

**U.S. Senate Committee on the Judiciary,
Subcommittee on the Constitution**
Hearing on “Restoring the Voting Rights Act After *Brnovich* and *Shelby County*”
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Chair Blumenthal, Ranking Member Cruz, and Members of the Senate Judiciary Committee’s Subcommittee on the Constitution:

Thank you for the opportunity to appear before you today to speak about the Supreme Court’s recent decision in *Brnovich v. Democratic National Committee*,¹ a case which eviscerated Section 2 of the Voting Rights Act² outside the context of redistricting.³ The opinion by Justice Samuel Alito is unmoored to the text of the statute, ignores the relevant history of Voting Rights Act, and thwarts Congress’s intent.

I begin with some history. A key component of the Act that Congress passed in 1965, Section 5, required states and localities with a history of racial discrimination in voting to ask either the U.S. Department of Justice or a three-judge court in Washington, D.C. for permission to change any voting rule.⁴ “Preclearance” required these jurisdictions to show that minority voters were not made worse off by the change; Congress intended to prevent states from passing new restrictive voting rules when courts struck down old ones. The idea behind preclearance was to prevent backsliding to worse conditions for voting, a concept that came to be known as “nonretrogression.”⁵

¹ ____ U.S. ___, 2021 WL 2690267 (U.S., July 1, 2021).

² Voting Rights Act of 1965, § 2 (as amended in 1982), now codified at 52 U.S.C. § 10301 (West 2021).

³ Within the context of redistricting, the Section 2 standards are well established by the courts, beginning with the Supreme Court’s opinion in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁴ Voting Rights Act of 1965, § 5, now codified at 52 U.S.C. § 10304 (West 2021). Section 4 of the Act, now codified at 52 U.S.C. § 10303 (West 2021), set forth the formula for determining which jurisdictions were covered by Section 5 preclearance. The Supreme Court ruled the formula unconstitutional in *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁵ *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000).

Section 5 helped a great deal until the Supreme Court in the 2013 case of *Shelby County v. Holder*⁶ held that the statute was no longer constitutional because it infringed on an invented state right to “equal sovereignty.”⁷ Although Section 5—when it was still in place—was effective in stopping new bad voting laws, it did not deal with discriminatory voting laws already on the books. Thus, if a state already had laws making it hard for minority voters to register or vote, Section 5 could not touch it.

In the years after passage of the initial Voting Rights Act, some litigants tried to use another part of the Act, Section 2, to attack restrictive voting rules already in place. At first the Court agreed that these challenges could go forward, but the Supreme Court in 1980’s *City of Mobile v. Bolden*⁸ case held that such challenges required proof of intentional discrimination.

Congress disagreed with the Supreme Court’s interpretation in *City of Mobile*, and in 1982 Congress passed a revised Section 2.⁹ The revision made clear that plaintiffs challenging

⁶ 570 U.S. 529 (2013). The effects of *Shelby County* were immediate and bad for minority voters, as Justice Kagan explained in her *Brnovich* dissent:

Once Section 5’s strictures came off, States and localities put in place new restrictive voting laws, with foreseeably adverse effects on minority voters. On the very day *Shelby County* issued, Texas announced that it would implement a strict voter-identification requirement that had failed to clear Section 5. Other States—Alabama, Virginia, Mississippi—fell like dominoes, adopting measures similarly vulnerable to preclearance review. The North Carolina Legislature, starting work the day after *Shelby County*, enacted a sweeping election bill eliminating same-day registration, forbidding out-of-precinct voting, and reducing early voting, including souls-to-the-polls Sundays. (That law went too far even without Section 5: A court struck it down because the State’s legislators had a racially discriminatory purpose.) States and localities redistricted—drawing new boundary lines or replacing neighborhood-based seats with at-large seats—in ways guaranteed to reduce minority representation. And jurisdictions closed polling places in mostly minority areas, enhancing an already pronounced problem. Pettigrew, The Racial Gap in Wait Times, 132 Pol. Sci. Q. 527, 527 (2017) (finding that lines in minority precincts are twice as long as in white ones, and that a minority voter is six times more likely to wait more than an hour).

Brnovich, 2021 WL 2690267, at *26 (Kagan, J., dissenting) (some citations omitted).

⁷ Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016).

⁸ 446 U.S. 55 (1980).

