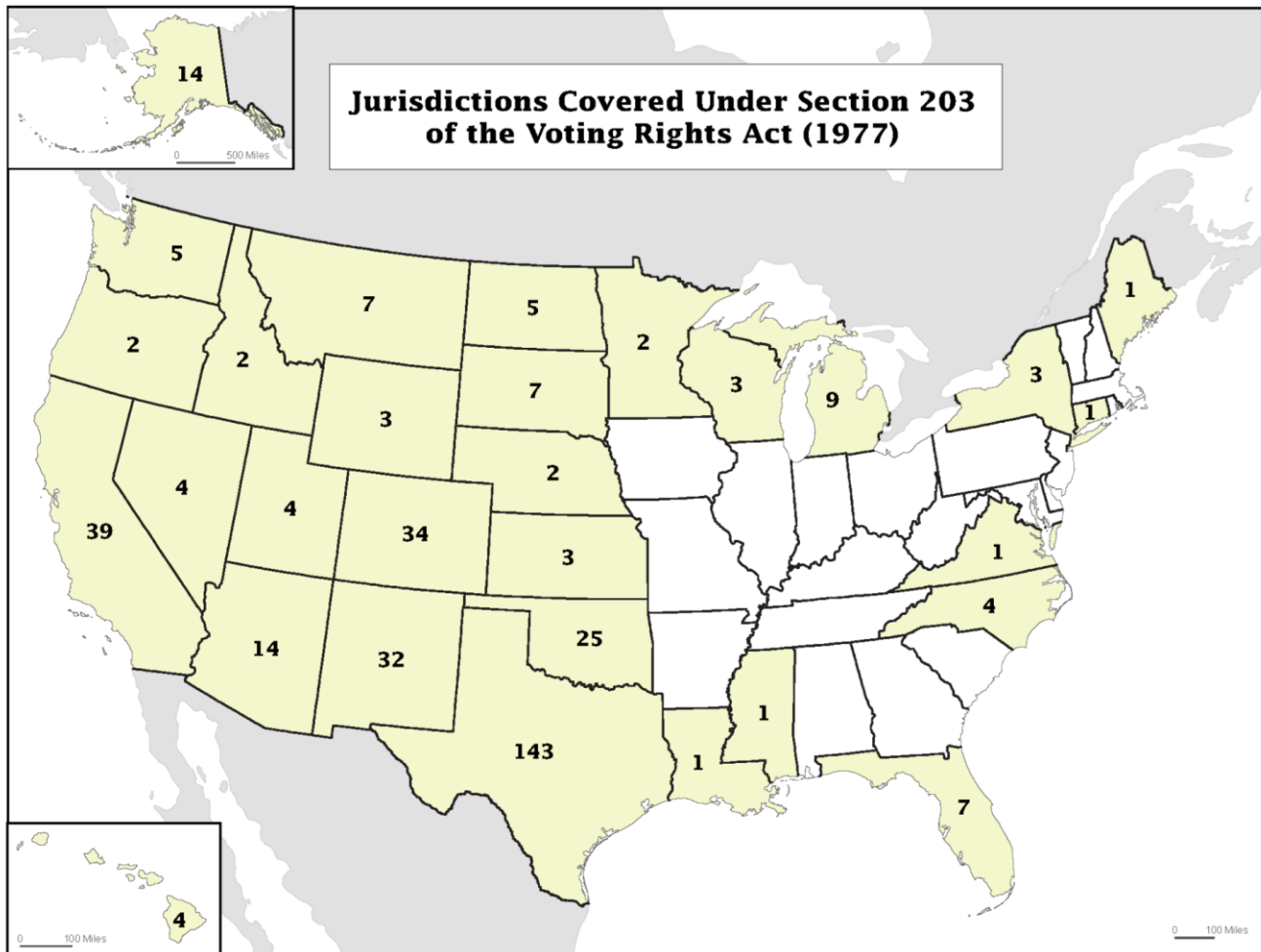
	Nov. 2006 ²	Nov. 2008 ³	Nov. 2010 ⁴	Nov. 2012 ⁵	Nov. 2014 ⁶	Nov. 2016 ⁷
	-Orange -San Benito -San Diego -San Francisco -San Mateo -Santa Clara -Ventura	-Riverside -Santa Clara			-Napa	-Napa -Siskiyou
CO	-Adams -Arapahoe -Denver			-Arapahoe -Denver		
CT						-East Hartford -Farmington -Hartford -Middletown -New Britain -Newington -West Hartford
FL	-Broward -Duval -Hillsborough -Osceola -Palm Beach	-Duval -Hillsborough -Seminole	-Seminole	-Duval -Hendry -Hillsborough -Lee -Miami-Dade -Orange -Osceola	-Duval -Hillsborough -Lee -Orange	-Hillsborough -Lee -Miami-Dade -Orange -Palm Beach
GA					-Fulton -Gwinnett	-Fulton -Gwinnett -Hancock
HI			-Honolulu			
IL	-Cook -Chicago			-Chicago -Cook	-Chicago	-Chicago -Cook
IN		-Madison		-La Porte		
KS	-Ford	-Ford		-Finney	-Finney	-Finney
LA	-Concordia Parish -New Orleans	-Jefferson Parish -Orleans Parish				-Orleans Parish
MA	-Boston -Springfield					-Quincy
MI	-Hamtramck	-Macomb		-Detroit -Hamtramck		-Dearborn Heights -Detroit -Hamtramck
MO						-St. Louis
MS		-Madison	-Neshoba			
MT	-Rosebud					
NC		-Alamance		-Alamance -Wake	-Robeson	-Cumberland -Forsyth -Mecklenburg -Robeson -Wake

