



**LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W**

STATEMENT OF JON GREENBAUM

CHIEF COUNSEL

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

U.S. SENATE COMMITTEE ON THE JUDICIARY

HEARING ON

**“PROTECTING A PRECIOUS, ALMOST SACRED RIGHT:
THE JOHN R. LEWIS VOTING RIGHTS ADVANCEMENT ACT”**

OCTOBER 6, 2021

Introduction

Chairman Durbin, Ranking Member Grassley, and Members of the U.S. Senate Committee on the Judiciary, my name is Jon Greenbaum and I serve as the Chief Counsel for the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on "Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act." My testimony will focus on ways in which Congress can remedy the damage to racial equality in voting caused by the Supreme Court's decisions in *Shelby County v. Holder*¹ and *Brnovich v. Democratic National Committee*² and discuss other provisions that update the Voting Rights Act to address current discrimination.

In 2013, the *Shelby County* decision effectively immobilized the preclearance provisions of Section 5 of the Voting Rights Act by finding its underlying coverage formula unconstitutional. The more recent *Brnovich* decision, while not gutting Section 2 vote denial "results" claims, makes it unnecessarily more difficult for plaintiffs to bring these cases, which runs directly counter to Congress' intent in first enacting the Voting Rights Act in 1965, and then in broadening the scope of Section 2 of the Act in 1982. The weakening of Section 2 protections by the Court in *Brnovich* is particularly and sadly ironic, as the Court in *Shelby County* had pointed to the continued existence of Section 2's "permanent, nation-wide ban on racial discrimination" when it eviscerated the Section 5 protections.³

The harm caused by *Shelby County* has been well-documented. The effects of *Brnovich* remain to be seen. It is time for Congress to act. The full protections of the Voting Rights Act are desperately needed today, particularly given the steps already taken—or about to be taken—by legislatures in states such as Georgia, Florida, and Texas in the aftermath of the 2020 election to raise additional barriers to the vote that will impact voters of color more severely than white voters. Moreover, there is a legitimate concern that some state legislatures will be emboldened by their reading of *Brnovich*, as they were by the decision in *Shelby*, and view it as a signal from the Court to take even more suppressive action. Congress should immediately reassert its intention to fully protect the voting rights of voters of color in Sections 2 and 5 of the Voting Rights Act.

I come to this conclusion based on twenty-four years of working on voting rights issues nationally. From 1997 to 2003, I served as a Senior Trial Attorney in the Voting Section at the United States Department of Justice, where I enforced various provisions of the Voting Rights Act, including Section 2 and Section 5, on behalf of the United States. In the eighteen years since, I have continued to work on voting rights issues at the Lawyers' Committee for Civil Rights Under Law as Chief Counsel, where I oversee our Voting Rights Project, and prior to that, when I served as Director of the Voting Rights Project.

The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to pursue racial justice through mobilization of the private bar. Voting rights has been an organizational core area since the inception of the organization. During my time at the Lawyers' Committee, among other things, I was intimately involved in the constitutional defense of Section 5 and its coverage formula in *Shelby County* and its predecessor

¹ 570 U.S. 529 (2013).

² 2021 WL 2690267 (2021).

³ 570 U.S. at 556.

case *Northwest Austin Municipal Utility District No. 1 v. Holder*.⁴ I also staffed the National Commission on the Voting Rights Act, which issued a report entitled *The National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work 1982-2005* (2006). The report and record of the National Commission on the Voting Rights Act, which was submitted to the House Judiciary Committee at the Committee’s request, was the largest single piece of the record supporting the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (“2006 VRA Reauthorization”).

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

Thus, our recommended response to the *Shelby County* decision starts with our support for provisions similar to those in the Senate bill, which parallel many of the provisions in H.R. 4, the John Lewis Voting Rights Advancement Act, which the U.S. House of Representatives passed on August 24, 2021. These provisions include a replacement coverage formula that would be applied to the preclearance provisions of Section 5 and the federal observer provisions of Section 8, and a transparency provision that requires all jurisdictions – irrespective of any coverage formula – to provide public notice of changes in voting practices. H.R. 4 included an additional amendment to Section 2: the creation of a “retrogression cause of action,” which allows the Attorney General or private parties an opportunity to stop changes in voting practices anywhere in the country before they diminish the voting rights of voters of color. As I will discuss more fully in my testimony, the retrogression cause of action would meet the current need to stop suppressive laws that discriminate against voters of color, using a tried and true standard, with limited interference with state sovereignty, and without implicating issues relating to differentiation among the states.

Our recommended congressional response to *Brnovich* is more limited, as Congress does not have to completely rewrite Section 2. It simply has to remove any ambiguity in the statute caused by the *Brnovich* opinion, which gave short shrift to a substantial legislative record and decades of jurisprudence which run counter to the *Brnovich* majority’s constricted view of this remedial statute. Congress originally enacted and later amended Section 2 to stymie not only blatant, explicit discrimination, but also facially neutral voting laws that, through ingenious, sophisticated methods, had a significant impact on minority citizens’ right to vote. Consistent with this purpose, prior to *Brnovich*, the Supreme Court and several of the Circuit Courts of Appeal had adopted a standard to ensure the effective implementation of those protections. That standard recognized not only that the Act applies broadly to all voting procedures and policies that abridge the right to vote—whether expressly or subtly—but also that a challenged law cannot be viewed in isolation, because a seemingly innocuous voting practice can interact with underlying social conditions to result in

⁴ 557 U.S. 193 (2009).

pernicious discrimination.⁵

Under that standard, Section 2 has worked for decades as a judicially manageable mechanism to stop voting discrimination. There has been no flood of questionable Section 2 vote denial “results” cases, and no widespread invalidation of voting regulations. Indeed, *Brnovich* marked the first time since the 1982 amendments to the Act that the Supreme Court reviewed a pure vote-denial claim. Prior to *Brnovich*, the lower courts had taken seriously the Court’s guidance, and carefully assessed the effects of challenged voting policies or procedures within each specific jurisdiction, based on the totality of the circumstances.

Brnovich compels an immediate response from this Congress, before some state legislators – intent on creating obstacles that disproportionately result in a negative impact on the rights of voters of color – hear it as a dog whistle to do just that, and before lower courts apply the opinion in ways that elevate unsubstantiated and untrue justifications for new burdensome voting practices over genuine and proved claims of racially discriminatory results.

Like H.R. 4, the Senate bill includes other important provisions. It amends Section 3(c) of the Act to authorize federal judges to bail-in jurisdictions where any voting discrimination against racial, ethnic or language minority voters is established. Consonant with that discretion and their broad remedial powers, judges will continue to have the authority to set the time frame and the scope of voting changes to which bail-in applies. At the same time, the bill facilitates the removal of jurisdictions in which voting discrimination no longer is present. Amendments to Section 4(a) of the Voting Rights Act enhance it to exempt previously bailed out jurisdictions and to streamline the process for political subdivisions with no recent voting discrimination to exit from coverage for Section 5 preclearance.

The bill also responds to the Supreme Court’s decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,⁶ by clarifying congressional intent to apply a broad definition of “prevailing party” through the well-established catalyst theory. This simple, but important, amendment reaffirms the Act’s purpose to make whole private attorneys general who successfully stop voting discrimination by allowing them to recover their reasonable attorneys’ fees.⁷

Finally, I will discuss the critical protections included in the Senate bill through its addition of the Native American Voting Rights Act, or NAVRA. The provisions in NAVRA target the most persistent obstacles faced by Native voters in elections: so-called “first generation” voting barriers that prevent Native Americans from registering to vote, casting a ballot and having their ballot counted.⁸ As one of the founding members of the Native American Voting Rights Coalition, or NAVRC, the Lawyers’ Committee applauds the Senate for including this important piece of

⁵ *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); *accord League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

⁶ 532 U.S. 598 (2001).

⁷ See 52 U.S.C. § 10310(e).

⁸ For a comprehensive discussion of first generation barriers to American Indian and Alaska Native voters, see James Thomas Tucker, Jacqueline De Léon & Dan McCool, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters* (NARF June 2020) <<https://vote.narf.org/obstacles-at-every-turn/>>.

legislation needed to secure the fundamental right to vote for indigenous voters.

I. Why and How Congress Must Respond to *Shelby County*

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

Prior to the *Shelby County* decision, the combination of Section 2 and Section 5 of the Voting Rights Act provided an effective means of preventing and remedying minority voting discrimination. Section 2, which is discussed more fully below, remains as the general provision enabling the Department of Justice and private plaintiffs to challenge voting practices or procedures that have a discriminatory purpose or result. Section 2 is in effect nationwide.⁹ Section 5 required jurisdictions with a history of discrimination, based on a formula set forth in Section 4(b), to obtain preclearance of any voting changes from the Department of Justice or the District Court in the District of Columbia before implementing the voting change.¹⁰ From its inception, there was a sunset provision for the formula, and the sunset provision for the 2006 Reauthorization was 25 years.¹¹

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

Except in rare circumstances, covered jurisdictions would first submit their voting changes to the Department of Justice. DOJ had sixty days to make a determination on a change, and if DOJ precleared the change or did not act in 60 days, the covered jurisdiction could implement the change.¹⁴ The submission of additional information by the jurisdiction, which often happened because DOJ requested such information orally, would extend the 60 day period if the submitted information materially supplemented the submission.¹⁵ DOJ could extend the 60 day period once by sending a written request for information to the jurisdiction.¹⁶ This often signaled to the jurisdiction that DOJ had serious concerns that the change violated Section 5. If DOJ objected to a change, it was blocked, but jurisdictions had various options, including requesting reconsideration from DOJ using Section 5 Procedures,¹⁷ seeking preclearance from the federal court,¹⁸ and modifying the

⁹ 52 U.S.C. § 10301.

¹⁰ 52 U.S.C. §§ 10303(b), 10304.

¹¹ 52 U.S.C. § 10303(b).

¹² 52 U.S.C. § 10304(c).

¹³ 52 U.S.C. § 10304(b), (d).

¹⁴ 52 U.S.C. § 10304(a).

¹⁵ *Id.* Procedures for the Administration of Section 5 of the Voting Rights Act (“Section 5 Procedures”), 28 C.F.R. § 51.37.

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

¹⁷ 28 C.F.R. § 51.45

¹⁸ 52 U.S.C. § 10304(a)

change and resubmitting it.

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

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

By any measure, Section 5 was responsible for preventing a very large amount of voting discrimination. From 1965 to 2013, DOJ issued approximately 1,000 determination letters denying preclearance for over 3,000 voting changes. This included objections to over 500 redistricting plans and nearly 800 election method changes (such as the adoption of at-large election systems and the addition of majority-vote and numbered-post requirements to existing at-large systems). Much of this activity occurred between 1982 (when Congress enacted the penultimate reauthorization of Section 5) and 2006 (when the last reauthorization occurred); in that time period approximately 700 separate objections were interposed involving over 2,000 voting changes, including objections to approximately 400 redistricting plans and another 400 election method changes.

Each objection, by itself, typically benefited thousands of minority voters, and many objections affected tens of thousands, hundreds of thousands, or even (for objections to statewide changes) millions of minority voters. It would have required an immense investment of public and private resources to have accomplished this through the filing of individual lawsuits.¹⁹

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

The Section 5 process also brought notice and transparency to voting changes. Most voting changes are made without public awareness. DOJ would produce a weekly list of voting changes that had been submitted, which was automatically sent to individuals and groups that electronically subscribed to receive the list.²⁰ For submissions of particular interest, DOJ would provide public

¹⁹ 2014 National Commission Report at 56.

²⁰ Section 5 Procedures, 28 C.F.R. §§ 51.32-51.33.

notice of the change if it believed the jurisdiction had not provided adequate notice of the change.²¹ But even more important, the Section 5 process incentivized jurisdictions to involve the minority community in voting changes. DOJ's Section 5 Procedures requested that jurisdictions with a significant minority population provide the names of minority community members who could speak to the change,²² and DOJ's routine practice was to call at least one local minority contact and to ask the individual whether they were aware of the voting change and had an opinion on it. Moreover, involved members of the community could affirmatively contact DOJ and provide relevant information and data.²³

B. The *Shelby County* Decision

In the *Shelby County* case, the Supreme Court decided in a 5-4 vote that the Section 4(b) coverage formula was unconstitutional. The majority held that because the Voting Rights Act "'impose[d] current burdens,'" it "'must be justified by current needs.'"²⁴ The majority went on to rule that because the formula was comprised of data from the 1960s and 1970s, it could not be rationally related to determining what jurisdictions, if any, should be covered under Section 5 decades later.²⁵ The four dissenting justices found that Congress had demonstrated that regardless of what data was used to determine the formula, voting discrimination had persisted in the covered jurisdictions.²⁶ The majority made clear that "[w]e issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."²⁷

Shelby County effectively immobilized Section 5 because following the decision preclearance is limited only to those jurisdictions where it is imposed by a court after a court previously made a finding of intentional voting discrimination. As a result, Section 5 is essentially dead without a modernized coverage formula, such as the one in the John Lewis bill pending before the Senate. There are compelling reasons for the Senate to act because voting discrimination has increased in the absence of Section 5, and Section 2 cannot adequately substitute for Section 5.

C. The Effect of the *Shelby County* Decision

The year after the *Shelby County* decision was issued, the Executive Summary and Chapter 3 of the 2014 National Commission Report discussed what was lost in the *Shelby County* decision. We identified the following impacts:

- Voting rights discrimination would proliferate, particularly in the areas formerly covered by Section 5;
- Section 2 would not serve as an adequate substitute for Section 5 for numerous reasons:

²¹ *Id.* at 28 C.F.R. § 51.38(b).

²² *Id.* at 28 C.F.R. § 51.28(h).

²³ *Id.* at 28 C.F.R. § 51.29.

²⁴ *Shelby County*, 570 U.S. at 536 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 at 203).

²⁵ *Shelby County*, 570 U.S. at 545-54.

²⁶ *Id.* at 560 (Ginsberg, J. dissenting).

²⁷ *Id.* at 556.

- The statutes are not identical but were instead intended to complement one another;
- Section 5 prevents a discriminatory voting change from ever going into effect whereas discrimination can affect voters in a Section 2 case prior to a court decision or a settlement;
- Section 2 litigation is time-consuming and expensive compared to Section 5 which is efficient and less-resource intensive;
- Section 2 is less likely to prevent discrimination than Section 5 because:
 - Under Section 2 plaintiffs have the burden whereas under Section 5, jurisdictions have the burden of proof;
 - Section 2 has a complicated multi-factor test that provides numerous defenses for jurisdictions, whereas Section 5 has a simple retrogression test.
- The *Shelby County* decision, and DOJ’s interpretation that it also bars use of the coverage formula for sending federal observers, has left voting processes vulnerable to discrimination.²⁸

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

D. Voting Rights Discrimination has Proliferated Since *Shelby County*, Particularly in the Areas Formerly Covered by Section 5

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

In my 2019 testimony before this Subcommittee, I did a deeper dive into the 41 post-*Shelby County* voting rights cases the Lawyers’ Committee had filed up to that time. My testimony reflected that voting discrimination remains alive and well, particularly in the states formerly covered by Section 5. The findings included the following:

- In the thirty-seven cases where we sued state or local governments, twenty-nine (78.3%) involved jurisdictions that were covered by Section 5, even though far less than half the country was covered by Section 5. Moreover, we sued seven of the nine states that were covered by Section 5 (Alabama, Arizona, Georgia, Louisiana, Mississippi, Texas, Virginia), as well as the two states that had were not covered but had a substantial percentage of the population covered locally (North Carolina and New York).

²⁸ 2014 National Commission Report at 12, 55-64.

- We achieved substantial success. Of the thirty-three cases where there had been some result at the time, we achieved a positive result in 26 of 33 (78.8%). In most of the seven cases where we were not successful, we had filed emergent litigation – either on Election Day or shortly before – where achieving success is most difficult.²⁹

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

In 2019, the Lawyers’ Committee did a 25 year look back on the number of times that an official entity made a finding of voter discrimination.³⁰ This analysis of administrative actions and court proceedings identified 340 instances between 1994 and 2019 where the U.S. Attorney General or a court made a finding of voting discrimination or where a jurisdiction changed its laws or practices based on litigation alleging voting discrimination. We found that the successful court cases occurred in disproportionately greater numbers in jurisdictions that were previously covered under Section 5.

