DISCRIMINATORY BARRIERS TO VOTING

HEARING

BEFORE THE

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HOUSE OF REPRESENTATIVES

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DISCRIMINATORY BARRIERS TO VOTING

THURSDAY, SEPTEMBER 5, 2019

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Washington, DC.

The subcommittee met, pursuant to call, at 10:05 a.m., in Historic Moot Court Room, University of Memphis Cecil C. Humphreys School of Law, 1 N. Front Street, Memphis, Tennessee, Hon. Steve Cohen [chairman of the subcommittee] presiding.

Present: Cohen, Nadler, and Jackson Lee.

Staff present: James Park, Chief Counsel; Keenan Keller, Senior Counsel; Will Emmons, Professional Staff Member; and Paul Taylor, Minority Counsel.

Mr. COHEN. As chairman of this committee on the Constitution, Civil Rights, and Civil Liberties, I call it to order.

Without objection, the chair is authorized to declare recesses of the subcommittee at any time.

I welcome everyone to today's hearing on discriminatory barriers to voting and I am extremely proud that we are here at the University of Memphis Law School, which is my alma mater where I went to law school, and not at this wonderful building but this law school. So I am proud, proud, proud to bring this to you.

Congressman Sheila Jackson Lee will be joining us. She is here. And, of course, Congressman Nadler, the chairman, is with us as well.

And also Representative Cooper has a representative here—Jim Cooper from Nashville—and I appreciated his interest in coming and I appreciate him sending a representative. So thank you for attending on his behalf. Nashville is in the house.

I will now recognize myself for an opening statement. Today's field hearing is part of a series of hearings that the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties will hold over the course of the 116th Congress to assess the current need for a reinvigoration of the preclearance requirement of Section 5 of the Voting Rights Act of 1965 and to consider other ways to strengthen that landmark civil rights statute.

Some of you may be studying civil rights law and know about the historic passage of those bills in 1965. Unfortunately, in *Shelby* v. *Holder*, which had nothing to do with Shelby as in Shelby County, Tennessee, but Shelby County, Alabama, the Supreme Court of the

United States overruled and ruled that the preclearance requirement didn't meet due process requirements and had to be—it was unconstitutional.

So we have been without a Voting Rights Act for some time and there are problems with that that our witnesses will discuss.

Our particular focus today is the evolution of racially discriminatory barriers to voting imposed by states and local governments and the central role that the federal government must play in tearing down those barriers to allow all people to vote, which is the fundamental basis of democracy.

Especially appropriate we are holding these hearings today in Memphis. Memphis and the Deep South, of which it is the heart, in addition to Tennessee also includes the neighboring states of Mississippi, Alabama, where there are hurricane fears, Arkansas, Georgia, and North Carolina——

[Laughter.]

Mr. COHEN [continuing]. Among other states. Tennessee was a central focus of activism for the civil rights movement in the 1960s—Diane Nash, John Lewis, Julian Bond was there locally. Russell Sugarmon, Vasco and Maxine Smith, many great legendary civil rights heroes.

Tennessee was not considered a state that had to have preclearance because we didn't have the history that the other states had. But the other states close to us—Mississippi, Alabama, Arkansas, Georgia, North Carolina, and Texas—not so close but in the same—did have to have preclearance. They have several things in common, among the facts that they were all part of the Confederacy.

Our esteemed colleague, Representative John Lewis, was beaten and bloodied as he marched in Selma, Alabama, to ensure that all Americans, regardless of race, had an equal right to vote.

James Chaney, Andrew Goodman, Michael Schwerner were murdered in Mississippi in Neshoba County, Philadelphia, as they were working in the '60s to register African Americans to vote.

And the Reverend Dr. Martin Luther King, Jr., the leader and face of the civil rights movement and the push for voting rights for African Americans came to Memphis in 1968 to march in solidarity with sanitation workers and became a martyr for the cause of civil rights.

It is in the spirit of those who fought and died for voting rights that we turn our attention today to the still unfulfilled promise of equal opportunity for all Americans to participate in our electoral process.

The Voting Rights Act of 1965 is considered the most effective civil rights statute ever enacted by the Congress. The act was enormously successful in expanding federal authority to protect the fundamental right to vote, and one of the central enforcements provisions was the preclearance provision.

That provision required certain jurisdictions with a history of voting discrimination against racial groups and language minority groups which, up until 2013, would have been those predominantly, though not exclusively, in the Deep South or states that chose to leave the United States of America and form their own country, all

because of race and slavery and wanting to maintain that economic opportunity that they had to have free labor and a superior race.

But they had to obtain approval—the states that had preclearance—of any changes to their voting laws or procedures from the Department of Justice or the U.S. District Court for the District of Columbia before such changes could take effect.

The purpose of that preclearance requirement was to ensure that the jurisdictions that were most likely to discriminate against minority voters would bear the burden of proving that any changes to the voting laws were not discriminatory before such changes took effect.

It provided a target independent review to ensure that the new rules, laws, and jurisdictions for the history of discrimination were fair to all voters, and because they had a record of discrimination, they had a burden to show positively to the court that these were not going to discriminate.

It rightly prevented potentially discriminatory voting practices from taking effect before they could harm minority voters and in this way preclearance proved to be a significant means of protection for the rights of minority voters.

This is why Congress repeatedly reauthorized the preclearance provision on an overwhelmingly bipartisan basis, most recently in 2006 when the House passed the Voting Rights Act reauthorization by a vote of 390 to 33.

Mind you, that was in 2006. It was 390 to 33, and the Senate 98 to nothing.

Then the Supreme Court gutted Section 5, the most important portion of the Voting Rights Act in *Shelby County* v. *Holder*. It struck down the coverage formula to determine which jurisdictions would be subject in the preclearance requirement.

As a result, the preclearance provision remains dormant unless and until Congress adopts a new coverage formula.

While Section 2 of the Voting Rights Act, which prohibited discrimination in voting, remains in effect, it is by itself a much less effective and significantly more cumbersome way to enforce the Voting Rights Act.

Most important, plaintiffs cannot invoke Section 2 until after alleged harm has taken place, thereby eroding the effectiveness of the Act. So you pass a law that might be, would have been, could have been declared void prior to its effectiveness through preclearance.

But because you don't have preclearance it can only be declared effective or illegal after it has gone into practice and after it has discriminated against voters and stopped them from voting. So the harm is done. The horse is out of the barn.

The onus is now on Congress to create a new coverage formula to reinvigorate the Act's most important enforcement mechanism—its preclearance requirement—and the need for strong federal enforcement remains as pressing as ever.

While we are, thankfully, no longer in a universe where state and local officials use literacy tests and poll taxes to deny the vote to African Americans and other minority voters, racially discriminatory barriers have taken on new forms since the days of Jim Crow.

Examples include discriminatory photo ID laws, polling place closures and relocations, restrictions on ex-felon voting, purges of voting rolls, all of which are designed to make it harder for African Americans and other racial and ethnic minorities to vote.

Gun permit IDs, good. Vote. Student ID, bad. No vote. Here in Tennessee we have seen a new state law enacted that would impose draconian penalties on third party voter registration groups from minor errors in registration forms, imposing a chilling effect on such groups' efforts to register new voters.

In addition, we have seen states engage in racial gerrymandering designed to dilute the strength of minority voters. In the absence of an effective pre-clearance regime, there is a high risk that these discriminatory measures will undermine the voting rights of racial and language minority voters.

I want to mention that yesterday Jim Sensenbrenner, a member of Congress since 1978, announced he was not going to run for reelection.

He is a Republican from Wisconsin. He sponsored the Voting Rights Act. He was one of the few Republicans who supported the Voting Rights Act reauthorization. He will be leaving Congress.

At one time—I think it was in the previous Congress—there was a decision by one of the sponsors of the legislation that to be a co-sponsor you had to find a Republican to come on with you so it wouldn't like just a Democratic bill and they wouldn't have, like, 160 Democrats and four Republicans. So they wanted to have an equal number.

Some people think this makes sense, that it looks good to have an equal number. I have never been a proponent of that. I think you get as many sponsors as you can and if the Republicans don't join, so be it.

But you want people who support your legislation to have the opportunity to show their support by being a co-sponsor.

Well, I found out that I had to have a Republican co-sponsor so I looked all over on the Republican side and I have got lots of Republican friends that I made over the years.

And it would have been easier for me to find that Indonesian airplane in the South Indian Ocean than it was to find a Republican to join me. There were just not many.

So I thank our witnesses. I welcome Congressman Sheila Jackson Lee, who has joined us here and a great advocate for voting rights and all things good, and Chairman Nadler for being here today. I look forward to a fruitful discussion. I thank the University of Memphis Law School. The dean was here and she is like Penny Hardaway. She has got a great future and great things are going to happen. Thank you, Dean, for being here.

Is this your first Penny Hardaway analogy?

Voice. Absolutely.

Mr. COHEN. You recruit good students.

Now I want to recognize the chairman of the full Judiciary Committee, the honorable gentleman from New York, Mr. Jerry Nadler, for his opening statement and welcome him to Memphis.

Mr. NADLER. Well, thank you very much.

I want to begin by thanking the chairman of the subcommittee, Mr. Cohen, for welcoming us to Memphis and for holding this important hearing.

It is fitting that this hearing is being held in a city that has been central to the struggle for achieving civil rights for all Americans. It is also home to the National Civil Rights Museum, which has turned the tragic spot where Dr. Martin Luther King, Jr., was assassinated into a beacon of hope that helps chronicle the advancements this country has made in fulfilling Dr. King's dream but also the many challenges that remain.

One of the great unmet challenges is the current assault in legislatures and courts across the country on the right to vote. In recent years, we have seen a rise in the enactment of voter suppression tactics such as burdensome proof of citizenship laws, photo ID laws, significant scale backs to early voting periods, restrictions on absentee ballots, and laws that make it difficult to restore the voting rights of formerly incarcerated individuals.

These kinds of voting restrictions have a disproportionate negative impact on minority voters. In the most recent elections in November 2018, voters across the country experienced various barriers to voting because of state and local laws and circumstances that made it hard or even impossible to vote.

For example, as our witness, Helen Butler can attest, in Georgia 53,000 voter registrants, 70 percent of whom were African American, were placed in so-called pending status and at risk of not being counted by the secretary of state, who was also the Republican nominee for governor in that election because of minor misspellings on their registration forms.

A federal court ultimately put a stop to this practice because of the, quote, "differential treatment inflicted on a group of individuals who are predominantly minorities," closed quote, but enacted just four days before the election, and only after a prolonged period of confusion and who knows how many eligible voters didn't vote because they didn't catch up on the news the last few days and they believed that they wouldn't be allowed to vote.

The recent rise in voter suppression measures can be directly attributed to the Supreme Court's disastrous 2013 decision in *Shelby County* v. *Holder*, which effectively gutted a critical enforcement provision known as the preclearance requirement of the Voting Rights Act of 1965, which has been one of the most effective civil rights statutes ever enacted into law.

Section 5 of the Voting Rights Act, or VRA, contains the preclearance requirement, which requires certain jurisdictions with a history of discrimination to submit any proposed changes to their voting laws or practices either to the Department of Justice or to the D.C. federal court for prior approval to ensure that those changes in laws or regulations or practices are not discriminatory.

To understand—let me add that my own jurisdiction of Manhattan and Brooklyn where my congressional district is were subject—Manhattan, Brooklyn, and the Bronx were subject to Section 5 preclearance and we did not find it burdensome. But it was good.

To understand why the preclearance requirement was so central to enforcing the VRA, it is worth remembering why it was enacted in the first place.

Before the VRA, many states and localities passed voter suppression laws, secure in the knowledge that it could take many years before the laws could be successfully challenged in court if at all.

As soon as one law was overturned as unconstitutional, another would be enacted, essentially setting up a discriminatory game of whack-a-mole.

Section 5's preclearance provision broke this legal logjam and helped to stop these discriminatory practices. Indeed, the success of the VRA with its effective preclearance requirement was apparent almost immediately after the law went into effect.

For instance, registration of African-American voters and the number of African Americans holding elected office both rose dramatically in the couple of years after enactment of the VRA.

These successes could not have happened without vigorous enforcement of the VRA and particularly of its preclearance provision.

The Shelby County decision, however, struck down as unconstitutional the VRA's coverage formula which determined which jurisdictions would be subject to the preclearance requirement, effectively suspending the operation of the preclearance requirement itself and in its absence the game of whack-a-mole has returned with a vengeance.

Within 24 hours of the Shelby County decision, for example, Texas's attorney general, North Carolina's General Assembly announced that they would reinstitute draconian voter ID laws.

Both states' laws were later held in federal courts to be intentionally racially discriminatory. But during the years between their enactment of the court's final decision, many elections were conducted while the discriminatory laws remained in place.

At least 21 other states have also enacted newly restrictive statewide voter laws since the Shelby County decision.

Restoring the vitality of the Voting Rights Act is of critical importance.

In 2006 when I was the ranking member of this subcommittee, we undertook an exhaustive process to build a record—a 15,000-page record—that demonstrate unequivocally the need to reauthorize the Voting Rights Act, provisions of which, like the preclearance requirement and the coverage formula that undergirded it, were expired.

At the time we found that most Southern states as well as others were still facilitating ongoing discrimination. For instance, these states and their subdivisions engaged in racially selective practices such as relocating polling places for African-American voters, and in the case of localities annexing certain wards simply to satisfy white suburban voters who sought to circumvent the ability of African American to run for local elective offices in their cities.

While it is true that those seeking to enforce—to enforce the Voting Rights Act can still pursue after-the-fact legal remedies under Section 2 even without preclearance, time and experience have proven that such an approach takes far longer, is far more expensive than having an effective preclearance regime, and once a vote has been denied it cannot be recast. The damage to our democracy is permanent and, as I said, the game of whack-a-mole has returned with a vengeance.

That is why I hope that members on both sides of the aisle and in both houses of Congress will come together and pass legislation to restore the Voting Rights Act to its full vitality.

Today's hearing will provide an important opportunity to renew our understanding of the importance of the Voting Rights Act and, in particular, of its preclearance provision and to support our efforts to craft a legislative solution.

I appreciate the University of Memphis Law School for hosting us today and I look forward to hearing from our distinguished witnesses.

And I thank the chairman. I yield back the balance of my time.

Mr. COHEN. Thank you, Chairman Nadler.

I have asked and she has consented—Congressman Sheila Jackson Lee—to make a brief statement. She wasn't told this beforehand but she is the successor in the interest and vigor and values and ability to articulate an issue to the great Barbara Jordan, who was a congressperson and one of her heroes and mine, too.

So I recognize Congressman Sheila Jackson Lee and thank her for being here.

Ms. JACKSON LEE. What a privilege to be able to be here with my friend in Chairman Steve Cohen and, of course, the dynamic chairperson, chairman of the House Judiciary Committee evidenced by the work that we have been able to do.

Chairman Cohen led a hearing in Houston, Texas, and we were forever grateful to have the ability to ensure that voices are heard around the nation on this vital question of voter empowerment.

As both my chairmen have just said, voting has nothing to do with party affiliation or partisanship. I would almost consider it a birthright, and in this historic town where I am reminded of the message of, I am a man—I am an American—I am a woman—I am an Native American—I am an African American—I am an individual deserving of that right, I could not be more pleased to join Steve Cohen, who has been such a leader on these issues.

Let me briefly say these points and as I do so let me thank the witnesses for your presence here today. Thank you, Dean. I am prone to law schools and so anytime you want to visit us in Houston we welcome you and we are delighted that you are training the current generation of constitutional specialists. Thank you so very much for your leadership.

The centuries old institution of slavery established a racial caste system in the United States so pervasive that it has survived the oppressive economic and social institution that slavery was and it has continued.

What we have seen over the years is an evolution of discriminatory voting practices. We have seen voter denial, voter dilution, and voter suppression and, tragically, all of that continues today.

It is much to my dismay that Texas has become the prototype for denying the rights of citizens to vote, and I want to mention in the context of African Americans, Hispanics, the elderly, young people, impoverished persons who may move around and are held to the standard of what is your address, denying them the right to vote homeless persons—homeless persons as well, that our goal in America should be to empower people to vote.

We have seen with the demise of preclearance, which is Section 5, that we are on our way back to square one for rehabilitating the Voting Rights Act.

So the lesson that we learn here is that maintaining our rights requires vigilance. Both Steve and Jerry are correct that we worked together in 2006 for the reauthorization of the Voting Rights Act, and let me take note of Chairman Sensenbrenner, who was an active and vigorous participant.

I remember the give and take and the 15,000 pages and the amendments that were accepted during that time frame. But I think the most evident of where we were as a country at that time is that there was actually a big celebration at the White House—a signing of the bill. And at the center point of the signing, I might say, was George W. Bush.

And so we find ourselves now since 2013 on the back side of liberty and justice, the uncaged—but uncaged by Supreme Court's 2013 Shelby County case ruling which struck down Section 4 of the Voting Rights Act.

Fourteen states, including my state of Texas, took extreme measures to enforce new voting restrictions before the 2016 presidential election.

As indicated in Harris County, where I live, we had a system where voters were getting purged from the rolls, effectively requiring people to keep active their registration.

Right before a bond election thousands were taken off the rolls and asked, are you truly a citizen and, if so, run down to the county and prove it before you can vote.

The Texas secretary of state recently claimed that his office had identified 95,000 possible noncitizens on the roles and gave the list to the attorney general for possible prosecution, leading to a claim by President Trump about widespread voter fraud and outrage from those who believe in justice.

Interestingly enough, all of that was disproved. There are questions of criminal prosecution and the secretary of state had to step aside.

At least 20,000 names turned out to be there by mistake, leading to chaos, confusion, concern that people's eligibility to vote was being questioned.

The list was made through state records going back to 1996 was shown which Texas residents weren't citizens when they got a driver's license.

But this continues. Latinos made up a big portion of the 90,000-person list and we believe that it was certainly based upon last names.

So all of us who have had a distinct history in this nation have found ourselves in the eye of the storm when it comes to the question of voter denial—denying you the right to vote—voter dilution—diluting the vote—and certainly voter suppression, all of it that continues.

And so these hearings are, clearly, crucial and I am reminded, since Steve indicated, my mentor, the Honorable Barbara Jordan, who, when someone asked, what do you people want, she said, squarely and forthrightly, we want the promise of America.

I believe all over America these hearings are forcing and enforcing the promise of America. I am delighted to be with you, Mr. Chairman, and thank you for the invitation.

I look forward to the witnesses and I am very excited by those who are present in this room.

I yield back.

Mr. COHEN. Thank you so much. We appreciate your statement and your great volume of work on these issues.

We welcome all of our witnesses here today and thank them for participating. We will have witnesses on two panels, and your written statements will be entered into the record in their entirety. And I will ask you to summarize your testimony in five minutes and I will give you a one-minute warning.

In Congress, we have lights. So if you see the red light you know that you are finished and then you—green light you go, et cetera. But we don't have lights here.

So we are going to get a signal from here. They get five minutes, and when they get to one minute they will let me know and I will go one. So that is the way we will do it here.

Before proceeding with the testimony, I remind every witness appearing before us today that all of your written or oral statements made to the subcommittee connected with this hearing are subject to the penalty of perjury pursuant to 18 USC 1001, which may result in the imposition of a find or imprisonment of up to five years, or both.

Turning to the first witness panel, our first witness is Kareem Crayton. Mr. Crayton is the executive director of the Southern Coalition for Social Justice.

His primary work explores the relationship between race and politics in representative institutions. His academic work addresses the varied effects of state-sanctioned racial exclusion and discrimination on campaigns, elections, and governance of the political system.

He previously served on the faculties of Harvard, the University of Southern California, the University of Alabama, the University of North Carolina, and the Vanderbilt University School of Law.

He received his JD and his Ph.D. in political science from Stanford, his BA in government magna cum laude from Harvard University.

Mr. Crayton, you are welcome and recognized for five minutes.

STATEMENTS OF KAREEM CRAYTON, EXECUTIVE DIRECTOR, SOUTHERN COALITION FOR JUSTICE; JAMES BLUMSTEIN, UNIVERSITY PROFESSOR OF CONSTITUTIONAL LAW AND HEALTH LAW & POLICY, VANDERBILT UNIVERSITY LAW SCHOOL; STEVEN MULROY, PROFESSOR OF LAW, THE UNIVERSITY OF MEMPHIS CECIL B. HUMPHREYS SCHOOL OF LAW; TEQUILA JOHNSON, CO-FOUNDER AND VICE PRESIDENT, THE EQUITY ALLIANCE

STATEMENT OF KAREEM CRAYTON

Mr. CRAYTON. Thank you, Mr. Chairman, and thanks to the committee for inviting me along with the panel to present on this important topic.

As was stated earlier, I am the executive director of the Southern Coalition for Social Justice. It is a nonprofit located in Durham, North Carolina. Can you hear me okay?

Mr. COHEN. You might want to come closer to the microphone.

Mr. CRAYTON. Okay. How is this?

Mr. COHEN. Closer.

Mr. CRAYTON. Okay.

Mr. COHEN. I feel like an eye doctor.

Mr. CRAYTON. How is that?

Mr. COHEN. Good.

Mr. CRAYTON. Okay. We are—the Southern Coalition is located in Durham, North Carolina, and our work focuses on providing multidisciplinary talent in law, organizing communications and research to communities across the South who are facing significant systemic problems related to access to opportunity here in the South, and that includes voting rights.

We partner with community organizations and we take as our focus, distinct from others, race equity as a guiding force, and we therefore spend a lot of time thinking about voting and how to make it more accessible to more people.

It is, as has been said earlier, a keen source of concern from our perspective that there is currently a need to have Section 5 or a replacement available. My intention today, briefly, is to offer comments on the perspective from where we sit about what has been lost and what the world looks like in a world without Section 5 and where organizations like ours try to assure political opportunity to organizations.

Due to that, I want to talk briefly about three particular examples, one of which you all have very nicely talked about so I don't have to say too much. But I want to talk about three particular issues: voter ID, about what we will discuss described as the criminalization of the ballot box, and then, finally, purges and removals.

First, with respect to voter ID rules, you all have already very nicely described some of the perils associated with rules that don't just look at ID as a means to assure against fraud but instead a means of deciding who will and won't be part of the electorate, where a legislature like the one in North Carolina makes a decision that they will privilege gun licenses but not privilege public school-issued photo IDs.

One makes some decisions about whether or not certain groups of people who tend to have one and not the other should be a part of the system. And our organization litigated in North Carolina what was called the "monster" voting bill out of the North Carolina General Assembly and the state was found to have intentionally discriminated with almost, as the bipartisan federal court sais, surgical precision.

The part I want to emphasize is that even though we won that case, the state legislature responded by crafting a new voter ID provision that was going to be entrenched in the state constitution. That provision passed in 2018 with 55 percent of the vote and we are now—pardon?

Mr. COHEN. Fifty-five percent of the vote of the legislature or—

Mr. CRAYTON. Fifty-five percent of the vote in an election for the congressional—excuse me, for the constitutional provision as it was presented after a significantly, I think, contentious campaign.

And in any case, we have since sought to sue to stop the implementing legislation that follows from that in state court and it is currently in the process.

But note that during this period of time, we have a voter ID bill that is on the books and we will have elections that have to be pursued unless a state court gives us a preliminary injunction.

The second topic I want to talk about briefly is an emergent issue but one that is not new to the United States and we describe it as the criminalization of the ballot box; that is, the use of public and private power to either penalize or harass people from doing nothing more than engaging in the exercise of the franchise.

What I will note simply is that several prosecutors, including in Texas and in North Carolina, have attempted to use state power for felony convictions for people who, at worse, are making mistakes and engaging in the political process, sometimes encouraged by the state, and it is our intention to assure that these laws, particularly in North Carolina where there is no intent requirement in the criminal statute, is not applied in an unconstitutional way. We are closely monitoring that and we will attend to it in the next few months.

Briefly, I will mention the third issue, which is purges and removals. This happened in a number of states. In my native state of Alabama, the state—secretary of state has encouraged this as another means of assuring against fraud.

And as it plays out, this tends to work against people who don't vote every election. If you vote in the national election in 2016 but don't vote in 2018 that can be counted against you, particularly if there are intervening elections to follow from it.

The challenge here is, one, that raises real speech concerns for people who choose not to participate in an election for any given time. But, two—and this is the deeper question that I will stop with—it discourages confidence that the political system is open to all people.

The real challenge in all of these efforts where people actually go through the registration process in one instance and then are told by the state, you have to go back to square one because you didn't participate in the way that we think you need to participate is that it sends a negative message to people that they are not entitled just because of citizenship, as Representative Jackson Lee said, to participate in elections because it is their right.

And the real challenge, I think—and I hope that this committee will consider it as you are thinking through provisions that will follow—how do we use state power to assure that people who are citizens and who are intending to do nothing more than have their voice heard, how do we encourage rather than discourage their participation.

It is my hope and, certainly, from our perspective at the Southern Coalition that we will be partners in that effort.

And we thank you for the opportunity to speak.

[The statement of Mr. Crayton follows:]

Proposed Testimony and Notes for Kareem Crayton, JD, PhD
House Judiciary Committee
September 5, 2019
Memphis, TN

Thank you for the opportunity to present testimony on this important topic. I am the Executive Director of the Southern Coalition for Social Justice, which is a non-profit social justice organization based in Durham, North Carolina. Our work brings together multidisciplinary talent to address long range structural problems across the South that have kept certain communities on the outside of opportunity.

We work in partnership with community organizations to identify the policy and legal issues that they view as most significant and to develop comprehensive strategies that address these concerns in a long-range manner. We do so with an emphasis on racial equity, which we think is a key feature in the formula for enacting lasting change in the South.

As I mentioned, I am grateful for the chance to share thoughts about the ongoing barriers to voting that Americans continue to face, particularly in the South. Our work has afforded us with a very keen vantage point to consider them, as my own scholarly work before assuming this role has provided.

There are multiple perspectives that I am sure will be brought to bear on the topic today, so I will limit my formal comments to three specific examples of the barriers to voting that I hope that will inform this committee and its work going forward to craft legislation that addresses an election system that endeavors to entrench equality but too often falls far short. In some ways, these are not entirely new tactics, but it is fair to say (to borrow from the music scene) the tunes vary along a pretty constant theme.

A. Voter ID Rules

Since the Supreme Court adopted a standard that permits the enactment of requirements to produce photo ID at the polls, states have taken multiple efforts to challenge the boundaries of their power to regulate participation. This experimentation poses serious concerns for voters who do not have a driver's license or a passport, which research frequently reveals more frequently includes the poor, the young, the disabled, women, and people of color. While advocates of this policy frequently

herald the availability of free photo ID, they tend to overlook both the paltry financial support for making free ID available and, more important, the blatant selectivity in which forms of ID are favored.

The Southern Coalition successfully litigated to strike down a very heinous 2014 statute in North Carolina affectionately known as the Monster Voting Bill. A bipartisan panel of federal judges eventually found that in adopting this bill that favored gun licenses but disfavored public school ID's, the state had engaged in intentional racial discrimination "with almost surgical precision." The General Assembly responded by crafting this requirement into a state constitutional amendment, which passed with 55% of the votes cast in 2018.

Our legal team is now challenging the implementing law under this new provision in state court as inconsistent with North Carolina's core state constitutional principles, and we remain committed to demonstrating the continuing threats that this policy has on the full and fair exercise of the franchise. The crucial point to recognize about this issue is that this litigation takes time to complete, and elections will be held in the interim. The risk of excluding people who have a history of participating as well as the even more likely level of confusion about changing rules – both by the voters and those who manage the polls are extremely troubling consequences of this policy.

B. Criminalization of the Ballot Box

In recent years, several individuals (often women and people of color) across the country have been targeted by state actors and private citizens for their efforts to become more engaged in the political process. These strategies are not entirely new to the American political landscape, but they are quite effective at curtailing the exercise of the franchise. The rationale of using criminal law to stop voter fraud has its moorings in the 19th Century effort to undermine the progress of the American Reconstruction by harassing and intimidating formerly enslaved people who sought to vote. Research by J. Morgan Kousser has nicely described the pattern of behavior of intimidation (to the point of violence) in ways that targeted precisely those areas where nascent African American political activity had the potential for great effect.

Then, as now, voters face the concerning possibility of retribution that can include private harassment and public investigation or accusations of fraud due to good faith efforts

of registering or voting. In the current era, both state and federal actors have raised the specter of "illegal voting" to intimidate newer voters from entering the political marketplace. The Southern Coalition has led efforts in Virginia and North Carolina to seek legal accountability for private actors that have wrongfully attempted to intimidate voters and has defended individuals prosecuted for felonies under a state law that does not account for good-faith mistakes. In America's most diverse electorate in history, where the country's rate of participation currently lags behind other developed democracies, discouraging new voters in this way threatens not only the personal security and liberty of those who are targeted but also a deeper societal trust in our electoral system by their friend and neighbors.

C. Voter Purges/Removals

A relatively more emergent issue that is becoming a widespread tactic of undermining the ability of infrequent voters to participate is the use of purges and removals. Multiple state administrators have, pursuant to their preferred reading of the Help America Vote Act have adopted a policy to (in their view) protect the voter rolls against fraud. Their intervention is to provide notice to voters they identify as infrequent and therefore likely to

There are clear speech questions at issue with this policy, since our constitutional doctrine for speech – including political speech recognizes protections for the right to speak as well as the right NOT to speak. Effectively penalizing a person who chooses not to participate during a particular election cycle would significantly depart from traditions of privileging both the content of speech and the decision whether to issue speech. And to my mind, the unmoored assertions of preventing fraud this way are far too specious from the real and well-documented effects on the large segments of our population that tends to show up to vote for national elections but perhaps not as frequently for more local races.

The depth of the harm associated with this policy is even more severe if one considers the significance of registering to vote. The United States is an outlier among developed democracies in its demand that a citizen needs to take a distinct step to qualify to vote in addition to actually traveling to the polls on Election Day. Political science research has made clear that registration as a process serves as its own barrier to participating. While the present system may be defended by

traditionalists, what is exceedingly difficult to accept is any system that would place voters back at square one simply because they choose to remain silent in one too many elections.

Mr. COHEN. Thank you, sir, and it is my error in not keeping up with the time as well. I am going to be a better time keeper.

James Blumstein is a university professor of con law and health law and policy, professor of management—Owen Graduate School of Management and director of the Vanderbilt Health Policy Center.

I knew of Mr. Blumstein and of his work when I was a state senator. He was respected with his testimony and opinions among the members of the General Assembly and teaches at the school I went to undergraduate. So I appreciate your being here.

Among his many accomplishments he was former Tennessee Governor Phil Bredesen's counsel on TennCare reform. He participated in a number of Supreme Court cases and arguing *Dunn* v. *Blumstein*, a successful '72 challenge to Tennessee's durational residency requirement for voter registration. He has a BA in economics from Yale, an MA in economics from Yale, and an LLB from Yale. He never could get out of Yale. [Laughter.]

Professor Blumstein, fortunately, you got to Vanderbilt, the Harvard of the South.

You are recognized for five minutes.

STATEMENT OF JAMES BLUMSTEIN

Mr. BLUMSTEIN. Thank you, Mr. Chairman, and I remember well your work when you were in the state legislature on getting funding for higher education and your good work there.

My testimony today will focus on a case I brought. You mentioned *Dunn* v. *Blumstein* and I will talk about that, and then some——

Mr. COHEN. You need to be closer to the mic.

Mr. BLUMSTEIN [continuing]. Some lessons that I have learned from that and lessons that I think are significant. But there are a few war stories here and a few examples I want to talk about.

First, what the case was about. When I am—when I moved to Tennessee in 1970 you had to live in the state a year in order to register to vote and you had to live in the county of your vote for 90 days.

I brought suit to challenge that based upon both violation or a penalty on the right to travel and a restriction on the right to vote, and that case was brought.

The Census data that we had from that era showed that about 3.3 percent of residents move from one state to another every year and about 3.3 percent of persons move from county to county every year.

So it overstates it a little bit but about 6½ percent of people were disenfranchised from these durational residency requirements, and the law was ultimately struck down by the District Court and then by the U.S. Supreme Court in an opinion by Justice Marshall.

I think that that case probably has enfranchised more people than any single case in our constitutional history about, as I said, somewhere a little bit south of 6.5 percent.

And then there are some stories about that and some lessons. As we were litigating this, the state said that it wanted to promote

voter knowledge and to protect the purity of the ballot—guard against voter fraud.

There was really no question at that point that voter knowledge was not really well served by a length of residency and we addressed that in the case directly.

But just parenthetically and just to lighten this up a little, I did offer to take a test of my voter knowledge of the issues. At that time, Senator Gore was running for reelection and I thought I knew a good bit about his—the issues in his campaign and the opponent's. I think Senator Brock was running against him.

And then we had the voter fraud. Well, this is important—the voter fraud issue. It showed that the lengthy residency requirements were put in to stop a real problem, the problem of colonization, where people would be brought in from outside the states like Kentucky or outside the district, and the voter residency requirements or durational requirements were put in so that people would know their neighbors—who was actually brought in on the day of election to colonize and who was a real resident.

But since those things had been enacted, Tennessee had adopted a system of voter registration to deal with voter fraud. And so the court was able to see that the voter registration system eliminated the need for these lengthy residency requirements and so that is the lesson that I want to talk about is that having a—taking seriously a problem rather than denying the existence of a problem allows a conversation to develop about how one can overcome the adverse effects of dealing with the problem such as the durational residency requirements and how the voter registration system allowed the courts to see that alternative methods of dealing with voter fraud were available that were much less debilitating on the right to vote.

So I take from that important lesson that if one recognizes and seeks in good faith to try to solve a problem in the least destructive way you can that that is likely to generate strong support across the aisle.

So I will—I see that my time has almost expired. I will be glad to take questions and respond to questions at that point. But I think that is an important takeaway of that experience.

Thank you very much.

[The statement of Mr. Blumstein follows:]

Testimony of Professor James F. Blumstein
Vanderbilt Law School -- September 5, 2019

Dunn v. Blumstein: Litigation Experiences and Lessons

I plan to discuss my experiences in successfully bringing *Dunn v. Blumstein*, 405 U.S. 330 (1972), and the lessons I want to share from that experience. The case challenged Tennessee's one-year in-state durational residency for voter registration and Tennessee's 90-day in-county durational residency for voter registration. In 1972, the Supreme Court (on a vote of 6-1) held both durational residency requirements unconstitutional as a violation of equal protection. The system of voter registration was considered by the Court a sufficient guard against voter fraud, allowing the Court to invalidate the durational residency requirements -- justified as protecting against voter fraud -- as an unnecessary restriction on the franchise.

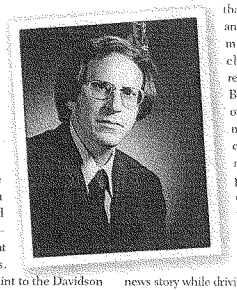
My recollection is that Census data showed that about 3.3% of persons moved interstate each year and another 3.3% of persons moved from county to county. So, that indicates that about 6.6% of potential voters were disenfranchised each year as a result of the durational residency requirements. I believe, therefore, that *Dunn v. Blumstein* likely enfranchised more voters than any other single case.

An important take-away is that taking claims of voter fraud seriously is important. Providing credible and effective safeguards against voter fraud allows for courts and policymakers to undo unnecessary voting restrictions that are targeted at voter fraud but that can be relaxed when other, serious safeguards against voter fraud are in place.

A New York Yankee in Tennessee Court

Soon after joining Vanderbilt's Law faculty, James Blumstein brought a voting rights lawsuit against the State of Tennessee that reached the Supreme Court.

James Blumstein still becomes indignant when he recalls his first attempt to register to vote after moving to Tennessee in 1970. A newly minted Yale Law graduate and native New Yorker, Blumstein had moved to Nashville in mid-June after accepting a position on Vanderbilt's law faculty. "Vanderbilt had summer classes back then, and I taught summer school that year," he recalled.



But when Blumstein tried to register to vote on July 1 in hopes of voting in Tennessee's August 6 primary, an election official blandly rebuffed him. Under Tennessee law, people moving into the state from elsewhere in the U.S. could not register to vote until they had lived in Tennessee for one year, and there was a separate three-month residency requirement for Tennessee counties. Blumstein took his complaint to the Davidson County Election Commission, which informed him that the durational residency requirement was mandatory.

Frustrated at being disenfranchised for a year by what he viewed as an unconstitutional law, Blumstein filed suit against the state, claiming that Tennessee's durational residency requirement violated the Equal Protection Clause of the Fourteenth Amendment. He also insisted on filing a provisional ballot in a sealed envelope—now a federal requirement when an individual's voting rights are disputed, but a process he "invented on the spot" so his vote could be counted if his suit prevailed.

Blumstein had not yet been admitted to the Tennessee Bar when he argued his case before a panel of three federal judges in late July. The panel made it clear that it would order Blumstein's vote counted in the August 6 primary. However, Judge Frank Gray noted that Blumstein's challenge to the three-month requirement would be moot by the time November elections rolled around. Blumstein countered that, as a representative of a class of voters disenfranchised by Tennessee's durational residency requirements, none of his challenges were moot, citing the doctrine of "capable of repetition, yet evading review."

The two sparred until "Judge Gray became so irritated he threw his glasses down," Blumstein recalled. "When the judge throws his glasses down on his desk, that is not a good sign!" When Blumstein returned to his office, he detailed his argument in a 16-page memo, which he submitted to the court. "I learned much later that Judge Gray had drafted an opinion holding the three-months issue moot, but changed his mind after reading that memorandum," Blumstein said. "But in his opinion, Judge Gray chided me for even being concerned about the mootness problem, pointing out the doctrine of 'capable of repetition, yet evading review.'"

Blumstein learned he had won the case in early September from a radio news story while driving back to Nashville after visiting family in Pennsylvania and New York. In the mail that had accumulated while he was away, he found letters informing him of his passing the Tennessee Bar and of his victory in the voting rights case. "It was my best mail day ever," he said.

The task of developing a plan to inform Tennesseans that they no longer had to satisfy a durational residency requirement to vote fell to Blumstein and the state's Attorney General, David Pack. Using census data, Blumstein had discovered that approximately 3.3 percent of Tennessee residents were disenfranchised by the one-year requirement and another 3.3 percent by the three-month requirement. Most were highly educated professionals. "After we went over the data and the communication plan, I asked David if he was going to appeal," Blumstein recalled. "He said, 'I don't know. I feel an obligation to support the law of Tennessee, but we're fencing out a lot of people who should be voting.'" Then Blumstein opened the door of Pack's office at the State Supreme Court building to leave, and the pair found themselves facing a small battalion of reporters, cameramen and flood lights.

The story of the brash young Yankee law professor filing a lawsuit against the state less than two months after moving to Nashville had made headlines in daily papers and become a staple of local television news. Blumstein even received a death threat, after which he begged the *Tennessean* reporter covering the story to stop publishing his address in every dispatch, then the paper's common practice. However, both men were caught off guard by the eager knot of correspondents outside Pack's office. "A reporter stuck a microphone in David Pack's face and asked if he was going to appeal," Blumstein recalled. "He made his decision on the spot. He said, 'I'm going to fight it all the way to the Supreme Court.'"

On November 16, 1971, Blumstein appeared before the High Court to argue *Dunn v. Blumstein*. At 26, he became the first of his Yale Law classmates to argue a case before the Supreme Court. In fact, *Dunn v. Blumstein* was his first case ever. The Court's 6-1 ruling in his favor was written by Justice Thurgood Marshall and announced on March 21, 1972. It held that Tennessee's durational residency requirements for voting violated the Equal Protection Clause "as they are not necessary to further a compelling state interest." Blumstein had not expected to get Justice Harry Blackmun's vote, but the only dissenting vote came from Chief Justice Warren Burger. However, Justice Blackmun wrote a concurring opinion in which "he needled me for launching what he disparagingly called a test case," Blumstein said.

The opening paragraph of Justice Blackmun's opinion "concurring in the result" of *Dunn v. Blumstein* read as follows: *"Professor Blumstein obviously could hardly wait to register to vote in his new home State of Tennessee. He arrived in Nashville on June 12, 1970. He moved into his apartment on June 19. He presented himself to the registrar on July 1. He instigated his lawsuit on July 17. Thus, his litigation was begun 35 days after his arrival on Tennessee soil, and less than 30 days after he moved into his apartment. But a primary was coming up on August. 6. Usually, such zeal to exercise the franchise is commendable. The professor, however, encountered—and I assume, knowingly so—the barrier of the Tennessee durational residence requirement and, because he did, he instituted his test suit."*

—Grace Renshaw

POLITICO

Tenn. 1-year residency rule violated Constitution, March 21, 1972

By Andrew Glass
March 21, 2012 04:47 AM EDT

On this day in 1972, the U.S. Supreme Court found that Tennessee's one-year minimum residency rule for voters violated the Constitution's Equal Protection Clause. Six members of the high tribunal voted to vacate the requirement. Chief Justice Warren Burger dissented while two justices, Lewis Powell and William Rehnquist, recused themselves.