	Nov. 2006 ²	Nov. 2008 ³	Nov. 2010 ⁴	Nov. 2012 ⁵	Nov. 2014 ⁶	Nov. 2016 ⁷
ND						-Benson -Rolette
NE	-Colfax	-Colfax	-Colfax		-Colfax -Douglas	-Douglas
NJ	-Bergen -Essex -Hudson -Middlesex -Salem	-Bergen	-Passaic		-Bergen	-Middlesex
NM	-Sandoval -Cibola			-Bernalillo -Cibola	-Cibola	-Cibola
NV						-Mineral -Washoe
NY	-Queens -Richmond -Westchester		-Orange	-Queens	-Orange	-Kings -Orange -Queens
OH	-Cuyahoga	-Cuyahoga	-Lorain	-Franklin -Hamilton	-Cuyahoga -Hamilton -Lorain	-Cuyahoga -Hamilton -Franklin
PA	-Berks	-Philadelphia	-Philadelphia	-Allegheny -Chester -Delaware -Lehigh -Philadelphia	-Lehigh	-Allegheny -Lehigh -Philadelphia
RI						-Pawtucket -Providence
SC		-Dorchester -Georgetown		-Richland	-Richland	
SD	-Bennett -Buffalo -Charles Mix -Denver -Mellette -Shannon -Todd -Ziebach	-Bennett -Jackson -Mellette -Shannon -Todd	-Bennett -Todd		-Charles Mix -Shannon	-Bennett -Jackson -Oglala Lakota
TN			-Shelby	-Davidson -Shelby	-Shelby	-Shelby
TX	-Brazos -Ector -Hale -Travis -Williamson	-Gonzales -Waller	-Harris	-Harris	-Harris -Waller	-Dallas -Harris -Waller
UT						-San Juan
VA		-Chesterfield				-Fairfax -Prince William

	Nov. 2006 ²	Nov. 2008 ³	Nov. 2010 ⁴	Nov. 2012 ⁵	Nov. 2014 ⁶	Nov. 2016 ⁷
WA	-King -Piece	-King				
WI				-Milwaukee	-Milwaukee	-Milwaukee