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

Prior to the *Shelby County* decision, critics of Section 5 frequently minimized the negative impact its absence would have by pointing out that DOJ and private parties could still stop discriminatory voting changes by bringing affirmative cases under Section 2 of the Voting Rights Act. Indeed, in the same paragraph of *Shelby County* where the Supreme Court majority states that Congress could adopt a new formula for Section 5, it also notes that its “decision in no way affects the permanent, nation-wide ban on racial discrimination in voting found in §2.”³¹

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

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

Section 2, as it currently exists, is quite different. It evaluates whether the status quo is

²⁹ The difficulty in successfully challenging voting procedures adopted or implemented close to an election results from judicial application of the “Purcell Principle,” in which the Supreme Court cautioned federal courts against issuing injunctions in voting rights cases close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). The Senate bill addresses the Purcell Principle by clarifying the circumstances under which it is appropriate for federal courts to grant relief in emergent voting rights litigation.

³⁰ Preliminary Report on Voting Discrimination Against Racial and Ethnic Minorities 1994-2019, https://lawyerscommittee.org/wp-content/uploads/2019/11/LC_VOTER_DISCRIM_RPT_H.pdf

³¹ *Shelby County*, 570 U.S. at 556.

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

In contrast, the Section 2 results inquiry is complex and resource intensive to litigate. As will be discussed in greater detail below in the context of the *Brnovich* decision, the “totality of circumstances” test set forth in the statute is fact-intensive by its own definition. The Senate Report supporting the 1982 amendment to Section 2 lists factors that courts have used as a starting point in applying the totality of circumstances test to include seven such factors (along with two factors plaintiffs have the option to raise).³² On top of the Senate factors, courts have introduced additional requirements. For example, in vote dilution cases, which typically involve challenges to redistricting plans or to a method of election, the plaintiff must first satisfy the three preconditions set forth by the Supreme Court in *Thornburg v. Gingles*,³³ before even getting to the Senate factors. These *Gingles* preconditions require plaintiffs to show that a minority group is compact and numerous enough to constitute a majority of eligible voters in an illustrative redistricting plan and whether there is racially polarized voting (minority voters are cohered in large number to support certain candidates and those candidates are usually defeated because of white bloc voting) and are necessarily proven by expert testimony. In vote denial cases, which involve challenges to practices such as voter identification laws, circuit courts prior to the *Brnovich* decision also added an additional test, with the developing majority view requiring that plaintiffs demonstrate that the challenged law imposes a discriminatory burden on members of a protected class and that this “burden must be in part caused by or linked to social conditions that have or currently produce discrimination against members of the protected class.”³⁴

The result is that Section 2 cases are extremely time-consuming and resource-intensive, particularly when defendants mount a vigorous defense. For example, *United States v. Charleston County*,³⁵ which I litigated at the Department of Justice, was a successful challenge to the at-large method of electing the Charleston (South Carolina) County Council. The litigation took four years, and it involved more than seventy witness depositions and a four-week trial, even though we had prevailed on the *Gingles* preconditions on summary judgment,³⁶ and needed to litigate only the totality of circumstances in the district court.

³² See e.g., *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

³³ *Id.* at 50-51.

³⁴ *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015)); see also *Ohio State Conference for the NAACP v. Husted*, 786 F.3d 524, 554 (6th Cir. 2014).

³⁵ 316 F. Supp. 2d 268 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir.), *cert denied*, 543 U.S. 999 (2004).

³⁶ *United States v. Charleston County*, 318 F. Supp. 2d 302 (D.S.C. 2002).

Four specific examples from the Lawyers' Committee's litigation record illustrate why Section 2 is an inadequate substitute for Section 5. The first and most prominent example is the Texas voter identification law, which illustrates the time and expense of litigating a voting change under Section 2 that both DOJ and the federal district court found violated Section 5 prior to the Shelby County decision.³⁷ The afternoon that *Shelby County* was decided, then-Texas Attorney General Greg Abbott announced that the State would immediately implement the ID law.³⁸ Several civil rights groups, including the Lawyers' Committee, filed suit in Texas federal court, challenging SB 14 under several theories, including Section 2, and DOJ filed its own suit under Section 2, and ultimately all of the cases were consolidated. The parties then embarked on months of discovery, leading to a two-week trial in September 2014, where dozens of witnesses, including 16 experts — half of whom were paid for by the civil rights groups — testified. Prior to the November 2014 election, the District Court ruled that SB 14 violated the “results” prong of Section 2 of the Voting Rights Act, because it had a discriminatory result in that Black and Hispanic voters were two to three times less likely to possess the SB 14 IDs and that it would be two to three times more burdensome for them to get the IDs than for white voters. The District Court's injunction against SB 14, however, was stayed pending appeal by the Fifth Circuit, so the law — now deemed to be discriminatory — remained in effect.³⁹ Subsequently, a three-judge panel and later an en banc panel of the Fifth Circuit Court of Appeals, affirmed the District Court's finding.⁴⁰ As a result, elections that took place from June 25, 2013 until the Fifth Circuit en banc opinion on July 20, 2016 took place under the discriminatory voter ID law. Had Section 5 been enforceable, enormous expense and effort would have been spared. The district court awarded private plaintiffs \$5,851,388.28 in attorneys' fees and \$938,945.03 in expenses, for a total of \$6,790,333.31. The fee award was recently unanimously by the Fifth Circuit.⁴¹ As of June 2016, Texas had spent \$3.5 million in defending the case.⁴² Even with no published information from DOJ, more than \$10 million in time and expenses were expended in that one case.

Second, in *Gallardo v. State*,⁴³ the Arizona legislature passed a law that applied only to the Maricopa County Community College District and added two at-large members to what was previously a five-member single district board. The legislature had submitted the change for Section 5 preclearance. The Department of Justice issued a more information letter based on concerns that the addition of two at-large members, in light of racially polarized voting in Maricopa County, would weaken the electoral power of minority voters on the board. After receiving the more information letter, Arizona officials did not seek to implement the change. Only after the *Shelby County* decision did they move forward, precipitating the lawsuit brought by the Lawyers' Committee and its partners. We could not challenge the change under Section 2, especially because we would not have been able to meet the first *Gingles* precondition. Instead we made a claim in state court alleging that the new law violated Arizona's constitutional prohibition against special laws because the board composition of less populous counties was not changed. Reversing the intermediate court of appeal, the Arizona Supreme Court rejected our argument, holding that the special laws provision of the state constitution

³⁷ *Veasey*, 830 F.3d at 227 n.7.

³⁸ *Id.* at 227.

³⁹ *Id.* at 227-29, 250.

⁴⁰ *Id.* at 224-25.

⁴¹ *Veasey v. Abbott*, 2021 WL 4022650 (5th Cir. Sept. 3, 2021).

⁴² Jim Malewitz & Lindsay Carbonell, *Texas' Voter ID Defense Has Cost \$3.5 Million*, THE TEX. TRIB. (June 17, 2016), <https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/>.

⁴³ 236 Ariz. 84, 336 P.3d 717 (2014).

was not violated. Unsurprisingly, the Latino candidate who ran for the at-large seat in the first election lost and the two at-large members are white.

Third, in 2015, the Board of Elections and Registration, in Hancock County, Georgia, changed its process so as to initiate a series of “challenge proceedings” to voters, all but two of whom were African American. This resulted in the removal of 53 voters from the register. Later that year, the Lawyers’ Committee, representing the Georgia State Conference of the NAACP and the Georgia Coalition for the Peoples’ Agenda and individual voters, challenged this conduct as violating the Voting Rights Act and the National Voter Registration Act, and obtained relief which resulted in the placement of unlawfully-removed voters back on the register.⁴⁴ Ultimately, plaintiffs and the Hancock County Board agreed to the terms of a Consent Decree that would remedy the violations, and required the county’s policies to be monitored for five years. But after the purge and prior to the court order, Sparta, a predominantly black city in Hancock County, elected its first white mayor in four decades. And before the case was settled, and the wrongly-purged voters placed back on the rolls, at least one of them had died.

The fourth matter is ongoing and reflects the significant present-day impact of the *Shelby County* decision and the loss of Section 5. It involves a law that Georgia, a previously covered jurisdiction, enacted this year, SB 202, a 53 section, 98-page law that changes many aspects of Georgia elections. It has spawned several federal lawsuits, most of which include voting discrimination claims. The Lawyers’ Committee is counsel in the one of these suits.

The litigation will unquestionably be resource intensive even if the various cases are fully or partially consolidated and the Plaintiffs engage in substantial coordination. It will require numerous experts and extensive fact discovery. There will be elections – and possibly multiple cycles of elections -- that will occur before Plaintiffs will have the evidence needed to establish a constitutional or Section 2 violation and the court will set aside the time to hear and decide the claims. If Plaintiffs prevail, Georgia will undoubtedly appeal and even more time will pass.

But for the *Shelby County* decision, there would be no SB 202, at least not in its current form, because at least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place. This is perhaps most clearly demonstrated by Georgia introducing several restrictions focused on voting by mail:

- The new absentee ballot ID requirements mandate that voters include a Georgia Driver’s license number or Georgia State ID number on their absentee ballot application. If they have neither, voters are required to copy another form of acceptable voter ID and attach the copies of ID documents along with other identifying information to both their absentee ballot applications and inside the absentee ballot envelope when returning the voted ballot.
- The bill also prohibits public employees and agencies from sending unsolicited absentee ballot applications to voters, yet threatens private individuals and organizations who are not so prohibited with a substantial risk of incurring hefty fines

⁴⁴ *Georgia State Conference of the NAACP v. Hancock County*, Case No. 15-cv-414 (M.D. Ga. 2015).

for every application they send to an individual who has not yet registered to vote or who has already requested a ballot or voted absentee.

- SB 202 significantly limits the accessibility of absentee ballot drop boxes to voters. While all counties would be required to have at least one, the placement of drop boxes is limited to early voting locations and drop boxes are available only to voters who can enter the early voting location during early voting hours to deposit their ballot inside the box. Thus, drop boxes are essentially useless to voters who can vote early in-person or who cannot access early voting hours at all due to work or other commitments during early voting hours.
- The bill also mandates an earlier deadline of 11 days before an election to request an absentee ballot, leaving some voters who become ill or have to travel out of the area in the lurch if they cannot vote during early voting and are unable to meet the earlier deadline to apply for a ballot.⁴⁵

These restrictions were adopted right after the November 2020 election, where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4%) and Asian (40.3%) voters, at higher rates than white (25.3%) voters.⁴⁶ Given this seemingly disproportionate impact on voters of color, I believe that if Georgia were subject to Section 5, these provisions would have been found retrogressive, and never would have been in effect. Instead, these provisions will be contested through time and resource intensive litigation under complex legal standards.

F. The Impact of *Shelby County* on the Loss of Observer Coverage

A less discussed impact of the *Shelby County* decision is on the loss of federal observer coverage. Under Section 8 of the Voting Rights Act,⁴⁷ the federal government had the authority to send federal observers to monitor any component of the election process in any Section 4(b) jurisdiction provided that the Attorney General determined that the appointment of observers was necessary to enforce the guarantees of the 14th and 15th Amendments.⁴⁸ A federal district court can also authorize the use of observers when the court deems it necessary to enforce the guarantees of the 14th or 15th Amendments as part of a proceeding challenging a voting law or practice under any statute to enforce the voting guarantees under the 14th or 15th Amendment.⁴⁹ Federal courts have concluded that the observer provisions are a constitutional exercise of congressional enforcement powers.⁵⁰

In the 2014 National Commission report, we determined that the Attorney General had certified 153 jurisdictions in eleven states for observer coverage⁵¹ and that the Department of Justice

⁴⁵ *Georgia State Conference of the NAACP, et al. v. Raffensperger, et al.*, N.D. GA, no. 1:21-cv-1250-JPB, First Amended Complaint, Doc. 35, ¶¶ 134-158.

⁴⁶ *Id.*, ¶¶ 92-100.

⁴⁷ 52 U.S.C. § 10305.

⁴⁸ 52 U.S.C. § 10305(a)(2).

⁴⁹ 52 U.S.C. §§ 10302(a), 10305(a)(2).

⁵⁰ See *United States v. Executive Committee of Democratic Party of Greene County*, 254 F. Supp. 543, 546-47 (N.D. Ala. 1966); *United States v. Louisiana*, 265 F. Supp. 703, 715 (E.D. La. 1966).

⁵¹ See U.S. Dep't of Just., Civ. Rts. Div., Voting Sec., *About Federal Observers and Election Monitoring* ("About Federal Observers") (last modified Sept. 11, 2020) <<https://www.justice.gov/crt/about-federal-observers-and-election->

had sent several thousand observers to observe several hundred elections from 1995 to 2012.⁵²

While officially not stating this, the practice of the Department of Justice has been to apply the Supreme Court’s finding that the Section 4(b) coverage formula is unconstitutional not just to preclearance, but to observer coverage. The *Shelby County* decision has reduced observer coverage to a trickle. In 2020, for the first time in decades, the Justice Department did not deploy a single federal observer for a Presidential Election. The Department of Justice has instead employed what it calls “monitors.”⁵³

The difference between federal observers and monitors is dramatic. Under the Voting Rights Act, “Observers shall be authorized to- (1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.” Monitors have no such rights: a jurisdiction does not need to provide any access to the voting process to any monitor.

By 2020, just five jurisdictions were covered for federal observers under Section 3(a) of the Voting Rights Act: Evergreen (Conecuh County), in Alabama;⁵⁴ the Dillingham, Kusilvak and Yukon-Koyukuk Census Areas in Alaska;⁵⁵ and St. Landry Parish in Louisiana.⁵⁶ Despite its continued coverage under Section 3(a), it does not appear that the Justice Department has been as active in sending federal observers to St. Landry Parish after the vote-buying issues that precipitated the litigation in the 1970s were resolved.⁵⁷ Consequently, by the end of 2020, federal observers were available in only a handful of jurisdictions covered under Section 3(a) of the VRA.

It is not difficult to see the difference in how this plays out in practice. In a year where legislatures in formerly covered states like Arizona⁵⁸ and Texas⁵⁹ are conducting audits of election results or considering restricting the ability of election officials to limit the conduct of partisan poll

[monitoring](#)>. The covered jurisdictions included the following number of political subdivisions in the identified states: “Alabama (22 counties), Alaska (1) Arizona (4), Georgia (29), Louisiana (12), Mississippi (51), New York (3), North Carolina (1), South Carolina (11), South Dakota (1) and Texas (18).” *Id.*

⁵² 2014 National Commission Report at 180-82.

⁵³ See e.g., Press Release, U.S. Dep’t. of Justice, “Justice Department Again to Monitor Compliance with the Federal Voting Rights Laws on Election Day,” (Nov. 2, 2020), <https://www.justice.gov/opa/pr/justice-department-again-monitor-compliance-federal-voting-rights-laws-election-day>.

⁵⁴ See *Allen v. City of Evergreen*, 2014 U.S. Dist. LEXIS 191739, at *4 (S.D. Ala. Jan. 13, 2014) (authorizing the “appointment of federal observers to monitor elections of the City of Evergreen” through December 21, 2020).

⁵⁵ See *Toyukak v. Mallott*, Case No. 3:13-cv-00137-SLG, Dkt. 282, Stip. and Order at 7-8 (D. Alaska Sept. 30, 2015) (“Pursuant to Section 3(a) of the VRA, 52 U.S.C. § 10302(a) ... Election Observers are appointed and are authorized to attend and observe elections and election activities that federal law authorizes, including training” for the three census areas through December 31, 2020).

⁵⁶ See *United States v. St. Landry Parish Sch. Bd.*, Case No. 76-1062 (W.D. La. Dec. 5, 1979) (authorizing federal observers “until further order of this Court”); see also U.S. COMM’N ON CIVIL RTS., THE VOTING RIGHTS ACT: UNFULFILLED GOALS 37 (Sept. 1981) (describing the vote-buying scheme that led to the Justice Department’s litigation against the county).

⁵⁷ See generally GAO, *Department of Justice’s Activities to Address Past Election-Related Voting Irregularities*, GAO-04-1041R, at 69 (Sept. 14, 2004) (“Data from the Voting Section shows that as of August 23, 2003, the court order was still in effect and that no elections were monitored at this parish during calendar years 2000 through 2003.”).

⁵⁸ Arizona Rev. Stat. § 16-602.

⁵⁹ Texas Senate Bill 7 (online at <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00007E.pdf#navpanes=0>).

watchers, it becomes vitally important for the federal government to have discretion to send observers to places with a history of voting discrimination for the purpose of ensuring that processes are fair and that voters of color are not disenfranchised.

The Senate bill will renew and restore the vitality of the federal observer provisions in several ways. First, it will revitalize Section 5 by enacting a new coverage formula. The effect of that new formula would make the covered states and political subdivisions subject to the preclearance requirements. Once subject to preclearance, a jurisdiction would be eligible for certification by the Attorney General under Section 8 of the Voting Rights Act. This fix, by itself, would lead to the restoration of much of the federal observer coverage lost from *Shelby County* because the vast majority of that coverage was due to the Attorney General's certifications.

