Restoring the Voting Rights Act after *Brnovich* and *Shelby County*

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Questions for the Record
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QUESTIONS FROM SENATOR FEINSTEIN

1. **I am concerned that the Supreme Court's decisions in *Shelby County v. Holder* and *Brnovich v. DNC* have made it easier for states to pass and defend discriminatory voting measures.**

    a. **How do you think Congress can improve on the *John Lewis Voting Rights Advancement Act* so that we are doing all that we can to protect the right to vote?**

The *John Lewis Voting Rights Advancement Act* (VRAA) has been a direct response to the increase in voter suppression and discriminatory behaviors that has resulted from the Supreme Court's *Shelby Country* and *Brnovich* decisions, with provisions that are updated to address modern forms of voting discrimination that have underscored the urgent need for robust voting rights protections.

LDF supports the VRAA in full. In addition, LDF stands ready to work with this Committee to identify potential ways to strengthen the VRAA in response to the 2020 election—which demonstrated the need for appropriate protections at all stages of the voting process, including the counting of ballots and certification of results—and in response to the experience of Black voters and other voters in the upcoming November 2022 elections. LDF will continue to monitor voting in this election through our Prepared to Vote ("PTV") initiative and our Voting Rights Defender ("VRD") project, which place LDF staff and volunteers on the ground for primary and general elections every year to conduct non-partisan election protection, poll monitoring, and to support Black political participation in targeted jurisdictions—primarily in the South. LDF is also a founding member of the non-partisan civil rights Election Protection Hotline (1- 866-OUR-VOTE), presently administered by the Lawyers' Committee for Civil Rights Under Law. The experiences, reports, and information collected during this election cycle may point to potential ways to strengthen the VRAA in the future.

    b. **In addition to the *John Lewis Voting Rights Advancement Act*, what other federal legislative measures do you believe are necessary to limit the ability of states to restrict voting rights?**

In addition to the VRAA, LDF also strongly supports the For the People Act and the Freedom to Vote Act ("FTPA/FRVA), a set of critical reforms that have been introduced in

previous Congresses as H.R. 1 and S. 1. These measures constitute a vital step forward to increase Americans' access to the ballot box, counteract the effects of racial and partisan gerrymandering, and promote transparency in the campaign finance system. The FTPA/FRVA covers four primary subject areas:

(1) Voting Rights: The FTPA/FRVA requires the establishment of a system of automatic voter registration and ensures that states hold at least 14 consecutive days of early, in-person voting. These measures ensure that voting registration is accessible to all voting-age individuals, mail-in initiatives are expanded, and that polling places are accessible to rural populations, students, and those with disabilities.

(2) Election Security: The FTPA/FRVA seeks to limit partisan interference with election administration and protect voters from intimidation and misinformation through limiting the ability of statewide election officials to remove local election administrators, making it a federal crime to intimidate or threaten election officials, and ensuring that post-election audits are completed.

(3) Redistricting: The FTPA/FRVA prohibits partisan and racial gerrymandering through setting forth new, mandatory criteria for states to use when drawing their congressional districts. This initiative will expand protections for minority voters and enhance transparency in the creation of such maps.

(4) Campaign Finance: The FTPA/FRVA increases transparency and oversight through mandating expenditures for donors who give large amounts of money, strengthens the FEC's enforcement process, and provides funds for states to improve their voting administration and infrastructure.

Together, the provisions in the FTPA/FRVA provide a North Star for the democracy reform agenda. They constitute a bold, comprehensive reform package that offers solutions to a broken democracy. Repairing and modernizing our voting system goes hand in hand with reforms that address the corrosive and inequitable power of money in our elections, and reforms that address the myriad ethical problems that plague all three branches of the federal government. The reforms in the FTPA/FRVA are necessary to advance racial justice, promote equal access to the political process, and ensure that our government works for all people, not just a powerful few. We urge Congress to adopt this critical measure, whether as a standalone bill or as part of a combined package with the VRAA, to further protect the right to vote.

2. **In your testimony, you write that "litigation is slow and costly – and court victories may come only after a voting law or practice has been in place for several election cycles."**

   a. **In light of this statement, what is your view on a proposal by some in Congress to update the *John Lewis Voting Rights Advancement Act* to "decrease the Attorney General's authority to deem a state or locality's actions a voting rights violation without a judicial finding of discrimination?"**

Under the John Lewis Voting Rights Advancement Act considered by the Senate as S.4 during the 117th Congress, "voting rights violations" are defined to include a numerated set of outcomes, among which are judicial findings of violations of the Fourteenth or Fifteenth Amendments or of the VRAA itself, consent decrees that contain an admission of liability for a voting rights violations, and Attorney General objections that prevent a proposed voting law or practice from being granted preclearance. All components of this definition are appropriate and well justified by case law and practice under the Voting Rights Act of 1965 and the congressional record. With respect to Attorney General objections, these determinations are a key component of equitable voting rights adjudications and should certainly continue to qualify as voting rights violations under the VRAA's updated geographic coverage formula.