APPENDIX I: JURISDICTIONS COVERED UNDER SECTION 203 OF THE VOTING RIGHTS ACT, 1977-2016¹

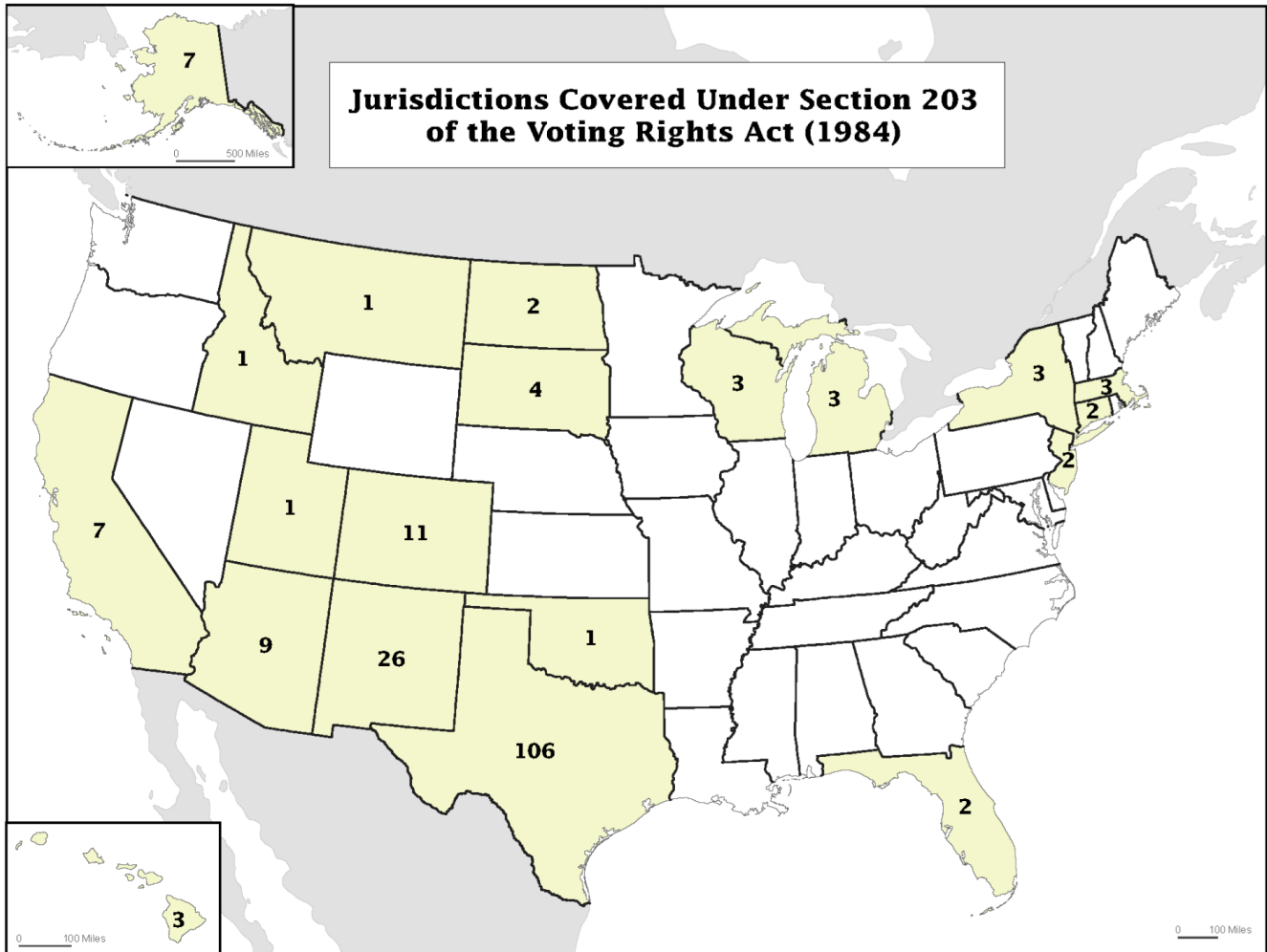
1977²



¹ U.S. Census Bureau, “The U.S. Census Bureau & Section 203 Determinations” <https://www.eac.gov/file.aspx?&A=7oJOXbEAifz3gdeQKjxLYkasF4eAE8WgLPdqKqmkVWo%3D> (last accessed June 12, 2018).

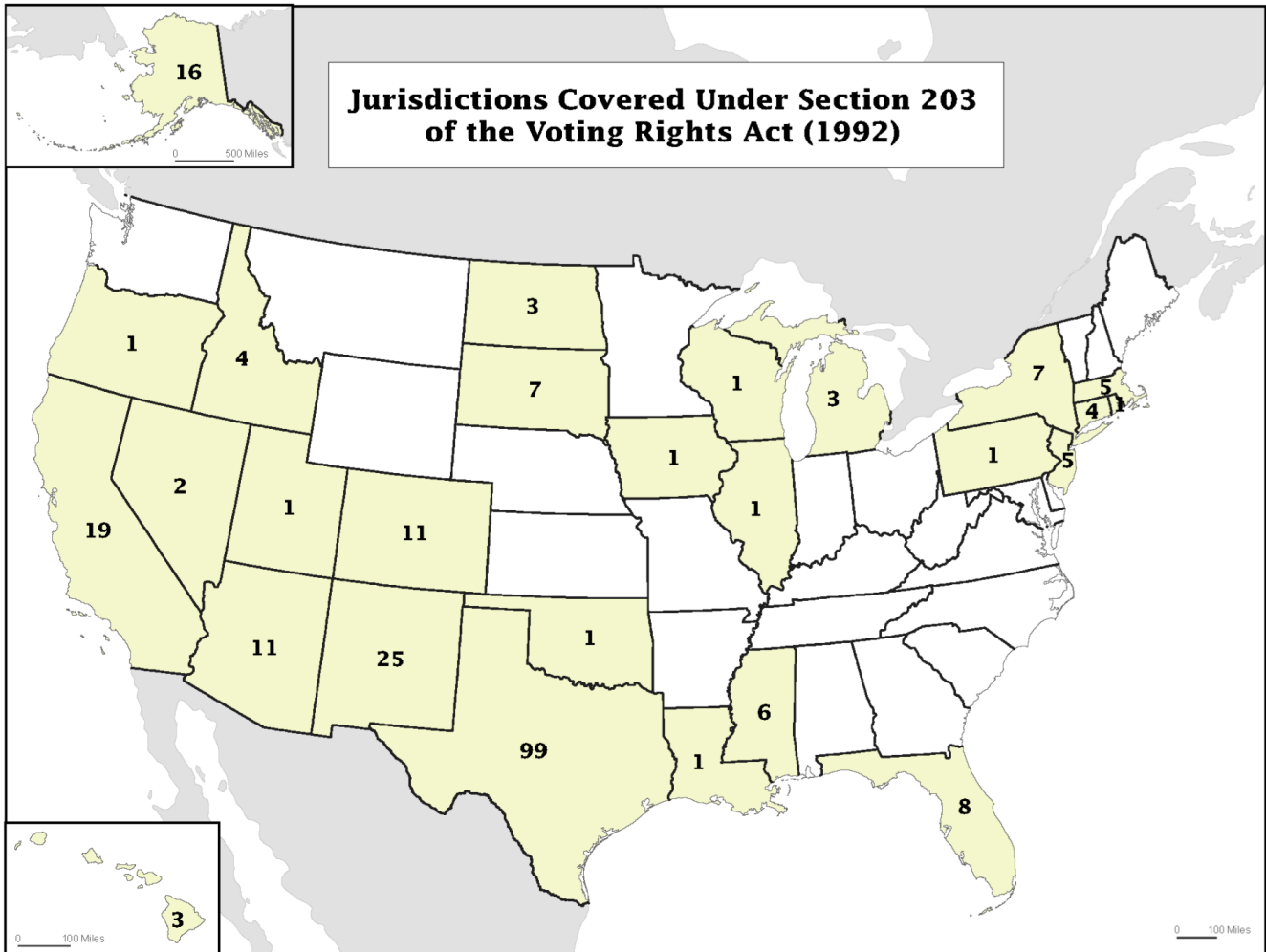
² *Id.* at 11.