The class action suit was brought by James Blumstein, who arrived in Nashville on June 12, 1970, as a freshly minted graduate of Yale Law School. After moving into his apartment on June 19, he tried to register on July 1 in hopes of voting in Tennessee's Aug. 6 primary. Blumstein, having been hired by Vanderbilt University as an assistant law professor, filed his "test" lawsuit 35 days after arriving in Tennessee in an ultimately successful bid to knock down its yearlong voting barrier.

When the issue came before the Supreme Court on Nov. 17, 1971, Blumstein, who had edited the prestigious Yale Law Journal, appeared before the tribunal on his own behalf. The case is known in judicial annals as *Dunn v. Blumstein* because Winfield Dunn was Tennessee's governor at the time.

Thurgood Marshall, in his 6,200-word majority opinion, accompanied by 31 footnotes, did not see "a compelling state interest" in denying Blumstein the right to vote, "concluding that Tennessee has not offered an adequate justification for its durational residence laws." The problem, Marshall wrote, is that they "exclude too many people who should not, and need not, be excluded."

In a 210-word dissent, Burger wrote that "it is no more a denial of equal protection for a state to require newcomers to be exposed to state and local problems for a reasonable period such as one year before voting, than it is to require children to wait 18 years before voting."

"Some lines must be drawn," Burger concluded.

SOURCE: *DUNN v. BLUMSTEIN*, 405 U.S. 330 (1972)

Mr. COHEN. Thank you, Professor.

For the students, I want to relate a little history to you. *Dunn* v. *Blumstein* was a governor named Winfield Dunn, who was from Memphis who was—from '71 to '75 he was governor of Tennessee—a Republican governor.

And when he says Gore, there were two Gores. Al Gore, Jr., had a father, Al Gore, Sr., who served in the Senate for I think 18 years and was defeated in '70. And I would also mention——

Mr. BLUMSTEIN. Right. And the election was about Al Gore, Sr. Al Gore, Jr., was one of my students later on.

Mr. COHEN. You taught him well.

Mr. BLUMSTEIN. Thank you.

Mr. COHEN. The process in Congress is when you are the majority you have three witnesses and when you are in the minority you have one witness.

Mr. Blumstein is here as the witness of the Republicans and he will appear on the second panel as well because they only supplied us with one witness. We will have three other Democrats to come later.

Now I would like to recognize a homeboy, Steven Mulroy, a professor of law at the University of Memphis Cecil C. Humphrey School of Law, since 2000, teaching in the area of con law, criminal law, criminal procedure, civil rights, and election law. Former civil rights lawyer for the U.S. Department of Justice and former federal prosecutor, he tried a number of voting rights cases which went to the Supreme Court.

In addition to his academic and litigation experience, Professor Mulroy has served as an elected Shelby County commissioner 2006 to 2014, drafting, among other things, the first legislation on any level to provide discrimination protection for the LGBT community.

He served as a law clerk to the Honorable Roger Vincent, the U.S. District judge of the Northern District of Florida. He got his JD from the William and Mary Law School, top 5 percent of his class, an editor of the Law Review.

Received his BA in linguistics from Cornell with distinction and he was a major proponent of IRV, which was a voting process that the city council passed and all, and that was important but it was named IRV, which reminds me of Irvin Salky, who needs to be remembered at all times.

Professor Mulroy, you are recognized for five minutes.

STATEMENT OF STEVEN MULROY

Mr. MULROY. Thank you, Mr. Chairman, and members of the committee. It is an honor to be able to speak to you today on such an important issue.

I started my legal career in the voting section enforcing Section 2 and Section 5 of the Voting Rights Act. I have published a number of scholarly articles on the Act, just recently published a book on election reform, and as has been pointed out, while I was an elected county commissioner I worked not only on reform of two methods of election but also personally was involved in a redistricting process.

While the Voting Rights Act undeniably succeeded early on in allowing minority voters access to the ballot casting and registration

and then later on succeeded in addressing minority vote dilution, it by no means ended all minority vote dilution.

And the same is true of the recent wave of vote suppression cases we have heard about today, the so-called third generation of Voting Rights Act enforcement, which picked up considerably after the *Shelby County* v. *Holder* decision.

After that decision, we now lack the most effective tool in fighting voting discrimination, Section 5 preclearance. The court left open the option of drafting a new coverage formula and Congress should do so.

Skeptics might protest that the Holder decision still left open Section 2 litigation and that is enough. But as we have already heard, Section 2 litigation by itself is not enough to address the problem. In a nutshell, it is too expensive, too drawn out, and too ineffective.

Expense. Section 2 plaintiffs have to pay credentialed expert witnesses and prepare extensive historical and socioeconomic analysis to meet their burden of proof. This costs money, hundreds of thousands of dollars in some cases, and that is not counting attorneys fees, which you only get if you win and even then you only get some of it.

Time. Section 2 cases typically take two to five years, and during those years, because courts are reluctant to grant preliminary injunctions prior to a full trial on the merits, as we have already heard, the discriminatory voting practices are in effect often for multiple election cycles.

Effectiveness. Section 5 had a clear legal standard. Discriminatory purpose or retrogression. Easy for litigants to argue and courts to enforce. Section 2 standard is more fuzzy. Also, Section 5 placed the burden of proof on the jurisdiction, which has the access to resources and data.

It nipped the discrimination in the bud rather than chasing after it after it began. Under the Supreme Court City of Bern decision, any preclearance resumption would require evidence and findings that it was congruent and proportional to the societal problem, and under Shelby County we would have to have an updated coverage formula.

Sadly, the plentiful examples of recent voting discrimination that we have in the record, including examples here in Tennessee, I think will suffice to meet those burdens.

H.R. 4, one of the bills being discussed, is a reasonable response to this record. It limits coverage to jurisdictions with a demonstrated pattern of multiple voting rights violations within a set time period demonstrated by formal findings of discrimination by either a federal court or DOJ.

While reasonable minds might differ as to the best look-back period or the minimum number of violations needed to trigger coverage, the solution H.R. 4 arrives at does not exceed the bounds of appropriate remedial legislation.

I would recommend one change to the bill, since we are—if we are talking about H.R. 4. Section 4(b) identifies as a covered practice requiring preclearance any conversion of single-member district to a multi-member district or at-large election scheme.

I recommend that a narrow exception be added for when such conversion involves the use of proportional or semi-proportional systems like limited voting, cumulative voting, or especially single transferrable vote, such that the relevant minority group would be expected under the well-recognized threshold of exclusion formula to elect candidates of choice at, roughly, the same or greater rate.

These alternative systems have been used for decades in many jurisdictions across the country. Federal courts have imposed them as Voting Rights Act remedies.

They are just as effective as the traditional single-member district remedy, in many cases more effective. The law should encourage experimentation, not discourage it.

I will conclude by noting that the right to vote has famously and improperly been called the right preservative of other rights. Where it is denied victims necessarily lack the means to use the local and state political processes to correct the problem.

So, by definition, it is appropriate for external actors, Congress, or federal courts to intervene. Doing so does not give federalism short shrift but merely gives voting rights their fair due.

I thank the committee.

[The statement of Mr. Mulroy follows:]

I. INTRODUCTION

I am honored to be able to speak to you today on such an important issue, one which has occupied the attention of those concerned about voting rights since the Supreme Court's Shelby County v. Holder decision.[1] After briefly reviewing my qualifications and some relevant Voting Rights Act history, I will explain why a reauthorized Section 5 is needed; why Section 2 alone will not suffice; why Congress likely has proper authority in this area; and why the current proposal for reauthorization set out in the HR4 is for the most part appropriate. I will also make one suggestion for amending the bill.

I am the Bredesen Professor of Law at the University of Memphis, where I have taught for 19 years. Among the courses I teach are Constitutional Law, a Federal Discrimination Seminar, and Voting Rights & Election Law. My first job after law school and a two-year federal district court clerkship was in the Voting Section of the U.S. Justice Department, where I enforced the Voting Rights Act, including Section 5 preclearance review, Section 2 litigation, and constitutional challenges to minority electoral districts. As shown in the attached resume, I have published a number of scholarly articles on various aspects of the Voting Rights Act, and just recently published a book on election reform which includes substantive discussion of the Voting Rights Act and constitutional jurisprudence on voting rights claims. For a time here in Memphis, I served as an elected county commissioner. In that capacity, I was personally involved in a redistricting process, efforts to ensure election integrity, and efforts to change local methods of election.

After the Voting Rights Act's 1965 passage, voting rights advocates focused on barriers to voting registration and casting a ballot. This so-called "first generation" of Voting Rights Act enforcement, *enfranchisement*, dealt with the use of literacy tests and other devices, as well as discriminatory application by local officials, to prevent racial and ethnic minorities from registering and voting. This first wave of enforcement was extraordinarily successful. Along with the use of federal registrars authorized under the Act, the registration and turnout rates of African-American voters in the South skyrocketed within a few years. *See* Chandler Davidson & Bernard Grofman, eds., QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (1994) (QUIET REVOLUTION).

By the 1970s, attention turned to the "second generation" of Voting Rights Act cases, those dealing with *minority vote dilution*. These cases concerned the use of particular methods of election and districting plans which diluted the voting strength of minority voters such that, even though they could register and cast a ballot, they would not have a realistic or equal chance to elect candidates of choice. *See., e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986). This second wave of enforcement was also successful, resulting in a dramatic increase in the percentage of elected officials at the federal, state, and local level who were candidates of choice of minority voters. *See* QUIET REVOLUTION, *supra*.

While the second generation did improve the situation for minority voters, such minority vote dilution continued, including up to the present day. For example, in every redistricting cycle

[1] Shelby County v. Holder, 570 U.S. 529 (2013).

since 1970, Texas has been found by courts to have violated the Voting Rights Act with racially gerrymandered districts.[2] That includes the most recent 2010 round of redistricting, where a federal district court found that Texas did so with racially discriminatory intent.. Perez v. Abbott (II), 253 F.Supp.3d 864 (W.D. Tex., 2017) (intentional dilution of black and Latino vote in congressional districting plan). Texas is by no means the only jurisdiction which has in recent years engaged in minority vote dilution in violation of the Act. *See, e.g.*, Michigan APRI v. Johnson, 833 F.3d 656 (6th Cir. 2016) (elimination of straight-ticket voting in Michigan found to dilute black voting rights); Luna v. Kern County, 291 F.Supp. 3d 1088 (E.D. Cal. 2018) (Latino voter dilution in California county redistricting plan).

In recent years, a "third generation" of Voting Rights Act enforcement has arisen in response to various barriers to voting—e.g., voter ID laws, restrictions on early voting, bans on same-day registration—which tend to disproportionately burden minorities. These new "vote denial" cases[3] mark a return to the first generation's focus on the bare ability to cast a ballot. *See, e.g.*, North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 242 (4th Cir. 2016) (striking down omnibus legislation re: voter ID, early voting, and same-day registration as being imposed with racially discriminatory purpose); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc) (strict Texas voter ID law violates Act), *and* Veasey v. Abbott, 249 F.Supp.3d 868 (S.D. Tex. 2017) (finding discriminatory purpose in passage of Texas voter ID law).

Along with the continuing instances of minority vote dilution, this new generation of vote denial cases underscores the continuing need for robust Voting Rights Act protection. Because the Shelby County decision has eliminated Section 5 preclearance review, the only legal vehicle still available is an affirmative minority vote dilution lawsuit under the Act's Section 2. For the reasons discussed below, merely relying on Section 2 is not adequate for the problem.

II. INSUFFICIENCY OF SECTION 2 ALONE AS A REMEDY

In a nutshell, Section 2 is expensive, time-consuming, and ultimately less effective than Section 5.

A. Expense

Litigation under Section 2 is a daunting enterprise. For one thing, it is expensive. This is true even in those cases where plaintiffs are lucky enough to have attorneys work *pro bono,* or with no up-front fees in hope of receiving court-ordered attorneys' fees if they end up prevailing.

This is certainly true for vote dilution cases. To make out a *prima facie* case alone, plaintiffs must employ highly credentialed expert witnesses using sophisticated statistical

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[2] *See* LULAC v. Perry, 548 U.S. 399 (2006); Bush v. Vera, 517 U.S. 952, (1996); Upham v. Seamon, 456 U.S. 37 (1982); White v. Weiser, 412 U.S. 783 (1973); White v. Regester, 412 U.S. 755, (1973) (collected in Veasey v. Perry, 71 F.Supp.3d 627, 636 n.23 (S.D. Tex. 2014), *rev'd in part on other grounds*, Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc)).

[3] *See, e.g.*, Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 SOUTH CAROLINA L. REV. 689 (2006).

techniques to establish racially polarized voting. Similar expert witness testimony is normally required for going beyond the *prima facie* case to establish a full record on historical discrimination & socioeconomic disparities affecting voting, the record of minority electoral success, and other inquiries under the "Senate factors" to be considered under the Act's "totality of the circumstances" approach. *See* Gingles, 478 U.S. at 41; *see also* Voting Rights Act of 1965. These expert witnesses normally do not work *pro bono,* so plaintiffs must be able to pay them for their work up front, which can be very expensive. Plaintiffs must be prepared to provide to the court extensive evidence of a "searching inquiry" into the "totality of the circumstances." *See id.;* United States v. Euclid City School Bd., 632 F. Supp. 2d 740, 770–71 (N.D. Ohio 2009); *see also* Johnson v. Hamrick, 196 F.3d 1216, 1223 (11th Cir. 1999) ("the resolution of a voting dilution claim requires close analysis of unusually complex fact patterns"). This takes a lot of time in research and preparation of documentary and witness evidence.

Vote denial cases are similarly complex and expensive. While federal courts analyzing such claims have not always required extensive evidence of racially polarized voting, they have required extensive evidence regarding the history of discrimination, socioeconomic disparities, and other intensive inquiries. *See* Dale Ho, *Voting Rights Litigation After* Shelby County: *Mechanics And Standards In Section 2 Vote Denial Claims*, 17 LEGISLATION AND PUBLIC POLICY 675, 699 (2014) (listing Senate factors discussed by courts in vote denial cases).

All of the above adds up. It is not unusual for voting rights plaintiffs and their lawyers to have to risk spending hundreds of thousands of dollars in Section 2 cases. *See* Brief of Joaquin Avila, *et al* as *Amici Curiae* in Support of Respondents a 16, *Shelby County v. Holder,* No. 12-96 (U.S. Feb. 1, 2013) (Avila Brief). Most of these expenditures will not be reimbursed regardless of the case's outcome. Some portion of the attorney fees may ultimately be reimbursed, but only if plaintiffs ultimately prevail in court. Even then, the court may not award the full amount incurred by plaintiffs' counsel, based on disagreements about the proper number of hours, billable rate, etc.

Because of this expense, civil rights organizations---one of the few types of entities with the resources to bring any Section 2 litigation—will use their limited resources to focus on the cases with the biggest impact, usually statewide challenges. But there are many voting rights problems at the local level as well, problems which will go unaddressed if Section 2 is the only relevant operative part of the Voting Rights Act. Indeed, the vast majority of Section 5 objections in the pre-Shelby County v. Holder period involved violations by local governments. *See, e.g.,* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 Nebraska L. Rev. 605, 612 (2005) (noting that 92.5% of Section 5 objections from 200 to 2005 were to voting changes at the local level).

Section 2 litigation is also expensive for the defendants. State and local governments routinely spend millions of dollars on such cases. Contrast the former Section 5 review. Almost all such review involved a streamlined administrative process which involved submitting paperwork to the Department of Justice. It thus cost jurisdictions an average of $500 to obtain preclearance review. Avila Brief, *supra*, at 20-21.

B. Time

Section 2 cases are also time-expensive. On average, such cases can last between 2 to 5 years. *Id.* at 21. It is not unusual for a redistricting case to last well toward the end of the decade.

The protracted nature of these cases is problematic in several ways. For one thing, it can be such a time commitment that it discourages plaintiffs, organizations, and lawyers from taking it on. For another, it usually means that voting rights violations continue for years without being addressed. This is because courts are generally reluctant to enter preliminary injunctions against voting practices before final adjudication after trial. Preliminary injunctions are considered extraordinary relief in even garden variety cases. Given the states' rights (or local government rights) interests involved in federal supervision of state and local voting and election rules, federal courts can be especially reluctant to do so. *See* Dale Ho, *supra*, 675 LEGIS. AND PUBLIC POLICY at 675–76. For example, of the approximately 21 successful Section 2 cases since Shelby County, preliminary injunctions, including even partial preliminary injunctions, were granted in only 1/3 of those cases. *See* U.S. Civil Rights Commission, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report*, at 224-230, available at https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf#page=164&zoom=100,0,96. (listing successful Section 2 cases between the 2006 reauthorization and 2018); This means that several election cycles can go by with the voting rights violation going uncorrected. Once the election occurs, there are no do-overs.

Contrast review under Section 5. Almost all such review occurred administratively. *See* Dale Ho, *supra*, at 683 n.26 (over 99% of annual submissions reviewed administratively). Reviews occur within 60 to 120 days. Even in the rare case where Section 5 review went to a special three-judge court for a declaratory judgment action, those actions completed within months rather than years. *Id.* at 683-685.

C. Effectiveness

Section 2 is also less effective at preventing voting discrimination than Section 5. While Section 2 covers the entire country, that coverage matters only to the extent that plaintiffs have the time, expertise, and resources to prosecute Section 2 claims. This leads to patchwork, pick-of-the-draw enforcement. Because the burden of proof is on plaintiffs, and that burden is fairly hard to meet as a practical matter, plaintiffs may not prevail even in otherwise meritorious cases. Because the legal standard is comparatively less clear, it is harder to predict outcomes, leading to uncertainty and inconsistent enforcement.

Section 5 is comparatively more effective. While its geographic coverage area is limited, it focuses on those jurisdictions where voting rights violations are most likely. Within those jurisdictions, its coverage is comprehensive. All significant voting changes which might abridge the right to vote are screened for discriminatory purpose or effect. The legal standard—either discriminatory purpose or "retrogression"—is clear and straightforward. Advocates, courts, and jurisdictions all have a relatively clear understanding of what is permitted and forbidden.

III. POWER TO REAUTHORIZE PRECLEARANCE REVIEW

A. Generally

There is broad congressional power to remedy discrimination in voting. Section 5 of the 14th Amendment, requiring equal protection of the laws, and Section 2 of the 15th Amendment, barring racial discrimination in voting, expressly grant Congress the power to enforce the amendments "by appropriate legislation." The Supreme Court has held that under these provisions, Congress is not confined to simply proscribing acts which are themselves violations of the 14th or 15th Amendment. Instead, where "appropriate" to further the goals of the amendments, it may prohibit conduct which is not itself unconstitutional, even where such regulation "intrudes into 'legislative spheres of autonomy previously reserved to the States.'" City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)); *see also*. Katzenbach v. Morgan, 384 U.S. 641, 648 (1966) (Section 5 of 14th Amendment); South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (Section 2 of 15th Amendment).[4] While Congress cannot change the substance of the restrictions of the amendments, it has "wide latitude" to draft reasonable regulations designed to remedy or prevent violations of the rights granted therein. Boerne, 521 U.S. at 519-520.

To be sure, any such exercise of congressional enforcement power must now be "congruent and proportional" to the scope of the societal problem Congress intends to address, as documented by evidence in the legislative record and soundly grounded congressional findings. Boerne, 521 U.S. at 520. But that does not undercut the broad remedial authority discussed above; it merely requires evidence in the record of a continuing and substantial problem to which the specific means—in this case, preclearance review—can be said to be "appropriate" as a remedy. *See* id. at 523-524. Indeed, in Boerne, the Court specifically cited the Voting Rights Act as a law properly supported by congressional evidence and findings to meet the "congruent and proportional" standard. Id. at 525-526 (citing South Carolina v. Katzenbach, 383 U.S. at 308; Katzenbach v. Morgan, , 384 U.S. at 656; Oregon v. Mitchell, 400 U.S. 100, 132 (1970); City of Rome v. U.S., 446 U.S. 156, 182 (1980)).

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[4] Historical evidence suggests that Section 5 of the 14th Amendment was intended to expand the power of Congress rather than the courts. *See generally* Laurent . Limiting congressional power to just proscribing those things already constitutionally proscribed would make the legislature's role redundant, or at most "insignificant." Katzenbach v. Morgan, 384 U.S. at 648. Instead, the 14th Amendment's Section 5 granted Congress the same broad, common-sense reach of authority granted by the Necessary and Proper Clause of Article I, Section 8, cl. 18, id. at 650, which Justice Marshall famously construed broadly to reach "all means plainly adapted" to an otherwise legitimate end. McCulloch v. Maryland, 17 U.S. 316, 41 (1819). In Ex parte Commonwealth of Virginia, 100 U.S. 339, 345-346 (1880), decided a mere 12 years after the amendment's ratification, the Supreme Court adopted an almost identical McCulloch-style deferential test for the broad reach of Congress' 14th Amendment Section 5 authority. The Court has construed Section 2 of the 15th Amendment in an identically broad way. South Carolina v. Katzenbach, 383 U.S. at 326.

The Shelby County decision made clear that even with the Voting Rights Act, the kind of record evidence of "widespread and persisting deprivation" of rights due to racial discrimination, Boerne, 521 U.S. at 267, would need to be substantial and up to date. *See* Shelby County, 570 U.S. at 554. To the extent the law imposed burdens on only some parts of the country, the record evidence would have to support a compelling case for why the law should treat some parts of the country differently from others regarding preclearance. *See* id. at 544-547.

But there is ample evidence available today of continuing voting discrimination against minorities, evidence which would both form a reasoned basis for treating some jurisdictions differently, and demonstrate that such properly targeted preclearance requirements were "congruent and proportional" to the scope of the problem. *See, e.g.,* U.S. Civil Rights Commission, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report*, at 224-230(2018 Civil Rights Comm'n Assessment), available at https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf#page=164&zoom=100,0,96. (listing successful Section 2 cases between the 2006 reauthorization and 2018); Justin Levitt, QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY, SENATE JUDICARY COMMITTEE (July 17, 2013) (Levitt QFR), at 8-27 (listing post-2006 Section 5 objections, Section 5 enforcement actions, Section 2 cases, and constitutional claims, all indicating racial discrimination in voting).

Among the data amassed in these and similar reports are that between the 2006 VRA reauthorization and the 2013 Holder decision, there were 27 Department of Justice Section 5 objections that were not later withdrawn, sounding in such areas as Redistricting (10), Method of Election (9), Polling Place Siting (2), Language Assistance (2), and Voter ID (2). Levitt QFR. During that same period, there were 25 voting changes withdrawn after the DOJ asked for more information on a submission, with a similar variety and ratio of types of voting changes involved. Id. Notably, there were 23 successful Section 2 lawsuits (from 16 different states) in the 5 years after the 2013 Holder decision, compared to only 5 such lawsuits in the 5 years prior to Holder. 2018 Civil Rights Comm'n Assessment.

B. Tennessee

Other scholars have supplemented the sources cited immediately above to document voting discrimination problems across the country in recent years. I will not repeat that here, but instead focus on issues closer to home, in Tennessee.

Federal courts have found Tennessee to have violated the Voting Rights Act with respect to its statewide state legislative redistricting plan in the 1990s redistricting cycle. *See* Rural West Tennessee African-American Affairs Council v. Sundquist, 209 F.3d 835 (6th Cir. 2000) (affirming district court finding that state House redistricting plan violated the Act). On a separate but related note, federal courts have also recently found that the state violated the Equal Protection Clause in its treatment of minority political parties regarding access to the ballot. Green Party of Tennessee v. Hargett, 791 F.3d 684 (6th Cir. 2015) (affirming lower court findings that restrictive ballot access rules violated Equal Protection rights of minor political parties).

Federal court findings are not the only source of concern. In some instances, the state's laws and practices reinforce the concern. Tennessee's unduly strict voter ID law has features which serve to disproportionately impact minority voters. For example, pursuant to the law, voters are instructed that a state handgun carry permit photo ID suffices for voter identification, but a college student ID issued by a state college does not. *See* Tennessee Secretary of State, *What ID is required when voting*, available at https://sos.tn.gov/products/elections/what-id-required-when-voting . A comprehensive 2014 U.S. Government Accountability Office (GAO) study showed that, after controlling for other potentially confounding factors, Tennessee's voter ID law caused a decline in voter turnout of between 2.2 and 3.2 percentage points.. U.S. GOV'T ACCOUNTABILITY OFFICE, GA)-14-634, ELECTIONS: ISSUES RELATED TO STATED VOTER IDENTIFICATION LAWS 48, 51 (2014), https://www.gao.gov/assets/670/665966.pdf. Significantly, the GAO found that this decline was more pronounced for African-Americans than for any other racial or ethnic demographic in the state. Id. While some may say that 3 percentage points does not seem like much, it is more than enough to change the outcome in a close election., especially where skewed against black voters.

Tennessee's felon disenfranchisement law also has distinctive features raising justified alarm about discriminatory impact. It disenfranchises all those convicted of a felony; a voter has the burden of applying for reenfranchisement after having completed his sentence, but can do so only if all restitution and court costs are paid as well. *See* T.C.A. §40-29-202(b). This provision, added in 2010,[5] makes Tennessee one of only 12 states which disenfranchises those convicted of felonies not only while in prison, but also while on parole, probation, and even after having completed their sentence. Christopher Uggen, Ryan Larson, and Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENTENCING PROJECT (Oct. 6, 2016) (Sentencing Project 2016), available at https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/. Tennessee has the unique provision, passed in 2006,[6] that bars reenfranchisement of those who have served their sentence, paid all fines and fees, but still owe child support. T.C.A. §40-29-202(c). The predictably racially disproportionate result of such strict provisions: Tennessee is thus one of only 4 states where more than 20% of the adult black population is disenfranchised. Sentencing Project 2016.

Sometimes the racially disparate effect comes from local decisions, including right here in Shelby County. For example, as recently as last year the local Election Commission originally planned to open only one poll site for the first week of early voting: namely, the Agricenter, a location east of the densest urban concentrations of Memphis in a predominately white area, inconvenient by public transport for most of the black population of the city. It took loud protestsfrom numerous fronts for it to scrap that plan. Ryan Poe, *Shelby County Democrats, Memphis NAACP sue over early voting sites*, MEMPHIS COMMERCIAL APPEAL, July 6, 2018, available at https://www.commercialappeal.com/story/news/politics/elections/2018/07/06/shelby-county-democrats-sue-over-early-voting-sites/758597002/; Jackson Baker, *Democrats, NAACP Prevail in Voting-Sites Matter*, MEMPHIS FLYER, July 9, 2018, available at

[5] *See* 2010 TENN. LAWS PUB. CH. 1115 (S.B. 440).
[6] *See* 2006 TENN. LAWS PUB. CH. 860 (S.B. 1678).

https://www.memphisflyer.com/JacksonBaker/archives/2018/07/09/democrats-naacp-prevail-in-voting-sites-matter.

And voting controversies of course continue. Just this past spring, Tennessee passed the Third-Party Voter Registration Law. *See* T.C.A. § 2-2-142. This law applies to all paid persons or organizations who attempt to register more than 100 persons. Id. They must pre-register, take a government-mandated training course, and file a sworn statement promising to obey state law. Id. Knowing violations are a Class A misdemeanor, punishable up to just under 1 year in jail and and/or a $2500 fine, with each violation a separately chargeable offense. Id. The law also imposes a civil penalty of up to $2000 for any organization filing up to 500 "incomplete" voter registration applications in a given year; over 500 such applications yields a maximum civil penalty of $10,000. T.C.A. §2-2-143.

This law has a significant potential chilling effect on paid voter registration drives. It was passed in response to supposed abuses by civil rights groups operating in traditionally underserved areas--groups which had achieved dramatic registration gains in 2018, particularly among minority voters. P.R. Lockhart, *Tennessee passed a law that could make it harder to register voters,* VOX, May 3, 2019, available at https://www.vox.com/policy-and-politics/2019/4/25/18516777/tennessee-senate-voter-registration-drives-legislation-fines-lawsuit. It is currently the subject of litigation brought by civil rights organizations which engage in such registration activities. *See* Complaint, Tennessee State Conference Of The NAACP et al. v. Hargett et al., C.A. No. _____ (M.D. Tenn. May 2, 2019).

Perhaps most troubling is the provision that outlaws any arrangement where workers are paid per number of completed applications, or are subject to any minimum quotas. *See* T.C.A. §2-2142(2)(c). In registration drives such as this, as in petition signature drives, it is sometimes necessary to incentivize productivity by paying for results as opposed to paying by the hour. This is a common practice used in other areas of business life, one no doubt the supporters of this law would defend in another private business context. Taken together, these provisions create the potential for suppressing voter registration drives in the minority community.

Sadly, Tennessee has its own examples to contribute to the growing body of evidence that voting practices and procedures with racially discriminatory effects are not just a thing of the past.

What remains, then, is the question of whether the current bill sets appropriate coverage standards and definitions of violations in light of the above.

IV. HR 4

The proposed bill is actually modest compared to the predecessor Section 5. Rather than applying to any jurisdiction with historic voter registration disparities, it only applies to those with recent formal findings of voting discrimination. Rather than applying broadly to all changes affecting voting, it applies only to certain classes of voting changes, which experience has shown have the greatest potential for minority vote dilution or denial.

These classes of changes include: (1) changing the method of election regarding the use of at-large seats or multimember districts; (2) changes in jurisdiction boundaries which significantly lower minority population percentages; (3) the use of multilingual materials; (4) redistricting; (5) registration; (6) voter ID; and (7) polling place locations. And even findings of violations of methods of election, redistricting, boundary changes, and polling place changes county only where there is a significant minority population.

As a voting rights scholar, I am aware that there are many cases and Section 5 objections involving these classes of voting changes. As a Voting Section attorney, I personally handled (1) through (4). As a voting rights advocate and activist in Memphis, I was personally involved in (4) through (7).

Under HR4, preclearance coverage applies to a State if there have been 15 or more voting rights violations within the State during the last quarter-century, or 10 or more such violations, if at least one was committed by the State itself. Any subdivision of a State gets coverage if it has 3 or more such violations within the last quarter-century. A "voting rights violation" can be a court judgment, settlement, or consent decree of a violation of the 14th or 15th Amendments or of the Voting Rights Act itself; or a Section 5 objection, by either a declaratory judgment court or the DOJ.

This rule sensibly ties preclearance coverage to actual findings of voting rights violations rather than using voter registration disparities as a proxy for such violations. The definition of a "voting rights violation" plausibly relies on a judicial determination, or a formal administrative determination that is subject to judicial review.

A pattern of such determinations can be suggestive of intentional discrimination here. That is obviously true where the finding relates to a violation of the 14th or 15th Amendments, which require intentional discrimination, or where it relates to an intent finding through preclearance or Section 2 litigation. But even where a preclearance objection or Section 2 liability finding is premised on discriminatory effects alone, a nexus to intent may be present. A pattern of such violations in the same jurisdiction over a relatively close span of years, one after another, places a jurisdiction on notice as to the voting rights problems it is creating. Continuing to violate those rights, especially where voting rights advocates or minority members of the community seek in vain to forestall or amend the challenged voting practice, indicates an indifference to the voting rights of minorities which legitimately causes concern. Even in the rare case where the pattern of voting rights violations is truly the result of one good faith mistake after another, it suggests a carelessness with minority voting rights which should put us on alert to scrutinize future voting changes, lest the violations continue.

Reasonable minds can of course differ as to how long the "lookback" period should be, or how many violations should be enough within the lookback period to trigger coverage. But these standards are by no means the kind of overkill which would render them inappropriate under federalism principles.

I would recommend one change to the bill. Section 4a(b) identifies as a "covered practice" requiring preclearance the conversion of a single-member district to a multi-member or

at-large election, where there is a significant minority population. I recommend that an exception be added for when such conversion involves the use of proportional or semi-proportional election systems like limited voting, cumulative voting, or the single transferable vote, such that the relevant minority group would be expected under the threshold of exclusion formula[7] to elect candidates of choice at roughly the same or greater rate. Unlike with more traditional "winner-take-all" systems, which have long been recognized to dilute minority voting strength, the use of multimember district or at-large races under these alternative systems does *not* present minority vote dilution concerns. A conversion to such a system should not be discouraged by triggering coverage. Indeed, given the many advantages of such systems (see below), the bill should contain express language indicating such systems as acceptable choices for state and local governments.

I have written much on the virtues of such systems, including as remedies for minority vote dilution under the Voting Rights Act.[8] They have a track record of success based on use for decades throughout numerous jurisdictions throughout the United States.[9] Courts have approved their use as Voting Rights Act remedies.[10] When used properly, they have proven to adequately provide equal opportunities for minority voters to elect candidates of choice.

Indeed, in many cases, they can do so better than the canonical single-member district (SMD) remedy for minority vote dilution. Unlike SMDs, they do not rely on residential segregation to be effective, and can assist minority groups who are politically cohesive but geographically dispersed.[11] They do not rely on "virtual representation," where minority voters outside the one or two majority-minority districts must rely on minority voters within such

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[7] *See* Steven J. Mulroy, RETHINKING US ELECTION LAW 139-142 (2018) (explaining the threshold of exclusion formula).

[8] *See* Steven J. Mulroy, RETHINKING US ELECTION LAW: UNSKEWING THE SYSTEM (Edward Elgar Press 2018); .Steven J. Mulroy, *Coloring Outside the Lines: Erasing "One Person, One Vote" and Voting Rights Act Dilemmas by Erasing District Lines,* 85 MISSISSIPPI. LAW JOURNAL. 1271 (2017); Steven J. Mulroy, *Nondistrict Vote Dilution Remedies under the Voting Rights Act, in* AMERICA VOTES!: A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 199 (Ben Griffith ed., 2d ed. 2011); Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for Using Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867 (1999); Steven J. Mulroy, *The Way Out: Toward A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333 (1998); Steven J. Mulroy, *Limited, Cumulative Evidence: Divining Justice Department Positions on Alternative Electoral Schemes*, 84 NAT'L CIVIC REV. 66 (1995).

[9] *See* Rethinking US Election Law, *supra*, at 133-139.

[10] *See* Dillard v. Baldwin County Board of Education, 686 F.Supp. 1459, 1461-1462 (M.D. Ala. 1988) (describing a number of Alabama federal consent decrees involving the use of limited and cumulative voting to resolve VRA minority vote dilution claims); U.S. v. Euclid City School Board, 632 F.Supp.2d 740, 753-755, 770-771 (N.D. Ohio 2009) (ordering limited voting remedy); United States v. Village of Port Chester, 704 F.Supp.2d 411 (S.D.N.Y. 2010) (ordering cumulative voting remedy); *see also* Minnesota Voters Alliance v. City of Minneapolis, 766 N.W.2d 683 (Minn. 2009) (ranked choice voting system did not violate one person, one vote); Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011) (same).

[11] *See* Rethinking US Election Law, *supra*, 147-148.

districts to virtually represent them.[12] They pose no tension between "descriptive representation" (having representatives who are members of the minority group) and "substantive representation" (having the legislative delegation vote consistent with minority voters' policy preferences), a tension sometimes present with SMDs.[13]

Further, these systems are immune (when used in an at-large framework) or relatively immune (when used in multimember districts) from "reverse discrimination" legal challenges[14] and gerrymandering manipulations,[15] including the new threat of redistricting based on Citizen Voting Age Population, which threatens to underrepresent the Latino community.[16] Particularly when combined with Ranked Choice Voting, as in the proportional representation system Single Transferable Vote used in Minneapolis and Cambridge, Massachusetts, they are more amenable to cooperation among various minority groups.[17]

Aside from the above advantages specific to Voting Rights Act concerns of minority vote dilution, they have the general "good government" advantages of leading to a more accurate reflection of the popular will, representing diversity over more dimensions than simply racial and ethnic diversity (e.g., diversity as to gender and LGBT status), and enhance competition and thus voter turnout.[18]

V. CONCLUSION

The right to vote has famously and properly been called "the right preservative of other ...rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964). Because it is so fundamental, robust federal measures are appropriate to protect it, even as it plays out in state and local elections. Where it is denied, victims of the denial necessarily lack the means to use the state or local political process to repeal or correct the infirm improper statute, regulation, ordinance, or administrative practice. It is thus appropriate for external actors—Congress and the federal courts—to step in.

Preclearance, specifically, was designed to "shift the advantage of time and inertia from the perpetrators" of voting discrimination to its victims. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966). Because vote dilution and vote denial mechanisms are still common today, and because affirmative litigation under Section 2 places the burden of time and inertia on the victims of those mechanisms, a revived preclearance process is appropriate.

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[12] *Id.* at 149-150.
[13] *Id.* at 150-152.
[14] *See* Miller v. Johnson, 515 U.S. 900 (1995) (invalidating under Equal Protection a minority-majority district where racial considerations were the "predominant motive" in drawing district lines).
[15] *Id.* at 145.
[16] *Id.* at 152. *See also* Steven J. Mulroy, *Coloring Outside the Lines*, *supra,* 85 MISSISSIPPI LAW JOURNAL 1271 (2017).
[17] *Id.* at 158.
[18] *Id.* at 156-168.

Mr. COHEN. Thank you, Professor Mulroy.

Ms. Tequila Johnson is a co-founder and vice president of the Equity Alliance, a Tennessee-based nonprofit that equips black and brown citizens with tools and strategies to strengthen their communities and make government work better.

Johnson currently also serves as assistant director of outreach and student engagement at Tennessee State University Center for Service Learning and Civic Engagement.

In that role, she is responsible for connecting students, staff, and faculty with various outreach opportunities and managing service learning initiatives.

In 2018, Ms. Johnson served as statewide manager for the Tennessee Black Voter Project, a statewide coalition of nearly two dozen local nonprofits working toward the goal of registering 50,000 black Tennesseans to vote.

Under her leadership, the group submitted 91,000 voter registration forms. I suspect that possibly influenced the General Assembly's new law and I am sure you will discuss that.

Ms. Johnson is a graduate of Tennessee State University where she received her Master's degree in counseling and psychology, currently pursuing a Ph.D. in industrial and organizational psychology.

We welcome you to Memphis, another so proud to be at TSU. And same song—we kind of copied it.

You are recognized for five minutes.

STATEMENT OF TEQUILA JOHNSON

Ms. JOHNSON. Chairman Nadler, Subcommittee Chairman Cohen, and Representative Jackson Lee, thank you for giving me the privilege to testifying about discriminatory barriers in voting.

My name is Tequila Johnson and I am the co-founder of the Equity Alliance. We are a nonprofit organization here who are focused on getting more black and brown communities out to vote.

I am a 33-year-old. I was born and raised in Chattanooga, Tennessee, and I have lived in Nashville for the past 16 years. I am a movement builder. I am a strategist. I am a community organizer.

My passion is to mobilize communities to bring about progressive change and to creatively use data, personal stories, and organizing strategies to dismantle discriminatory barriers to voting and other basic rights.

For generations, my ancestors—my family, my parents—have worked hard to have access and to achieve the American dream of life, liberty, and the pursuit of happiness.

For my family, this included fighting for the right to vote and ensuring that our community and other marginalized communities have access to the ballot.

From growing up in the housing projects of Chattanooga, Tennessee, to moving to the suburb of Harrison, Tennessee, I have traveled across this great state. I have talked to several residents and I know firsthand the issues as it relates to discriminatory barriers.

I have always had an interest in creating new movements, whether I was in high school, in college, or currently in Tennessee and Nashville.

My strategy has always been to mobilize those who are statistically underrepresented and unlikely to exercise their voice in a democracy either by voting or registering to vote.

Through my work, I have began to realize how important it is for my community to become self-determining and to exercise autonomy through voting. I also realize that there were countless systemic and discriminatory barriers to voting that have to be dismantled.

In 2016, I traveled all across the state to almost every county and I learned from community members and friends who had tried to vote early in person that they had been purged from the rolls because they had not voted in the last two federal elections. These people didn't recall receiving any kind of notice and they had said if they had known they needed to reregister they would have.

Many of the people I talked to said that they just didn't know. Prior to 2018, I learned from family and community members that a polling location in a predominantly black neighborhood of Shelby County, Tennessee, had closed and the nearest location was more than 20 minutes away and in a predominantly white neighborhood.

This impacted many people I know because they did not have the means to drive and many of them felt uncomfortable being in a predominantly white polling location.

As a result, many just did not go out to vote and voter apathy reigned. Tennessee is ground zero for voter suppression.

Tennessee has some of the most restrictive voting rights laws including voting restoration laws. This only allows some individuals who were convicted of certain crimes within certain years to have their voting rights restored.

And if you were convicted of any infamous crimes you may still not be eligible to vote because the law requires you to complete your sentence, fulfill legal obligations such as child support and restitution, complete a certification of restoration, and many other things.

I also recently learned that Tennessee is one of the few states that views incarceration as willful unemployment, meaning that while people are incarcerated their child support continues to accrue even though they may not be receiving any income.

I have worked to help people restore their rights to vote—several people—and I can tell you that it is a daunting process, especially for someone who is trying to reintegrate into society.

In 2018, I served as the statewide director for the Tennessee Black Voter Project. This project was a collaboration between nearly two dozen black nonprofits, organizations, and businesses across the state.