Throughout the Voting Rights Act's history, Congress has assigned key aspects of its enforcement to the Attorney General. These include not only the power to make preclearance determinations under Section 5,[1] but also the power to determine whether a jurisdiction has maintained a "test or device," a determination that can trigger preclearance coverage,[2] and the power to appoint federal election observers, including the authority to exercise judgment to determine "when the assignment of observers is . . . necessary to enforce the guarantees of the 14th or 15th amendment."[3] In *South Carolina v. Katzenbach*, the Supreme Court rejected a challenge to these provisions brought by South Carolina and other states on separation-of-powers and other grounds, holding that Congress's decision to grant such powers to the Attorney General was "a valid means for carrying out the commands of the Fifteenth Amendment."[4]

The reasoning employed by the Court in *Katzenbach* applies as well to the VRAA's inclusion of Attorney General objections within the definition of voting rights violations for purposes of the updated coverage formula. In keeping with the traditional role of the Attorney General in voting rights enforcement, Congress is doing the same thing the Court specifically approved of in *Katzenbach*: "marshall[ing] an array of potent weapons against the evil [of voting discrimination], with authority in the Attorney General to employ them effectively."[5]

b. In addition, how would you respond to the claim that the injunctive relief standard is "too subjective as it requires the complaint to 'raise a serious question?'"

Section 109 of the VRAA establishes a new standard for plaintiffs seeking preliminary relief against likely voting rights violations to ensure that, in parts of the country where preclearance does not apply, there is still a remedy at law available to block voting changes that are likely to be problematic from being enforced while the merits of the litigation are decided. The preliminary injunctive standard set forth in this portion of the VRAA is a necessary and appropriate response to the Supreme Court's increasing use in recent years of a version of the principle set forth in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), as well as the Court's expanded use

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1 52 U.S.C. § 10304.

2 *Id.* § 10303(b).

3 *Id.* § 10305(a)(2).

4 *Katzenbach*, 383 U.S. at 337.

5 *Id*.

of "its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument."[6] To address the grave threat to the meritorious enforcement of voting rights statutes that these tendencies on the part of the Court represent, the VRAA simplifies the standard by instructing a court to grant preliminary relief if it determines that the plaintiff "has raised a serious question" as to whether a challenged practice violates federal voting rights statutes or the Constitution, and whether, absent the relief, the hardship imposed on the plaintiff would be greater than the hardship imposed on the defendant. Determining whether a plaintiff has raised a "serious question" will pose no interpretive challenge to federal judges, because it is an objective, proven standard drawn from federal practice, where for more than three decades courts have successfully applied it in various contexts.[7]

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6 *See, e.g., Merrill v. Milligan,* 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting).

7 *See, e.g., Bernhardt v. Los Angeles Cty*., 339 F.3d 920, 932 (9th Cir. 2003) (concluding that the plaintiff "is entitled to a narrow injunction because she has succeeded in raising serious questions about the [challenged policy]"); *Republic of the Philippines v. Marcos,* 862 F.2d 1355, 1362 (9th Cir.1988) (serious questions are those "which cannot be resolved one way or the other at the hearing on the injunction" . . . they "need not promise a certainty of success, nor even present a probability of success"); *National Wildlife Fed'n v. Coston,* 773 F.2d 1513, 1517 (9th Cir. 1985) (Serious questions need not promise a certainty of success, nor a probability of success, but must indicate a "fair chance of success on the merits").

"Restoring the Voting Rights Act after *Brnovich* and *Shelby County*"

Hearing before the Senate Committee on the Judiciary, Subcommittee on the Constitution

July 14, 2021

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Ms. Janai Nelson:

1. **Statements at the hearing reflected that "the gap between minority voting participation and white voting majority participation shrunk to almost zero."**

    a. **Is it correct that the racial gap in voting has shrunk to "almost zero?"**

Unfortunately, it is simply untrue that the racial gap in voting in this country is "almost zero." In fact, according to statistics published by the Census Bureau, turnout disparities between white voters and voters of color persist at a nationwide average of over 12 percentage points, as of the most recent presidential election.[1] According to the Census Bureau, 70.9% of non-Hispanic white U.S. citizens voted in the November 2020 election.[2] By contrast, only 62.6% of Black citizens, 53.7% of Latino citizens, and 59.7% of Asian American citizens voted in that election.[3] In several states, racial turnout gaps exceeded this national average.[4] Indeed, in three states previously covered by Section 5 preclearance—Louisiana, South Carolina, and Texas—the turnout gap between Black and white voters in the November 2020 election was the highest yet recorded in this century.[5]

Concerningly, recent research indicates that the Census Bureau's statistics on turnout may overestimate the incidence of voting among communities of color, suggesting that racial turnout disparities may be even greater than Census data reveals.[6] And the state of voting discrimination since 2020 has been far from static—indeed, the recent onslaught of restrictive and likely discriminatory voting laws enacted at the state level in response the 2020 election will

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1 U.S. Census Bureau, *Voting and Registration in the Election of November 2020* (April 2021), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html (Table 4b, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020).

