



WRITTEN STATEMENT OF
SOPHIA LIN LAKIN
DIRECTOR, VOTING RIGHTS PROJECT
AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

The Right Side of History: Protecting Voting Rights in America

Submitted to the U.S. Senate Committee on the Judiciary

Hearing on March 12, 2024

Submitted on March 11, 2024

Introduction

Chairman Durbin, Ranking Member Graham, and members of the Committee, thank you for the opportunity to testify before you regarding the pressing need for the restored and strengthened voting rights protections in the John R. Lewis Voting Rights Advancement Act.

The ACLU Voting Rights Project was established in 1965—the same year that the historic Voting Rights Act (“VRA”) was enacted—and has litigated more than 400 cases since. Its mission is to build and defend an accessible, inclusive, and equitable democracy free from racial discrimination. The Voting Rights Project has filed or intervened in more than 30 lawsuits to protect voters since the 2020 election, including on behalf of Black, Latine, Asian, Indigenous communities, and voters with disabilities. That includes several recent cases that have reached the Supreme Court, including a redistricting challenge under Section 2 of the VRA in *Allen v. Milligan*¹ (successfully enjoining Alabama’s congressional plan that diluted Black voters’ electoral strength), and a racial gerrymandering lawsuit in *Alexander v. South Carolina NAACP*² (challenging South Carolina’s congressional plan adopted in 2022). It also includes two Supreme Court cases challenging the last administration’s discriminatory census policies: *Department of Commerce v. New York*³ (successfully challenging an attempt to add a citizenship question to the 2020 Census), and *Trump v. New York*⁴ (challenging the exclusion of undocumented immigrants from the population count used to apportion the House of Representatives). And it includes challenges to voter purges and documentary proof of citizenship laws, and to other new legislation restricting voting rights in states like Florida, Georgia, Mississippi, Ohio, and Texas

In my capacity as Director of the ACLU Voting Rights Project, I lead the planning, strategy, and supervision of the ACLU’s voting rights litigation nationwide, which focuses on ensuring that all Americans have access to the franchise, and that everyone is equally represented in our political processes. I also serve as litigation counsel on many of the Project’s cases. I am currently litigating or have litigated numerous cases challenging racially discriminatory laws under Section 2 of the Voting Rights Act, including *Alpha Phi Alpha Fraternity Inc. v. Raffenberger*,⁵ a redistricting challenge to Georgia’s state legislative maps for unlawfully diluting Black voters’ voting strength; *NAACP v. Arkansas Board of Apportionment*,⁶ another redistricting case challenging Arkansas’s state house legislative district map for diminishing Black voters’ voting power; *Sixth District of the African Methodist Episcopal Church v. Kemp*,⁷ a challenge to Georgia’s sweeping voter suppression law enacted in the wake of the 2020 elections; *Texas v. Crystal Mason*,⁸ the representation on appeal of Ms. Mason who was

¹ 599 U.S. 1 (2023).

² No. 3:21-cv-03302-MGL-TJH-RMG (D. S.C. filed Oct. 12, 2021). The Supreme Court heard oral argument in this case on October 11, 2023. A decision remains pending.

³ 139 S. Ct. 2551 (2019).

⁴ 141 S. Ct. 530 (2020).

⁵ No. 1:21-cv-05337-SCJ (N.D. Ga. filed Dec. 30, 2021).

⁶ No. 4:21-cv-01239-LPR (E.D. Ark. filed Dec. 29, 2021).

⁷ No. 1:21-cv-01284-JPB (N.D. Ga. filed Mar. 29, 2021).

⁸ No. 02-18-00138-CR (Tex.App.—Fort Worth 2018).

convicted and sentenced to 5-years' imprisonment for submitting a provisional ballot that was never counted even though she did not know she was ineligible to vote; *MOVE Texas v. Whitley*,⁹ a challenge to a discriminatory purge program in Texas; *Missouri State Conference of the NAACP v. Ferguson-Florissant School District*,¹⁰ a challenge to the discriminatory at-large method of electing school board members; *Frank v. Walker*,¹¹ a challenge to Wisconsin's voter ID law; and *North Carolina State Conference of the NAACP v. McCrory*,¹² a challenge to North Carolina's omnibus voter suppression law passed in the immediate aftermath of *Shelby County v. Holder*.¹³

More than a century ago, the Supreme Court famously described the right to vote as the one right that is preservative of all others.¹⁴ As Chief Justice John Roberts has explained, “[t]here is no right more basic in our democracy than the right to participate in electing our political leaders.”¹⁵ Unfortunately, our nation has a long and well-documented record of fencing out certain voters—Black voters and other voters of color, in particular—and today that racial discrimination in voting remains a persistent and widespread problem.

The landmark Voting Rights Act (“VRA”), one of the signature achievements of the Civil Rights Movement, has been critical in the efforts to combat this enduring blight. Passed initially in 1965, and reauthorized and amended with bipartisan support in 1970, 1975, 1982, 1992, and 2006,¹⁶ it is one of the most effective pieces of federal civil rights legislation ever enacted. But nearly eleven years ago, in *Shelby County v. Holder*,¹⁷ the Supreme Court struck down the formula used to determine which jurisdictions were covered by a federal preclearance regime. This meant that the heart of the VRA—the requirement that jurisdictions with a long record of voter suppression submit proposed changes to election laws to federal officials *before* they went into effect—functionally ended.

My written statement will discuss the ACLU's experience with ongoing and intensifying attacks on voting access, particularly for voters of colors, in the wake of the Supreme Court's 2013 decision in *Shelby County v. Holder*, and describe some of the reasons why the

⁹ No. 5:19-cv-00171 (W.D. Tex. filed Feb. 22, 2019).

¹⁰ 894 F.3d 924 (8th Cir. 2018).

¹¹ 768 F.3d 744 (7th Cir. 2014).

¹² 831 F.3d 204 (4th Cir. 2016) (“*N.C. NAACP v. McCrory*”).

¹³ 570 U.S. 529 (2013).

¹⁴ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

¹⁵ *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

¹⁶ *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments, Pub. L. No. 97-205, 96 Stat. 131 (1982); Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, as amended, 52 U.S.C. § 10301 *et seq.*

¹⁷ 570 U.S. 529 (2013).

preclearance requirement is essential to protect voting rights, particularly in light of the Supreme Court’s 2019 decision in *Brnovich v. Democratic National Committee*, which made it harder for plaintiffs suing under the VRA to meet their burden of proof.

The *Shelby County* decision changed the landscape of voting rights in the United States.¹⁸ Under the VRA, states and counties with the worst histories and records of voting discrimination had to obtain federal “preclearance”—that is, approval from the Department of Justice or a federal court—before implementing any changes to voting laws and practices, to ensure they did not make minority voters worse off. *Shelby County* struck down the formula used to identify which states were required to do so, gutting the heart of the Act. In her dissent in that case, the late Justice Ruth Bader Ginsburg warned that the Court’s decision was “like throwing away your umbrella in a rainstorm.”¹⁹ After the decision, the rainstorm became a downpour.

Shelby County unleashed torrent of voter suppression and other discriminatory voting laws unlike anything the country had seen in decades.²⁰ Previously covered jurisdictions like Texas and North Carolina swiftly enacted discriminatory restrictions that were either previously blocked or would have been readily blocked under preclearance. And then in 2021, in the wake of historic turnout in the 2020 election cycle—despite the COVID-19 pandemic, dangerous rhetoric, and a false narrative of voter fraud surrounding the 2020 presidential election—legislators launched an unprecedented wave of attacks on voting rights. In many instances they targeted the very methods that voters of color used to turn out in record numbers during the pandemic. That relentless assault continues.

Since *Shelby County*, the main protection the VRA affords against this torrent of anti-voter measures is Section 2 of the statute. Section 2 bans the use of any “voting qualification or prerequisite to voting . . . which results in a denial of abridgment of the right of any citizen of the United States to vote on account of race or color.”²¹ It applies nationwide, to all jurisdictions. In the districting context, it requires proof that minority voters face—unlike their majority peers—

¹⁸ This written statement incorporates my prior written testimony before the House Judiciary Committee, Constitution, Civil Rights, and Civil Liberties Subcommittee submitted on August 14, 2021, and June 27, 2021. I am also indebted to my ACLU colleagues who contributed to the preparation of this statement, in particular Dayton Campbell-Harris, Davin Rosborough, Victoria Ochoa, Adriel I. Cepeda Derieux, Molly McGrath, and Xavier Persad who provided invaluable support.

¹⁹ 570 U.S. at 590 (Ginsberg, J., dissenting).

²⁰ See Dale E. Ho, *Building an Umbrella in A Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 Yale L.J. Forum 799 (2018); *Block the Vote: Voter Suppression in 2020*, ACLU (Feb. 3, 2020), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020>. This wave has not receded: According to the Brennan Center for Justice’s analysis as of May 14, 2021, state lawmakers introduced at least 389 restrictive voting bills in 48 states—more than 4 times, the number of restrictive bills introduced two years ago—and at least 14 states enacted 22 new laws that restrict access to the vote—putting this legislative cycle on track to far exceed the current record. *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.work/research-reports/voting-laws-roundup-may-2021.

²¹ 52 U.S.C. § 10301.

bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter.”²²

Section 2 litigation is expensive, complex, and time-consuming, even compared to the baseline expenses and time of litigation. And because a Section 2 challenge can only be brought *after* a law has been passed or a policy implemented, multiple elections involving hundreds of elected officials can take place while the case is being litigated under regimes that courts later find are racially discriminatory. This is an irrevocable taint on our democracy that we have, unfortunately, seen play out in vivid terms in formerly covered jurisdictions like Alabama, Georgia, North Carolina, and Texas, thanks to the *Shelby County* decision. Stronger protections for voting rights are therefore necessary to prevent voting discrimination.

The Supreme Court in *Shelby County* based its ruling in part on the assumption that voting rights plaintiffs would still be able to obtain preliminary or emergency relief in voting rights cases before an imminent election.²³ But the theoretical availability of preliminary relief has also proven inadequate. The current standard for obtaining a preliminary injunction makes it difficult for plaintiffs to win relief in Section 2 cases. This problem has only worsened due to the expansion, at the Supreme Court’s direction, of the so-called “*Purcell* principle,” *i.e.*, the idea that courts should be cautious in issuing orders which change election rules in the period right before an election. That idea has metastasized from a commonsense warning to, effectively, a bright-line rule against changing voting laws or districts within even a few months of Election Day.²⁴ All too frequently, this rule stymies voting rights advocates’ efforts to ensure that voters are protected, and that discriminatory laws and practices are blocked *before* they can taint an election.

The Supreme Court has also weakened Section 2’s strength as a tool to combat the assault on voting rights. Since *Shelby County*, the Court has chipped away further at Section 2’s protections, especially as it relates to laws that abridge or deny the right to vote based on race through restricting the time, place, and manner of voting (vote abridgement/denial cases), most notably in *Brnovich v. Democratic National Committee*. The 2021 *Brnovich* decision made two broad changes to Section 2 challenges against election administration regulations. First, it raised the bar plaintiffs must meet to satisfy their burden for a successful Section 2 claim. Second, the Court lowered the threshold governments must meet for an election administration law to survive a Section 2 challenge. These two changes together made Section 2 challenges to election administration laws more difficult, in defiance of both congressional intent and Section 2’s text.

The VRA’s framers understood that Section 2, a nationwide tool to bring cases one-by-one, could not bear the weight it now does. That is why the preclearance regime was enacted and remained in place with bipartisan support for decades. And it is why the stronger voting rights

²² *Allen v. Milligan*, 599 U.S. 1, 25 (2023).