We set a collective goal to submit voter registration forms from underrepresented neighborhoods in the state and by the voter registration deadline we submitted tens of thousands of forms without the support of the secretary of state.

Then, in 2019, the state legislator came behind and passed a new law restricting the ability of civic engagement groups—poorly fund-

ed civic engagement groups—and individuals from registering voters in large-scale voter registration efforts.

The restrictions range from groups receiving consent to having to record personal information, not turning incomplete forms, acts for public communication regarding voter registration, status—that, and much more.

These violations and provisions would also open civic engagement groups and individuals that register large numbers of voters up to criminal penalties and civil fines up to but not necessarily limited to $10,000.

Due to these discriminatory barriers to voting and voter registration, I believe that Congress—I believe that Congress has a constitutional obligation to act to ensure every American citizen has equitable access to exercise their voting rights.

I believe that modern, fair, and free elections are critical to removing institutional barriers that have suppressed the votes and voices of black voters since Reconstruction.

I believe that passing H.R. 1 was a necessary step, but you must not stop there. We need to renew the full Voting Rights Act of 1965 that gave African Americans full citizenship in this country.

I also urge you to hold states accountable. A new national voter restoration registration act, for example, could limit states in what they can do to penalize voter registration groups such as mine.

And they could pass national nationwide mandatory motor-voter law to automatically register those seeking driver's licenses and state ID cards.

Thank you.

[The statement of Ms. Johnson follows:]

Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S House of Representatives Committee on the Judiciary, my name is Tequila Johnson, and I am grateful for the opportunity to testify today on "Discriminatory Barriers to Voting."

I am thirty-three years old. I was born in Chattanooga, Tennessee. I have lived in Nashville, Tennessee for the past sixteen years. I am a movement builder, strategist, and organizer. My passion is to mobilize my community to bring about progressive change, and to creatively use data, personal stories, and organizing strategies to dismantle discriminatory barriers to voting and other basic rights. I will discuss some of these barriers later in my testimony.

I begin, however, with a more personal story. In order to understand what motivates me to fight for equal opportunity for my community in the voting space in particular, you have to understand where I come from and how my experiences growing up in Tennessee contributed to my political and civic consciousness.

My Background and Personal Story

For generations my ancestors, my family, and my parents worked hard to access and achieve the American Dream of life, liberty, and the pursuit of happiness. For my family, this included fighting for the right to vote and ensuring that our community and other marginalized communities have access to the ballot.

My passion for organizing, strategizing, and advocating for voting rights and other civil rights dates back to when I was a child and I witnessed systemic inequities based on race, wealth, class, and gender. As a child, I can remember traveling miles by foot and bus with my Great Aunt Diane to Signal Mountain, where she cleaned houses and did laundry for wealthy people. I was always in awe of the mansions, extravagance, and the nonchalant interactions she had with her clients. With only a sixth-grade education, she struggled to read and write and would often ask for my assistance, so there were several occasions where I would have to serve as her interpreter talking for her to her clients.

My mom, a young mother who worked two jobs during the day, was so busy she did not have much time. My dad was a struggling drug addict, and he has been in and out of prison since I was two years old. I leaned on my Great Aunt Diane for support and conversation. It was the conversations she and I had that still resonate with me to this day. She was resilient, strong, and fierce. She never missed a day, she never complained, and when I would complain, she would constantly remind me of the price of freedom and self-determination. She made sure I understood that absolutely nothing in life is free except for the ability to choose. She reiterated that freedom was not "free" for Black people, so I should take mine and my path very seriously.

I grew up in the Alton Park Housing Projects in Chattanooga, Tennessee. My family and I lived in the housing projects until I was six years old, and from there, we moved to City View, a low-income apartment complex. It wasn't until I was fourteen years old that my parents were able to

buy their first house in the suburb of Harrison, Tennessee. It was in Harrison that I realized, for the first time, that I was a minority in my school. In high school, I struggled to find my voice in a loud sea of privilege and exposure that I never knew existed. I organized student council elections and strategically used that as leverage to create the first hip hop dance team my school had ever had. I learned a lot in high school and valued my education and exposure. But I knew I would attend a Historically Black College and University. As a first-generation college student, my parents and family were extremely supportive and proud of me. And I knew I could not and would not let them down.

In 2008, the election of President Barack Obama sparked my political interest. I thought, "here is a Black man in a country that has not always given us, Black folks, freedom to be self-determining, being sworn in as a leader." I cried and I thought of my Great Aunt Diane's stories. I thought about those who had come before us and fought so hard to get us where we were. I knew then that I had to carry on this tradition of movement building—that civic engagement work was my calling.

Over the next few years I poured myself into civic engagement work. I studied, organized, self-reflected, and listened to the stories of community members. My engagement and advocacy inspired those around me to join the fight as well. In 2016, my best friend Christiane Buggs, a teacher, shared with me her desire to start going to the State Capitol to sit in on the Education Subcommittee hearings in regards to her failing school. We attended these hearings, asked questions, and set up meetings with legislators. We stood out as young, Black women, bold and unapologetic, standing up for our beliefs. We wanted to inspire change; we wanted self-determination and agency for all people, the overlooked, the over policed, and the voiceless.

After witnessing the lack of representation of Black women in the legislature and local school boards, Christiane decided to run for her school board in a highly contested race. She realized that she could affect change by being a school board representative. While working with Christiane, I saw the dismal civic participation in our community. That was also when I saw first-hand how dollars could out vote people and how greedy legislators with their hands in the pockets of lobbyists and special interest groups could pick their constituents. I knew this did not represent the values of our great nation, I knew this was not the self-determination and self-agency my ancestors fought and ultimately died for.

During her campaign, we engaged, mobilized, and encouraged those voters who were statistically less likely to vote, including Black voters—and we won that race. Since being elected, Christane has implemented policies that, I believe, only a young, Black teacher who has witnessed the issues plaguing schools both inside and outside the classroom could implement. From this experience, I realized what voting does for us—it levels the playing field. It does not matter if you are a billionaire or someone who is struggling to make ends meet—by voting, you have a voice and you have a say in the direction of this country.

Discriminatory Barriers to Voting in Tennessee

As I began to realize how important it was for my community to become self-determining and to exercise autonomy through voting and active engagement in political processes, I also realized that there were countless systemic and discriminatory barriers to voting that had to be dismantled. This is the next part of my story—identifying barriers and strategically working to overcome them.

- *Voter purges:* In 2016, I learned from community members and friends who tried to vote early in person that they had been purged from the rolls because they had not voted in the last two federal elections. These people did not recall receiving any kind of notice that they were purged and had to re-register. Many of the people who I talked to said that they thought they had voted in the past two election cycles and were wrongfully purged. The purge disproportionately impacted my community, as I heard numerous accounts from friends, family members, and contacts who told me that they could not vote even though they wanted to and thought they had followed all the right steps to cast their ballot. They said that if they had known they needed to reregister, then they would have happily registered to vote.

- *Photo Identification (ID):* In 2012, the legislature passed a law that required voters to show a photo ID at the polls and this impacted many older Black voters who did not have a government-issued photo ID. One story became viral—where a 96-year old African-American woman brought along a rent receipt, a copy of her lease, her voter registration card and her birth certificate, but was denied the photo ID because her birth certificate was in her maiden name and she didn't show her marriage certificate.[1] While she ultimately got her ID after the intervention of the Senate Speaker at the time, the new photo ID law impacted poor, elderly Black voters who do not always have birth certificates or know their social security numbers.

- *Polling Place Closures:* Prior to the 2018 midterms, I learned from family and community members that a polling location in a predominantly Black neighborhood of Shelby County had closed, and the nearest location was more than twenty minutes away and in a predominantly White neighborhood. This impacted many of the people I know because they did not have the means to drive to the new location and some of them felt uncomfortable being in a predominantly white polling location, as a result of this change, they did not go out and vote.

- *Restrictions on the Right to Vote of Ex-Felons:* Tennessee has some of the most restrictive voting rights restoration laws. This allows only some individuals who were convicted of certain crimes within certain years to have their rights restored. And if you are convicted of crimes other than crimes that are "infamous," you may still not be eligible to vote because the law also requires you to complete your sentence, fulfill all your legal financial obligations (e.g., child support and restitution), and complete a

[1] *See* Yolanda Putman, *NAACP Says Tennessee's Voter ID Law Makes It Harder for Poor, Minorities to Vote* (July 25, 2016), https://www.timesfreepress.com/news/local/story/2016/jul/25/naacp-officials-local-leaders-encourage-minor/377604/.

certificate of restoration. I have personally helped several people restore their rights and it is a daunting process, especially for someone who is struggling to find their place in society. Recently, I learned from documents I received from a public records request that most denials of restoration applications are because a person has not paid child support, which under Tennessee law, accrues while the person is incarcerated. So, the accrual of large amounts of child support and other financial blocks to voting become barriers to folks who should be otherwise able to vote.

- *Restrictions on Voter Registration Efforts of Civic Engagement Groups:* In 2018, I served as the statewide director for the Tennessee Black Voter Project. The project was a collaboration between nearly two dozen Black-led nonprofits and organizations in Tennessee. We set a collective goal to submit voter registration forms from underrepresented neighborhoods in the state. And by the voter registration deadline, we submitted tens of thousands of forms. Then in 2019, the legislature passed a new law restricting the ability of civic engagement groups and individuals from registering voters in large-scale voter registration efforts. The restrictions ranged from groups and individuals having to preregister with the State, swear an oath that they will obey the law, receive consent from all applicants before recording any of their personal information, not turn in "incomplete" forms above a certain number per year, and include a disclaimer with a "public communication" regarding "voter registration status" that such communication is not authorized or in conjunction with the Secretary of State. There is more—violation of these provisions could open civic engagement groups and individuals that register large numbers of voters to criminal penalties and civil fines up to but not necessarily limited to $10,000. This makes it difficult for third-parties to register voters at voter registration events, where many disenfranchised, low-income, and minority individuals register to vote.

My Organizing and Strategizing to Dismantle Some of These Barriers

I was inspired by what Tennessee Congressman Jim Cooper said about voting, "democracy works best when everyone participates." That phrase has stuck with me because it is so true, but it is not a sentiment that is shared by everyone. When I think about the sacrifices my ancestors made to ensure our citizenship and the right to participate in the civic process, I know that I am fighting on the right side of history.

Through my work for The Equity Alliance along with co-founder Charlane Oliver, we disrupted the status quo by exploring new ways to engage black voters and expand the electorate. The organization has partnered with churches, sororities, and libraries and hosted more than four voter block parties at polling precincts. We have organized and engaged in countless state, local, and national elections. We share the belief that using our voting power in the fight for social justice and economic equality for all communities is one of the most effective ways to bring about positive change. As part of my work for The Equity Alliance, I have helped host more than four voter block parties at polling precincts, hosted several events, and designed political education trainings to name a few. The organization has partnered with churches, universities, businesses, and libraries. This work has helped me gain recognition on a national and global scale my work has been nationally recognized by The New York Times, the Washington Post,

Pew Charitable Trusts, CNN, MSNBC, and the Huffington Post, to name a few. —most recently, I delivered a commencement speech at a high school in Vislec, Germany.

Since 2016, I have rolled up my sleeves and pants' legs to dive headfirst into identifying barriers (which I have listed above) and trying to find ways to overcome them through education and political engagement. My organizing approach is unconventional, exciting and unapologetic. I believe in meeting people where they are, and that collaboration is the new leadership. Most times, I've been the only African-American in key government meetings, important policy hearings, at the state capitol and because of this I co-founded five community organizations including The Equity Alliance, The Equity Alliance Fund, The Power of Ten Pac, The Nashville Justice League, and Faith Unchained to bring more people like me into these critical conversations about voting and justice—empowerment is my power.

Overall, I've realized that registering voters is a necessary step for them to exercise their right to vote. I've organized and registered potential voters in churches, night clubs, laundromats, football games—my tactic is to meet registrants where they are. This has been the most effective in engaging voters from my community, who have been historically disenfranchised, and often feel apathy towards the political process from which they have been excluded.

That's why I believe Congress has a constitutional obligation to act to ensure every American citizen has equitable access to exercise their voting rights. I believe that modern, fair, and free elections are critical to removing institutional barriers that have suppressed the voices of black voters since Reconstruction. I believe that passing H.R. 1 was a necessary step, but you must also renew the full Voting Rights Act of 1965 that gave African Americans full citizenship in this country. I also urge you to hold states accountable. A new National Voter Registration Act, for example, could limit states in what they can do to penalize voter registration groups, and they could pass a nationwide mandatory motor-voter law to automatically register those seeking driver's licenses and state ID cards.

Conclusion

Organizing and strategizing are central to my ability to carry out civic engagement work, to get my community and even the global community interested in voting, politics, and policy change. With the help of Congress, I hope to continue fighting for the self-determination of my community and carrying on the tradition of activism informed by data-driven, people centered approaches and grassroots community engagement.

Dated: 9/2/2019

Tequila Johnson

Tequila Johnson

Mr. COHEN. Thank you very much.

Appreciate your work and I think—I fear that that was the cause of the General Assembly's passage of the law, to inhibit people from doing mass voter efforts.

And you were right about the re-enfranchisement law except I sponsored it in the Senate and passed it to where you could get reinstated if you completed your sentence, and then in the House a man named Stacey Campfield, who was a state rep, put the amendment on this that you had to be current in your child support.

The ACLU said—told Representative Larry Turner to accept the amendment because they thought they would beat it in court. They were wrong. The court didn't strike it down. It should have. Unfortunate.

We now have questions and I am going to first ask Mr. Crayton, you maybe can explain to some of the students and give your perspective on the opinion in *Shelby* v. *Holder*. What was the reason they struck down the law and do you feel that the record that was compiled that Mr. Nadler said was as many as 15,000 pages, as much as that, was not complete and sufficient to support the passage of the reauthorization of the Voting Rights Act?

Mr. CRAYTON. Sure. Mr. Chairman, I certainly disagree with the decision taken by the majority of the court. The position that the chief justice on behalf of the majority offered was that while he found no fundamental problems with the concept of preclearance, he thought that the evidence presented was not sufficient to support the continuance of the provision.

As you may recall, during the oral argument he made much of the difference between Mississippi, as he had observed, that had a lower rate—excuse me, a higher rate of registration among African Americans than Massachusetts, and if Mississippi was covered and Massachusetts wasn't covered, if registration was the sort of measure for whether one needed to have that coverage he didn't understand. He didn't understand why that matched up.

Now, there has since been some attention to whether or not those assessments were accurate. But the main point to think about is what the framework, it seems to me, of what preclearance was designed to do.

The chief justice wanted to take a snapshot in 2013 as to whether or not the current work of the Voting Rights Act was actually still necessary and he seemed to discount, as I think Justice Ginsberg offered in dissent, the fact that what he was seeing was the result of the protection that Section 5 offered, such that without it you might well see a very different analysis of places where voting rights were reasonably protected, whether—where participation was fairly robust.

You know, he said the—I think the analogy was something like having an umbrella in the midst of, you know, no rain at all and say, well, this is clearly stopping the rain, and you are thinking, well, that is not quite how that works and you can't really know in a natural experiment what the effect of a protection is unless you do without it.

The challenge is, A, we have had that burden borne by a specific group of people in the South traditionally and that has been people

of African descent for a very long period of time and it is unfair to take a chance on their backs, I think.

The other concern was always that the Congress, as we had always understood as I taught the Reconstruction amendments, has a great deal of discretion to make these judgments and the Supreme Court was supplanting its own preferences for Congress's.

And I will just say this and stop. We, in my capacity as a professor, a group of political scientists and law professors, submitted to the court current data showing that there was significant difference in the way in which white voters in covered states understood things like race equity, religious tolerance—any factor you want to consider.

There were significant differences that made it more likely that the expectation that Congress adopted in 2006 with the provision that there was still work to do with preclearance.

And the court roundly ignored it. And it seems to me that if we think that the Reconstruction amendments work the way that we do, where Congress is given some discretion to make these judgments where it originally was the group that stepped in, that the court's role is simply to ask the question as to whether or not it was reasonable to do so.

The court didn't take that approach and I do believe in this iteration we have to be mindful of a court that is, unfortunately, not usually going to abide by the same approach and framework as was evidenced in, say, Boerne because Boerne certainly purported to think with respect to the adoption of the Voting Rights Act up until 2006 and the court has now seemed to depart from that framework and tried to craft its own.

My hope would be that the committee takes that into account.

Mr. COHEN. Let me ask you a question. I think I remember—the states that were under preclearance were, basically, Texas around to Carolina. Was that right? And then maybe Arizona. Was it one state outside of the Old South?

Mr. CRAYTON. There are a few of them. So parts of Virginia, parts of North Carolina were covered. But parts of California, Michigan, New Hampshire, New York.

Mr. COHEN. But there were parts in those jurisdictions.

Mr. CRAYTON. Parts of.

Mr. COHEN. But was it not the entire state of Mississippi, Alabama, Georgia, Texas, Louisiana—the entire state?

Mr. CRAYTON. Correct.

Mr. COHEN. And is Arizona the entire state or was it just portions?

Mr. CRAYTON. I believe it is the entire state.

Mr. COHEN. Yeah.

Mr. CRAYTON. Or was.

Mr. COHEN. And then the smaller areas which were jurisdictions within New York, Michigan, et cetera, population wise would you think it was accurate to say that 85, 90—a large great percentage were in the states of the old Confederacy?

Mr. CRAYTON. Correct. That is fair.

Mr. COHEN. And the court said that we needed to have a new formula to see if there were other jurisdictions that belonged and/or other—some of the jurisdictions that might have been out.

Is that in some ways like the Supreme Court asking Congress to tell the court how many beans there are in a jar?

Mr. CRAYTON. Mr. Chairman, I hadn't thought about it that way. But——

[Laughter.]

Mr. CRAYTON [continuing]. The analogy seems pretty apt to me. And I think the other thing, just briefly, to point out is it ignores the transformative goal of the Voting Rights Act in this part of the country.

It is not to ignore other parts where elements of this were relevant but to have stopped the progress of a long-term project was to turn its back, I think—the court turning its back on the long-term effort to change culture and structure, and that is just not something that you can put a stopwatch on. I think that is, unfortunately, what is relevant in the Shelby County decision.

Mr. COHEN. Thank you, sir.

I know recognize the chairman, Mr. Nadler, for five minutes of questioning.

Mr. NADLER. Thank you.

I think it was Professor Mulroy who mentioned City of Boerne. The City of Boerne case threw out the applicability to the states of the Religious Freedom Restoration Act. That was the prime purpose of that decision.

Mr. MULROY. Yes.

Mr. NADLER. Could you elaborate how it affected the—what we are talking about, the Voting Rights Act?

Mr. MULROY. Yes. Well, as you correctly stated, in the City of Boerne case the Supreme Court——

Mr. NADLER. Could you talk a little closer to the mic?

Mr. MULROY. Oh. Yeah. The city—in the City of Boerne case the Supreme Court struck down the Religious Freedom Restoration Act as it applied to state and local governments on federalism grounds, and interesting—what they did was they contrasted the record that had been set up for the Voting Rights Act with the sparse record, at least as they saw it, for RFRA—the Religious Freedom Restoration Act.

So they said, look, we saw with the Voting Rights Act extensive record testimony before Congress, extensive legislative findings that voting discrimination was widespread, pervasive, extremely problematic societal wide.

We see no such similar record with respect to state and local governments failing to give accommodations to religious minorities. There is no such epidemic of that in the record that we can see.

So, therefore, this federalism cost of the federal government top down mandating what state and local governments will do is not a valid exercise of Congress's admitted authority under Section 5 of the Fourteenth Amendment——

Mr. NADLER. So this is, in effect—it is, in effect—said there is a good record—a sufficient record in——

Mr. MULROY. Yes.

Mr. NADLER [continuing]. In the Voting Rights Act——

Mr. MULROY. Yes.

Mr. NADLER [continuing]. Which they completely overturned.

Mr. MULROY. Yes. Then a few years later they overturned that very record. The one way you might be able to reconcile those two, Mr. Chairman, is to say if you take the majority opinion at its word, they were concerned about whether the coverage formula was up to date.

And since the coverage formula focused so much on registration rates they said, well, look, registration rates have balanced so, apparently, there is no more problem. If you do a coverage formula that is not based on registration rates but is based on actual proven demonstrated instances of Voting Rights Act violations, then, theoretically, at least, they should not be able to lodge that objection.

Mr. NADLER. I have always read the Shelby County decision as saying that Section 4 was unconstitutional. Basically, you know, it is not that necessary anymore but basically it is unconstitutional because the invasion of the states' rights to conduct their own elections, which might be justified by a bad—a history—cannot be justified by a test—a Section 4 test based on ancient history, looking back to pre-'64.

Mr. MULROY. Yes.

Mr. NADLER. And as almost inviting Congress to enact a modern Section 4 based on more current data—that that would clearly by constitutional.

So I want to ask——

Mr. MULROY. I think that is fairly stated, yes.

Mr. NADLER. Hmm?

Mr. MULROY. I think that is fairly stated, what you just said.

Mr. NADLER. Okay. And that is why we have drafted the legislation we are talking about and we have made many attempts over the years to—I never understood, by the way, why you had to establish—Steve Chabot, as chairman, and I, as ranking member of this subcommittee, back in 2006 sat through 15,000 pages of hearings to establish a robust record.

I am not sure why it is the province of the Supreme Court to tell Congress how big a record to make before making legislative decisions. But we are doing that again right now.

But it seems to me that if you had a modern test you could justify this even under Shelby County. It seemed that they almost invited us to.

Dr. CRAYTON, if we had a test in the legislation that looked to practices that had been thrown out by courts in the last few years or that had been shown to be discriminatory in their effects in various trials, that might not be just in the South.

It certainly wouldn't be just in the South—voter ID laws, for instance. That is essentially what we are looking at. Would you comment on that?

Mr. CRAYTON. To take the earlier point, I think that is one of the features that might make this court more comfortable and I would take the view generally that if we are of the position that going after suppression-oriented policies is the goal then we should do that no matter where it happens to live.

I just would offer, again, from our perspective that we not lose sight of the region-specific concerns that gave rise to that in the first place.

Mr. NADLER. But how would you write into law the region perspective?

Mr. CRAYTON. The suppression pieces of it, I think, are quite well stated. I think I would consider whether or not, as we were discussing earlier with respect to the length of period that we would look back on bad activities, or perhaps even things that were said on the floor of a legislature.

We had, in Shelby County, a lot of information about things that we were seeing.

Mr. NADLER. Certainly things that were said on the floor of the legislature. You couldn't look back too far because the Supreme Court would say you can't do that.

Mr. CRAYTON. Yes, sir. Although it is quite clear, as I think has been said earlier in the statements, since 2013 and a lot of people raced without very much hearing or effort at all and that might be some evidence of something other than good decision making.

Mr. NADLER. Thank you.

Finally, Ms. Johnson, the Tennessee legislature put on rather draconian penalties and—restrictions and penalties on voter registration drives. How do you think a federal law could adjust that kind of a problem?

Ms. JOHNSON. Thank you, Chairman.

I definitely think that something needs to prevent them from having the autonomy to be able to do things like that. I definitely think that reenacting the civil rights law the way it was, preventing them from having that autonomy, would help, because right now there is no oversight. They are, literally, able to do whatever they want to do.

Mr. NADLER. Thank you.

Mr. COHEN. Thank you, Mr. Nadler. Now I recognize Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

And to the witnesses, your work is provocative and I thank you very much. I am going to try and sort of do meteoric questioning and try to get a large global picture of this issue.

Let me just suggest that I find the Shelby decision partisan in its most appalling way. I cannot find a legitimate basis of at the period of 2013 of taking the stance that they did.

And I think that Justice Ginsberg's most prominent comment, that you don't get rid of the polio vaccine because you think you have overcome polio, is so potent for even where we are today.

Let me quickly go to you, Professor Crayton, just quickly on this question of the criminalization of the ballot box. So we have a new opportunity in the restoration of the Voting Rights Act now and we certainly have a bill that has already been on the table.

But how important do you think it is that, as we write this legislation, that we have language that really speaks directly to that?

Make this document so clear and this question of criminalization—what I understand or what I feel is poor folk who are registering and states are putting in laws that are layered and so you can be a grandmother trying to register and you can be prosecuted.

How important it is for that precise aspect to be covered?

Mr. CRAYTON. I think you have identified one significant piece of it where I think it is crucial so that people who are in good faith

who are engaged in registering other people are not unfairly prosecuted or intimidated from doing that.

And so part of that is, I think, charged to states to be very clear about what is and isn't permissible and perhaps not to be able to change the rules without very much notice.

And I would also point out that for people who have served time, who, the time that they were in prison, according to some rules, they weren't allowed to vote.

But once they are out there are instances where people have not completed their fines and fees, that creates confusion about when a person is——

Ms. JACKSON LEE. But should our bill give relief by using that terminology in the—even though we are focused around 5 and 4 but gives—you have some terminology about criminalization?

Mr. CRAYTON. I would like to see some attention put so that prosecutors who are not thinking about the real-world consequences or perhaps are about how voters can be intimidated by the use of state power.

It should be a part—I hope for it to be a part of the federal language so that at least people think twice before utilizing that power because I think, unfortunately, what people don't take appreciation of is not just the people that they are targeting are people who then become intimidated but everybody around them—their family members, their friends, their communities—and that is where I think the undermining of confidence becomes a real consideration.

Ms. JACKSON LEE. H.R. 1 is the global—I think we have an opportunity to hone in on some of these aspects of what we are hearing as we go around the country and the real testimony of people.

Professor Blumstein—I am sorry. Yeah. Blumstein. Let me thank you for your work, and it is interesting that you are able to get a common sense opinion out of the Dunn case, which is you were able to get the court to be able to ascertain the unfairness of a time frame, which also goes to denying citizens the common sense right to vote.

Is there something that we need to focus in on this reauthorization of the Voting Rights Act that would be attractive or would be plain sense to the Supreme Court that what we are doing is saying that the Constitution in its framework gives people the right to vote, and so duration and other aspects short of outright conspicuous fraud, which has not been determined, should be—should not be reasons why people should be able to vote?

Mr. BLUMSTEIN. I am not sure I have a good answer to that question. There is a more general issue, I think, Representative, and that is how does one engage someone who may have a different point of view in a way that is likely to bring about some change in attitude or change in perspective.

And I think the concerns, for example, that I would have—I think Professor Mulroy was very articulate in expressing his view that Section 2 of the Voting Rights Act is not as effective as Section 5.

But there were problems about the administration of Section 5 as well. My colleague, Carol Swain, has written about whether

maximizing black representatives is a better avenue for achieving certain goals.

So I think that—I think that the—if you are asking how can people disagree on some things, how can they reach agreement on some other things, I will just reiterate what I said in my testimony, which is starting with respect for the views of the other point of view.

And so in this case, I have to say that Section 5 of the Voting Rights Act, going back to South Carolina v. Katzenbach in 1965 was seen as a conquered province approach, heavy handed, but justified at the time because of the abuses—I have written about this—the abuses of the time.

And so I think the case has to be made not just that there were problems but that there are problems of a magnitude that justify the stripping of the state autonomy and impinging upon federalism.

So it is not just here is a case, here is a case—gosh, we have to bring an expensive piece of litigation. That is our American way. We are presumed innocent.

In Section 5 you are presumed guilty, and I think that that was okay in 1965. I think the case has to be made in 2019 or 2020 that we are in the same place and I think that—it can't just be, you know, we don't like it as well.

I mean, if you are asking how to be an effective advocate, I am skeptical, really, because I think that the argument has to be made that the values are so overwhelmingly positive as they were in 1965 as to abrogate the tradition of states' authority, states' autonomy, and the presumption of innocence.

Ms. JACKSON LEE. Thank you. That is the record that we are trying to create.

Let me go to Professor Mulroy and Johnson, very quickly.

Professor Mulroy, if you can, again, just sort of hit on the insufficiency of Section 2 and then the amendment that you wanted to see included in this reiteration of the Voting Rights restoration.

I just want to say to the professor who just spoke, I am looking at preciseness but I am also looking at legislation that takes a view that answers pointedly the court's criticisms. The professor just indicated there is a mountain of reasons that we need to restore and we need to have that in our legislation.

So Section 2's inefficiency or lack—the horse is out of the barn door—and then I just want Ms. Johnson to be prepared. What an amazing story of your life that many people just forget.

And so I would be interested in your view that this tool of the Voting Rights restoration—this bill is the armor that is needed for vulnerable people in communities that you have seen.

Professor.

Mr. MULROY. Yes. Thank you. So I will answer those questions in turn.

Section 2, which I litigated a lot when I was at the voting section, is an effective piece of legislation but not nearly as effective as Section 5.

In order to—when we were at the DOJ and we had resources to—unlimited budgets to pay for expert witnesses and to, you know, throw manpower at a problem, we could mount a Section 2

case. But private litigants, it is a very daunting task to put out that kind of money.

And at the same time, it takes years and during those years the voting discrimination practice continues in election cycle after election cycle.

And, of course, the burden is on the plaintiff to prove the violation whereas under Section 5 preclearance the burden is shifted, the idea being that the burdens of time and inertia should be shifted away from the victims of discrimination to the perpetrators of discrimination, which is what the whole point of Section 5 preclearance was.

As to that amendment, just very briefly, it is a minor point but, but under H.R. 4 it says among the voting changes that will automatically trigger preclearance review will be anytime you move from a single-member district plan to a multi-member or at-large plan.

Now, that makes total sense given the history that we have used in the past where we have used a traditional winner-take-all at-large or multi-member plan to dilute minority voting strength.

But there are some multi-member and at-large systems that don't dilute minority voting strength. Cumulative voting is one example. The single transferrable vote is another.

And different local jurisdictions have experimented with these things including as remedies in Voting Rights Act cases to solve minority vote dilution.

So all I am suggesting is that when it is that type of shift from a single-member district to multi-member or at-large where you put in special voting rules to account for minority vote dilution and it looks like it will, in fact, then you wouldn't necessarily trigger Section 5 preclearance.

So what I am trying to say is let us not discourage experimentation with those methods because in many ways they can be better than the traditional single-member district remedy for minority vote dilution.

And then, briefly, if I could, Congresswoman Jackson Lee, just to respond to something we just heard a second ago about whether the magnitude of the problem is demonstrated in the record, I would just like to point out that the U.S. Civil Rights Commission did a really comprehensive study in 2018—an assessment of voting rights problems—and among the things they pointed out was that there were only five successful Section 2 lawsuits for minority vote dilution in the five years prior to *Shelby County* v. *Holder* and 23 in the five years after.

And I think that provides dramatic evidence that some of what you have already been talking about, which is that once you took *Shelby County* v. *Holder*—took that umbrella away from the rainstorm you started to see a proliferation of Voting Rights Act violations, particularly this new generation of vote suppression.

And I think that record might very well demonstrate to the Supreme Court that a resumption of Section 5 preclearance is warranted.

Ms. JACKSON LEE. And, Ms. Johnson—I called you Professor Johnson—Dr. Johnson, to be with your grandmother and what a powerful story.

But let me ask this as we write this legislation. I think it would be important—you think it would be important—to refer again to the importance of, one, not criminalizing voting, but two, to ensure ex-felons can vote and that it should be clearly stated.

Your view, if you would?

Ms. JOHNSON. Yes, I agree with you. I would like to say also I think some simple measures that could be made is, one, really looking at the paper forms and if we are not going to move to automated voter registration then what information—what necessary information is required, particularly in the state of Tennessee.

One of the things—one of the issues that we ran into was the nuance of the form. It should be in alignment with the national voter registration form.

Another thing is making sure that as we are talking about restoring felons' rights to vote that we are considering some of those barriers such as child support, parole, probation—how do we go through that process and making sure that it is a streamlined process that has some sort of federal mandate that restricts states from gutting that and making it something more nuanced than it needs to be.

But I completely agree with you. I think that we really need to think about how this affects those marginalized communities and make sure that as we are proposing this legislation that we are considering those barriers.

Ms. JACKSON LEE. Thank you.

Mr. COHEN. Thank you, Ms. Johnson, and thank you, Congresswoman Jackson Lee. And I think one last follow-up from the chairman.

Mr. NADLER. Let me first thank the chairman of the subcommittee for his indulgence in permitting me this extra question.

Professor Blumstein, you mentioned a few minutes ago that one question is that back in 1965 you had very severe restrictions and, more recently, at the time on Shelby County—at the time of Shelby County you didn't have the record of the heavy-handed overwhelming suppression.

And I think what you said or implied was that the burden of proof—there is a burden to show that in order to justify the intrusion on federalism that the burden is to show that the—that the cause is so overwhelming that—as it was justified in 1965 but, arguably, not in 2013.

But even granted that, isn't that a quintessentially congressional determination not for a court—for Congress to determine the necessity of legislation in the severity of a problem? Isn't that why we exist?

Mr. BLUMSTEIN. Well, certainly, Congress has a very important role in Section 2 of the Fifteenth Amendment and Section 5 of the Fourteenth Amendment to enforce the terms.

Part of the issue is that the Supreme Court's interpretation of the Fifteenth Amendment and the Fourteenth requires purpose, showing of intent to discriminate.

And so as the law has gone beyond purpose to effect that is where the question of Congress's enforcement power is called into question. If this were really a showing only of discriminatory purpose, I think the congressional role would be easier.

As one moves from purpose to effect, which is what the 1982 amendments to Section 2 of the Voting Rights Act did and the interpretation, then there is a judicial role for determining whether Congress is enforcing the provisions of the Fifteenth and Fourteenth Amendments or whether it is going beyond, and I think that is where the judicial role comes in.

And I think that it was Justice Black's dissent in *South Carolina* v. *Katzenbach*, if I recall, where he talked about a conquered province. And so there is a history. I mean, this is my adopted region. As we spoke earlier, I am from Brooklyn. I originally was in New York when I was——

Mr. NADLER. Which was a covered jurisdiction.

Mr. BLUMSTEIN. Which was a covered—yes. And I grew up in a New Deal family. My middle name is Franklin and I was named for President Roosevelt. I was born 12 days after he died. So I am not unsympathetic to these considerations.

On the other hand, when I grew up in Brooklyn I never heard about federalism. That was just not something that was on my radar. No one thought about it in my high school or in my circle of friends.

And as you go out into the rest of the country, I think one sees that those values are not trivial. They don't trump always.

But they are important considerations, and in the discussion about how far Congress can go in overturning important principles of state autonomy and state independence and state power, one has a judicial role to determine what the degree of protection of those interests is.

And I think we have seen the Supreme Court waffling back and forth on these federalism cases and they are looking for a standard.

I think, you know, Shelby County was one, I recall, interstitial case inviting Congress to do a better job of identifying these areas, and in response to the representative from Texas's question, I thought she asked a very important question—how do you persuade somebody who might not agree with you on every—on all the issues—how do you talk to them as people.

And I think—I have spent my whole life doing things like that and trying to bring people together from different points of view and get people to talk to each other rather than across each other and be less rhetorical.

And I think part of the answer is to respect the value of federalism, not to denigrate it, but to say that there are countervailing values that are more important, and to the extent that one can make the case that voter suppression where the voter activity like it was back in 1965 is still prevalent, that is a stronger argument.

Now, in a piece—I testified on the 1982 amendments to the Voting Rights Act and was published in a article in the Virginia Law Review. What you had was really pretty horrible.

As I said, the jurisdictions refused to take no for an answer. They would do X and then the court would strike it down. They would do Y.

It was like a whack-a-mole, and I think there was a very strong piece of evidence as to why the timing that Professor Mulroy talks about should be preserving what was really used as the freezing principle to freeze in place things the way they are.

But as that doctrine developed, things like zoning got included in that. It was much more intrusive upon state autonomy than one would have thought and the rationale I think has—I am not saying it doesn't exist but it is less than it was.

And so I think that is the argument that has to be made. To me, as someone who is not unsympathetic to these values but who also cares about things like federalism, I would want to see not just how there are examples of things that are bad but how the persistence, the pervasiveness, is comparable to what it was when the Voting Rights Act was passed and approved in South Carolina v. Katzenbach. That is the best I can do, Representative Nadler and Chairman—Mr. Chairman, to that. Thank you for your question.

Mr. COHEN. Thank you, sir. You did an excellent job.

That concludes our questioning in the first panel. We will have a break for about five or 10 minutes before we bring our second panel.

I think the first panel for their time and their very important testimony.

We are recessed for about five or 10 minutes.

[Recess.]

Mr. COHEN. Thank you, everybody.

As you heard, those are the wonderful sounds that say we are in the majority, because you got the gavel. That is a good thing.

Turning to our second panel, our first witness will be Mr. Jon Greenbaum. Mr. Greenbaum is chief counsel and senior deputy director for the Lawyers' Committee for Civil Rights Under Law. He has worked in various roles since 2003.

From '97 to 2003, he was the senior trial attorney in the voting section of the Civil Rights Division at the U.S. Department of Justice. He investigated, filed, and litigated Voting Rights Act cases around the country and evaluated redistricting plans and other voting changes under Section 5 of the Act.

He received his JD from UCLA, a school that came to Memphis and lost recently, and a BA in history——

[Laughter.]

Mr. NADLER. In what sport?

Mr. COHEN. Football.

Mr. NADLER. Okay.

[Laughter.]

Mr. NADLER. We will take that——

[Laughter.]

Mr. COHEN. And his BA in history and legal studies from the University of California Berkeley. Mr. Greenbaum, you are now recognized for five minutes and you can defend the Bruins as much as you want to. [Laughter.]

STATEMENTS OF JON GREENBAUM, CHIEF COUNSEL AND SENIOR DEPUTY DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; JAMES BLUMSTEIN, UNIVERSITY PROFESSOR OF CONSTITUTIONAL LAW AND HEALTH LAW & POLICY, VANDERBILT UNIVERSITY LAW SCHOOL; HELEN BUTLER, EXECUTIVE DIRECTOR, GEORGIA COALITION FOR THE PEOPLES' AGENDA; JAMES TUCKER, PRO BONO VOTING RIGHTS COUNSEL, NATIVE AMERICAN RIGHTS FUND

STATEMENT OF JON GREENBAUM

Mr. GREENBAUM. Chairman Nadler, Subcommittee Chairman Cohen, and Representative Jackson Lee, thank you for giving me the privilege of testifying about discriminatory barriers in voting.

I have been a voting rights lawyer since 1997 for seven years in the Voting Section of DOJ and for more than 15 years at the Lawyers' Committee, a national nonprofit civil rights organization that focuses on issues of racial discrimination.

My conclusions are drawn from that long and deep experience. The 2013 decision of the United States Supreme Court in *Shelby County* v. *Holder* is the single greatest setback to voting rights in the modern era.

The decision found unconstitutional the coverage formula used to determine what areas of the country were subject to Section 5 of the Voting Rights Act.

Section 5 had required jurisdictions with a history of discrimination to demonstrate to DOJ or a federal court that a voting change did not have a discriminatory purpose or effect before the change could be implemented.

For nearly 50 years, the preclearance process was effective, efficient, and transparent. I witnessed this firsthand at DOJ, which received almost all submissions in the first instance.

Regarding effectiveness, from 1965 to 2013, DOJ issued approximately 1,000 determination letters denying preclearance for over 3,000 voting changes.

In addition, because the Section 5 process existed, jurisdictions were deterred countless times from making discriminatory changes in the first place.

Additionally, the Section 5 process served as a notice system because jurisdictions had to submit their changes for review before implementing them.

The process was also efficient and transparent. The submitted change would go into effect unless DOJ acted in 60 days. DOJ published Section 5 procedures that provided transparency as to DOJ's process; gave covered jurisdictions guidance on how to proceed through the Section 5 process; and gave the public an opportunity to offer input.

Because DOJ consulted with minority constituencies as part of its review process, jurisdictions were incentivized to involve minority communities before making voting changes.

In *Shelby County*, the five-member majority said that because the coverage was comprised of data from the 1960s and 1970s, it could not be rationally related to determining what jurisdictions, if any, should be covered under Section 5 decades later, regardless of

whether those jurisdictions continue to engage in voting discrimination.

Significantly, the majority made clear that "[w]e issue no holding on Section 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."

The rest of my testimony focuses on why Congress should take the Court up on its invitation and draft another formula.

We have six years of experience which demonstrates the hole left by the gutting of Section 5. In place of the transparent, efficient, and effective system of protecting minority voting rights with Section 5, we have to protect minority voting rights with less information, greater expenditure of resources, and less effective legal remedies.

Most voting changes take place under the radar. Advocates and voters may not know a voting change has been made until a voter learns on Election Day that she or he is not on a registration list or that a polling place has been moved.

Legal and grassroots organizations have made tremendous efforts and expended substantial resources to substitute for Section 5. The most effective of these efforts has been in Georgia and you are hearing today from our close partner, Helen Butler, on that.

We have been able to stop numerous proposals before enactment and the Lawyers' Committee has filed suit 12 times in Georgia since *Shelby County*.

Still, all of our efforts cannot be as effective as a revitalized Section 5 because there is no way to cover everything. Further, even when we win in litigation, often the damage has already occurred and is sometimes irrevocable.