2 *Id.*

3 *Id.*

4 *Id.*

5 Kevin Morris, Peter Miller & Coryn Grange, *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act*, Brennan Center for Justice (Aug. 20, 2021), https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights**.**

6 Stephen Ansolabehere, Bernard L. Fraga & Brian F. Schaffner, *The CPS Voting and Registration Supplement Overstates Minority Turnout,* Journal of Politics (2021), https://static1.squarespace.com/static/5fac72852ca67743c720d6a1/t/5ff8a986c87fc6090567c6d0/1610131850413/CPS_AFS_2021.pdf.

likely exacerbate these racial turnout gaps still further.[7] Notably, many of these laws are directly targeted at blocking pathways to the ballot box that Black and Latino voters used successfully in 2020.[8]

b. Is this the appropriate metric to use to evaluate whether Congress should enact voting protections specifically for minority communities? If not, why not?

Turnout is a relevant consideration, but turnout alone is only part of the story. At best, it is an incomplete indicator of the unprecedented challenges faced by Black voters in recent elections, as recounted, in part, in LDF's *Democracy Defended* reports.[9] As I explained in my testimony before this Committee last year, relatively high turnout and registration rates among Black voters in 2020 occurred because of Herculean efforts by civil-rights groups, organizers, and activists, as well as sheer determination and resilience on the part of Black voters—and despite a litany of unequal obstacles that Black voters were forced to navigate and overcome across this nation. Overcoming unequal burdens does not mean those burdens do not exist. Nor is a two-tiered model of access to the franchise acceptable or lawful. As the Fifth Circuit explained in *Veasey v. Abbott*, LDF's lawsuit challenging Texas's discriminatory voter ID law,

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[7] Morris, Miller & Grange, *supra* note 5; *see also* Kevin Morris, *Patterns in the Introduction and Passage of Restrictive Voting Bills are Best Explained by Race, Brennan Center for Justice* (Aug. 3, 2022), https://www.brennancenter.org/our-work/research-reports/patterns-introduction-and-passage-restrictive-voting-bills-are-best.

[8] For example, after Black voters increased their usage of absentee ballots as a result of the pandemic, S.B. 90 in Florida severely curtailed the use of unstaffed ballot return drop boxes and effectively eliminated community ballot collection. *See generally* Complaint for Declaratory and Injunctive Relief, *Fla. State Conferences of Branches of NAACP v. Lee*, No. 4:21-cv-00187-WS-MAF (N.D. Fla. May 6, 2021), ECF No. 1. And in Georgia and Texas, after strong early in-person turnout among Black voters, lawmakers initially moved to outlaw or limit Sunday voting in a direct attack on the "souls to the polls" turnout efforts undertaken by many Black churches to mobilize voters to engage in collective civic participation. Letter from Sam Spital et al., LDF, to Texas Senate (May 29, 2021), https://www.naacpldf.org/wp-content/uploads/LDF-Conference-Committee-Report-OppositionSenate-20210529-1.pdf; Letter from John Cusick et al., LDF et al., to Ga. House of Representatives, Special Comm. on Election Integrity (Mar. 14, 2021), https://www.naacpldf.org/wpcontent/uploads/LDF-SPLC-Written-Testimony-on-SB202-3.18.21.pdf. In both states, after advocacy from LDF and others, lawmakers eventually removed these blatantly discriminatory provisions from the omnibus voting bills under consideration—although in both states, the final forms of the enacted bills remained extremely harmful to voters of color. Press Release, LDF, *LDF Files Lawsuit Against the State of Florida Over Suppressive Voting Law* (May 6, 2021), https://www.naacpldf.org/pressrelease/ldf-files-lawsuit-against-the-state-of-florida-over-suppressive-voting-law/; Press Release, LDF, *Civil Rights Groups Sue Georgia Over New Sweeping Voter Suppression Law* (Mar. 30, 2021), https://www.naacpldf.org/press-release/civil-rights-groups-sue-georgia-over-new-sweeping-votersuppression-law/. The 2021 omnibus voting law in Texas eliminated a number of accessible, common sense voting methods, including "drive-thru" voting and 24-hour early voting—both methods that proved invaluable for Black and Latino voters in Texas's largest cities in 2020. Complaint for Declaratory and Injunctive Relief, *Houston Justice v. Abbott*, No. 5:21-cv-00848 (W.D. Tex. filed Sept. 7, 2021), ECF No. 1, https://www.naacpldf.org/wp-content/uploads/Houston-Justice-et-al.-v.-Abbott-et-al.-Complaint.pdf; *see also* Press Release, LDF, *Lawsuit Filed Challenging New Texas Law Targeting Voting Rights* (Sept. 7, 2021), https://www.naacpldf.org/press-release/lawsuit-filedchallenging-new-texas-law-targeting-voting-rights/.