1984³



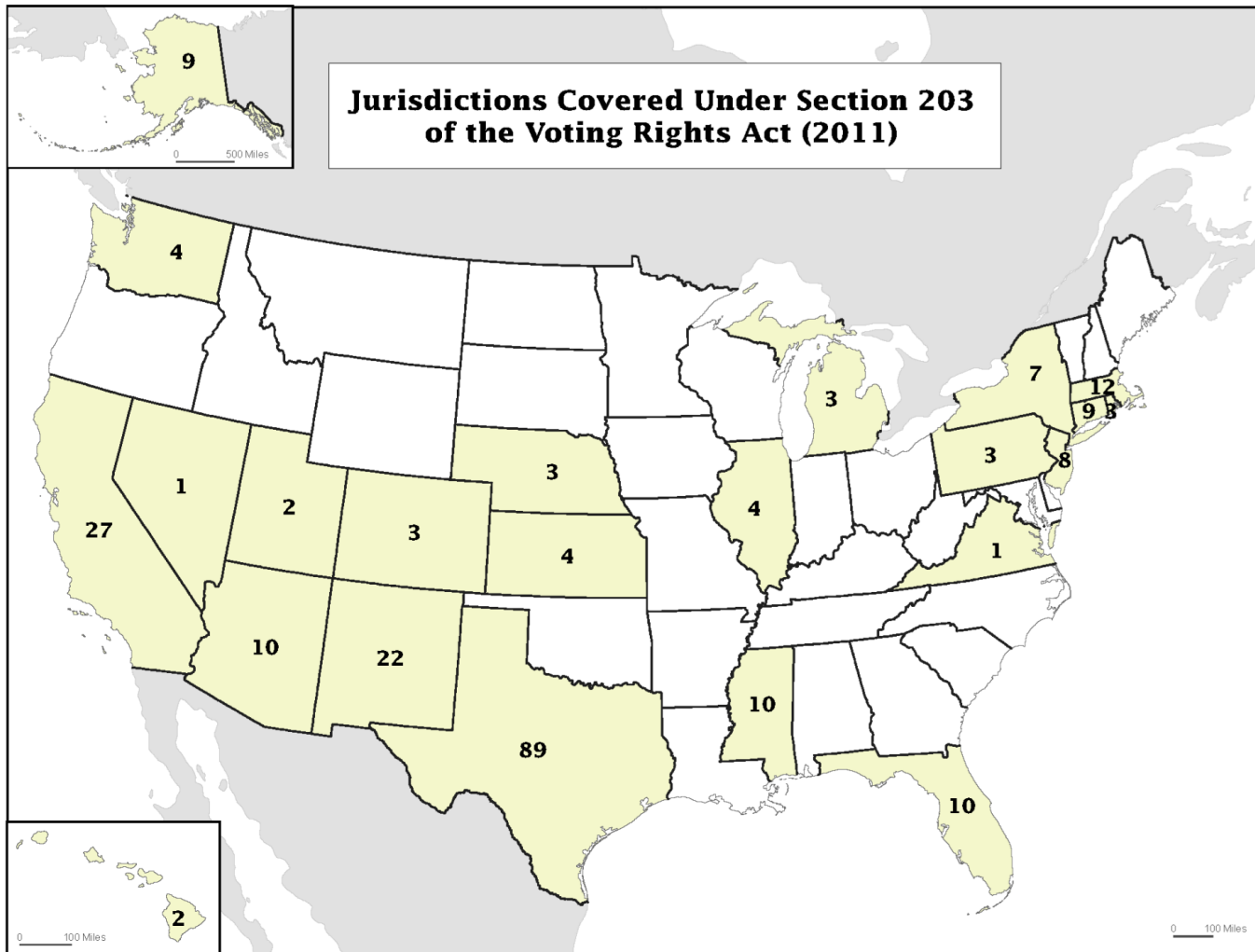
³ *Id.* at 12.