A searing example is the purge of black voters in Hancock County, Georgia, that we stopped but only after a white mayor was elected in a majority black city for the first time in decades.

The Texas voter ID law had been blocked by Section 5 pre-*Shelby County*. After *Shelby County*, the civil rights community spent years successfully challenging the law during which time Texas used the discriminatory law. The civil rights community in the state of Texas spent more than $10 million in the litigation.

The prevalence of voting discrimination remains high, particularly in the places formerly covered by Section 5. The Lawyers' Committee has been involved in 41 cases since the *Shelby County* decision, including four against the federal government.

Of the other 37 cases, 29 of them involve covered jurisdictions. Moreover, we have sued seven of the nine states that were fully covered by Section 5 formerly.

In my view, the geographic coverage formula contained in the VRAA's amendment to Section 4(b) satisfies the constitutional concerns articulated by the Court because it is based on current data, is designed to address current problems, and targets only jurisdictions that have engaged in persistent voting discrimination over a sustained period of time.

I look forward to your questions.

[The statement of Mr. Greenbaum follows:]

Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S House of Representatives Committee on the Judiciary, my name is Jon Greenbaum and I serve as the Chief Counsel for the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on the following topics:

- the Supreme Court's decision in *Shelby County v. Holder*,[1] which effectively immobilized the preclearance provisions of Section 5 of the Voting Rights Act by finding its underlying coverage formula unconstitutional;
- the efficiency of the Section 5 process prior to the *Shelby County* decision; the negative effect of the *Shelby County* decision on minority voting rights and the limitations and costs of employing Section 2 of the Act as a substitute;
- the high level of voting discrimination since the *Shelby County* decision, especially in the jurisdictions formerly covered by Section 5;
- how the replacement coverage formula in HR4, the Voting Rights Advancement Act,[2] sufficiently responds the constitutional issues raised by the Supreme Court in Shelby County.

I come to my conclusions based on twenty-two years of working on voting rights issues nationally. From 1997 to 2003, I served as a Senior Trial Attorney in the Voting Section at the United States Department of Justice, where I enforced various provisions of the Voting Rights Act, including Section 5, on behalf of the United States. In the sixteen years since, I have continued to work on voting rights issues at the Lawyers' Committee for Civil Rights Under Law as Chief Counsel, where I oversee our Voting Rights Project, and prior to that, I served as Director of the Voting Rights Project.

The Lawyers' Committee is a national civil rights organization created by President Kennedy in 1963 to mobilize the private bar to confront issues of racial discrimination. Voting rights has been an organizational core area since the inception of the organization. During my time at the Lawyers' Committee, among other things, I was intimately involved in the constitutional defense of Section 5 and its coverage formula in *Shelby County*, its predecessor case *Northwest Austin Municipal Utility District No. 1 v. Holder*, and two extensive reports that have examined the extent of minority voting discrimination based on DOJ and court enforcement records and numerous field hearings: National Commission on Voting Rights, *Protecting Minority Voters: Our Work Is Not Done* (2014) ("2014 National Commission Report") and *The National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting*

[1] 570 U.S. 529 (2013).
[2] Voting Rights Advancement Act, H.R. 4, 116th Cong. 2019.

Rights Act at Work 1982-2005 (2006). The report and record of the latter National Commission, which was submitted to the House Judiciary Committee at the Committee's request, was the largest single piece of the record supporting the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("2006 VRA Reauthorization"). The Lawyers' Committee is currently compiling a report that will detail the federal enforcement record of voting discrimination on a state-by-state basis for the last twenty-five years. We hope to release this report to the public in early October.

The *Shelby County* decision

Prior to the *Shelby County* decision, the combination of Section 2 and Section 5 of the Voting Rights Act provided a relatively effective means of preventing and remedying minority voting discrimination. Section 2, which is discussed more fully below, remains as the general provision enabling the Department of Justice and private plaintiffs to challenge voting practices or procedures that have a discriminatory purpose or result. Section 2 is in effect nationwide.[3] Section 5 required jurisdictions with a history of discrimination, based on a formula set forth in Section 4(b), to obtain preclearance of any voting changes from the Department of Justice or the District Court in the District of Columbia before implementing the voting change.[4] From its inception, there was a sunset provision for the formula, and subset provision for the 2006 Reauthorization was 25 years.[5]

In the *Shelby County* case, the Supreme Court decided in a 5-4 vote that the Section 4(b) coverage formula was unconstitutional. The majority held that because the Voting Rights Act "'impose[d] current burdens,'" it "'must be justified by current needs.'"[6] The majority went on to rule that because the formula was comprised of data from the 1960s and 1970s, it could not be rationally related to determining what jurisdictions, if any, should be covered under Section 5 decades later.[7] The four dissenting justices found that Congress had demonstrated that regardless of what data was used to determine the formula, voting discrimination had persisted in the covered jurisdictions.[8] The majority made clear that "[w]e issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."[9]

The effect of the *Shelby County* decision is that Section 5 is effectively

[3] 52 U.S.C. § 10301.
[4] 52 U.S.C. §§ 10303(b),10304.
[5] 52 U.S.C. § 10303(b).
[6] *Shelby County*, 570 U.S. at 536 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 at 203) 2009.
[7] *Shelby County*, 557 U.S. at 545-54.
[8] *Id.* at 560 (Ginsberg, J. dissenting).
[9] *Id.* at 556.

immobilized as, for now, preclearance is limited only to those jurisdictions where it is imposed by a court after a court previously made a finding of intentional voting discrimination. This special preclearance coverage is authorized by Section 3(c) of the Act. Courts have rarely ordered Section 3(c) coverage, and when they do, it is typically quite limited. Indeed, the only jurisdictions I am aware of that our currently subject to Section 3(c) coverage are Pasadena, Texas and Evergreen, Alabama.[10] In the case of Pasadena, the only changes subject to preclearance relate to the method of election and redistricting.[11]

As a result, Section 5 is essentially dead until Congress takes up the Supreme Court's invitation to craft another coverage formula. There are compelling reasons for Congress to do so because, as discussed below, voting discrimination has increased in the absence of Section 5, and Section 2 cannot adequately substitute for Section 5.

How Section 5 worked prior to the *Shelby County* decision

Before looking at the *post-Shelby County* record, it is important to first understand how Section 5 worked prior to the *Shelby County* decision. Covered jurisdictions had to show federal authorities that the voting change did not have a discriminatory purpose or effect. Discriminatory purpose under Section 5 was the same as the Fourteenth and Fifteenth Amendment prohibitions against intentional discrimination against minority voters.[12] Effect was defined as a change which would have the effect of diminishing the ability of minority voters to vote or to elect their preferred candidates of choice.[13] This was also known as retrogression, and in most instances was easy to measure and administer. For example, if a proposed redistricting plan maintained a majority black district that elected a black preferred candidate at the same black population percentage as the plan in effect, it would be highly unlikely to be found retrogressive. If, however, the proposed plan significantly diminished the black population percentage in the same district, it would invite serious questions that it was retrogressive.

Except in rare circumstances, covered jurisdictions would first submit their voting changes to the Department of Justice. DOJ had sixty days to make a determination on a change, and if DOJ precleared the change or did not act in 60 days, the covered jurisdiction could implement the change.[14] The submission of additional information by the jurisdiction, which often happened because DOJ requested such information orally, would extend the 60 day period if the submitted information materially supplemented the submission.[15] DOJ could extend the 60 period once by

[10] *See Patino v. City of Pasadena*, 230 F. Supp. 667, 729 (S.D. Tex. 2017).
[11] *Id.*
[12] 52 U.S.C. § 10304(c).
[13] 52 U.S.C. § 10304(b), (d).
[14] 52 U.S.C. § 10304(a).
[15] *Id.* Procedures for the Administration of Section 5 of the Voting Rights Act ("Section 5 Procedures"), 28 C.F.R. §

sending a written request for information to the jurisdiction.[16] This often signaled to the jurisdiction that DOJ had serious concerns that the change violated Section 5. If DOJ objected to a change, it was blocked, but jurisdictions had various options, including requesting reconsideration from DOJ, Section 5 Procedures,[17] seeking preclearance from the federal court,[18] and modifying the change and resubmitting it.

In the nearly seven years I worked at DOJ, I witnessed first-hand how effective Section 5 was at preventing voting discrimination and how efficiently DOJ administered the process to minimize the burdens to its own staff of attorneys and analysts, and to the covered jurisdictions. The Section 5 Procedures cited above provided transparency as to DOJ's procedures and gave covered jurisdictions guidance on how to proceed through the Section 5 process. Internal procedures enabled DOJ staff to preclear unobjectionable voting changes with minimal effort and to devote the bulk of their time to those changes that required close scrutiny.

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

> By any measure, Section 5 was responsible for preventing a very large amount of voting discrimination. From 1965 to 2013, DOJ issued approximately 1,000 determination letters denying preclearance for over 3,000 voting changes. This included objections to over 500 redistricting plans and nearly 800 election method changes (such as the adoption of at-large election systems and the addition of majority-vote and numbered-post requirements to existing at-large systems). Much of this activity occurred between 1982 (when Congress enacted the penultimate reauthorization of Section 5) and 2006 (when the last reauthorization occurred); in that time period approximately 700 separate objections were interposed involving over 2,000 voting changes, including objections to approximately 400 redistricting plans and another 400 election method changes.
>
> Each objection, by itself, typically benefited thousands of minority voters, and many objections affected tens of thousands, hundreds of thousands, or even (for objections to statewide changes) millions of minority voters. It would have required an immense investment of public and private resources to have accomplished this through the filing of individual lawsuits.[19]

51.37.

[16] Section 5 Procedures, 28 C.F.R. § 51.37.

[17] 28 C.F.R. § 51.45

[18] 52 U.S.C. § 10304(a)

[19] National Commission on Voting Rights, Protecting Minority Voters: Our Work Is Not Done 56 (2014) (internal citations omitted).

In addition to the changes that were formally blocked, Section 5's effect on deterring discrimination cannot be understated. Covered jurisdictions knew that their voting changes would be reviewed by an independent body and they had the burden of demonstrating that they were non-discriminatory. By the time I began working at DOJ, Section 5 had been in effect for several decades and most jurisdictions knew better than to enact changes which would raise obvious concerns that they were discriminatory – like moving a polling place in a majority black precinct to a sheriff's office. In the post-*Shelby* world, a jurisdiction is likely to get away with implementing a discriminatory change for one election (or more) before a plaintiff receives relief from a court, as the Hancock County, Georgia voter purge and Texas voter identification cases detailed later illustrate.

The Section 5 process also brought notice and transparency to voting changes. Most voting changes are made without public awareness. DOJ would produce a weekly list of voting changes that had been submitted, which individuals and groups could subscribe to in order to receive this weekly list from DOJ.[20] For submissions of particular interest, DOJ would provide public notice of the change if it believed the jurisdiction had not provided adequate notice of the change.[21] But even more importantly, the Section 5 process incentivized jurisdictions to involve the minority community in voting changes. DOJ's Section 5 Procedures requested that jurisdictions with a significant minority population provide the names of minority community members who could speak to the change,[22] and DOJ's routine practice was to call at least one local minority contact and to ask the individual whether she or he was aware of the voting change and had an opinion on it. Moreover, involved members of the community could affirmatively contact DOJ and provide relevant information and data.[23]

Why Section 2 is an inadequate substitute for Section 5

Prior to the *Shelby County* decision, critics of Section 5 frequently minimized the negative impact its absence would have by pointing out that DOJ and private parties could still stop discriminatory voting changes by bringing affirmative cases under Section 2 of the Voting Rights Act. Indeed, in the same paragraph of *Shelby County* where the Supreme Court majority states that Congress could adopt a new formula for Section 5, it also notes that its "decision in no way affects the permanent, nation-wide ban on racial discrimination in voting found in §2."[24]

[20] Section 5 Procedures, 28 C.F.R. § 51.32-51.33.
[21] *Id.* at 28 C.F.R. § 51.38(b).
[22] *Id.* at 28 C.F.R. § 51.28(h).
[23] *Id.* at 28 C.F.R. § 51.29.
[24] *Shelby County*, 570 U.S. at 556.

During the *Shelby County* litigation and the reauthorization process preceding it, defenders of Section 5 repeatedly pointed out why Section 2 was an inadequate substitute. Six years of experience demonstrate this.

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

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

In contrast, the Section 2 results inquiry is complex and resource intensive to litigate. The "totality of circumstances" test set forth in the statute is fact-intensive by its own definition. The Senate Report supporting the 1982 amendment to Section 2 lists factors that courts have used as a starting point in applying the totality of circumstances test to include seven such factors (along with two factors plaintiffs have the option to raise).[25] On top of the Senate factors, courts have introduced additional requirements. For example, in vote dilution cases, which typically involve challenges to redistricting plans or to a method of election, the plaintiff must first satisfy the three preconditions set forth by the Supreme Court in *Thornburg v. Gingles*,[26] before even getting to the Senate factors. These *Gingles* preconditions require plaintiffs to show that that a minority group is compact and numerous enough to constitute a majority of eligible voters in an illustrative redistricting plan and whether there is racially polarized voting (minority voters are cohered in large number to support certain candidates and those candidates are usually defeated because of white bloc voting) and are necessarily proven by expert testimony. In vote denial cases, which involve challenges to practices such as voter identification laws, courts have also added an additional test, with the developing majority view requiring that plaintiffs demonstrate

[25] *See e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).
[26] *Id.* at 50-51.

that the challenged law imposes a discriminatory burden on members of a protected class and that this "burden must be in part caused by or linked to social conditions that have or currently produce discrimination against members of the protected class."[27]

The result is that Section 2 cases are extremely time-consuming and resource-intensive, particularly when defendants mount a vigorous defense. For example, *United States v. Charleston County*,[28] which I litigated at the Department of Justice, was a successful challenge to the at-large method of electing the Charleston (South Carolina) County Council. The litigation took four years, and it involved more than seventy witness depositions and a four-week trial, even though we had prevailed on the *Gingles* preconditions on summary judgment,[29] and needed to litigate only the totality of circumstances in the district court.

Below is an analysis of the voting cases the Lawyers' Committee has participated in since 2013 that is detailed in Appendix A and B. Thirteen of the cases involve voting changes, ten in covered jurisdictions, two in non-covered jurisdictions, and the thirteenth of the Federal Government. In my view, the changes in all ten of the cases in covered jurisdictions would have been blocked by Section 5 because they were retrogressive. In the ten cases we filed, we included Section 2 claims only five times. In the other five cases although we believed the changes had a discriminatory impact we were concerned about meeting the demanding standard of proof under Section 2 or the time and resources it would take to do so. In the five cases that contained a Section 2 claim, we included other claims. Of all of the cases in which we filed for a temporary restraining order or a motion for preliminary injunction, we used Section 2 as a basis only once.

Three specific examples from the Lawyers' Committee's litigation record illustrate why Section 2 is an inadequate substitute for Section 5. The most prominent example is the Texas voter identification law, which illustrates the time and expense of litigating a voting change under Section 2 that both DOJ and the federal district court found violated Section 5 prior to the *Shelby County* decision.[30] The afternoon that *Shelby* was decided, then-Texas Attorney General Greg Abbott announced that the State would immediately implement the ID law.[31] Several civil rights groups, including the Lawyers' Committee, filed suit in Texas federal court, challenging SB 14 under several theories, including Section 2 and DOJ filed its own suit under Section 2 and all of the cases were consolidated. The parties then embarked on months of discovery, leading to a two-week trial in September 2014, where dozens of witnesses, including 16 experts — half of whom were paid for by the civil rights groups — testified.

[27] *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015)); see also, Ohio State Conference for the NAACP v. Husted, 786 F.3d 524, 554 (6th Cir. 2014).
[28] 316 F. Supp. 2d 268 (D.S.C. 2003), aff'd, 365 F.3d 341 (4th Cir.), *cert denied*, 543 U.S. 999 (2004).
[29] *United States v. Charleston County*, 318 F. Supp. 2d 302 (D.S.C. 2002).
[30] *Veasey*, 830 F.3d at 227 n.7.
[31] *Id.* at 227.

Prior to the November 2014 election, the District Court ruled that SB 14 violated the "results" prong of Section 2 of the Voting Rights Act, because it had a discriminatory result in that Black and Hispanic voters were two to three times less likely to possess the SB 14 IDs and that it would be two to three times more burdensome for them to get the IDs than for white voters. The District Court's injunction against SB 14, however, was stayed pending appeal by the Fifth Circuit, so the law — now deemed to be discriminatory — remained in effect.[32] Subsequently, a three-judge panel and later an *en banc* panel of the Fifth Circuit Court of Appeals, affirmed the District Court's finding.[33] As a result, elections that took place from June 25, 2013 until the Fifth Circuit *en banc* opinion on July 20, 2016 took place under the discriminatory voter ID law. Had Section 5 been enforceable, enormous expense and effort would have been spared. The civil groups are seeking $6,767,508.37 in attorneys' fees and $946,844.87 in expenses, for a total of $7,714,353.24. As of June 2016, Texas had spent $3.5 million in defending the case.[34] Even with no published information from DOJ, more than $10 million in time and expenses were expended in that one case.

In *Gallardo v. State*,[35] the Arizona legislature passed a law that applied only to the Maricopa County Community College District and added two at-large members to what was previously a five-single district board. The legislature had submitted the change for Section 5 preclearance. The Department of Justice issued a more information letter based on concerns that the addition of two at-large members, in light of racially polarized voting in Maricopa County, would weaken the electoral power of minority voters on the board. After receiving the more information letter, Arizona officials did not seek to implement the change. Only after the *Shelby County* decision did they move forward, precipitating the lawsuit brought by the Lawyers' Committee and its partners. We could not challenge the change under Section 2, especially because we would not have been able to meet the first *Gingles* precondition. Instead we made a claim in state court alleging that the new law violated Arizona's constitutional prohibition against special laws because the board composition of less populous counties was not changed. Reversing the intermediate court of appeal, the Arizona Supreme Court rejected our argument, holding that the special laws provision of the state constitution was not violated. Unsurprisingly, the Latino candidate who ran for the at-large seat in the first election lost and the two at-large members are white.

In 2015, the Board of Elections and Registration, in Hancock County, Georgia, changed its process so as to initiate a series of "challenge proceedings" to voters, all but two of whom were African American. This resulted in the removal of 53 voters from the register. Later that year, the Lawyers' Committee, representing the Georgia State Conference of the NAACP and the Georgia Coalition for the Peoples' Agenda and individual voters, challenged this conduct as violating the Voting Rights Act and the

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

National Voter Registration Act, and obtained relief which resulted in the placement of unlawfully-removed voters back on the register.[36] Ultimately, plaintiffs and the Hancock County Board agreed to the terms of a Consent Decree that will remedy the violations, and require the county's policies to be monitored for five years. But after the purge and prior to the court order, Sparta, a predominantly black city in Hancock County, elected its first white mayor in four decades. And before the case was settled, and the wrongly-purged voters placed back on the rolls, at least one of them had died.

Section 2 was not designed to stop retrogressive voting changes from taking effect and so it is an ill-suited replacement for Section 5. In the nearly forty years since Section 2 was expanded in 1982 to include discriminatory results claims, there are few cases in which Section 2 plaintiffs have obtained preliminary relief among the several hundred cases in which Section 2 plaintiffs ultimately succeeded through a court judgment or a settlement.

The Lawyers' Committee's voting litigation record post-*Shelby County* shows the high degree of voting discrimination, particularly in the areas formerly covered by Section 5

The Lawyers' Committee's litigation record since the *Shelby County* decision bears out both the high degree of contemporaneous voting discrimination and the inadequacy of Section 2 as a substitute for Section 5. Through our Voting Rights Project, we have been involved in 41 voting cases since the *Shelby County* decision. This record ranks either first or second of any entity nationally. A narrative summary of each case can be found at Appendix A and a summary table of the cases can be found at Appendix B. It is important to note that as, a racial justice organization, the Lawyers' Committee does not participate in litigation where we do not believe the issue at hand involves a question of discriminatory purpose and/or impact.

This record is notable in a number of respects. First, our litigation docket has become more active in the post-*Shelby County* years. Though I do not have exact numbers for the pre-*Shelby County* period, I can confidently say that we have had more cases in my six post-*Shelby County* years at the Lawyers' Committee than in my ten pre-*Shelby County* years.

Second, although we have participated in cases all over the country, most of our voting litigation has involved jurisdictions covered by Section 5 prior to *Shelby County*. Not including the four cases where we sued the federal government, in twenty-nine of the thirty-seven (78.3%) cases we have been opposed by state or local jurisdictions that were covered by Section 5, even though far less than half the country was covered by Section 5. Moreover, we have sued seven of the nine states that were covered by Section

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

5 (Alabama, Arizona, Georgia, Louisiana, Mississippi, Texas, Virginia), as well as the two states that had were not covered but had a substantial percentage of the population covered locally (North Carolina and New York). To be clear, I am not talking about cases brought against local jurisdictions in a state, but cases brought against state officials.

Third, we have achieved substantial success. Of the thirty-three cases where there has been some result, we have achieved a positive result in 26 of 33 (78.8%). In most of the seven cases where we were not successful, we had filed emergent litigation – either on Election Day or shortly before – where achieving success is most difficult.

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

Notwithstanding the successes of the Lawyers' Committee and others, the hole left by the absence of Section 5 is immense. We are simply unaware of many potentially discriminatory voting changes that are enacted. Even when we are aware of the changes, without Section 5, it is extremely difficult to stop changes from going into effect through litigation, as demonstrated above. Such litigation is extremely resource-intensive, both in time and expense, and the relatively small voting rights bar has significant limits on how cases it can litigate simultaneously. The case-by-case method is inefficient and inadequate as compared to Section 5.

These issues will be exacerbated enormously during the post-2020 Census redistricting, as several thousand formerly covered jurisdictions will be redistricted within about a two-year window and Section 5 will not available to protect minority voters for the first time since the 1960s. Critics of Section 5 cited the costs to state sovereignty and the resource costs of Section 5 as reasons why it should be abandoned. These costs pale in comparison to the costs to minority voting rights in the absence of Section 5 as well as the resource costs involved in evaluating the redistricting plans in several thousand jurisdictions and litigating individual plans on grounds they are discriminatory. Moreover, Section 2 will serve to protect minority voters only where they can constitute a majority of voters in a district,[37] whereas Section 5 is not so limited. In certain areas of the country, minority voters in some districts have been able to elect candidates of choice with slightly less than a majority. These districts will not be protected under Section 2 as they were under Section 5.

Using the standards set forth in *Shelby County*, the current need for Section 5 outweighs the current burden in those areas with persistent and current discrimination.

[37] *Bartlett v. Strickland*, 559 U.S. 1 (2009)

The Voting Rights Advancement Act's (VRAA) Coverage Formula is Constitutional

The Supreme Court majority in *Shelby County* found that Congress's readopting of a coverage formula in 2006 based on voter registration and turnout data from the 1964, 1968, and 1972 election was irrational, irrespective of whether voting discrimination was still concentrated in the covered areas. According to the Court, the formula itself must be based on current data and must be constructed based on the current problems in order to be rational:

> 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. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. 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. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress.[38]

In my view, the geographical coverage formula contained in the VRAA's amendment to Section 4(b) satisfies the constitutional concerns articulated by the Court because it is based on current data and is designed to address current problems.

The threshold for coverage is a relatively high one — statewide coverage applies only if, during the last 25 calendar years, there have been 15 or more voting rights violations in the State or 10 or more violations with at least one committed by the State.[39] For political subdivisions, coverage applies only if there are three voting rights violations within the political subdivision in the past twenty-five years.[40] Violations are based on DOJ objections, court findings of voting discrimination, or a settlement of a Voting Rights Act and/or constitutional challenge to a voting law or practice that results in a change to that voting law or practice.

This formula is tailored to ensure that only those jurisdictions that have

[38] *Shelby County*, 570 U.S. at 554.
[39] Voting Rights Advancement Act, H.R. 4, 116th Cong. 2019.
[40] *Id.*

engaged in persistent voting discrimination over a sustained period of time are covered. No jurisdiction will be covered because of a one-time episode. Coverage is rolling: jurisdictions whose records improve can get out under the formula, those whose worsen can be added. The twenty-five period is logical because it ensures that two redistricting cycles are within the window of review, which is important because redistricting and changes related to redistricting (such as precinct boundaries and polling place changes) represent the most frequent occurrences of voting discrimination.

Conclusion

The Supreme Court decision in *Shelby County v. Holder* left minority voters the most vulnerable to voting discrimination they have been in decades. The record since the *Shelby County* decision demonstrates what voting rights advocates feared – that without Section 5, voting discrimination would increase substantially. It will only get worse with the 2020 election and the post-2020 redistricting on the horizon. For these reasons, it is imperative for Congress to act quickly.

APPENDIX A

CASES THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS' VOTING RIGHT PROJECT HAS PARTICIPATED IN SINCE *THE SHELBY COUNTY V. HOLDER* DECISION[1]

Alabama

Section 2 Vote Dilution Challenge to At-Large Election to State High Courts: On September 7, 2016, the Lawyers' Committee, on behalf of the Alabama NAACP, filed a vote dilution lawsuit under Section 2 of the Voting Rights Act (VRA) in the Middle District of Alabama challenging the state's at-large method of electing justices and judges of the Alabama Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals. The case was tried in November 2018 and the parties are awaiting a decision. Despite African Americans comprising more than one-quarter of Alabamians, none sit on any of these 3 courts, and none have been elected to any of these courts in a quarter of a century. The matter has been tried and is awaiting decision. ***Alabama State Conference of NAACP v. Alabama*, 264 F. Supp. 3d 1280 (M.D. Ala. 2017)**

Defense of Suit Challenging Congressional Apportionment and Distribution of Electoral College Votes: The State of Alabama and Congressman Morris J. Brooks, Jr. of Alabama sued the Department of Commerce and others, alleging that the inclusion of undocumented immigrants in the total population count for congressional apportionment and Electoral College votes violates the Fourteenth Amendment, the Census Clause, and the Enumeration Clause of the U.S. Constitution, and the Administrative Procedures Act. The Lawyers' Committee successfully moved to intervene as defendants on behalf of affected local jurisdictions. The matter is pending. ***State of Alabama, et al. v. U.S. Dept. of Commerce, et al.*, No. 2:18-cv-0772-RDP (N.D. Ala., May 21, 2018).**

Arizona

Challenge to At-Large Election System: Prior to the *Shelby County* decision, the Arizona legislature passed a law that applied only to the Maricopa County Community College District and added two at-large members to what was previously a five-single district board. The legislature had submitted the change for Section 5

[1] Lawyers' Committee staff served as counsel in all of these cases except for certain cases filed on Election Day where staff worked with local counsel, who filed the case.

preclearance. The Department of Justice issued a more information letter based on concerns that in light of racially polarized voting in Maricopa County, the addition of two at-large members , would weaken the electoral power of minority voters on the board. After receiving the more information letter, Arizona officials did not seek to implement the change. Only after the *Shelby County* decision did they move forward. Because it would not be possible to meet the first *Gingles* precondition, a Section 2 suit could not be brought, so the Lawyers' Committee and its partners sued in state court alleging that the new law violated Arizona's constitutional prohibition against special laws because the board composition of less populous counties was not changed. Reversing the intermediate court of appeal, the Arizona Supreme Court rejected the plaintiffs' argument, holding that the special laws provision of the state constitution was not violated. ***Gallardo v. State*, 236 Ariz. 84, 336 P.3d 717 (2014).**

Challenge to Long Waiting Lines Caused by Polling Place Consolidation: The Lawyers' Committee's lawsuit challenged the reduction of polling places in Maricopa County after severe cut-backs disenfranchised voters in the 2016 presidential preference primary because of extremely long lines, hours-long wait-times and a host of election administration problems. Maricopa County is Arizona's most populous county and was a covered jurisdiction under Section 5 of the VRA with approximately 60 percent of the state's minority voters residing in the county. In February 2016, the county slashed the total number of polls from 211 in 2012 to only 60. With this reduction, there was approximately one polling place for every 21,000 voters in Maricopa County as compared to one polling place for every 1,500 voters in the rest of the state. The parties settled the case with an agreement that required Maricopa County to create a comprehensive wait-time reduction plan and a mechanism to address wait times at the polls that exceed 30 minutes. ***Huerena v. Reagan, Superior Court of Arizona*, Maricopa County, CV2016-07890 (D. Ariz. July 7, 2016).**

Suit to Enjoin State's Two-Tier Voter Registration Process: Arizona created a two-tier voter registration process in the wake of the Supreme Court's decision in *ITCA v. Arizona*, which held that Arizona's documentary proof of citizenship requirement was preempted by the National Voter Registration Act (NVRA) as applied to federal elections. Confusion ensued when the state limited voters using the federal form to voting in federal elections, even if the state had information in its possession confirming the applicant was a United States citizen. The Lawyers' Committee and other civil rights organizations sued, alleging that the state's two-tier registration process constituted an unconstitutional burden on the right to vote. The parties settled the matter with an agreement that allows the state to continue to require proof of citizenship to register to vote in state elections, but requires the state

to treat federal and state registration forms the same and to check motor vehicle databases for citizenship documentation before limiting users of the federal registration form to voting in federal elections. ***League of United Latin Am. Citizens Arizona v. Reagan*, No. CV17-4102 PHX DGC, 2018 WL 5983009 (D. Ariz. Nov. 14, 2018).**

Election Day Suit Seeking Extensions of Polling Hours in Maricopa County: On Election Day, November 6, 2018, Plaintiffs, in coordination with the Lawyers' Committee's Election Protection program, filed an emergent action, seeking an extension of the voting hours at all of Maricopa County's mega voting centers, which had suffered technology problems leading to the sites being closed for significant periods of time. The state court denied the request for emergency relief. ***Arizona Advocacy Network v. Maricopa Co. Bd. of Supervisors, et al.*, No. cv-20-8-013943 (Superior Court of Ariz., County of Maricopa, Nov. 6, 2018).**

California

Successful Challenge to Decision by Secretary of Commerce to Add Citizenship Question to 2020 Census: On April 17, 2018, the City of San Jose and the Black Alliance for Just Immigration, represented by the Lawyers' Committee and other counsel, filed a Complaint in the Northern District of California under the Enumeration Clause of the Constitution and the Administrative Procedure Act seeking an injunction against the March 26, 2018 decision by Secretary of Commerce Wilbur Ross to add a citizenship question to the 2020 Census questionnaire. The decision was made, ostensibly, in response to a request by the Department of Justice, which professed a need for the question in order to allow it to prosecute actions under Section 2 of the Voting Rights Act. The Complaint alleged that the addition of the question would diminish the quality and accuracy of the Census count, further decrease the undercount of minority and immigrant populations, and was arbitrary and capricious and contrary to law. After trial, on March 6, 2019, the District Court ruled that the Secretary's decision was arbitrary and capricious under the APA and violated the Enumeration Clause. On June 27, 2019, in a companion case, *U.S. Dept. of Commerce v. Ross*, the Supreme Court issued a decision affirming the finding that the Secretary had violated the APA because he had contrived false reasons for his decision, leading to entry of final judgment in the California case, permanently enjoining Ross from adding the question to the Census. ***City of San Jose, et al. v. Wilbur Ross, et al.* (N.D. Ca., No. 3:18-cv-2279-RS).**

Florida

Suit Seeking Extension of Registration Deadline for Counties Affected by Hurricane Michael: In the wake of the devastation wreaked by Hurricane Michael, plaintiffs sought an emergency extension of the voter registration deadline in counties that had been particularly affected; the application was denied. ***New Florida Majority Educ. Fund, et al. v. Detzner*, No. 4:18-cv-00466-RH-CAS (N.D. Fla., October –, 2018).**

Georgia

Challenge to Georgia's Electronic Ballot System as Insecure and Not Allowing Voters To Check Their Vote: The Lawyers' Committee and co-counsel represented the Coalition for Good Governance and individual plaintiffs in a suit challenging Georgia's use of electronic ballot machines system, alleging that the vulnerability of the machines to tampering and their failure to have a paper back-up so voters can verify their votes violate the constitutional right to vote. On August 9, 2019, the district court preliminarily enjoined the state's use of their direct-recording electronic voting machines for all elections after December 31, 2019. The court further directed that, if the state is unable to implement completely a new system beginning January 2020, it must be ready to use paper ballots. The court also ordered that the state ensure that all polling places have paper back-ups for their electronic polling books. ***Donna Curling, et al. v. Brian Kemp, et al.* No. 1:17-cv-02989-AT (N.D. Ga., August 8, 2017).**

First State Challenge to Georgia's "Exact Match" Law Which Disproportionately Disenfranchises African American, Latino and Asian American Voters: The Lawyers' Committee brought this action in state court, seeking a writ of mandate compelling county registrars to process voter registration applications submitted by its client the New Georgia Project. The state had been cancelling voter registration applications which failed to exactly match Social Security or Georgia Driver's Service Records, unless the applicants contacted their county registrars to resolve the non-match within 40 days. Compounding the problem, county registrars would stop processing all voter registration applications for 90 days from the close of voter registration for state primary elections at the end of April until runoffs were over in August, the height of voter registration drives. As a result, the controverted applications were not appearing on any active or pending voter registration lists. After the county registrars starting processing the applications again in August, registrants began seeing their applications cancelled right before the close of voter registration for the general election on Election Day. The court denied the petition for a writ of mandate, ruling that state law did not

require counties to process voter registration forms on any particular deadline other than by Election Day. ***Third Sector Development, et al. v. Kemp, et al., Fulton County Superior Court*, Case No. 2014CV252546, 2014 WL 5113630 (October 10, 2014)**

First Federal Challenge to Georgia's "Exact Match" Law Which Disproportionately Disenfranchises African American, Latino and Asian American Voters: This suit, brought by the Lawyers' Committee and a coalition of civil rights organizations, alleged that Georgia's "exact match" voter registration process, which required information on voter registration forms to exactly match information about the applicant on Social Security Administration (SSA) or the state's Department of Driver's Services (DDS) databases, violated Section 2 of the VRA, the NVRA, and imposed an unconstitutional burden on the right to vote in violation of the First and Fourteenth Amendments. Under the "exact match" process, more than 40,000 applicants were in "pending" status in 2016 because the information on their voter registration applications did not exactly match the DDS or SSA database information. The suit was settled when the State agreed to allow all such persons to vote, upon showing acceptable voter ID at polling places. ***Georgia State Conference of NAACP, et al., v. Brian Kemp, et al.* (N.D. Ga. No. 2:16-cv-00219-WCO, September 14, 2016).**

Second Challenge to Georgia's "Exact Match" Law Which Disproportionately Disenfranchises African American, Latino and Asian American Voters and Naturalized Citizens: This is the second challenge to Georgia's "exact match" practice. After the Georgia legislature passed a statute again establishing an "exact match" system, the Lawyers' Committee and a coalition of civil rights organizations filed suit in the U.S. District Court for the Northern District of Georgia against then Georgia Secretary of State, Brian Kemp, alleging that Georgia's "exact match" voter registration process, violated Section 2 of the VRA, the NVRA, and imposed an unconstitutional burden on the right to vote in violation of the First and Fourteenth Amendments. Under the "exact match" process, more than 53,000 applicants were in "pending" status in 2018 because the information on their voter registration applications did not exactly match the DDS or SSA database information or because the process inaccurately flagged United States citizens as potential non-citizens. On November 2, 2018, the Court partially granted Plaintiffs' motion for preliminary relief, ordering that Georgians inaccurately flagged as non-citizens could vote using a regular ballot if they provided proof of citizenship to a poll manager rather than a deputy registrar (who might not be at the polling station), when voting at the polls for the first time. The Georgia legislature subsequently amended the

"exact match" law in 2019 to permit applicants who fail the "exact match" process for reasons of identity to become active voters, but the Legislature chose not to enact any remedial legislation to reform the "exact match" process that continues to inaccurately flags United States citizens as non-citizens. The litigation is pending. ***Georgia Coal. for People's Agenda, Inc. v. Kemp,* 347 F. Supp. 3d 1251 (N.D. Ga. 2018).**

Challenge to Georgia's Rejection of Absentee Ballots Based upon Alleged Signature Matching and Immaterial Errors or Omissions: On October 23, 2018, the Lawyers' Committee joined lawsuits challenging the state's practices of 1) rejecting absentee ballots based upon election officials' untrained conclusion that the voter's signature on the absentee ballot envelope did not match the voter's signature on file with the registrar's office, and 2) rejecting absentee ballots for immaterial errors or omissions on the ballot envelope. Georgia had an extraordinarily high rate of absentee ballot rejections generally, but the rejection rate in Gwinnett County was almost 3 times that of the state and absentee ballots cast by voters of color were rejected by Gwinnett County at a rate between 2 and 4 times the rejection rate of absentee ballots cast by white voters. Plaintiffs were granted preliminary relief before the November 2018 mid-term election. Subsequently, Georgia enacted remedial legislation and the lawsuits were voluntarily dismissed in 2019. ***Martin v. Kemp*, No. 18-14503-GG (N.D. Ga. 2018).**

Challenge to Georgia's Unlawful Registration Scheme Relating to Federal Runoff Elections: In this case, the Lawyers' Committee challenged Georgia's runoff election voter registration scheme as a violation of NVRA. Under Georgia law, eligible Georgians were required to register to vote on the fifth Monday before a general or primary election in order to be eligible to vote in a runoff election if no candidate received a majority of the vote. The runoff election would generally be held about two months after the general or primary election As a result, Georgians would be required to register to vote approximately three months before a runoff election in order to participate in that election. Under Section 8 of the NVRA (52 U.S.C. § 20507(a)(1)), states are prohibited from setting voter registration deadlines in excess of thirty days before a federal election. Thus, Georgia's runoff election voter registration scheme violated this provision of the NVRA and the District Court granted a preliminary injunction enjoining the state from using the longer deadline ahead of the Georgia Sixth Congressional Runoff Election in June 2017. Subsequently, the parties settled the matter with the Secretary of State agreeing not to enforce a voter registration deadline that violated Section 8 of the NVRA. ***Georgia State Conference NAACP v. Georgia*, No. 1:17-CV-1397-TCB (N.D. Ga. May 4, 2017).**

Suit Challenging State Legislative Redistricting: Civil rights organizations and voters, represented by the Lawyers' Committee, filed suit in the United States District Court for the Northern District of Georgia, challenging the State legislature's post-*Shelby* 2015 redistricting of two legislative districts as racial and partisan gerrymanders. The Plaintiffs alleged the legislature targeted African American population in drawing the districting plans to increase the electoral advantage of white Republicans as the districts were becoming more competitive for Black Democrats. After African American candidates were elected to seats in both of the challenged districts in November 2018, the parties agreed to voluntary dismissals of the actions. ***Georgia State Conference of NAACP v. Georgia*, No. 1:17-CV-1427 (N.D. Ga. 2017).**

Challenge to Purge of Mostly Black Voters in Hancock County: Plaintiffs, represented by the Lawyers' Committee, filed this action on November 3, 2015 in the U.S. District Court for the Middle District of Georgia. This case challenged the removal of 53 voters, 51 of whom were African Americans, from the voter rolls of a small, predominately Black county. The purge occurred just prior to a hotly contested election in Sparta, the largest city in Hancock County, and white candidate was elected mayor for the first time in decades. The case was brought under Section 2 of the VRA and Section 8 of the NVRA. Immediately, the District Court directed Defendants to restore qualified purged voters to the registration rolls or show cause why they would not do so. As a result, 17 voters were restored to the rolls; two others would have been restored, but had died in the interim; and eight voters were placed into inactive status, but remained eligible to vote by producing proof of their residency when requesting a ballot. The parties subsequently mediated the case, which resulted in a settlement in which the Defendants agreed to comply with the NVRA before removing anyone from the voter rolls and to be subject to monitoring by a court appointed examiner. On March 30, 2018, the Court granted the parties' Joint Motion for Entry of Consent Decree. Compliance with the Consent Decree is being actively monitored by the Court appointed examiner. ***Georgia State Conference of NAACP v. Hancock Cty. Bd. of Elections & Registration*, No. 5:15-CV-00414 (CAR) (M.D. Ga. 2015).**

Vote Dilution Lawsuit Challenging District Plans for Gwinnett County: Plaintiffs, represented by the Lawyers' Committee and other civil rights organizations, filed a vote dilution suit under Section 2 of the VRA challenging the districting plans for the County Board of Commissioners and Board of Education. At the time the lawsuit was filed, no African American, Latino or Asian American candidates had ever won election to these boards, despite the fact that Gwinnett

County is considered to be one of the most racially diverse counties in the Southeastern United States. After two long-term incumbents chose not to run for re-election to the School Board in the 2018 mid-term election, and with the minority population of the county continuing to grow, African American and Asian American candidates were finally elected to the County Commission and an African American candidate was elected to the School Board for the first time in the county's history. Following these electoral successes, the parties agreed to a voluntary dismissal of the litigation. ***Ga. State Conference of the NAACP v. Gwinnett Cty. Bd. of Registrations & Elections*, No: 1:16-cv-02852 (N.D. Ga. 2016).**