[9] NAACP Legal Defense and Educational Fund, Inc. ("LDF"), Thurgood Marshall Institute, *Democracy Defended* (2021), https://www.naacpldf.org/wp-content/uploads/LDF_2020_DemocracyDefended-1-3.pdf.

discriminatory burdens on the right to vote can constitute an unlawful "abridgement" of that fundamental right regardless of whether some Black voters overcome the burdens and are able to cast ballots.[10] As the *Veasey* court observed, "in previous times, some people paid the poll tax or passed the literacy test and therefore voted, but their rights were still abridged."[11]

Today, poll taxes and literacy tests are no longer a feature of our electoral landscape, but discriminatory burdens on the right to vote persist, perpetuating new forms of the same "insidious and pervasive evil" that Congress found itself confronted with in 1965.[12] For example, post-election surveys[13] and analyses of smartphone data[14] have made clear that Black and Latino voters wait in significantly longer lines than white voters to cast their ballots in person. Black voters and other voters of color are also more likely to lack identification required to vote,[15] more likely to be unable to take time off work to vote,[16] more likely to be asked to vote by provisional ballot,[17] and more likely to have those provisional ballots rejected.[18] Clearly, there is still significant work for a restored, strengthened, and revitalized Voting Rights Act to do if this nation is to move closer to becoming a truly equitable, racially inclusive democracy.

2. **Statements and testimony at the hearing indicated that the Voting Rights Advancement Act would require preclearance for "mere allegations" and "not proof of voter discrimination," and that "all it takes is allegations . . . by the Attorney General" for states to fall under the preclearance requirement.**

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10 *See Veasey v. Abbott*, 830 F.3d 216, 260 (5th Cir. 2016).

11 *Id.* at 260 n.58.

12 *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

13 Hannah Klain et al., *Waiting to Vote: Racial Disparities in Election Day Experiences*, Brennan Center for Justice (June 3, 2020), https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf.

14 M. Keith Chen et al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data* (Oct. 30, 2020), https://arxiv.org/pdf/1909.00024.pdf.

15 Alex Vandermaas-Peeler, Daniel Cox, Molly Fisch-Friedman, Rob Griffin & Robert P. Jones, *American Democracy in Crisis: The Challenges of Voter Knowledge, Participation, and Polarization*, PRRI (July 17, 2018), https://www.prri.org/research/American-democracy-in-crisis-voters-midterms-trump-election-2018/; *see also* Phoebe Henninger, et al., *Who Votes Without Identification? Using Individual-Level Administrative Data to Measure the Burden of Strict Voter Identification Laws* 13 (Sept. 29, 2020), https://scholar.harvard.edu/files/morse/files/mich_voter_id.pdf; Joel Kurth & Ted Roelofs, *Poor in Michigan with no ID. "I am somebody. I just can't prove it."*, Bridge Michigan (Sept. 26, 2017), https://www.bridgemi.com/urban-affairs/poormichigan-no-id-i-am-somebody-i-just-cant-prove-it.

16 Vandermaas-Peeler et al., *supra* note 15.

17 Daron Shaw, *Report on Provisional Ballots and American Elections* (June 21, 2013), http://web.mit.edu/supportthevoter/www/files/2013/08/Provisional-Ballots-Shaw-and-Hutchings.docx_.pdf; Joshua Field et al., *Uncounted Votes: The Racially Discriminatory Effects of Provisional Ballots, Center for American Progress* (Oct. 2014), https://cdn.americanprogress.org/wp-content/uploads/2014/10/ProvisionalBallots-report.pdf?_ga=2.111276417.42375908.1621859427-264694957.1618767359.

18 Thessalia Merivaki & Daniel A. Smith, *A Failsafe for Voters? Cast and Rejected Provisional Ballots in North Carolina*, Sage Journals (Sept. 19, 2019) https://journals.sagepub.com/doi/10.1177/1065912919875816; *see* Field et al., *supra* note 17.

a. Is this true or false?

The referenced statements and testimony are inaccurate. The Senate's proposed John Lewis Voting Rights Advancement Act (VRAA) would update and restore the Voting Rights Act's full protections for the modern era, reinstating federal oversight over discriminatory voting practices with a preclearance coverage formula based on objective data and reliable sources of evidence. More detailed information on the coverage formula is provided below in response to the second part of this question.

b. How do the coverage formulas trigger application of preclearance requirements to jurisdictions under the VRAA?

Among its critically needed provisions, the VRAA restores Section 5 preclearance, updating the formula that determines which geographic jurisdictions are subject to preclearance to meet contemporary challenges, as the Supreme Court directed in *Shelby County*.[19] The bill includes a modernized geographic coverage formula under which states and their subdivisions will be covered based on recent voting rights violations within a "rolling" period of years, as well as a new type of preclearance coverage formula that requires jurisdictions with growing racial minority populations to obtain preclearance before adopting certain practices that are widely known to discriminate against voters of color. Both elements of the coverage formula are based on objective criteria, justified by a voluminous congressional record attesting to an overwhelming number of discriminatory voting laws and policies, and in no way reliant on "mere allegations," whether by the Attorney General or anyone else.

3. **Statements at the hearing indicated that "in 2020, in Texas. . . 66% of registered voters cast their ballot—historic numbers of Hispanic and African American voters participated in the election[,]" and that because 66% of registered voters cast their ballot in the 2020 election in Texas, it showed that "anybody who wanted to cast their ballot who was legally qualified to do so had ample opportunity to do so and they did so in a very robust fashion."**

a. Is a 66% overall participation rate by registered voters probative of whether minority voters have the same opportunity to register and to vote as white voters? Why or why not?