⁹ *Gingles*, 478 U.S. at 43-44 (“The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations. First and foremost, the Report dispository rejects the position of the plurality in *Mobile v. Bolden*, 446 U.S. 55 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters.”) (footnote omitted); *id.* at 44 n.8 (“The Senate Report states that amended § 2 was designed to restore the ‘results

voting rules did not have to prove that a jurisdiction acted with an intent to discriminate against minority voters; it was enough to show that “the political processes leading to nomination or election in the State or political subdivision are not equally open to participation” by members of a protected class “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.”¹⁰ It is a type of disparate impact standard.¹¹ As Justice Kagan’s dissent in *Brnovich* put it succinctly, “Section 2 demands proof of a statistically significant racial disparity in electoral opportunities (not outcomes) resulting from a law not needed to achieve a government’s legitimate goals.”¹²

The 1982 amendment to Section 2 created a broad statute in which Congress told courts to look at the “totality of the circumstances” in deciding whether a law gave minority voters “less opportunity” than white voters to participate and elect.¹³ Among the factors were the socioeconomic conditions which could make minority voters face extra barriers to voting, and the tenuousness of the supposedly neutral justifications states could advance for passing restrictive voting rules.¹⁴

test’—the legal standard that governed voting discrimination cases prior to our decision in *Mobile v. Bolden*, 446 U.S. 55 (1980). S.Rep., at 15–16. The Report notes that in pre-*Bolden* cases such as *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (CA5 1973), plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. Under the ‘results test,’ plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose. S.Rep., at 16, U.S.Code Cong. & Admin.News 1982, p. 193.”).

¹⁰ 52 U.S.C. § 10301(b) (emphasis added).

¹¹ Nicholas Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L. J. 1566, 1617–19 (2019).

¹² *Brnovich*, 2021 WL 2690267, at *30 (Kagan, J., dissenting).

¹³ 52 U.S.C. § 10301(b).

¹⁴ The Court in *Gingles* repeatedly referenced the Senate Report accompanying the 1982 Voting Rights Act amendments to understand the meaning of Section 2’s admonition that minority voters should not have “less opportunity” than other voters to participate in the political process and elect representatives of their choice:

The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations. First and foremost, the Report dispository rejects the position of the plurality in *Mobile v. Bolden*, 446 U.S. 55 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters. The intent test was repudiated for three principal reasons—it is “unnecessarily divisive because it

Although the Supreme Court interpreted Section 2 many times in the context of redistricting cases, until *Brnovich*, the Court had never interpreted the issue in vote denial cases, in which a state or locality makes it harder for minority voters to register and vote. Lower courts had read Section 2 to set forth a tough standard for overturning a state law, but one that could be met in appropriate cases. The 5th Circuit, for example, one of the country’s most conservative courts, held that Texas’ very strict voter identification law violated Section 2;¹⁵ when Texas eased its law in response to litigation, the 5th Circuit held it no longer violated the statute.¹⁶

Justice Alito’s opinion in *Brnovich*, ignoring the text of Section 2, the statute’s comparative focus on lessened opportunity for minority voters, and the history that showed

involves charges of racism on the part of individual officials or entire communities,” it places an “inordinately difficult” burden of proof on plaintiffs, and it “asks the wrong question.” The “right” question, as the Report emphasizes repeatedly, is whether “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.”

In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors. The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State’s or the political subdivision’s use of the contested practice or structure is tenuous may have probative value. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered. Furthermore, the Senate Committee observed that “there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.” Rather the Committee determined that “the question whether the political processes are ‘equally open’ depends upon a searching practical evaluation of the ‘past and present reality,’ and on a “functional” view of the political process.

¹⁵ *Gingles*, 478 U.S. at 43-44 (citations and footnotes omitted).

¹⁶ *Veasey v. Abbott*, 830 F.3d 216, 264-65 (5th Cir. 2016) (en banc).

¹⁶ *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

Congress intended to alter the status quo and give new protections to minority voters, offered a new and very difficult test for plaintiffs to meet to show a Section 2 vote denial claim.

Rather than focus on the totality of the circumstances test written into the law and conduct a local, functional inquiry as explained in the key 1982 Senate Report—which itself drew from the Supreme Court’s decision in cases such as *White v. Register—Brnovich* offered non-binding so-called “guideposts” for decision.¹⁷ Eschewing the textualist approach purportedly favored by many of the Justices in the *Brnovich* majority, the opinion creates an ad hoc test meant less as guideposts and more like roadblocks for voting rights plaintiffs, giving states defending restrictive voting laws numerous ways of defeating Section 2 claims.¹⁸

One guidepost rolls the clock back to 1982, holding that if a voting practice was not common during the year when Congress amended Section 2, it is likely not a violation for a state to eliminate the practice even if it would disproportionately impact minority voters. The idea that Section 2 requires plaintiffs to demonstrate that voting restrictions exceed the “usual burdens of voting”¹⁹ as they existed in 1982 is flatly contradicted by the textual command of Section 2 to find a violation when minority voters have “less opportunity” than others to participate in the political process and elect representatives of their choice.

Nothing in Section 2’s text, history, or precedent supports a 1982 benchmark, a time when early voting was scarce and voter registration difficult in many places. This is the opposite

¹⁷ *Brnovich*, 2021 WL 2690267, at *10 (“we decline in these cases to announce a test to govern all VRA § 2 claims involving rules, like those at issue here, that specify the time, place, or manner for casting ballots. . . . All told, no fewer than 10 tests have been proposed. But as this is our first foray into the area, we think it sufficient for present purposes to identify certain guideposts that lead us to our decision in these cases.”).

