



**Written Testimony of Janai S. Nelson  
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**Before the United States Senate  
Committee on the Judiciary  
Subcommittee on The Constitution**

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

**July 14, 2021**

Good morning, Chair Blumenthal, Ranking Member Cruz, and members of the Subcommittee. My name is Janai Nelson, and I am the Associate Director Counsel at the NAACP Legal Defense and Educational Fund, Inc. (“LDF”). Thank you for the opportunity to testify this morning on some of LDF’s efforts to protect and defend the voting rights of Black Americans through litigation and other forms of advocacy, to share some of what we have observed with regard to the proliferation of barriers to voting since the U.S. Supreme Court’s decision in *Shelby County, Alabama v. Holder* in 2013, and to discuss the urgent need to restore the Voting Rights Act to its full strength after both *Shelby* and the recent decision in *Brnovich v. Democratic National Committee*.<sup>1</sup>

Since its founding in 1940 by Thurgood Marshall, LDF has been a leader in the fight to secure, protect, and advance the voting rights of Black voters and other communities of color. LDF was launched at a time when the nation’s aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality in every area of life. Through litigation, public policy, and public education, LDF’s mission has remained focused on seeking structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. In advancing that mission, protecting the right to vote for African Americans has been positioned at the epicenter of our work. Beginning with *Smith v. Allwright*,<sup>2</sup> LDF’s successful U.S. Supreme Court case challenging the use of whites-only primary elections in 1944, LDF has been fighting to overcome a myriad of obstacles to ensure the full, equal, and active civic and political participation of Black voters.

The importance of the right to vote to the integrity of our democracy cannot be overstated. Indeed, Thurgood Marshall—who litigated LDF’s watershed victory in *Brown v. Board of Education*,<sup>3</sup> which set in motion the end of legal segregation in this country and transformed the direction of American democracy in the 20th century—referred to *Smith v. Allwright*, the case that outlawed all-white primaries, as his most consequential case. He held this view, he explained, because he believed that the vote, and the opportunity to access political power, was critical to fulfilling the guarantee of full citizenship promised to Black people in the 14th Amendment to the U.S. Constitution. LDF has prioritized its work protecting the right of Black citizens to vote for over 80 years—representing Martin Luther King Jr. and the marchers in Selma, Alabama in 1965, litigating seminal cases interpreting the scope of the Voting Rights Act, and working in communities across the South to strengthen and protect

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<sup>1</sup> 570 U.S. 529 (2013); 594 U.S. \_\_\_\_ (2021).

<sup>2</sup> 321 U.S. 629 (1994).

<sup>3</sup> 347 U.S. 483 (1954).

the ability of Black citizens to participate in the political process free from discrimination.

Despite the guarantees of the 14<sup>th</sup> and 15<sup>th</sup> Amendments, the Voting Rights Act (“VRA”), and other federal voting rights statutes, racial discrimination and targeted suppression of the Black vote persists, and the need for litigation by LDF and other civil rights organizations to defend against these attacks on the fundamental right to vote has not abated. Indeed, in the years since the infamous 2013 Supreme Court decision in *Shelby County, Alabama, v. Holder*,<sup>4</sup> methods of voter suppression have metastasized across the country.

LDF helped to litigate the *Shelby* case, including presenting argument in the Supreme Court in defense of the constitutionality of Section 5 of the Voting Rights Act and the importance of pre-clearance to the protection of voting rights. The Supreme Court’s decision in *Shelby*, disabling this key provision, has had a devastating effect on the voting rights of racial, ethnic, and language minorities in this country. In that decision, Chief Justice John Roberts invited Congress to update the Voting Rights Act to respond to modern conditions. In the eight years since *Shelby* was decided, however, Congress has failed to act upon the Court’s invitation to update the Voting Rights Act, leaving voters of color—and our democracy—unprotected. Now, the Supreme Court’s decision in *Brnovich* misinterpreting and weakening Section 2 of the Voting Rights Act, threatens to embolden states and jurisdictions to unleash a torrent of new voting restrictions that burden Black voters’ ability to participate equally in the political process. This latest decision of the Court underscores the urgent need for Congress to take action to restore the Voting Rights Act in unequivocal terms and to do so swiftly.

### **Significance of the Voting Rights Act**

The end of the Civil War has been described as this nation’s “Second Founding.”<sup>5</sup> It was then that the United States undertook efforts to amend our Constitution to provide Congress with substantial, affirmative power to finally enforce the principle espoused by the Founders, that *all* are created equal, and that access to the franchise is the cornerstone of citizenship and democracy. Importantly, the 14<sup>th</sup> and 15<sup>th</sup> Amendments to the Constitution also provided new, specific

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<sup>4</sup> 570 U.S. 529 (2013).

<sup>5</sup> See generally Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019)

authority for Congress to defend equal rights, stating that Congress *shall* have power to enforce the Amendments through appropriate legislation.<sup>6</sup>

The Civil Rights Amendments give Congress the explicit power to enforce the guarantee of equal protection and protection against voting discrimination based on race. Yet the collective promise of equality for Black Americans was blatantly obstructed for nearly 100 years after the ratification of those Amendments. During that period, states and municipalities throughout the country “resort[ed] to facially neutral tests that took advantage of differing social conditions”<sup>7</sup> between Black and white voters to create discriminatory voting policies. Black people were systematically disenfranchised by poll taxes,<sup>8</sup> literacy tests,<sup>9</sup> property requirements,<sup>10</sup> threats,<sup>11</sup> and lynching.<sup>12</sup> Practices like literacy tests, while facially neutral, relied on the reality of private and state-sponsored discrimination to successfully interfere with, prohibit, and discourage Black voters’ from exercising their constitutional right to vote.

For nearly a century, Congress abdicated its obligation to use its enforcement powers despite persistent and egregious voting discrimination by federal, state, and local governments against Black people. And the Supreme Court often proved a hostile forum for civil rights plaintiffs.<sup>13</sup> Post-Reconstruction, state and private actors subjected Black Americans to racial violence and flagrant discrimination in all areas of life, including education, employment, healthcare, housing, and transportation, which increased the suppressive force of many voting policies, whose very success was premised on the existence of racial discrimination in other aspects of social,

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<sup>6</sup> U.S. Const. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); U.S. Const. amend. XV, § 2 (“The Congress shall have the power to enforce this article by appropriate legislation.”).

<sup>7</sup> *Underwood*, 730 F.2d at 619 & n.10.

<sup>8</sup> Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: University of Chicago Press, 2004).

<sup>9</sup> Jason Morgan Ward, *Hanging Bridge: Racial Violence and America’s Civil Rights Century* (New York: Oxford University Press, 2016).

<sup>10</sup> *Id.*

<sup>11</sup> Michael Fellman, *In the Name of God and Country: Reconsidering Terrorism in American History* (New Haven, CT: Yale University Press, 2010); U.S. Commission on Civil Rights, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume VII: The Mississippi Delta Report: Chapter 3, Voting Rights and Political Representation in the Mississippi Delta* (last accessed June 21, 2021), <https://www.usccr.gov/pubs/msdelta/ch3.htm>.