1992⁴



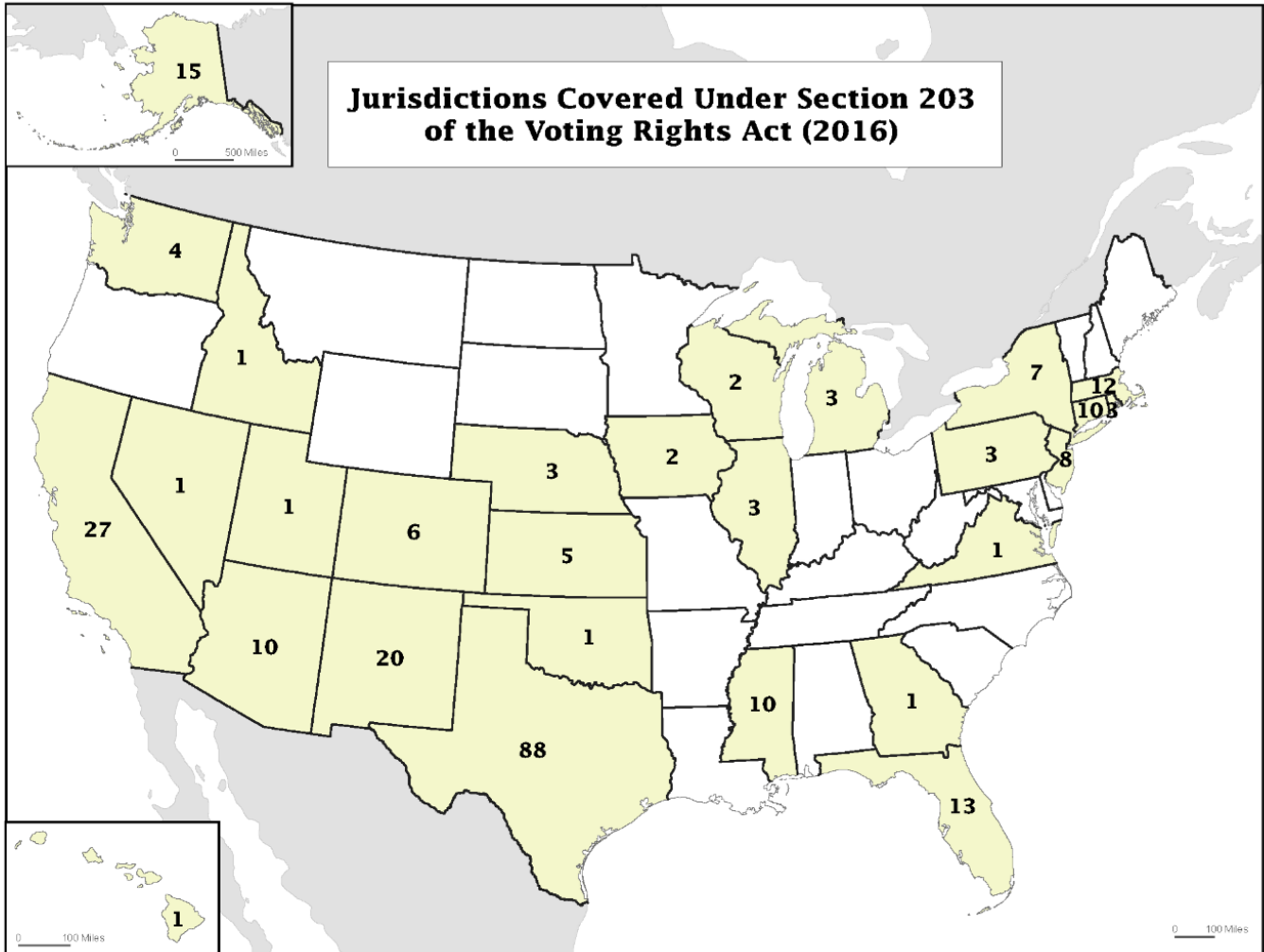
⁴ *Id.* at 13.

2011⁶



⁶ *Id.* at 15.

2016⁷



⁷ *Id.* at 16.

APPENDIX J: COPIES OF INTERROGATORIES AND DOCUMENT REQUESTS SENT BY THE COMMISSION TO THE DEPARTMENT OF JUSTICE



UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 Pennsylvania Ave. NW · Suite 1150 · Washington, DC 20425 www.usccr.gov

October 20, 2017

John M. Gore
Acting AAG for Civil Rights
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Acting Assistant Attorney John M. Gore:

In follow-up to our Aug. 28, 2017, letter and under the authorities cited below, please find enclosed a set of Interrogatories and Document Requests being issued to your office by the U.S. Commission on Civil Rights' (the "Commission").

Congress has tasked the United States Commission on Civil Rights with annually examining "Federal civil rights enforcement efforts in the United States." *See* 42 U.S.C. § 1975a(c)(1). Under this mandate, for fiscal year 2018, the Commission is conducting a study to evaluate the U.S. Department of Justice's federal voting rights enforcement efforts after the 2006 Reauthorization of the temporary provisions of the Voting Rights Act (VRA) and the impact of *Shelby County v. Holder* decision on the Department's enforcement strategies and priorities. The Commission will send its findings and recommendations to the President, the Congress, and the general public in a report scheduled for release in September 2018.

Please note that Congress has also given the Commission subpoena authority, *see* 42 U.S.C. § 1975a(e)(2), and directed that "[a]ll federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties." *See* 42 U.S.C. § 1975b(e).

It is requested that a response to these Interrogatories and Document Requests be provided within 30 days of service; *i.e.*, by Monday, November 20, 2017.

Thank you for your anticipated cooperation. Should you have any questions, please call me at 202-376-7622.

Sincerely,

A handwritten signature in blue ink, appearing to read "M E Rudolph".

Maureen E. Rudolph
General Counsel

FY 2018 Statutory Report

DATE: October 20, 2017

TO: John M. Gore, Acting Assistant Attorney General
U.S. Department of Justice, Civil Rights Division

FROM: Mauro A. Morales, Staff Director
Maureen E. Rudolph, General Counsel
U.S. Commission on Civil Rights

SUBJECT: Interrogatories and Document Requests in support of the U.S. Commission on Civil Rights' Examination of the Voting Rights Act and Enforcement by the Department of Justice

Congress has tasked the United States Commission on Civil Rights with annually examining "Federal civil rights enforcement efforts in the United States." See 42 U.S.C. § 1975a(c)(1). Under this mandate, for fiscal year 2018, the Commission is conducting a study to evaluate the U.S. Department of Justice's federal voting rights enforcement efforts after the 2006 Reauthorization of the temporary provisions of the Voting Rights Act (VRA) and the impact of *Shelby County v. Holder* decision on the Department's enforcement strategies and priorities. The Commission will send its findings and recommendations to the President, the Congress, and the general public in a report scheduled for release in September 2018.

Pursuant to 42 U.S.C. § 1975a(e)(4) and § 1975b(e), the United States Commission on Civil Rights (the "Commission"), through its General Counsel, Maureen E. Rudolph, requests that Acting Assistant Attorney General John M. Gore, U.S. Department of Justice, Civil Rights Division, answer fully, in writing and under oath, each of the following Interrogatories and respond to each of the following Document Requests.