¹⁸ The five “guideposts” the majority opinion identified are: “the size of the burden imposed by a challenged voting rule,” *id.* at *12; “the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982,” *id.*; “[t]he size of any disparities in a rule’s impact on members of different racial or ethnic groups,” *id.* at *13; “the opportunities provided by a State’s entire system of voting when assessing the burden imposed by a challenged provision,” *id.*; and “the strength of the state interests served by a challenged voting rule,” *id.*

¹⁹ *Id.* at *12.

of the nonretrogression principle that used to apply in Section 5 cases. That principle kept states from making voting worse; the *Brnovich* 1982 factor encourages rollbacks by setting 1982 as the baseline.

The *Brnovich* guidepost naming the strength of the state's interest in its voting rules turns the “totality of the circumstances” tenuousness standard on its head. Under the tenuousness standard, if a state passed a restrictive voting law and claimed it was necessary to stop voter fraud, the state would have to *prove* that this was the real justification and not a pretext for discrimination. As Justice Kagan explained in her dissent, “Throughout American history, election officials have asserted anti-fraud interests in using voter suppression laws.”²⁰

But the *Brnovich* guidepost in practice does exactly the opposite of searching for tenuousness: the Court repeatedly says restrictive state voting laws could be justified by a concern over voter fraud even if a state could not point to any fraud in its state to justify its challenged laws.²¹

Finally, even if a state passes a law with the intent to discriminate against minority voters, plaintiffs will have a hard time proving a Section 2 violation under *Brnovich*. In *Brnovich*²² and other recent cases,²³ the Supreme Court has made it hard to win voting rights

²⁰ *Id.* at *38 (Kagan, J., dissenting).

²¹ Compare *id.* at *13 (“One strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome”), and *20 (“And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.”), with *id.* at *33 (Kagan, J., dissenting) (“Throughout American history, election officials have asserted anti-fraud interests in using voter suppression laws.”), and *38 (Kagan, J., dissenting) (“Arizona has not offered any evidence of fraud in ballot collection, or even an account of a harm threatening to happen.”).

²² *Id.* at *22 (rejecting evidence Arizona legislature passed restrictive voting laws with racially discriminatory intent).

²³ See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2326 n.18 (2018).

suits by relying on racially discriminatory *intent* of a state legislature in passing restrictive voting rules.²⁴

Congress should reverse this statutory decision through carefully-crafted legislation, just as Congress has done in the past, approving Voting Rights Act renewals and extensions by broad bipartisan majorities.²⁵ Any new legislation will have to consider the scope of Congress's power under Article I, Section 4's "elections clause" to "make or alter" state rules regarding federal elections, as well as Congress's power to pass voting legislation affecting federal, state, and local elections under its power to enforce the voting amendments, including the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.²⁶ It also will have to consider that part of *Brnovich* in which the Court wrote that the dissent's disparate impact test for finding Section 2 violations in vote denial cases might "deprive the States of their authority to establish non-discriminatory voting rules."²⁷ This statement appears like a threat to find new congressional voting rights legislation unconstitutional.

²⁴ See generally Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50 (2020), available at: <https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/07/Hasen-The-Supreme-Court%20%80%99s-Pro-Partisanship-Turn.pdf>.

²⁵ The Senate approved the most recent 2006 VRA amendments by a vote of 98-0. Carl Hulse, *By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES, July 21, 2006, <https://www.nytimes.com/2006/07/21/washington/21vote.html>.

²⁶ *Shelby County v. Holder*, 570 U.S. at 567 n.2 (Ginsburg, J., dissenting) ("The Constitution uses the words 'right to vote' in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact 'appropriate legislation' to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections."); see generally Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. 19TH AMENDMENT Ed. 27 (2020), available at: <https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/07/Thin-and-Thick-Conceptions-of-the-Nineteenth-Amendment-Right-to-Vote-and-Congress%20%99s-Power-to-Enforce-It.pdf>.

²⁷ *Brnovich*, 2021 WL 2690267, at *18; see generally Richard L. Hasen, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES, July 1, 2021, at A1, available at: <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html> (raising constitutional concern).

If Congress considers rules to restore either Section 2 or Section 5 of the Voting Rights Act, it will have to offer record evidence showing constitutional voting rights violations within the states, and the need for congruent and proportional legislation to deal with the scope of the constitutional violations.²⁸

Thank you for the opportunity to present these views. I welcome your questions.

²⁸ I offered the same advice when I testified before the Senate Judiciary Committee in 2006 on the renewal of the Voting Rights Act, warning that without changing the coverage formula in Section 4, the Supreme Court could well strike down the preclearance provisions of the Voting Rights Act as exceeding Congressional power (as the Court did seven years later in *Shelby County* after Congress failed to rewrite the coverage formula). See *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (Statement of Richard L. Hasen), available at: <https://electionlawblog.org/archives/hasen-testimony-final.pdf>.