Suit to Extend Registration Period for Communities Hard-Hit by Hurricane Matthew: The Lawyers' Committee sought emergency relief to extend the voter registration for Chatham County, Georgia residents in the wake of Hurricane Matthew. The storm had resulted in the closing of County government offices for what would have been the last six days of the voter registration period. Despite requests to extend the deadline, both Governor Nathan Deal and Secretary of State Brian Kemp, refused to extend the deadline for Chatham County residents. Chatham County, which includes the city of Savannah, has over 200,000 voting age citizens, of whom more than 40 percent are African American or Latino. It was hit particularly hard by the devastating storm. Almost half of its residents lost power, and it was one of six counties subject to a mandatory evacuation order. Following a hearing on the plaintiffs' motion for a preliminary injunction on October 14, 2016, the Court ordered that the voter registration deadline for Chatham County residents be extended from October 11, 2016 to October 18, 2016. As a result of this extension, approximately 1,418 additional Chatham County residents registered in time to be eligible to vote in the November 2016 general election. Approximately 41 percent of these new registrants are African American, 4.5 percent are Latino and 38.6 percent are white. ***Georgia Coalition for the Peoples' Agenda, et al., v. John Nathan Deal, et al.* (S.D. Ga., No. 4:16-cv-0269-WTM-GRS, October 12, 2016).**

Challenge to District Lines of Emanuel County School Board as Dilutive of Black Votes: Plaintiffs, represented by the Lawyers' Committee, alleged that the district boundaries for the Emanuel County School Board violated Section 2 of the VRA. The complaint alleged that the then current map of seven School Board districts impermissibly diluted the voting strength of African American voters by "packing" them into one district. African Americans comprises 81 percent of the voting-age population in one of the districts and a minority in all of the other six. Although African Americans made up one-third of the county's voting-age population and close to half of the students in Emanuel County, and although African American

candidates had run in other districts, there had never been more than one African American member on the School Board at one time. After suit was filed, the parties negotiated a settlement, resulting in the creation of two majority-minority single-member districts. ***Georgia State Conference of NAACP, et al., v. Emanuel County Board of Commissioners, et al.,* (S.D. Ga., No. 6:16-cv-021, February 23, 2016).**

Election Day Suits to Extend Voting Hours: Plaintiffs, working with the Lawyers' Committee's Election Protection program, filed two suits on Election Day 2018 to extend voting hours in precincts with large African-American populations, that had suffered technology failures, resulting in extraordinarily long lines. The court granted hours' long extensions at the Booker T. Washington and Morehouse College Archer Auditorium Precincts, and Pittman Park Recreation Center precincts. ***Georgia State Conference of NAACP, et al. v. Fulton County Bd. of Reg. & Elections* (Superior Ct. of Fulton County, State of Georgia, Nov. 6, 2018).**

Indiana

Election Day Suit to Extend Voting Hours: Plaintiffs, in a suit coordinated by the Lawyers' Committee's Election Protection program, unsuccessfully sought emergent relief to extend the voting hours in Johnson County, Indiana, because polling places had run out of paper ballots. ***Dan Newland v. Johnson Co., et al.*, (Johnson County Superior Court, State of Indiana, November 6, 2018).**

Kansas

Defense against Attempt to Change Federal Registration Form re Proof of Citizenship: The Lawyers' Committee intervened on behalf of the Inter Tribal Council of Arizona, Inc. to successfully defeat an attempt by the states of Arizona and Kansas to modify the state-specific instructions of the federal mail voter registration form to require applicants residing in Kansas and Arizona to submit proof-of-citizenship documents in accordance with state law. ***Kobach v. U.S. Election Assistance Commission*, 772 F. 3d 1183 (10th Cir. 2015).**

Louisiana

Challenge to State's Districting Plan for Electing Justices to Supreme Court: The Lawyers' Committee's Complaint alleges that the method of electing members of the Louisiana Supreme Court violates the Voting Rights Act. The suit

maintains that Louisiana's electoral map for electing justices denies black voters an equal opportunity to elect justices of their choice. Louisiana's population is 32% African American but just one of state's seven Supreme Court districts is majority-black in population. As a result, six of the seven justices on the most powerful court in the state are white. The suit, which highlights that the state's Supreme Court districts have not been redrawn since 1999, alleges that a second majority-black district must be drawn to address the harm to black voters. ***Louisiana State Conference of the NAACP, et al., v. State of Louisiana, et al.*** **(M.D. La., No. 3:19-cv-00479-JWD-EWD, July 23, 2019).**

Mississippi

Challenge to Redistricting of State Senate District: On July 9, 2018, Black Mississippi voters filed a challenging the districting plan for Mississippi State Senate District 22 under Section 2 of the Voting Rights Act. Plaintiffs, represented by the Lawyers' Committee and Mississippi Center for Justice contended that the plan diluted the voting strength of Black voters and, combined with racially polarized voting, prevented them from electing candidates of their choice to the Senate District 22 seat. Plaintiffs prevailed at trial and the trial court gave the Legislature an opportunity to re-draw the district to comply with the court's decision. After failing to obtain a stay of the court's order, the Legislature redrew the district to create a district with a sufficiently large Black voting population to give Black voters an equal opportunity to elect candidates of their preference. The Fifth Circuit affirmed the district court's decision. ***Thomas v. Bryant*****, 919 F.3d 298 (5th Cir. 2019).**

Suit Challenging State's Restrictive Absentee Ballot Procedures: On November 21, 2018, Plaintiffs, represented by the Lawyers' Committee, filed a complaint challenging, on federal constitutional right to vote grounds, Mississippi's unique combination of requiring notarization of both the absentee ballot application and the ballot itself, in addition to a deadline of receipt of the ballot the day before election day. Plaintiffs also sought emergency relief to compel the counting of ballots post-marked by election day (November 27) in the senatorial run-off, where voters had only 9 days – including Thanksgiving weekend – to apply for, obtain, and cast their absentee ballots. The court denied relief on November 27, 2019 on grounds that it was too close to the election to order relief. The case is still pending. ***O'Neil v. Hosemann*****, No: 3:18-cv-00815 (S.D. Miss. Nov. 27, 2018).**

New York

Suit to Restore Voting Rights to New Yorkers Who Were Removed from Poll Books in Violation of Federal Law: The Lawyers' Committee and another civil rights organization filed suit to restore the voting rights of millions of New Yorkers ahead of the 2018 election. Plaintiffs alleged that certain eligible but "inactive" voters are improperly removed from poll books throughout New York State in violation of the NVRA. Plaintiffs contend that the removal of inactive voters from the poll books disproportionately impacts voters of color. The litigation is continuing. ***Common Cause/New York v. Brehm,* Case No. 1:17-cv-06770 (S.D.N.Y 2017).**

Suit Challenging Purge of New York City Voters: On November 3, 2016, the Lawyers' Committee and another civil rights organization filed suit alleging that the New York City Board of Elections (NYCBOE) had purged voters from the rolls in violation of the NVRA. Plaintiffs sought the restoration of all purged voters to the registration list, and also that the NYCBOE count all affidavit ballots cast by these individuals in the November 2016 election. Earlier in 2016, the NYCBOE had confirmed that more than 126,000 Brooklyn voters were removed from the rolls between the summer of 2015 and the April 2016 primary election. Shortly before the November 2016 election, the parties reached an agreement under which the NYCBOE agreed to provide various forms of notice to poll workers and voters concerning the requirement that all voters who believed they were registered were to be offered an affidavit ballot on Election Day. The NYCBOE also agreed to send absentee ballots to two individual plaintiffs who had previously been purged from the registration list. After further negotiations and the entry of the State of New York and the U.S. Department of Justice in the case, the NYCBOE agreed to place persons who were on inactive status or removed from the rolls back on the rolls if they lived at the address listed in their voter registration file and/or if they had voted in at least one election in New York City since November 1, 2012 and still lived in the city. Subsequently, the parties negotiated a Consent Decree, under which the NYCBOE agreed to comply with the NVRA before removing anyone from the rolls, and to subject itself to a four-year auditing and monitoring regimen. The Consent Decree was approved by the Court in December 2017 and is being monitored by the plaintiffs. ***Common Cause/New York v. Board of Elections in City of New York* (E.D.N,Y., No. 1:16-cv-06122-NGG-VMS).**

North Carolina

Challenge to At-Large Method of Electing Jones County Commissioners as Dilutive of Black Voters' Rights: Plaintiffs, represented by the Lawyers' Committee, challenged the at-large scheme of electing members to the Jones County,

NC Board of Commissioners under Section 2 of the Voting Rights Act. Due to the at-large method of electing members to the Jones County Board of Commissioners, which diluted the voting strength of African American voters, no African American candidate had been elected to the Jones County Board of Commissioners since 1998. The parties eventually settled the matter with an agreement that the Board of Commissioners would implement a seven single-member district electoral plan, including two single-member districts in which African-American voters constitute a majority of the voting-age population. ***Hall v. Jones Cty. Bd. of Commissioners*, No. 4:17-cv-00018 (E.D.N.C. Aug. 23, 2017).**

Suit Alleging Violation of Sections 5 and 7 of NVRA: Since 2013, North Carolina has seen a precipitous drop in the number of voter registration applications offered and collected at public assistance agencies and DMV offices across the state. In particular, the drop in public assistance registration significantly and detrimentally affects low income voters of color. Suit was filed in December 2015, by the Lawyers' Committee and other civil rights organizations, alleging that North Carolina was violating Sections 5 and 7 of the NVRA, in not adequately making assistance to register to vote available to people who visit motor vehicle and public assistance agencies. The case settled in 2018, with substantial improvements made at both DMV and NC social service agencies in how voter registration applications are offered and processed. ***Action NC, et al. v. Kim Westbrook Strach, et al.* (M.D.N.C., No. 1:15-cv-01063).**

Pennsylvania

Election Day Challenge to Acceptance of Absentee Ballots: On Election Day, 2018, Plaintiff, coordinating with the Lawyers' Committee's Election Protection program, obtained a court order from the Commonwealth of Pennsylvania allowing her to vote her absentee ballot which had been rejected because of Pennsylvania's overly-restrictive time requirements, due to no fault of Plaintiff.

Challenge to Absentee Ballot Deadline: On November 13, 2018, Plaintiffs, represented by the Lawyers' Committee and other civil rights organizations, filed a challenge under Pennsylvania's and the federal constitutions, alleging that Pennsylvania's requirement that absentee ballots must be received by the Friday before election day violates the right to vote. The suit is pending. ***Cassandra Adams Jones, et al. v. Robert Torres, et al.* (Commonwealth Court of Pennsylvania, No. 717 MD 2018, Nov. 13, 2018).**

South Dakota

Challenge to Lack of Access for Native Americans to Polling Place Locations: This suit, brought by the Lawyers' Committee in 2014, challenged the failure of Jackson County to maintain a voting and registration location sufficiently convenient to the Pine Ridge Reservation of the Oglala Sioux Tribe. After suit was filed, the County passed a resolution to open a location in proximity to the Reservation for federal elections over the next four years. The suit was subsequently dismissed as moot. ***Thomas Poor Bear, et al. v. The County of Jackson, et al.,* (D. S.D.No. 5:14-cv-05059-KES).**

Tennessee

Suit Challenging New Law Restricting Voter Registration Activity: The Lawyers' Committee, representing several civil rights organizations, filed suit the day the Governor signed into law a statute that imposes severe restrictions on voter registration activity by community groups and third parties and includes criminal and civil penalties for failures to comply with the law. The law was enacted in the wake of successful large-scale voter registration initiatives in the state in 2018 which targeted minority and underserved communities. The case is pending. ***Tennessee State Conference of the N.A.A.C.P. v. Hargett*, Case No. 3:19-cv-00365 (M.D. Tenn. 2019).**

Texas

Challenge to Restrictive Voter ID Law: This Was a Federal court action, brought by several civil rights organizations, including the Lawyers' Committee, and the Department of Justice, challenging the Texas voter ID law under Section 2 of the VRA and the U.S. Constitution. In October 2014, the district judge ruled in Plaintiffs' favor on all claims and blocked the law, holding that it violated Section 2 of the VRA, constituted an unconstitutional burden on the right to vote, amounted to a poll tax, and was motivated in part by a racially discriminatory purpose. In July 2016, the Fifth Circuit, siting *en banc*, affirmed the district court's finding of discriminatory effect under Section 2, and remanded the case to the district court for further fact-finding on the discriminatory intent claim. The district court entered an interim remedial order that allowed anyone to vote without the required ID. On April 10, 2017, the district court issued a decision re-affirming its prior determination that SB 14 was passed, at least in part, with a discriminatory intent. On June 1, 2017, Texas passed a new law, SB 5, which it claimed remedied the effects of SB 14. While SB 5

shares provisions in common with the court-ordered interim remedy, there are aspects of concern, including a harsh felony penalty (up to two years of imprisonment) for voters who inappropriately use the affidavit process for voting in-person without an acceptable photo ID. On August 23, 2017, the court granted declaratory relief, holding that SB 14 violated Section 2 of the VRA and the 14th and 15th Amendments to the U.S. Constitution. The court enjoined SB 14 and SB 5, finding that the new law "perpetuates SB 14's discriminatory features." On April 27, 2018, the Fifth Circuit issued an opinion "reversing and rendering" the district court's order for permanent injunction and further relief, finding that the district court had abused its discretion, and further finding that SB 5 constituted an effective remedy "for the only deficiencies in SB 14," and that there was no equitable basis for subjecting Texas to ongoing federal election scrutiny under Section 3(c) of the Voting Rights Act. ***Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).**

Challenge to Attempted Purge of Naturalized Citizens: In late January 2019, David Whitley, Texas' Secretary of State, sent Texas counties a list containing 95,000 registered voters and directing the counties to investigate their voting eligibility. The list was based on DMV data the state knew was flawed and would necessarily sweep in thousands of citizens who completed the naturalization process after lawfully applying for a Texas drivers' license. Naturalized citizens are entitled to full voting rights under Constitution. Voting rights advocates, including the Lawyers' Committee, filed lawsuits challenging the purging of voters based upon this flawed process. The case was eventually settled after the U.S. District Court in Texas granted a motion for preliminary injunction, enjoining the removal of voters from the rolls based upon this flawed process. ***Texas League of United Latino American Citizens v. Whitley*, No. 5:19-cv-00074 (W.D. Tex. February 27, 2019).**

Challenge to At-Large Election of Texas High Courts as Diluting Votes of the Latinx Population: The Lawyers' Committee brought this suit challenging the at-large voting districts for the Texas Supreme Court and the Texas Court of Criminal Appeals, as unlawfully diluting the votes of Latinx voters, who, despite comprising a sizeable percentage of Texans, had not elected a candidate of their choice to either of these courts for decades. Although the court found, after trial, that plaintiffs had met the basic standards for a violation of Section 2 of the Voting Rights Act, it denied relief on the primary basis that partisanship, rather than race, explained the election results. ***Lopez, et al. v. Abbott*, (S.D. Tex., 2:16-cv-00303, July 20, 2016).**

Utah

Suit Challenging County's Failure to Provide Effective Language Assistance and In-Person Early Voting Sites for Navajo Nation Voters: San Juan County, Utah is home to a substantial Native American population. The County moved to all-mail balloting in 2014. Coupled with a lack of sufficient in-person early voting sites serving the Navajo Nation's voters, Plaintiffs, represented by the Lawyers' Committee and other civil rights organizations, argued that the county failed to provide effective language assistance to its Native American population. Following a period of intense and sometimes contentious litigation, the parties reached a settlement in which the county agreed to 1) provide in-person language assistance on the Navajo reservation for the 28 days prior to each election through the 2020 general election; 2) maintain three polling sites on the Navajo reservation for election day voting, including language assistance; and 3) to take additional action to ensure quality interpretation of election information and materials in the Navajo language. The settlement is being monitored by the plaintiffs. ***Navajo Nation Human Rights Comm'n v. San Juan County*, 216CV00154JNPBCW, 2017 WL 3976564, at *1 (D. Utah Sept. 7, 2017).**

Virginia

Suit to Extend Registration Deadline: In 2016, Virginia's state online voter registration platform crashed during the last days of voter registration, leading up to the October 17th voter registration deadline. The Lawyers' Committee, working with local civil rights groups, filed suit in the U.S. District Court for the Northern District of Virginia, after the Commonwealth had refused a request to extend the time for registration. After a hearing, the court ordered Virginia to extend the deadline until midnight October 21. As a result, approximately 28,000 Virginians registered to vote, who otherwise would not have been able to. ***New Virginia Majority Education Fund, et al. v. Virginia Department of Elections, et al.*, No. 1:16-cv-013190CMH-MSN, N.D.VA, Alexandria Division.**

Washington, D.C.

Challenge to Decision by the Election Assistance Commission's Executive Director to Include Proof of Citizenship Requirement on Federal Registration Form Instructions: In January 2016, EAC Executive Director Brian Newby, acting without input from the EAC Commissioners, issued notice to Alabama, Georgia, and Kansas that the federal registration form instructions would be amended to allow these states to require citizenship documents from applicants who use the federal registration form. Plaintiffs, represented by a number of civil rights organizations including the Lawyers' Committee, filed suit to enjoin Newby's action

and the United States Court of Appeals for the District of Columbia Circuit preliminarily enjoined the EAC from changing the federal voter registration form after the District Court for the District Court of Columbia denied Plaintiffs' motion for a preliminary injunction. The parties have fully briefed cross-motions for summary judgment and the action remains pending. ***League of Women Voters of United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016).**

Challenge to Presidential Advisory Commission on Election Integrity: On May 11, 2017, President Trump established the Presidential Advisory Commission on Election Integrity, to study the registration and voting processes used in Federal elections, including those that "could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting." Exec. Order 13799. The Commission was chaired by Vice President Pence, but its Vice-Chair is Kansas Secretary of State Kris Kobach, a known advocate of laws and regulations that have the effect of suppressing votes, particularly those of minority voters. Other members of the Commission included Hans Von Spakovsky, Christian Adams, and Ken Blackwell, all advocates of similar laws and regulations. On June 28, 2017, the Commission held a meeting after which Kobach sent a letter to every state requesting the production of information relating to every voter in the nation, including political affiliation and the last four digits of their social security numbers. This meeting was not open to the public. The Commission also announced that its next meeting would be held on July 19, 2017, but would be open to the public only via video streaming. On July 10, 2017, the Lawyers' Committee filed an action on its own behalf, seeking production of all Commission records under Section 10 of the Federal Advisory Committee Act, simultaneously seeking a temporary restraining order that would require the Commission to produce its records prior to the July 19 meeting, and would open that meeting to in-person public participation. On July 18, 2017, Judge Kollar-Kotelly issued an opinion denying the TRO application on the bases that (1) the Commission had submitted an affidavit promising to make all documents public; (2) there was no requirement that the documents be produced prior to the July 19 meeting; and (3) there was no requirement for in-person public participation. The Commission proceeded with its meeting on July 19. On July 21, Plaintiff filed motions on the basis that the Commission had not fulfilled its commitment to produce all records and documents. After reviewing the briefing, the Court set a hearing date of August 30, at which time DOJ apologized on behalf of its client, the Commission, for not disclosing all the documents it had promised to disclose. The Court ordered that the Commission prepare a Vaughn Index, listing all documents it is withholding from production and that the parties meet and confer to discuss the specifics and timing of the Vaughn Index. On September 29, the federal government provided Plaintiff with

its Vaughn Index, which indicated, among other things, that there were communications between some of the members of the Commission on substantive matters that had not been disclosed to the public. The Lawyers' Committee then filed a motion to compel compliance with the court's prior order, which is fully briefed and pending decision. On January 3, 2018, President Trump announced that he was dissolving the Commission. The suit was subsequently dismissed. ***Lawyers' Committee for Civil Rights Under Law v. Presidential Advisory Commission on Election Integrity, et al.*, D.D.C. No. 1:17-cv-01354-CKK, July 10, 2017.**

Presidential Advisory Commission on Election Integrity – FOIA: On January 26, 2018, the Lawyers' Committee filed a complaint on its own behalf in the District Court for the District of Columbia, seeking compliance by the Department of Justice and the Department of Homeland Security with FOIA requests for documents relating to the Presidential Advisory Commission on Election Integrity. The matter is pending. ***Lawyers' Committee for Civil Rights Under Law v. U.S. Dept. of Justice*, D.D.C. No. 1:18-cv-00167-EGS, January 26, 2018.**

Appendix B – Summary Table of Cases which the Lawyers' Committee for Civil Rights Under Law's Voting Rights Project has participated in since *Shelby County v. Holder*						
Case Name	**Year Filed**	**State**	**Result**	**Opposing Covered Jurisdiction**	**Challenging Voting Change**	**Section 2 Claim**
Alabama State Conference of the NAACP v. State of Alabama	2017	Alabama	Pending	Y	N	Y
State of Alabama v. US Dept. of Commerce	2018	Alabama	Pending	Y	N	N
Gallardo v. State of Arizona	2014	Arizona	Negative	Y	Y	N
Huerena v. Reagan, Superior Court of Arizona	2016	Arizona	Positive	Y	Y	N
League of United Latin American Citizens of Arizona v. Reagan	2018	Arizona	Positive	Y	Y	N
Arizona Advocacy Network v. Maricopa County Board of Supervisors	2018	Arizona	Negative	Y	N	N
City of San Jose v. Wilbur Ross	2018	California	Positive	N, Federal Gov't	N	N
New Florida Majority Education Fund v. Detzner	2018	Florida	Negative	No	N	N
Donna Curling v. Brian Kemp	2017	Georgia	Positive	Y	N	N
Georgia State Conference of the NAACP v. Brian Kemp	2016	Georgia	Positive	Y	Y	Y (+)
Georgia Coalition for the People's Agenda v. Brian Kemp	2018	Georgia	Positive	Y	Y	Y (+)
Martin v. Kemp	2018	Georgia	Positive	Y	N	N
Georgia State Conference of the NAACP v. Georgia (Runoff Elections)	2017	Georgia	Positive	Y	N	N
Georgia State Conference of the NAACP v. Georgia (Redistricting)	2017	Georgia	Positive	Y	Y	N
Georgia State Conference of the NAACP v. Hancock County Board of Elections and Registration	2015	Georgia	Positive	Y	Y	Y (+)
Georgia State Conference of the NAACP v. Gwinnett County Board of Registration and Elections	2016	Georgia	Positive	Y	N	Y

Case Name	Year Filed	State	Result	Opposing Covered Jurisdiction	Challenging Voting Change	Section 2 Claim
Georgia Coalition for the People's Agenda v. John Nathan Deal	2016	Georgia	Positive	Y	N	Y
Georgia State Conference of the NAACP v. Emanuel County Board of Commissioners	2016	Georgia	Positive	Y	N	Y
Georgia State Conference of the NAACP v. Fulton County Board of Registrations and Elections	2018	Georgia	Positive	Y	N	N
Third Sector Development, et al. v. Kemp, et al.	2014	Georgia	Negative	Y	N	N
Dan Newland v. Johnson County	2018	Indiana	Negative	N	N	N
Kobach v. U.S. Election Assistance Commission	2013	Kansas	Positive	Y	N	N
Louisiana State Conference of the NAACP v. State of Louisiana	2019	Louisiana	Pending	Y	N	Y
Thomas v. Bryant	2018	Mississippi	Positive	Y	N	Y
O'Neil v. Hosemann	2018	Mississippi	Pending	Y	N	N
Common Cause New York v. Brehm	2017	New York	Pending	Y	N	N
Common Cause New York v. Board of Elections in the City of New York	2016	New York	Positive	Y	Y	N
Hall v. Jones County Board of Commissioners	2017	North Carolina	Positive	N	N	Y
Action North Carolina v. Kim Westbrook Strach	2015	North Carolina	Positive	Y	N	N
Election Day Challenged to Acceptance of Absentee Ballots	2018	Pennsylvania	Positive	N	N	N
Cassandra Adams Jones v. Robert Torres	2018	Pennsylvania	Pending	N	N	N
Thomas Poor Bear v. The County of Jackson	2014	South Dakota	Positive	N	N	Y
Tennessee State Conference of the NAACP v. Hargett	2019	Tennessee	Pending	N	Y	N
Veasey v. Abbott	2018	Texas	Positive	Y	Y	Y (+)
Texas League of United Latin American Citizens v. Whitley	2019	Texas	Positive	Y	Y	Y (+)

Case Name	Year Filed	State	Result	Opposing Covered Jurisdiction	Challenging Voting Change	Section 2 Claim
Lopez v. Abbott	2016	Texas	Negative	Y	N	Y
Navajo Nation Human Rights Commission v. San Juan	2017	Utah	Positive	N	Y	Y (+)
New Virginia Majority Education Fund v. Virginia Department of Elections	2016	Virginia	Positive	Y	N	N
League of Women Voters of United States v. Newby	2016	Washington, DC	Positive	N, Federal Gov't	Y	N
Lawyers' Committee for Civil Rights Under Law v. Presidential Advisory Commission on Election Integrity	2017	Washington, DC	Positive	N, Federal Gov't	N	N
Lawyers' Committee for Civil Rights Under Law v. US Dept. of Justice	2018	Washington, DC	Pending	N, Federal Gov't	N	N

Legend
Case Name = name of the case
Year Filed = year in which case was filed
State = State of the court the case was filed in, including the federal court
Result
Positive = positive change resulting from case if representing plaintiff, no change if representing defendant
Negative = no change resulting from case if representing plaintiff, change if representing defendant
Pending = case still pending with no positive or negative results yet
Opposing Covered Jurisdiction
Y= an opposing party was covered under Section 5.
N = no opposing party was covered under Section 5.
N, Fed Gov't = the federal government is the opposing party
Challenging Voting Change
Y = Yes, challenged voting change
N = No, did not challenge voting change
Section 2 Claim
Y = Only a Section 2 claim
Y (+) = Section 2 is one of multiple claims
N = no Section 2 claim

Mr. COHEN. Thank you very much.

Mr. Blumstein, I think, knows that he gave an opening statement in the first panel. He is going to participate in the second panel for questions but not for an opening statement.

Mr. BLUMSTEIN. What I said was I would not have an opening statement but I didn't really—five minutes went a lot faster than I thought they would. So I actually have a few comments that I——

Mr. COHEN. We will get to you in questioning, I assure you. I will ask you some questions——

Mr. BLUMSTEIN. But I do have some comments that were kind of left over from my presentation that I had to edit out, Mr. Chairman. So if you will indulge me, I do have a few minutes that I would like to say a few words.

Mr. COHEN. I will indulge you because I am that kind of guy. [Laughter.]

Mr. BLUMSTEIN. I appreciate that. Thank you. I feel very indulged.

STATEMENT OF JAMES BLUMSTEIN

Mr. BLUMSTEIN. I want to say a few——

Mr. COHEN. Pull closer to the microphone.

Mr. BLUMSTEIN. Sorry. A few—a few things from *Dunn* v. *Blumstein* and then some things about the current.

First, about *Dunn* v. Blumstein—when I brought that case, I got death threats, and the Tennessean used to publish—the Tennessean used to publish the addresses of their sources in the newspaper. I had to make a special appeal to the editor to take that out of the newspaper so people would not know where to come.

I think that is evidence that times have changed to a large degree. Not completely. I don't want to overstate that. But death threats are not part of the—of the system now and the challenge to existing law or existing circumstances.

The state is very different. The county is very different. There is a story about mootness. One of the issues that that case dealt with was the fact that I had already lived here 90 days by the time the election was coming around and the three-judge court wanted to throw out the 90-day issue, and I explained to them that that was a doctrine of capable repetition yet evading review, which I still teach in my con law classes.

And I wrote a 16-page legal-sized memo on that issue. I realized I had a problem—that Judge Gray was one of the judges on the panel. Threw his glasses down and said, I don't care what you say—it is moot.

So I wrote this memorandum and I learned later that he had ordered it to be drafted, that it was moot, but that he read the memorandum, was persuaded and changed his mind. And he wouldn't ever let me have the satisfaction of knowing that I had changed his mind.

So he said the plaintiff is excessively nervous about the mootness of that point of the case but he should know there is a doctrine called capable of repetition yet evading review. But that was actually the basis of a 16-page memorandum. But if you were to look at the federal supplement you would see that somehow I was a nervous Nellie.

The decision to appeal—the attorney general was actually quite affected by the evidence about voter registration and that voter registration took away the need for these lengthy durational residency and you didn't have to disenfranchise people and still not compromise the integrity of the ballot.

And so I asked him whether he was going to appeal, and he said, well, you know, you have kind of persuaded me I have a duty to appeal, and he was kind of wishy-washy about it.

So I said, okay, you have 90 days. Let me know.

We opened the door, he goes out, and here was all the news stations from Nashville, radio stations, print media. There were about 15 microphones and klieg lights, and someone put a mic in front of this face and said, General Pack, are you going to appeal this case to the Supreme Court. He looked at all the lights, we are going to fight it all the way. It took him less than 90 seconds to make that decision, far from 90 days.

So politics has an effect. It makes a difference upon public officials in how they—how they act in that—in that regard.

The last point about that case is I want to mention that the provisional ballot had its origins in that case—the provisional ballot. This is something that I dreamed up right on the spot and it is now part of federal law. So that case, I think, is important for that as well.

Now, the congresswoman from Texas raised an important question and I want to just develop that a little bit because I take that very seriously and I tried to give a serious and thoughtful response to the question, which it deserved.

If we are in a world where there is mixed opinions—different opinions—what am I looking at from the Republican side that is a real risk, going forward, and how could the Democrats gain some common ground?

I think the Supreme Court's recent decision holding that partisan gerrymandering is a nonjusticiable question raises a real risk and I think the Pennsylvania Supreme Court decision that redid congressional apportionment in Pennsylvania is a real threat.

There is federal law on this. I think if the interest was shown to, in a sense, stop court intervention and essentially reapportioning based upon state constitutional provisions where we are putting some constraints upon court's ability to do that, of course, the Constitution gives that power to the states, not to the courts.

And so I think in terms of responding, Representative Nadler, to your point, that if one is looking for common ground that is where I would go fishing would be on putting restraints upon state supreme courts seemingly adopting partisan outcomes in those cases, given the nonjusticiability holding——

Mr. NADLER. I am sorry. I didn't understand what you are saying. Are you suggesting that Congress should put restrictions on state supreme courts from making such decisions?

Mr. BLUMSTEIN. For congressional elections. Correct.

And it already exists. It is already in federal law. But it needs to be qualified. The Pennsylvania Supreme Court apparently was not aware of the statutory restrictions that exist on this and updating and clarifying them, I think, would be important. State supreme courts have a role to play but not to apportion.

So my position—do I have time to respond, Representative? I don't want to over—I don't want to——

Mr. COHEN. We have hit the time and we are going over. But we are going to have a question period and we will come back to you.

Mr. BLUMSTEIN. Okay. I will shut. Thank you.

Mr. COHEN. And I appreciate it.

Mr. BLUMSTEIN. I don't want to abuse your indulgence so I appreciate that very much.

Mr. COHEN. I thank you for your testimony, and this is a little out of order, too, but I will say two things.

If you saw the Twitter terrorists that I see, death threats still exist. We haven't changed that much. We get death threats in Congress a lot now on Twitter.

And number two, you say times have changed, and times have changed some. And I wish we could just introduce a song into our appeal of *Shelby County* v. *Holder*. In Dixie there is a reason they say old times there are not forgotten, and they didn't forget them. That is so states haven't changed.

Ms. Butler, thank you. You are executive director of the Georgia Coalition of the Peoples' Agenda. In that role, she leads an advocacy organization convened by the revered legendary Dr. Joseph Lowery and comprised of representatives from the human rights, civil rights, environmental, labor, women, young professionals, youth, elected officials, peace and justice groups—round up the usual suspects—throughout Georgia and other southeastern states.

She leads initiatives to increase citizen participation of the governors of their communities in areas including education, criminal and juvenile justice reform, protecting the right to vote, and economic development.

Ms. Butler, welcome, and I think Ms. April Hubbard's not here but she was here, I think. There she is. I thought you would have red on. The Deltas are recognized. Ms. Butler is a Delta and we thank you for being here. [Laughter.]

Mr. COHEN. Thank you, Ms. Butler, and thank you, Ms. Hubbard.

STATEMENT OF HELEN BUTLER

Ms. BUTLER. Thank you, Chairman Nadler, Subcommittee Chairman Cohen, and Representative Jackson Lee. Thank you so much for the opportunity to testify before you today about my experiences with discriminatory barriers to voting.

I was born and raised in Georgia and was one of the first 50 African-American students to attend the University of Georgia after the integration of the school by Charlayne Hunter-Gault and Hamilton Holmes.

Prior to joining the nonprofit world, I spent more than 20 years working in the business world with General Motors and in the wholesale and retail grocery industry.

In 2003, I was recruited to join the Peoples' Agenda and began my career in the nonprofit sphere. I also serve as the convener of the Black Women's Roundtable of Georgia and as a board member of the Morgan County Board of Elections.

I am a past member of the state of Georgia Help America Vote Act advisory committee and was appointed to serve on the U.S.

Commission on Civil Rights as a member of the Georgia Advisory Committee in 2013.

As a result of my civic engagement work with the Peoples' Agenda and lifelong experience as a Georgia native and voter, I have witnessed firsthand discriminatory barriers to the ballot box that Georgians of color face and how the lack of preclearance in the aftermath of the Supreme Court's decision in *Shelby* v. *Holder* has made it much more difficult for nonprofit organizations like the Peoples' Agenda to protect the vote and ensure equal access to the ballot for voters of color.

It is impossible for me to recount in the allotted five minutes all of the numerous ways the loss of preclearance after the Shelby decision has negatively impacted voters of color and civic engagement organizations in Georgia.

But I will provide a few examples. Since the Shelby decision, polling place closures, consolidations, and relocations, particularly in minority and underserved communities, have dramatically increased in Georgia.

In fact, in 2015, former Secretary of State Brian Kemp issued a training document to all 159 county boards of elections ahead of the 2016 election cycle describing how they could close or consolidate polling places and voting precincts without having to preclear these changes through DOJ.

In fact, the reference to the lack of preclearance in the document was in bold type for emphasis. With the loss of preclearance, my organization and partners have spent countless hours attempting to monitor 159 boards of elections to see whether they are proposing polling place changes or other voting changes that would negatively impact minority voters.

We have spent considerable time and resources advocating against these changes in minority communities across the state. All of this increased work and diversion of resources is a direct result of the absence of preclearance post-Shelby.

But as a result of our increased monitoring efforts, we have also discovered illegal purges of minority voters by county election boards including the notorious discriminatory purging of black voters from the Hancock County registration lists by a majority board of election—white majority board of elections in 2015.

We spent considerable time and resources attending Hancock County Board of Election meetings, organizing voters, and community members to oppose these purges and successfully litigating a challenge to the purge in federal court.

We were also forced to file litigation challenging the codification of Georgia's exact match voter registration process in 2017. That was referred to earlier by Chairman Nadler regarding the 53,000 who were put on a pending list.

That litigation is ongoing and continues to drain our time and resources. Since the Shelby decision, members of the Georgia legislature have also repeatedly sought to enact legislation cutting back early voting periods, eliminating Sunday early voting and cutting back poll hours in Atlanta.

Sunday voting has proven critical for turning out voters of color in Georgia because of our Souls to the Polls initiative and other activities at churches and other events on Sundays.

Although we have successfully advocated many of these—against many of these changes, this is just another example of how the lack of preclearance has emboldened our legislators to suppress the minority vote through legislation.

If these examples of post-Shelby voter suppressions are not bad enough, the Peoples' Agenda and our partners are extremely concerned about how the rights of minority voters will be protected in the upcoming post-2020 redistricting process in the absence of the full protection of the Voting Rights Act.

Therefore, we strongly urge Congress to take action to ensure the rights of minority voters are protected in the redistricting process and put a halt to the continued efforts to suppress the vote in states and local jurisdictions in the aftermath of the Shelby decision.

Thank you.

[The statement of Ms. Butler follows:]

Good morning Constitution Subcommittee Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee.

My name is Helen Butler and I am the Executive Director of the Georgia Coalition for the People's Agenda ("PEOPLE'S AGENDA"). I have attached a short biography describing my background to my written statement as Appendix 1.

The PEOPLE'S AGENDA is a non-partisan, non-profit organization convened by the Reverend Dr. Joseph E. Lowery and it is comprised of a coalition of representatives from civil rights, human rights, peace and justice organizations, and concerned citizens of the State of Georgia. The PEOPLE'S AGENDA is based in the greater Atlanta metro area, but we have members located throughout the entire State of Georgia who help to advance our mission and achieve our organizational goals.

Our mission seeks to improve the quality of governance in Georgia; create a more informed and active electorate; and ensure responsive and accountable elected officials. A significant focus of our work is on voter empowerment and ensuring equal access to the ballot for eligible Georgians of color and under-represented communities. Our voter empowerment work includes:

- Providing voter registration assistance with an emphasis on education and mobilization. Our voter registration activities include providing voter registration assistance and education at Historically Black Colleges and Universities (HBCUs), high schools, naturalization ceremonies, community events, and at other locations across the state;

- Conducting town hall meetings, candidate forums and asking candidates to respond to questionnaires in order to provide valuable information to voters to give them opportunities to learn about the candidates' positions and to engage in dialogue with the candidates;

- A "Get Out the Vote" campaign, which is used in central locations throughout the state to encourage voter turnout;

- Our Election Protection Project, which informs voters of their rights and provides immediate relief when problems are encountered by voters on or before Election Day; and,

- Our "Vote Connection Center" provides training and technical assistance to nonprofit organizations and individuals through effective issue campaign organizing and civic engagement.

The PEOPLE'S AGENDA has always been dedicated to fighting for the voting rights of Georgia's citizens through public education, training, advocacy and litigation. When necessary, we have been forced to spend even more time and resources fighting discriminatory voting laws and policies and practices at the state and local levels in the wake of the Supreme Court's 2013 decision in Shelby County v. Holder due to the lack of the preclearance process.

Today I will provide you with some examples of barriers to the ballot faced by voters of color in Georgia since the Shelby County decision and how my organization and others have been forced to divert significant time and resources to monitoring voting changes at the state and local levels and to take action in response to changes which deny Georgians of color an equal opportunity to participate in the political process.

Polling Place Closures, Consolidations and Moves

In the aftermath of the Shelby County decision in 2013, many of Georgia's county boards of election proposed or took action to close, consolidate or move polling locations—oftentimes in areas primarily serving voters of color and in underrepresented communities. These changes can discourage and confuse voters and lead to depressed turnout.

The PEOPLE'S AGENDA and other civic engagement organizations have been forced to devote a significant amount of time and resources to monitoring proposals to close, consolidate or move polling locations across the state's 159 counties. Our work dealing with these polling place changes has included issuing pubic records requests for county boards of election minutes and agendas; sending staff and coalition members to observe and make comments at boards of election meetings; submitting written objections to proposals to close or change polling locations, and organizing rapid response actions with community members who are impacted by these changes.

In the aftermath of the Shelby County decision and in the absence of preclearance, we often have little or no reasonable advance notice of these polling place changes; there has been a lack of transparency in the stated rationales for these changes in minority communities; and we are often forced to turn our attention toward organizing a rapid response in an attempt to stop or ameliorate these changes while juggling our other important organizational initiatives and priorities.

Prior to the Shelby County decision, county boards of election were required to submit polling place and voting precinct changes to the Department of Justice ("DOJ") for preclearance to ensure that the changes did not retrogress the ability of minority voters to elect candidates of their choice. The preclearance process prevented many of these changes from taking effect and acted as a deterrent to the adoption of such changes.

While the PEOPLE'S AGENDA and our state partners have achieved some success in stopping or ameliorating the scope of some polling place changes post-Shelby, we have been unable to prevent them all from taking effect.

Consequently, we often have to devote even more time and resources to assist voters impacted by these changes. Since polling place closures and relocations are not always widely publicized by county boards of election, voters often show up to vote on Election Day at their former polling place and are surprised to learn that the poll has moved. Voters who are used to walking to their polling place and learn on Election Day that the poll has been moved several miles away may be unable to travel to the new poll that day, especially if there is no accessible public transit. Some voters may have other commitments with their jobs, childcare or other responsibilities which prevent them from spending more time traveling to the new polling location and, as a result, they are forced to forego participating in the election. Restoration of preclearance would help provide

notice and transparency to polling place changes in Georgia, help to prevent discriminatory changes from taking effect and give voters the opportunity to participate in the process.

Some of the post-Shelby efforts to close, consolidate or move poll locations by county boards of elections in Georgia have included, but are not limited to:

- A proposal to close all but two polling places in Randolph County, which would have disproportionately impacted voters of color and suppressed the minority vote in this economically challenged, rural county, was tabled after the PEOPLE'S AGENDA and other advocacy groups organized community opposition to the plan;

- A proposal to eliminate all but one of the City of Fairburn polling places, even though the number of polling places had been increased in recent years because of long lines on Election Day, was rescinded following advocacy efforts by the PEOPLE'S AGENDA and other groups;

- A proposal to eliminate all but one of Elbert County precincts and polling locations to the detriment of voters of color in a rural county with no robust public transit service was rescinded after opposition by advocacy groups and voters;

- The PEOPLE'S AGENDA and other groups have led advocacy efforts to oppose polling place and precinct changes in Fulton County in the wake of Shelby with some success;

- A proposal to close 2 of 7 precincts and polling places in Morgan County after the county previously reduced the number of polling locations from 11 to 7 in 2012, was rejected after the board considered opposition to the plan by the PEOPLE'S AGENDA.