We request that the Acting Assistant Attorney General serve a copy of the answers and objections, if any, along with the requested documents on counsel for the Commission within thirty days after service, at the offices of the U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, N.W., Suite 1150, Washington, D.C. 20425.

INSTRUCTIONS AND DEFINITIONS

1. These interrogatories request information available to the Assistant Attorney General and his employees, agents, representative, and unless privileged, attorneys, including with respect to any information or persons within the Voting Rights Section of the Civil Rights Division of the United States Department of Justice.
2. For each interrogatory the period covered is fiscal year 2006 to the present unless otherwise indicated.
3. The United States Commission on Civil Rights shall be referred to as the “U.S. Commission on Civil Rights,” or the “Commission.”
4. The United States Department of Justice shall be referred to as “DOJ” or the “Department.”
5. The Civil Rights Division of the United States Department of Justice shall be referred to as “CRT” or the “Division.”
6. The Voting Rights Section of the Civil Rights Division of the United States Department of Justice shall be referred to as “VRS” or the “Section.”
7. The Acting Assistant Attorney General (“AAG”) should state the basis for any objection to answering any interrogatory. In the event that the Acting Assistant Attorney General objects to a part of an interrogatory, the Acting Assistant Attorney General is required to furnish information requested by the interrogatory that is not included within that partial objection.
8. These interrogatories are continuing in nature, and to the extent that the Acting Assistant Attorney General acquires new information on or before March 2, 2018, that is responsive to these interrogatories, the Acting Assistant Attorney General is required to supplement his response.
9. The word “document” or “documents” or words of like or similar import means, *inter alia*: correspondence; memoranda; data; telexes; letters; books; charts; diagrams; still photographs; moving pictures; tapes; records; graphs; index cards; inventories; handwritten notes; agreements; jottings; scribbles; other writings; printed material; pamphlets; cables; telegrams; calendars; diary entries; studies; working papers; tabulations; data sheets; reports; index catalogues; typewritten notes; printed notes; contracts; memoranda of understanding; computer printouts; electronic mail; any and every means by which information is recorded and/or transmitted, including, but not limited to, any recorded, transcribed, punched, computerized, filmed, and/or graphic matter, however produced and/or reproduced; file folders containing such data, the precise order in which such items are contained in the file folder and all wording on each such file folder; and computer terminals or systems containing

such information or items.

10. The word “person” means any natural person and/or any corporation, partnership, association, joint venture, limited partnerships, committee, any government and/or governmental body, commission, board, and/or agency and/or other business association and/or entity, including both the singular and the plural.
11. The term “communication” means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, conversations, dialogues, discussions, interview, consultations, agreements, and other understandings between or among two or more persons.
12. The term “Voting Rights Act” shall refer to the Voting Rights Act of 1965, including all of its amendments and reauthorizations.
13. The term “Section 2” shall refer to Section 2 of the Voting Rights Act.
14. The term “Section 5” shall refer to Section 5 of the Voting Rights Act.
15. The term “Section 203” shall refer to Section 203 of the Voting Rights Act.
16. The term “4(f)(4)” shall refer to Section 4(f)(4) of the Voting Rights Act.
17. The term “4(e)” shall refer to Section 4(e) of the Voting Rights Act.
18. The term “Section 208” shall refer to Section 208 of the Voting Rights Act.
19. The term “federal election observers” refers to federal election observers assigned by the Director of the Office of Personnel Management (OPM) as authorized by Section 8 of the Voting Rights Act, 52 U.S.C. § 10305.
20. The term “federal election monitors” refers to DOJ personnel deployed to monitor elections in the field as described by the Department.¹
21. If any document responsive to this request was, but is no longer, in your possession, custody or control, please furnish a description of each such document and indicate the manner and circumstances under which it left your possession, custody, and control and state its present location and custodian, if known.

¹ Department of Justice, Fact Sheet on Justice Department’s Enforcement Efforts Following Shelby County Decision, available at <https://www.justice.gov/crt/file/876246/download>.

FY 2018 Statutory Report

22. If for any request there are no responsive documents in your possession, custody, or control, state whether documents that would have been responsive were destroyed or mislaid, and if so, the circumstances under which they were destroyed or mislaid.
23. For any document response to any request for production but withheld pursuant to a claim of privilege, identify:
 - a. the author's name and title or position;
 - b. the recipient's name and title or position;
 - c. all persons receiving copies of the document;
 - d. the number of pages of the document;
 - e. the date of the document;
 - f. the subject matter of the document; and the basis for the claimed privilege.
24. In lieu of providing a written response to an interrogatory, you may produce a document that fully responds to the interrogatory. Should the document not fully respond to the interrogatory, please state so in your written response and also provide the additional information needed to fully respond or the grounds for withholding such information, as specified in these instructions.
25. These requests are continuing and responses to document requests are to be supplemented when you receive subsequent or additional information, either directly or indirectly.

INTERROGATORIES

1. Provide the number of attorneys assigned to the Department's VRS, the number of active VRA investigations, the number of VRA investigations initiated and VRA investigations resolved or concluded. For each investigation described above, please indicate the VRA provision/s involved, the subject matter of the investigation, the nature of any resolution, and the State or City or subdivision where the investigation arose.
2. Please describe the basis for the Department's decision to (a) drop its intent challenge to Texas SB 14 and (b) for taking the position that Texas SB 5 removes any discriminatory effect or intent identified in Texas SB 14.
3. What is the appropriate remedy for a judicial finding of intentional discrimination? Is there justification for a remedy other than repeal, given the finding that the statute or policy to be modified was tainted by an impermissible design to discriminate?
4. What is the appropriate remedy for repeated or multiple judicial findings of intentional discrimination within the same jurisdiction, over similar time periods?