Overall participation rates for the registered-voter population as a whole are not probative of whether certain groups of voters, such as Black or Latino voters, face inequities in the opportunity to register and to vote. Moreover, as discussed above in response to Question 1, it is a well-documented fact that racial turnout gaps persist at significant levels, both across the United States and, to an even greater extent, in several states formerly subject to Section 5 preclearance. And turnout levels alone cannot speak to the discriminatory barriers and challenges faced and overcome by Black voters in the registration and voting process. Moreover, as noted below, reported turnout levels show a significant racial gap.

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19 *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 548 (2013).

b. Do you agree that Hispanic and African American voters in Texas had the same opportunity to register to vote or to vote in the 2020 election as white voters?

In fact, the evidence strongly suggests the opposite: that Latino and Black voters in Texas *did not* have the same opportunity to register to vote or to vote in the 2020 election as white voters. According to the Census Bureau's statistics on voter registration and voter turnout, 78.5% of non-Hispanic white citizens in Texas were registered to vote as of the 2020 election.[20] By contrast, only 69.9% of Black citizens in Texas—and only 63.2% of Latino citizens in Texas—were registered to vote as of that election.[21] These data reflect a registration gap, as of the 2020 election, of nearly 9 percentage points between white citizens and Black citizens and of more than 15 percentage points between white citizens and Latino citizens, strongly suggesting unequal opportunities to register to vote that fall along racial lines.

Adding context to these disparities in voter registration, Texas has a continuing record of flawed purge practices that disproportionately target naturalized U.S. citizens, a population which, in Texas, includes significant numbers of Latino and Black citizens.[22] This record includes a flawed purge attempted by the Texas Secretary of State in 2019 that improperly flagged 98,000 naturalized citizens for the cancellation of their voter registration before it was blocked by a federal court, and which ultimately induced the state to enter into a binding settlement agreement.[23] The Texas Secretary of State's methodology in 2019 was severely overinclusive—at least 99.9% of the individuals targeted for removal were naturalized citizens who had become U.S. citizens before registering to vote.[24] As the U.S. District Court for the Western District of Texas found at the time, "perfectly legal naturalized Americans were burdened with . . . ham-handed and threatening" actions by the Texas Secretary of State, which raised constitutional concerns and "exemplifie[d] the power of government to strike fear and anxiety and to intimidate the least powerful among us."[25] Unfortunately, Texas engaged in another over-inclusive purge of naturalized U.S. citizens as recently as 2021 using a "new

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20 U.S. Census Bureau, *supra* note 1.

21 *Id*.

22 *See* Robert Warren & Donald Kerwin, *The US Eligible-to-Naturalize Population: Detailed Social and Economic Characteristics*, 3 J. Migration & Human Security 306, 311 (2015); Abby Budiman et al., *Naturalized Citizens Make Up Record One-in-Ten U.S. Eligible Voters in 2020*, Pew Research Ctr. (Feb. 26, 2020), https://www.pewresearch.org/his-panic/2020/02/26/naturalized-citizens-make-up-record-one-in-ten-u-s-eligible-voters-in-2020/; New American Economy Research Fund, Power of the Purse: The Contributions of Black Immigrants in the United States (Mar. 19, 2020), https://research.newamericaneconomy.org/report/black-immigrants-2020/ (reporting that Texas is home to the highest number of Black immigrants from Africa and has the fifth-highest number of Black immigrants who are eligible voters of any state).

23 *Texas LULAC v. Whitley*, No. CV SA-19-CA-074-FB, 2019 WL 7938511, at *1–*2 (W.D. Tex. Feb. 27, 2019).

24 *Id.* at *1 ("Out of 98,000 new American voters on the list, thus far approximately 80 have been identified as being ineligible to vote.").

25 *Id.*

program [that] continues to flag eligible voters as suspected non-citizens,"[26] raising questions about the state's compliance with the terms of the 2019 settlement agreement.[27]

With respect to voter turnout, according to the Census Bureau, 72.0% of non-Hispanic white voters in Texas cast ballots in the Nov. 2020 election, as compared to only 60.8% of Black voters and 53.1% of Latino voters.[28] Thus, Census Bureau data from the 2020 election in Texas—which, as above, may overstate turnout among voters of color[29]— reflect turnout gaps of over 11 percentage points between white voters and Black voters and of nearly 19 percentage points between white voters and Latino voters. These racial disparities in turnout, as noted above, were the starkest yet seen in Texas this century[30]—and recent legislation in Texas may accelerate them.[31]

c. What facts should Congress be examining to determine whether minority voters are being subject to discriminatory voting conditions?