<sup>12</sup> Brad Epperly, et al., *Rule by Violence, Rule by Law: The Evolution of Voter Suppression and Lynching in the U.S. South*, (Mar. 1, 2016), <https://ssrn.com/abstract=3224412>

<sup>13</sup> See, e.g., *Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Giles v. Harris*, 189 U.S. 475 (1903); *Grovey v. Townsend*, 295 U.S. 45 (1935).

economic, and political life.<sup>14</sup> During this period, in the memorable words of W.E.B. Du Bois, “Democracy died save in the hearts of black folk.”<sup>15</sup>

Congress finally took up its charge by passing the Voting Rights Act of 1965 (“VRA”), compelled by the Civil Rights Movement generally, and the violent events of Bloody Sunday in Selma, Alabama, specifically. The VRA fulfilled the promise of the 15<sup>th</sup> Amendment that the right to vote should not be denied because of race, color or previous condition of servitude, as well as the 14<sup>th</sup> Amendment’s guarantee of equal protection under the law. Its purpose was ambitious but clear: to finally “banish the blight of racial discrimination in voting.”<sup>16</sup> The VRA enshrined our most fundamental values by guaranteeing to all citizens the right to vote, which the Supreme Court has called “preservative of all rights.”<sup>17</sup> In many ways, the VRA made the promise of the Civil Rights Amendments a reality and legitimized our democracy for the first time in our history.<sup>18</sup> Among the most transformative of the civil rights statutes passed in the 1960s,<sup>19</sup> the Voting Rights Act has been justly described as “the crown jewel” of the Civil Rights Movement.

The success of the VRA is largely predicated on the purposeful, precise yet necessarily expansive nature of its provisions. The VRA’s preclearance provisions brought profound changes to the country and was successful at dismantling the continuation of Jim Crow subjugation in the electoral arena specifically because of its prophylactic design. Previously, when the Department of Justice obtained favorable decisions striking down suppressive voting practices, states merely enacted new discriminatory schemes to restrict Black people from voting. In establishing the preclearance framework of the VRA, Congress, therefore, “had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the [Voting Rights Act] itself.”<sup>20</sup> Section 5 of

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<sup>14</sup> See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 310–11 & nn.9–10 (1966) (observing that the effectiveness of literacy tests at blocking Black Americans from voting resulted, in significant part, from the pervasiveness of racial discrimination in education); *Underwood v. Hunter*, 730 F.2d 614, 619 & n.10 (11<sup>th</sup> Cir. 1984) (explaining that, after 1890, Southern state legislatures “resort[ed] to facially neutral tests that took advantage of differing social conditions” between Black and white voters”).

<sup>15</sup> W. E. Burghardt Du Bois, *Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt To Reconstruct Democracy in America, 1860–1880* 30 (1935).

<sup>16</sup> *Katzenbach*, 383 U.S. at 308.

<sup>17</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>18</sup> Nikole Hannah Jones, *Our democracy’s founding ideals were false when they were written. Black Americans have fought to make them true*, *New York Times Magazine* (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>

<sup>19</sup> See *Nw. Austin, Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198, 201 (2009) (the “historic accomplishments of the [VRA] are undeniable”).

<sup>20</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 314, 335 (1966). As Chief Justice Earl Warren

the VRA was expressly designed to address not only then-existing discriminatory voting schemes but also to address the “ingenious methods”<sup>21</sup> that might be devised and used in the future to suppress the full voting strength of African Americans. Section 5 preclearance was an efficient, effective, and *necessary* mechanism for detecting and redressing the many forms of voting discrimination *before* elections took place.

Additionally, Section 2 of the VRA provided litigants with the tools to challenge voting laws or policies which resulted in vote dilution or vote denial “on account of race or color.” In the years after the VRA’s initial passage in 1965, litigants used Section 2 to challenge restrictive voting rules that were already in place and therefore were not subject to the preclearance process. In 1980, foreshadowing the present moment, the Supreme Court eroded a decades-old understanding of Section 2’s protections, holding that such challenges required proof of intentional discrimination.<sup>22</sup> In 1982, Congress corrected the Supreme Court’s interpretation by amending Section 2 such that a violation was established when, seen in the “totality of the circumstance of the local electoral process,” the challenged standard, law, practice, or procedure had the result of denying a racial or language minority an equal opportunity to participate in the political process.<sup>23</sup> Critically, among the factors considered by Congress in the totality of the circumstances were socioeconomic disparities that could make historically disenfranchised racial groups face extra barriers to voting.<sup>24</sup>

In amending Section 2, Congress took specific issue with the supposedly neutral justifications states had previously advanced for passing restrictive voting rules. Congress found that “even if state actors had purposefully discriminated, they would likely be “ab[le] to offer a non-racial rationalization,” supported by “a false trail” of “official resolutions” and “other legislative history eschewing any racial motive.”<sup>25</sup> Thus, Congress determined that only a results-focused statute could prevent states from finding ways to abridge minority citizens’ voting rights. Congress’ 1982 amendment was textually clear and precise. Section 2’s results test created a broad statute meant to supersede the “intent” requirement that the Court had grafted on to Section 2 prior to the 1982 amendments, thus expanding the reach of Section 2.

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explained: “Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures.” *Id.* at 30.

<sup>21</sup> U.S. Congress, House, Committee on the Judiciary Voting Rights, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25, 20 Apr. 1, 1965.

<sup>22</sup> *Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>23</sup> See 52 U.S.C. § 10301.

<sup>24</sup> S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982) at 28-29.

<sup>25</sup> *Id.* at 36.

Section 2 broadly “prohibits all forms of voting discrimination.”<sup>26</sup> The plain statutory text prohibits “any ‘standard, practice, or procedure’ that ‘results in a denial or abridgment’”<sup>27</sup> of the right to vote on account of race. Section 2 thus “covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgment of ‘the right’ to vote.”<sup>28</sup>

### The *Shelby* and *Brnovich* Decisions

Unfortunately, the Supreme Court’s decision in *Shelby* brought an abrupt halt to the successes of the VRA’s preclearance provisions, and now its *Brnovich* decision threatens the efficacy of the VRA’s Section 2.

In *Shelby*, the Supreme Court rendered preclearance inoperative, making Section 5 of the VRA unenforceable until Congress enacts a new coverage provision to identify the covered jurisdictions. As the late Justice Ruth Bader Ginsberg noted in her dissent to the *Shelby* decision: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”<sup>29</sup> The *Shelby* decision allowed state and local governments to unleash discriminatory voter suppression schemes virtually unchecked.<sup>30</sup> At its pre-*Shelby* strength, Section 5 would have prevented many of the voter suppression schemes that we have encountered since 2013. Indeed, as Justice Kagan notes in her *Brnovich* dissent “the problem of voting discrimination has become worse . . . in part because of what this Court did in *Shelby County*.”<sup>31</sup>

Just eight years ago in *Shelby*, the Court explicitly stated that its decision “in no way affect[ed] the permanent, nationwide ban on racial discrimination in voting found in [Section] 2.”<sup>32</sup> Indeed, the Court emphasized in the *Shelby* decision that “Section 2 is permanent, applies nationwide,” and broadly “forbids any ‘standard, practice, or procedure’ that ‘results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.’”<sup>33</sup> Yet days ago, in its *Brnovich* decision, the Supreme Court manufactured a counter-factual set of

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<sup>26</sup> *Thornburg v. Gingles*, 478 U.S. 45 n.10 (1986). See also *Johnson v. DeGrandy*, 512 U.S. 997 (1994).

<sup>27</sup> Section 2 text

<sup>28</sup> *Chisom* 501 U.S. 380 (1991) at 397.

<sup>29</sup> *Shelby Cnty*, 570 U.S. at 590 (Ginsburg, J., dissenting).

<sup>30</sup> U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report* (2018), [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf).