²³ See *Shelby Cnty. v. Holder*, 570 U.S. 529, 537 (2013) (remarking that under Section 2, “injunctive relief is available in appropriate cases to block voting laws from going into effect”).

²⁴ See Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427, 428 (2017).

protections in the John R. Lewis Voting Rights Advancement Act of 2024 (“VRAA”),²⁵ including a new preclearance regime, are critical.

Just last week, on the 59th Anniversary of Bloody Sunday, we honored the late John Lewis and the civil rights and demonstrators in Selma, Alabama, who put their lives on the line—or even died—to secure the right to vote. It was their courage, sacrifice, and determination that pushed Congress to pass the Voting Rights Act. Then—as now—Congress had the power and responsibility under the Fourteenth and Fifteenth Amendments to adopt strong enforcement legislation to prevent racial discrimination in the voting process at the federal, state, and local levels. Indeed, when Congress acts to address racial discrimination in voting—protecting both the fundamental right to vote and the right to be free from racial discrimination, two rights at the center of the Reconstruction Amendments—it does so at the height of its power.²⁶ Today, this body has not only the authority but the duty to ensure that all Americans are free to exercise the franchise in elections without the taint of racial discrimination.

I. The Assault on Voting Rights is Ongoing and Intensifying.

When the Supreme Court nullified the preclearance formula in 2013, it released the worst vote-suppressing offenders from federal oversight amidst a growing backlash against increased minority voter participation. These states and others took *Shelby County* as a signal that they could enact voting restrictions that disproportionately harmed voters of color with impunity—and they moved swiftly to do so. The same day *Shelby County* came down, Texas officials announced they would implement restrictive voter ID laws that a federal court had previously blocked under Section 5.²⁷ Less than two months later, North Carolina passed an omnibus voting bill that a federal court later found “target[ed] African Americans with almost surgical precision.”²⁸ Alabama and Mississippi, which had passed similar ID laws previously blocked under preclearance, began enforcing these laws within a year.²⁹

Ultimately, *Shelby County* opened the floodgates to levels of voting discrimination unlike anything the country had seen in a generation. States and localities unleashed a squall of burdensome and discriminatory voting restrictions including strict photo ID requirements, restraints on voter registration, overbroad voter purges, cuts to early voting, restrictions on the

²⁵ John R. Lewis Voting Rights Advancement Act of 2024, S.4263, 118th Cong. (2024).

²⁶ See *Tennessee v. Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) (“Broad interpretation [of Congress’ power] [i]s particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). (“Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.”).

²⁷ *Veasey v. Abbott*, 830 F.3d 216, 227 & n.7 (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 Conf. for the NAACP v. Husted*, 786 F.3d 524, 554 (6th Cir. 2014).

²⁸ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

²⁹ Caroline Courmoyer, *Mississippi’s Voter ID Law Debuts During Primary*, *Governing* (June 2, 2014), <https://www.governing.com/news/headlines/voter-id-law-debuts-during-mississippi-primary.html>; Kim Chandler, *Alabama photo voter ID law to be used in 2014, state officials say*, *AL.com* (June 25, 2013), https://www.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html.

casting and counting of absentee and provisional ballots, documentary proof of citizenship requirements, polling place closures and consolidations, and criminalization of acts associated with voter registration or voting.³⁰

These attacks also reflect a familiar pattern of backlash to record voter turnout by voters of color. In part due to public health and safety accommodations implemented in response to the COVID-19 pandemic, which allowed more voters than ever before to cast a ballot by mail, voter turnout surged in the 2020 elections.³¹ Asian-American and Latine voter turnout rose dramatically to historic highs, while Black voter turnout rebounded from a dip in 2016.³² In many places, voters of color used absentee and mail voting at much higher rates than before.³³ In Georgia, for example, the 2018 and 2020 elections saw Black, Latine, and Asian American voters exceed the rates of absentee ballot usage of white voters,³⁴ and voters played key roles in the outcome of the presidential race not only in Georgia but also in Arizona, Georgia, and Pennsylvania, and the two run-off elections for U.S. Senate in Georgia in January 2021.³⁵

Unfortunately, in the wake of this historic turnout—which spanned political parties and demographic groups—and the dangerous rhetoric, violence, and lies surrounding the 2020 presidential election, legislators responded by launching an all-out assault on the right to vote. They introduced more than 440 bills in nearly every state aimed at restricting access to the franchise, particularly in communities of color.³⁶ States like Georgia, Texas, and Florida—the former two previously subject to Section 5, and the latter covered in part—passed omnibus bills with a variety of restrictive policies. Those bills particularly targeted absentee and mail voting—the very voting methods that voters of color safely relied on in greater numbers in recent elections.³⁷ These policies range from strict absentee voter ID laws that disproportionately impact voters of color, mail voting restrictions, and limits voter assistance, among others.

³⁰ Appendix A to the ACLU’s 2021 VRAA Report documents these events at length to the extent the ACLU provided direct representation or participated as amicus. *See* The Case for Restoring and Updating the Voting Rights Act: A Report of the American Civil Liberties Union 2021, https://www.aclu.org/wp-content/uploads/publications/aclu_2021_vra_report_-_combined.pdf.

³¹ *See* William H. Frey, *Turnout in 2020 Spiked Among Both Democratic and Republican Voting Groups, New Census Data Shows*, Brookings (May 5, 2021), <https://www.brookings.edu/research/turnout-in-2020-spiked-among-both-democratic-and-republican-voting-groups-new-census-data-shows/>.

³² *Record High Turnout in 2020 General Election*, U.S. Census Bureau, <https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html>

³³ *The Voting Experience in 2020*, Pew Research Center, <https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/>.

³⁴ Expert Report of Dr. Bernard L. Fraga at 23, *In re: Ga. Senate Bill 202*, No. 1:12-MI-55555-JPB (N.D. Ga.).

³⁵ *See id.*; Nate Cohn, *Why Warnock and Ossoff Won in Georgia*, N.Y. Times (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/upshot/warnock-ossoff-georgia-victories.html>.

³⁶ Brennan Center, *Voting Laws Roundup: December 2021*, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021?ref=readtangle.com>.

³⁷ For example, Florida and Texas passed laws requiring voters to provide a state ID number or the last four digits of a social security number to obtain a mail ballot. Georgia’s law requires voters to provide a driver’s license number, a state ID number, or a copy of acceptable voter ID.

The onslaught has not abated. In 2023, lawmakers introduced at least 356 anti-voter bills, and at least 14 states enacted 17 restrictive voting measures.³⁸ These new restrictions continue to focus on restricting mail voting or making it more difficult, including by requesting additional information or documents, shortening the window to request a mail-in ballot, and prohibiting or limiting the availability and accessibility of drop boxes. Other laws target individuals and organizations who help voters access the ballot. Mississippi, for example, enacted Senate Bill 2358, which blocks anyone—including a friend, neighbor, or volunteer from a voter service group—from helping a Mississippi voter submit their absentee ballot unless the assistor is an election official, postal worker, family member, or caregiver (an undefined term in the law). In Florida, Senate Bill 7050 not only adds barriers to mail voting, it targets voter registration work by increasing penalties non-governmental voter registration organizations face for minor mistakes, mistakes and prohibiting like allowing noncitizens including long-time permanent residents from handling handle voter registration forms.³⁹ Civil penalties can run up to \$50,000 per offense, which is enough to put many of these voter registration organizations out of business.⁴⁰ Many of these organizations focus on serving predominately Hispanic communities that are less likely to be English proficient,⁴¹ and are disproportionately under-registered to vote compared to white Floridians.⁴² An attack on these voter registration organization is thus an attack on registering Hispanic Floridians.

At the same time, our Nation has become increasingly diverse. According to the 2020 Census, *all* of the population growth in this country over the last decade was due to growth in communities of color.⁴³ Today, the country has more racial and ethnic diversity 2010 and 2020, the Black population increased from 13.6% of the population to 14.2%, the Asian population increased from 5.6% to 7.2% in 2020, the Hispanic population increased from 16.3% to 18.7%, while the white population declined from 72.4% to 61.6%.⁴⁴ Of these populations, Hispanic and

³⁸ Brennan Center, Voting Laws Roundup: 2023 in Review, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review>.

³⁹ *Fla. State Conf. of Branches & Youth Units of the NAACP v. Byrd*, No. 4:23CV215-MW/MAF, 2023 WL 4311084, at *1-*2 (N.D. Fla. July 3, 2023).

⁴⁰ *Id.* at *8.

⁴¹ Pew Research Center, *Latinos make up 17% of Florida registered voters in 2020*, <https://www.pewresearch.org/short-reads/2020/10/19/latinos-make-up-record-17-of-florida-registered-voters-in-2020/>.

⁴² U.S. Census Bureau, *Voting and Registration in the Election of November 2022*, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-586.html>.

⁴³ Brookings Institute, *New 2020 Census Results Show Increased Diversity Countering Decade-Long Declines in America's White and Youth Populations*, <https://www.brookings.edu/articles/new-2020-census-results-show-increased-diversity-countering-decade-long-declines-in-americas-white-and-youth-populations/#:~:text=This%20means%20that%20all%20of,as%20two%20or%20more%20races.&text=Together%20C%20these%20groups%20now%20comprise,40%25%20of%20the%20U.S.%20population>.

⁴⁴ U.S. Census Bureau, *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>.

Asian Americans are the fastest-growing racial and ethnic groups nationally, increasing by 23% and 35.6%, respectively, from 2010 to 2020.⁴⁵

Instead of embracing these changing demographics and working to create the inclusive multiracial democracy that the Reconstruction Amendments promise, some perceive the growing political strength of communities of color as an unwelcome threat to the status quo. Like high turnout and registration rates, the growth in population of a racial minority group frequently catalyzes attempts to limit and delay the growth in the political power that should accompany population growth in any democracy.⁴⁶

This past redistricting cycle—the first full cycle without the VRA’s preclearance protections—demonstrated this difficult reality in stark terms. At least six of the nine states that were previously required to submit district maps for preclearance now face lawsuits challenging their maps for racial discrimination⁴⁷ (Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Texas). In many of these states, minority population growth and/or the state’s changing demographics *should* have translated to new political opportunities for racial minorities in the state’s district maps but did not. In the subset of these lawsuits that the ACLU is litigating, federal courts, including the U.S. Supreme Court in the case of Alabama, have found statewide maps in Alabama, Georgia, Louisiana, and South Carolina racially discriminatory.

- In Georgia, for example, 2020 census data showed tremendous growth in the state’s Black population over the last decade. Still, lawmakers in 2021 enacted legislative maps that created failed to provide equal for Black Georgians, especially in Metro Atlanta, where the Black population increased by hundreds of thousands, voting remained polarized by race, and racial discrimination continued to affect political participation opportunities.⁴⁸ Last October, the court held that the State’s legislative maps diluted the voting strength of Black Georgians in violation of the VRA and ordered Georgia to draw two new Black opportunity districts in the state Senate and five new Black opportunity districts in the state House.⁴⁹
- In Alabama, where white residents were the only demographic group to decline in population in both absolute and relative numbers from 2010 to 2020 and Black people and other people of color drove a disproportionate share of the state’s population growth over the last decade, state legislators in 2021 enacted a map with just one

⁴⁵ Brookings, *Mapping America’s diversity with the 2020 census*, <https://www.brookings.edu/articles/mapping-americas-diversity-with-the-2020-census/#:~:text=Latino%20or%20Hispanic%20and%20Asian%20Americans%20are%20the,further%20afield%20than%20the%20familiar%20large%20metro%20areas>.