- A proposal to reduce the number of precincts and polling locations from 36 to 19 in Fayette County was tabled in the face of opposition by the PEOPLE'S AGENDA, other civic engagement groups and voters;

- A proposal to consolidate all polling locations to a single location in Hancock County, a majority-Black, economically challenged, rural county with no regularly scheduled public transit, was tabled after the PEOPLE'S AGENDA, other civic engagement groups and voters organized against the proposal;

- A proposal to eliminate 20 of 40 precincts and polling locations in majority-Black and economically challenged neighborhoods in Macon-Bibb County was scaled back as a result of advocacy efforts by the PEOPLE'S AGENDA and other civic engagement groups; and,

- A proposal by the Macon-Bibb County Board of Elections to move a polling location in a majority-Black precinct from a public gymnasium to a Sheriff's Office was defeated only after 20% of the registered voters in the precinct signed a petition opposing the move.

Georgia's Exact Match Voter Registration Process

The PEOPLE'S AGENDA, voters and advocates were forced to bring multiple lawsuits during the past ten years challenging various iterations of the state's "exact match" voter registration process that was demonstrated to prevent Georgia's eligible people of color from completing the voter registration process.[1] In fact, just prior to the 2018 mid-term election, the Associated Press reported that there were more than 53,000 voter registration applications on hold because of Georgia's "exact match" process—the vast majority of which had been submitted by Georgians of color.[2]

Georgia's "exact match" voter registration process required that certain identity information (name, date of birth, driver's license or Social Security number) from a voter registration form had to "exactly match" information about the applicant on file with the state's Department of Driver's Services or Social Security Administration. If the information was not an "exact match," the application was put into pending status, the applicant was not registered to vote and the application was subject to cancellation. If the application was cancelled, the applicant would be required to start the registration process over again.

In many cases, discrepancies preventing these applicants from registering to vote were caused through no fault of the applicant, such as errors made by county registrars' offices when they entered the registration form data into the state's Enet voter registration system or because of existing errors in the Driver' Services or Social Security Administration's databases. Discrepancies as minor as a missing hyphen in a hyphenated last name, the transposition of a single letter in a name, or the use of a shortened version of the applicant's name (Tom versus Thomas), would result in a non-match that would prevent the applicant from completing the registration process, unless the applicant undertook additional efforts to resolve the issue with county registrars' offices.

The "exact match" process was also shown to prevent eligible Georgians who are United States citizens from completing the registration process due to the fact that the process relies upon outdated citizenship data collected by the Georgia Department of Driver's Services when a non-citizen obtains a limited term driver's license in the state. Since that data is not automatically updated when a person becomes a naturalized citizen, new Americans are flagged as potential non-citizens when they register to vote—even though they are citizens who are entitled to register and vote.

Although DOJ precleared an early iteration of the "exact match" process in 2010 when it was an administrative process created by the Secretary of State, the state legislature and governor modified it when the "exact match" process was codified into Georgia law with the passage of House Bill 268 in 2017.[3] By that time, the PEOPLE'S AGENDA and other organizations involved in litigation challenging the process had demonstrated that it disproportionately and negatively

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[1] See *Morales v. Handel*, Civil Action No. 1:08–CV–3172, 2008 WL 9401054 (N.D.Ga. 2008); *Georgia State Conference of the NAACP v. Kemp*, Civil Action No. 2:16-cv-00219-WCO (N.D.Ga. 2016); *Georgia Coalition for the People's Agenda v. Kemp*, 1:18-CV-04727-ELR (N.D..Ga. 2018).

[2] Ben Nadler, Voting rights become a flashpoint in Georgia governor's race, AP, October 9, 2018, https://www.apnews.com/fb011f39af3b40518b572c8cce6e906c.

[3] http://www.legis.ga.gov/Legislation/20172018/170669.pdf

impacted the ability of African American, Latino and Asian American applicants to complete the voter registration process. In the absence of the preclearance process post-Shelby, HB 268 went into effect and continued to disproportionately prevent Georgians of color from completing the voter registration process through the 2018 mid-term elections.

As litigation challenging the law continued in the aftermath of the 2018 mid-term elections, the Georgia legislature chose to largely abandon the "exact match" process with respect to identity information when it passed House Bill 316 in the 2019 legislative session and the bill was signed into law by Governor Kemp.[4] While the PEOPLE'S AGENDA and other organizations who joined with us in the litigation considered the abandonment of the "exact match" requirement for identity information to be a victory, the enactment of HB 316 demonstrated that no legitimate purpose had been served by the state's long-standing requirement that the name, date of birth, driver's license or Social Security number exactly match the same information about the applicant on other government databases.

While the legislature and Governor Kemp finally abandoned the exact identity match requirement, they have done nothing to remedy the routine flagging of Georgia's United States citizens as potential non-citizens because of the state's continued use of outdated citizenship records in the voter registration process. The PEOPLE'S AGENDA and other civic engagement organizations believe that the state's refusal to reform the deficient citizenship match process has more to do with the current anti-immigrant mood within certain segments of Georgia's state government and legislature than with any legitimate rationale that this process is warranted to prevent non-citizens from registering to vote—particularly when the process relies on outdated citizenship data that does not reflect current information about the citizenship of the applicants.

As a result, the deficient and discriminatory citizenship match process has been allowed to continue, delaying or preventing Georgians who are United States citizens from completing the voter registration process. The PEOPLE'S AGENDA will be forced to continue to divert time and resources to the litigation challenging this process for the foreseeable future in the absence of preclearance.

Voter Purges at the State and Local Levels in Georgia

In a 2018 report, the Brennan Center for Justice found that states previously covered by Section 5 of the Voting Rights Act had shown significant increases in the numbers of voters purged from the voter registration rolls post-Shelby.[5] In fact, the report found that Georgia purged approximately twice as many voters (1.5 million) between 2012 and 2016 than the state purged between 2008 and 2012. While many of these purges are attributable to the state's "use it or lose it" law that targets voters for removal after a period of inactivity, local county boards of election have also played an active, and sometimes unlawful and discriminatory role, in the purging of voters of color from the from the registration rolls to suppress the vote.

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[4] http://www.legis.ga.gov/legislation/en-us/display/20192020/hb/316

[5] Jonathan Brater, Kevin Morris, Myrna Pérez, and Christopher Deluzio Purges: A Growing Threat to the Right to Vote, Brennan Center for Justice, Juyl 20, 2018, https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.pdf.

One of the most notorious post-Shelby purge cases involved the removal of Black voters from the voter registration rolls by the majority white Hancock County Board of Elections and Registration during the summer and fall of 2015 before a hotly contested municipal election in the City of Sparta in which white candidates challenged long-term Black incumbents. All but two of the challenged voters were Black. The challenge proceedings resulted in the removal of 53 voters from the voter registration list. Many more eligible voters were threatened with removal from the rolls even though they were properly registered to vote in the county.

I learned about the efforts to remove Black voters from the registration list in Hancock County from voters in the community while I was helping to organize opposition to the County's efforts to close and consolidate polling locations. The PEOPLE'S AGENDA, along with the Georgia State Conference of the NAACP, challenged these purges in federal court after the board refused to resolve the matter before we proceeded to litigation.

After time-consuming and expensive litigation, the parties eventually agreed to resolve the case with a consent order in which illegally purged voters were restored to the registration rolls, the board agreed to implement reforms to its purge processes, an independent "examiner" was appointed by the Court to monitor the board's compliance with the consent order, and the Court retained jurisdiction over the matter for a period of five years.[6]

Since the Hancock County matter, the PEOPLE'S AGENDA has learned about other efforts made to purge voters improperly from the voter registration rolls in Laurens and DeKalb Counties. The PEOPLE'S AGENDA has been forced to divert time and resources to the investigation of these purges and may be forced to commence litigation in the event these purges cannot be resolved informally.

In addition, the PEOPLE'S AGENDA receives complaints from individuals who have difficulty restoring their right to vote following a felony conviction or who are improperly purged due for a felony. Due to delays in county boards of election receiving timely updates from the Georgia Secretary of State and/or the Georgia Department of Corrections, returning citizens are sometimes denied voter registration even after they have fully completed the terms of their sentences.

Redistricting

The 2021 redistricting cycle in Georgia will be the first redistricting cycle in the state in many years that will take place without the full protections of Section 5 of the Voting Rights Act. We fully expect that conservatives in the Georgia legislature will continue a practice of engaging in secretive redistricting processes that provide little to no transparency or opportunities for voters to participate in the process in order to ensure that the redistricting plans adopted by the legislature and signed by the Governor will not dilute minority voting strength or discriminate against minority voters. In the absence of preclearing those redistricting plans, the PEOPLE'S AGENDA expects that it will expend significant time and resources for research, advocacy, and potentially time consuming and expensive litigation during the 2021 redistricting cycle.

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[6] *See Georgia State Conference of NAACP v. Hancock Cty. Bd. of Elections & Registration*, No. 5:15-CV-00414 (CAR), 2018 WL 1583160, at *1 (M.D. Ga. Mar. 30, 2018).

Absentee Ballot Issues

Ahead of the 2018 midterm elections, the PEOPLE'S AGENDA and other civic engagement organizations successfully sought emergency relief in federal court to block the practice of allowing election officials with no prior training in signature verification to reject absentee ballots if they believe the signature on the ballot does not match the voter's signature on file. This emergency relief also prevented them from rejecting absentee ballots based upon immaterial omissions or mistakes on the absentee ballot envelopes, without allowing the voters a reasonable opportunity to cure the issue so the ballots could be counted.

The PEOPLE'S AGENDA also became aware that absentee ballots, including ballots that were sent from abroad, military facilities, and other locations had not been delivered to the Macon-Bibb County Board of Elections in a timely manner by the United States Post Office. Following our investigation, the PEOPLE'S AGENDA, along with the Lawyers' Committee for Civil Rights Under Law, submitted correspondence to Congressman Sanford Bishop and other members of Congress requesting an investigation.

Efforts to Cutback or Eliminate Sunday Early Voting and Atlanta Poll Hours

Following the Shelby County decision in 2013, the Georgia legislature has repeatedly attempted to cut back early voting hours and Sunday early voting schedules. The legislature also sought to cut back extended poll hours for municipal elections in the City of Atlanta, the most populous city in the state, in 2018.[7]

The most recent attempt to enact these cut-backs occurred during the 2018 legislative session with the filing of HB 363 by conservative legislators. HB 363 would have forced polls in the majority-Black City of Atlanta to close an hour earlier than under existing law and would have eliminated early voting on the Sunday before Election Day, a high turnout day for Black voters due to "Souls to the Polls" events that encourage voters to cast ballots early after attending church.

As a result of these efforts in the legislature to suppress turnout by minority voters, the PEOPLE'S AGENDA and other civic engagement organizations were forced to divert time and resources to organizing opposition to the legislation and to prepare for protracted legal battles if the advocacy strategy proved unsuccessful. This type of legislation would most likely be blocked if preclearance was reinstated.

Conclusion

The elimination of the preclearance process post-Shelby has put the burden of monitoring, investigating, advocating, and litigating challenges to voting changes that negatively impact voters of color on my organizations and our sister organizations. This has resulted in a drain on our resources, diverting time from our staff and volunteers when we are also continuing to move forward with our other civic engagement programs and organizational goals.

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[7] Kira Lerner, UPDATED: Georgia bill that would eliminate Sunday voting and suppress black turnout fails, Think Progress, March 16, 2018,https://thinkprogress.org/georgia-sunday-voting-cut-9c1c2ffafd18/.

The loss of preclearance has also resulted in a lack of transparency, often coupled with little to no reasonable advance notice of adverse voting changes, at both the state and local level. Prior to the Shelby decision, preclearance served as a deterrent, which helped to prevent some discriminatory voting changes from being proposed at the state or local level.

The PEOPLE'S AGENDA and our sister organizations will continue our important work to protect the vote, eliminate barriers to the ballot box, and to ensure equal participation in the political process for Georgians of color and underrepresented communities. However, we are extremely concerned about the 2021 redistricting cycle without the full protection of the Voting Rights Act and hope that Congress will pass legislation to ensure that all eligible Georgia citizens who wish to cast a ballot will be able to do so.

Biography of Helen Butler

Helen serves as Executive Director of the Georgia Coalition for the Peoples' Agenda, a non-profit organization comprised of representatives from the human rights, civil rights, environmental, labor, women, young professionals, youth, elected officials, peace and justice groups throughout the State of Georgia and other southeastern states, convened by Dr. Joseph E. Lowery, that advocates for voting rights and justice issues. She was recruited to join the Coalition for the Peoples' Agenda in 2003 as the State Director by Rev. James Orange (Leader) and was able to increase the membership of the organization to over sixty statewide and local organizations as well as, promote collaborative issue campaign organizing activities throughout Georgia, nationally and in the southeastern region. In keeping with the People's Agenda commitment to quality education, criminal and juvenile justice reform, protecting the right to vote, economic justice and development, and other social justice issues, she has formed strategic alliances to improve quality of life for communities of color.

She serves as the Convener of the Black Women's Roundtable of Georgia as an affiliate of the National Coalition on Black Civic Participation to promote health and wellness, economic security, education and global empowerment of Black women.

Prior to joining the non-profit world, she served as Vice President of Human Resources for retail and wholesale grocery businesses for over 20 years, as well as, an Accountant for General Motors Corporation in Doraville and the Central Office in Warren, Michigan. While in the Graduate Public Administration studies at the University of Georgia, she served as Administrative Assistant for Athens-Clarke County Community Coordinated Child Care (4-C) where she developed and implemented a functional budgeting system.

Biography of Helen Butler

She serves on the Morgan County Board of Elections and served as a past member of the State of Georgia Help America Vote Act Advisory Committee (HAVA). In 2013, she was appointed to serve on the U. S. Commission on Civil Rights as a member of the Georgia Advisory Committee. She serves on the Board of Directors for ProGeorgia, the State Voices Civic Engagement Table. She has served on the Board of Directors for Women's Actions for New Directions (WAND), Board of Directors for Colonial Stores' Employees' Credit Union, Board of Directors for YES! Atlanta (Youth Program), Founding member of the Zeta Psi Chapter of Delta Sigma Theta Sorority at the University of Georgia, Advisory Board of Big Brothers/Big Sisters, Center Manager for Junior Achievement, Life Member of the NAACP, Vice President of Metro Atlanta Personnel Society, Society for Human Resources Management, and Industrial Relations Research Association.

She served on the Fulton County Complete Count Committee and the Georgia Complete Count Committee for the 2010 Census that targeted the African, African American, Afro-Latino and Caribbean communities. The "I Matter I Count – Count Me Black" theme for the 2010 Census highlighted the need to get immigrant communities to check the box "Black" on the questionnaire so that counts for their neighborhoods would be accurate and would impact funding and representation. She currently serves on the City of Atlanta's 2020 Complete Count Committee and the State Civic Engagement Table's Complete Count Committee.

She has received recognition for the 2019 Dr. C.T. Vivian Courage Award by Let Us Make Man, Atlanta's Top 100 Black Women of Influence 2018 by the Atlanta Business League; Georgia Gem of the Year 2018 by Women of Distinction; Activism from the Apex Museum (2016); Delta Sigma Theta Sorority Southern Region 2016 Public Policy Change Agent; the 2015 Chairman's Award of the Democratic Party of Georgia; 2015 Terrell County Branch NAACP Social Justice Award; the highest recognition for community member of the City of Atlanta -- 2014 Phoenix Award; 2013 Community Service Champion for Civic Engagement by the Urban League of Greater Atlanta, 2013 Epic Women Leadership in Government, National Coalition on Black Civic Participation's Black Women's Roundtable Voting Rights and Social Justice Leadership Award (2013), recognition by the City Council of the City of Atlanta, The President of Atlanta City Council's Community Service Award (2012), Gospel Hip Hop Woman Warrior Award (2012), 2009 Outstanding Georgia Citizen by Secretary of State, 2009 Unsung Shero Award by Concerned Black Clergy of Atlanta, 2010 Rainbow/PUSH Fannie Lou Hammer Award, Delta Sigma Theta's Atlanta Alumnae Chapter (2008), 2008 Douglass-Debs Award, Georgia Stand Up 2006 Policy Institute for Civic Leadership, Georgia Human Rights Union, Who's Who Among African Americans, 1976; Outstanding Young Women of America, 1983; and 2002 National Association of Secretaries of State Award for Voter Education.

Helen is a native of Morgan County, Georgia. Graduated with honors from Pearl High School in Madison, GA in 1966 as Salutatorian and National Merit Scholar. As one of the first 50 African American students to attend the University of Georgia after the integration of the school by Charlene Hunter - Gault and Hamilton Holmes, she received a Bachelor of Business Administration from the University of Georgia with a major in Accounting. She also studied and served as a Recruiter for the Masters of Public Administration program at the University of Georgia. She was certified as an Issue Campaign Organizer by the Midwest Training Academy in 2000. She is a member of the Mt. Zion Missionary Baptist Church.

Mr. COHEN. Thank you, Ms. Butler. Thank you very much.

Our next witness is Mr. James Tucker. He is an attorney with the law firm of Wilson Elser in Las Vegas, Nevada. He is one of the founding members of the Native American Voting Rights Coalition and serves as a pro bono voting rights counsel to the Native American Rights Fund, or NARF.

He was co-counsel with NARF—I guess it is NARF—in *Toyukak* v. *Tribal*—close enough?

Mr. TUCKER. Good work.

Mr. COHEN. First language assistance case under the VRA, fully tried decision since 1980. Co-counsel with NARF and ACLU on several other language and voter assistance cases and in cases challenging the Constitution of Section 5.

Mr. Tucker holds a doctor of science of laws and Master of laws from the University of Pennsylvania, JD from the University of Florida, and a Master of public administration degree from the University of Oklahoma, and a Bachelor of Arts degree in history from the Barrett Honors College at Arizona State University.

Mr. Tucker, thank you, and you are recognized for five minutes.

STATEMENT OF JAMES TUCKER

Mr. TUCKER. Thank you, Mr. Chairman.

Chairman Nadler, Chairman Cohen, and Representative Jackson Lee, on behalf of the Native American Rights Fund, thank you for examining discriminatory barriers to voting.

First generation barriers are those that limit access to registration, casting a ballot, or having that ballot counted. In 2013, Shelby County suggested that those barriers are largely a thing of the past.

That conclusion simply does not reflect reality in Indian Country. Last year we completed a series of nine field hearings in seven states to evaluate Native American registration and voting.

One hundred twenty-five witnesses testified at those hearings. Their testimony showed that first generation barriers to voting are not only alive and well, but they are in fact the dominant theme of Indian Country.

The starting point for examining discriminatory barriers in voting in Indian Country is to look at the general barriers that Native voters face to political participation.

Many are geographically isolated. They lack traditional mailing addresses, relying on geographic descriptions of their homes' locations, shared mailboxes, or relatives to receive their mail. They lack broadband access. Hundreds of thousands have limited English proficiency with some of the country's highest illiteracy rates.

They are impoverished. They have low levels of educational attainment. These general barriers often are the products of discrimination themselves. For example, isolation is the result of forced removal and relocation.

In a similar vein, limited English proficiency and illiteracy are prevalent because Native Americans were denied public schooling that persisted in many places until as recently as the 1980s, over 30 years after *Brown* v. *Board of Education*.

Discrimination begets discrimination. State and local election officials frequently adopt voting procedures which, when combined with these general barriers, prevent Native voting.

In some cases, they do so ignorant of the outcome. But far too often they do so intentionally to exploit these well-known barriers and deprive Native Americans of their fundamental right to vote.

That is confirmed by the unparalleled success Native American plaintiffs achieve in voting litigation, prevailing over 90 percent of the time.

Several successful cases have challenged Native lack of access to in-person polling places in states including Nevada and South Dakota. This is what political scientists refer to as the tyranny of distance.

Polling places are located off of tribal lands several hours away by vehicle, to which many Native voters lack access or for which they cannot afford to purchase gas. We received testimony that Native voters would have to drive as much as eight hours, weather conditions permitting, to get to their polling place.

Often, these polling places are in sparsely populated non-Native communities. For example, the polling place for the 2000 tribal members of the Crow Creek Reservation in Buffalo County, South Dakota, was established in a non-Native town with just eight non-Native voters.

Alaska also was covered by Section 5. We brought two successful cases in Alaska where election officials suppressed Native voting by making what they euphemistically called a, quote, "policy decision" to deny language assistance to Alaska Native voters.

In attempting to defend their indefensible actions, officials claimed that they could provide less voting information to Alaska Natives than voters received in English.

The state even argued that the Fifteenth Amendment to the United States Constitution did not apply to Native voters. This was in 2014, more than 144 years after the amendment was ratified.

Jurisdictions have shifted to all vote by mail systems or permanent absentee voting, knowing that Native voters lack access to mail.

They likewise mandate physical addresses for voter identification, rejecting the use of tribal IDs and aware that addresses aren't available on tribal lands.

The vast majority of the barriers Native voters face today are first generation. Clearly, much work remains to be done. The progress has fallen far short of the parity suggested by Shelby County.

All of us suffer and our elected government has less legitimacy each time an American Indian or Alaska Native is prevented from registering to vote or being turned away at the polls.

We look forward to working with the subcommittee to overcome the barriers to voting rights in Indian Country.

Thank you very much for your attention. I will welcome the opportunity to answer any questions you may have.

[The statement of Mr. Tucker follows:]

Testimony of Dr. James Thomas Tucker[1]

Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary

"Discriminatory Barriers to Voting"

University of Memphis Cecil C. Humphreys School of Law

September 5, 2019

Chairman Nadler, Chairman Cohen and Ranking Member Johnson, and Committee Members, thank you for your invitation to testify at the hearing on discriminatory barriers to voting. The Native American Voting Rights Coalition (NAVRC) applauds the Subcommittee for examining this important topic.

NAVRC is a coalition of national and regional grassroots organizations, academics, and attorneys advocating for the equal access of Native Americans to the political process.[2]

Discriminatory Barriers are Widespread in Indian County.

In June 2013, the United States Supreme Court struck down the coverage formula for what has long been recognized as "the heart of the Voting Rights Act," Section 5, the Act's preclearance provisions.[3] A narrow majority concluded that "things have changed dramatically," with "voter turnout and registration rates now approach[ing] parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[4] Similarly, the District Court stated in dicta and without any evidence that certain jurisdictions like Alaska were "swept" into Section 5 coverage despite "little or no evidence of current problems."[5]

Those conclusions are just as wrong today as they were then in Indian Country and in the jurisdictions that formerly were covered for other racial and language minority groups.

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[1] S.J.D. and LL.M., University of Pennsylvania; J.D., University of Florida; M.P.A., University of Oklahoma; B.A., Arizona State University, Barrett Honors College. Attorney at Wilson Elser Moskowitz Edelman & Dicker LLP; Pro Bono Voting Rights Counsel to the Native American Rights Fund; Vice Chair, Census Bureau National Advisory Committee on Racial, Ethnic, and Other Populations (NAC).

[2] For more information about the NAVRC, *see* NARF, About the Native American Voting Rights Coalition, *available at* https://www.narf.org/native-american-voting-rights-coalition/.

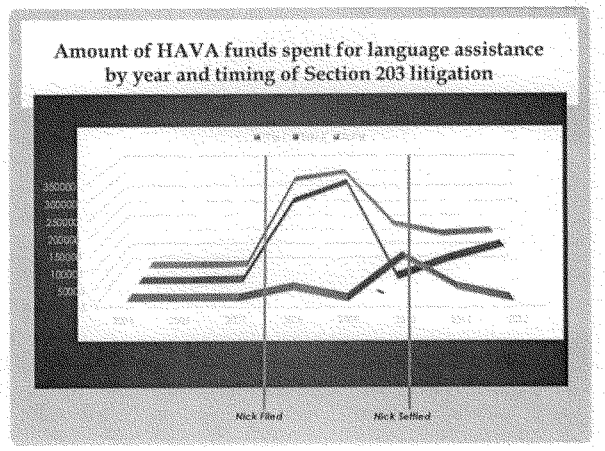
[3] *See Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

[4] *Id.* at 547.

[5] *Shelby County v. Holder*, 679 F.3d 848, 881 (D.C. Cir. 2012) (three-judge court).

While the *Shelby County* case was being litigated, Alaska was under a settlement agreement for violating the language assistance provisions in Section 203 of the Voting Rights Act ("VRA") and the voter assistance provisions in Section 208 of the VRA.[6] The agreement followed the federal court's 2008 issuance of a preliminary injunction in *Nick v. Bethel* finding that the State of Alaska had engaged in a wholesale failure to provide language assistance to Yup'ik-speaking voters in the Bethel Census Area.[7] The court noted that "State officials became aware of potential problems with their language-assistance program in the spring of 2006," but their "efforts to overhaul the language assistance program did not begin in earnest until *after this litigation*."[8] A graph depicting Alaska's federal HAVA expenditures makes that conclusion clear:

Figure 1. Alaska's Language Assistance Expenditures After Being Sued.



[6] *See* Settlement Agreement and Release of All Claims, *Nick v. Bethel*, No. 3:07-cv-00098-TMB, docket no. 787-2 (D. Alaska Feb. 16, 2010).

[7] In particular, the District Court found that the State of Alaska and other state defendants violated Section 203 of the VRA by failing to:

> provide print and broadcast public service announcements (PSA's) in Yup'ik, or to track whether PSA's originally provided to a Bethel radio station in English were translated and broadcast in Yup'ik; ensure that at least one poll worker at each precinct is fluent in Yup'ik and capable of translating ballot questions from English into Yup'ik; ensure that "on the spot" oral translations of ballot questions are comprehensive and accurate; or require mandatory training of poll workers in the Bethel census area, with specific instructions on translating ballot materials for Yup'ik-speaking voters with limited English proficiency.

Order Re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants, *Nick v. Bethel*, No. 3:07-cv-00098-TMB, docket no. 327 at 7-8 (D. Alaska July 30, 2008).

[8] *Id.* at 8 (emphasis added).

Alaska's election officials previously had used federal HAVA funds to open a new elections office in the predominately non-Native community of Wasilla, which had a population of less than 8,000.[9] However, state officials chose not to use any funds for language assistance for tens of thousands of Alaska Natives until after the *Nick* case was filed, even though that was one of the approved uses for the federal appropriation. Notably, they did so reluctantly and only after being sued. Eventually, election officials used a small percentage of the HAVA appropriation so that no state funds would have to be used to make voting accessible to Limited-English Proficient (LEP) Alaska Native voters.

At that time, Alaska had been covered under Section 5 for Alaska Natives since 1975. However, state officials had taken no steps "to ensure that Yup'ik-speaking voters have the means to fully participate in the upcoming State-run elections" in 2008,[10] a third of a century later.

Alaska Native villages outside of the Bethel region expected that the fruits of the hard-fought victory in the *Nick* litigation would be applied to other regions of Alaska where language coverage was mandated. However, Alaska officials made a "policy decision" not to do so despite the continued Section 203 coverage of several other boroughs and Census Areas. The State's own documents show that the statewide bilingual coordinator was directed to deny language assistance to those areas. Coincidentally (or not so), the bilingual coordinator's last day of employment was on December 31, 2012, the very day that the *Nick* agreement ended.

That led Alaska Native voters and villages from three covered regions, the Dillingham and Wade Hampton Census Areas[11] for Yup'ik and the Yukon-Koyukuk Census Area for the Athabascan language of Gwich'in, to file suit just a month after *Shelby County* was decided. In *Toyukak v. Treadwell*, Alaska Natives sued the State for again violating Section 203 and for intentional discrimination in violation of the United States Constitution because election officials deliberately chose to deny language assistance to other regions of Alaska even while the *Nick* settlement was in effect.

In defending the latter claim, Alaska argued that the Fifteenth Amendment was inapplicable to Alaska Native voters.[12] At the same time, state officials argued that Alaska Natives were entitled to less voting information than English-speaking voters. They rested their

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[9] U.S. Census Bureau, QuickFacts, Wasilla City, Alaska, Population estimates as of April 1, 2010, *available at* https://www.census.gov/quickfacts/fact/table/wasillacityalaska/LND110210 (population in 2010 was 7,816, of whom over 80 percent were White alone).

[10] *Id.* at 9.

[11] The area was named after Wade Hampton III, a Lieutenant General for the Confederate States of America who later served as Governor and United States Senator from South Carolina and who opposed Reconstruction. Alaska renamed the area after the Kuslivak Mountain Range following the June 17, 2015 massacre at the Charleston Emanuel African Methodist Episcopal Church by a white supremacist. *See* Lisa Demer, *Wade Hampton no more: Alaska census area honoring Confederate officer is renamed*, ANCHORAGE DAILY NEWS, July 2, 2015.

[12] *See* James T. Tucker, Natalie A. Landreth & Erin Dougherty Lynch, *"Why Should I Go Vote Without Understanding What I am Going to Vote For?": The Impact of First Generation Barriers on Alaska Natives*, 22 MICH. J. RACE & LAW 327, 361-62 (2017) (quoting trial transcripts).

argument on a paternalistic belief that the State, not the voters, should determine what voting information provided to other voters was important enough for LEP Alaska Native voters to know before exercising their fundamental right to vote.[13]

The Alaska Native voters ultimately prevailed, but only after nearly two million dollars in attorneys' fees and costs, the passage of fourteen months for the "expedited" litigation, and a two-week trial in federal court.[14] The court concluded that "based upon the considerable evidence," the plaintiffs had established that DOE's actions in the three census areas were "not designed to transmit substantially equivalent information in the applicable minority... languages."[15]

The *Toyukak* decision came just fourteen months after *Shelby County*. That victory, and many others like it in Indian Country since 2013, refute the majority's conclusion that "things have changed dramatically" and "[b]latantly discriminatory evasions of federal decrees are rare."[16] The norm in many areas like Alaska in a post-*Shelby* world is defiance and deliberate violations of federal voting rights law to suppress registration and voting by American Indians and Alaska Natives.

That is not to say that no progress has been made. Far from it. The historic 2018 election of the two first Native American women to Congress, Congresswoman Debra Haaland from New Mexico and Congresswoman Sharice Davids from Kansas, shows that great strides have occurred. Congress recognized as much in reauthorizing the expiring provisions of the Voting Rights Act in 2006.[17] Nevertheless, despite how far Native Americans have come, they remain dramatically underrepresented at every level of government. They comprise only two tenths of one percent of all elected officials in the United States, even though the 6.8 million American Indians and Alaska Natives constitute two percent of the country's 326.6 million people.[18]

Clearly, much work remains to be done. The progress has fallen far short of the blanket statement in *Shelby County* that "[v]oter turnout and registration rates now approach parity."[19] While Native "candidates hold office at unprecedented levels,"[20] representation reflecting just one-tenth of their population certainly is not the unqualified success suggested by the *Shelby County* majority.

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[13] *Id.* at 361.

[14] *Id.* at 361.

[15] *Id.* at 372.

[16] 570 U.S. at 547.

[17] *See generally* Voting Rights Reauthorization Act of 2006, Pub. L. No. 109-246, 2006 U.S.C.C.A.N. (120 Stat.) 577, § 2(b)(1) ("Significant 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.").

[18] *See* U.S. Census Bureau, American Indian and Alaska Native Heritage Month: November 2018 (Oct. 25, 2018), *available at* https://www.census.gov/newsroom/facts-for-features/2018/aian.html (2017 estimate of AIAN population alone or in combination with another race).

[19] 570 U.S. at 540 (quoting *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 202 (2009)).

[20] *Id.* at 547.

A decade after the Voting Rights Act was reauthorized, we realized that it was time to take a "temperature check" of Indian Country to determine the extent of any progress that had been made in Native American registration and voting.

In late 2017 and early 2018, led by the Native American Rights Fund, the Native American Voting Rights Coalition completed a series of nine field hearings in seven states on the state of voting rights in Indian Country.[21] Approximately 125 witnesses from dozens of tribes in the Lower Forty-Eight testified about the progress of the First Americans in non-tribal elections, and the work that remains to be done. Field hearings were not conducted in Alaska because the Alaska Advisory Committee to the U.S. Commission on Civil Rights already had a similar effort underway.

Those hearings show that the first-generation barriers that *Shelby County* found to be largely eradicated[22] remain the dominant norm for Native American voters.

Barriers include depressed socio-economic status, lower levels of educational achievement, geographic isolation, and language, among others. When those barriers are combined with methods of election that either intentionally or innocently exploit their impact, they result in vote denial. For example, geographical isolation leads to what political scientists refer to as the "tyranny of distance." When in-person registration and voting locations are placed far off of reservations and at great distances that can be 100 miles or more from Native communities, and when combined with the lack of time or resources to reach those locations, entire communities are disenfranchised.

As I will discuss, it is no coincidence that much of the post-*Shelby* litigation in Indian Country has focused on voting changes that exploit the everyday barriers that American Indians and Alaska Natives face when trying to participate in the political process.

General factors negatively impacting Native American registration and voting.

Members of the 573 federally recognized tribes[23] face many barriers to political participation. Although many other American voters share some of these obstacles, no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country. Moreover, the government-to-government relationship between the tribes and the United States is unique to the American Indian and Alaska Native population.

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[21] The field hearings were conducted at the following locations: Bismarck, North Dakota on September 5, 2017; Milwaukee, Wisconsin on October 16, 2017; Phoenix, Arizona on January 11, 2018; Portland, Oregon, on January 23, 2018; on the tribal lands of the Rincon Band of Luiseño Indians north of San Diego, California, on February 5, 2018; Tulsa, Oklahoma on February 23, 2018; on the tribal lands of the Isleta Pueblo just outside of Albuquerque, New Mexico on March 8, 2018; Sacramento, California on April 5, 2018; and on the tribal lands of the Navajo Nation in Tuba City, Arizona on April 25, 2018.

[22] 570 U.S. at 547.

[23] U.S. Dep't of the Interior, Bureau of Indian Affairs, Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1,200 to 1,205 (June 24, 2019) (listing federally recognized tribes and Alaska Native villages).

Historical distrust of the federal government:

It is impossible to fully understand voting barriers in Indian Country without starting with the bad relationship the indigenous population has had, and continues to have, with the federal government. Antipathy and distrust persist towards Federal, State, and local governments because of past (and in some cases, ongoing) actions that discriminate against Natives or that undermine the preservation of their culture and heritage.

In late 2016 and early 2017, NAVRC oversaw one of the most comprehensive in-person surveys ever conducted in Indian Country about barriers faced by Native voters. A total of 2,800 Native voters in four states completed the in-person survey.[24] In all four states, Native voters expressed the greatest trust in their Tribal Governments. Although the federal government was identified by respondents as the most trusted of non-tribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota.[25] Those negative experiences often are exacerbated and reinforced when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted.

Geographical isolation:

The isolated locations of tribal lands contribute to the political exclusion of Native Americans. Approximately one-third of all American Indians and Alaska Natives (AIAN) live in Hard-to-Count Census Tracts – roughly 1.7 million out of 5.3 million people from the 2011-2015 American Community Survey (ACS) estimates.[26] Hard-to-Count Census Tracts include those Census Tracts "in the bottom 20 percent of 2010 Census Mail Return Rates (i.e. Mail Return Rates of 73 percent or less) or tracts for which a mail return rate is not applicable because they are enumerated in 2010 using the special Update/Enumerate method."[27] The states with the greatest percentage of the AIAN population in Hard-to-Count Census Tracts reside in the western states: New Mexico (78.6 percent), Arizona (68.1 percent), and Alaska (65.6 percent).[28] Geographical isolation plays one of the most significant reasons for why those states have such a large percentage of their AIAN population in Hard-to-Count areas.

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[24] *See* The Native American Voting Rights Coalition, Survey Research Report: Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota 8, 38, 67 (Jan. 2018) ("NAVRC Report"), *available at* https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf. The Executive Summary of the NAVRC Report is available at https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf. The survey respondents included 644 Native voters in Arizona, 1,052 in Nevada, 602 in New Mexico, and 502 in South Dakota. NAVRC Report, *supra*, at 8, 38, 67.

[25] *See* NAVRC Report, *supra* note 24, at 15, 45, 77, 111. Respondents were asked, "Which government do you trust most to protect your rights?" *Id.* at 15, 45, 76-77. Among respondents in the other two states, 22.1 percent identified the federal government in Arizona and 27.4 percent identified the federal government in New Mexico. *See id.* at 77, 111.

[26] *See* The Leadership Conference Education Fund, Table 1a: States Ranked by Number of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, *available at* http://civilrightsdocs.info/pdf/census/2020/Table1a-States-Number-AIAN-HTC.pdf.

[27] *Id.*

[28] *See* The Leadership Conference Education Fund, Table 1b: States Ranked by Percent of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, *available at* http://civilrightsdocs.info/pdf/census/2020/Table1b-States-Percent-AIAN-HTC.pdf.

Isolation due to physical features such as mountains, canyons, oceans, rivers, and vast expanses of unoccupied land are compounded by an absence of paved roads to connect tribal lands with off-reservation communities. Even where roads are present, Native voters often lack reliable transportation to travel the vast distances to elections offices and county seats. Inclement weather conditions frequently make such travel impossible, particularly in early November when general elections are held.

Non-traditional mailing addresses, homelessness, and housing instability:

Access to voting in Indian Country is made substantially more difficult because of the prevalence of non-traditional mailing addresses, homelessness, and housing instability.

The Census Bureau's 2015 National Content Test (NCT) Report illustrates these points. Among all of the population groups included in the 2015 NCT, the AIAN population experienced the lowest 2010 Census mail response rate, at 57.8 percent.[29]

Non-traditional mailing addresses are prevalent among American Indians and Alaska Natives residing on tribal lands. Non-traditional mailing addresses encompass "noncity-style addresses, which the Census Bureau defines as those that do not contain a house number and/or a street name."[30] Examples of noncity-style mailing addresses include:

- General delivery
- Rural route and box number
- Highway contract route and box number
- Post office box only delivery

> Noncity-style addresses used by the Census Bureau also include location descriptions such as "BRICK HOUSE with ATTACHED GARAGE ON RIGHT," structure points (geographic coordinates), and census geographic codes including state code, county code, census tract number, and census block number.[31]

It is commonplace for homes on tribal lands to use noncity-style mailing addresses. Many homes can only be identified by a geographic location (e.g., "hogan located three miles down dirt road from Hardrock Chapter House"). Others may be located by reference to a BIA, state, or county road mile marker (e.g., "the house located on the right side of BIA-41 between highway marker 17 and highway marker 18") or intersection (e.g., the house at the intersection of BIA-41 and BIA-15"). Additionally, mailboxes may be on the side of the road far from where

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[29] *See* U.S. Census Bureau, 2015 National Content Test Race and Ethnicity Analysis Report 32, table 2 (Feb. 28, 2017) ("NCT Report").

[30] U.S. Census Bureau, 2020 Census Local Update of Census Addresses Program Improvement Project Recommendations 2 (Apr. 13, 2015) ("2020 LUCA Recommendations"), *available at* https://www2.census.gov/geo/pdfs/partnerships/2020_luca_recommendation.pdf.

[31] *Id.*

the home(s) associated with them are located, with the mailbox identified only by a General Delivery number, Rural Route, or box number. Many AIAN residents of tribal lands only receive their mail by post office box. Often, several families or generations of a single family might share a post office or general delivery box to get their mail.

The disproportionately high rate of homelessness in Indian Country is another major factor that prevents Native Americans from registering to vote and casting a ballot. According to the 2016 ACS, only 52.9 percent of single-race American Indian and Alaska Native householders owned their own home, compared to 63.1 percent of the total population.[32] According to data from the U.S. Department of Housing and Urban Development, although "only 1.2 percent of the national population self-identifies as AI/AN ... 4.0 percent of all sheltered homeless persons, 4.0 percent of all sheltered homeless individuals, and 4.8 percent of all sheltered homeless families self-identify as Native American or Alaska Native."[33] The AIAN population likewise experiences higher rates of homelessness among veterans than other population groups. Specifically, "2.5 percent of sheltered, homeless Veterans were American Indian or Alaska Native, although only 0.7 percent of all Veterans are American Indian or Alaska Native."[34]

Homelessness takes several forms in Indian Country. Witnesses at the NAVRC field hearings in Portland and San Diego testified about "couch-surfing," in which Native Americans lacking permanent housing "crash on a couch" of a friend or family member or temporarily sleep at a relative's house when they are on the reservation. According to the 2016 ACS, approximately 15.5 percent of the AIAN population was residing in a different house than the one they reported a year earlier.[35]

In Wyoming, it is estimated that 55 percent of the 11,000 members of the Northern Arapaho Tribe residing on the Wind River Indian Reservation lack permanent housing. HUD found that if couch surfing did not occur in the Navajo Nation between 42,000 and 85,000 Navajo people living on tribal lands would be homeless. HUD has estimated that nationally, 68,000 new housing units are needed on tribal lands to alleviate the housing crisis – 33,000 new homes to eliminate overcrowding and 35,000 new homes to replace deteriorated or delipidated housing units.