<sup>31</sup> *Brnovich v. Democratic National Committee*, 594 U.S. \_\_\_, \_\_\_ (2021), No. 19–1257, slip op. at 13 (U.S. July 1, 2021).

<sup>32</sup> *Shelby Cnty*, 570 U.S. at 557.

<sup>33</sup> *Id.* at 536–37 (quoting 52 U.S.C. § 10301(a)).

“guideposts” to govern Section 2 claims in order to weaken Section 2 and in complete disregard of the statutory text.

In *Brnovich*, the Court’s majority relied on five invented factors—or “guideposts,” in Justice Alito’s terminology—to uphold a pair of Arizona laws that the *en banc* Ninth Circuit had found discriminatory in violation of Section 2.<sup>34</sup> The decision improperly and illogically departs from the plain text of Section 2, ignores settled precedent, and curtails the broad application of Section 2 that Congress intended, thus making it more difficult and burdensome to ensure that every eligible citizen is able to freely exercise their right to vote. By design, Section 2’s language is sweeping in scope—as Justice Kagan explained, “to read it fairly . . . is to read it broadly. And to read it broadly is to do much that the majority is determined to avoid.”<sup>35</sup> The majority ignored the statutory text of Section 2 and discounted language in the VRA requiring that voters have an equal opportunity to vote in favor of its erroneous conclusion that, so long as the process of voting is sufficiently “open” to all voters within the context of a State’s entire system of voting, a discriminatory voting change does not violate Section 2. As Justice Kagan poignantly notes, this interpretation of Section 2 has no textual basis and contravenes the will of this body and the precedent of the Court:

The Court always says that it must interpret a statute according to its text—that it has no warrant to override congressional choices. But the majority today flouts those choices with abandon. The language of Section 2 is as broad as broad can be. It applies to any policy that “results in” disparate voting opportunities for minority citizens. It prohibits, without any need to show bad motive, even facially neutral laws that make voting harder for members of one race than of another, given their differing life circumstances. That is the expansive statute Congress wrote, and that our prior decisions have recognized. But the majority today lessens the law—cuts Section 2 down to its own preferred size. The majority creates a set of extra-textual exceptions and considerations to sap the Act’s strength, and to save laws like Arizona’s. No matter what Congress wanted, the majority has other ideas. This Court has no right to remake Section 2.<sup>36</sup>

The majority claims to recognize that the VRA “applies to a broad range of voting rules, practices and procedures,” and “does not require proof of discriminatory

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<sup>34</sup> *Brnovich*, 594 U.S. at \_\_\_, slip op. at 13 (opinion of the Court).

<sup>35</sup> *Id.* at 41 (Kagan, J., dissenting).

<sup>36</sup> *Id.* at 40–41.



purpose,” but does so in word only. In substance, the majority’s decision disregards these purposes and erects an indefensible barrier for VRA plaintiffs because it believes that Congress should not have used its enforcement power to legislate broadly to protect the fundamental right to vote from racial discrimination. In other words, six Justices of the Supreme Court attempted to rewrite Section 2 of the VRA because they took issue with the nature of a constitutional bill passed by Congress upheld by multiple federal courts over the course of the 56 years since its passage, and relied upon by countless voters of color, to protect their right to vote. In our constitutional structure, the legislative function belongs to Congress. The Supreme Court’s role, by contrast, is to interpret and apply a statute enacted by Congress as it is written, not to arbitrarily—or, worse, surgically—undermine and redraft the Congress’s work.

Discounting the statute’s actual text, as well as several of the Senate Factors that have guided Section 2 litigation for decades, the majority based its analysis on five factors or “guideposts” that it described as non-exhaustive but “important circumstances” for courts to consider when confronted with a Section 2 vote-denial claim.<sup>37</sup> These guideposts, as Justice Kagan’s dissent makes plain, are in fact “a list of mostly made-up factors, at odds with Section 2 itself.”<sup>38</sup> They “mostly inhabit[] a law-free zone”<sup>39</sup> and are unmoored from both text and truth. Not surprisingly, the majority opinion’s guideposts “all cut in one direction—toward limiting liability for race-based voting inequalities” and shielding discriminatory laws from Section 2 challenges.<sup>40</sup>

One of the Court’s newly created guideposts under Section 2 specifically instructs courts to compare the challenged voting restrictions to the burdens of voting as they existed in 1982, when Section 2 was amended by Congress to reach “results”. This “guidepost” contravenes the text and purpose of Section 2 which is to prohibit racial discrimination in voting—defined as unequal opportunity between present-day racial groups to elect candidates of their choice—not to impose 1982 as a reference point for evaluating whether today’s laws are discriminatory. As Justice Kagan observes, “Section 2 was meant to disrupt the status quo, not to preserve it—

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<sup>37</sup> *Id.* at 16 (opinion of the Court).

<sup>38</sup> *Id.* at 20 (Kagan, J., dissenting).

<sup>39</sup> *Id.*

to eradicate then-current discriminatory practices, not to set them in amber.”<sup>41</sup> The majority’s guidepost, has no basis in the text or purpose of Section 2.<sup>42</sup>

Another “guidepost” enumerated in the *Brnovich* decision suggests that states may erect roadblocks and obstacles to voting that disproportionately harm historically disenfranchised racial groups and engage in voter suppression so long as that state has raised a theoretically legitimate—albeit unsubstantiated—interest, such as abstract concerns about potential for fraud. This guidepost threatens to restore our nation to the time before the Voting Rights Act’s enactment, when states adopted facially neutral voting laws under the pretense of “purity of the ballot” but with the intent of excluding Black voters from the political process. This guidepost, too, finds no support in the VRA’s text and, what’s more, has no basis in the factual record to support the majority’s conclusion. Indeed, the majority decision repeatedly refers to a supposed risk of voter fraud, even though Arizona could not point to any fraud to justify its challenged laws.<sup>43</sup> This guidepost, thus, rests on phantom fears about voter fraud, a phenomenon that is almost nonexistent, as a court-endorsed basis for restrictive voting legislation and stands in stark contrast to the reality that voter fraud is virtually non-existent. A study of the 834 million ballots cast in the elections between 2000 and 2014 found only 35 credible allegations of in-person voter fraud.<sup>44</sup> By contrast, there are voluminous examples of persistent and proliferating racial discrimination in voting during the same time period.<sup>45</sup> While the Fifteenth

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<sup>41</sup> *Id.* at 25 (Kagan, J., dissenting).

<sup>42</sup> Nicholas Stephanopoulos, *The Supreme Court showcased its ‘textualist’ double standard on voting rights*, *The Washington Post* (July 1, 2021), <https://www.washingtonpost.com/opinions/2021/07/01/supreme-court-alito-voting-rights-act/>; David Gans, *Selective originalism and selective textualism: How the Roberts court decimated the Voting Rights Act*, *SCOTUSBlog* (July 7, 2021), <https://www.scotusblog.com/2021/07/selective-originalism-and-selective-textualism-how-the-roberts-court-decimated-the-voting-rights-act/>.

<sup>43</sup> Richard Hansen, *The Supreme Court’s Latest Voting Rights Opinion Is Even Worse Than It Seems*, *Slate* (July 8, 2021), <https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html?via=rss>.