⁴⁶ *Restoring the Voting Rights Act: Combating Discriminatory Abuses*: Hearing on H.R.4 before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 117th Cong.4 (2021) (Statement of Thomas A. Saenz, President and General Counsel, Mexican American Legal Defense and Education Fund).

⁴⁷ Alaska, another formerly covered jurisdiction, faced several partisan gerrymandering lawsuits this past redistricting cycle as well. *See Matter of the 2021 Redistricting Cases*, 528 P.3d 40 (2023).

⁴⁸ U.S. Census Bureau, Georgia: 2020 Census, <https://www.census.gov/library/stories/state-by-state/georgia-population-change-between-census-decade.html>.

⁴⁹ *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:22-cv-00122-SCJ, 2023 WL 7037537 (N.D. Ga. Oct. 26, 2023). The case is currently on appeal.

majority-Black congressional district.⁵⁰ Black people are about 27% of Alabama’s population but were properly represented by just one of seven (14%) congressional districts.⁵¹ After a lengthy evidentiary hearing documenting how the map dilutes the voting strength of Black Alabamians, a three-judge federal court held—and the Supreme Court affirmed in its landmark ruling in *Allen v. Milligan*—that the state’s congressional map likely violates the VRA. As a result, for the first time in Alabama’s history, Black voters will have two congressional districts in which they have an equal opportunity to elect their candidates of choice in the upcoming 2024 election.

- Louisiana likewise passed maps at the state and congressional level that failed to reflect the growth of its Black population, even though the 2020 Census data showed that one-third of the state’s population is now Black.⁵² Despite that demographic shift, the legislature passed a congressional plan in which only one of Louisiana’s six districts was majority Black. After years of litigation, the district court and the Fifth Circuit Court of Appeals concluded that we were likely to succeed in showing that map violated the Voting Rights Act, and the legislature finally redrew the congressional plan to add an additional Black opportunity district this January.⁵³ And in February, following a seven-day trial, a federal district court found that the state legislative maps also diluted Black Louisianians’ votes in every corner of the state, and ordered the state to draw three additional Black opportunity districts in the state senate and six additional Black opportunity districts in the state house.⁵⁴
- Texas experienced similar growth, adding almost four million people between 2010 and 2020 that came almost entirely from people of color. The Hispanic population grew by 20.9% to 39.3% of the population, the Black population grew by 25.1% to 13.9% of the population, and the Asian population grew 66.5% to 6.3% of the population.⁵⁵ At the same time, Texas’s white population decreased by 17.5% over that same period. Despite these demographic shifts, Texas’s congressional and legislative maps passed in response to reapportionment fail to reflect these changes, adding two new majority-white districts and no new opportunity districts for voters of color. Several lawsuits were filed in Fall 2021 challenging these redistricting plans

⁵⁰ *Allen v. Milligan*, 599 U.S. 1, 16 (2023).

⁵¹ U.S. Census Bureau, Alabama: 2020 Census, <https://www.census.gov/library/stories/state-by-state/alabama-population-change-between-census-decade.html>.

⁵² U.S. Census Bureau, Louisiana: 2020 Census, <https://www.census.gov/library/stories/state-by-state/louisiana-population-change-between-census-decade.html>.

⁵³ *Robinson v. Ardoin*, 605 F. Supp. 759, 766 (M.D. La. 2022); *Robinson v. Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022); *Robinson v. Ardoin*, 86 F.4th 574, 583 (5th Cir. 2023); Louisiana State Legislature, S.B. 8 (2024 First Extraordinary Session), <https://www.legis.la.gov/legis/BillInfo.aspx?i=245512>.

⁵⁴ *Nairne v. Ardoin*, No. 3:22-cv-178, 2024 WL 492688, at *30–32 & n.359, *44 (M.D. La. Feb. 8, 2024); *Nairne v. Ardoin*, No. 3:22-cv-178, ECF No. 234 at 4–7, 15 (appendix to ruling and order containing “separately enumerated findings of facts and conclusions of law”). The case is currently on appeal.

⁵⁵ U.S. Census Bureau, Texas: 2020 Census, <https://www.census.gov/library/stories/state-by-state/texas-population-change-between-census-decade.html>.

for violating the VRA and Fourteenth and Fifteenth Amendments.⁵⁶ Litigation remains ongoing.

- In North Dakota, the Spirit Lake Tribe and the Turtle Mountain Band of Chippewa challenged North Dakota’s state legislative maps for unlawfully diluting the voting power of Native Americans in violation of the VRA.⁵⁷ In November 2023, a district court held the map violated Section 2.

The fight against the exclusion of voters of color from electoral opportunities is also being hard fought at the local level. In Dodge City, Kansas, for example, the Latine population grew dramatically over the last few decades. As of 2021, it comprises 65% of the city’s total population and 46% of its citizen voting age population. Nevertheless, the Latine population is significantly underrepresented on the City Commission. The ACLU, along with partners at UCLA Voting Rights Project and Clearly Gottlieb, went to trial in late February 2024. There, we presented compelling evidence that because of racially polarized voting and past and present discrimination, the City’s at-large method of election for City Commission prevents Latine voters from electing their candidates of choice.

These discriminatory voting laws and practices have prompted an explosion of litigation to protect voters from state and local officials’ federal-law violations. Since *Shelby County*, the ACLU has filed or intervened in nearly 100 new cases, and we currently have more than 35 active matters. We have sued all nine of the formerly covered jurisdictions (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia). In fact, of the 95 cases involving state and local jurisdictions, more than a third (36%) involved one of the nine formerly-covered states. When ACLU cases involving states with covered localities are included (California, Florida, Michigan, New York, North Carolina), that proportion rises to nearly half (49%) of our cases. Of the 20 amicus briefs that the ACLU has submitted in cases brought by other organizations since *Shelby County*, 12 (60%) involved cases in one of the formerly covered states.⁵⁸

What these cases and obtained results have shown us is that, perhaps now more than ever, litigation is critical to stem the tide of assaults on voting rights. Between the 2012 and 2016 Presidential elections alone, the ACLU and its affiliates won 15 voting rights victories, protecting more than 5.6 million voters in 12 states that collectively are home to 161 members of the House of Representatives and wield 185 votes in the Electoral College.⁵⁹ In the run-up to and immediately after the 2020 presidential election, the ACLU won 28 positive outcomes in 21

⁵⁶ See, e.g., *League of United Latin Am. Citizens v. Abbott*, No. 3:21-cv-00259-DCG-JES-JVB (W.D. Tx. filed on Oct. 18, 2021).

⁵⁷ *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-CV-22, 2023 WL 8004576 (D.N.D. Nov. 17, 2023). The case is currently on appeal.

⁵⁸ These numbers are based on a recent review of the ACLU Voting Rights Project’s internal case management tracker.

⁵⁹ See Dale Ho, *Let People Vote: Our Fight for Your Right to Vote in This Election*, ACLU (Nov. 3, 2016), <https://www.aclu.org/blog/voting-rights/fighting-voter-suppression/let-people-vote-our-fight-your-right-vote-election>.

states and Puerto Rico to safeguard the voting rights of millions of Americans as the COVID-19 pandemic spread across the country and states struggled—or refused—to protect public health while ensuring access to the ballot. Since 2021, the ACLU has achieved 33 positive voting rights outcomes in 17 states. Of course, the ACLU is just one of many organizations tirelessly working to protect voting rights through litigation.⁶⁰

This data is powerful evidence that voting discrimination continues to plague our democratic process, particularly in the formerly covered jurisdictions.

II. Current Tools are Inadequate to Protect Voting Rights

Since *Shelby County*, Section 2 of the VRA has been the heart of federal safeguards on the right to vote. It applies nationwide, to every state and local jurisdiction, and it does not sunset. However, unlike the Section 5 preclearance regime, which applies *before* a law goes into effect, a Section 2 challenge can only come *after* a law is already enacted or a policy announced. Plaintiffs must go to court and litigate—a process that costs hundreds of thousands, if not millions, of dollars and often takes years—before a judge will strike down the law or order the practice stopped. This process is costly not just for Plaintiffs, but for the taxpayers who foot the bill if a map is struck down. In the interim, the law or practice remains in effect, which means multiple elections involving hundreds of elected officials may be irrevocably tainted—taking place under a discriminatory regime that a court later finds unlawful. And unlike some other civil rights, voters cannot be compensated once they lose their right to vote in an election or vote under discriminatory rules. Voters can only wait for the next election.

A. Voting rights cases are different than other civil rights litigation.

Case-by-case litigation after discriminatory laws have been enacted presents particularly troubling challenges in the voting context because voting rights litigation is different than other civil rights disputes. Think of an employment or housing discrimination case based on membership in a protected class. At least in theory, going through the legal process can restore that person’s job or apartment, or make them whole through backpay or money damages.

Elections are different: once an election happens under a discriminatory regime, it is impossible to compensate the victims of discrimination. Their rights have been compromised irrevocably because the election cannot be re-run. While those voters may be able to vote in future elections free from discrimination, the officials who won an election run under unlawful practices gain the benefits of incumbency, making it harder to dislodge them from office. Those elected officials will make policy while in office, and courts cannot (and should not) dislodge those decisions, even if the mechanism under which they took office is later found to be unconstitutional or in violation of the VRA.

⁶⁰ In fact, several local ACLU offices across the country (the ACLU has local offices in all 50 states) have brought voting lawsuits since 2020 that are not on the ACLU Voting Rights Project’s docket, including: (1) ACLU of Florida’s two recent local redistricting lawsuits in *Jacksonville Branch of the NAACP v. City of Jacksonville*, and *Grace Inc. v. City of Miami*; (2) *Baltimore County NAACP v. Baltimore County*; and (3) ACLU of Texas in *Fair Maps Texas Action Committee v. Abbott* challenging new Texas state legislative and congressional maps as violations of the U.S. Constitution and VRA.

In short, voting rights are different. The ability to challenge a law or policy after it has been enacted or implemented is a critical tool in combating voting discrimination, but reauthorizing a preclearance regime that prophylactically stops discriminatory changes from going into effect in the first place is necessary to ensure that racial discrimination is blocked before it can take root.

B. Section 2 cases are expensive, resource intensive, and time-consuming.

Section 2 cases are very costly to bring, both in terms of money and time. By its very nature, bringing a Section 2 case requires a significant investment at the outset, with no promise of eventual success or recouping any costs. As the Supreme Court recognized last year, “§ 2 litigation in recent years has rarely been successful” and “[s]ince 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits.”⁶¹ This makes it harder for plaintiffs to bring Section 2 cases at all. And even in cases that succeed, the burdens of litigation make Section 2 an insufficient substitute for preclearance.

1. Section 2 cases are expensive and resource intensive.

Section 2 litigation requires intensive fact development. Plaintiffs must assemble local election data and hire experts to offer expensive and complex statistical testimony. Historians and social scientists are often needed to describe past and ongoing discrimination in the jurisdiction. Candidates, elected officials, and community leaders are frequently called upon to testify about their personal experiences with bloc voting, the responsiveness of elected officials, racial appeals in campaigns, and the like.⁶² As a result, the cost of a Section 2 case regularly falls in the six to seven-figure range.⁶³

A few examples from the ACLU’s recent Section 2 litigation experience reflects the considerable monetary costs of these cases:

- In *North Carolina State Conference of NAACP v. North Carolina* (“*N.C. NAACP v. McCrory*”),⁶⁴ which successfully challenged North Carolina’s omnibus bill limiting early voting and same-day registration, requiring certain forms of photo identification, and banning out-of-precinct voting, plaintiffs were awarded

⁶¹ *Allen v. Milligan*, 599 U.S. 1, 29 (2023).