Racial disparities in voter turnout and ballot rejection rates are a relevant and appropriate consideration, which Congress should continue to examine. In addition, Congress should examine evidence, such as that discussed above, that Black voters and other voters of color are negatively impacted by longer wait-times at polling places,[32] less access to required forms of voter identification or underlying documentation, increased risk of being harassed or intimidated at the polls, decreased ability to take off time from work to vote,[33] higher likelihood of being forced to vote using a provisional ballot[34] and lower likelihood of having their provisional ballots counted,[35] and heightened risk of being removed from absentee-voting lists.[36] As I explained in my testimony before this Committee, Congress should also consider racial disparities and evidence of discrimination in other areas of life—including education, employment, healthcare, housing, and transportation—as the suppressive power of many restrictive voting laws in the past

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26 Findings of Fact and Conclusions of Law at 4-5, *Campaign Legal Center v. Scott*, No. 1:22-cv-00092-LY, ECF No. 55 (W.D. Tex. Aug. 2, 2022) ("[I]n Tarrant County, at least 119 of the 675 suspected non-citizen voters provided documentation confirming citizenship. Likewise, 93 of the 385 suspected non-citizen voters in Travis County provided proof of citizenship, and 88 of the 302 suspected non-citizen voters in Collin County provided proof of citizenship.").

27 Acacia Coronado, Paul Weber & Nicholas Riccardi, *New Texas voting law snags US citizens, mail ballot requests*, A.P. (Jan. 14, 2022), https://apnews.com/article/voting-rights-austin-texas-voting-legislature-f6bca0efd177745538e0c08aca796fb0.

28 *Id*.

29 Ansolabehere, Fraga & Schaffner, *supra* note 6.

30 Morris, Miller & Grange, *supra* note 5.

31 *See* Nick Corasaniti, Mail Ballot Rejections Surge in Texas, With Signs of a Race Gap, N.Y. Times (March 18, 2022), https://www.nytimes.com/2022/03/18/us/politics/texas-primary-ballot-rejections.html.

32 Klain et al., *supra* note 13; Chen et al., *supra* note 14.

33 *See* Vandermaas-Peeler et al., *supra* note 15; *see also* Henninger et al., *supra* note 15; Kurth et al., *supra* note 15.

34 Shaw, *supra* note 17; Field et al., *supra* note 17.

35 Merivaki & Smith, *supra* note 18; Field et al., *supra* note 17.

36 Kevin Morris & Peter Miller, *Nonwhite Voters at Higher Risk of Being Dropped from Arizona's Mail Ballot List*, Brennan Center for Justice (Aug. 11, 2022), https://www.brennancenter.org/our-work/analysis-opinion/nonwhite-voters-higher-risk-being-dropped-arizonas-mail-ballot-list.

and present has been heightened by the existence of racial discrimination in other aspects of social, economic, and political life.[37]

Finally, as noted above, many voting laws continue to target the practices and procedures that voters of color have used successfully to cast a ballot. The proliferation of such laws is another important fact that militates toward the need to enact greater federal protections of the right to vote.

d. Is it correct that any qualified citizen who wants to cast a ballot in Texas can and has "ample opportunity" to do so? Can you provide additional detail about barriers to voting that qualified citizens in Texans faced in seeking to cast their ballots?

It is not true that any qualified citizen who wants to cast a ballot in Texas has "ample opportunity" to do so. Texas was recently ranked the 46th hardest state in the nation to vote as a result of the various barriers and restrictions that the state has implemented for their voters; this was not a surprise to LDF and our partners in the civil rights community.[38] With limited access to absentee voting, no absentee ballot cure process, stringent voter identification laws, accessibility issues, and several reported instances of voter intimidation, Texas voters face significant barriers to the franchise. In addition, unlike 42 states and the District of Columbia, Texas denies eligible citizens the opportunity to register to vote online.[39]

Examples of these barriers were highlighted in the 2020 election. In Tarrant County, several incidents were reported in which caravans of individuals bedecked in campaign attire displayed long guns near polling places, potentially intimidating and harassing voters.[40] Fortunately, LDF and other civil rights partners were able to intervene, resulting in the implementation of alternative polling locations. Individual experiences also highlight examples of barriers to voting that qualified citizens in Texas have faced in recent elections. As highlighted in LDF's *Democracy Defended* report on the 2020 election, because of Texas's restrictive absentee-voting rules, one individual had to leave her hospitalized husband's side and drive to the election administrator's office to request an emergency ballot for him—then deliver the application to her husband, receive a doctor's certification of his illness, and drive back to the office in order for her husband to vote.[41] In addition, one 93-year-old voter in Texas was denied the opportunity to include a change-of-address form with her absentee ballot over the phone under the false premise that Texas makes it illegal for voters to correct their ballots, even though no Texas law forbade such curing opportunities.[42] These examples and others make it clear that

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37 *See, e.g.*, *Katzenbach*, 383 U.S. at 310–11 & nn.9–10 (observing that the effectiveness of literacy tests at blocking Black Americans from voting resulted, in significant part, from the pervasiveness of racial discrimination in education).

38 Scot Schraufnagel, Michael J. Pomante II & Quan Li, *Cost of Voting in the American States: 2022* (21 Elec. L. J. 2022), https://www.liebertpub.com/doi/epdf/10.1089/elj.2022.0041.

39 Nat'l Conf. of State Legislatures, *Online Voter Registration* (Sept. 22, 2022), https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx.

40 LDF, *supra* note 9, at 130.

41 *Id.* at 132.