<sup>44</sup> German Lopez, *The case against voter ID laws, in one chart*, *Vox.com* (August 6, 2015), <https://www.vox.com/2015/8/6/9107927/voter-id-election-fraud>; *See also*, Quinn Scanlan, *‘We’ve never found systemic fraud, not enough to overturn the election’: Georgia Secretary of State Raffensperger says*, *ABC News* (Dec. 6, 2020), <https://abcnews.go.com/Politics/weve-found-systemic-fraud-overturn-election-georgia-secretary/story?id=74560956>; *Debunking the Voter Fraud Myth*, *Brennan Center for Justice* (Jan. 31, 2017), [https://www.brennancenter.org/sites/default/files/analysis/Briefing\\_Memo\\_Debunking\\_Voter\\_Fraud\\_Myth.pdf](https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf).

<sup>45</sup> J. Morgan Kousser, *Facts of Voting Rights* 3 (cataloguing currently 4,173 “voting rights events” after 1982, including many after 200); H. R. Rep. No. 109-478, at 40–43 (2006) (reciting numerous Department of Justice objections to proposed voting laws under Section 5 in the relevant time period, as well as several voting laws that were withdrawn or amended voting changes were withdrawn or amended after the DOJ requested more information); U.S. Commission on Civil Rights, *An Assessment*

Amendment and the Voting Rights Act clearly demand the eradication of racial discrimination in voting as a national imperative,<sup>46</sup> the majority’s opinion sends a false message that voter fraud, not racial discrimination, is the real threat to our system of democracy, and that Black voters’ rights must yield if they conflict with state “fraud-prevention” measures. . But this is simply untrue as a matter of law. Under our Constitutional structure, “the Fifteenth Amendment supersedes contrary exertions of state power.”<sup>47</sup>In short, the *Brnovich* decision is antithetical to the core constitutional principles of equality and anti-discrimination and is a major departure from nearly four decades of interpretation and analysis of Section 2 of the Voting Rights Act consistent with those principles.

### **Current Landscape of Voting Rights**

Our nation is at a critical juncture in the decades-long struggle to create, maintain, preserve, and ensure true equality of voting rights for all citizens. For the first time in more than half a century, we enter a redistricting cycle without the protection of preclearance under Section 5 of the Voting Rights Act. At the same time, voter suppression is intensifying at the local and state levels and the right to vote for Black people and other people of color is facing its greatest threat in decades, now with an exceedingly high bar to challenge voting laws under Section 2 if the *Brnovich* majority’s suggested guideposts are applied.

2020 was an unprecedented year in many respects and revealed the ongoing and urgent need for robust protections for voting rights. With the COVID-19 pandemic, the country faced not only a public health crisis, but also a threat to the very foundation of our democracy: free and fair elections. The staggering rate of transmission, infection, and death related to COVID-19 placed many voters in the unthinkable position of choosing to risk their health or lose their fundamental right as citizens to participate and vote. Voters across the country were forced to make a

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*of Minority Voting Rights Access in the United States* 226 (Sept. 12, 2018), [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf) (identifying successful Section 2 litigation between the 2006 reauthorization and the *Shelby* decision in 2013); *see generally* Ellen D. Katz et al, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643 (2006).

<sup>46</sup> U.S. Const. amend. XV; 52 U.S.C. § 10301; *Katzenbach*, 383 U.S. at 308 (“The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century”).

<sup>47</sup>*Katzenbach*, 383 U.S. at 325; *see Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (“When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.”).

life-risking choice to participate in elections because their state and local governments did not adequately protect them by providing safe opportunities to vote.<sup>48</sup>

Moreover, the wave of voter suppression laws that were implemented over the last year demonstrate that we must fight voter suppression from the stages of registration and participation in primaries to the counting and canvassing of ballots. Indeed, in the 2020 Elections, efforts at voter suppression continued beyond Election Day: stoked and encouraged by the former President, misguided individuals across the country participated in a dangerous campaign to disrupt the counting and certification of the presidential election and ultimately to overturn its results.<sup>49</sup>

Accounts from LDF's Voting Rights Defender and Prepared to Vote teams, detailed in the LDF Thurgood Marshall Institute's report *Democracy Defended*,<sup>50</sup> reveal the depth and breadth of the issues voters faced on and following Election day. In sum, the 2020 election did not, as numerous news reports suggested, "go smoothly."<sup>51</sup> The celebrated turnout and registration rates among Black voters occurred despite a litany of unequal obstacles and because of the Herculean efforts by civil-rights groups, organizers, and activists and the sheer determination and resilience of Black Voters. This model is not sustainable. Nor is it acceptable or lawful. Black voters' ability to overcome unequal burdens does not diminish the fact that those burdens exist. And, our Constitution does not countenance two systems of

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<sup>48</sup> *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM Research Lab (last updated March 5, 2021), <https://www.apmresearchlab.org/covid/deaths-by-race>; *COVID-19 hospitalization and deaths by race/ethnicity*, Centers for Disease Control and Prevention (last updated March 12, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-raceethnicity.html>.

<sup>49</sup> Simon Romero, Shaila Dewan & Giulia McDonnell Nieto del Rio, *In a Year of Protest Cries, Now It's 'Count Every Vote!' and 'Stop the Steal!'*, New York Times (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/us/electionprotests-vote-count.html>; Bill Bostock, *Videos show Trump protesters chanting 'count those votes' and 'stop the count' outside separate ballot-counting sites in Arizona and Michigan*, Business Insider (Nov. 5, 2020), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11>; Jake Lahut, *Dozens of pro-Trump protesters chant 'Fox News sucks' outside major election HQ in Arizona, with several reportedly trying to get inside as votes are being counted*, Business Insider (Nov. 4, 2020), <https://www.businessinsider.com/video-fox-news-sucks-chant-crowd-outside-maricopa-election-arizona-2020-11?r=US&IR=T>; Maura Ewing et al., *Two charged with carrying weapons near Philadelphia vote-counting site amid election tensions*, Washington Post (Nov. 6, 2020), <https://www.washingtonpost.com/nation/2020/11/06/philadelphiaattack-plot-vote-count-election/>.

<sup>50</sup> *Democracy Defended: Executive Summary*, NAACP Legal Defense Fund Thurgood Marshall Institute (Feb. 10, 2021), [https://www.naacpldf.org/wp-content/uploads/LDF\\_02102021\\_DemocracyDefendedPreview11.pdf?\\_ga=2.209659025.2082701624.1617629692-217316157.1616678028](https://www.naacpldf.org/wp-content/uploads/LDF_02102021_DemocracyDefendedPreview11.pdf?_ga=2.209659025.2082701624.1617629692-217316157.1616678028).

<sup>51</sup> Sherrilyn Ifill, *No, This Election Did Not Go 'Smoothly'*, Slate (Nov. 9, 2020), <https://slate.com/news-andpolitics/2020/11/2020-election-voting-did-not-go-smoothly.html>.

voting in this country—one in which Black and other marginalized voters require an independent, non-governmental apparatus to exercise the fundamental right to vote while white voters do not.

Since the Supreme Court’s *Shelby* decision, states and localities have unleashed countless schemes that seek to deny or abridge the rights of voters of color. Indeed, every year since 2013, communities of color throughout our country have sought to vote and participate equally and meaningfully in the political process without the core protections of the Voting Rights Act. And every year since the *Shelby* decision, restrictive and suppressive voting changes are implemented that would have been blocked by Section 5. Numerous reports<sup>52</sup> have catalogued these suppressive practices—including strict voter identification laws, unfair purging, cuts to early voting, and eliminating polling places—utilized in many states and jurisdictions throughout the country.