Second, the bill includes a modest, but important, conforming amendment to observer coverage by federal courts under Section 3(a) of the Act. Currently, that section authorizes federal observer coverage "for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment..."⁶⁰ The bill would amend Section 3(a) by striking "violations of the fourteenth or fifteenth amendment" and inserting "violations of the 14th or 15th Amendment, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group,".

That change would make it easier for federal courts to authorize observers because it would relieve the Attorney General or private litigant from having to establish the likelihood of a constitutional violation, which implicates a higher burden of proof. Under the modified language, a violation of the Voting Rights Act or any federal law prohibiting voting discrimination on the basis of race, color or language minority status would suffice. As long as a litigant establishes the requisite voting rights violation, including those under federal laws such as the Voting Rights Act, they would be entitled to the appointment of federal observers unless the jurisdiction establishes that voting rights violations "(1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future."⁶¹

Third, the bill would amend Section 8 of the Voting Rights Act⁶² to expand the Attorney General's discretion to assign federal observers in jurisdictions covered by the Act's preclearance provisions. It would leave Section 8(a)(1) intact, but would amend Section 8(a)(2)(B) to include as a basis for sending observers violations of "any provision of this Act or any other Federal law protecting the right of citizens of the United States to vote." Furthermore, it would add a new subparagraph 8(a)(3) to duplicate the process for certification by the Attorney General to also include instances in which "in the Attorney General's judgment, the assignment of federal observers is necessary to enforce the guarantees of section 203" of the VRA.

Fourth, the bill shifts responsibility for the federal observer program from the Director of the Office of Personnel Management to the Attorney General. This update reflects the impact that *Shelby County* has had on the federal observer program. Because few (and in the case of 2020 no) federal

⁶⁰ 52 U.S.C. § 10302(a).

⁶¹ 52 U.S.C. § 10302(a).

⁶² 52 U.S.C. § 10305.

observers have been deployed for elections in the past eight years due to the loss of Section 5 coverage, much of the expertise and experience built up by OPM in the first five decades under the Voting Rights Act has been lost. Moreover, the change recognizes that the program can be run more efficiently by the Attorney General, who has the primary authority for certifying jurisdictions for federal observer coverage. Importantly, the bill makes clear that the OPM Director will continue to be able to “assist in the selection, recruitment, hiring, training, or deployment of these or other individuals authorized by the Attorney General for the purpose of observing whether persons who are entitled to vote are being permitted to vote and whether those votes are being properly tabulated.”

Taken together, the Senate bill makes these much-needed changes to the Voting Rights Act to restore and renew the federal observer protections, which were severely undermined by the *Shelby County* decision.

G. Addition of a Retrogression Standard to Section 2

In August, the House passed the John Lewis Voting Rights Advancement Act, named after one of the true giants of our lifetimes, a person who literally put his life on the line so that others could vote free of discrimination on the basis of the color of their skin. Now is the time for Congress to honor his memory with passage of a bill that resuscitates Section 5 and includes complimentary protections from voting discrimination.

Like H.R. 4, the Senate bill includes a “transparency” requirement, which enhances opportunities to protect voters of color from voting discrimination. The “transparency” provision requires that any State or political subdivision that makes any change in a voting practice or procedure in any election for Federal office that results in a difference with that which has been in place 180 days before the date of the Federal election must provide reasonable and detailed public notice of the change within 48 hours. Additional, specific requirements for notice are provided as for polling place changes for Federal elections and for the changes in the constituency that will participate in any election through redistricting or reapportionment.⁶³

We agree that notice by any state or political subdivision of changes in voting practices or procedures and to any prerequisite to voting is essential to any effective response to the *Shelby County* decision, but we see no reason to limit the notice requirement to changes affecting Federal elections.⁶⁴

We are pleased to see that the bill strengthens Section 2 to protect against voting rules that make voters of color worse off in terms of their voting rights than the status quo. This is a vital amendment for protecting voters.

The bill amends Section 2 to provide that a violation is established if a challenged voting qualification, prerequisite, standard, practice or procedure has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race, color or language minority status to participate in the electoral process or elect their preferred candidates of choice. This standard is known as “retrogression,” or backsliding, which simply means that the voting change “will make members of such a group worse off than they had been before the change.”⁶⁵

⁶³ See H.R. 4, 116th Congress, Sec. 6.

⁶⁴ See, e.g., *Katzenbach*, 383 U.S. at 310–15.

⁶⁵ 28 C.F.R. § 51.54(b); *Beer v. United States*, 425 U.S. 130, 140-42 (1976).

Retrogression is already incorporated in Section 5’s preclearance review, applying well-defined standards established by federal courts that are set forth in U.S. Department of Justice regulations. The current standards have been in effect for over three decades.⁶⁶

The amendment is necessary because the retrogression standard is not encompassed in Section 2 currently. As the Supreme Court has explained, “[t]he inquiries under §§ 2 and 5 are different. Section 2 concerns minority groups’ opportunity ‘to elect representatives of their choice,’ 42 U.S.C. § 1973(b) (2000 ed.), while the more stringent § 5 asks whether a change has the purpose or effect of ‘denying or abridging the right to vote,’ § 1973c.”⁶⁷ The differences relate in large measure to the nature of the voting change:

In § 5 preclearance proceedings – which uniquely deal only and specifically with changes in voting procedures – the baseline is the status quo that is proposed to be changed: If the change ‘abridges the right to vote’ relative to the status quo, preclearance is denied, and the status quo (however discriminatory it may be) remains in effect. In § 2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the status quo ‘results in [an] abridgement of the right to vote’ or ‘abridge [s] [the right to vote]’ relative to what the right to vote ought to be, the status quo itself must be changed.”⁶⁸

In other words, “Section 2 concerns itself with the possibility of a minority group’s present, but *unrealized*, opportunity to elect...” In contrast, “[t]he question of retrogressive effect under Section 5 looks at gains that have already been realized by minority voters and protects them from future loss.”⁶⁹

To summarize, as written “§ 2 does not prohibit retrogression,” by itself. “Dilution under § 2 is measured against a hypothetical undiluted practice rather than against a [jurisdiction’s] prior practice (as it would be in a § 5 analysis).”⁷⁰ Adding the retrogression standard to Section 2 will help ensure that regardless of whether a jurisdiction is covered by Section 5, minority voters are protected from the future loss of voting opportunities they have already, which is an issue both with respect to redistricting and changes that create restrictions on the right to vote.

The proposed retrogression cause of action provides an additional, reasonable, and necessary weapon in the fight against suppressive and discriminatory voting practices. First, and most important, it responds to current needs, which are not limited to those states and political subdivisions that may be subject to geographic coverage or which attempt to implement practices known to be susceptible to discriminatory applications. As of July 14, 2021, at least 18 states had enacted laws this year that made it harder to vote.⁷¹ These laws were passed not only in states like Georgia and Arizona, that were previously covered by Section 4 of the Voting Rights Act, but also by states not previously covered, such as Indiana, Idaho, Kansas, Montana, Nevada, Oklahoma, Utah, and

⁶⁶ See 28 C.F.R. Part 51, originally published in 52 Fed. Reg. 490 (Jan. 6, 1987).

⁶⁷ *Bartlett v. Strickland*, 556 U.S. 1, 24-25 (2009).

⁶⁸ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (1997).

⁶⁹ *Texas v. United States*, 831 F. Supp.2d 244, 261-62 (D.D.C. 2011) (italics in original).

⁷⁰ *Patino v. City of Pasadena*, 230 F.Supp.3d 667, 712 (W.D. Tex. 2017).

⁷¹ “Voting Laws Roundup: July 2021,” www.brennancenter.org, Aug. 12, 2021.

Wyoming,⁷² and included provisions not captured in the “known practices” category, including those that make mail voting and early voting more difficult.⁷³

Second, the amendment to Section 2 would impose a minimal federal burden on the States in several ways. All States would be treated alike by this retrogression provision because Section 2 has nationwide application. Unlike Section 5, under the new provision proposed voting changes would not have to be submitted for preclearance before going into effect. Neither the U.S. Department of Justice nor any federal court will be involved in approving a voting change unless it is challenged through litigation. Moreover, the enacting jurisdiction will not be required to establish that the voting change has neither the purpose nor the effect of making minority voters worse off. Instead, retrogression under the proposed amendment to Section 2 places the burden of proof on the plaintiff alleging a violation as with other federal voting rights protections.

Third, the standards for reviewing a retrogression claim are well established. The relevant factors to be considered in evaluating a retrogression claim under the proposed amendment to Section 2 include those used for decades by the Department of Justice, such as: “The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change”; “The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change”; and “The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change.”⁷⁴

We believe that these amendments, individually and collectively, are constitutional under the current constitutional framework for the Fourteenth and Fifteenth Amendments. These amendments would respond to the current problems of jurisdictions enacting retrogressive voting changes that may be difficult to challenge under other provisions. In comparison to the needs addressed under the bill’s other proposed amendments to the Voting Rights Act, the burdens they create are relatively modest. The requirement of providing notice of changes provides almost no burden, as it would take little effort to provide notice.

Furthermore, the burden of creating a cause of action prohibiting retrogressive voting changes is constitutionally acceptable under the circumstances. The Supreme Court has stated that Congress has the enforcement authority to address voting changes that have a discriminatory effect.⁷⁵ In addition, because numerous other civil rights laws allow for discriminatory effect causes of action, including Title VII of the Civil Rights Act of 1964,⁷⁶ involving employment discrimination, and the Fair Housing Act of 1968,⁷⁷ permitting such a cause of action is hardly unusual.

Finally, creating a cause of action for retrogression nationally does not implicate the concerns about the equal sovereignty of the States, expressed by the majority in the *Shelby County* decision.⁷⁸ The retrogression cause of action should not be a threat to those jurisdictions whose proposed voting

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 28 C.F.R. § 51.57.

⁷⁵ *City of Rome*, 446 U.S. at 173-79.

⁷⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)

⁷⁷ *Texas Dept., of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. 519 (2015).

⁷⁸ *Shelby County*, 570 U.S. at 544-45.

practices changes are intended to make it easier for voters to vote, because a party would have to successfully bring suit in order to stop the change, which seems implausible under the circumstances. The burden is placed on the party challenging the change. Proving retrogression is not as complicated as proving discriminatory results under Section 2, but it is a high standard, and history has taught us that it is perfectly suitable to assess the discriminatory effects of proposed changes in voting practices.

II. Why and How Congress Must Respond to *Brnovich*

A. Section 2 of the Voting Rights Act

From the ratification of the Fifteenth Amendment in 1870 through the 1960s, the federal government tried—and failed—to defeat the “insidious and pervasive evil” of “racial discrimination in voting,” which had been “perpetuated . . . through unremitting and ingenious defiance of the Constitution.”⁷⁹ Although Justice Frankfurter wrote long ago that the Fifteenth Amendment targeted “contrivances by a state to thwart equality in the enjoyment of the right to vote” and “nullifie[d] sophisticated as well as simple-minded modes of discrimination[,]”⁸⁰ prior to the VRA’s passage, this language proved largely aspirational.⁸¹

Responding to the states’ tenacious “ability . . . to stay one step ahead of federal law,” Congress passed the VRA to provide a “new weapon[] against discrimination.”⁸² The Act “reflect[ed] Congress’ firm intention to rid the country of racial discrimination in voting.”⁸³ The essence of the VRA’s protections was exemplified in Section 2, which provided: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”⁸⁴

Notwithstanding Section 2’s broad language, jurisdictions sought to evade its reach by placing “heavy emphasis on facially neutral techniques.”⁸⁵ These “techniques” included everything from “setting elections at inconvenient times” to “causing . . . election day irregularities” to “moving polling places or establishing them in inconvenient . . . locations.”⁸⁶ In one Mississippi county, voters were forced to “travel 100 miles roundtrip to register to vote.”⁸⁷ In one Alabama county, “the only registration office in the county [was] closed weekends, evenings and lunch hours.”⁸⁸ These regulations ostensibly governed the time, place, and manner of voting in a neutral way, but they “particularly handicap[ped] minorities.”⁸⁹

⁷⁹ *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966).

⁸⁰ *Lane v. Wilson*, 307 U.S. 268, 275 (1939)

⁸¹ See, e.g., *Katzenbach*, 310–15 (describing pre-VRA efforts to enforce the Fifteenth Amendment).

⁸² Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 524–25, 550 (1973) (hereinafter *Right to Vote*).

⁸³ *Katzenbach*, 383 U.S. at 315.

⁸⁴ Voting Rights Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437, 437.

⁸⁵ *Right to Vote*, *supra* at 552.

⁸⁶ *Id.* at 557–58.

⁸⁷ Steven L. Lapidus, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 FORD. L. REV. 93 (1983).

⁸⁸ *Id.* at 93–94.

⁸⁹ *Id.* at 96.

Against this backdrop, and responding to this Court’s plurality decision in *City of Mobile v. Bolden*, which had read into Section 2 a “discriminatory purpose” element,⁹⁰ Congress expressly expanded Section 2, now codified at 52 U.S.C. § 10301. As amended, Section 2 prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”⁹¹ Congress further specified that, under Section 2, a violation is established if, “based on the totality of [the] circumstances,” the political processes leading to an election are not “equally open to participation” by minority voters so that they have less opportunity than white voters “to participate in the political process and to elect representatives of their choice.”⁹² By adopting this “results test,” Congress captured the “complex and subtle” practices which “may seem part of the everyday rough-and-tumble of American politics” but are “clearly the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination.”⁹³

Section 2 provides relief for both *vote dilution*—schemes that reduce the weight of minority votes—and *vote denial*—standards, practices, or procedures that impede minority citizens from casting votes or having their votes counted. Vote-denial cases were the paradigmatic, “first generation” cases brought under Section 2. Later the Supreme Court “determine[] that the Act applies to ‘vote dilution’ as well.”⁹⁴

Thirty-five years ago, in *Gingles v. Thornburg*,⁹⁵ the Court recognized that Congress inserted the words “results in” to frame the Section 2 inquiry. Instead of asking whether, in a vacuum, a voting practice facially sounds as if it denies or abridges the rights of minority voters, the question is: in context, does the practice “interact” with pre-existing social and historical conditions to *result in* that burden? Answering this question requires courts to examine the challenged practice not as a theoretical postulate, but as a law or regulation that interacts with real-world conditions and must be evaluated through a fact-heavy, “intensely local appraisal,”⁹⁶ that accounts for the “totality of [the] circumstances.”⁹⁷

⁹⁰ 446 U.S. 55, 62 (1980).

⁹¹ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. at 131, 134 (emphasis added).

⁹² *Id.* A claim for violation of Section 2 (and the Fourteenth Amendment) can still be based on a finding of intentional discrimination, by application of the settled standards for proving intentional discrimination as set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which includes (1) the historical background; (2) the sequence of events leading to the challenged practice, including procedural and substantive deviations from normal process; (3) relevant legislative history; and (4) whether there is a disparate impact on any group. See, e.g., *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 220-21 (4th Cir. 2016).

⁹³ S. Rep. No. 97-417, at 12 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 189 (“Senate Report”).

⁹⁴ See Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 423 (1995). The congressional record accompanying the 1982 Amendments is replete with examples of the discriminatory practices that concerned Congress. The House Judiciary Committee noted that counties in Virginia and Texas had instituted “inconvenient location and hours of registration” and other restrictive practices that acted as “continued barriers” to racial minorities. H.R. Rep. No. 97-227, at 14, 17 (1981) (“House Report”). The Senate Judiciary Committee similarly identified states’ “efforts to bar minority participation” through “registration requirements and purging of voters, changing the location of polling places[,] and insistence on retaining inconvenient voting and registration hours.” Senate Report at 10 n.22. For example, a Georgia county “adopted a policy that it would no longer approve community groups’ requests to conduct voter registration drives, even though only 24 percent of black eligible voters were registered, compared to 81 percent of whites.” *Id.* at 11.

⁹⁵ 478 U.S. 30, 47 (1986).

⁹⁶ *Id.* at 79 (quotation marks omitted).

⁹⁷ 52 U.S.C. § 10301(b).