⁶² See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143 (2015).

⁶³ H.R. Rep. No. 116-317, at 60 (2019) (noting testimony that “costs for a Section 2 case can range from hundreds of thousands of dollars to \$10 million.”); Br. of Joaquin Avila et al. as Amici Curiae in Support of Resp’ts at 24, *Shelby Cnty.*, 570 U.S., No. 12-96 (“Section 2 cases regularly require minority voters and their lawyers to risk six- and seven-figure expenditures for expert witness fees and deposition costs.”) (citing *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005)), available at <https://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brief%20of%20Joaquin%20Avila%20et%20al.%20in%20Support%20of%20Respondents.pdf>.

⁶⁴ 831 F.3d. 204.

\$5,922,165.28 for the costs and fees associated with the litigation, including multiple unsuccessful appeals.⁶⁵

- In *National Association for the Advancement of Colored People v. East Ramapo Central School District* (“*NAACP v. East Ramapo*”),⁶⁶ a Section 2 case that successfully challenged the at-large method of election for the East Ramapo, New York school board, the plaintiffs were awarded \$5,446,139.99 in costs and fees.⁶⁷
- In *Montes v. City of Yakima*,⁶⁸ which successfully challenged the at-large voting system for the City Council of Yakima, Washington under Section 2, the plaintiffs were awarded \$1,521,911.59 in costs and fees.⁶⁹
- In *Wright v. Sumter County Board of Elections and Registration*,⁷⁰ a Section 2 case brought by the ACLU and partners that successfully challenged the at-large method of electing the Sumter County, Georgia school board members,⁷¹ plaintiffs were awarded \$786,929.98 for the costs and fees incurred to litigate the case.⁷²
- In *Missouri State Conf. of National Association for Advancement of Colored People v. Ferguson-Florissant School District*, a Section 2 case that successfully challenged the Ferguson-Florissant School District Board’s method of conducting at-large elections to elect Board members under Section 2, Plaintiffs incurred \$1,137,920.05 in attorneys’ fees and \$232,320.43 in non-taxable expenses.⁷³

Although the ACLU eventually recovered its costs in the cases above, litigation requires that plaintiffs pay such expenses up front without any promise of success. Given their cost and complexity, it should be no surprise that many affected voters and the lawyers that would represent them (frequently nonprofit legal organizations and local civil rights attorneys with limited resources) simply decline to bring Section 2 cases in the first place.

⁶⁵ Mem. Order, *McCrary*, 831 F.3d (No. 1:13-cv-00861-TDS-JEP), ECF No. 508.

⁶⁶ 462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff’d sub nom.*, *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).

⁶⁷ *NAACP v. E. Ramapo*, 462 F. Supp. 3d (No. 7:17-CV-08943), ECF No. 694.

⁶⁸ 40 F. Supp. 3d 1377 (E.D. Wash. 2014).

⁶⁹ Order, *Montes*, 40 F. Supp. 3d (No. 2:12-CV-03108-TOR), ECF No. 186.

⁷⁰ 979 F.3d 1282 (11th Cir. 2020) (affirming finding of a Section 2 violation).

⁷¹ See Nicholas Casey, *A Voting Rights Battle in a School Board ‘Coup’*, N.Y. Times (Nov. 3, 2020), <https://www.nytimes.com/2020/10/25/us/politics/voting-rights-georgia.html>.

⁷² Order, *Wright*, 979 F.3d (No. 1:14-CV-00042-WLS), ECF No. 322.

⁷³ No. 4:14-cv-2077-RWS, 2020 WL 2747306, at *1 (E.D. Mo. May 27, 2020).

2. Section 2 cases are time-consuming.

Even when cases are brought, it typically takes years to litigate a Section 2 claim to completion.⁷⁴ That may reflect the simple fact that voting rights litigation tends to be quite complex. As former ACLU Voting Rights Project Director, Laughlin McDonald, explained in testimony before the Senate 18 years ago:

[Section 2 cases] are among the most difficult cases tried in federal court. [V]oting rights cases impose almost four times the judicial workload of the average case. Indeed, voting cases are more work intensive than all but five of the sixty-three types of cases that come before the federal district courts.⁷⁵

The ACLU’s Section 2 litigation experience bears this out. The following table summarizes the ACLU’s Section 2 litigation since *Shelby County*, including the length of time it has taken to litigate the case from filing to resolution⁷⁶:

ACLU Section 2 Cases Litigated to Judgment/Settlement since <i>Shelby County</i>						
Case name	Citation	Practice Challenged	Date Filed	Date Resolved	Days	Success?
<i>Bethea v. Deal</i>	No. CV216-140, 2016 WL 6123241 (S.D. Ga. Oct. 19, 2016)	Failure to extend voter registration deadline after hurricane	10/17/16	10/19/16	2	N
<i>Frank v. Walker</i>	768 F.3d 744 (7th Cir. 2014)	Voter ID	12/13/11	3/23/15	1197 ⁷⁷	N
<i>Florida Dem. Party v. Scott</i>	No. 4:16CV626-MW/CAS, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016)	Failure to extend voter registration deadline after hurricane	10/9/16	10/12/16	3	Y

⁷⁴ See *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (2005) (“Two to five years is a rough average” for the length of Section 2 lawsuits).

⁷⁵ *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 141 (2006) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project).

⁷⁶ “Date Resolved” reflects the date upon which a case was fully resolved on the merits either through a court decision and exhaustion of any appeals, through a consent decree, or through a settlement between the parties.

⁷⁷ Litigation on plaintiffs’ as-applied constitutional claims remained ongoing until January 2023, but the Seventh Circuit rejected our Section 2 claims in 2014, and the Supreme Court denied a petition for review of that decision in March 2015.

ACLU Section 2 Cases Litigated to Judgment/Settlement since <i>Shelby County</i>						
Case name	Citation	Practice Challenged	Date Filed	Date Resolved	Days	Success?
<i>Jackson v. Bd. of Trustees of Wolf Point</i>	No. CV-13-65-GF-BMM-RKS, 2014 WL 1794551 (D. Mont. Apr. 21, 2014), <i>R. & R. adopted as modified sub nom.</i> 2014 WL 1791229 (D. Mont. May 6, 2014)	School redistricting	8/7/13	4/14/14 ⁷⁸	250	Y
<i>Rangel-Lopez v. Cox</i>	344 F. Supp. 3d 1285 (D. Kan. 2018)	County polling place closure	10/26/18	1/30/19	96	Y ⁷⁹
<i>Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.</i>	894 F.3d 924 (8th Cir. 2018), <i>cert. denied</i> , 139 S. Ct. 826 (2019)	School Board At-Large Elections	12/18/14	1/7/19	1482	Y
<i>Montes v. City of Yakima</i>	No. 12-CV-3108-TOR, 2015 WL 11120964 (E.D. Wash. Feb. 17, 2015)	City At-Large Elections	8/22/12	2/17/15 ⁸⁰	910	Y
<i>MOVE Texas Civic Fund v. Whitley</i>	No. 5:19-cv-00171 (W.D. Tex. Feb 22, 2019) ⁸¹	Statewide voter purge	2/4/19	4/29/19	85	Y
<i>NAACP v. East Ramapo</i>	462 F. Supp. 3d 368 (S.D.N.Y. 2020), <i>aff'd</i> 984 F.3d 213 (2d Cir. 2021)	School Board At-Large Elections	11/16/17	1/6/21	1147	Y
<i>N.C. NAACP v. McCrory</i>	831 F.3d 204 (4th Cir. 2016), <i>cert. denied</i> , 137 S. Ct. 1399 (2017)	Voter ID; Early Voting; Same-day registration; Out-of-Precinct Ballots; Pre-Registration	8/30/13	5/15/17	1355	Y
<i>Navajo Nation Human Rts. Comm'n v. San Juan Cnty.</i>	No. 2:16-cv-00154 (D. Utah 2016)	All-mail voting, elimination of polling places	2/26/16	2/21/18 ⁸²	727	Y

⁷⁸ This date reflects the date the district court adopted a joint consent decree proposed by parties on both sides; later proceedings centered around attorney's fees and costs.

⁷⁹ Although the court denied the plaintiffs' Motion for a Temporary Restraining Order, the plaintiffs voluntarily moved to dismiss the case after the defendants announced the opening of new polling locations. *See ACLU of Kansas Declares Victory; Files Voluntary Motion to Dismiss Dodge City Voting Access Suit*, ACLU of Kansas (Jan. 25, 2019), <https://www.aclukansas.org/en/press-releases/aclu-kansas-declares-victory-files-voluntary-motion-dismiss-dodge-city-voting-access>.

⁸⁰ This is the date the court adopted a remedial plan, later proceedings focused on attorney's fees and costs.

⁸¹ Parties on both sides filed a joint motion to dismiss because of a reached settlement.

⁸² This date reflects when the settlement from the parties was reached and announced. *See Settlement Announced in Navajo Nation Human Rights Commission v. San Juan County*, ACLU of Utah (Feb. 21, 2018), <https://www.acluutah.org/newsroom/item/1418-settlement-announced-in-navajo-nation-human-rights-commission-v-san-juan-county>.

ACLU Section 2 Cases Litigated to Judgment/Settlement since <i>Shelby County</i>						
Case name	Citation	Practice Challenged	Date Filed	Date Resolved	Days	Success?
<i>Ohio State Conf. of the NAACP v. Husted</i>	No. 2:14-CV-00404 (S.D. Ohio 2014)	Early Voting	5/1/14	4/17/15 ⁸³	352	Y
<i>People First Alabama v. Merrill</i>	491 F. Supp. 3d 1076 (N.D. Ala. 2020)	Absentee Ballot Excuse Requirement (COVID-19)	5/1/20	11/16/20	200	N ⁸⁴
<i>Wright v. Sumter Cnty. Bd. of Elections & Registration</i>	301 F. Supp. 3d 1297 (M.D. Ga. 2018), <i>aff'd</i> 979 F.3d 1282 (11th Cir. 2020)	County Redistricting	3/7/14	10/27/20	2427	Y

The average length of time that the ACLU’s Section 2 cases have taken to litigate is 731 days or over two years. When emergency cases, such as those brought after natural disasters to extend an election-related deadline or those brought to accommodate voters in the COVID-19 pandemic, are excluded, this average jumps to 911 days or approximately thirty months, over two and a half years. But this does not include currently pending cases. The following table summarizes the ACLU’s pending Section 2 litigation, including the number of days the case has been pending:

Pending ACLU Section 2 Cases					
Case name	Citation	Practice Challenged	Date Filed	Days Pending	Interim Success?
<i>Sixth District of the AME Church v. Kemp</i>	Case No. 1:21-mi-55555-JPB	Restrictive absentee voting laws and laws around ballot acceptance	3/29/21	1,078	N ⁸⁵
<i>Milligan v. Allen</i>	Case No. 2:21-cv-01530-AMM	Alabama congressional redistricting map	11/16/21	848	Y (preliminary injunction)

⁸³ This date reflects when the parties reached a settlement and moved to dismiss the case.