Since 2008, LDF has monitored elections through our Prepared to Vote initiative (“PTV”). Our PTV initiative places LDF staff and volunteers on the ground for primary and general elections every year to conduct non-partisan election protection, poll monitoring, and to support Black political participation in targeted jurisdictions—primarily in the South.

LDF is also a founding member of the non-partisan civil rights Election Protection Hotline (1-866-OUR-VOTE), administered by the Lawyers’ Committee for Civil Rights Under Law. The Election Protection hotline coalition works year-round

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<sup>52</sup> In 2014, the Lawyer’s Committee organized the National Commission on Voting Rights which issued a report documenting ongoing voting discrimination. National Commission on Voting Rights, *Protecting Minority Voters: Our Work Is Not Done* (2014), <http://votingrightstoday.org/ncvr/resources/discriminationreport>; In 2016, the Leadership Conference on Civil and Human Rights released a report before the first presidential election conducted without the full safeguards of the VRA detailing polling place reductions on a massive scale in many of the jurisdictions that were once protected by Section 5 of the VRA. The Leadership Conference Education Fund, *The Great Closure Report*, Civilrights.org, (Nov. 2016) <http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf>; In 2018 the Leadership Conference published a report finding 1,688 polling place closures between 2012 and 2018, almost double the 868 closures found in their 2016 report. The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote*, (Sep. 2019) [democracydiverted.org](http://democracydiverted.org); Leading up to the 2018 midterm elections the United States Commission on Civil Rights presented a report to the 116<sup>th</sup> Congress with urgent recommendations regarding the protection of voting rights across the nation. U.S. Commission on Civil Rights, *U.S. Commission on Civil Rights Urges Congress to Prioritize Civil Rights Oversight and Legislation*, Dec. 7, 2018, <https://www.usccr.gov/press/2018/12-07-Priorities-for-116th-Congress.pdf>; The Election Protection Coalition amassed extensive data evidencing systemic barriers faced by voters in Georgia, Texas, Florida and North Dakota. Laura Grace & Morgan Conley, *Election Protection 2018 Midterm Elections Preliminary Report*, (2018) <https://866ourvote.org/wp-content/uploads/2019/01/Election-Protection-Preliminary-Report-on-the-2018-MidtermElections.pdf>.

to ensure that all citizens have an equal opportunity to vote and have that vote count. Election Protection provides Americans from coast to coast with comprehensive information and assistance at all stages of voting—from registration to absentee and early voting, to casting a vote at the polls, and overcoming obstacles to their participation.

Accordingly, our PTV initiative equips voters with non-partisan educational information about how to comply with confusing, onerous, or newly changed election laws, including burdensome registration requirements, stringent voter ID laws, and strict absentee qualifications. On election day, PTV volunteers visit polling sites to ensure voters are informed of their state’s voting requirements, answer questions about how to comply with election laws, and, when necessary, engage in rapid response actions to ensure every eligible voter is able to cast a ballot. PTV plays a critical role in tracking, monitoring, and reporting practices that make it harder for Black people and other people of color to exercise the fundamental right to vote. It is one of countless non-governmental efforts that work to ensure that Black and other marginalized voters have as close to an equal opportunity to vote and elect candidates of their choice as possible. But it is actually the responsibility of government to protect and defend the right to vote and we call on Congress to pass the necessary legislation create a more equal system of voting in this country.

It is against this backdrop, at this moment of crisis in American democracy, that six Supreme Court justices imposed new and additional burdens on voters seeking to vindicate their rights under Section 2, which have no support in the statute’s text or history. To quote Justice Kagan:

“The court decides this Voting Rights Act case at a perilous moment for the nation’s commitment to equal citizenship. It decides this case in an era of voting-rights retrenchment – when too many states and localities are restricting access to voting in ways that will predictably deprive members of minority groups of equal access to the ballot box.”

The extensive record of discriminatory voting practices enacted since *Shelby* demands that Congress fulfill its constitutional obligation to protect voters from an onslaught of new and “ingenious methods” of voter discrimination. If the Court is threatening to hold states to a standard from 1982, Congress needs to set a new standard in 2021. Congress can and must update the Voting Rights Act by passing new, clear and unequivocal mandates to protect the fundamental right to vote from racial discrimination and anti-democratic incursions.

## LDF Voting Rights Litigation Post-*Shelby* and the Need for Prophylactic Legislation

Through its report, titled “Democracy Diminished: State and Local Threats to Voting post-*Shelby County, Alabama v. Holder*,” LDF tracks, monitors, and publishes a record of discriminatory voting changes in jurisdictions formerly protected by Section 5.<sup>53</sup> *Democracy Diminished* details the many tactics that state and local policymakers have implemented with alarming speed since the *Shelby* decision, including barriers to voter registration, cuts to early voting, purges of the voter rolls, strict photo identification requirements, and last-minute polling place closures and consolidations. LDF also monitors and tracks incursions on the right to vote and is often compelled to bring litigation to defend and protect the rights of Black and other marginalized voters. This obligation has increased since the Supreme Court rendered Section 5 inoperable.

Without the protection of Section 5 of the Voting Rights Act, voters have had to rely on case-by-case litigation under the Constitution, other provisions of the VRA, and other laws to help protect the right to vote. Among these remaining provisions, and absent Congress’s restoration of Section 5, Section 2 of the Voting Rights Act has now become the primary statutory check on racial discrimination in voting. In fact, according to the U.S. Commission on Civil Rights, in the first five years following *Shelby*, an unprecedented sixty-one lawsuits were filed under Section 2 of the VRA.<sup>54</sup> Twenty-three of these cases were successful.<sup>55</sup> In other words, over those first five years alone, federal courts identified *twenty-three* voting laws or practices that “result[ed] in a denial or abridgement of the right . . . to vote on account of race or color.”<sup>56</sup> By contrast, in the five years before *Shelby*, only five Section 2 cases were won.<sup>57</sup> This means that, after *Shelby*, the rate of successful Section 2 litigation quadrupled.<sup>58</sup> And these cases arose predominantly in jurisdictions formerly covered by Section 5.<sup>59</sup>

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<sup>53</sup> NAACP Legal Defense Fund, *Democracy Diminished*, LDF’s Thurgood Marshall Institute, <https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished-State-and-Local-Threatsto-Voting-Post-Shelby-County-Alabama-v.-Holder.pdf>

<sup>54</sup> U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* 10 (Sept. 12, 2018), [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf).

<sup>55</sup> *Id.* at 22.

<sup>56</sup> 52 U.S.C. § 10301(a).

<sup>57</sup> U.S. Commission on Civil Rights, *supra* note 63, at 227.

<sup>58</sup> *Id.* at 234.

<sup>59</sup> *Id.* (In the five years after *Shelby*, “12 out of 21 (52.2 percent)” of successful Section 2 cases arose in formerly covered jurisdictions, compared to “two out of five (40 percent)” in the five years before *Shelby*).

Since the *Shelby* decision, federal courts have also struck down voting changes that violate the 14<sup>th</sup> and 15<sup>th</sup> Amendments to the U.S. Constitution,<sup>60</sup> the 24<sup>th</sup> Amendment to the U.S. Constitution,<sup>61</sup> Sections 2 and 203 of the Voting Rights Act, and the Americans with Disability Act. Indeed, there have been at least nine federal court decisions finding that states or localities enacted racially discriminatory voting laws or practices intentionally, for the purpose of discriminating against Black voters, Latino voters, or other voters of color.<sup>62</sup> That fact is alarming. In Texas, for example, a trial court held that the state enacted its strict voter ID law with the purpose of discriminating against Black and Latino voters.<sup>63</sup> In Wisconsin, a federal court struck down various voting restrictions under the Voting Rights Act, and found one, a limitation on hours for in-person absentee voting, based on intentional discrimination in violation of the Fifteenth Amendment.<sup>64</sup> And in North Carolina, the Fourth Circuit Court of Appeals found that the North Carolina legislature worked with “surgical provision” to ensure that its omnibus voting law would disproportionately disenfranchise African American voters.<sup>65</sup> These findings by federal courts are a shocking condemnation of our voting systems, and demonstrate what the unfettered post-*Shelby* world has wrought.