In *Gingles*, the Court explained the “essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the [voting] opportunities enjoyed by black and white voters.”⁹⁸ Recognizing Section 2’s command that courts consider the “totality of circumstances,” the *Gingles* Court looked to the Senate Report accompanying the 1982 amendments to compile a list of relevant “circumstances.”⁹⁹ These nine social and historical conditions—the “Senate Factors”—include considerations such as the history of official discrimination in the jurisdiction (Factor One); the extent of discrimination in the jurisdiction’s education, employment, and health systems (Factor Five); and whether the challenged practice has a tenuous justification (Factor Nine).¹⁰⁰

Since *Gingles*, four different Circuits addressing vote-denial cases have used the foundation laid in *Gingles* to analyze these matters. This formulation distills Section 2 liability into a two-part test: (1) there must be a disparate *burden* on the voting rights of minority voters (“an inequality in the opportunities enjoyed”); and (2) that burden must be *caused* by the challenged voting practice (“a certain electoral law, practice, or structure . . . cause[s] an inequality”) because the practice “interacts with social and historical conditions” of racial discrimination.¹⁰¹ No other Circuit has put forth an alternative formulation.

B. The Facts of *Brnovich*

That was the situation until *Brnovich*. In *Brnovich*, the Supreme Court reviewed two Arizona voting practices: one mandated that votes cast out of the voter’s precinct (“OOP”) not be counted; the other prohibited the collection of mail-in ballots by anyone other than an election official, a mail carrier, or a voter’s family member, household member or caregiver. Plaintiffs had claimed that these practices violated Section 2 of the Voting Rights Act.

The United States District Court for the District of Arizona had ruled against the plaintiffs on both claims, but, applying the settled standards described above, the United States Court of Appeals for the Ninth Circuit had reversed, en banc, finding that the out-of-precinct policy violated the “results” prong of Section 2 and that the limitations on collections of absentee ballots violated both the “results” and “intent” prongs of Section 2.

As to the out-of-precinct policy, the Ninth Circuit identified several factors, acknowledged by the district court, leading to a higher rate of OOP voting by voters of color than by white voters: frequent changes in polling locations (polling places of voters of color experienced stability at a rate 30 percent lower than the rate for whites);¹⁰² confusing placement of polling locations (indigenous populations in particular lived farther from their assigned polling places than did white voters,¹⁰³);

⁹⁸ 478 U.S. at 47.

⁹⁹ 478 U.S. at 36.

¹⁰⁰ *Id.* at 36–37 (citing Senate Report at 28–29).

¹⁰¹ *Gingles*, 478 U.S. at 47; *accord League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

¹⁰² *Brnovich v. Democratic National Committee*, Joint Appendix, at 590 (online at https://www.supremecourt.gov/DocketPDF/19/19-1257/162052/20201130133300128_19-1257%20-1258%20Joint%20Appendix.pdf).

¹⁰³ *Id.* at 592.

and high rates of residential mobility.¹⁰⁴ As a result, 1 in every 100 Black voters, 1 in every 100 Latinx voter, and 1 in every 100 indigenous peoples voter cast an OOP ballot, compared to 1 in every 200 white voters.¹⁰⁵

As to the absentee-ballot collection limitation, the Ninth Circuit relied on the district court’s finding that voters of color were more likely than white voters to return their early ballots with the assistance of third parties.¹⁰⁶ The disparity was the result of the special challenges experienced by communities that lack easy access to outgoing mail services, socioeconomically disadvantaged voters who lacked reliable transportation, and voters who had trouble finding time to return mail because they worked multiple jobs or lacked childcare services, all burdens that disproportionately fall on Arizona’s minority voters.¹⁰⁷

Applying the “totality of circumstances” test, with primary reliance on the Senate factors that demonstrated a history of discrimination in Arizona that persists to this day, the Ninth Circuit found that both the OOP policy and the absentee-ballot collection law violated the “results” prong of Section 2 of the VRA. The court also found that the absentee ballot law had been enacted with discriminatory intent, based on statements of the sponsor and a racist video used to promote passage of the law.¹⁰⁸

C. The *Brnovich* Decision: Its Meaning, and Its Consequences

In *Brnovich*, a 6-3 Court reversed the Ninth Circuit’s decision. Had it done so by applying the settled standards, we may not be here today. But, in writing for the Court’s majority, Justice Alito provided guidelines for future treatment of Section 2 vote denial “results” cases that were not only new, but also contrary – or at least dilutive of – the decades-long accepted standards.

I emphasize *Brnovich* does not spell the end of Section 2 cases. Rather, it unnecessarily and unreasonably makes it more difficult for civil rights plaintiffs to win Section 2 actions, when they already were difficult to prevail. And it does so in a way that flies in the face of congressional intent. Further, it raises too many ambiguities in too many important areas to leave it to the courts to fill in the blanks. The greater difficulty and ambiguity threaten to undermine the core purpose of the Voting Rights Act.

1. *Brnovich* is a solution in search of a problem

First, *Brnovich* purports to cure a non-existent problem. One of the premises of *Brnovich* is that “[i]n recent years, [Section 2 vote denial claims] have proliferated in the lower courts.”¹⁰⁹ In support of this statement, the Court relies on the amicus curiae briefs of Sen. Ted Cruz, the State of Ohio, and the Liberty Justice Center.¹¹⁰ However, those briefs describe a total of perhaps 16 cases, dating back over 7 years, and only 3 of them led to a finding of Section 2 liability.

¹⁰⁴ *Id.* at 594.

¹⁰⁵ *Id.* at 595-96.

¹⁰⁶ *Id.* at 597.

¹⁰⁷ *Id.* at 598.

¹⁰⁸ *Id.* at 681.

¹⁰⁹ *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *8 (2021).

¹¹⁰ *Id.* at n.6.

The fact is that since Congress amended Section 2 in 1982 and since the Supreme Court supplied its test for adjudicating Section 2 violations, the Supreme Court has never deemed it necessary to review a single Section 2 vote-denial case. At the same time, there was absolutely no evidence that courts were being overwhelmed by Section 2 vote denial cases. And when such cases are brought, courts have had no trouble applying the standard to separate discriminatory voting practices from benign election regulations. In short, the pre-existing standard had worked well.

2. **Brnovich reads a remedial statute narrowly**

One of the most important canons of statutory construction – and one that gives the greatest deference to congressional intent – is that remedial statutes are to be broadly construed,¹¹¹ and there are few statutes in this Nation’s history more remedial than the Voting Rights Act of 1965. Yet, rather than read the Act expansively, the Court created new stringent “guideposts,” most prominently suggesting higher standards for both the size of the burden and the size of the disparity, and a lower standard for the State to meet to justify the burdens it is placing on the right to vote.

The purported touchstone of the *Brnovich* opinion is the Court’s construction of the requirement in Section 2(b) that the political process be “equally open” as the “core” requirement of the law.¹¹² The concept of equal “opportunity” as used in the same statute, the Court acknowledged somewhat grudgingly, “may stretch that concept to some degree to include consideration of a person’s ability to *use* the means that are equally open.”¹¹³ In that context, the Court turned to the “totality of the circumstances” test, and said that “any circumstance that has a logical bearing on whether voting is ‘equally open’ and afford equal ‘opportunity’ may be considered,” and proceeded to list five “important circumstances” that were relevant.¹¹⁴

Some of these “important circumstances” seem fairly innocuous on their face: e.g., the size of the burden, the size of the disparity. Others not so much: e.g., the degree of departure of the challenged practice from practices standard when Section 2 was amended in 1982 or which are widespread today, and the opportunities provided by the electoral process as a whole. Another has never been deemed relevant to Section 2 analysis: the strength of the state’s justification for the practice – except in connection with assessment of the tenuousness of that justification. Overall, however, the devil is in the details, and in the ambiguities created by the Court’s specific choice of language that may pave the way for state legislatures to enact additional discriminatory laws and for lower courts to apply Section 2 parsimoniously in vote denial “results” cases.

3. **The size of the burden should include factors specific to the affected community resulting from discrimination**

The first factor that Justice Alito highlighted was the “size of the burden,” emphasizing that voters “must tolerate the usual burden of voting.”¹¹⁵ The application of this “guidepost” by legislatures and lower courts might be colored by a footnote at the end of the paragraph on burden,

¹¹¹ See *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (broadly construing the VRA as “aimed at the subtle, as well as the devious, state regulations which have the effect of denying citizens their right to vote”); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (stating general rule of statutory construction).

¹¹² *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *12; 52 U.S.C. § 10301.

¹¹³ *Brnovich*, 2021 WL 2690267, at *12 (emphasis in original).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

where Justice Alito expounded on what “openness” and “opportunity” might mean (as, say, with museums or school courses that are open to all) as compared to the “absence of inconvenience” (such as lack of adequate transportation or conflicting obligations).¹¹⁶ The vagueness with which the Court left this issue, and its relegation to a footnote, may limit its precedential impact, but its practical impact may be substantial.

What Justice Alito does not acknowledge is that some of these indicia of what he calls “inconvenience” are themselves not simply subjective to an individual, but, are reflective of a group’s socio-economic circumstances, that are themselves the product of a history of discrimination. In the Texas Photo ID case, for example, we were able to demonstrate that not only were Black and Latinx voters more likely than white voters not to possess the required photo ID, but that they were more likely than white voters not to be able to get the ID because of, among other reasons, lack of access to transportation.¹¹⁷

The same logic might apply to polling place location and closure decisions that might make it just that much more burdensome for voters of color than for white voters to vote. Or, as in the new Georgia statute, SB 202, prohibiting line relief - the provision of food and water to those waiting in line to vote - particularly when voters of color are much more often confronted with long wait-times than are white voters.¹¹⁸

Mandating additional voter ID requirements in order to submit an application for an absentee ballot or to return a voted absentee ballot is another new hurdle voters will now face in Georgia under its new omnibus bill. Under this provision, voters requesting an absentee ballot must submit with their application their driver’s license number, their personal identification number on a state-issued personal identification card, or a photocopy of other specified forms of identification. For voters who do not have a Georgia’s driver license or state ID card number, voting absentee will now require access to photocopy technology. Voters without such access to technology will face a higher burden in complying with these ID requirements. Recent data shows that Black Georgians are 58% more likely and Latinx Georgians are 74% more likely to lack computer access in their homes as compared to their white counterparts.¹¹⁹ Thus, we can expect voters of color to face a significantly higher burden than white voters in complying with the ID requirements for requesting and returning absentee ballots.

If *Brnovich* is construed by state legislatures as permitting them to impose barriers that affect different racial or ethnic groups differently because of their relative wealth – particularly when those differences are themselves the product of historic discriminatory practices – it will have a serious impact on the voting rights of persons of color.

¹¹⁶ *Id.*

¹¹⁷ *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc).

¹¹⁸ Georgia Senate Bill 202 (online at <https://www.legis.ga.gov/api/legislation/document/20212022/201498>); *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 36; Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places*, Georgia Public Broadcasting, Oct. 17, 2020, accessible at <https://www.npr.org/2020/10/17/924527679/why-do-nonwhitegeorgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl>.

¹¹⁹ *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 44.

4. 1982 Standards and Widespread Practice Are Not Important

Second, Justice Alito said that other relevant factors included the degree of departure of the challenged practice from the “standard practice when §2 was amended in 1982,” a choice which is largely left unexplained, other than in rebuttal to Justice Kagan’s dissent, in which he writes, somewhat tautologically, that “rules that were and are commonplace are useful comparators when considering the totality of the circumstances.”¹²⁰ Although the Court acknowledges that this would not apply to practices that themselves were discriminatory in 1982, the fact is that such benchmarks are neither necessary nor productive. If the history of voter discrimination in this country has taught us anything, it is that those who want to stop voters of color from voting change their methods with the times, and with the change in the ways voters of color are voting.

Again, Georgia is illustrative. In Georgia, state legislators responded to the record-shattering turnout of 2020 by passing omnibus legislation that restricts the right to vote at nearly every step of the process and disproportionately affects voters of color. Among its provisions, the law requires voter identification in order to request an absentee ballot and vote absentee; severely limits access to absentee ballot drop boxes; and significantly shortens the period in which voters can apply for and cast absentee ballots. These restrictions were adopted right after the November 2020 election where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4%) and Asian (40.3%) voters, at higher rates than white (25.3%) voters.¹²¹ But, Justice Alito’s reasoning may be construed as supporting the proposition that, if in 1982, Georgia did not make absentee ballots universally available, that could be a “highly important” consideration, even if voters of color are more heavily impacted than white voters by these changes. State legislatures should not be led to believe that they can get away with erecting new barriers to vote based on what they did 40 years ago.

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

5. So-called “small differences” can be important.

Third, in explaining the importance of the size of the disparities, Justice Alito indicates that “small differences should not be artificially magnified,”¹²² again dealing obliquely with the consequences of the differences being caused by differences in wealth – which may themselves be the result of historic racial discrimination. Specifically, the Court criticized the Ninth Circuit for finding disproportionate impact based on a relative comparison of the percentage of voters whose votes were rejected because they were cast out of precinct. In the case of Indigenous, Black, and Latinx voters, the percentage was 1% for each group; in the case of white voters, the percentage was .05.¹²³

¹²⁰ 2021 WL 2690267, at n.15.

¹²¹ *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 47.

¹²² 2021 WL 2690267, at *13.

¹²³ *Id.* at *4.

The Court neglected to note that the discriminatory out of precinct practice meant that almost 4,000 votes cast by voters of color had been rejected – and that if their circumstances were equivalent to those of white voters, 2,000 of their votes would have counted.

The Texas Photo ID case is illustrative. There, the court found that, even though over 90% of all groups had the required ID, Black voters were twice as likely as white voters not to have the ID, and Latinx voters were about three times as likely. In fact, the court found that 608,470 Texas voters lacked the ID.¹²⁴ Obviously, the Texas numbers are meaningful no matter how viewed. But the point is that smaller numbers may be too. Legislatures and lower courts should not be led to believe that they can chip away at electoral margins by reducing the likelihood of voters of color being able to cast their votes, no matter how small the effect. We need not dwell on the closeness of the 2020 presidential election in Arizona, Georgia, and Wisconsin to underscore the importance of even small differentials in impact.

6. Other opportunities to vote do not necessarily ameliorate discrimination in particular methods of voting

Fourth, Justice Alito explained that the opportunities provided by the entire electoral system should be factored into the equation, implying that, for example, access to absentee ballots may be curtailed, as long as the voter can still vote in person.¹²⁵ But, if an advantageous means of voting is curtailed as to one group more than it is to another, what difference does it make that there may be other methods of voting? If all methods of voting made voting equally accessible, there would have to be only one method. Obviously, expanding methods of voting makes it more likely that people will vote. And, equally obviously, contracting them makes it less likely that people will vote. Contracting them in a way that affects some racial or ethnic groups more than others is inconsistent with the language and Congressional intent of Section 2. States should not be led to believe that they have carte blanche to target specific voting practices, when the effect is discriminatory, and try to justify it by the availability of other means of voting.

7. Justification for discriminatory practices must be based on reality

And, fifth, in explaining the state justification factor, the Court seemed to open the door to a state’s justifying virtually any discriminatory action simply by parroting the words “fraud prevention.”¹²⁶ Again, while the Court did not say so explicitly, the fear is that state legislatures and the lower courts may so interpret the Court’s opinion.

The incongruity of the Court’s approach is seen in comparing the hundreds of thousands of voters who were potentially deprived from voting under Texas’s prior Photo ID law, with the infinitesimally small number of persons even accused of fraudulently voting. A state’s choice to prevent non-existent fraud at the expense of thousands of votes, disproportionately of person of color, is not legitimate. Again, permitting such choice, is inconsistent with the language of Section 2 and Congressional intent.

¹²⁴ *Veasey v. Perry*, 71 F.Supp.3d 627, 659 (S.D. Tex. 2014).

¹²⁵ 2021 WL 2690267, at *13.

¹²⁶ *Id.*

8. The Senate Factors are relevant

The *Brnovich* majority went on to raise questions as to whether the Senate Factors are relevant to a Section 2 vote denial case, implying they are not, but leaving ambiguous precisely what the Court means as to how the few Factors the Court deems potentially relevant fit in, other than superficially.¹²⁷

Although *Gingles* involved vote dilution, the decision addressed Section 2 writ large, recognizing that “Section 2 prohibits *all* forms of voting discrimination, not just vote dilution.”¹²⁸ Further, *Gingles* recognized the applicability of the various Senate Factors would naturally turn on the type of Section 2 claim at issue.¹²⁹ The *Gingles* Court’s statement that the Senate Factors will “often be pertinent to *certain types* of § 2 violations,” such as dilution,¹³⁰ cannot be reconciled with a conclusion that the Factors “*only*” inform one specific type of Section 2 claim.