⁸⁴ In this case, the trial court judge found a violation of Section 2 and entered an injunction barring the application of the excuse requirement to vote absentee; on appeal, the Eleventh Circuit granted a stay of the injunction without explaining its reasoning, *see Op., People First Ala. v. Merrill*, 491 F. Supp. 3d 1076 (No. 20-13695-B), 2020 WL 6074333 (likely relying on *Purcell v. Gonzalez*, *see infra.*).

⁸⁵ The Court ultimately granted preliminary injunctions under the First Amendment against the line-relief ban outside the 150-foot buffer zone and under the Materiality Provision of the Civil Rights Act against the provision against counting absentee ballots missing a birthdate, but only did so in 2023 for the 2024 elections.

Pending ACLU Section 2 Cases					
Case name	Citation	Practice Challenged	Date Filed	Days Pending	Interim Success?
<i>Stone v. Allen</i>	Case No. 2:21-cv-01531-AMM (N.D. Ala.)	Alabama State Senate redistricting map	11/16/21	846	N
<i>Arkansas NAACP v. Arkansas Board of Apportionment</i>	Case No. 4:21-cv-01239-LPR (E.D. Ark.)	Arkansas state legislative redistricting map	12/29/21	803	N ⁸⁶
<i>Alpha Phi Alpha v. Raffensperger</i>	Case No. 1:21-cv-05337-SCJ (N.D. Ga.)	Georgia state legislative redistricting maps	12/30/21	802	Y (trial win, on appeal)
<i>White v. Mississippi Board of Elections</i>	Case No. 4:22-cv-00062-SA-JMV (N.D. Miss.)	Mississippi Supreme Court districting	04/25/22	686	N
<i>Mississippi NAACP v. Mississippi Board of Elections</i>	Case No. 3:22-cv-00734-DPJ-HSO-LHS (S.D. Miss.)	Mississippi state legislative redistricting maps	12/02/22	465	N
<i>Robinson v. Ardoin</i>	Case No. 3:22-cv-00211-SDD-SDJ (M.D. La.)	Louisiana congressional redistricting map	03/30/22	712	Y ⁸⁷
<i>Nairne v. Ardoin</i>	Case No. 3:22-cv-00178-SDD-SDJ (M.D. La.)	Louisiana state legislative redistricting maps	03/14/22	728	Y (trial win, on appeal)
<i>Coca v. Dodge City, Kansas</i>	Case No. 6:22-cv-01274-EFM (D. Kan.)	At-large city council districts	12/15/22	452	N

The average length of time ACLU’s active Section 2 cases have been pending is 742 days. Most are still at the trial court, and three have trials scheduled 5–11 months from now. In short, voting rights cases start with the baseline pace of litigation, which can be frustratingly slow for all parties, and add an additional layer of complexity, causing cases to drag on for years.

⁸⁶ The en banc Eighth Circuit denied rehearing on January 30, 2024. Plaintiffs have until April 29, 2024, to petition for a writ of certiorari in the U.S. Supreme Court.

⁸⁷ The trial court in *Robinson* granted plaintiffs’ request for a preliminary injunction on June 6, 2022, a decision that the Supreme Court stayed following the Fifth Circuit’s denial of Louisiana’s stay request. *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022). The Court held the case in abeyance until it ruled on *Allen v. Milligan* in June 2023, which led the Court to vacate the stay and return the case to the Fifth Circuit for review in its ordinary course. *Ardoin v. Robinson*, 143 S. Ct. 2654 (2023). The Fifth Circuit affirmed the district court’s ruling on the merits but vacated the preliminary injunction because, according to the panel, the Legislature had time to pass a new lawful map before the 2024 elections. In January 2024, the Legislature passed a map containing two opportunity districts for Black voters. That map is now subject to ongoing litigation in *Robinson* and *Callais v. Landry*, No. 3:24-cv-00122-DCJ-CES-RRS (W.D. La. 2024).

C. Elections can take place under discriminatory regimes while Section 2 litigation is pending.

In the time it takes to litigate a Section 2 case, many elections can take place, with millions of votes cast to elect hundreds of government officials elected while the litigation remains pending. Preliminary relief is theoretically available to prevent elections from proceeding under challenged regimes while a case is being litigated. But preliminary injunctions are difficult to win in Section 2 cases under current standards. In fact, two leading civil rights lawyers estimated that preliminary injunctions were granted in fewer than 5% of Section 2 cases.⁸⁸ This means that even when the law is on the plaintiffs' side, multiple elections take place under practices later found to be discriminatory—and there is no way to adequately compensate the victims of voting discrimination after-the-fact.

Our experience litigating a vote dilution challenge to the at-large method of elections for the Ferguson-Florissant School Board in Missouri is illustrative. The Ferguson-Florissant school district was created pursuant to a 1975 desegregation order.⁸⁹ In 2014, the district's student body was approximately 80% Black, but Black residents were a minority of the district's voting-age population. Due to racially polarized voting, as recently as 2014, there was not a single Black board member on the seven-member school board. Our lawsuit was ultimately successful, with the Eighth Circuit affirming in a unanimous opinion that the Board's at-large method of elections violated Section 2.⁹⁰ But the case took four years to litigate—and elections in 2015, 2016, 2017, and 2018 were held while proceedings were ongoing. In that time, nine school board members were elected.⁹¹

The following table shows Section 2 cases decided since *Shelby County* that have been reported in Westlaw⁹² where plaintiffs sought a preliminary injunction, unsuccessfully, and later went on to win relief.⁹³

⁸⁸ See Elmendorf & Spencer, *supra* note 19, at 2145 (citing Gerald Hebert & Armand Derfner, *More Observations on Shelby County, Alabama, and the Supreme Court*, Campaign Legal Ctr. (Mar. 1, 2013), <http://www.campaignlegalcenter.org/news/blog/more-observations-shelby-county-alabama-and-supreme-court> (“The actual number of preliminary injunctions that have been granted in the hundreds of Section 2 cases that have been filed over the years is quite small, likely putting the percentage at less than 5%, and possibly quite lower.”)).

⁸⁹ *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 930 (8th Cir. 2018).

⁹⁰ See *id.*

⁹¹ See *Election Results Archive*, Saint Louis County, Missouri, <https://stlouiscountymo.gov/st-louis-county-government/board-of-elections/election-results-archive/> (last visited June 25, 2021) (collecting election results from April 7, 2015, April 5, 2016, April 4, 2017, and April 3, 2018 elections).

⁹² While we have attempted to be systematic in this research, we do not purport to present a complete picture of all Section 2 litigation. Because this analysis is limited only to cases reported on Westlaw that specifically cite to Section 2's codification in the U.S. Code, it is likely under-inclusive. For example, if a Section 2 case settles without a judicial opinion, it may not appear in such a database. For more information, a helpful database of Section 2 cases is available at the Michigan University School of Law's Voting Rights Initiative's Section 2 Cases Database. *Section 2 Cases Database*, Michigan University School of Law's Voting Rights Initiative, (Feb. 29, 2024), <https://voting.law.umich.edu/database/>.

⁹³ This includes cases where relief was obtained by winning a final decision on the merits or favorable settlement. This largely borrows from Professor Ellen Katz's definition of a “successful” Section 2 case. See University of

Section 2 Cases – Preliminary Relief Denied, but Ultimately Successful					
Case Name	Citation	Challenged Practice	Prelim. Inj. Sought	Relief Granted ⁹⁴	Days to Relief
<i>Wandering Medicine v. McCulloch</i>	No. CV 12-135-BLG-DWM, 2014 WL 12588302 (D. Mont. 2014)	Polling Places; Registration Deadline	10/10/12 ⁹⁵	6/13/14 ⁹⁶	611
<i>Jackson v. Bd. of Trustees of Wolf Point</i>	No. CV-13-65-GF-BMM-RKS, 2014 WL 1794551 (D. Mont. Apr. 21, 2014), <i>R. & R. adopted as modified sub nom.</i> 2014 WL 1791229 (D. Mont. May 6, 2014)	School Redistricting	8/7/13	4/14/14 ⁹⁷	250
<i>Favors v. Cuomo</i>	39 F. Supp. 3d 276 (E.D.N.Y. 2014)	State Legislative Redistricting	3/27/12	11/5/13	588
<i>Benavidez v. Irving Indep. Sch. Dist.</i>	No. 3:13-CV-0087-D, 2014 WL 4055366 (N.D. Tex. Aug. 15, 2014)	At-Large Elections	1/8/13	8/15/14	584
<i>Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.</i>	894 F.3d 924 (8th Cir. 2018), <i>cert. denied</i> , 139 S. Ct. 826 (2019)	At-Large Elections	12/2/15 ⁹⁸	7/3/18	944
<i>N.C. NAACP v. McCrory</i>	831 F.3d 204 (4th Cir. 2016), <i>cert. denied</i> , 137 S. Ct. 1399 (2017)	Voter ID; Early Voting; Same Day Registration	5/19/14	7/29/16	1092
<i>Pope v. Cnty. of Albany</i>	94 F. Supp. 3d 302 (N.D.N.Y. 2015)	County Redistricting	7/15/11 ⁹⁹	3/24/15	1348

Michigan School of Law Voting Rights Initiative, *About the Project*, <https://voting.law.umich.edu/about/> (“Successes include: Issuance of a preliminary injunction, a finding for a plaintiff on the merits, a decision issuing attorneys’ fees in a manner that indicated a plaintiff had been successful on the merits or through settlement, or if the plaintiff achieved some other positive outcome. Cases involving multiple Section 2 claims in which plaintiffs were successful on at least one. Fees or remedy cases in which defendants stipulated that the challenged practice had violated Section 2, even if plaintiffs were unable to obtain attorneys’ fees or the post-settlement relief sought.”).

⁹⁴ The date in the “Relief Granted” column reflects the date of whatever court decision on the merits, consent decree, or settlement between the parties, first began to provide relief for the plaintiffs.

⁹⁵ 906 F. Supp. 2d 1083 (D. Mont. 2012) (preliminary injunction denied), *aff’d* 544 F. App’x 699 (9th Cir. 2013).

⁹⁶ Relief was granted through a settlement between the parties. *See Wandering Medicine v. Mont. Sec’y of State*, ACLU of Montana, <https://www.aclumontana.org/en/cases/wandering-medicine-v-montana-secretary-state> (last visited June 25, 2021).

⁹⁷ This date reflects the date the district court adopted a joint consent decree proposed by parties on both sides; later proceedings centered around attorney’s fees and costs.

⁹⁸ In this case, we moved for summary judgment (which was denied) and then for interim relief in the event that liability was established at trial, rather than a preliminary injunction. In Section 2 cases challenging at-large elections, if liability is established, there frequently can be a substantial delay before relief is ordered, given the complexities of crafting a remedial election plan. *See* Mem. in Support of Pls.’ Mot. for Interim Relief, *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018) (No. 16-4511), 2015 WL 13249955 (Dec. 2, 2015) (describing requested relief).

⁹⁹ No. 1:11-CV-00736 LEK/DRH, 2011 WL 3651114 (N.D.N.Y. Aug. 18, 2011), *aff’d*, 687 F.3d 565 (2d Cir. 2012) (denying motion for preliminary injunction).