5. What is the appropriate timing for relief after a judicial determination of illegality? How many elections should be conducted under a practice found to be unlawful?
6. In 2013, DOJ intervened in a redistricting challenge in Texas, claiming that congressional and state house districts were drawn with the intent to discriminate based on race, in violation of the Voting Rights Act.² And in light of that claim, and Texas's history, DOJ sought bail-in relief under Section 3 of the VRA. Several decisions have now found that congressional and state house districts were indeed drawn with the intent to discriminate based on race. If those findings are upheld on appeal, will DOJ continue to seek bail-in relief? And if not, why not? And what would it take to seek bail-in relief?
7. The Supreme Court declared the formula for applying Section 5 to be unlawful,³ but that decision did not have an impact on the application of Section 2 of the VRA. Does DOJ plan to evaluate the multitude of both statewide and local redistricting plans coming in 2021, and if so, how does it plan to do so? Please describe how resources, including staffing, will be allocated to complete this task.
8. Please identify any and all VRA cases in which the Department changed its position by withdrawing its opposition to a voting change; state the VRA basis and analysis supporting that change; and describe the underlying VRA issues presented by the cases.
9. Please describe all policy guidance, written instructions, or directives developed or disseminated regarding the enforcement of Sections 2, 5, 203, and 208 of the Voting Rights Act.
10. Please explain the Department's criteria for selecting cases for enforcement of Sections 2, 5, 203, and 208 of the Voting Rights Act.
11. Please explain the rationale behind who signs legal filings for the Department in voting rights cases. Are there particular individuals who are required to sign on? Is there a process an attorney has to go through in order to sign on to a filing or, if they have previously been on a filing for an earlier filing in a case, not remain on subsequent filings?

Election Monitoring and Observing

12. Identify the number of federal *election observers* deployed by the DOJ on election days and throughout the year. What are the Department's federal election observer deployment

² Department of Justice, Justice Department to File New Lawsuit Against State of Texas Over Vote I.D. Law, Aug. 22, 2013, available at <https://www.justice.gov/opa/pr/justice-department-file-new-lawsuit-against-state-texas-over-voter-id-law>.

³ See *Shelby Cty. v. Holder*, 570 U.S. 2 (2013), available at https://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf.

- plans for the 2018 election and how do they compare to federal election observer deployment in 2016 and 2017?
13. Identify the number of federal *election monitors* deployed by the DOJ on election days and throughout the year. What are the Department's federal election monitor deployment plans for the 2018 election and how do they compare to federal election monitor deployment in 2016 and 2017?
 14. In a recent statement,⁴ the Department stated that it monitored sixty-seven jurisdictions in the recent presidential election to gather information on "whether voters are subject to different voting qualifications or procedures on the basis of race, color or membership in a language minority group; whether jurisdictions are complying with the minority language provisions of the Voting Rights Act; whether jurisdictions permit voters to receive assistance by a person of his or her choice if the voter is blind, has a disability or is unable to read or write; whether jurisdictions provide polling locations and voting systems allowing voters with disabilities to cast a private and independent ballot." Please summarize the subject matter and nature of complaints received, organized by state and city, in all elections monitored by the Department. Please indicate which, if any, of the complaints were submitted as evidence in a voting right case.
 15. What are DOJ's plans for deploying federal election observers and monitors to monitor the election process at the polls on and before Election Day? How will the Department make determinations about where to send observers and monitors?
 16. In a recent statement,⁵ the Department stated that it expanded its election monitoring to include assessments of physical accessibility of polling places, which included accessibility surveys of over two hundred polling places in 2012. What were the findings of this survey? Was a similar survey conducted during the 2016 presidential election? If so, what were the findings?

Section 2 of the Voting Rights Act

17. To the extent not captured in other requests, please provide any documents that indicate the relative prioritization of Section 2 enforcement among other priorities, or the prioritization of particular types of Section 2 cases above other Section 2 cases.

⁴ Department of Justice, Justice Department to Monitor Polls in 28 States on Election Day, Press Release, Nov. 7, 2016, available at <https://www.justice.gov/opa/pr/justice-department-monitor-polls-28-states-election-day>.

⁵ Department of Justice, The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities, available at <https://www.justice.gov/file/69411/download>.

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18. Identify the Section 2 cases that the Department filed, or in which it intervened, filed an amicus brief, or statement of interest, or took some other action. For each relevant case, provide the case name, the case number, the court, the year the case was initiated, the year that the Department joined the case, the subject matter of the case, and the maximum and minimum number of DOJ lawyers assigned to the case, noting the applicable year of such staffing level assignments. If applicable, provide whether there was a judgment, settlement, dismissal, or other resolution, and whether any such resolution was in DOJ's favor.
19. Please identify any notice letters of intent to sue for alleged Section 2 violations, the subject matter of the voting practice in the putative challenge, and identify any instances in which a jurisdiction that received a notice letter of intent to sue changed its voting practice prior to the initiation of a Department suit, noting whether that change addressed the Department's voting rights concern.
20. Please identify any investigation of an alleged Section 2 violation the Department undertook which did not result in a DOJ action including but not limited to a notice letter of intent to sue, an intervention in a case, an amicus brief, a statement of interest, or DOJ filing suit.