D. The Growing Present Need

As with the need for the resuscitation of Section 5, recent events reflect the significant present-day need for an immediate response to *Brnovich*. As detailed throughout this testimony, for example, the recently enacted Georgia voter suppression law, SB 202 increases the burdens for virtually every aspect of voting from voting by mail through voting in person. At least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place were it not for the decision in *Shelby County*. The effect of the *Brnovich* decision on the challenge to SB 202 remains to be seen, but already defendants have moved to dismiss the complaints on the basis of *Brnovich*. Although, we strongly believe that the complaints as drafted fully and adequately plead a “results” claim under Section 2 even post-*Brnovich*, the very making of these arguments demonstrates how those who support the erection of barriers to vote intend on using that opinion.

Georgia, of course, is not the only state that is considering or has passed laws with new barriers to voting that disproportionately affect voters of color. Florida did so with SB 90, a law that – similar to Georgia’s – imposes new and unnecessary restrictions on absentee ballots, the use of drop-boxes, and line-warming. And Texas passed an omnibus voting bill that would, among other things, empower partisan poll watchers with virtually unfettered access in polling places, while at the same time tying the hands of election officials to stop the poll watchers from engaging in intimidating conduct. Texas has a well-documented history of voter intimidation by poll watchers that has disproportionately affected voters of color. The courts have acknowledged this pattern before—in 2014, a federal district court described this very issue: “Minorities continue to have to overcome fear and intimidation when they vote. . . . [T]here are still Anglos at the polls who demand that minority voters identify themselves, telling them that if they have ever gone to jail, they will go to prison if they vote. Additionally, there are poll watchers who dress in law enforcement-style clothing for an

¹²⁷ *Id.*

¹²⁸ 478 U.S. at 45 n.10 (emphasis added); see Senate Report at 30 (confirming that Section 2 “prohibits practices, which . . . result in the denial of equal access to any phase of the electoral process for minority group members”) (emphasis added).

¹²⁹ See *id.* at 45.

¹³⁰ *Id.* (emphasis added).

intimidating effect to which voters of color are often the target.”¹³¹

As with Georgia’s SB 202, some of these provisions might have been stopped by an effective Section 5 and challenges to some of them may be hampered by the effect of the *Brnovich* decision. The bottom line, however, is that recent events have only underscored the need for a robust Voting Rights Act.¹³²

E. The bill’s response to *Brnovich*

The impact of *Brnovich* has yet to be measured, but common sense and history instruct us that those who wish to target voters of color will undoubtedly feel emboldened by a decision that can be read as making it more difficult for plaintiffs to prove a Section 2 violation, giving state legislatures a “Get Out of Jail” card to pass voter suppressive legislation and justify it simply by claiming “voter fraud.” Although we firmly believe that the courts should not apply *Brnovich* in such a manner, the threat is there. Continued commitment to the core purpose of the Voting Rights Act should not be left in the uncertainty created by the ambiguous and problematic language of *Brnovich*.

The Senate bill responds to *Brnovich* by clarifying congressional intent on the scope and application of Section 2. It maintains the existing structure for vote dilution cases in Section 2(b) of the VRA, including use of a totality of circumstances test to determine whether “the political processes leading to nomination or election in the State or political subdivision are not equally open” to groups of voters on the basis of their race, color or language minority status “in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” It codifies the legal standards in *Gingles* as governing vote dilution claims. Importantly, it provides that the class of citizens protected under Section 2 “may include a cohesive coalition of members of different racial or language minority groups.”

The bill codifies vote denial claims in Section 2, consistent with the scope and application recognized by federal courts pre-*Brnovich*. The standard for vote denial claims focuses on whether a voting law or procedure “imposes a discriminatory burden” on protected voters such that they “face greater difficulty” than non-minority voters “in complying with the standard, practice, or procedure, considering the totality of the circumstances.” To meet that burden of proof, plaintiffs would have to establish “such greater difficulty is, at least in part, caused by or linked to social and historical conditions that have produced or currently produce discrimination against members of the protected class.”

Applying longstanding jurisprudence interpreting Section 2 vote denial or abridgment claims, the bill sets out those Senate factors that may be applicable to establishing such claims. Consistent with the intensely local appraisal for Section 2 claims, no “particular combination or number of factors” is required to establish a violation. The bill further clarifies congressional intent that many of the factors identified by Justice Alito are not relevant to vote denial or abridgment claims,

¹³¹ *Veasey v. Perry*, 71 F. Supp. 3d 627, 636–37 (S.D. Tex. 2014), *aff’d and reversed on other grounds*, *Veasey v. Abbott*, 830 F. 3d 216 (5th Cir. 2016) (en banc).

¹³² *See, e.g., Shelby Cnty.*, 570 U.S. at 536 (“[V]oting discrimination still exists; no one doubts that.”); *Nomination of the Hon. Amy Coney Barrett to the Supreme Court: Hearing Before S. Comm. on the Judiciary* (Oct. 14, 2020) (“[R]acial discrimination still exists in the United States and I think we’ve seen evidence of that this summer.”) (statement of Amy Coney Barrett).

including: “the total number or share of members of a protected class on whom a challenged standard, practice, or procedure does not impose a material burden”; whether the challenged practice “has a long pedigree or was in widespread use at some earlier date”; whether that practice is used in other States or political subdivisions; alternative methods of voting, unless the State or political subdivision is “simultaneously expanding” them “to eliminate any disproportionate burden imposed by the challenged procedure; as well as the invocation of preventing vote fraud or other criminal activity as a justification for the challenged procedure without proof it has occurred in the jurisdiction.

Finally, the bill’s *Brnovich* fix makes clear that Section 2 also encompasses intentional voting discrimination. The factors included in the bill track those long used by federal courts to identify circumstantial evidence of discriminatory purpose, through application of the criteria described in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹³³

We identify here a number of issues for consideration to strengthen the language of the bill in clarifying congressional intent in response to *Brnovich*:

- Clarify that, in determining the extent to which a challenged voting rule burdens minority voters, the absolute number or the percent of voters affected or the presence of non-minority voters in the affected area will not be dispositive. H.R. 4 had that language, and defined “affected area,” to avoid the present ambiguity in the Senate bill that may cause federal courts to misinterpret the standards for vote denial or abridgment in cases involving thousands of minority voters by denying them relief for so-called “de minimis” violations.
- Clarify that in determining whether the policy underlying the use of a voting rule is tenuous – one of the Senate factors – the court should consider whether the voting rule in question was actually designed to advance and in fact materially advances a valid and substantiated state interest. That preventing voter fraud may be a valid state interest should not lead to a determination that any voting practice alleged to have been enacted to protect fraud is valid, particularly if the instances of voter fraud are rare, if not virtually non-existent, and the means chosen to combat the alleged fraud scarcely further that aim, and, further, do so at the expense of preventing eligible voters from voting.
- Clarify that a discriminatory law cannot be justified on the basis that it was a standard practice at a particular date, such as 1982, or is widespread today, but must be judged solely on the totality of the circumstances in the particular jurisdiction, as viewed at the time the action under Section 2 is brought.
- Put an end to any doubt, as raised by the concurring opinion of Justices Gorsuch and Thomas in *Brnovich*, that there is a private cause of action for a Section 2 violation, as every Circuit Court of Appeals has held.

¹³³ 429 U.S. 252 (1977).

With these proposed changes to the Senate bill, we believe it will restore Section 2 to the standards that were widely used by federal courts to address vote denial or abridgment claims before the *Brnovich* decision misinterpreted congressional intent for those claims.

III. Adjusting the contours of Section 5 coverage to address over- and under-inclusiveness

When Congress enacted the Voting Rights Act in 1965, it was aware that the coverage formula could be both over-inclusive and under-inclusive. It resolved these issues by including the Act’s “bailout”¹³⁴ and “bail-in” provisions, respectively.¹³⁵ The Senate bill makes important changes to both of those provisions to more narrowly target the VRA’s remedies to those jurisdictions where they are most needed.

A. The Need for a More Flexible “Bail-in” under Section 3(c) of the VRA

1. The limited use of the bail-in provision before *Shelby County*

The bail-in provision addresses the under-inclusiveness of the coverage determinations under Section 4(b) of the Act by applying preclearance to the “so-called ‘pockets of discrimination ... outside the States and political subdivisions as to which the prohibitions of [the Act] were in effect.’”¹³⁶ A permanent provision of the VRA, the Section 3(c) bail-in mechanism applies nationwide to reach “denials and abridgements of the right to vote on account of race or color [or language minority status]¹³⁷ wherever they may occur throughout the United States.”¹³⁸

Section 3(c) describes the circumstances under which a jurisdiction may be covered under the bail-in provision:

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does

¹³⁴ Bailout is codified in Section 4(a) of the VRA. See 52 U.S.C. § 10303(a) (transferred from 42 U.S.C. § 1973b(a)).

¹³⁵ Bail-in is codified in Section 3(c) of the VRA. See 52 U.S.C. § 10302(c) (transferred from 42 U.S.C. § 1973a(c)).

¹³⁶ H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2454. For that reason, Section 3(c) often is referred to as “the pocket trigger” for Section 5 preclearance coverage.

¹³⁷ The current language of Section 3(c) applies not just to discrimination “on account of race or color,” but also includes “or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title.” 52 U.S.C. § 10302(c). The latter language was added in the 1975 amendments to the VRA, in which Congress expressed its intent to apply the Act’s protections to language minority voters. See Pub. L. 94-73, § 206, 89 Stat. 402 (Aug. 6, 1975). The bracketed addition reflects the current statutory language.

¹³⁸ H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2454.

not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 4(f)(2)....¹³⁹

Federal courts interpreting the bail-in provision's language have concluded that it requires the reviewing court to "determine (1) whether violations of the Fourteenth or Fifteenth Amendments justifying equitable relief have occurred within the State or any of its political subdivisions; and (2) whether, if so, the remedy of preclearance should be imposed."¹⁴⁰ Stated another way, Section 3(c) "requires that (a) violations of the Fourteenth or Fifteenth Amendments (b) justifying equitable relief (c) have occurred (d) within the State or its political subdivisions."¹⁴¹ Therefore, the bail-in provision applies relief, including the determination of which voting changes are to be subject to preclearance, using the "traditional case-by-case approach."¹⁴²

For much of the VRA's history, Section 3(c) was used sparingly. During the first decade after the VRA was enacted in 1965, no jurisdiction was bailed-in under the provision.¹⁴³ By 2013, approximately eighteen jurisdictions had bailed-in under Section 3(c): two states, Arkansas¹⁴⁴ and New Mexico¹⁴⁵; twelve counties¹⁴⁶; two municipalities¹⁴⁷; and two school districts.¹⁴⁸ Over half of those jurisdictions, ten, were bailed in for discrimination against American Indians, for whom there was little coverage under Section 4(b) and Section 4(f)(4) of the VRA.¹⁴⁹ All but two of the jurisdictions, the State of Arkansas and the Gadsden County School District in Florida, were bailed in as a result of consent decrees.

¹³⁹ 52 U.S.C. § 10302(c).

¹⁴⁰ *Jeffers v. Clinton*, 740 F. Supp. 585, 587 (E.D. Ark. 1990) (three-judge panel); see also *Perez v. Abbott*, 390 F. Supp.3d 803, 813 (W.D. Tex. 2019) (recognizing that *Jeffers* provides the "most thorough analysis and discussion in the case law of § 3(c) and its requirements" and applying "this same general framework.").

¹⁴¹ *Id.*

¹⁴² H.R. Rep. No. 89-439 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2475.

¹⁴³ See generally TEN YEARS AFTER at 11 n.3 ("No court has yet used the authority of section 3, however, to impose the special coverage remedies on jurisdictions not covered by the act.").

¹⁴⁴ *Jeffers*, 740 F. Supp. at 585.

¹⁴⁵ *Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984) (consent decree).

¹⁴⁶ *United States v. Thurston Cty.*, No. 78-0-380 (D. Neb. May 9, 1979) (consent decree); *McMillan v. Escambia Cty.*, No. 77-0432 (N.D. Fla. Dec. 3, 1979) (consent decree); *Woodring v. Clarke*, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983) (Alexander County, Illinois) (consent decree); *United States v. McKinley Cty.*, No. 86-0029-C (D.N.M. Jan. 13, 1986) (consent decree); *United States v. Sandoval Cty.*, No. 88-1457-SC (D.N.M. May 17, 1990) (consent decree); *United States v. Los Angeles Cty.*, Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 26, 1991) (consent decree); *United States v. Cibola Cty.*, No. 1:93-1134-LH/LFG (D.N.M. Apr. 21, 1994) (consent decree), ECF No. 72; *United States v. Socorro Cnty.*, No. 1:93-1244-JP (D.N.M. Apr. 13, 1994) (consent decree), ECF No. 46; *United States v. Alameda Cty.*, No. 3:95-cv-1266 (SAW) (N.D. Cal. Jan. 27, 1996) (consent decree), ECF No. 13; *United States v. Bernalillo Cty.*, No. 1:98-0156-BB/LCS (D.N.M. Apr. 27, 1998) (consent decree), ECF No. 6; *Kirkie v. Buffalo Cty.*, No. 3:03-cv-3011 (D.S.D. Feb. 12, 2004) (consent decree), ECF No. 23; *Blackmoon v. Charles Mix Cty.*, No. 4:05-cv-4017 (D.S.D. Dec. 4, 2007) (consent decree), ECF No. 144.

¹⁴⁷ *Brown v. Bd. of Comm'rs of Chattanooga*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990) (consent decree); *United States v. Vill. of Port Chester*, No. 1:06-cv-15173 (S.D.N.Y. Dec. 22, 2009) (consent decree), ECF No. 119.

¹⁴⁸ *N.A.A.C.P. v. Gadsden City Sch. Bd.*, 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984) (Gadsden Cty. Sch. Dist.); *Cuthair v. Montezuma-Cortez Sch. Dist. No. RE-1*, No. 1:89-cv-0964 (D. Col. Apr. 9, 1990) (consent decree).

¹⁴⁹ The ten jurisdictions covered for American Indians include the State of New Mexico; Thurston County, Nebraska; Bernalillo, Cibola, McKinley, Sandoval, Socorro Counties in New Mexico; Buffalo and Charles Mix Counties in South Dakota; and the Montezuma-Cortez School District RE01 in Colorado.

The lack of more widespread Section 3(c) coverage can be explained in at least three ways. First, many of the States and political subdivisions that engaged in voting discrimination were covered by Section 5 already.¹⁵⁰ Second, non-covered jurisdictions that engaged in voting rights violations often were under one or more court orders that remedied that discrimination.¹⁵¹ Third, the legal standards for securing bail-in can be inordinately difficult for jurisdictions that do not voluntarily consent to the remedy.

2. The difficulty securing bail-in after *Shelby County*

Some commentators and critics of Section 5 have suggested that the Section 3(c) bail-in mechanism can provide a viable alternative to Section 5 in a post-*Shelby* world. Actual experience has proven a much different reality. Since *Shelby County* was decided in June 2013, only a handful of jurisdictions have been bailed in through the Section 3(c) remedy. The two examples I will provide both involve jurisdictions formerly covered by Section 5.

In *Allen v. City of Evergreen, Alabama*, after the plaintiffs successfully challenged a redistricting plan for the city council and the system for determining voter eligibility, they moved for remedies including the appointment of federal observers and bail-in.¹⁵² The City agreed to the relief, which “would restore a preclearance requirement which is limited in scope.”¹⁵³ The federal court ordered preclearance to be in place until December 31, 2020, limiting it to two voting changes: any change in the redistricting plan or method of election for members of the city council and any change in the standards for determining voter eligibility.¹⁵⁴ In granting the stipulated relief, the court retained jurisdiction through the end of 2020.¹⁵⁵

In *Patiño v. City of Pasadena, Texas*, the court found that the city adopted a plan for electing members of its council that intentionally diluted the votes of Latino citizens in violation of Section 2 of the VRA and the Fourteenth Amendment.¹⁵⁶ As a result of the finding of intentional discrimination, the court granted the plaintiffs’ request to require the city to submit future changes to its redistricting plan to the Attorney General for preclearance.¹⁵⁷ In addition, the court retained jurisdiction to review any other voting change different from what was in force in the 2013 election.¹⁵⁸ The court referred to the six year preclearance period in the *Evergreen* consent order, suggesting that “five years, or through the 2021 election, might be appropriate” for Section 3(c) coverage “because it is likely enough time for demographic trends to overcome concerns about dilution from redistricting.”¹⁵⁹ Subsequently, the court adopted a six year preclearance period

¹⁵⁰ See U.S. Dep’t of Just., *Jurisdictions previously covered by Section 5 at the time of the Shelby County decision* <<https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>> (updated Sept. 11, 2020).