Section 2 Cases – Preliminary Relief Denied, but Ultimately Successful					
Case Name	Citation	Challenged Practice	Prelim. Inj. Sought	Relief Granted ⁹⁴	Days to Relief
<i>Veasey v. Abbott</i>	830 F.3d 216 (5th Cir. 2016)	Voter ID	9/1/13	8/10/16	1074
<i>Navajo Nation v. San Juan Cnty.</i>	162 F. Supp. 3d 1162 (D. Utah 2016), 266 F. Supp. 3d 1341 (D. Utah 2017), <i>aff'd</i> , 929 F.3d 1270 (10th Cir. 2019)	Districting	1/12/12	7/16/19	2742
<i>Navajo Nation Human Rts. Comm. v. San Juan Cnty</i>	No. 2:16-cv-00154 (D. Utah 2016)	Vote by Mail	2/25/16	2/22/18 ¹⁰⁰	728
<i>Ala. State Conf. of the NAACP v. City of Pleasant Grove</i>	372 F. Supp. 3d 1333 (N.D. Ala. 2019) (denying MTD); No. 2:18-CV-02056-LSC, 2019 WL 5172371 (N.D. Ala. Oct. 11, 2019)	At-Large Elections	12/13/18	10/11/19	302
<i>Flores v. Town of Islip</i>	No. 18-CV-3549-GRB-ST, 2020 WL 6060982 (E.D.N.Y. Oct. 14, 2020)	At-Large Districts	3/1/19	10/14/20	592
<i>Blackfeet Nation v. Stapleton</i>	No. 4:20-CV-00095-DLC (D. Mont. 2020)	Failure to open Satellite election office	10/9/20	10/12/20	3
<i>NAACP v. East Ramapo</i>	462 F. Supp. 3d 368 (S.D.N.Y. 2020), <i>aff'd</i> 984 F.3d 213 (2d Cir. 2021)	School Districting	12/8/17	5/26/20	900
<i>Spirit Lake Tribe v. Jaeger</i>	No. 1:18-CV-222, 2018 WL 5722665 (D.N.D. 2018)	Voter ID	10/30/18	4/24/20	542
<i>Alpha Phi Alpha v. Raffensperger</i>	587 F. Supp. 3d 1222 (N.D. Ga. 2022); No. 1:21-CV-05337-SCJ, 2023 WL 7037537 (N.D. Ga. Oct. 26, 2023)	State legislative redistricting	1/07/22	10/26/23	657
<i>Grant v. Raffensperger</i>	587 F. Supp. 3d 1222 (N.D. Ga. 2022); No. 1:22-cv-00122-SCJ, 2023 WL 7037537 (N.D. Ga. Oct. 26, 2023)	State legislative redistricting	1/13/22	10/26/23	651
<i>Pendergrass v. Raffensperger</i>	587 F. Supp. 3d 1222 (N.D. Ga. 2022); No. 1:21-cv-05339-SCJ, 2023 WL 7037537 (N.D. Ga. Oct. 26, 2023)	Congressional redistricting	1/12/22	10/26/23	652

The average length of time that it has taken to obtain relief in these Section 2 cases is 792¹⁰¹ days (or approximately 26 months)—more than the two-year standard federal election cycle—during which hundreds of state and federal government officials have been elected under regimes later found to be discriminatory. For example, before litigation in *North Carolina NAACP v. McCrory* came to a successful close, voters in North Carolina chose 188 federal and

¹⁰⁰ This date reflects when the parties reached and announced a settlement. See *Settlement Announced in Navajo Nation Human Rights Commission v. San Juan County*, ACLU of Utah (Feb. 21, 2018), <https://www.acluutah.org/newsroom/item/1418-settlement-announced-in-navajo-nation-human-rights-commission-v-san-juan-county>.

¹⁰¹ Without the outlying *Blackfeet Nation v. Stapleton* lawsuit, the average length of time rises to 837 days.

state officials under rules later struck down as unlawful.¹⁰² Thus, even where plaintiffs moved quickly and sought preliminary relief, Section 2 litigation is an inadequate tool to prevent a discriminatory law from tainting elections.

III. The development of the so-called *Purcell* principle has further constrained the effectiveness of Section 2 and other voting rights protections.

As noted above, preliminary relief blocking a challenged practice while litigation continued in due course was supposed to solve the problem of holding elections under schemes later found unconstitutional or illegal. Indeed, the Supreme Court in *Shelby County* cited the assumption that plaintiffs would still be able to obtain preliminary or emergency relief in voting rights cases as a reason preclearance was no longer necessary.¹⁰³

But preliminary relief has too often proved inadequate to meet the threats to voting rights. Because Section 2 cases are so complex and fact-intensive, it is often difficult to win on a less-than-full trial record. But the problem has only worsened with the growth, at the Supreme Court's direction, of the so-called "*Purcell* principle," *i.e.*, the idea that courts should be cautious issuing orders that might change election rules in the period right before an election.¹⁰⁴

In the years following *Purcell v. Gonzalez*,¹⁰⁵ the brief, unsigned decision that spawned the *Purcell* principle, courts have used this "principle" to hijack the case-specific analysis for obtaining preliminary relief. The instruction to consider possible voter confusion and administrative burdens that may ensue if a court intervenes close to an election now works as something close to a bright-line rule against entering relief for plaintiffs several months from Election Day—even where the sought relief would neither confuse voters nor impose administrative burdens. At the same time, courts have applied the rule inconsistently, often with little explanation, making it harder for officials and voters alike to understand why courts have blocked relief for voters in a specific case. This fuels the perception that the principle is being used in one direction only: to stymie voting rights advocates' efforts to protect voters from discriminatory laws and practices, and to block those *before* they can taint an election.

A. *Purcell v. Gonzalez*: A narrow, fact-specific decision.

The *Purcell* decision itself is a narrow, fact-specific ruling. It bears little resemblance to the so-called "*Purcell* principle" that hovers like a dark cloud over voting rights today.

¹⁰² *NC SBE Contest Results*, North Carolina State Board of Elections, <https://er.ncsbe.gov> (accessing 2014 election results through the filters on the dashboard).

¹⁰³ 570 U.S. at 537 ("Both the Federal Government and individuals have sued to enforce § 2 . . . and injunctive relief is available in appropriate cases to block voting laws from going into effect[.]") (citations omitted); *see also* Oral Arg. Tr., *Shelby Cnty.*, No. 12-96, 2013 WL 6908203, at *25 (Justice Kennedy: "Is [a Section 2 suit] an effective remedy?" Pls. Counsel: "It is—number one, it is effective. There are preliminary injunctions.").

¹⁰⁴ *See* Hasen, *supra* note 16, at 428.

¹⁰⁵ 549 U.S. 1 (2006).

In 2006, Plaintiffs—residents of Arizona, Indian tribes, and community organizations—moved for a preliminary injunction barring the state from implementing a voter identification requirement; the district court denied the request, but the Ninth Circuit Court of Appeals granted in a short, three-line order.¹⁰⁶ The defendants—the State of Arizona and county election officials—appealed to the Supreme Court, which dissolved the Court of Appeals’ injunction. In doing so, the Court warned that “[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls,” and that “[a]s an election draws closer, that risk will increase.”¹⁰⁷ Considering the election’s imminence, the need for clarity and given the Ninth Circuit’s lack of explanation, the Supreme Court vacated the Ninth Circuit’s injunction and allowed the election to proceed under new voter ID rules.¹⁰⁸

The crux of the decision was procedural error and the relationship between trial and appellate courts. Nothing in *Purcell* purports to assert a hard-and-fast rule that courts should never intervene within several months of an election. Yet, following the Supreme Court’s lead, courts now cite *Purcell*—a narrow decision that described commonsense factors that a court should consider when an election is imminent—as an inviolable bar on granting any relief in the period before an election.

B. The *Purcell* principle has left unlawful and unconstitutional voting laws in place for years.

Aggressive application of the *Purcell* principle in the past decade has meant that voting laws ultimately found to be unlawful remain in place for years—even if courts agree that the laws are racially discriminatory—simply because the reviewing federal court would have had to block them in the period “close” to an election. But “close” to an election has become a moving target such that courts now often refrain from intervening in some cases several months before an election. As a result, many elections take place, and candidates assume office, under discriminatory or otherwise unlawful regimes as the window to challenge them narrows. This concern is magnified in the wake of *Shelby County* and the loss of the preclearance regime that would have prevented many of these laws from being enacted—or even proposed in the first instance.

The following cases starkly illustrate this concern:

Milligan v. Allen (Congressional Redistricting Plan). In late 2021, along with the ACLU of Alabama, Legal Defense Fund, and cooperating law firms, the ACLU challenged Alabama’s congressional redistricting plan as racially discriminatory under Section 2 and the Fourteenth Amendment. Despite Alabama having stark racially polarized voting, continuing discrimination in the political system, and a Black voting-age population over 27% concentrated in compact areas, Black voters had an opportunity to elect a representative of their choosing in only one of Alabama’s seven districts. Alabama’s legislature accomplished this by “cracking,” or

¹⁰⁶ See Order, *Gonzalez v. Arizona*, No. 06-16702, ECF No. 16 (9th Cir. Sept. 18, 2006).

¹⁰⁷ *Purcell*, 549 U.S. at 4–5.

¹⁰⁸ *Id.*

breaking up a region of the State called the Black Belt—an area of primarily majority Black counties that includes Montgomery and Selma—into four different congressional districts.

In January 2022, a three-judge panel agreed that Alabama’s congressional plan unfairly diluted Black voters’ voting power. The court enjoined Alabama’s congressional map under Section 2 and gave the State an opportunity to redraw the map before the 2022 elections with a second district where Black Alabamians could have a fair chance at electing a candidate of their choice. Alabama did no such thing. It appealed and asked the Supreme Court to block the district court’s ruling. The Supreme Court did just that: it stayed the three-judge panel’s decision, with Justice Kavanaugh applying a new, enhanced version of *Purcell* and explaining that due to the proximity to the next election, the required changes to the congressional plan were not “feasible without significant cost, confusion, or hardship.”¹⁰⁹ The Court also agreed to take up the case on the merits—a process of briefing, oral argument, and waiting that played out over the course of approximately 16 months. During this time, an entire election cycle elapsed under the maps the three-judge panel found highly likely to violate Section 2 of the VRA. It is likely no coincidence that the turnout gap between Black and white Alabama voters in the 2022 general election was the widest in over a decade—nine percentage points by one estimate¹¹⁰—and had Alabama’s lowest turnout in 36 years according to the Alabama Secretary of State’s own figures.¹¹¹

In June 2023, the Supreme Court issued a landmark ruling that affirmed the district court’s decision and paved the way for a new, fairer congressional map for Black Alabamians. And indeed, Black voters will go to the polls this year to vote under a map that, for the first time in Alabama’s history, contains two districts in which they can elect candidates of their choice.

But this historic win for Black voters cannot erase the harm they suffered due to the *Purcell* principle’s application: 2022 congressional elections proceeded apace under the racially discriminatory map. Nor did the Court’s eventual decision affirming the injunction end the fight. After the Court’s ruling, Alabama chose defiance over compliance when given the chance to draw a new map. It did so by passing a new congressional map that in the words of the district court “[did] not provide the remedy we said federal law requires.”¹¹² The court was “disturbed by the evidence that the State . . . ultimately did not even nurture the ambition to provide the required remedy.” It remarked that it was “not aware of any other case in which a state legislature—faced with a federal court order . . . requiring a plan that provides an additional opportunity district—responded with a plan that the state concedes does not provide that district.”¹¹³ And while this ended the fight for 2024, Alabama has persisted in defending its discriminatory map, with a trial set for February 2025.

¹⁰⁹ *Merrill v. Milligan*, 142 S. Ct. 879, 881–82 (2022) (Kavanaugh, J., concurring).