Section 5 of the Voting Rights Act

21. Identify the Section 5 declaratory judgment cases in which the Department has litigated an objection to a voting change, consented to a voting change, or filed an enforcement action for each fiscal year from 2006 to the 2013. For each relevant case, provide the case name, the case number, the court, subject matter of the voting change or subdivision seeking the change, the year the case was initiated, and, if applicable, identify the outcome of the matters described indicating whether it was resolved in DOJ's favor.
22. Identify all Section 5 information letters sent in connection with voting changes, the subject matter of the voting change, the jurisdiction seeking the change and the date of the Department letter. Relatedly, please identify all instances in which the jurisdiction changed the voting practice at issue following the issuance of the Department letter and note whether that change satisfied the Department's voting rights concern.
23. Identify any case, in 2014 and after, in which the Department participated relating to a Section 5 precleared voting change. Please describe the subject matter of the case, any resolution of the case, and whether that resolution was in favor of the Department.
24. Describe what the Department's actions were after a Section 5 objection was lodged between 2006 and the Supreme Court's decision in *Shelby County v. Holder*. In particular, please describe whether the Department continued to monitor the jurisdictions

for which an objection was lodged and what activities were encompassed in the monitoring, including, if applicable, the monitoring of Section 2 litigation in those jurisdictions.

Section 203 of the Voting Rights Act

25. Identify the Section 203, 4(e), or 4(f)(4) cases that the Department filed, or in which it intervened, filed an amicus brief, or statement of interest, for each fiscal year from 2006 to the present. For each relevant case, provide the case name, the case number, the court, the year the case was initiated, the year that the Department joined the case, the subject matter of the case, and the maximum and minimum number of DOJ lawyers assigned to the case, noting the applicable year of such staffing level assignments. If applicable, provide whether there was a judgment, settlement, dismissal, or other resolution, and whether any such resolution was in DOJ's favor.
26. Please identify any notice letters of intent to sue for alleged Section 203, 4(e), or 4(f)(4) violations, the subject matter of the voting practice in the putative challenge, and identify any instances in which a jurisdiction that received a notice letter of intent to sue changed its voting practice prior to the initiation of a Department suit, noting whether that change ameliorated the Department's voting rights concern.
27. Please identify any investigation of an alleged Section 203, 4(e), or 4(f)(4) violation the Department undertook which did not result in a DOJ action including but not limited to a notice letter of intent to sue, an intervention in a case, an amicus brief, a statement of interest, or DOJ filing suit.
28. What efforts has the DOJ made to assess jurisdictions' compliance with the December 2016 language determinations under Section 203, including jurisdictions newly subject to Section 203 and jurisdictions that had already been subject to 203 but now have a new language responsibility?

Section 208 of the Voting Rights Act

29. Identify the Section 208 cases that the Department filed, or in which it intervened, filed an amicus brief, or statement of interest, or took some other action, for each fiscal year from 2006 to the present. For each relevant case, provide the case name, the case number, the court, the year the case was initiated, the year that the Department joined the case, the subject matter of the case, and the maximum and minimum number of DOJ lawyers assigned to the case, noting the applicable year of such staffing level assignments. If applicable, provide whether there was a judgment, settlement, dismissal, or other resolution, and whether any such resolution was in DOJ's favor.

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30. Please identify any notice letters of intent to sue for alleged Section 208 violations, the subject matter of the voting practice in the putative challenge, and identify any instances in which a jurisdiction that received a notice letter of intent to sue changed its voting practice prior to the initiation of a Department suit, noting whether that change ameliorated the Department's voting rights concern.
31. Please identify any investigation of an alleged Section 208 violation the Department undertook which did not result in a DOJ action including but not limited to a notice letter of intent to sue, an intervention in a case, an amicus brief, a statement of interest, or DOJ filing suit.

DOJ Voting Rights Amicus Briefs and Statements of Interest

32. Provide a summary of all voting rights cases where the Department submitted an amicus brief or statement of interest related to the VRA for each fiscal year from 2006 to the present. For each relevant case, provide the case name, the case number, the court, the year the case was initiated, the subject matter of the brief or statement and, if applicable, describe the resolution of the matter and whether it was in DOJ's favor.

DOCUMENT REQUESTS

1. Please provide any and all policy guidance, written instructions, or directives developed or disseminated regarding the enforcement of Sections 2, 5, 203, and 208 of the Voting Rights Act created or in use since fiscal year 2006.
2. Please provide any and all policy guidance, written instructions, or directives developed or disseminated regarding voting rights enforcement after the *Shelby County v. Holder* decision.
3. Please provide any memoranda, documents or analyses discussing whether to bring or continue litigation or other Department action in connection with VRA enforcement cases.
4. Collect and provide documents, including evaluations or notes, created by DOJ's federal election observers in the 2016 Presidential Election.⁶
5. To the extent not covered by the document requests above, please provide any and all documents relied on to prepare responses to interrogatories.



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⁶ Department of Justice, About Federal Observers and Election Monitoring, <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring> (last visited Oct. 11, 2017) (noting that federal election observers write reports of the activities they witness in polling places and provide those reports to the Division).

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CERTIFICATE OF SERVICE

I certify that I have caused this 20th day of October 2017, the foregoing United States Commission on Civil Rights' Interrogatories and Document Requests to be served by courier upon the following:

John M. Gore
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
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Washington, DC 20530-0001



Maureen E. Rudolph
General Counsel