¹⁵¹ For examples of voting rights violations that were remedied already and therefore were found a federal court not to be the proper subject of preclearance, see generally *Jeffers*, 740 F. Supp. at 601 (ordering a limited bail-in for Arkansas for any majority-vote requirements and the state’s 1990 redistricting plans because the remaining “constitutional violations found ... have already been remedied by judicial action.”).

¹⁵² Civ. Act. No. 13-0107-CG-M, 2014 U.S. Dist. LEXIS 191739, at **1-2 (S.D. Ala. Jan. 13, 2014).

¹⁵³ *Id.* at *4.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at **4-6.

¹⁵⁶ 230 F. Supp. 3d 667 (S.D. Tex. 2017).

¹⁵⁷ *Id.* at 729.

¹⁵⁸ *Id.* at 729.

¹⁵⁹ *Id.* at 730.

through June 30, 2023.¹⁶⁰ The court explained that would encompass four election cycles and redistricting following the 2020 Census.¹⁶¹

Requests for Section 3(c) relief have not been granted in other cases for a variety of reasons. One cause is the difficulty in obtaining a finding of discriminatory intent. In *Jeffers*, the court held that to establish a violation of the Fourteenth or Fifteenth Amendment necessary to support bail-in, it required “proof of conscious racial discrimination.”¹⁶² The court in *Perez v. Abbott* agreed, concluding that “triggering violations for bail-in relief must be violations of Fourteenth and Fifteenth Amendment protections against racial discrimination in voting.”¹⁶³

For example, in *Toyukak v. Treadwell*, the plaintiffs developed a strong record supporting a finding of discriminatory intent, including: Alaska’s contention that the Fifteenth Amendment did not apply to Alaska Natives; its position that Alaska Natives were entitled to less voting information than other voters because they were Alaska Natives; purposeful failure to translate ballots into covered languages and dialects; and what state officials euphemistically referred to as “policy decisions” not to provide voting materials and assistance to Alaska Native voters in areas covered by Section 203 of the Act.¹⁶⁴ The federal court held that the plaintiffs established a Section 203 violation, while also suggesting it was the product of discriminatory intent. The court explained that Alaska’s voting program was “not designed to transmit substantially equivalent information in the applicable minority... languages.”¹⁶⁵

Nevertheless, the court declined to reach the question of whether the plaintiffs established that Alaska intentionally discriminated against Native voters, taking under advisement the constitutional claim that served as the basis for the Section 3(c) request to focus on other remedies.¹⁶⁶ Later, the court directed the parties to mediation to try to resolve the litigation.¹⁶⁷ The *Toyukak* court’s reluctance to make a finding of discriminatory intent sufficient to support Section 3(c) relief is consistent with what has occurred since Congress amended Section 2 to explicitly permit results claims – judges will sometimes not reach intent claims when they find liability on a results claim.¹⁶⁸ It is inherently difficult for a federal judge to find that officials in the community in which they reside have engaged in purposeful discrimination, regardless of a voting procedure’s discriminatory impact.¹⁶⁹ The *Toyukak* plaintiffs settled and obtained court oversight over Alaska’s language program for three census areas through the end of 2020, recently extended until 2022, in lieu of

¹⁶⁰ *Patiño v. City of Pasadena*, No. H-14-3241, 2017 U.S. Dist. LEXIS 229191, at **5-6 (S.D. Tex. Jan. 16, 2017).

¹⁶¹ *Id.* at *5 n.4.

¹⁶² 740 F. Supp. at 589.

¹⁶³ 390 F. Supp. 3d 803, 813-14 (W.D. Tex. 2019).

¹⁶⁴ See James Thomas Tucker, Natalie Landreth & Erin Dougherty Lynch, “*Why Should I Go Vote Without Understanding What I am Going to Vote For?*”: *The Impact of First Generation Voting Barriers on Alaska Natives*, 22 MICH. J. RACE & LAW 327, 358-72 (2017).

¹⁶⁵ *Id.* at 372 (emphasis added).

¹⁶⁶ *Id.* at 374.

¹⁶⁷ *Id.* at 375-76.

¹⁶⁸ 446 U.S. 55 (1980).

¹⁶⁹ The Senate reached a similar conclusion in its report accompanying the 1982 amendments to the VRA, noting that because of the reluctance among federal judges to make a finding of intentional discrimination after *Bolden*, “litigators virtually stopped filing new vote dilution cases.” S. REP. NO. 417, at 26 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 203.

pressing their Section 3(c) claim.¹⁷⁰

Perez added another wrinkle to the difficulty for plaintiffs seeking bail-in by limiting the evidence outside of the underlying violation that the court considered as part of the bail in determination to that of constitutional voting violations. This, the court rejected consideration of Section 2 results violations¹⁷¹ and decided that the only Section 5 objections that could support bail-in were those based upon discriminatory intent, reasoning that a “mere finding of discriminatory effect or ‘retrogression’ does not amount to a constitutional violation...”¹⁷²

Perez also interpreted the broad language of Section 3(c) narrowly to further limit the geographic scope of constitutional violations that may be considered. The statute provides that the relevant violations are those that “have occurred within the territory of such State or political subdivision.”¹⁷³ In *Jeffers*, the court construed Section 3(c) as meaning what it says:

We agree with plaintiffs that both State and local violations of the voting guarantees of the Fourteenth and Fifteenth Amendments must be taken into account. The statute does not say that the State or its officials must be guilty of the violations, but only that the violations must “have occurred *within the territory*” of the State... And besides, as we have already held, officials of local governments are State officials for present purposes; local governments are arms of the State and only exist at its sufferance.¹⁷⁴

In contrast, *Perez* found that “these violations should at most provide relevant context” to whether a court should grant equitable relief, “and not be used as a trigger for bail-in relief.”¹⁷⁵ It read the statute differently than *Jeffers*, explaining “it simply makes clear that political subdivisions such as cities may be subjected to § 3(c) relief based on their own violations, and does not mean that a State may be subjected to bail-in based on violations by its political subdivisions.”¹⁷⁶

Moreover, even where intentional discrimination has been established in violation of the Fourteenth or Fifteenth Amendment, that may be insufficient to result in bail-in. In *Jeffers*, the court emphasized that Section 3(c) requires “violations *justifying equitable relief*.”¹⁷⁷ Like any other form of equitable relief, a court has considerable discretion, taking into consideration the public interest codified in the VRA. The court suggested several factors to weigh in making that determination:

Have the violations been persistent and repeated? Are they recent or distant in time? Are they the kind of violations that would likely be

¹⁷⁰ See Tucker, Landreth & Dougherty Lynch at 376.

¹⁷¹ 390 F. Supp. 3d at 813.

¹⁷² *Id.* at 817-18.

¹⁷³ 52 U.S.C. § 10302(c).

¹⁷⁴ 740 F. Supp. at 600 (emphasis in original). *Jeffers* qualified its construction by concluding, “We also think that more than one violation must be shown. The statute uses the plural (‘violations’), and it would be strange if a single infringement could subject a State to such strong medicine.” *Id.*

¹⁷⁵ 390 F. Supp. 3d at 817.

¹⁷⁶ *Id.*

¹⁷⁷ 740 F. Supp. at 601 (emphasis in original).

prevented in the future, by preclearance? Have they already been remedied by judicial decree or otherwise? How likely are they to recur? Do political developments independent of this litigation, make recurrence more or less likely?¹⁷⁸

Those factors are to be balanced between “the interest of the plaintiffs in vindication of their constitutional right to vote” against “the interest of the defendants in maintaining the sovereignty of the State.”¹⁷⁹

Perez cited the *Jeffers* factors with approval, applying them to reach its holding that Section 3(c) bail-in should not be imposed on Texas.¹⁸⁰ The court made that determination despite its conclusion that there were “recent, statewide violations of the Fourteenth Amendment by the State” that were “the type to appropriately trigger the bail-in remedy against the State, and the bail-in remedy sought by Plaintiffs would appropriately redress the violation.”¹⁸¹ In particular, the court described the case as involving

findings of intentionally discriminatory behavior affecting minority voters statewide... Numerous counties were drawn with the purpose to dilute minority voting strength in the Texas House plan, as well as CD23 and numerous congressional districts in the Dallas-Fort Worth metroplex in the Congressional plan.¹⁸²

Compounding those violations, the court concluded that although “it could and should also consider the intentional discrimination findings made in the underlying voter ID litigation, it does little to bolster the foundation for bail-in.”¹⁸³ The court explained that the purposeful discrimination “affected only a small portion of minority voters (indigent minority voters),” with “no indication that its effects had not been fully remedied.”¹⁸⁴

Remarkably, *Perez* noted its “grave concerns about Texas’s past conduct,” but nevertheless concluded “that ordering preclearance on the current record would be inappropriate...”¹⁸⁵ The court attempted to justify its holding by explaining, “Even without being subject to preclearance, Texas must still comply with the requirements of the Fourteenth Amendment and § 2 of the VRA in the upcoming redistricting cycle, and undoubtedly its plans will be subject to judicial scrutiny.”¹⁸⁶ That conclusion is certainly true, but it severely undermines the legislative purpose of Section 3(c): to prevent discriminatory voting changes that are enacted by knowing bad actors *before* they go into effect.

The reluctance of federal courts to order bail-in to remedy even a strong record of

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 390 F. Supp. 3d at 818-21.

¹⁸¹ *Id.* at 816.

¹⁸² *Id.*

¹⁸³ *Id.* at 820.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 820-21.

¹⁸⁶ *Id.* at 821.

discrimination such as the one in *Perez* goes far to explain why Section 3(c) relief rarely has been granted where it is contested.¹⁸⁷ It may be laudable that many jurisdictions agree to bail-in to cure their intentional discrimination against minority voters. But conditioning coverage for preclearance on a jurisdiction's consent does little to provide redress from the worst offenders, who, like Texas officials, are recidivists engaging in repeated acts of intentional discrimination designed to suppress the votes of racial, ethnic and language minorities. It goes far to explain why Section 3(c) is an inadequate remedy for the broader Section 5 coverage proposed by H.R. 4 under a new geographic formula. It also highlights the need for the modest, yet crucial, amendment that the bill makes to the violations that qualify for bail-in under Section 3(c).

3. The Senate bill clarifies Congressional intent on bail-in

Section 2(a) of H.R. 4 and the Senate bill make a simple, but essential, change to Section 3(c). Currently, bail-in only is available where the United States or a private litigant establishes discriminatory intent in violation of the Fourteenth or Fifteenth Amendment. That requirement has imposed an insurmountable burden on many plaintiffs, even in the face of a strong record of purposeful discrimination. The Senate bill corrects that deficiency by striking “violations of the Fourteenth and Fifteenth amendment” and inserting “violations of the Fourteenth or Fifteenth Amendments, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group.”

By amending Section 3(c) to include other forms of voting discrimination against racial, ethnic and language minorities, the Senate bill gives federal courts greater flexibility to provide bail-in relief where it is warranted. Remedial orders may be adapted to the circumstances present in the jurisdiction, consistent with the case-by-case approach that has been a hallmark of the pocket trigger. It further empowers courts to broadly require preclearance of all voting changes, where a demonstrated history of continued violations of the Constitution or federal law warrants it. At the same time, courts retain the authority to adopt a more targeted approach by limiting the time period during which preclearance remains in effect or the types of voting changes to which it applies.

B. The Need for More Flexible “Bail-out” under Section 4(a) of the VRA

The bailout provisions, codified in Section 4(a) of the Voting Rights Act, strive to strike the right balance between continuing Section 5 coverage of jurisdictions with a present record of voting discrimination, while allowing those jurisdictions that have been free of voting discrimination for a sufficient time are allowed to exit from coverage. The current version of the bailout provisions is this designed to “recogniz[e] and reward[] ... good conduct” of covered jurisdictions, “rather than require[] them to await an expiration date which is fixed regardless of the actual record.”¹⁸⁸

¹⁸⁷ See also *North Carolina State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016) (“As to the other requested relief, we decline to impose any of the discretionary additional relief available under § 3 of the Voting Rights Act, including imposing poll observers during elections and subjecting North Carolina to ongoing preclearance requirements... Such remedies ‘[are] rarely used’ and are not necessary here in light of our injunction.”) (quoting *Conway Sch. Dist. v. Wilhoit*, 854 F. Supp. 1430, 1442 (E.D. Ark. 1994)).

¹⁸⁸ Senate Jud. Comm. Report on the Voting Rts. Act Amds. Act of 1982, S. Rep. No. 97-417, 97th Cong., 2d Sess. 16, 44 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 222.

Congress has periodically reassessed the effectiveness of the bailout provisions to strike the balance between covering jurisdictions with an ongoing record of voting discrimination and those that have taken sufficient steps to eradicate voting discrimination.¹⁸⁹ As originally enacted, the bailout provisions permitted a covered jurisdiction to bailout if it established that no test or device had been used since the VRA was enacted “in a manner that was racially discriminatory in either purpose or effect.”¹⁹⁰ This provision proved to be too expansive, allowing jurisdictions that subsequently had judicial findings of longstanding voting discrimination to bail out from coverage, such as the State of Alaska and Apache County in Arizona.¹⁹¹ In 1970, Congress further refined the standard by requiring that a jurisdiction seeking to bailout had to show it had been free of voting discrimination for at least ten years.¹⁹²

The most significant changes to the bailout provisions came in 1982 through two amendments. For the first time, political subdivisions covered as a result of statewide coverage were given a path to bailing out; previously, such coverage only could be removed if the covered state itself bailed out. Second, Congress clarified that to establish that it had been free of voting discrimination for ten years, a covered jurisdiction seeking bailout had to establish factors such as: (1) no test or device had been used to determine voter eligibility with the purpose or effect of discrimination; (2) there had been no final judgments, consent decrees, or settlements entered against the jurisdiction for racially discriminatory voting practices; (3) timely submission of voting changes for Section 5 preclearance; and (4) the absence of objections by the Department of Justice or the District Court of the District of Columbia to any submitted voting changes. Other criteria that had to be submitted at the time of bailout included the elimination of any dilutive voting or election procedures, constructive efforts to eliminate any known harassment or intimidation of voters, and other constructive efforts to expand registration and voting opportunities for minority voters.¹⁹³

Consonant with the overall intent to apply preclearance to the jurisdictions where it is most needed, the Senate bill makes some additional adjustments to provide for a more flexible bailout standard. Generally, we support these adjustments. For example, the bill makes clear that “any plaintiff seeking a declaratory judgment” under Section 4(a) “may request that the Attorney General consent to entry of judgment.” That is a reasonable addition, which reflects longstanding Department of Justice practice to work cooperatively with covered jurisdictions to facilitate their bailout if they are eligible to do so.

The Senate bill also includes a reasonable modification to allow certain political subdivisions covered as a result of statewide coverage to bailout. In particular, if a political subdivision is covered solely as the result of statewide coverage, that political subdivision “may seek a declaratory judgment” if it “demonstrates that the subdivision meets the criteria” for bailout “for the 10 years preceding” the date it became covered. This amending language carefully tailors Section 5 coverage

¹⁸⁹ For a more detailed discussion of the legislative history of the bailout provisions of the VRA, *see generally* Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 393-94 (1985) and J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, reprinted in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 257-75 (Ana Henderson ed. Berkeley 2007).

¹⁹⁰ Hebert, *supra*, at 259.

¹⁹¹ *See id.* at 260.

¹⁹² *Id.*

¹⁹³ *Id.* at 262-63.

by permitting that in covered states, those political subdivisions that have no record of recent voting discrimination in the previous ten years are eligible for bailout.

We are concerned that the final amendment proposed in the Senate bill could permit jurisdictions with a present record of voting discrimination to bailout. It provides, “[i]f a political subdivision was not subject to the application of this subsection by reason of a declaratory judgment entered prior to the date of enactment” of the Senate bill, and “is not, subsequent to that date of enactment, subject to the application” of bailout by virtue of being covered in its own right, then the political subdivision will not be covered by Section 5. We understand this provision is meant to address political subdivisions that bailed out previously, exempting them from coverage if they are in a state covered statewide. We strongly recommend that such jurisdictions be exempted from statewide coverage only if they have been completely free of voting discrimination in the previous ten years, instead of the current language that would not cover them unless they have at least three voting rights violations in the previous 25 years.

With the amendments in the Senate bill, as modified by our suggestion for bailout of jurisdictions that previously have bailed out, the bill takes a reasoned approach to ensuring that the new geographic coverage formulas are constitutional.