¹¹⁰ Kevin Morris & Coryn Grange, *10 Years After SCOTUS Gutted Voting Rights Act, Alabama Turnout Gap Is Worse*, Brennan Ctr. For Justice (June 22, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/10-years-after-scotus-gutted-voting-rights-act-alabama-turnout-gap-worse>.

¹¹¹ John Sharp, *Alabama’s midterm election turnout worst in at least 36 years*, AL.com (Nov. 9, 2022), <https://www.al.com/election/2022/11/alabamas-midterm-election-turnout-worst-in-at-least-36-years.html>.

¹¹² *Milligan v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 5691156, at *3 (N.D. Ala. Sept. 5, 2023).

¹¹³ *Id.* at *4.

The stay in *Milligan* also had downstream impacts in other redistricting cases. In Georgia, for example, the Supreme Court’s order came down on the first day of an evidentiary hearing to on the merits of Georgia’s state legislative and congressional maps. The district court concluded that the plaintiffs had shown the maps likely violated the VRA, but still denied preliminary relief on the basis of the *Milligan* stay. While plaintiffs prevailed at trial this past October, congressional and state legislative elections in 2022 proceeded in the meantime under the discriminatory maps. Congressional and state legislative cases in Louisiana were similarly held hostage to the *Milligan* stay, denying the possibility of relief for 2022.

Sixth District of the African Methodist Episcopal Church v. Kemp (Statewide Voter Suppression Bill). Also in 2021, the ACLU, the ACLU of Georgia, NAACP Legal Defense Fund, Southern Poverty Law Center, and cooperating law firms,¹¹⁴ representing churches and civic organizations including the Sixth District of the African Methodist Church and Delta Sigma Theta Sorority, challenged provisions of Senate Bill 202, Georgia’s 2021 omnibus election law under Section 2, the Civil Rights Act, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the First, Fourteenth, and Fifteenth Amendments. The law made sweeping changes to election administration that make it disproportionately harder for Black Georgians, other Georgians of color, and Georgians with disabilities to vote and have their vote counted. It imposed measures that make it more burdensome to vote absentee or by mail, restricting out-of-precinct voting, drastically reducing the early voting period for runoff elections.

In a particularly callous move, the new law also made it a criminal offense to “give, offer to give, or participate in the giving of . . . food and drink”¹¹⁵ to voters waiting in Georgia’s notoriously long voting lines. The provision—known as the “line relief ban”—applied not only within 150 feet of the polling place but also within 25 feet of any voter standing in line to vote no matter how far the line stretched. Georgia consistently has some of the longest voting lines in the country—a barrier disproportionately borne by Black voters.¹¹⁶ This not only makes the voting process more burdensome, but studies show it can discourage voters from participating in future elections.¹¹⁷ This is one of the scenarios that line relief activities try to counteract with messages of solidarity and community expressed by those providing food and water.

In May 2022, five months before the November election, Plaintiffs moved for a preliminary injunction to enjoin the line relief ban. Although the court concluded that the line relief ban likely violated the First Amendment, it declined to grant preliminary relief because of *Purcell*. The court did ultimately grant the plaintiffs’ subsequent preliminary injunction, filed the next year, blocking the line relief ban for the 2024 election.¹¹⁸ But in the meantime, Georgia conducted elections in 2022—which featured a hotly contested Senate seat, 14 congressional

¹¹⁴ Co-counsel includes partner law firms Wilmer Cutler Pickering Hale and Dorr LLP and Davis Wright Tremaine LLP.

¹¹⁵ Ga. Code Ann. § 21-1-414(a).

¹¹⁶ See Expert Report of Dr. Stephen Pettigrew, In re: Georgia Senate Bill 202, No. 1:21-mi-55555-JPB, ECF No. 535-18 (N.D. Ga.).

¹¹⁷ *Id.*

¹¹⁸ In re Georgia Senate Bill 202, No. 1:21-mi-55555-JPB, 2023 WL 5334617 (Aug. 18, 2023).

representatives, and all of Georgia’s executive officers and legislative seats—under a law that surely violates the U.S. Constitution.

North Carolina State Conference of the NAACP v. McCrory (Statewide Voter Suppression Bill). In 2013, along with the Southern Coalition for Social Justice, the ACLU filed a lawsuit representing the League of Women Voters of North Carolina and individual North Carolina voters, in consolidated litigation challenging a sweeping voter suppression bill in North Carolina. Among other things, the bill imposed a strict voter identification requirement, slashed a week of early voting, eliminated same-day registration and pre-registration, and required the invalidation of ballots cast out-of-precinct. The law was announced just hours after the Supreme Court’s decision in *Shelby County*—which released North Carolina from the preclearance regime—and enacted a few short weeks later.

These changes had a tremendous impact on voter access in the state. In the 2012 presidential election alone, approximately 900,000 people voted during the week of early voting that the law eliminated; nearly 100,000 voters registered using same-day registration; approximately 50,000 had pre-registered; and 7,500 cast ballots out of precinct. Not only did the 2013 law eliminate these widely used forms of participation, it also banned the use of many commonly held forms of government-issued photo ID for voting purposes, including North Carolina student IDs, public assistance IDs, and even municipal employee ID cards. In all, every form of registration or voting curtailed or eliminated by the bill had been disproportionately used by Black voters; The only form of voting the ID requirement exempted—absentee voting—was disproportionately used by white voters.

Ultimately, the Fourth Circuit found that the law was enacted with racially discriminatory intent and struck down the challenged provisions as unconstitutional. The court found that in enacting these provisions, the North Carolina legislature “target[ed] African Americans with almost surgical precision.” But the case took 34 months to litigate—almost three years—from complaint to the Fourth Circuit’s ruling. In the interim, the 2014 general election took place under the new law, with 188 federal and state offices elected—including a U.S. Senator, 13 congressional representatives, four state supreme court justices, and 170 state legislative seats.

We did everything we could to prevent this. We litigated this very complex matter on an expedited timeline, and sought a preliminary injunction before the 2014 midterms, which the Fourth Circuit granted. Unfortunately, the Supreme Court stayed that ruling, likely based on the *Purcell* principle—effectively leaving the discriminatory regime in place for the 2014 election. The Supreme Court subsequently permitted that preliminary ruling to go into effect, and plaintiffs ultimately prevailed on the final merits of the case. But even though we did everything in our power to prevent this discriminatory law from tainting the 2014 election, thanks to the demise of preclearance and the expansion of the *Purcell* principle, we lacked adequate tools to do so. And while the law has since been struck down, there is no way to now compensate the Black voters of North Carolina—or our democracy itself—for that gross injustice.

Veasey v. Abbott (Statewide Voter ID Bill). In 2013, civil rights groups filed a lawsuit challenging what was then the nation’s harshest voter identification law, leaving more than 600,000 eligible voters without the required form of ID. The law was originally signed into law in 2011. But when Texas sought to have the law precleared under the pre-*Shelby County* Section

5, it was blocked on grounds that Texas could not show that the law would not discriminate against Black and Latinx voters. Within hours of the *Shelby County* decision, however, Texas, now free from the preclearance process, immediately implemented the requirement.

On October 9, 2014, after a nine-day trial, the district court issued a 143-page opinion that concluded the voter ID law was passed with discriminatory intent and had discriminatory results. The court permanently enjoined the state from enforcing the ID requirement. The full Fifth Circuit, acting *en banc*, eventually affirmed the district court’s finding that the voter ID law violated the Voting Rights Act in July 2016. But as in North Carolina, the case took over three years to litigate from complaint filing to appellate ruling. In the interim, the 2014 general elections were held with the voter ID requirement in place. In those elections, Texas voters filled an open governor’s seat, voted for six other statewide officeholders, and elected all 36 members of the state’s congressional delegation, all 150 members of the state house, and half of the state senate. Moreover, the voter ID requirement was still in place for the 2016 primary, including a contested presidential primary in both major parties, as well a 2015 election to approve seven proposed constitutional amendments. All told, more than 11 million ballots were cast under a discriminatory election regime.

As in North Carolina, the plaintiffs did everything they could. They sued the day after the Governor announced the law’s implementation and moved expeditiously to resolve the case on its merits. In contrast to many of the applications for urgent relief discussed here, this case had opportunity for a full hearing of the claims and evidence, with dozens of witnesses testifying. Nevertheless, the Fifth Circuit stayed the injunction, “based primarily on the extremely fast-approaching election date,” *i.e.*, because of *Purcell*. When the plaintiffs asked the Supreme Court to vacate the stay, it declined to do so—presumably also on the basis of *Purcell*.

Notably, nothing in the Fifth Circuit’s stay order in any way contradicted the district court’s finding that the law was passed with discriminatory intent and had discriminatory results. In other words, the appellate court concluded that proper application of the *Purcell* doctrine required it to allow a law found to be “motivated, at the very least in part, *because of* and not merely *in spite of* . . . detrimental effects on the African-American and Hispanic electorate” to govern the conduct of federal elections. The Texas plaintiffs did everything they could to prevent this discriminatory law from tainting the 2014 election, but thanks once again to the demise of preclearance and the expansion of the *Purcell* principle, over 200 federal and state officials in Texas were elected under a regime the full Fifth Circuit would affirm as “impos[ing] significant and disparate burdens on the right to vote” and as “ha[ving] a discriminatory effect on minorities’ voting rights in violation of Section 2 of the [VRA].”¹¹⁹

Husted v. Ohio State Conference of the NAACP (Cuts to Early Voting). In May 2014, we filed a lawsuit representing the Ohio chapters of the NAACP, the League of Women Voters, the A. Philip Randolph Institute, and various churches and other organizations, challenging an Ohio law that sharply cut the availability of early voting passed in the wake of the surge in turnout during the 2012 presidential election. These cuts disproportionately impacted Black Ohio

¹¹⁹ *Veasey v. Abbott*, 830 F.3d 216, 265 (5th Cir. 2016).

voters, who not only relied more heavily on early voting than white voters but also relied more heavily on Sunday voting, which the law eliminated.

In June 2014, just one month after we filed suit and three and a half months after the law was enacted, we moved for a preliminary injunction, submitting voluminous documents to support our claims, including several expert reports, extensive briefing, and hundreds of pages of exhibits. In a thorough opinion, weighing the competing evidence proffered by the state to defend the practice, the district court found that we had shown that the law was substantially likely to violate the Constitution and Section 2, and on September 4, 2014 (weeks in advance of the early voting period) issued a preliminary injunction mandating that early voting go forward without the state's cuts. The state appealed, and after emergency briefing, on September 24, the Sixth Circuit affirmed the injunction, finding, in a similarly thorough opinion, that the plaintiffs were likely to succeed on their VRA and constitutional arguments.

Despite these findings on the merits, the Supreme Court stayed the injunction in a five to four vote—presumably on the basis of *Purcell*—just sixteen hours before early voting was to begin. In contrast to the opinions of the lower courts, setting out detailed findings of fact and conclusions of law, the Supreme Court's stay was three sentences long, giving no clarity on what, precisely, it disagreed with or how the courts below had erred. The case ultimately settled, with the state agreeing to restore some of the reduced early voting opportunities.

In the meantime, however, the 2014 general election went forward with the early voting cuts in place, with religious and community organizations scrambling to communicate the changes and to arrange transportation for their members. As Reverend Todd Davidson, of the Antioch Baptist Church in Cleveland noted, “[b]ecause of the last-minute decision by the [Supreme C]ourt, [his church] was forced to hold off on their advertising because they did not want to give incorrect information.” The settlement, moreover, did not take effect until after primary elections in 2015. All told, over one hundred federal and state officials, including the state's governor, lieutenant governor, and secretary of state, were elected and over three million ballots were cast under a regime that two levels of the federal court system had concluded would likely violate the U.S. Constitution and the VRA—based solely on the *Purcell* principle.