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<sup>60</sup> *4th Circuit Court of Appeals strikes down North Carolina omnibus voting law finding “provisions target African Americans with almost surgical precision.”*, Robert Barnes & Ann Marrow, *Appeals court strikes down North Carolina’s voter-ID law*, Washington Post (Jul. 29, 2016), [https://www.washingtonpost.com/local/publicsafety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583\\_story.html](https://www.washingtonpost.com/local/publicsafety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583_story.html).

<sup>61</sup> *NAACP v. Billups*, 554 F.3d 1340 (2009)

<sup>62</sup> See, e.g., *People First of Ala. v. Merrill*, 2020 WL 5814455 (N.D. 2020); *Jones v. Jefferson County Board of Education*, 2019 WL 7500528 (N.D. Ala. 2019); *Stout v. Jefferson County Board of Education*, 882 F.3d 988 (11<sup>th</sup> Cir. 2018); *Allen v. City of Evergreen*, 2014 WL 12607819 (S.D. Ala. 2014); *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9<sup>th</sup> Cir. 2020); *Michigan State A Philip Randolph Institute v. Johnson*, 326 F. Supp. 3d 5323 (E.D. Mich. 2019); *Holmes v. Moore*, 840 S.E.2d 244 (2020); *North Carolina NAACP v. McCrory*, 831 F.3d 204 (4<sup>th</sup> Cir. 2016); *Perez v. Abbott*, 250 F.Supp.3d 123 (W.D. Tex. Apr. 20, 2017); *Perez v. Abbott*, 253 F.Supp.3d 864 (W.D. Tex. May 2, 2017); *Veasey v. Abbott*, 265 F.Supp.3d 684 (S.D. Tex. 2017); *Patino v. City of Pasadena*, 230 F.Supp.3d 667 (S.D. Tex. 2017).

<sup>63</sup> *Veasey v. Abbott*, No. 2:13-CV-193, 2017 WL 3620639 (S.D. Tex. Aug. 23, 2017).

<sup>64</sup> *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016).

<sup>65</sup> *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4<sup>th</sup> Cir. 2016).



LDF has litigated challenges to many of these restrictive voter ID laws in Texas<sup>66</sup> and Alabama,<sup>67</sup> absentee voting restrictions in Alabama,<sup>68</sup> Arkansas,<sup>69</sup> Louisiana,<sup>70</sup> South Carolina,<sup>71</sup> judicial redistricting schemes that deny Black voters an opportunity to participate in the political process on an equal basis and elect candidates of their choice,<sup>72</sup> and discriminatory early voting restrictions in Waller County, Texas. LDF challenged President Trump’s Election Integrity Commission,<sup>73</sup> and currently remains in litigation against former President Trump and the Republican National Committee for their efforts to discredit the legitimacy of ballots cast by voters in cities with large Black populations.<sup>74</sup> LDF also sued the United States Postal Service (“USPS”) in 2020 to ensure the timely delivery of mail-in ballots cast in the November Presidential election and January special election in Georgia.<sup>75</sup>

While LDF will continue to vigorously pursue litigation to protect voting rights under Section 2 of the VRA, the U.S. Constitution, and other laws, we know that even these robust efforts and those of our civil rights colleagues and the reinvigorated Department of Justice are not enough to fully protect the right to vote.<sup>76</sup> I have previously submitted written testimony before this Congress that summarizes

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<sup>66</sup> *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

<sup>67</sup> *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018), *aff'd sub nom. Greater Birmingham Ministries v. Sec’y of State for Alabama*, 966 F.3d 1202 (11th Cir. 2020), *opinion vacated and superseded sub nom. Greater Birmingham Ministries v. Sec’y of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021), and *aff'd sub nom. Greater Birmingham Ministries v. Sec’y of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021).

<sup>68</sup> *People First of Alabama v. Merrill*, No. 2:20-cv-00619 (N.D. Ala. 2020).

<sup>69</sup> *Mays v. Thurston*, No. 4:20-cv-00341 (E.D. Ark. 2020).

<sup>70</sup> *Power Coalition for Equity and Justice v. Edwards*, No. 3:20-cv-00283 (M.D. La. 2020).

<sup>71</sup> *Thomas v. Andino*, 3:20-cv-01552 (D.S.C. 2020).

<sup>72</sup> *Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020); *Christian Ministerial Alliance v. Hutchinson*, No. 4:19-cv-00402-JM (E.D. Ark. 2019).

<sup>73</sup> *LDF and Local Alabama Organization File Federal Lawsuit Challenging President’s “Election Integrity” Commission*, NAACP Legal Defense and Educ. Fund, Inc. (Jul. 18, 2017), <https://www.naacpldf.org/press-release/ldf-and-local-alabama-organization-file-federal-lawsuit-challenging-presidents-election-integrity-commission/>.

<sup>74</sup> *LDF Files Amended Complaint in its Lawsuit Against President Trump and His Campaign’s Attempts to Overturn the Election by Disenfranchising Black Voters*, NAACP Legal Defense and Educ. Fund, Inc. (Dec. 22, 2020), <https://www.naacpldf.org/press-release/ldffiles-amended-complaint-in-its-lawsuit-against-president-trump-and-his-campaigns-attempts-to-overturn-theelection-by-disenfranchising-black-voters/>.

<sup>75</sup> *NAACP v. U.S. Postal Service*, No 1:20-cv-02295 (D. D.C.2020).

<sup>76</sup> *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, <sup>76</sup> NAACP Legal Defense and Educ. Fund, Inc. (Feb. 14, 2019), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs02.14.19.pdf>; Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed); Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) (“Two to five years is a rough average” for the length of Section 2 lawsuits) [http://commdocs.house.gov/committees/judiciary/hju24120.000/hju24120\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju24120.000/hju24120_0.HTM).

selected litigation that LDF has brought post-*Shelby*, which is representative of the broad and persistent attack on voting rights that defines our national moment.<sup>77</sup>

Our experience litigating against discriminatory challenges to every stage of the voting process since *Shelby*, demonstrates that there are numerous methods of voter suppression that are effective and successful in their goal: to confuse, discourage, make burdensome, or deny the right to vote. The intimidation and disenfranchisement of Black voters has always been central to the American story and its underlying origins rooted in white supremacy. Indeed, the loathsome methods of voter suppression that we see today, are not dissimilar from the methods of the past in their intent or results. Much of what we see is a modernization of old tactics, a modernization of the poll tax and grandfather clauses. But we also see the same strategies used during the Jim Crow era—such as confusing and ever-changing registration requirements and discriminatory at-large election schemes. What is different from recent decades is that we are operating today without the protection of Section 5 of the VRA—and must now rely on a diminished Section 2—at great costs to our democracy. *Brnovich* has undoubtedly made it more challenging to litigate future challenges to voting rights. And, while litigation remains an essential tool in the fight to protect the integrity of our democracy, it is not sufficient. Affirmative, prophylactic legislation is essential.