IV. Facilitating Recovery of Attorneys’ Fees for Prevailing Parties in VRA Cases

The Senate bill also includes a very important fix to clarify congressional intent on the standard of review to be applied to attorneys’ fees applications in cases successfully litigated under the Voting Rights Act. Since its enactment in 1965, the VRA has codified the intent to incentive private litigants to enforce the Act through a strong attorneys’ fees provision.¹⁹⁴ Congress included the provision because it recognized that the Attorney General alone did not have the resources to bring enforcement actions for every violation of the Act. It was necessary to offer broad reimbursement for enforcement by “private attorneys general,” particularly given how expensive and time-consuming voting rights litigation is. I have offered examples of the tremendous costs of litigation elsewhere in my testimony.

“Like most civil-rights statutes, the Voting Rights Act contains a fee-provision that changes the so-called ‘American rule’ for attorney fees by allowing victorious citizen plaintiffs to recover their attorney fees from the losing party.”¹⁹⁵ Initially, it was unclear whether parties who secured an agreement or settlement also were eligible for attorneys’ fees. Federal courts responded overwhelmingly by acknowledging that such out-of-court success resulting in a jurisdiction’s change in conduct for a voting procedure or method was enough to qualify the plaintiff as a “prevailing party” under the statute. Applying the “catalyst theory,” courts reasoned that the litigation brought by the plaintiff was the catalyst for the jurisdiction to change its conduct, such that it would not have happened absent the lawsuit.

¹⁹⁴ See generally 52 U.S.C. § 10310(e) (“Attorneys’ fees. In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.”).

¹⁹⁵ Testimony of Bryan L. Sells before the Subcomm. on the Const., Civil Rts., and Civil Liberties of the House Comm. on the Judiciary 21 (Oct. 17, 2019).

In 2001, however, the Supreme Court rejected the “catalyst theory” in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.¹⁹⁶ The Court narrowly construed the term “prevailing party” in the fee-shifting provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act. A majority reasoned that under the FHA and ADA, “the ‘catalyst theory’ is not a permissible basis for the award of attorney’s fees.”¹⁹⁷ According to the Court, some “judicially sanctioned” victory was necessary to be eligible for an attorneys’ fees award.¹⁹⁸

The Supreme Court’s “rejection of the catalyst theory has had ‘a profoundly negative impact on civil rights litigation.’”¹⁹⁹ “*Buckhannon* reduces plaintiffs’ leverage in settlement negotiations because defendants are aware that they can often avoid a fee award by capitulating, and it also makes settlement more difficult by taking away the potential for face-saving out-of-court settlements in which the defendants do not admit liability.”²⁰⁰ Some federal courts have applied *Buckhannon* to fee applications in voting rights cases, even where the plaintiffs have devoted considerable resources to secure a hard-won victory against a jurisdiction unwilling to cure voting rights violations short of litigation.

A case in South Dakota brought by the Lawyers’ Committee, *Poor Bear v. Jackson County*,²⁰¹ is illustrative of the impact of *Buckhannon* on private litigants bringing enforcement actions under the VRA:

The parties litigated the case for more than two years. The district court had rejected the counties primary defenses, and the plaintiffs had filed a motion for summary judgment on the merits. Rather than defend their position on the merits or engage in settlement discussions with the plaintiffs, the County entered into a temporary agreement with the State to offer a satellite voting location for four election cycles. The County then immediately sought to dismiss the case on ripeness grounds, and the district court granted the motion.

The plaintiffs still moved for an award of fees, but the district court rejected the motion under *Buckhannon*. There was no dispute that the plaintiffs had been the catalyst for the defendants’ capitulation, that was no longer enough to qualify for fees as a prevailing party. The plaintiffs in *Poor Bear* were represented by a non-profit civil rights organization and private counsel that had undoubtedly devoted hundreds of hours to the case. Although they obtained excellent results for their clients, they recovered nothing.²⁰²

¹⁹⁶ 532 U.S. 598 (2001).

¹⁹⁷ *Id.* at 610.

¹⁹⁸ *Id.*

¹⁹⁹ Sells Testimony, *supra*, at 22 (quoting Rebecca Glenberg, *Attorney’s Fees and Buckhannon*, J. VA. TR. LAWYERS’ ASSOC., Vol. 20, No. 4, at 13 (2009)); see also Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007) (same).

²⁰⁰ Sells Testimony, *supra*, at 22.

²⁰¹ 5:14-CV-5059-KES (D.S.D. filed 2014).

²⁰² Sells Testimony, *supra*, at 22.

The bill responds to *Buckhannon* by clarifying congressional intent to apply a broad definition of “prevailing party” through the well-established catalyst theory. It provides, “The term ‘prevailing party’ means a party to an action that receives at least some of the benefit sought by such action, states a colorable claim, and can establish that the action was a significant cause of a change to the status quo.” This amendment to the attorneys’ fees provision of the VRA fulfills the desire of Congress to encourage private litigants to enforce the Act. It likewise discourages jurisdictions from needlessly running up fees and expenses through a war of attrition against resource-scarce civil rights organizations and individuals in a manner that undercuts the fundamental right to vote.

V. **NAVRA is needed to secure equal voting rights in Indian Country**

Title III of the Senate bill incorporates the Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act of 2021, or NAVRA. Originally introduced bicamerally in the 115th Congress by Senator Tom Udall (S. 3543) and then-Representative Ben Ray Luján (H.R. 7127), NAVRA was the product of efforts by the Native American Voting Rights Coalition, of which the Lawyers’ Committee is a founding organizational member. Led by the Native American Rights Fund, NAVRC conducted a series of nine field hearings in seven states on the state of voting rights in Indian Country.²⁰³ Approximately 125 witnesses from dozens of tribes in the Lower Forty-Eight testified about the progress of the First Americans in non-tribal elections, and the work that remains to be done.²⁰⁴ The updated version of NAVRA was introduced bicamerally in mid-August with bipartisan support of Rep. Tom Cole and Rep. Sharice Davids (H.R. 5008) and Senator Luján (S. 2702). The Lawyers’ Committee supports the inclusion of NAVRA in the Senate bill to address many of the most basic barriers to political access and participation by Native American voters.

Many of the obstacles in Indian Country were considered previously in a pre-introduction roundtable hearing in 2018 that was jointly held by the Senate Committee on Indian Affairs and the Senate Committee on Rules and Administration.²⁰⁵ We strongly believe that a post-introduction hearing on NAVRA would provide additional context for how the remedies are carefully tailored to address voting discrimination faced by Native voters. We encourage the Senate to convene a separate hearing on NAVRA that will allow witnesses from Tribes, Native organizations and Native voters to further develop that record.

I will provide an overview of the factual and legal basis for NAVRA and the broad constitutional power of Congress to enact it.

²⁰³ The field hearings were conducted at the following locations: Bismarck, North Dakota on September 5, 2017; Milwaukee, Wisconsin on October 16, 2017; Phoenix, Arizona on January 11, 2018; Portland, Oregon, on January 23, 2018; on the tribal lands of the Rincon Band of Luiseño Indians north of San Diego, California, on February 5, 2018; Tulsa, Oklahoma on February 23, 2018; on the tribal lands of the Isleta Pueblo just outside of Albuquerque, New Mexico on March 8, 2018; Sacramento, California on April 5, 2018; and on the tribal lands of the Navajo Nation in Tuba City, Arizona on April 25, 2018.

²⁰⁴ Field hearings were not conducted in Alaska because the Alaska Advisory Committee to the U.S. Commission on Civil Rights already had a similar effort underway.

²⁰⁵ See Senate Comm. on Indian Affairs & Senate Comm. on Rules & Admin., Roundtable on “Voting Rights, Access, and Barriers in Indian Country” (July 17, 2018), available at <https://www.indian.senate.gov/hearing/roundtable-voting-rights-access-and-barriers-indian-country-webcast>.

A. Congress has broad authority to remedy voting discrimination on Tribal Lands

Like the other provisions in the Senate bill, NAVRA is grounded in part in congressional authority to remedy voting discrimination through the Fourteenth and Fifteenth Amendments and to regulate the conduct of federal elections through the Election Clause of Article I, Section 4 of the Constitution. But as the findings in the bill make clear, Congress also has other broad powers that allow it to regulate elections in Indian Country through passage of NAVRA.

“The Constitution explicitly and implicitly grants Congress broad general powers to legislate on issues relating to Indian Tribes, powers consistently described as plenary and exclusive. These powers arise from the grant of authority in the Indian Commerce Clause and through legislative matters arising under the Treaty Clause.” The bill further explains, “The Federal Government is responsible for upholding the obligations to which the Federal Government has agreed through treaties, legislation, and executive orders, referred to as the Federal trust responsibility toward Indian Tribes and their members.”

The Supreme Court has interpreted congressional authority in regulating relations between the United States and Tribal Nations expansively. As the bill notes in its findings, “The Supreme Court has repeatedly relied on the nature of this ‘government to government’ relationship between the United States and sovereign Indian Tribes for congressional authority to enact ‘legislation that singles out Indians for particular and special treatment.’”²⁰⁶ Legislation that removes barriers to Native American voting “is vital for the fulfillment of Congress’ ‘unique obligation’” towards Native Americans, particularly to ensure “that Native American voters are fully included as ‘qualified members of the modern body politic.’”²⁰⁷

B. General factors negatively impacting Native American registration and voting

Members of the 574 federally recognized tribes²⁰⁸ face numerous barriers to political participation. Although many other American voters share some of these obstacles, no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country. Moreover, the government-to-government relationship between the tribes and the United States is unique to the American Indian and Alaska Native population. I will briefly describe some of the general factors that impede participation by Native voters, with a particular emphasis on challenges resulting from non-traditional addresses. A more detailed discussion is in NARF’s *Obstacles* report.

1. Historical distrust of the federal government

Antipathy and distrust among Native voters persist towards Federal, State, and local governments because of past (and in some cases, ongoing) actions that discriminate against Natives

²⁰⁶ *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974).

²⁰⁷ *Bd. of Cty. Comm’rs v. Seber*, 318 U.S. 705, 715 (1943).

²⁰⁸ See National Congress of American Indians (NCAI), *Tribal Nations & the United States: An Introduction* (2020 ed.), available at <https://www.ncai.org/about-tribes>. As NCAI explains, “There are 574 federally recognized Indian Nations (variously called tribes, nations, bands, pueblos, communities and native villages) in the United States. Approximately 229 of these ethnically, culturally and linguistically diverse nations are located in Alaska; the other federally recognized tribes are located in 35 other states. Additionally, there are state recognized tribes located throughout the United States recognized by their respective state governments.” *Id.*

or that undermine the preservation of their culture and heritage. In the fall of 2016 and spring of 2017, NAVRC oversaw one of the most comprehensive in-person surveys ever conducted in Indian Country about barriers faced by Native voters. A total of 2,800 Native voters in four states completed the in-person survey.²⁰⁹ In all four states, Native voters expressed the greatest trust in their Tribal Governments. Although the federal government was identified by respondents as the most trusted of non-tribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota.²¹⁰ Those negative experiences often are exacerbated and reinforced when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted.

2. Geographical isolation

The isolated locations of tribal lands contribute to the political exclusion of Native Americans. Approximately one-third of all American Indians and Alaska Natives (AIAN) live in Hard-to-Count Census Tracts – roughly 1.7 million out of 5.3 million people from the 2011-2015 American Community Survey (ACS) estimates.²¹¹ Hard-to-Count Census Tracts include those Census Tracts “in the bottom 20 percent of 2010 Census Mail Return Rates (i.e. Mail Return Rates of 73 percent or less) or tracts for which a mail return rate is not applicable because they are enumerated in 2010 using the special Update/Enumerate method.”²¹² The states with the greatest percentage of the AIAN population in Hard-to-Count Census Tracts reside in the western states: New Mexico (78.6 percent), Arizona (68.1 percent), and Alaska (65.6 percent).²¹³ Geographical isolation is one of the most significant reasons for why those states have such a large percentage of their AIAN population in Hard-to-Count areas.

Isolation due to physical features such as mountains, canyons, oceans, rivers, and vast expanses of unoccupied land are compounded by an absence of paved roads to connect tribal lands with off-reservation communities. Even where roads are present, Native voters often lack reliable transportation to travel the vast distances to elections offices and county seats. Inclement weather conditions frequently make such travel impossible, particularly in early November when general elections are held.

²⁰⁹ See The Native American Voting Rights Coalition, Survey Research Report: Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota 8, 38, 67 (Jan. 2018) (“NAVRC Report”), available at <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf>. The Executive Summary of the NAVRC Report is available at <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf>. The survey respondents included 644 Native voters in Arizona, 1,052 in Nevada, 602 in New Mexico, and 502 in South Dakota. NAVRC Report, *supra*, at 8, 38, 67.

²¹⁰ See NAVRC Report, *supra*, at 15, 45, 77, 111. Respondents were asked, “Which government do you trust most to protect your rights?” *Id.* at 15, 45, 76-77. Among respondents in the other two states, 22.1 percent identified the federal government in Arizona and 27.4 percent identified the federal government in New Mexico. See *id.* at 77, 111.

²¹¹ See The Leadership Conference Education Fund, Table 1a: States Ranked by Number of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, available at <http://civilrightsdocs.info/pdf/census/2020/Table1a-States-Number-AIAN-HTC.pdf>.

²¹² *Id.*

²¹³ See The Leadership Conference Education Fund, Table 1b: States Ranked by Percent of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, available at <http://civilrightsdocs.info/pdf/census/2020/Table1b-States-Percent-AIAN-HTC.pdf>.

3. Non-traditional mailing addresses, homelessness, and housing instability

Access to voting in Indian Country is made substantially more difficult because of the prevalence of non-traditional mailing addresses, homelessness, and housing instability. The Census Bureau's 2015 National Content Test (NCT) Report illustrates these points. Among all of the population groups included in the 2015 NCT, the AIAN population experienced the lowest 2010 Census mail response rate, at 57.8 percent.²¹⁴

Non-traditional mailing addresses are prevalent among American Indians and Alaska Natives residing on tribal lands. Non-traditional mailing addresses encompass “noncity-style addresses, which the Census Bureau defines as those that do not contain a house number and/or a street name.”²¹⁵ Examples of noncity-style mailing addresses include:

- General delivery
- Rural route and box number
- Highway contract route and box number
- Post office box only delivery

Noncity-style addresses used by the Census Bureau also include location descriptions such as “BRICK HOUSE with ATTACHED GARAGE ON RIGHT,” structure points (geographic coordinates), and census geographic codes including state code, county code, census tract number, and census block number.²¹⁶

It is commonplace for homes on tribal lands to use noncity-style mailing addresses. Many homes can only be identified by a geographic location (e.g., “hogan located three miles down dirt road from Hardrock Chapter House”). Others may be located by reference to a BIA, state, or county road mile marker (e.g., “the house located on the right side of BIA-41 between highway marker 17 and highway marker 18”) or intersection (e.g., the house at the intersection of BIA-41 and BIA-15”). Additionally, mailboxes may be on the side of the road far from where the home(s) associated with them are located, with the mailbox identified only by a General Delivery number, Rural Route, or box number. Many AIAN residents of tribal lands only receive their mail by post office box. Often, several families or generations of a single family might share a post office or general delivery box to get their mail.

The disproportionately high rate of homelessness in Indian Country is another major factor that prevents Native Americans from registering to vote and casting a ballot. According to the 2016 ACS, only 52.9 percent of single-race American Indian and Alaska Native householders owned their own home, compared to 63.1 percent of the total population.²¹⁷ According to data from the U.S. Department of Housing and Urban Development, although “only 1.2 percent of the national

²¹⁴ See U.S. Census Bureau, 2015 National Content Test Race and Ethnicity Analysis Report 32, table 2 (Feb. 28, 2017) (“NCT Report”).

²¹⁵ U.S. Census Bureau, 2020 Census Local Update of Census Addresses Program Improvement Project Recommendations 2 (Apr. 13, 2015) (“2020 LUCA Recommendations”), available at https://www2.census.gov/geo/pdfs/partnerships/2020_luca_recommendation.pdf.