IV. Continuing Attacks on Section 2 and its Effectiveness.

Compounding the limitations of litigating voting rights challenges *after* a law's enactment, attacks on Section 2 itself since *Shelby County* make the need to pass a restored and strengthened VRA even more urgent.

Since *Shelby County*, the Supreme Court has chipped away further at Section 2's protections—most notably, in *Brnovich v. Democratic National Committee*. *Brnovich*, decided in 2021,¹²⁰ was the Supreme Court's first attempt to interpret vote denial/abridgement claims rather than vote dilution claims since the 1982 Amendments, the Court weakened federal protections for voting rights even further. The case concerned two Arizona restrictions that had disproportionate impacts on Native American communities and other communities of color, which the plaintiffs challenged as violating Section 2: a ban on the collection of early ballots and

¹²⁰ 141 S. Ct. 2321 (2021).

a rule mandating that ballots cast in person at the wrong precinct be discarded entirely, rather than counted for the offices for which that voter is eligible to vote.¹²¹ In the decision, which reversed an en banc panel of the Ninth Circuit, the Supreme Court set out five so-called “guideposts” to assess Section 2 “vote denial” claims. These guideposts were untethered to the actual text of the statute.¹²² The decision and these guideposts make bringing successful Section 2 claims more difficult.

The Court’s decision in *Brnovich* undermined Section 2’s purpose of providing “the broadest possible scope in combating racial discrimination,”¹²³ and limited what Justice Scalia called a “powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination.”¹²⁴ In particular, the Court’s decision did two things to make Section 2 claims harder to win.

First, the Court ratcheted up the bar for plaintiffs to establish a discriminatory burden on the right to vote by introducing less-protective and already-weakened constitutional standards into this statute. Section 2 calls for an inquiry based on “the totality of the circumstances,” into whether “political processes . . . are not equally open” to people of color¹²⁵—or, in other words, whether a practice imposes a burden on voters of color. *Brnovich* changed this inquiry. Going forward, the question is whether the burden imposed by a challenged practice is, in a court’s view, akin to the “usual burdens of voting,” finding those to be essentially per se permissible under Section 2.¹²⁶ Absent from the analysis is a discussion of whether the so-called “usual” burdens of voting are equally burdensome to all voters, particularly to voters of different racial groups. Though the decision refers to “mere inconvenience,” the difficulty of, say, driving to a mail box is very different on a remote Native American reservation where residents do not receive postal service at their doors, and are also much less likely to have access to cars than it is for other voters.¹²⁷ The Court also found relevant “the degree to which a voting rule departs from

¹²¹ *Id.* at 2330.

¹²² *See id.* at 2338–40.

¹²³ *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (internal quotation marks & citation omitted).

¹²⁴ *Id.* at 406 (Scalia, J., dissenting); *see, e.g., Hearing on the Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong. 2 (2021) (statement of Sean Morales-Doyle, Acting Director, Voting Rights and Elections Program, Brennan Center for Justice) (“In its opinion in *Brnovich*, the Court’s majority ignores the clear intention of Congress in crafting Section 2: to provide a powerful tool to root out race discrimination in voting and representation.”); *id.* (statement of Ezra Rosenberg, Co-Director, Voting Rights Project, Lawyers Committee for Civil Rights Under Law) (“[*Brnovich*] unnecessarily and unreasonably makes it more difficult for civil rights plaintiffs to win Section 2 actions And it does so in a way that flies in the face of congressional intent. Further, it raises too many ambiguities in too many important areas to leave it to the courts to fill in the blanks.”); *Hearing on Restoring the Voting Rights Act after Brnovich and Shelby County, Hearing Before the Subcomm. on the Constitution of the S. Committee on the Judiciary*, 117th Cong. (2021) (statement of Janai Nelson, Associate Director Counsel, NAACP Legal Defense and Educational Fund, Inc.) (“The [*Brnovich*] decision improperly and illogically departs from the plain text of Section 2, ignores settled precedent, and curtails the broad application of Section 2 that Congress intended, thus making it more difficult and burdensome to ensure that every eligible citizen is able to freely exercise their right to vote.”).

¹²⁵ 52 U.S.C. § 10301(b).

¹²⁶ 141 S. Ct. at 2338 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008)).

¹²⁷ *Id.*

what was standard practice . . . in 1982.”¹²⁸ But this ignores that the reauthorization of the VRA in 1982, just as in 1965, was motivated by a desire to *change* state election rules and eradicate the racially discriminatory measures that remained—not grandfather them into law.¹²⁹ By introducing these irrelevant considerations into the Section 2 analysis, *Brnovich* makes it more difficult for plaintiffs to prove their cases.

Second, the Court also ratcheted down the bar for jurisdictions to defend restrictions on voting with a disparate impact. In particular, *Brnovich* imports into this inquiry—without any grounding in text or history—a state’s asserted interest in preventing election fraud and does so by placing a heavy thumb on the scale in the state’s favor. Even when wholly unsubstantiated with actual evidence, which it gratuitously referred to as “strong and entirely legitimate,” the Court concluded that rules justified with reference to these interests are “less likely to violate § 2.”¹³⁰ The lower court in *Brnovich* found the offered justification of voter fraud for the ban on ballot collection—particularly important to Native American communities, who often lack adequate transportation or regular postal service—to be tenuous, due to the utter absence of voter fraud in Arizona.¹³¹ On this point, the Supreme Court again disagreed, and went further: holding that states are under no obligation to provide any evidence of an actual history or risk of fraud within their borders, or to show how a challenged rule actually would prevent election fraud.¹³²

Beyond *Brnovich*, Section 2 faces continued attacks by jurisdictions and groups hostile to racial justice by resurfacing arguments long settled. For example, in a Section 2 case challenging Arkansas’ state legislative districts, a federal judge became the first in the nation to depart from 60 years of precedent, including from the Supreme Court,¹³³ and practice that private individuals and organizations (i.e., not just the Department of Justice) can bring lawsuits under Section 2 of the VRA.¹³⁴ Indeed, private plaintiffs have brought the vast majority of successful Section 2 cases; decisions in hundreds of Section 2 cases brought by private plaintiffs alone, including numerous Supreme Court decisions, have granted relief to private individuals. The counter-textual, ahistorical analysis the court used to leap over prior precedent and congressional intent to reach this conclusion was particularly shocking because Arkansas did not argue the issue and the court decided to raise it on its own. Even more shocking was the Eighth Circuit Court of Appeals’ panel’s affirmance of this decision in a 2-1 ruling over the strong dissent of

¹²⁸ *Id.*

¹²⁹ S. Rep. No. 97-417, 54 & n.184 (1982) (describing the widespread use of practices such as “restrictive registration, multi-member and at-large districts with majority vote-runoff requirements, prohibitions on single-shot voting and others” in covered jurisdictions and characterizing them as “tend[ing] to [be] discriminatory in the particular circumstances”).

¹³⁰ *Brnovich*, 141 S. Ct. at 2340.

¹³¹ See *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1035 (9th Cir. 2020) (en banc) (“No one has ever found a case of voter fraud connected to third-party ballot collection in Arizona. This has not been for want of trying.”).

¹³² *Brnovich*, 141 S. Ct. at 2348.

¹³³ *Morse v. Republican Party of Va.*, 517 U.S. 186, 231–32 (1986); *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969).

¹³⁴ See *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893, 911 (E.D. Ark. 2022), *aff’d*, 86 F.4th 1204 (8th Cir. 2023).

Chief Judge Smith,¹³⁵ and the full court’s refusal to reconsider the dissent of three judges.¹³⁶ As one of those judges, Judge Colloton, explained, the “panel should not have even reached this issue of national significance,” and in declining to rehear the case, the full Eighth Circuit “regrettably misse[d] an opportunity to reaffirm its role as a dispassionate arbiter.”¹³⁷ While this decision did not address whether private plaintiffs are able to vindicate their rights under Section 2 under an alternative route, using 42 U.S.C. § 1983, this route too is currently being challenged.¹³⁸

In another brazen attack to weaken Section 2 of the VRA, the full Fifth Circuit Court of Appeals chose to reconsider its own prior rulings that different groups of color who shared similar voting patterns and issues of discrimination could bring a “coalition district claim” under Section 2 and stayed a trial court ruling that the prior Fifth Circuit panel had recognized was well-supported by its own precedent.¹³⁹

Even Justice Kavanaugh, who was in the *Milligan* majority, did not foreclose entertaining at a later date the argument raised by Justice Thomas “that even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future.”¹⁴⁰ Thus, even in the context of this important reaffirmance of Section 2’s viability, the sword of Damocles makes an appearance.

Considering these foundational attacks on Section 2 itself, voters of color cannot be expected to put all their eggs in the basket of a provision so consistently under attack from multiple angles.

Conclusion

The need for restored and strengthened voting rights protections is impossible to overstate. If the aftermath of the 2020 elections teaches us anything, it is that this is a perilous time for our democracy. We must come together to ensure its vitality for another 250 years. But we lack the tools to combat the kind of tenacious racial discrimination in voting that continues to threaten our democracy’s health.

While Section 2 is an important tool, it too has been weakened by recent Supreme Court cases. It also faces an onslaught of attacks that threaten to further undermine its effectiveness. Section 2 cases, moreover, by definition *react* to already-implemented changes. They are time- and resource-intensive and difficult to litigate: often requiring experts and extensive briefing. Far too frequently, this results in elections being held under regimes that are later struck down as

¹³⁵ *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023).

¹³⁶ *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 91 F.4th 967 (8th Cir. 2024) (en banc).

¹³⁷ *Id.* at 969–70; 974 (Colloton, J., dissenting).

¹³⁸ *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655, Br. of Def.-Appellant (8th Cir. Jan. 30, 2024).

¹³⁹ *Petteway v. Galveston Cnty., Texas*, 87 F.4th 721, 723 (5th Cir. 2023) (en banc).

¹⁴⁰ *Allen v. Milligan*, 599 U.S. 1, 45 (2023).

racially discriminatory, forever tainting those elections and irreparably damaging the right to vote.

The contemporary application of the *Purcell* “principle,” which has metastasized into a per-se ban on federal courts enjoining voting-related laws in the months before an election, has exacerbated this harm. In contrast, the preclearance regime under the VRA—which operated for decades—allowed the federal government to nimbly protect the right to vote, blocking discriminatory changes to election rules before they went into effect and became much more difficult to undo. Importantly, state actors subject to preclearance also benefit from the process: case-by-case, after-the-fact voting rights litigation is expensive for defendants, just as it is for civil rights plaintiffs.

Congress has the power to act and the responsibility, under the Constitution, to ensure that the right to vote is not abridged. The Fourteenth and Fifteenth Amendments to the U.S. Constitution guarantee citizens the right to due process and equal protection under law, and the right to vote free from disenfranchisement on the basis of race, respectively.¹⁴¹ Both of these amendments also unambiguously empower Congress to enforce their guarantees.¹⁴² If other institutions tasked with protecting constitutional rights, such as the court system and state governments, fail to live up to their duties, this body must intervene.

Thank you again for the opportunity to testify in front of this Committee on these important issues.

¹⁴¹ U.S. Const. amends. XIV, XV.

¹⁴² U.S. Const. amends. XIV § 5, XV § 2.