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[32] U.S. Census Bureau, Facts for Features: American Indian and Alaska Native Heritage Month: November 2017 (Oct. 6, 2017), available at https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html ("2017 AIAN Summary").

[33] Substance Abuse and Mental Health Services Administration (SAMHSA), Expert Panel on Homelessness among American Indians, Alaska Natives, and Native Hawaiians 5 (2012), *available at* https://www.usich.gov/resources/uploads/asset_library/Expert_Panel_on_Homelessness_among_American_Indians%2C_Alaska_Natives%2C_and_Native_Hawaiians.pdf.

[34] *Id.* at 8 (citing HUD & VA, Veteran Homelessness: A Supplemental Report to the 2010 Annual Homeless Assessment Report to Congress).

[35] *See* U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, Selected Population Profile in the United States: American Indian and Alaska Native alone (300, A01-Z99) ("2016 AIAN Profile"), *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

Frequently changing residences, with no single permanent residence, can prevent many American Indians and Alaska Natives from being able to register to vote and casting a ballot.[36]

Socio-economic barriers:

Socio-economic barriers likewise make the voting process less accessible for Native Americans. Native peoples have the highest poverty rate of any population group, 26.6 percent, which is nearly double the poverty rate of the nation as a whole.[37] The poverty rate was even higher on federally recognized Indian reservations and Alaska Native villages, at 38.3 percent.[38] The median household income of single-race American Indian and Alaska Native households in 2016 was $39,719, far below the national median household income of $57,617.[39]

Native Americans also has lower rates of educational attainment. Among the American Indian Alaska Native population 25 years of age and older, 20.1 percent had less than a high school education.[40] The unemployment rate of those aged 16 and older in the workforce was 12 percent.[41] Approximately 19.2 percent lacked health insurance,[42] and 13.4 percent of all occupied households lacked access to a vehicle, making it impossible to travel great distances to register and vote.[43]

Language barriers and illiteracy among Limited-English Proficient Tribal Elders:

Dozens of different dialects are widely spoken among the major American Indian and Alaska Native languages. Over a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home.[44] Two-thirds of all speakers of American Indian or

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[36] U.S. Department of Housing and Urban Development, "Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs (Jan. 2017), *available at* https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf.

[37] U.S. Census Bureau, Profile America Facts for Features: CB16-FF.22, American Indian and Alaska Native statistics, *available at* https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff22.html (Nov. 2, 2016) ("2016 AIAN FFF").

[38] U.S. Census Bureau, Table B17001C: Selected Population Profile in the United States: 2015 American Community Survey 1-Year Estimates (last visited on Feb. 7, 2018), *available at* https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_1YR/B17001C/0100000US|0100089US.

[39] 2017 AIAN Summary, *supra* note 32.

[40] *See* 2016 AIAN Profile, *supra* note 35.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] 2016 AIAN FFF, *supra* note 37 (27 percent).

Alaska Native languages reside on a reservation or in a Native village,[45] including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy.[46]

Alaska, Arizona, and New Mexico have the largest number of Limited-English Proficient (LEP) persons voting-age citizens (that is, U.S. citizens who are 18 years of age and older). Between them, they account for approximately 87 percent of all American Indians and Alaska Natives who reside in an area required to provide language assistance in an Alaska Native or American Indian language:

Figure 2. Comparison Between the Top Three States with Limited-English Proficient AIAN Populations.

Alaska	Arizona	New Mexico
54,275 Alaska Natives live in one of the 15 areas covered by Section 203 for an Alaska Native language.	123,470 American Indians live in one of the six counties covered by Section 203 for an American Indian language.	132,955 American Indians live in one of the 10 counties covered by Section 203 for an American Indian language.
At least 10 percent of all Alaska Natives in covered areas are of voting age and LEP in an Alaska Native language.	At least 14.5 percent of all American Indians in covered areas are of voting age and LEP in an American Indian language.	At least 8 percent of all American Indians in covered areas are of voting age and LEP in an American Indian language.
LEP Alaska Natives are located in approximately 200 villages and communities in the 15 covered areas.	Approximately 96.7 percent of all American Indians who are LEP and reside in a county covered for Native language assistance reside in just three counties: Apache, Coconino, and Navajo.	91.1 percent of all American Indians and 89.3 percent of all voting-age American Indians who are LEP and live in a covered county live in just four counties: Bernalillo, McKinley, Sandoval, and San Juan.

Nationally, 357,409 AIAN persons reside in a jurisdiction covered by Section 203 of the Voting Rights Act, where assistance must be provided in the covered Native language.[47] Alaska Native language assistance is required in 15 political subdivisions of Alaska, which "is an increase of 8 political subdivisions from 2011."[48] Assistance in American Indian languages is required in 35 political subdivisions in nine states, "up from the 33 political subdivisions of five states covered in the 2011 determinations."[49]

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[45] *See* U.S. Census Bureau, Native American Languages Spoken at Home in the United States and Puerto Rico: 2006-2010 at 2 (Dec. 2011).

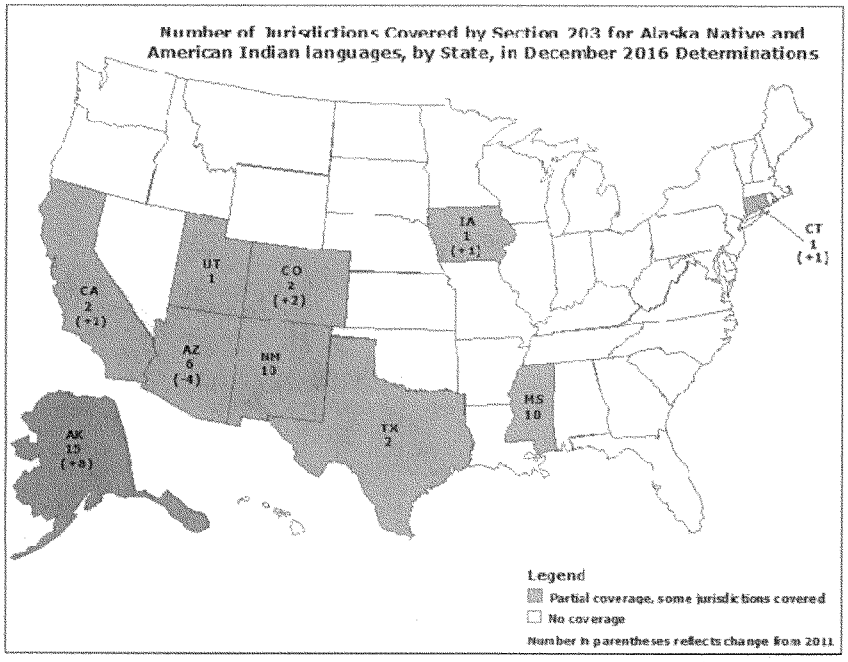
[46] *See* U.S. Census Bureau, Public Use Data File for the 2016 Determinations under Section 203 of the Voting Rights Act, *available at* https://www.census.gov/rdo/data/voting_rights_determination_file.html (Dec. 5, 2016).

[47] U.S. Census Bureau, Press Release: Census Bureau Releases 2016 Determinations for Section 203 of the Voting Rights Act (Dec. 5, 2016), *available at* https://www.census.gov/newsroom/press-releases/2016/cb16-205.html.

[48] AAJC, NALEO & NARF, Voting Rights Act Coverage Update 3 (Dec. 2016) ("Section 203 Update"), *available at* https://advancingjustice-aajc.org/sites/default/files/2016-12/Section%20203%20Coverage%20Update.pdf.

[49] *Id.*

Figure 3. Jurisdictions required to provide language assistance in Native languages.



Language poses a barrier to political participation for several reasons. First, LEP American Indians and Alaska Natives, like other LEP populations, are generally among the hardest to reach among all voters. Outreach and publicity communications written or transmitted in English usually are not understood unless they are translated into the applicable Native language. In-person communication through trained bilingual enumerators yields the best results, but can be confounded by the lack of enumerators fluent in the language, geography, and adequate funding to reach the LEP population.

Figure 4. American Indian and Alaska Native languages covered by Section 203, by State.

Language	Political subdivisions	Covered states
Navajo	11	AZ, NM, UT
Choctaw	10	MS
Yup'ik (Alaska Native)	9	AK
Inupiat (Alaska Native)	6	AK
American Indian (all other AI Tribes)	5	CA, CT, IA, TX
Apache	5	AZ, NM
Ute	4	CO, NM, UT
Alaska Athabascan (Alaska Native)	3	AK
Pueblo	3	NM, TX
Aleut	1	AK

Moreover, the difficulty in preparing complete, accurate, and uniform translations of voting materials (including instructions) is compounded by the absence of words in Native languages for many English terms. Frequently, that requires that concepts be interpreted to communicate the meaning of what is being asked, rather than word-for-word translations. Identification of those concepts usually requires closely coordinating with trained linguists from Native communities to provide effective translations.

Figure 5. "I voted" sticker in English and Yup'ik used in Alaska.

Illiteracy also is very prevalent among LEP American Indians and Alaska Natives, especially among Tribal Elders. In areas covered by Section 203 of the Voting Rights Act, illiteracy among LEP voting-age citizens is many times higher than the national illiteracy rate of 1.31 percent in 2016.[50]

In Alaska, in covered areas for which Census data is available, the illiteracy rate among LEP Alaska Natives of voting age is 40 percent for Aleut-speakers, 28.4 percent for Athabascan-speakers, 15 percent for Yup'ik-speakers, and 8.2 percent for Inupiat-speakers.[51] In Arizona, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 25 percent for Navajo-speakers and 6.8 percent for Apache-speakers.[52] In Mississippi, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 34 percent for Choctaw-speakers.[53] Finally, in New Mexico, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 19.1 percent for Navajo-speakers and 6.7 percent for Apache-speakers; data was not available for speakers of the Pueblo languages.[54]

In areas with LEP Tribal Elders who are hampered by illiteracy, language assistance in the voting process generally must be done in-person by a bilingual enumerator fully fluent in the Native language and applicable dialect.

Lack of broadband access and Internet use:

Among all population groups, the digital divide is most profoundly felt in Indian Country. People residing in tribal areas have virtually no access to computers or the Internet, with the Federal Trade Commission estimating broadband penetration in tribal communities at

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[50] *See* U.S. Census Bureau, Flowchart of How the Law Prescribes the Determination of Covered Areas under the Language Minority Provisions of Section 203 of the Voting Rights Act 2 (Dec. 5, 2016), *available at* https://www.census.gov/rdo/pdf/2_PrescribedFlowFor203Determinations.pdf. "Illiteracy" is defined as including those persons who "have less than a 5th grade education." *Id.*

[51] *See* U.S. Census Bureau, Voting Rights Determination File: Section 203 Determinations (Dec. 5, 2016), Public Use Data File and Technical Documentation (Excel spreadsheet of "Determined Areas Only") ("Section 203 Determination File"), *available at* https://www.ccnsus.gov/rdo/data/voting_rights_determination_file.html. In Alaska, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 30.5 times higher for Aleut-speakers; 21.7 times higher for Athabascan-speakers; 11.4 times higher for Yup'ik-speakers; and 6.3 times higher for Inupiat-speakers. *Compare id. with supra* note 50 and accompanying text.

[52] *See* Section 203 Determination File, *supra* note 51. In Arizona, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 19.1 times higher for Navajo-speakers; and 5.2 times higher for Apache-speakers. *Compare id. with supra* note 50 and accompanying text.

[53] *See* Section 203 Determination File, *supra* note 51. In Mississippi, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 25.9 times higher for Choctaw-speakers. *Compare id. with supra* note 50 and accompanying text.

[54] *See* Section 203 Determination File, *supra* note 51. In New Mexico, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 14.6 times higher for Navajo-speakers; and 6.7 times higher for Apache-speakers. *Compare id. with supra* note 50 and accompanying text.

less than ten percent.[55] Not surprisingly, the hardest to count Census areas for the rural AIAN population are all on reservations or in Alaska Native villages lacking reliable and affordable broadband access. To illustrate that fact, a mapping tool shows how Hard-to-Count Census Tracts correlate with reservations.[56]

Even where some broadband access may be available, depressed socio-economic conditions often prevent American Indians and Alaska Natives from having access to or using online resources including the Internet. For example, the cost or inconvenience of driving to a location where Internet access can be obtained, or the cost of getting Internet service in those areas in Indian Country where it may be offered, prevents many American Indians and Alaska Natives from going online.[57]

The digital divide is also a generational phenomenon in Indian Country. In NAVRC's field hearing in Bismarck, we heard testimony from Montana tribal members who described the widespread use of the Internet and smart phones by younger tribal members, despite the lack of use by Elders.

With the increasing use of online resources to register voters and disseminate voting information, accommodations need to be made for Native voters on tribal lands until broadband is fully accessible.

Summary of some of the findings from the field hearings in Indian Country.

A detailed report of findings from the Native American Voting Rights Coalition's field hearings will be provided to this Subcommittee. What follows is a summary of some of the key findings from those field hearings. The Coalition's final report will have much more detailed information about those findings, as well as other findings.

Finding 1: Non-traditional mailing addresses are used to disenfranchise Native voters.

Several Native witnesses testified about how their use of a non-traditional mailing address has either made it difficult to register to vote or has disenfranchised them altogether. This testimony has been consistent throughout Indian Country, regardless of the location of the tribal lands:

- At the Bismarck, North Dakota field hearing, an elected county official testified that many voters residing on the Crow Creek Indian Reservation in Buffalo County, South Dakota have had difficulty

[55] Parkhurst et al., The Digital Reality: E-Government and Access to Technology and Internet for American Indian and Alaska Native Populations 3, *available at* https://pdfs.semanticscholar.org/4bb4/f5efcd1cf4ec342b5d45dd824bb10d9bb0f2.pdf.

[56] *See* Mapping Hard to Count (HTC) Communities for a Fair and Accurate 2020 Census, *available at* http://www.censushardtocountmaps2020.us/.

[57] *See* Gerry Smith, *On Tribal Lands, Digital Divide Brings New Form of Isolation*, HUFFPOST, Apr. 23, 2012, *available at* https://www.huffingtonpost.com/2012/04/20/digital-divide-tribal-lands_n_1403046.html.

registering to vote because of non-traditional addresses. That problem persisted even after efforts were undertaken to identify physical addresses to use in the County's 911-emergency notification system.

- At the Portland, Oregon field hearing, voters from the Colville and Yakama Reservations in eastern Washington State testified that many tribal members were unable to register to vote to receive their ballot by mail for state elections because they only had post office boxes available that could not be readily correlated with a physical address where they actually lived. Notably, after the field hearing, Washington State enacted legislation that offers some relief for Native voters.

- At the San Diego field hearing, a member of the Torrez Martinez Desert Cahuilla Indian, located just west of the Salton Sea in California, did not have a traditional mailing address and was only able to vote because of the timely intervention of a family friend who was running for office and was able to get a waiver of the registration requirement for a physical address.

- At the Tuba City, Arizona field hearing, a member of the Navajo Nation testified that like many tribal members, he has multiple addresses that make it more difficult to vote by mail. His family's home on tribal lands does not have a physical address. He shares a post office box with several family members in Page, located approximately 75 miles up the highway. Some of his mail is delivered to the Chapter House in Tuba City. Other mail is delivered to the home where he resides in Flagstaff, where he is a school counselor. He often is unable to check his post office in Page more frequently than every 30-45 days. The 130 mile drive from Flagstaff to Page prevents him from getting his mail-in ballot in time to return it by the deadline to be counted.

Finding 2: Distances to in-person voting locations disenfranchise Native voters.

The tremendous distance to in-person locations to register to vote and to cast ballots also disenfranchises Native voters. Two examples from Nevada illustrate this point.

Elko County is the second largest county in Nevada and the fourth largest county in the United States. Distances between communities are made even greater by the additional mileage necessary to going around the mountain ranges throughout the County.

Figure 6. Communities and mountain ranges in Elko County, Nevada.

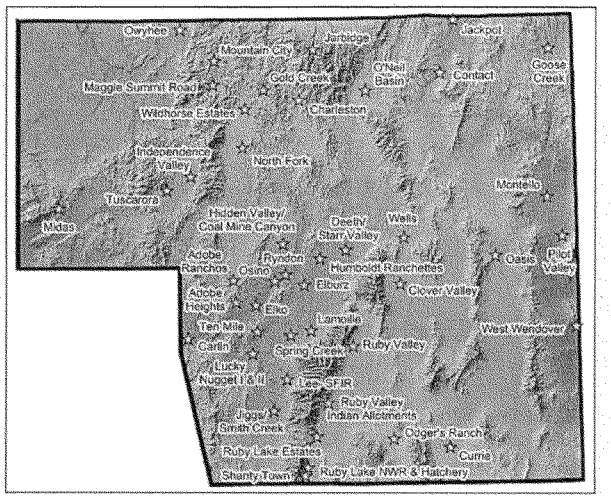
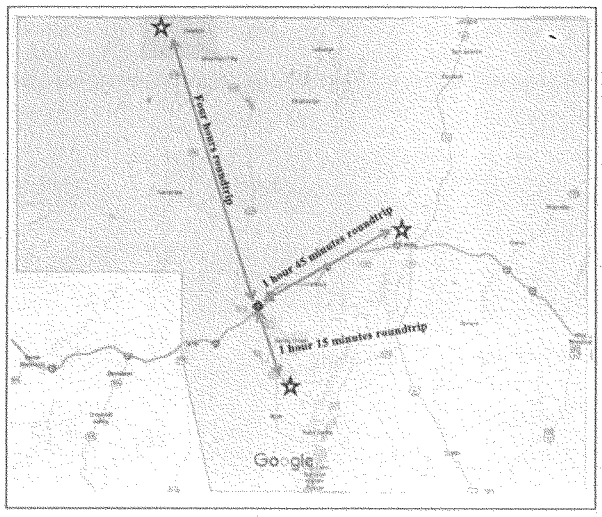


Figure 7. Driving distances from tribal lands to early voting location in Elko County, Nevada.



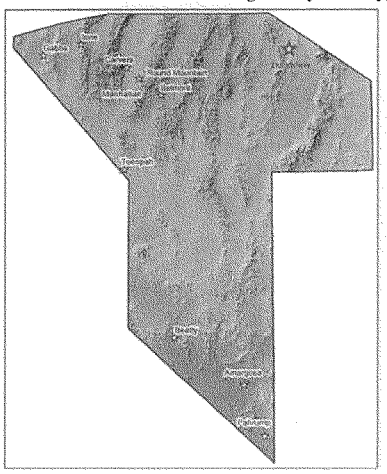
Elko County has six polling places for 41 precincts. All six polling places are located in the southern and central part of the county, including four in and around Elko. Twelve of the "rural" precincts were designated for all-mail voting.

The Duck Valley Shoshone-Paiute Reservation includes a single precinct in Owyhee (Precinct 29). There is no in-person voting location or polling place there, and the precinct is designated solely as a vote-by-mail location. It is estimated that less than a quarter of Elko County residents living on the Duck Valley Reservation are registered to vote in Nevada, with approximately 200 registered voters out of an eligible voting-age population greater than 800.

In addition, the disparate voting opportunities were reflected in voter turnout: Precinct 29 had turnout of 42 percent in the 2014 General (all through mail-in voting), compared to 55.6 percent for the county as a whole.[58] No ballots were cast through early voting or absentee ballots because of the all mail-in voting.

All tribal areas in Elko County other than the Elko Colony located in Elko lack an in-person early voting location. Travel to Elko can take as long as four hours roundtrip, with the possibility that roads may be impassable because of inclement weather conditions common in the fall and winter months.

Figure 8. Communities and mountain ranges in Nye County, Nevada.

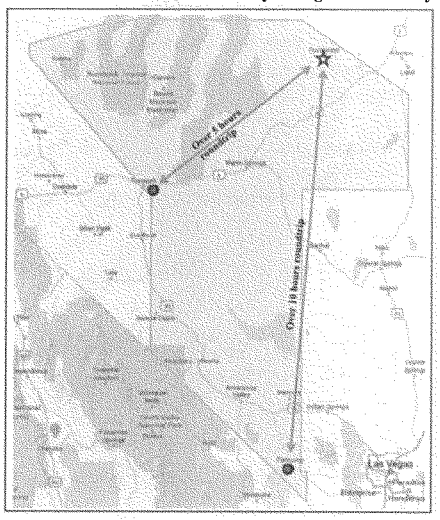


Nye County is the largest county in Nevada and the third largest county in the United States. Like Elko County, distances between communities are made even greater by the additional mileage necessary to going around the mountain ranges throughout the County. The Duckwater Reservation is located in the northeastern corner of the County, presenting some of the longest drives in the Lower Forty-Eight States to reach the County's two election offices.

[58] Turnout is based on the number of ballots cast for governor, which was the highest profile race on the ballot.

There are 35 voting precincts in Nye County. Eight of those precincts, including Duckwater (located in Precinct 3), have exclusively all mail voting. Like the Duck Valley Reservation, Duckwater has a very depressed voter registration rate. Duckwater only had 59 registered voters, even though the population of the community was 368 in the 2000 Census.

Figure 9. Driving distances from tribal lands to early voting location in Nye County, Nevada.



For the 2016 election, there were two early voting locations: the Ian Deutch Justice Complex at 1520 East Basin Avenue in Pahrump, and the Nye County Clerk's Office at 101 Radar Road in Tonopah. Neither location is accessible to tribal members. The Pahrump early voting location is 303 miles each way by road from Duckwater. The Tonopah early voting location is 140 miles each way by road from Duckwater.

Currently, no early voting is available in Duckwater. All voting is by mail. If voters living on the reservation were able to vote in-person, it would require either a five-hour roundtrip drive to Tonopah or a ten-hour roundtrip drive to Pahrump.

The tremendous distances that Native voters living on tribal lands face is partially a product of relocation to reservations that are far from non-Native communities. But far too often, distance itself is used to discriminate against Native Americans when local non-tribal officials deny registration and polling places on tribal lands. As the low registration and turnout numbers from Nevada show, and as will be discussed in the next section, denial of in-person voting effectively disenfranchises entire Native communities.

Finding 3: Native voters have unequal access to in-person voting locations.

In-person voting opportunities are inaccessible to many Native voters living on tribal lands because of distance issues and lack of transportation.

In some locations, local election officials have denied polling places on reservations in favor of establishing them in much more sparsely populated non-Native communities. For example, the polling location for the Crow Creek Reservation in South Dakota was established off-reservation in a non-Native community with just eight voters, even though the Reservation has a total population of over 2,200 people. Buffalo County refused to establish an in-person voting location at Fort Thompson, the capital and major community on the reservation with a population of about 1,300 people.

Similarly, voting locations often are not established on tribal lands, limiting all voting by mail. Even post offices may not be on tribal lands or may have reduced hours on Election Day, further limiting vote-by-mail opportunities for Native voters.

Three post-*Shelby* examples illustrate the litigation Native voters have had to bring to secure equal in-person voting opportunities denied to those living on reservations.

In 2015, election officials in Jackson County, South Dakota agreed to open a satellite office in Wanblee on the Pine Ridge Reservation after they were sued. Prior to filing suit, Four Directions, a NAVRC member that focuses on Native voter registration and organizing, offered to provide staffing for the satellite office at no cost, but the County refused.[59]

In 2016, Native voters in Nixon (on the Pyramid Lake Reservation) and in Shurz (on the Walker River Reservation) Nevada were facing roundtrip drives of 100 miles and 70 miles, respectively, to vote in-person because no polling places were established on tribal lands. They joined two other tribes and sued, obtaining a preliminary injunction requiring a polling place to be established on each reservation for the 2016 General election.[60]

San Juan County, Utah eliminated all three of the polling places located on the Navajo Nation tribal lands in the southern part of the county. The County switched to a mail-in ballot that was printed in English, providing no language assistance in Navajo despite being covered for the language under Section 203. In 2018, the County settled after being sued, agreeing to restore the three closed polling places and to provide the mandated language assistance.[61]

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[59] *Poor Bear v. Jackson County*, No. 5:14-cv-05059-KES (D.S.D. May 1, 2015).

[60] *Sanchez v. Cegavske*, 214 F. Supp.3d 961 (D. Nev. 2016).

[61] *Navajo Nation Human Rights Commission v. San Juan County*, No. 2:16-cv-00154-JNP (D. Utah Feb. 2018).

Finding 4: Local election officials deny polling places based on voter threshold laws.

Laws in many states give county clerks the discretion to designate precincts in rural and tribal areas as all vote-by-mail if they do not meet a designated threshold of registered voters.

Nevada Revised Statutes § 293.343 provides that a registered voter residing in an "election precinct in which there were not more than 200 voters registered for the last preceding general election, or in a precinct in which it appears to the satisfaction of the county clerk and Secretary of State that there are not more than 200 registered voters," may be required to vote-by-mail. Similarly, California Elections Code 3005(a) permits registrars of voters to designate precincts with fewer than 250 voters as "vote-by-mail."

This form of official discretion is widely used on tribal lands to suppress Native voter participation. It creates a vicious cycle in which vote-by-mail depresses voter registration rates on tribal lands, making it even more difficult to meet the threshold for a mandatory in-person voting location. It leads to the low registration rates such as those described above for the Duck Valley and Duckwater Reservations in Nevada.

Shortly before the 2016 election, Native voters and tribes in northern Nevada prevailed in a federal lawsuit to obtain in-person early voting and Election Day voting locations on tribal lands.[62]

During the field hearings, witnesses from California tribes testified about their difficulty in meeting the 200-voter threshold, even for more populous reservations. One witness testified that the Thule River Tribe secured a polling place for the first time in 2017, only after a two-year extensive voter registration campaign that they – and not the County – conducted.

Finding 5: Native voters have unequal access to online voter registration.

Increasingly, states are moving to online voter registration. State election officials tout savings from online registration over the administrative costs of processing paper application forms. According to the National Conference of State Legislatures (NCSL), 37 states and the District of Columbia offer online voter registration.[63] NCSL reports that "Arizona experienced a reduction in per-registration costs from 83 cents per paper registration to 3 cents per online registration. Other states have also experienced significant cost savings in processing registrations."[64]

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[62] *See Sanchez*, 214 F. Supp.3d at 961.

[63] *See* Nat'l Conf. of State Legis., Online voter registration (Dec. 6, 2017), *available at* http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx.

[64] *Id.*

However, NCSL's advocacy for online voter registration is based on a false premise. According to NCSL, "[i]n all states, paper registration forms are available for anyone, including those who cannot register online."[65] We received testimony from many Native voters that local election officials restrict how many paper voter registration applications that they are allowed to submit.

Several witnesses testified that many of those applications are rejected with no follow-up to the applicant to correct any "errors" that they find. Often, those "errors" are tied to a Native voter's use of a non-traditional mailing address, such as a post office box, a home lacking a street address, or a shared address.

The outright vote denial they experience when their applications are restricted or rejected is compounded by the absence of access to the Internet and computer resources to use the Internet in much of Indian Country. This includes: lack of broadband penetration; inability to afford the cost of an Internet connection; lack of access to computers or smart phones; and the digital divide, especially among tribal Elders.

Until online voter registration is fully accessible to all Native Americans, paper voter registration forms need to be offered and made more readily available on tribal lands. Local election officials also need to conduct regular in-person voter registration drives on tribal lands. Finally, local election officials must be required to allow community organizers and grass roots advocates to submit completed voter registration applications, and those applications must be timely processed (consistent with the statutory requirements of the National Voter Registration Act, or NVRA).

Finding 6: Native voters have unequal access to in-person voter registration sites.

Permanent voter registration sites, such as those located at county clerk's offices, elections offices, or Department of Motor Vehicle sites, are too distant for Native voters, many of whom lack any form of reliable transportation. Few election offices have permanent satellite voter registration locations on tribal lands, even where there are large populations of voters on the reservations.

On several reservations, particularly those in South Dakota, local election officials have denied requests from tribal governments for satellite offices due to a claimed lack of funding. Satellite offices are denied even when Tribes have departments and offices that would be designated as voter registration sites under the NVRA if they were branches of a non-tribal government. Moreover, few election offices recruit, train, and pay tribal members to serve as deputy voting registrars on tribal lands.

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[65] *Id.*

Finding 7: Voter ID laws have a discriminatory impact on Native voters.

Many states have enacted voter identification laws, some of which include requirements that effectively bar Native Americans from registering to vote.

In some cases, Native voters lack the identification required by state law. Some laws, such as the original version of the statute challenged in North Dakota, do not accept tribal identification cards. Even where they do, the cards may not meet the requirements of the state law because they lack a picture, do not have a qualifying physical address, or do not have an expiration date.

Native voters frequently are unable to a state-issued identification card. Many Natives, especially tribal Elders, lack documentation proving their citizenship or birth. Non-traditional mailing addresses do not meet state requirements. Election officials exercise their discretion to challenge only Native voters because of their non-traditional address, claiming that the voter lives in another state or county, or that the alleged lack of specificity prevents the officials from identifying the precinct to which the voter should be assigned.

Socio-economic barriers also prevent many Natives from obtaining identification beyond their Tribal ID cards. State offices such as DMV locations where state-issued identification can be obtained often are vast distances from tribal lands, which poses barriers for those lacking transportation or those who cannot afford the cost of driving to the locations. Many Native voters cannot endure the inconvenience and time lost making a roundtrip drive that may take several hours, or even an entire day.

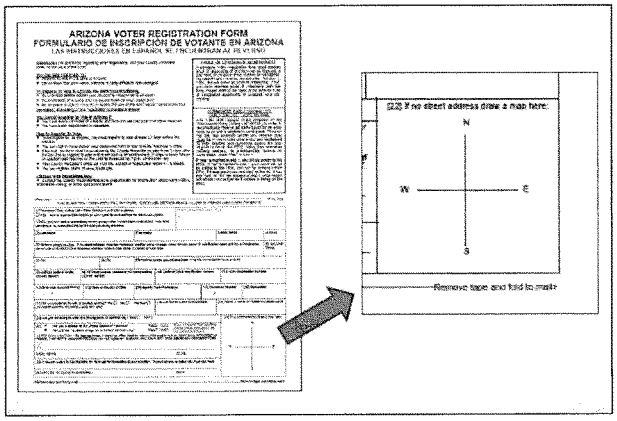
Furthermore, we heard testimony from Native voters who lacked identification when they attempted to vote, and were unable to return to the off-reservation polling place before it closed. That barrier is particularly prevalent where the in-person polling place is located a great distance from a voter's home. In addition, child care, job, school, or other commitments may prevent the voter from returning to vote. The inconvenience of having to make another round-trip drive and the bad experience they had when trying to vote also leads to disenfranchisement of Native voters.

Finding 8: Native voters are disproportionately impacted by voter purges.

Even when Native voters with non-traditional mailing addresses are registered, they may still be purged because of those addresses. Local election officials euphemistically refer to voter purges as "list maintenance procedures." Regardless of what they are called, the effect is the same. They disproportionately deprive Native Americans of their fundamental right to vote.

In 2012, Apache County, Arizona purged 500 Navajo voters because the County Recorder claimed their addresses were "too obscure" and the Recorder alleged that they could not be assigned to a precinct. The County Recorder failed to accept a P.O. Box and the applicants' drawing on the voter registration form to show the location of their home. Under the NVRA, election officials are required to accept the voter's drawing to identify their precinct, and cannot deny a voter registration application or purge an existing application because it uses a non-traditional address or has to be identified on a map by landmarks or geographic features.

Figure 10. Section of Arizona's voter registration form to identify location of non-traditional address.



In places required to provide language assistance under Section 203, information about voter purges typically is not provided in the covered Native language. Many Native voters vote infrequently in non-Tribal elections, causing their registration to be purged if they do not respond to a NVRA notice that may be written in a language they do not read, if they are able to read at all.

Once purged, many Native voters won't vote again in non-Tribal elections. Effectively, a voter purge can result in permanent disenfranchisement.

Finding 9: Vote-By-Mail (VBM) often disenfranchises Native voters.

Vote-By-Mail is increasingly being used to conduct elections. According to NCSL, 22 states have adopted at least some form of VBM. Three states, Colorado, Oregon and Washington, conduct all of their voting by mail. In discussing the possible disadvantages of VBM, NCSL acknowledges the "disparate effect" on Native Americans:

> Mail delivery is not uniform across the nation. Native Americans on reservations may in particular have difficulty with all-mail elections. Many do not have street addresses, and their P.O. boxes may be shared. Literacy can be an issue for some voters, as well. Election materials are often written at a college level. (Literacy can be a problem for voters at traditional polling place locations too.) One way to mitigate this is to examine how voter centers are distributed throughout counties to best serve the population.[66]

[66] Nat'l Conf. of State Legis., All-Mail Elections (aka Vote-By-Mail) (June 27, 2019), *available at* http://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx.

Native voters who testified at our field hearings consistently repeated similar concerns and gave examples of how they have been – or could be – disenfranchised by VBM, including:

- Inability to register to receive a VBM ballot because they lack physical addresses or otherwise have non-traditional mailing addresses;
- Inability to timely receive their VBM ballot because their mail is delivered far off their reservation, in some cases 100 miles or more each way from where they live;
- Lack of transportation to get their VBM ballot;
- Illiteracy or language barriers that prevent them from being able to read or understand their ballot;
- The closest post offices are only open on certain days or for restricted times that often conflict with their work schedules;
- Lack of security for VBM ballots once they are dropped off;
- Being required to pay postage to return a VBM ballot, which can have the same effect as a poll tax on economically disadvantaged voters;
- The absence of VBM drop-off boxes on tribal lands;
- Mistakes completing the envelope or other materials that are required for their VBM to be counted;
- Absence of in-person assistance from election officials;
- Delays in having their VBM ballot returned to the election office because of how mail from their community is routed by the post office;
- Native voters face socio-economic barriers that depress Native turnout through VBM; and
- Low levels of trust that their VBM will be counted, with a recent survey showing that a quarter of all Native voters have no trust in VBM.

In Arizona, only 18 percent of Native American voters have home mail delivery outside of the urban Maricopa (metropolitan Phoenix) and Pima (metropolitan Tucson) areas. VBM was used to suppress Native voting through a state law that barred collecting completed VBM ballots for those lacking transportation or the economic means to return them by mail or to drop off at an early voting location.

Similarly, as I mentioned previously, San Juan County switched to a VBM system as a means to eliminate all of the polling places on tribal lands and to deny voters language assistance in the Navajo language.[67] From Navajo Mountain, Utah, which is near Lake Powell, it is about 200 miles (a four or five hour drive) each way, weather conditions permitting. It requires driving south into northern Arizona on U.S. highway 98 to U.S. highway 160 in Navajo County, Arizona to U.S. highway 191 north back into Utah. Montezuma Creek is the closest Navajo community to the county seat in Monticello, which is a 75 mile drive each way.

These examples illustrate how even seemingly innocuous changes in the method of casting a ballot, such as VBM, can be used to disenfranchise an entire community of Native voters.

Finding 10: Jurisdictions are not providing translations of all voting materials.

Native voters in jurisdictions covered by Section 203 of the Voting Rights Act do not receive effective translations of all information provided to English-speaking voters in lengthy state-created voter information guides. In Arizona and New Mexico, we received substantial testimony that Native voters only receive a fraction of the information provided to voters in English, in apparent violation of Section 203's mandate. Voters do not receive translations of candidate statements, neutral ballot summaries, and other crucial information. The absence of television and radio announcements likewise deprives Native voters of much of the pre-election outreach and publicity provided in non-tribal areas.

Federal observers documented the following deficiencies under Section 203 and the *Toyukak* Order in the August and November 2016 elections in Alaska:

- ***Training deficiencies.*** Overall, training fell far short of the goal of mandatory training (with an emphasis on in-person training) for poll workers, with no poll workers trained on how to translate the ballot into the covered Alaska Native languages:

  - Less than half – 46 percent (55 poll workers) – received training in 2016
  - 4 percent (5 poll workers) received training at least a year earlier, in 2015
  - 10 percent (12 poll workers) received training two or more years earlier
  - 39 percent (47 poll workers) had never been trained

- ***Inadequate staffing of bilingual poll workers.*** Federal observers were unable to document how much bilingual assistance and translations, if any, were available in covered villages in the three census areas (Dillingham, Kuslivak, and Yukon-Koyukak) prior to Election Day. However, the lack of bilingual poll workers in many polling places in those areas suggests that much work remains to be done to provide full and equal access to the election process before and on Election Day. The summary federal observers provided indicates:

[67] *Navajo Nation Human Rights Commission v. San Juan County*, No. 2:16-cv-00154-JNP (D. Utah Feb. 2018).

- **August 2016 Primary Election**
  - No bilingual poll worker was available at any time in 3 out of 19 villages
  - Among the other 16 villages:
    - In Koliganek, a bilingual poll worker was only available "on call" and was not present in the polling place
    - In three villages (Dillingham, Kotlik, and Marshall), the bilingual poll worker left the polling place during a portion of the time the polls were open and there was no assistance available during their absence
- **November 2016 General Election**
  - No bilingual poll worker was available at any time in one out of the 12 villages observed
  - In Fort Yukon, there was no language assistance available for at least 80 minutes when the bilingual poll worker left
  - In Venetie, the only bilingual poll worker left the polling place 3 1/2 hours before the polls closed and did not return
- **Translated written materials required under the Order were unavailable in many locations.**
  - Among the 19 villages federal observers were at in August 2016:
    - No translated voting materials were available in six villages: Alakanuk, Kotlik, Arctic Village, Beaver, Fort Yukon, and Venetie
    - The "I voted" sticker was the only material in an Alaska Native language in Marshall and Mountain Village
    - In Emmonak, the Yup'ik glossary was the only translated material federal observers saw
    - 10 villages had a sample ballot written in Yup'ik but only two (Koliganek and Manokotak) had written translations of the candidate lists
    - Only one village, Aleknagik, had a written translation of the Official Election Pamphlet available for Yup'ik-speaking voters
  - Among the 12 villages federal observers were at in November 2016:
    - Six out of 12 polling places did not have a translated sample ballot available for voters
    - Five of those villages had no sample ballot at all: New Stuyakok, Alakanuk, Hooper Bay, Arctic Village, and Venetie

- Fort Yukon had a Gwich'in sample ballot that was kept at the poll worker's table and not made available for voter use

- The absence of translated voting materials had its greatest impact in polling places that did not have a bilingual poll worker present during all election hours

  - Lack of written translations in those locations meant no language assistance of any kind was provided
  - Lack of trained bilingual poll workers in some polling places contributed to the lack of language assistance

Little, if any, information about ballot measures is provided to Native voters before Election Day, including translation of those measures into Native languages or simplification so voters can understand them. The first time that many Native voters see or hear about a ballot measure is on Election Day when they vote. However, electioneering prohibitions often are cited as the reason for not explaining ballot measures to Native voters at voting locations.

At least one of the New Mexico Pueblos has started engaging in self-help by creating their own voter information pamphlets to explain the meaning and impact of ballot measures and including evaluations of candidates.

Many of these problems could be resolved for Native languages in which the tribes request written materials. As we found in Alaska, having written materials greatly facilitates complete, accurate, and uniform translations even for voters who are illiterate because bilingual poll workers can read those translations to them. Otherwise, the quality and content of the information an LEP Native voter receives will vary widely, depending on the on-the-spot translation skills of whichever poll worker happens to assist them.

Conclusion

The NAVRC looks forward to working with the House Judiciary Committee and the Subcommittee on the Constitution, Civil Rights and Civil Liberties to overcome the barriers to voting rights in Indian Country. As the initial passage and subsequent amendments to the federal Voting Rights Act have shown, protecting the fundamental right to vote is not a partisan issue. It is an American issue. All of us suffer, and our elected government has less legitimacy, each time an American Indian or Alaska Native is prevented from registering to vote or being turned away at the polls. We appreciate your efforts to address the very real struggles that Native Americans have every day in the voting process.

Thank you very much for your attention and your commitment to making voting fully accessible in Indian Country.

Mr. COHEN. Thank you, Dr. Tucker.

First, let me ask you a question about—the last election there was a situation in one of the Dakotas where they said you had to have an address and the Native American folks generally didn't have an address.

Mr. NADLER. A street address.

Mr. COHEN. Street—yes, home street address. Did you all litigate that or what happened with that case?

Mr. TUCKER. It was litigated. In fact, just recently there was a circuit court of appeals decision that reversed the district court order that granted relief for it.

What they did during the election was actually amazing. So North Dakota is one of I think only six states in the United States that have same-day voter registration, and so they—tribes were actually able to issue addresses referring to like, you know, the location of the tribal council building.

But they issued them letters that they presented then so that they could vote. But it required an extraordinary amount of effort, extraordinary efforts by community organizers, by the litigators.

You know, the litigators included those from the Native American Rights Fund and it is something that just to replicate that in every single election places a tremendous—you know, tremendous burden on some of the people who are least able to afford to do that.