42 *Id.* at 134.

qualified citizens in Texas face continued barriers to casting their ballot, which are likely to be exacerbated in the 2022 election.

4. **There was testimony at the hearing that minority voters "registered up to the level of the rest of the country . . . decades ago." Is that accurate?**

As in the context of voter turnout, statistics on voter registration published by the Census Bureau disprove this claim. In fact, according to the Census Bureau, voter-registration disparities between white citizens and Black, Latino, Asian, and other citizens persist at a nationwide average of over 11 percentage points as of November 2020.[43] According to the same data tables, 76.5% of non-Hispanic white U.S. citizens were registered to vote as of November 2020.[44] By contrast, only 68.9% of Black citizens, 61.1% of Latino citizens, and 63.8% of Asian American citizens were registered to vote as of November 2020.[45] Moreover, as discussed above in response to Question 1, registration statistics and turnout rates do not tell the full story of the unacceptable barriers Black voters and other voters of color must often overcome to exercise the most fundamental right of citizenship.

5. **Senators and witnesses at the hearing assailed third-party ballot collections efforts as "ballot harvesting" and asserted that the practice invites fraud, undermines integrity of and confidence in elections, and that prohibiting it, as the Arizona law at issue in Brnovich did, would protect the right to vote.**

    a. **Are these statements concerning purported harms and risks of third-party ballot collection accurate?**

These statements are unsubstantiated. In fact, third-party ballot collection efforts are a lifeline for many voters, including voters of color. Like third-party registration drives, they also implicate constitutional protections for speech and association under the First Amendment, as well as protections on the right to vote under the First and Fourteenth and Amendments.[46]

    b. **Why is third-party ballot collection a critical tool to expanding access to the franchise, particularly in minority communities?**

Third-party ballot collection is especially important for Black voters, who are less likely to have access to a vehicle than other voters,[47] and may face more difficulty returning ballots without assistance from their church, local community organization, or another trusted source of assistance. Third-party ballot collection is also particularly important for voters who have limited mobility, including older voters or voters with disabilities. These voters are more likely to rely

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43 U.S. Census Bureau, *supra* note 1 (showing that 76.5% of U.S. citizens identifying as "non-Hispanic white alone" were registered to vote as of November 2020, as compared to 65.0% of all other U.S. citizens).

44 *Id.*

45 *Id.*

46 *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158-59, 1164 (N.D. Fla. 2012) (making these points in the analogous context of third-party registration drives).

47 *Car Access*, Nat. Equity Atlas (2019), https://nationalequityatlas.org/indicators/Car_access#/.

on trusted third parties, such as home health aides or nonprofit organizations, to help them return their ballots.

c. How do prohibitions on third-party ballot access disproportionately and discriminatorily impact minority communities?

Third-party ballot access, including third-party ballot collection and delivery and community ballot collection, is a particularly important option for voters who face barriers in accessing voting locations. Restrictions on third-party ballot access tend to culminate in two types of limitations: restrictions on who can assist voters in collecting and returning ballots, and limits on how many ballots an individual can collect. For the reasons explained above, restrictions or prohibitions on third-party ballot collection activities will likely diminish access to the franchise for the most vulnerable voters, including racial minority voters, first-time voters, voters with rigid work or care-taking schedules, and voters who are disabled, elderly, or have limited access to transportation.

Simply put, third-party ballot access benefits minority communities. For Black and other racial minority households, who are less likely to have access to a car than white households,[48] such third-party initiatives—often organized by entities such as churches, nonprofits, or civic organizations—assist in surmounting transportation barriers to the ballot and provide a lifeline to the franchise. A similar importance exists for disabled voters, who face impediments returning their ballots due to inadequate voting accommodations and access to transportation.[49] Elderly voters are also more likely to use mail ballots and often face similar impediments in returning their ballots due to mobility issues.[50]

As the Fifth Circuit found in a voting rights case arising in Mississippi, and as is still true today, Black workers "predominate in blue-collar and service worker positions in which they are likely to be working for an hourly wage and are less likely to be able to take off from work to register to vote."[51] Black voters employed in these positions often face barriers in taking time off to vote or to submit their absentee ballots.[52] Ballot collection initiatives by trusted third parties enable individuals' ballots to reach their destination safely and be counted, even if the individual casting the ballot is unable to submit it themselves. In another example, a case arising in Montana indicates that third-party ballot access initiatives are particularly important for Native American voters who may live further away from county election offices than other members of

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48 *Id.*

49 Abigail Abrams, *Mail Voting Boosted Turn Out for Voters with Disabilities. Will Lawmakers Let it Continue?*, TIME (Feb, 18, 2021, 12:24 PM), https://time.com/5940397/2020-mail-voting-accessibility/

50 Charles Stewart III, *Some Demographics on Voting By Mail*, Cal Tech Election Updates (Mar. 20, 2020), https://electionupdates.caltech.edu/2020/03/20/some-demographics-on-voting-by-mail/; Michalina Kubicka, *Barrier to Access: Older Voters*, The Voter Formation Project, https://www.voterformationproject.org/post/barriers-to-access-older-voters.

51 *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1256 (N.D. Miss. 1987), *aff'd sub nom. Mississippi State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991).