²¹⁶ *Id.*

²¹⁷ U.S. Census Bureau, Facts for Features: American Indian and Alaska Native Heritage Month: November 2017 (Oct. 6, 2017), available at <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html> (“2017 AIAN Summary”).

population self-identifies as AI/AN ... 4.0 percent of all sheltered homeless persons, 4.0 percent of all sheltered homeless individuals, and 4.8 percent of all sheltered homeless families self-identify as Native American or Alaska Native.”²¹⁸ The AIAN population likewise experiences higher rates of homelessness among veterans than other population groups. Specifically, “2.5 percent of sheltered, homeless Veterans were American Indian or Alaska Native, although only 0.7 percent of all Veterans are American Indian or Alaska Native.”²¹⁹ Frequently changing residences, with no single permanent residence, can prevent many American Indians and Alaska Natives from being able to register to vote and casting a ballot.²²⁰

4. Socio-economic barriers

Socio-economic barriers likewise make the voting process less accessible for Native Americans. Native peoples have the highest poverty rate of any population group, 26.6 percent, which is nearly double the poverty rate of the nation as a whole.²²¹ The poverty rate was even higher on federally recognized Indian reservations and Alaska Native villages, at 38.3 percent.²²² The median household income of single-race American Indian and Alaska Native households in 2016 was \$39,719, far below the national median household income of \$57,617.²²³

Native Americans also have lower rates of educational attainment. Among the American Indian Alaska Native population 25 years of age and older, 20.1 percent had less than a high school education.²²⁴ The unemployment rate of those aged 16 and older in the workforce was 12 percent.²²⁵ Approximately 19.2 percent lacked health insurance,²²⁶ and 13.4 percent of all occupied households lacked access to a vehicle, making it impossible to travel great distances to register and vote.²²⁷

5. Language barriers and illiteracy among Tribal Elders

Dozens of different dialects are widely spoken among those speaking the major American Indian and Alaska Native languages. Over a quarter of all single-race American Indian and Alaska

²¹⁸ Substance Abuse and Mental Health Services Administration (SAMHSA), Expert Panel on Homelessness among American Indians, Alaska Natives, and Native Hawaiians 5 (2012), available at https://www.usich.gov/resources/uploads/asset_library/Expert_Panel_on_Homelessness_among_American_Indians%2C_Alaska_Natives%2C_and_Native_Hawaiians.pdf.

²¹⁹ *Id.* at 8 (citing HUD & VA, Veteran Homelessness: A Supplemental Report to the 2010 Annual Homeless Assessment Report to Congress).

²²⁰ U.S. Department of Housing and Urban Development, “Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs (Jan. 2017), available at <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf>.

²²¹ U.S. Census Bureau, Profile America Facts for Features: CB16-FF.22, American Indian and Alaska Native statistics, available at <https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff22.html> (Nov. 2, 2016) (“2016 AIAN FFF”).

²²² U.S. Census Bureau, Table B17001C: Selected Population Profile in the United States: 2015 American Community Survey 1-Year Estimates (last visited on Feb. 7, 2018), available at https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_1YR/B17001C/0100000US|0100089US.

²²³ 2017 AIAN Summary, *supra*.

²²⁴ See 2016 AIAN Profile, *supra*.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

Natives speak a language other than English at home.²²⁸ Two-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village,²²⁹ including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy.²³⁰

Alaska, Arizona, and New Mexico have the largest number of Limited-English Proficient (LEP) persons voting-age citizens (that is, U.S. citizens who are 18 years of age and older). Between them, they account for approximately 87 percent of all American Indians and Alaska Natives who reside in an area required to provide language assistance in an Alaska Native or American Indian language. Nationally, 357,409 AIAN persons reside in a jurisdiction covered by Section 203 of the Voting Rights Act, where assistance must be provided in the covered Native language.²³¹ Alaska Native language assistance is required in 15 political subdivisions of Alaska, which “is an increase of 8 political subdivisions from 2011.”²³² Assistance in American Indian languages is required in 35 political subdivisions in nine states, “up from the 33 political subdivisions of five states covered in the 2011 determinations.”²³³

Moreover, the difficulty in preparing complete, accurate, and uniform translations of voting materials (including instructions) is compounded by the absence of words in Native languages for many English terms. Frequently, that requires that concepts be interpreted to communicate the meaning of what is being asked, rather than word-for-word translations. Identification of those concepts usually requires closely coordinating with trained linguists from Native communities to provide effective translations.

Illiteracy also is very prevalent among LEP American Indians and Alaska Natives, especially among Tribal Elders. In areas covered by Section 203 of the Voting Rights Act, illiteracy among LEP voting-age citizens is many times higher than the national illiteracy rate of 1.31 percent in 2016.²³⁴ In Alaska, in covered areas for which Census data is available, the illiteracy rate among LEP Alaska Natives of voting age is 40 percent for Aleut-speakers, 28.4 percent for Athabaskan-speakers, 15 percent for Yup’ik-speakers, and 8.2 percent for Inupiat-speakers.²³⁵ In Arizona, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 25 percent for Navajo-speakers and 6.8 percent for Apache-speakers.²³⁶ In Mississippi, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians

²²⁸ 2016 AIAN FFF, *supra* (27 percent).

²²⁹ See U.S. Census Bureau, Native American Languages Spoken at Home in the United States and Puerto Rico: 2006-2010 at 2 (Dec. 2011).

²³⁰ See U.S. Census Bureau, Public Use Data File for the 2016 Determinations under Section 203 of the Voting Rights Act, available at https://www.census.gov/rdo/data/voting_rights_determination_file.html (Dec. 5, 2016).

²³¹ U.S. Census Bureau, Press Release: Census Bureau Releases 2016 Determinations for Section 203 of the Voting Rights Act (Dec. 5, 2016), available at <https://www.census.gov/newsroom/press-releases/2016/cb16-205.html>.

²³² AAJC, NALEO & NARF, Voting Rights Act Coverage Update 3 (Dec. 2016) (“Section 203 Update”), available at <https://advancingjustice-aaajc.org/sites/default/files/2016-12/Section%20203%20Coverage%20Update.pdf>.

²³³ *Id.*

²³⁴ See U.S. Census Bureau, Flowchart of How the Law Prescribes the Determination of Covered Areas under the Language Minority Provisions of Section 203 of the Voting Rights Act 2 (Dec. 5, 2016), available at https://www.census.gov/rdo/pdf/2_PrescribedFlowFor203Determinations.pdf. “Illiteracy” is defined as including those persons who “have less than a 5th grade education.” *Id.*

²³⁵ See U.S. Census Bureau, Voting Rights Determination File: Section 203 Determinations (Dec. 5, 2016), Public Use Data File and Technical Documentation (Excel spreadsheet of “Determined Areas Only”) (“Section 203 Determination File”), available at https://www.census.gov/rdo/data/voting_rights_determination_file.html.

²³⁶ See Section 203 Determination File, *supra*.

of voting age is 34 percent for Choctaw-speakers.²³⁷ Finally, in New Mexico, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 19.1 percent for Navajo-speakers and 6.7 percent for Apache-speakers; data was not available for speakers of the Pueblo languages.²³⁸

C. Election officials exploit barriers to discriminate against Native voters

Native Americans were among the last to obtain their fundamental right to participate in non-tribal elections. It was not until 1948 that Arizona and New Mexico granted Native Americans the right to vote, which came only as the result of litigation by veterans who were denied the right to vote after returning from World War II.²³⁹ The litigation was necessary even though Congress already had twice recognized the truism that our Nation's first people were United States citizens: in the Indian Citizenship Act of 1924, and again in the Nationality Act of 1940. But Arizona and New Mexico were not the last states to recognize the fundamental right of Native voters. Utah would not do so until 1956.

State recognition did not lead to equal voting rights. Disabling literacy tests prevented hundreds of thousands of Native voters who were denied schooling the ability to register to vote. Language barriers resulting from the absence of schools on tribal lands compounded that disenfranchisement. County and local governments also actively targeted tribal lands for political exclusion by gerrymandering practices such as in Apache County, Arizona, which packed Natives comprising a majority of the eligible voters into a single district, violating equal population (one person, one vote) requirements. Only with the passage of the 1970 and 1975 amendments to the federal Voting Rights Act, which banned literacy tests and required assistance be provided to limited-English speaking Native voters, did some of those barriers begin to unravel. The 1982 amendments to the Voting Rights Act, which added protection for voter assistance in Section 208 and codified the discriminatory effects test in Section 2, also have been vital to efforts by Native Americans to obtain equal access to the political process.

It is not possible to fully summarize all of the recent litigation in Indian Country, in which state and local election officials have exploited disabling barriers faced by Native voters to disenfranchise them. As described in NARF's *Obstacles* report, those cases have successfully challenged, among other things: the lack of voter registration and in-person voting locations on Tribal lands; disparate early voting opportunities compared to non-Native voters; denial of drop boxes; shortened mailing timeframes in which election deadlines pass before Native voters receive mail-in ballots and can return them; imposition of voter ID requirements they cannot meet because they lack traditional mailing addresses or documents that are needed to register to vote; prohibitions on ballot collection that allows Native voters to overcome their lack of transportation, such as the challenge to Arizona's ballot collection ban in *Brnovich*; denial of voter assistance; and imposition of witness signature requirements, among many others.

The Lawyers' Committee has been counsel in some of those cases, two of which I will summarize. San Juan County, Utah eliminated all three of the polling places located on the Navajo

²³⁷ *See id.*

²³⁸ *See id.*

²³⁹ *See Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (Ariz. 1948); *Trujillo v. Garley*, Case No. 1353 (D.N.M. 1948).

Nation tribal lands in the southern part of the county. The County switched to a mail-in ballot that was printed in English, providing no language assistance in Navajo despite being covered for the language under Section 203. In 2018, the County settled after being sued by the Lawyers' Committee, agreeing to restore the three closed polling places and to provide the mandated language assistance.²⁴⁰

More recently, an Alaska state court issued a preliminary injunction for the 2020 election, suspending Alaska's requirement that any person voting by absentee ballot sign the ballot envelope in the presence of a witness and obtain the witness's signature on the grounds that this requirement impermissibly burdened Alaskans' right to vote in light of the COVID-19 pandemic. The court specifically noted COVID-19's disparate impact on Alaska Natives living in remote villages with stay-at-home orders. The evidence showed that an estimated one-in-three Alaska Natives living alone would have been required to access a non-household-member to witness their ballots, effectively disenfranchising them. The Alaska Supreme Court ultimately required that Alaska count unsigned ballots as well as to conduct voter outreach to inform residents of the change in policy.²⁴¹

C. NAVRA provides targeted remedies for obstacles Native voters face

NAVRA addresses the obstacles experienced by Native voters in several targeted ways, consistent with the broad authority Congress has in its government-to-government relationship with Tribal Nations. These measures are essential to removing many of the first generation voting barriers limiting access of Native Americans to opportunities to register to vote, to cast a ballot, and to have their ballot counted.

Section 304 of NAVRA establishes a Native American Voting Task Force Grant Program designed to improve voter registration and ballot access in Native American communities through several means, including: outreach and education; providing additional satellite, early voting and absentee voting locations; providing culturally and linguistically appropriate election materials and information; election worker training to ensure compliance with federal law; development of best practices for elections in Indian Country; nonpartisan observation and evaluation of election procedures; improving broadband access; establishing mailing addresses that allow Native voters to receive voting materials and ballots; and facilitating collaboration between Tribal Governments and federal, state and local governments responsible for elections in Native American communities.

NAVRA also includes several provisions to make voter registration and voting more accessible for Native voters. Section 305 amends § 7 of the National Voter Registration Act of 1993²⁴² by adding as designated voter registration sites those federally funded facilities located on Indian land or primarily engaged in providing services to Native Americans. Section 306 would allow Tribal Governments to designate at least one in-person polling site on the Tribe's Indian lands, prevent the reduction of polling places on Indian lands, and provide additional polling sites based upon several criteria such as the number of voters assigned to polling places, travel distances and time to reach polling sites, transportation barriers, waiting times, and other factors.

²⁴⁰ *Navajo Nation Human Rights Commission v. San Juan County*, No. 2:16-cv-00154-JNP (D. Utah Feb. 2018).

²⁴¹ *Arctic Village Council vs. Meyer*, No. 3AN-20-7858 CIL, 2020 WL 6120133 (Alaska Oct. 5, 2020).

²⁴² 52 U.S.C. § 20506(a).

Recognizing the increasing use of alternatives to in-person voting, especially mail-in voting, NAVRA responds to the addressing barriers that effectively disenfranchise many Native voters including those at issue in *Brnovich*. Tribal Nations are permitted to designate at least one building per voting precinct as ballot pickup and collection sites. At the request of Tribes, mail-in and absentee ballots are to be provided to registered Native voters without requiring a residential address or completed application for the ballot. Tribally designated buildings may be substituted for required residential or mailing addresses. At least one ballot drop box must be provided for each Tribal Nation's lands, with additional drop boxes provided if the totality of the circumstances demonstrates their need. In-person early voting opportunities must be offered on Tribal lands if a State or political subdivision offers them elsewhere, which must provide at least a 10-hour period to vote for each day early voting sites are open.

In addition, NAVRA responds to many of the problems that Native voters have experienced with disenfranchising provisional ballot procedures. In much of Indian Country, resolution of provisional ballots so they will be counted requires Native voters to travel extensive distances, in some cases as much of a day of driving, to a county seat. Often, Native voters receive insufficient notice and time to cure any issues. NAVRA addresses those issues by requiring clear notice be given to Native voters, and providing that resolution of any issues with their ballot may be done at any polling place on Indian lands or through alternative means such as facsimile. The bill also resolves a barrier created by the Help America Vote Act by creating a private cause of action for Native voters to enforce the provisional ballot requirements in NAVRA.

Section 307 of NAVRA requires that any State or political subdivision seeking to remove a voter registration or polling site on Indian lands must meet certain requirements. Specifically, it creates a process of Tribal administrative review that requires either that the Tribe consent to the change or after consulting with the Tribe to institute a declaratory judgment action in the U.S. District Court for the District of Columbia. Alternatively, the change may be submitted for review and approval by the Attorney General after consultation with the Tribal Government.

Voter identification problems faced by Native voters are the focus of Section 308 of NAVRA. Under that provision, if a State or political subdivision requires identification to register to vote or to cast a ballot, they must accept an identification card issued by a federally recognized Tribe, the Bureau of Indian Affairs, the Indian Health Service, or any other Tribal or Federal agency that issues identification cards to eligible Native voters. This remedy cannot be circumvented by requiring multiple forms of identification. Election officials also must consult with Tribes to ensure that any identification that must be submitted online is accessible to Native voters.

NAVRA also facilitates ballot collection from Native voters who often lack access to reliable and affordable transportation to get to voting locations, post offices or drop boxes. Section 309 permits any person to return a sealed ballot of a voter residing on Indian lands, as long as the person returning the ballot receives no compensation. There is no limit placed on the number of ballots that may be returned. Organizations collecting and returning sealed ballots are required to keep a record of the materials collected and the location and date the ballot materials were submitted.

Section 310 of NAVRA includes a simple, but important, fix to the language assistance provisions of the Voting Rights Act. As currently written Section 203 provides that covered

jurisdictions do not have to provide written translations for languages that are “historically unwritten.”²⁴³ Federal courts have consistently applied that proviso to find that covered American Indian and Alaska Native languages are “historically unwritten” even for Native languages that are written and widely used by Native voters.²⁴⁴ This section of NAVRA cures this problem by providing that Native voters in jurisdictions covered by Section 203 for their language may receive written translations in their language if their Tribal Government determines that written translations are needed.

The remaining provisions of NAVRA facilitate Native voting in several ways. Section 311 allows Tribes to request that the Attorney General send federal observers by identifying one or more instances in which a voting rights violation is expected to occur in an election. Section 312 recognizes Tribal jurisdiction to detain or remove any non-Indian unaffiliated with the Federal or a State or local government who intimidates, harasses or impedes the conduct of an election or voting. Section 313 requires the Attorney General annually consult with Tribal Nations regarding Federal elections. Section 314 provides for recovery of attorneys’ fees, litigation expenses and expert fees to a prevailing party in any enforcement action brought under NAVRA. Section 315 directs the GAO to conduct a study and report on the prevalence of nontraditional or nonexistent mailing addresses for Native voters and to identify alternatives to resolve those barriers. Finally, Section 316 requires consultation with the U.S. Postal Service to resolve addressing problems.

The Lawyers’ Committee commends the Senate for including NAVRA in the bill. They offer a very reasoned, targeted, and constitutional approach to resolving some of the most basic access barriers that Native Americans face in registering to vote and casting a ballot that it is counted.

Conclusion

The eight years since the Supreme Court’s decision in *Shelby County v. Holder* have left voters of color the most vulnerable to voting discrimination they have been in decades. The record since the *Shelby County* decision demonstrates what voting rights advocates feared – that without Section 5, voting discrimination would increase substantially. The *Brnovich* decision – by creating new hurdles for Section 2 claimants to overcome – raises the stakes appreciably. Congress must act.

²⁴³ See generally 52 U.S.C. § 10503(c) (“... Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”).

²⁴⁴ See generally JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 91-98, 280-85* (2009). Examples of Native languages that are widely used in written form include Choctaw, Navajo and Yup’ik, among others. See *id.*