And it is amazing that they were able to achieve the successes they were in terms of getting people registered at least for the purpose of that one election.

But like so much of these sorts of gains, they are fleeting and they can go away at the whim of an election official who just simply chooses not to follow the law.

Mr. COHEN. Thank you, Doctor.

Mr. Greenbaum, you heard what Professor Blumstein said about gerrymandering and the thought that state courts, as they did in North Carolina, just yesterday or the day before ruled the congressional redistricting unconstitutional.

Do you concur in his opinion that state supreme courts shouldn't have jurisdiction over legislative decisions or gerrymandering that might violate constitutional provisions?

Mr. GREENBAUM. I think that is totally wrong, especially—so I disagree with my colleague over here—particularly when, using Pennsylvania as an example when they are looking at state fundamental rights to vote provisions and other—and true, North Carolina as well—state constitutional provisions.

State constitutional provisions can protect voters just like federal constitutional provisions can, and this is a particular case in which the Supreme Court had ducked the issue for decades and ultimately decided to not address the issue.

I mean, we, the Lawyers' Committee, as an organization think it is problematic because oftentimes the issues of race and partisanship are intertwined with one another and one of the things that we are fearful of in the next redistricting is that states will say, oh, we are discriminating based on partisan reasons when race a lot of times is the means of achieving a partisan end.

We had a case in Georgia where that was the case, where the demographics of the districts were changing so they did a mid-decade redistricting specifically focused on districts that were becoming more African American, which put the Republican incumbents at risk.

And the defense of the state in that case was, oh, we weren't doing it for racial reasons; we were doing it for partisan reasons. But it was the racial demographics that were driving the change in the district.

Mr. COHEN. Let me ask you this. Probably the most famous case to come out of this area was *Baker* v. *Carr*.

Mr. GREENBAUM. Sure.

Mr. COHEN. That was basically a redistricting case because it said you couldn't—you had to do one man-one vote. Under the holdings of this Supreme Court that they recently held on gerrymandering, would *Baker* v. *Carr* have been allowed? [Laughter.]

Mr. GREENBAUM. Well, let us be—let us maybe be glad that the Supreme Court weren't the ones that decided *Baker* v. *Carr* and *Reynolds* v. *Simms* and a whole bunch of other cases including my colleague's case over here which, I have to say, is one that—when I was teaching voting rights classes to law students was one that we often used and one that the Lawyers' Committee uses in terms of the fundamental right to vote precedent.

Yes, I think it was a mistake for the Supreme Court to find that partisan gerrymandering is not justiciable because it clearly affects the rights of voters.

Mr. COHEN. And I don't have much time left but I would like to ask you to reiterate what you think we should do in our statute to come up with a basis for determining preclearance states that would meet the Supreme Court muster under the Holder decision.

Mr. GREENBAUM. Sure. And one of the things I want to say is that the Court in Shelby County, the standard that they put down was a rational basis standard, which should be the most lenient standard given to legislation, so that Congress should have a lot of latitude here.

I think the formula that Congress, that is in H.R. 4 actually responds effectively to the issues raised by the Supreme Court.

What the Supreme Court was essentially saying, and I disagree with the opinion; I litigated on the team that was in the defense of Section 5. The Lawyers' Committee was involved in the defense. So I disagree with the opinion.

But what I read the opinion to say is whatever you use as a formula has to match the current conditions and that by using this old formula, regardless of whether the facts showed that these jurisdictions should be covered, the formula itself has to be reflective of what the conditions are, and I think that H.R. 4 does an effective job of doing that because it is a formula that will cover, that has the potential of covering different jurisdictions during different periods of time based on relatively contemporaneous records of discrimination.

And the formula actually sets a pretty high burden for who gets covered under it. You won't get there if there is one bad case. It is only going to be those jurisdictions that engage in persistent discrimination that are going to get there.

Mr. COHEN. Thank you, sir.

I now recognize the chairman of the full committee, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

Let me just come back to the redistricting for a moment. *Baker* v. *Carr* itself overturned, as I recall, a 1946 decision, which I forget what it was but that '46 decision essentially said it was a political question, essentially said what the Supreme Court just said about federal redistricting.

Now, it said that population was a political—was not justiciable. It was a political decision, et cetera. The criticism, of course, is that there was no way of the electorate changing that. *Baker* v. *Carr* and *Wesberry* v. *Sanders* and others overturned that and the Supreme Court now has gone back to the 1946 rationale with respect to districting and saying it is up to the—it is up to the voters, et cetera.

But the voters are totally barred from having any impact, as they were under the—under the one person-one vote problem.

Now, as I understand the Constitution, the states have the primary responsibility for voting and for elections. With the federal government, with Congress having the final ability of its own elections and federal elections or elections that affect federal elections, and the Supreme Court in Shelby says you have to have a good reason for the federal government to come in and dictate to the states, which seems exactly the opposite of what was being said a few minutes ago, against the state supreme courts enforcing proper districting through their own constitutions.

I think the states have an absolute right to do that, not just for their own—for legislatures but for Congress, too. They are the judges of Congress until Congress comes in and overturns them. So I don't—I think they have very good grounds there.

Let me ask a different question, though. A witness on the previous panel mentioned the burden of Section 2 litigation—that, you know, when the Justice Department was doing it, they had unlimited resources but when a private litigant did it, it could be millions of dollars, et cetera, et cetera, and it is very difficult. Section 2 enforcement is very difficult for that—for that reason, among others.

So my question is what would you think of a federal statute that said that if someone sued a state for engaging in voter suppression and won the lawsuit—and won, and there was an affirmative finding by a court that the state had engaged in discrimination, et cetera, that all expenses be paid to the litigant by the state or by the—or by the private—or by the county or whatever?

In other words, the counties or state should know that if they enacted a discriminatory thing, if they closed polling places on an Indian reservation or in a black area or wherever, they might end up spending $10 million or $20 million if someone had actually sued and won.

Mr. GREENBAUM. Well, we do have—the good news with that is—so I would be in favor of that and the good news for that is you have already enacted some protections with respect to that.

You know, the Texas case—the Texas ID case that we mentioned—the Civil Rights Division Act DOJ litigated that case as well as a number of civil rights organizations, including mine. We

submitted our fee application. It was, roughly, $7 million—a little over $7 million that we submitted.

Now, it doesn't actually reflect the total amount of time we put on the case because we are talking about a four-week trial. We are talking, like, 16 expert witnesses. We are talking about multiple appeals in that case.

It makes a big different to voting rights advocates to have those fee provisions available.

Mr. NADLER. So you are saying there are some fee provisions but they are not adequate?

Mr. GREENBAUM. Well, yes. I mean, oftentimes we have a difficult time recovering the actual amount of time that we spent on the case at, you know, what is a fair rate.

Mr. NADLER. And are the difficulties in collecting that susceptible of change by statute?

Mr. GREENBAUM. Yes. Yes.

Mr. NADLER. So it would be a good idea to enact a statute that effectuated that?

Mr. GREENBAUM. Yes, Chairman Nadler.

Mr. NADLER. Okay. Thank you.

I am not sure who to ask this question of but we were talking about voter purges. Now, we know that voter purges have been used very discriminatorily and very deliberately.

My question is, isn't there a legitimate reason or methodology for a state—what is a legitimate methodology for a state to keep its voting rolls up to date? People do die. They do move.

What would be the right thing to do which wouldn't be discriminatory or lead to people who should be able to vote being taken off the rolls?

Ms. Butler, maybe, or Dr. Tucker.

Ms. Butler.

Ms. BUTLER. Okay. Well, for me, not taking people off the rolls—I know it is legitimate to say if someone died that is a legitimate reason to be taken off the rolls.

But for other reasons—I mean, if people are still alive and they are able to vote they should be allowed to vote and should not be purged from the rolls. They do list maintenance about moving and if people decide not to vote in several elections that is a choice.

Mr. NADLER. Well, we understand that that is—but what would be legitimate for the state to do to take care of people who, A, die and, B, say, move to a different state?

Ms. BUTLER. That would be a reason as well as if they moved to another state. Those would be two legitimate reasons. Any other reasons——

Mr. NADLER. So there—so there should be some requirement that before anybody is purged there has to be a death notice or something from the Post Office for a change of address notice sent to the—sent to the—whoever is doing the elections?

Mr. GREENBAUM. And a lot of that is actually protected under the National Voter Registration Act that Congress passed in 1993, because it used to be that states could just purge pretty much people at will.

Mr. NADLER. Are they—are the provisions of the motor-voter law—the National Voter Registration Act—sufficient in this re-

spect? Any problems in enforcement or should we strengthen the National Voter Registration Act?

Mr. GREENBAUM. There probably needs to be some changes made, particularly because, you know, we had the bad Supreme Court decision recently, which is allowing Ohio to purge people based on what we think is—what we thought was an inaccurate interpretation of the NVRA. But the Supreme Court went the other way.

Mr. NADLER. So we—so we should clarify that legislatively?

Mr. GREENBAUM. Yes.

Mr. NADLER. And, finally, let me ask Mr. Greenbaum. Why is it not—why do we not see, not in this Justice Department but when we have a more sympathetic to voting rights Justice Department—why do we not see lawsuits against local governments for the violation of civil rights under color of law?

In other words, we have statutes that empower the federal government to under certain circumstances seek criminal enforcement and under other circumstances civil enforcement against local officials—state officials, local officials—who deprive people of civil rights under color of law, and if someone—if there is a pattern of closing polling places in black areas or on Indian Reservations or doing a lot of other things we have seen, why is it not an effective thing to do or what are the pros and cons of that?

I mean, how could we change—how could we or should we change the law with respect to enforcing civil rights violated by local governments or by local officials under color of law?

Mr. GREENBAUM. I want to give some thought to that. I mean, there actually are a fair amount of protections out there. But they are not aggressively being enforced enough by the federal government.

Mr. NADLER. So they are not aggressively enforced. Now I understand. But when you have a sympathetic administration why aren't they?

Mr. GREENBAUM. I wish—you know, I wish I had a definitive answer to that. If I still worked—if I still worked in the Civil Rights Division I probably could give——

Mr. NADLER. All right. Let——

Mr. GREENBAUM [continuing]. I probably would have an answer. But I couldn't tell you what it was. That is something that, frankly, frustrates me.

Mr. NADLER. Let me ask a last question then following up on this. What, if anything, should we do statutorily to make that more—and maybe you will answer that after the hearing privately or whatever if you can't now. But what, if anything, should we do in terms of changing the law to make that kind of enforcement more used and more effective?

Mr. GREENBAUM. Chairman Nadler, I would appreciate the opportunity to—that is not a question I have thought of before and I would really appreciate the opportunity to think about that, and perhaps if you asked me a written question or give me the opportunity to supplement my testimony, I will do that.

Mr. NADLER. Please do supplement your testimony. I would like to see an answer to that. Anybody else who wants to also who has

thoughts on that—on that question, because it seems to me it is a possible tool.

Mr. TUCKER. Mr. Chairman, can I just——

Mr. NADLER. Sure.

Mr. TUCKER [continuing]. give you an example? One of the things that we have been pushing for is mandatory tribal consultations between the Justice Department and tribes——

Mr. NADLER. Mandatory what?

Mr. TUCKER. Mandatory tribal consultations between DOJ and the tribes, and I will give you an example of how that can come into play.

DOJ filed a lawsuit or there was actually pre-litigation but they first opened an investigation in Coconino County, Arizona, because they found a report had been published by an outside organization finding that there were some accessibility issues under the Americans with Disabilities Act.

Rather than consulting with the tribe or consulting with the organization that issued the report, DOJ went in—and this was just about a year ago under the current administration—and they found that 31 out of 32 polling places on Navajo lands in Coconino County were not ADA accessible. Not surprising to anyone who is familiar with chapter houses.

They don't have paved parking lots. They don't have handicapped parking. They don't have ramps. They don't have money. And rather than consulting, which would have alleviated the problem, they simply——

Mr. NADLER. Rather than what?

Mr. TUCKER. Rather than consulting they just—they went in and they—you know, they opened the investigation. They, you know, came up with an agreement, and it is something that would have been simply resolved by curbside voting.

They could have reached an agreement where there could have been mandatory curbside voting. They could have brought the ballot out to the voters. It would have been fully accessible.

Instead, what they have done is they placed those polling places in jeopardy being closed in the future and they have also opened up a can of worms outside of that in other parts of Indian Country where we are having election officials actually using that as a pretext to deny in-person voting opportunities on tribal lands because they say, the ADA requires us to deny this application.

Mr. NADLER. Thank you.

Mr. COHEN. Thank you, sir. Thank you, Mr. Chair.

We now yield five minutes to Ms. Sheila Jackson Lee.

Ms. JACKSON LEE. Chairman, thank you so very much.

Mr. Tucker, you have just literally given me more fodder for where we are today. I will come to you in a moment. But please think to have this answer.

I want you to give basically the general numbers of the Indian Nation today. Give me some ballpark figures including covering any number of the nations—the tribes. If you will just give me a ballpark number.

I want to go to Mr. Greenbaum, and let me thank you for your years of service and let me try to indicate my view of H.R. 4 a global statement that lawyers can use. They can use the findings. They

can use the statutory provisions, precisely indicating both problem but fact and as well the formula.

And so let me pose this question. I noticed that you were in the Justice Department from 1997 to 2003, and if you can be pithy in your answers, would you say that the civil rights division—voting rights division—was vigorous during that time?

Mr. GREENBAUM. Yes, particularly during the first half of that time. I would say more vigorous during the Clinton administration than during the first Bush administration, although I would say that the first Bush administration—second Bush administration did not interfere with ongoing cases that I brought but made it more difficult to bring cases.

Ms. JACKSON LEE. But at least the door was open?

Mr. GREENBAUM. Yes.

Ms. JACKSON LEE. I am sad to hear that but at least the door was open.

Mr. GREENBAUM. Yes.

Ms. JACKSON LEE. Take the example that we are presently in, which is why I think the voting rights—H.R. 4, H.R. 1—are so crucial, because if it can stand it means that it can operate in spite of changing administrations.

So the record for Texas is poor.

Mr. GREENBAUM. Yes.

Ms. JACKSON LEE. We started out with the Texas ID law and the Obama administration DOJ stood tall with us. We were victorious in the district court, and went on.

In the present atmosphere and administration, the DOJ completely flipped and went to the opposition of getting rid of the Texas ID law or supporting the Texas ID law.

Mr. GREENBAUM. The replacement Texas ID law—because Texas brought in a—as a result of the first set of court decisions, Texas changed its ID law and that happened close to the time that there was a change in administration and DOJ flipped positions with the change in administration. In fact, there was a brief that DOJ was supposed to file.

Ms. JACKSON LEE. But it was not a perfect change?

Mr. GREENBAUM. It was not a perfect change.

Ms. JACKSON LEE. It was not where we wanted to be.

Mr. GREENBAUM. Right. It was not——

Ms. JACKSON LEE. So there was no——

Mr. GREENBAUM. We challenged it—we challenged that subsequent change. We won in the district court.

Ms. JACKSON LEE. So the——

Mr. GREENBAUM. We lost in the 5th Circuit. You are correct that DOJ flipped positions.

Ms. JACKSON LEE. So let me get to my point.

Mr. GREENBAUM. Sure.

Ms. JACKSON LEE. And I appreciate it. The point is is that with the potential for these kinds of flips——

Mr. GREENBAUM. Yes.

Ms. JACKSON LEE [continuing]. It is crucial that we have a solid findings in law even though it can go up to the Supreme Court that we can operate under.

Likewise, the Affordable Care Act. I am just trying to show the flipping—Affordable Care Act, supporting it was, by one administration DOJ vigorously. This administration—the Trump administration came and completely flipped—get rid of it, which jeopardizes innocent citizens.

So my pointed question to you is the importance of findings that reflect some of what is in your presentation, particularly the point about Section 5, incentivized communities——

Mr. GREENBAUM. Yes.

Ms. JACKSON LEE [continuing]. Which Mr. Tucker reflects, to consult with minorities.

Mr. GREENBAUM. Yes.

Ms. JACKSON LEE. And we have examples where not consulting, if you will, leads to calamity.

Mr. GREENBAUM. I completely agree with that.

Ms. JACKSON LEE. The other point I wanted to make is you highlighted the horror that has been created by the Shelby decision.

Mr. GREENBAUM. Yes.

Ms. JACKSON LEE. Can you just say that in one or two sentences that we have seen a downward spiral of voter empowerment since Shelby?

Mr. GREENBAUM. I think you have said that better than I could. I do want to agree with what you said. I don't think I need to add to what you said.

I would be remiss if I didn't mention the first voting case I brought at the Lawyers' Committee was Waller County, which you are very familiar with.

Ms. JACKSON LEE. Yes.

Mr. GREENBAUM. And that was a situation where a white district attorney——

Ms. JACKSON LEE. Yes.

Mr. GREENBAUM [continuing]. Told black students at the——

Ms. JACKSON LEE. At Prairie View.

Mr. GREENBAUM [continuing]. At Prairie View that they would be subject to felony prosecution if they voted. We sued him. We got that to stop.

But then what they did was they were going to decrease the number of hours of early voting at Prairie View—the polling place closest to campus—and we were able to block that under Section 5. And it is a great example of how Section 5 blocks repeated efforts at discrimination.

Ms. JACKSON LEE. And I thank you very much.

The chairman has been very kind to indulge and if you, Ms. Butler, and Mr. Tucker, I don't want to leave out the Indian Nation. So I will go with you, Ms. Butler. You can just answer.

I want Ms. Butler to answer how devastating it is going to be by having redistricting without Section 5 operable, the first in decades in 2021.

But I want to really highlight the Indian Nation in terms of the language concerns and the threatening atmosphere that pulls opportunity in voting under the Fourteenth and Fifteenth Amendment by where we are today.

And most people don't think of the Pueblos and the reservations and the denial of rights. I just got through doing the Violence Against Women Act. We had to put more rights for Indian women.

But can you indicate how oppressive and that this H.R. 4 needs to have a heavy handprint on empowering the Indian Nation to vote?

Mr. TUCKER. So it is very, very important that Indian tribes, just like the other language minority groups and racial groups, be considered. You asked how many. There are 6.8 million American Indians and Alaska Natives nationally. They comprise about 20 percent of Alaska's population.

I am going to use an example to highlight the point. So the Navajo Nation has approximately 400,000 people who live primarily in three states—Arizona, New Mexico, and Utah.

In San Juan County, Utah—getting back to this whole issue of one person-one vote, in 1984 San Juan County—their at-large method of electing their three-member county commission was struck down because it specifically was designed and was having the effect of disenfranchising Native voters.

The county did not redistrict at all after that decision. So what they did was they basically used a one person-one vote violation to ensure the primacy of non-Natives who comprised a minority of the population—only about 45 percent of the county's population but they had a majority of the share because they used a redistricting plan that was based on the 1980s.

That was a fairly recent decision. It actually was just upheld in the Court of Appeals. But in addition, there were two other companion cases that were brought.

They also denied access to the school boards, and this is a Lawyers' Committee case—they used vote by mail. They shifted to vote by mail and eliminated three polling places on Navajo lands specifically to deny Navajos the right to vote because they were afraid that, again, because Navajos were in the majority they would actually elect a majority.

This just proves the point that I understand—you know, Professor Blumstein has talked about the need for respect of state sovereignty. These are not innocent actors. You know, things like H.R. 4 are specifically designed to get to the serial offenders and they do it in two ways.

They do it at the state level and, more particularly, what we are more likely to see in Indian Country is going to be a jurisdiction by jurisdiction level at the county level.

San Juan County is exactly the sort of place that needs to be covered by Section 5. My understanding is it would be under H.R. 4 because they certainly have more than three violations in the last 10 years.

And, again, I appreciate the fact that you have highlighted the importance of the American Indian and Alaska Native community and the barriers they face and the legislation that would fix that.

Ms. JACKSON LEE. Thank you.

Ms. Butler, on your redistricting point? Thank you for your service.

Ms. BUTLER. Thank you.

Redistricting definitely would be very critical to communities of color. Georgia, as you know, based on Census data, is going to be a majority minority state and so it is going to be critical that we have oversight in how the lines are drawn. We have seen the gerrymandering, the packing of minority voters so that we dilute their voting strength.

So it is critical that we have that oversight protection to be able to get people that were represented—that we want to represent us, especially for communities of color.

Ms. JACKSON LEE. Thank you.

Thank you, Mr. Chair.

Mr. COHEN. Thank you very much. Thank you.

I want to—I recognized Ms. Hubbard here, who is with the Deltas. Is anybody here from AKA?

Ms. JACKSON LEE. Please. [Laughter.]

Mr. COHEN. So there is an AKA here. Great. Thank you.

You also do a lot to help people get registered to vote. You have got a long history with that and I thank you. And women the right to vote and all that.

Bradley Watkins—did he make it? I didn't see him. The Peace and Justice Center has been working on some issues. I think he might have filed a lawsuit today, which is important.

I want to recognize former Senator Marrero who is here and thank her for her attendance and her service over the years and I want to thank all the witnesses that have come and testified.

And we are going to have a press conference right afterwards. It is Room 335? Who knows which room we are in? 335, is that right?

Oh, this is it? Good. That makes it easier. That makes it easy.

And let me just say this. It is interesting to think—in Australia you have to vote and if you don't vote they give you a penalty on your income tax. So they don't worry about the voter registration rolls. They keep everybody on it and you are supposed to vote.

So it doesn't seem like in a country like ours where we have a bedrock of democracy and the idea of people having a chance to participate that we should take almost anybody off the rolls because everybody should be able to vote and if you show up.

We are going to have a mayor's election and a city council election here in a month, and it is expected that less than 20 percent will vote.

So it is—we are here trying to see to it the people have a right to vote. People don't vote when they got a right to vote. Peg Watkins is here from League of Women Voters. We appreciate your being here and encouraging people to vote and registering people.

But they don't come to vote. So if somebody shows up we ought to give them something. Thank them, and not try to stop them.

Ms. Jackson Lee, for a last comment.

Ms. JACKSON LEE. Mr. Chairman, I just wanted to thank you. We are in your hometown, your district, and I think everyone should know how more than faithful you are to these values in Washington.

You always wonder what your member is doing away from you. He is consistently a champion for constitutional and civil rights and the empowerment of all people.

I want to likewise thank the purity of voting. The League of Women Voters—likely, you would have them here because that is what they represent and I want to thank your staff. We saw her again—your district staff that is doing such an excellent job.

And if I might, say that if I had not already graduated from law school—this is such a stunning building—I might try to reenroll.

And might I say that I am grateful that the GSA has a better mind to give this post office to a law school of empowerment versus hotels. And so I am delighted that this is a place of justice.

It is just simply beautiful and I thank you for having us here. And I hope my thank yous are pertinent to the closing of this hearing, and thank you to all the witnesses.

Mr. Chairman, I yield back to you with a great deal of thanks.

Mr. COHEN. You are welcome. You are welcome.

Ms. JACKSON LEE. Thank you, Chairman Nadler.

Mr. COHEN. Thank you.

Mr. Nadler, do you want to make some remarks?

Mr. NADLER. Yes, I will be brief.

I simply wanted to, first, thank the witnesses both from the first and second panels, thank everyone from the local organizations and from the civil rights community and from the general community who came out to this hearing, which is hopefully part of the foundation for enactment of a new replacement for Section 4, among other things, of the Voting Rights Act to reestablish some of the protections that we had and maybe to go further in some other respects.

And I want to thank the chairman for holding this hearing and for all the other work he is doing on the—on civil rights and civil liberties.

And I think it also—I think it is very nice that a former not only post office but courthouse became a law school and stayed with the law.

So I want to thank everybody and I want to particularly thank the chairman, and I yield back.

Mr. COHEN. I thank each of you and I appreciate it, and I will say here in my hometown this is a great opportunity to have this hearing here. I am so honored to be the chair of the Constitution, Civil Rights, and Civil Liberties Committee. It is the highest honor I could ever—and position I could ever hope to have.

For locals, they will know—my colleagues may not—but I stand on the shoulders of Russell Sugarmon, Vasco and Maxine Smith, and Irvin Salky and Julian Bond from Atlanta, and that is where they would want me to be and that is who I think about and serve.

So with that, we are going to conclude this hearing and thank you all, the witnesses, for appearing.

Without objection, all members will have five legislative days to submit additional written questions for the witness or additional materials for the records.

With that, the hearing is adjourned. Thank you.

[Whereupon, at 12:51 p.m., the subcommittee was adjourned.]

APPENDIX

TESTIMONY OF STEVEN J. MULROY BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS & CIVIL LIBERTIES, U.S. HOUSE JUDICIARY COMMITTEE REGARDING HR4, AMENDING THE VOTING RIGHTS ACT OF 1965

ADDENDUM: QUESTION FOR THE RECORD

To: Rep. Steve Cohen
CC: Other Reps. on the Judiciary Committee
Date: Nov. 26, 2019
Re: QFR

Following my testimony in Memphis, you asked the following Question For The Record: "If there was anything that you heard at the hearing that you would like to respond to, please do so here."

In my testimony, I suggested one change to HR 4's Section 4(b), which requires preclearance for a switch from single-member districts (SMDs) to either multimember districts or at-large election methods. The change would be an exception for when such conversion involved the use of proportional or semi-proportional voting methods like cumulative voting and the single transferable vote (STV). Rep. Jackson-Lee asked me a question about this suggestion during the hearing, and also expressed interest in more detail after the hearing.

I wish to elaborate on my suggestion and offer suggested statutory language. I will first present the proposed statutory language, and then provide background.

Proposed Exception For Multimember/At-Large Proportional and Semi-Proportional Systems

I suggest an exception to the Section 4(b) preclearance trigger discussed above. It would appear as an addition to Section 4A(b)(1)(B), just after subpart(ii). It would read as follows:

> *"Provided*, that no such preclearance would be required if the proposed change would involve the use of a semi-proportional or proportional voting system like [limited voting,] cumulative voting or the Single Transferable Vote, where the racial groups or language minority groups would be expected under the threshold of exclusion formula to elect candidates of choice at roughly the same or greater rate than under the existing single-member district system."

A "definitions" section of the Act would separately define the terms "semi-proportional voting system"; "proportional voting system"; "cumulative voting": "Single Transferable Vote"; and "threshold of exclusion formula." These terms will be discussed below.

I also included "limited voting" as an optional addition to the list of voting systems subject to the exception. As explained below, limited voting can enhance minority voting opportunity under the right conditions, but is generally not as effective in doing so as cumulative voting or in particular STV. I recommend including it to give states and localities maximum

flexibility in designing an electoral system which satisfies general good government concerns while avoiding minority vote dilution. However, if the Committee preferred to keep this exception narrow, limited voting could be omitted from the exception language.

Generally

Section 4(b)'s requirement of preclearance where a jurisdiction moves away from SMDs makes sense in general. For decades, jurisdictions used multimember or at-large systems to dilute minority voting strength. However, those systems dilute minority voting strength only when they use a "winner-take-all" framework. *See* Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems As Voting Rights Act Remedies*, 77 NORTH CAROLINA LAW REVIEW 1867, 1876 (1999). That is not true with proportional or semi-proportional systems like cumulative voting and STV.

Indeed, in many cases, those systems can work *better* than the traditional SMD remedy for vote dilution. For example, this is the case when (1) the minority population is so geographically dispersed that it is difficult to draw a minority-majority district; (2) it is possible to draw only one such district, but the minority group's population would warrant electing more than one candidate of choice; (3) drawing such a district(s) creates tensions with partisan fairness, or pairing incumbents, or other districting criteria; (4) there is more than one protected minority group, and it is difficult to do justice to both under a SMD construct; (5) the bulk of the minority group population would be situated outside the minority-majority SMD, forcing them to rely on "virtual representation" by the person elected inside that district; (6) the SMD approach would create a tension between "descriptive" representation and "substantive" representation; or (7) the small size of the jurisdiction, or other practical or good-government considerations, argue for an at-large approach. *See* Steven J. Mulroy, *Nondistrict Vote Dilution Remedies Under The VRA*, in Benjamin E. Griffith, ed., AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 205-208 (2d ed. 2012).

Indeed, even aside from these special cases where cumulative voting and STV better serve the VRA's remedial goals, there are many good reasons to have a general preference for these systems over SMDs. They enhance representation among more dimensions than just racial and ethnic; and increase competition and turnout. *Id.* They can also reduce harmful gerrymandering. *See* Steven J. Mulroy, RETHINKING US ELECTION LAW: UNSKEWING THE SYSTEM 145-150 (2018).

Thus, it can be counterproductive to provide that a switch from SMDs to multimember/at-large *always* triggers a preclearance requirement. Such a requirement might dissuade jurisdictions from adopting a cumulative voting or STV system which is just as protective of minority voting rights as the existing SMD system, or perhaps even better from that perspective. That's why an exception is called for.

Cumulative Voting And Single Transferable Vote

Under cumulative voting, voters have multiple votes to distribute among the candidates, usually equal to the number of seats to be filled. They can distribute their votes however they

want. For example, in an election with 15 candidates to fill 5 seats, a voter could "plump" all 5 votes for one candidate; allocate 3 votes to one candidate and 2 votes to another; or follow the traditional path of allocating one vote to each of 5 candidates. The 5 highest resulting vote-getters fill the 5 seats.

Under STV, voters can rank their 1st, 2nd, 3rd, etc. choices, in order of preference. Any candidate netting over a minimum quota of 1st-place votes (roughly 1/n of the total votes, where n is the number of seats to be filled) gets seated. Any "surplus" votes above that quota are transferred to remaining candidates based on 2nd choices. If no candidate meets the quota, the candidate with the fewest votes is eliminated, and that candidate's votes are transferred to remaining candidates based on 2nd choice votes. This process of seating and eliminating candidates, and transferring votes to remaining candidates based on 2nd, 3rd, etc. preferences, continues until all seats are filled. In the example above with 15 candidates running to fill 5 seats, any candidate with more than 1/6 of the total vote would be seated, with any "extra" votes over 1/6 of the total vote being reassigned.

Both cumulative voting and STV have long track records in the U.S. Cumulative voting has been used in recent years in Peoria, Illinois; by the County Commission for Chilton County, Alabama; and by about 40 school boards in Alabama, South Dakota, and Texas. *See* Steven J. Mulroy, RETHINKING US ELECTION LAW: UNSKEWING THE SYSTEM 135-136 (2018); Steven J. Mulroy, *Nondistrict Vote Dilution Remedies Under The VRA*, in Benjamin E. Griffith, ed., AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 200-202 (2d ed. 2012). Where it has been used, it has enhanced the representation of minority voters protected under the VRA. *See id.* and sources cited therein. The respected law professor and civil rights advocate Lani Guinier, who President Clinton nominated to serve as the DOJ's Assistant Attorney General for Civil Rights, famously advocated for this electoral system as a more effective method of empowering racial and ethnic minorities protected by the VRA, long before the Shelby County Supreme Court decision. *See, e.g.,* Lani Guinier, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994). Numerous federal courts have mentioned cumulative voting as a potential remedy for minority vote dilution under the VRA. *See* United States v. Village of Port Chester, 704 F. Supp. 2d 411, 449 (S.D.N.Y. 2010) (citing cases). Indeed, it has been ordered by federal courts as such a remedy. *Id.*

STV also has a long track record in the U.S. Cambridge, Massachusetts has used it to elect its city council for decades; Minneapolis has used it for a local governing body for over a decade. *See* Mulroy, RETHINKING US ELECTION LAW, *supra*, at136-138; AMERICA VOTES!, *supra*, at 200-202. Australia has used it to elect its national Senate for over 60 years. *Id.* Again, it has helped to enhance minority representation. For example, when New York City adopted STV to elect local community school boards in 1970, the percentage of black and Hispanic board members jumped to levels close to the corresponding black and Hispanic percentages of the citywide population. Mulroy, RETHINKING US ELECTION LAW, at 138-139. Indeed, STV resulted in more proportional results than the single-member district city council elections held in NYC during the same period, despite the presence of a number of minority-oriented districts in that districting plan. *Id.*

Threshold of Exclusion

Political scientists have long recognized that there is a well-settled formula which can be used to determine how a politically cohesive voting bloc can fare under either cumulative voting or STV. That formula is 1/{number of seats to be filled} + 1. This is called the "threshold of exclusion." *Id.* at 139. The formula conservatively assumes the worst-case scenario (from the perspective of minority voter empowerment) that an Anglo majority fields as many candidates as there are seats to be filled, and spreads its votes evenly among those Anglo-supported candidates, with no support for the minority-preferred candidate. *Id.*; *see also* Port Chester, 704 F. Supp.2d at 450-451. Any politically cohesive racial or ethnic group which numbers over that minimum threshold should elect a candidate of choice, even if the Anglo majority votes 100% against their candidates. Again using the example of a race where 5 seats are to be filled, if African-Americans or Hispanics are at least 1/6 of the voters on election day, they should elect a candidate of choice. The formula is also scalable: in the above example, if Hispanics are 2/6 (or 1/3) of the electorate, they should be able to elect 2 candidates of choice. And so on.

The threshold formula is important because it helps provide accurate estimates of the relative effectiveness of cumulative voting or STV in remedying minority vote dilution—estimates which can help compare it with the traditional remedy of single-member districts. It is long-recognized, well-understood formula acknowledged in the political science literature, law review scholarship, and case law. Its inclusion in the proposed statutory exception would assure that the law gave jurisdictions the flexibility to try these innovative systems, but not in such a way that they would serve as "cover" for minority vote dilution.

Limited Voting

There is one other non-SMD voting system which could also enhance minority voting strength: limited voting. Under limited voting, voters are allowed to only cast a number of votes that is *less* than the total number of seats to be filled, to prevent a majority voting bloc from completely "sweeping" the election and thus shutting out a politically cohesive minority. In the example of filling 5 seats, a voter would only be allowed to cast a vote for 4 candidates, or 3, or 2. Limited voting is used in Philadelphia, PA; Hartford, CT; in about two dozen city councils in Alabama; about a dozen school boards and county commissions in North Carolina; and in scores of local jurisdictions elsewhere in Connecticut and Pennsylvania. It can also help to prevent or remedy minority vote dilution. *See* United States v. Euclid City School Board, 632 F.Supp.2d 740 (N.D. Ohio 2009).

The threshold of exclusion for limited voting is different from cumulative voting and STV. It is

$$\frac{\{\text{number of votes each voter has}\}}{\{\text{number of votes each voter has}\} + \{\text{number of seats to be filled}\}}$$

Thus, in our example of filling 5 seats, if each voter was limited to only 4 votes, the threshold would be $4 / \{4 + 5\} = 4/9 =$ roughly 44%.

While limited voting can enhance minority representation under certain circumstances, it is generally less effective than either cumulative voting or STV. In order to reduce the threshold of exclusion enough to give voting minorities good opportunities to elect candidates of choice, one has to sharply curtail the number of votes each voter has. This is problematic, in that it reduces choice for voters across the board.

Conclusion

STV, cumulative voting, and limited voting (in order of preference) are viable alternatives to SMDs as systems which enhance fair representation, including fair representation for the minority groups protected under the VRA. They should be among the options jurisdictions can select without triggering preclearance requirements. For that reason, I respectfully suggest the amendment to HR4 discussed above.

Respectfully,

Steven J. Mulroy
Bredesen Professor of Law,
University of Memphis
Memphis, TN

VANDERBILT Law School

September 12, 2019

Hon. Keenan Keller
Senior Counsel
House Committee on the Judiciary
2138 Rayburn Building
Washington, D.C. 20515

Dear Mr. Keller:

I am writing to follow up on our conversation after the hearing in Memphis last week of the Judiciary Committee's Subcommittee on the Constitution, chaired by Rep. Cohen. I do not have Rep. Cohen's email address, so I am sending this letter to you in the hope that you will take the appropriate steps to bring it to the attention of Rep. Cohen and his staff. I would like its contents to be included in the hearing record as a point of clarification of discussions and comments involving Chairman Nadler, Rep. Cohen, and me.

The issue involved the role of state courts in Congressional apportionment. Chairman Nadler and Rep. Cohen interpreted my comments (in response to questions) to mean that state courts had no jurisdiction to interpret state constitutional law and apply it to Congressional apportionment. That does not reflect my position, so I thought that I would take a moment to clarify my view, which was expressed in the context of criticizing the stance of the Pennsylvania Supreme Court in implementing a reapportionment plan for members of Congress from Pennsylvania.

Under Article I, Section 4 of the United States Constitution, the power to determine the "Times, Places, and Manner of holding Elections" for members of Congress "shall be prescribed in Each State by the Legislature thereof." That provision contemplates a role for states in apportioning Congressional seats within their jurisdiction.

The apportionment process is assigned to the state's legislature, indicating that apportionment is a part of a state's political/legislative process. Since the 1930s (*Smiley v. Holm*), the Supreme Court has allowed governors to participate through exercise of the veto power, if that is part of the normal political lawmaking process of the state. A state referendum on ratification of a districting plan is allowed, as ratification is part of the normal lawmaking process (*Ohio* ex rel. *Davis v. Hildebrant*) In a recent case from Arizona (*Arizona State Legislature v. Arizona Independent Redistricting Commission*), the Supreme Court allowed that state to vest Congressional districting in a separately chosen commission, not the legislature. The Court's rationale turned on how direct democracy was a reservation of lawmaking power in the people, and a state could choose to vest districting power in the people themselves, as the ultimate sovereigns in the state's lawmaking process. Critical in the Arizona case was characterizing districting as part of the lawmaking process.

In the Pennsylvania case, allowing a state Supreme Court to declare a districting plan invalid under a state constitution would seem to be part of the lawmaking process. Courts determine whether the outcome of the political process accords with a state's constitution. So a judicial declaration

of unconstitutionality under the state's constitution would probably be all right, consistent with how a state's lawmaking process works, with judicial review. The court would have jurisdiction to make such a judgment. And when, as in Pennsylvania, the governor vetoes proposed apportionment legislation, that seems all right as well. The governor's role in the lawmaking process has been recognized when it is a traditional part of a state's lawmaking process.

In my opinion, what is not all right, however, is for a court to redraw district lines on its own based on state constitutional law. In a somewhat different context, that issue was raised but left unanswered in *Branch v. Smith* (2003).

That issue was my focus when I was testifying.. In my judgment, such judicial action stretches the *Smiley* and the *Arizona* cases too far. In no sense are courts part of a state's lawmaking process when they are crafting and imposing their own apportionment plan. And districting is and must be part of a state's lawmaking process. It is one thing to declare invalid the work of the lawmaking process under state constitutional principle; it is quite another to take on the apportionment process itself by developing and implementing a judicially-crafted apportionment plan under state law.

At most, what the state court can do is to block a state's Congressional redistricting as adopted by the legislature, but it cannot redo the districting on its own.

In sum, a state court has authority to review a state's legislatively-drawn Congressional apportionment as it does review other state legislation for conformity to a state's constitution. A state Supreme Court, such as Pennsylvania's, has authority to determine and declare whether a Congressional apportionment statute is consistent with state constitutional requirements. But that power does not include the power to establish and impose, as a remedy or otherwise, its own apportionment plan under state law. Under Article I, Section 4 of the United States Constitution, that exercise of judicial power intrudes on the state's lawmaking process.

If the political branches cannot agree on an apportionment alternative, then there is impasse. In essence, the state's lawmaking process has failed to exercise the authority conferred by the Constitution on state legislatures. This is where federal law enters in. Federal statutory law contemplates what to do when there is impasse in the state's lawmaking process.

The Constitution contemplates a federal Congressional role in redistricting. That role is triggered when the state lawmaking process defaults (through political impasse). Under Article I, Section 4, "Congress may at any time by Law make or alter" the regulation of states' Congressional elections, including apportionment. In such circumstances, federal law steps in to deal with the impasse.

Specifically, 2 U.S.C. Sec. 2a(c) deals with this precise type of impasse/default situation – what to do "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment." That is, if there is no change in the number of representatives based on the census, representatives "shall be elected from the districts then prescribed by the law of such

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State." Where there is no change in overall representation in a state after the last census, the federal statutory command is pretty direct and provides a federal statutory basis for federal guidance and intervention. *Id.* at (c)(1).

In sum, where impasse in a state's lawmaking process arises, federal law intercedes and relies on preexisting districting. The reliance on preexisting districting is required under federal law unless there is a breach of federal (not state) constitutional requirements – *e.g.*, one person, one vote. Given that partisan vote dilution cases are now not justiciable under federal constitutional principles (*Rucho v. Common Cause*), impasse at the state level triggers reliance on preexisting districting in the absence of a violation of federal law. A state Supreme Court cannot resolve such an impasse by imposing its own apportionment plan; federal law controls.

I hope that this analysis clarifies my comments and the basis for those comments.

Very truly yours,

James F. Blumstein

James F. Blumstein
University Professor of Constitutional Law
and Health Law & Policy
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Director, Health Policy Center

cc: Paul Taylor

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James Tucker for the record:
https://docs.house.gov/meetings/JU/JU10/20190905/109887/HHRG-116-JU10-20190905-SD002.pdf