52 Vandermaas-Peeler, et al., *supra* note 15 (finding that Black (16%) and Hispanic (16%) Americans are much more likely to report having trouble taking time off of work than white Americans (8%).)

the electorate and have limited access postal services.[53] The court found "evidence of increased Native American voter turnout between the 2014 and 2018 elections due to the efforts of organizations like Western Native Voice that do ballot-collection work on reservations."[54] Especially now, as numerous states implement restrictive voting laws that limit the availability of ballot drop boxes and reduce the time period during which voters may return absentee ballots, third-party ballot access functions as a critical tool to level the playing field and provide access to the ballot for voters whose voices might otherwise be excluded from the democratic process.

6. **Testimony at the hearing asserted that Section 2 "demands that race not be taken into account" when setting voting laws and procedures," and that Section 5 by contrast demands states take race into account when adopting voting changes, such as those that result from redistricting. That testimony appears to be arguing that Section 2 and Section 5 are sometimes at odds with one another. Is this an accurate statement of the law? Please explain.**

This statement of the law is inaccurate. The suggestion that Section 2 and Section 5 are somehow at odds with each other is disproven by the texts of the statutes and their longstanding interpretation by federal courts, including the Supreme Court. By its text, Section 2 forbids any "voting qualification or prerequisite to voting or standard, practice, or procedure" which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[55] It is violated where "the totality of circumstances" reveals that "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [a protected group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[56] As interpreted and applied by the Supreme Court and other courts, Section 2 authorizes and indeed *requires* the consideration of race under certain circumstances.

The highly structured framework set forth by the Supreme Court to evaluate Section 2 claims in *Thornburg v. Gingles* first demands proof of three objective "preconditions," namely, that: (1) a minority group is "sufficiently large and compact to constitute a majority in a reasonably configured district," (2) the minority group is "politically cohesive," and (3) the majority votes sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate.[57] If these preconditions are established, a court considers several factors identified by the Supreme Court, based on the guidance of the Senate Judiciary Committee report accompanying the 1982 amendments to Section 2, that are indicative of the totality of circumstances to determine whether the political process is equally open to minority voters.[58] Where evidence shows that a state's redistricting plan, for example, in combination with racial polarization and other factors evincing discrimination, denies minority voters an equal opportunity to elect their preferred candidates, and that the creation of an additional majority-

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53 *Driscoll v. Stapleton*, 473 P.3d 386, 393 (Mont. 2020).

54 *Id.*

55 52 U.S.C. § 10301(a).

56 *Id.* at §10301(b).

57 *Thornburg v. Gingles*, 478 U.S. 30, 48-52 (1986).

58 *Id.* at 36-38.

minority district is consistent with traditional redistricting principles, Section 2 may require the drawing of a district that provides voters of color an equal opportunity to participate in the political process and elect candidates of choice.[59] In short, it is wholly inaccurate to claim that Section requires "race-neutral" decision-making or demands that race not be taken into account.[60]

Section 5 employs a "retrogression" standard, under which the Attorney General or a court is instructed to deny preclearance to "[a]ny voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color" or of language minority status.[61] This means that if a law subject to preclearance would diminish or lead to a retrogression in the electoral power of racial minority voters, the law may be blocked from going into effect.[62] The two provisions were designed work together—in the words of one canonical source, "Section 2 is a legal *sword* that enables minority voters to improve their electoral position, while Section 5 is a *shield* that prevents minority voters' position from worsening."[63] Thus, while the standards of Section 2 and Section 5 are distinct, they are clearly compatible and complementary—and neither statute prohibits the appropriate use of race.

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59 *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248-51 (2022) (per curiam).

60 Nor does the Fourteenth Amendment to the U.S. Constitution forbid the use of race in redistricting. Instead, the Fourteenth Amendment requires that the use of race as a *predominant* consideration in redistricting satisfy strict scrutiny—that is, that the use of race as a predominant consideration must be narrowly tailored to achieve a compelling state interest. Compliance with the VRA is such a compelling state interest, as lower courts have held and the U.S. Supreme Court has long assumed. *E.g.*, *Bush v. Vera*, 517 U.S. 952, 977 (1996) (collecting cases); *see Perez v. Abbott*, 253 F. Supp. 3d 864, 898 (W.D. Tex. 2017) ("Compliance with § 2 of the VRA constitutes a compelling governmental interest."); *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 981 F. Supp. 751, 761 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2d Cir. 1999) ("hold[ing] that remedying a violation of Section 2 of the Voting Rights Act of 1965 is a compelling state interest"). Thus, when a state's use of race is narrowly tailored to comply with the VRA, meaning that the state has "a strong basis in evidence" that provides "good reason to believe" its use of race is necessary to comply with the VRA, strict scrutiny is satisfied. *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015).

61 52 U.S.C. § 10304(b).

62 *See Beer v. United States*, 425 U.S. 130, 141 (1976) ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

63 Daniel H. Lowenstein, Richard L. Hasen, Daniel P. Tokaji & Nicholas Stephanopoulos, *Election Law: Cases and Materials* (6th ed. 2017).