### **Limits of Litigation**

Voting rights litigation can be slow and expensive. The parties often spend millions litigating these cases.<sup>78</sup> The cases take up significant judicial resources.<sup>79</sup> And the average length of Section 2 cases is two to five years.<sup>80</sup> But, in the years during a case’s pendency, thousands—and, in some cases, millions—of voters are effectively disenfranchised. For these reasons, the need for prophylactic legislation is both urgent and acute. Litigation is a blunt instrument. The beauty and innovative genius of Section 5 preclearance review was that it allowed federal authorities to stop

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<sup>77</sup> Written Testimony of Janai S. Nelson Before the United States House of Representatives Committee on House Administration. Subcommittee on Elections, “Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting” (June 24, 2021), <https://docs.house.gov/meetings/HA/HA08/20210624/112806/HHRG-117-HA08-Wstate-NelsonJ-20210624.pdf>.

<sup>78</sup> *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, NAACP Legal Defense and Educ. Fund, Inc. (Feb. 14, 2019), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs02.14.19.pdf>.

<sup>79</sup> Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed).

<sup>80</sup> Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) (“Two to five years is a rough average” for the length of Section 2 lawsuits).

voting discrimination *before* it inevitably harmed voters in a variety of federal, state, or local elections.

The *Brnovich* decision makes immediate congressional action to restore the Voting Rights Act to its full power and articulate in unambiguous terms the commitment to equality and anti-discrimination in voting all the more urgent. Since *Shelby* was decided in 2013, Section 2 has been our primary line of defense against the discriminatory denial or abridgement of the right to vote. In 2020, LDF filed five cases bringing Section 2 claims.<sup>81</sup> And, this year, in 2021, we have filed two more, challenging voter-suppression bills in Georgia and in Florida.<sup>82</sup> The United States Department of Justice and our colleagues at other civil-rights organizations are also actively litigating Section 2 cases in response to a renewed wave of harmful and discriminatory voting laws and practices.

As noted earlier, two weeks ago, six Supreme Court justices dealt a substantial blow to Section 2 and the democratic ideals it was designed to protect. By weakening Section 2 of the Voting Rights Act based on its own views of how much discrimination is acceptable, a majority of the Supreme Court has once again diminished our democracy. Again, the Court has devalued the storied and tragic history of sacrifice by Black Americans that led to the Act's passage, as well as the present assault on the citizenship and voting rights of people of color that make the VRA's intended protections—including Section 5 preclearance—so critical today.

Even before *Brnovich*, it was clear that case-by-case litigation under Section 2, the Constitution, and other laws would be no match for the national crisis our democracy now faces. Litigation is slow and costly—and court victories may come only after a voting law or practice has been in place for several election cycles. All the while, critical elections for the presidency, congress, state legislative seats, and scores of seats at the local levels have come and gone. Individual voting-rights lawsuits filed under Section 2 or other provisions, simply put, cannot substitute for the prophylactic power of Section 5 preclearance.

This year alone, at least seventeen states have rolled back early and mail voting, added new hurdles for voter registration, imposed burdensome and unnecessary voter identification requirements, stripped power from state and local

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<sup>81</sup> *Power Coalition for Equity and Justice v. Edwards*, No. 3:20-cv-00283 (M.D. La. 2020); *Harding v. Edwards*, 3:20-cv-00495 (M.D. La.); *Thomas v. Andino*, 3:20-cv-01552 (D.S.C. 2020); *People First of Alabama v. Merrill*, No. 2:20-cv-00619 (N.D. Ala. 2020); *Mays v. Thurston*, No. 4:20-cv-00341 (E.D. Ark. 2020).

<sup>82</sup> *Sixth District of the African Methodist Episcopal Church v. Kemp*, No. 1:21-cv-01284-JPB (N.D. Ga. 2021); *Florida State Conference of Branches and Youth Units of the NAACP v. Lee*, No. 4:21-cv-00187-WS-MAF (N.D. Fla. 2021).

election officials to enhance voting access, and taken other steps to make voting more difficult.<sup>83</sup> This recent wave of voter suppression bills would likely never have been introduced under preclearance. Indeed, the deterrent effect was Section 5’s genius—it stopped discrimination before the harm occurred. We urgently need such prophylactic legislation now.

### **Need for Full Restoration and Enforcement of the Voting Rights Act**

When Congress reauthorized the VRA in 2006, it legislated against the backdrop of an unbroken line of Supreme Court authority holding that the VRA’s preclearance process was a constitutional means for the Congress to ensure the equal right to vote.<sup>84</sup> Despite the devastating effect of the Court’s *Shelby* decision, the Court did not overrule the constitutionality of a measured and properly tailored preclearance provision—nor did it render other such remedies inherently unconstitutional. The Court in *Shelby* held that the VRA’s preclearance coverage formula was unconstitutional because it had not been updated since the 1970s, and therefore was not based on “current conditions.”<sup>85</sup> But the Court’s opinion left opportunity for Congress to establish a new preclearance framework responsive to current conditions. Indeed, the Supreme Court found preclearance a “stringent” and “potent” measure, fully available to Congress to deploy as an “extraordinary” tool to confront racial discrimination in elections and voting systems.<sup>86</sup> And, as noted above, Chief Justice Roberts expressly invited Congress to establish such a framework.<sup>87</sup>

In the previous century, the Constitution was amended only twelve times—each time with careful, deliberate consideration. That a Constitutional Amendment was devoted solely to the prohibition of racial discrimination in voting—and that the Amendment expressly delegated enforcement powers to Congress—underscores the extraordinary harm of the denial to vote based on race.<sup>88</sup> Further, the Supreme Court has long recognized that the Fifteenth Amendment’s prohibition on “sophisticated as well as simple-minded modes of discrimination”<sup>89</sup> endows Congress with extraordinary power to “use any rational means to effectuate the constitutional

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<sup>83</sup> Brennan Center for Justice, *Voting Laws Roundup: May 2021* (updated as of June 21, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

<sup>84</sup> See *Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>85</sup> *Shelby County, Ala. v. Holder*, 570 U.S. 529, 554 (2013).

<sup>86</sup> *Id.* at 545-46.

<sup>87</sup> *Id.* at 557.

<sup>88</sup> U.S. Const. amend. XV; see *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (holding that “Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting”\_).

<sup>89</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 342, (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

prohibition of racial discrimination in voting.”<sup>90</sup> A legislative remedy such as an updated preclearance mechanism would, therefore, be justified as an exercise of this extraordinary power.

Even one election in which the right to vote is restricted, threatened, diluted, denied, impeded, or violated, is one election too many. Violations of our electoral rights are not ordinary harms and must therefore be met with extraordinary remedies. An election conducted under conditions later found to be racially discriminatory has consequences that existing methods of defense cannot combat. The inability of the courts to retroactively correct these wrongs further disenfranchises and threatens to disengage voters who may understandably believe that their vote does not matter if discriminatory voting practices are left unchecked. Racially discriminatory practices in the electoral system have consequences that preclearance can prevent and correct. Preclearance was designed as a unique and powerful intervention to stop discrimination *before* elections take place.

Without preclearance, Section 2 has borne a weight it was never intended to carry alone.<sup>91</sup> Despite “its sweep and power,” as Justice Kagan’s dissent reminds us, “Section 2 was supposed to be a back-up.”<sup>92</sup> Now more than ever, it is not only imperative that Congress restore the VRA, but also that Congress *strengthen* the VRA to better address the ingenious methods that are, and will be, used to suppress the full voting strength of African Americans and people of color.

### **The Need for Known Practices Coverage Protections**

In addition to a preclearance requirement for states with a history of voting rights violations, a Known Practices Coverage (“KPC”) preclearance framework is necessary to address specific forms of voting discrimination that continue to threaten rights of voters of color. KPC would require preclearance for any voting policies or practices that pose a significant potential for violations of voting rights as demonstrated by broad historical experience. For example, the creation of at-large seats, annexations of suburban populations, and redistricting completed by incumbents all raise concerns when they occur in a jurisdiction that has experienced recent, significant growth of a specific minority population. Importantly, a KPC framework would require federal preclearance of voting practices that are known to correlate with racial or language-based discrimination only in jurisdictions that have a significant racial or language minority citizen voting age population. KPC combines

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<sup>90</sup> *Katzenbach*, 383 U.S. at 324.

<sup>91</sup> *See Brnovich*, 594 U.S. at \_\_\_, slip op. at 11 (Kagan, J., dissenting).

<sup>92</sup> *Id.*

a demographic threshold with the prevalence of specific, known practices of voting rights discrimination.

We urge Congress to take up the Court’s invitation to legislate to enforce the promise of an equal right to vote for all, and to employ the full force of its constitutional authority to protect the American voters from the extraordinary harm of denying or diminishing their right to vote.

### **Generational Obligation to Protect the Right to Vote**

It is unacceptable that in 2021—56 years after the passage of the Voting Rights Act—the right to vote remains under threat. Yet today we see a repeat of history. Justice Ginsburg, in her *Shelby* dissent, compared efforts to combat voter suppression in the states as similar to “battling the Hydra.”<sup>93</sup> According to Greek mythology, for every head cut off the Hydra, a mythical and monstrous creature, two more would grow in its place.<sup>94</sup> Preclearance was designed to address the Hydra problem—to eliminate adaptive, and unrelenting discriminatory voting practices.

Indeed, the Hydra problem is what we see unfolding in the states. Across the country, a resurgence of Jim Crow-style voter discrimination is targeting voters of color by restricting access to the ballot for Black, Latino, Asian American and Pacific Islander, and Native American communities. According to the Brennan Center, as of May 14<sup>th</sup>, state legislators have introduced over 389 bills with restrictive provisions in 48 states.<sup>95</sup> The states of Georgia, Florida, Iowa, Arkansas, and Utah have already passed strict voter suppression legislation and several others stand poised to do the same in the coming weeks.<sup>96</sup>

A significant number of the most suppressive voting laws in the states are made possible by the Supreme Court’s *Shelby* decision. That decision not only freed covered jurisdictions from their duty to report any changes in voting laws or rules to the federal government but signaled to jurisdictions throughout the country that the federal government would not screen for improper limits, restrictions, and barriers to voting participation.

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<sup>93</sup> *Shelby County*, 570 U.S. at 560 (Ginsburg, J., dissenting).

<sup>94</sup> *Hydra: Greek Mythology*, Britannica.com (last accessed May 24, 2021), <https://www.britannica.com/topic/Hydra-Greek-mythology>.

<sup>95</sup> *State Voting Bills Tracker 2021*, Brennan Center for Justice (last updated May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021>.

<sup>96</sup> *Voting Laws Roundup: March 2021*, Brennan Center for Justice (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>.

*Brnovich* threatens to tilt the scales yet again in favor of unlawful voter suppression, enabling an ongoing assault on our democracy and casting our nation back to a painful era of unequal citizenship. Damaging though it was, however, the majority’s opinion in *Brnovich* never questioned Section 2’s constitutionality or discounted Congress’s power to enforce the Fifteenth Amendment by enacting a robust, nationwide ban on racial discrimination in voting. It is entirely within this Congress’s power—no less today than it was in 1982—to reject the Supreme Court’s latest misreading of Section 2.

Voting access left to the whims of state lawmakers has proven that the scourge of voter suppression reaches far beyond the states and jurisdictions previously covered by the VRA. The proliferation of state anti-voting laws across the country demonstrates the urgent need for Congress to bring the VRA’s preclearance formula into the modern era, to reinstate federal oversight over discriminatory voting practices, to address the Court’s recent misinterpretation of Section 2’s vote-denial standards, and to strengthen and protect voting rights wherever suppression occurs. States have proven time and time again, that they are incapable of monitoring themselves and federal legislation is needed to protect voters.

Congress purposefully designed Section 5 to address our current crisis. Congress’s predecessors on both sides of the aisle and with the signature of presidents from both major political parties supported for nearly 50 years Section 5, a provision meant to address racial discrimination in voting and block any practices and procedures which may result in discrimination before they are implemented, elections are held, and irreversible harms to voters occur. This prophylactic function of Section 5 was the express intention of the 89th Congress in 1965, which expressly sought to prevent not only then-existing discriminatory voting schemes, but to also prevent the “ingenious methods” that might be devised to suppress votes in the future.<sup>97</sup>

The passage of the VRA was spurred by the grassroots activism of thousands across the country, and especially in the South, who faced down billy clubs, police dogs, and vitriol from white mobs in order to secure the unencumbered right to vote. It was the result of the tremendous sacrifice of those beaten on the Edmund Pettus Bridge, including the late Congressman John Lewis, the martyrdom of Medgar Evers, Jimmie Lee Jackson, Viola Gregg Liuzzo, Andrew Goodman, James Chaney and

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<sup>97</sup> U.S. Congress, House, Committee on the Judiciary *Voting Rights*, 89th Cong., 1st sess., 1965, Mar. 18–19, 23–25, Apr. 1, 1965.

Michael Schwerner and so many unnamed others<sup>98</sup> that proved crucial in ensuring that the federal government take seriously its duty to affirmatively enforce the right to the franchise. In short, the right to vote that we enjoy today was forged by courageous people who demanded change and demanded the protection and expansion of the franchise. The activists and protestors and organizers of today are carrying forward those torches of change, lit during the struggle for freedom from slavery and sustained during the Civil Rights Movement throughout the 1960s, to ensure that the next generation can exercise the right to vote as a tool for transformation.

It is the heroism of average Americans to speak out, protest and demand change when faced with injustice, that we see again today in the calls for federal legislation to protect the right to vote. It is the obligation of this generation of lawmakers to respond to their call and ensure that the hard-won gains of the past are not lost. People and institutions across the country have decried the onslaught of voting restrictions, from influential Black executives in corporate America, corporations like Coca Cola and Delta Airlines,<sup>99</sup> sports associations like Major League Baseball,<sup>100</sup> film industry icons,<sup>101</sup> religious leaders,<sup>102</sup> and more. In 2020, we saw thousands of people risk contracting the deadly COVID-19 virus in order to exercise their full rights as American citizens by voting.<sup>103</sup> The ability to participate

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<sup>98</sup> Marty Roney, *Remembering the Martyrs of Bloody Sunday*, USA Today (Mar. 7, 2015), <https://www.usatoday.com/story/news/nation/2015/03/03/bloody-sunday-martyrs/24344043/>; Deborah Barfield Berry, *“Bloody Sunday” pilgrimage to move through Miss.*, USA Today (Feb. 10, 2014), <https://www.usatoday.com/story/news/nation/2014/02/10/civil-rights-pilgrimage/5376225/>.

<sup>99</sup> Andrew Ross Sorkin & David Gelles, *Black Executives Call on Corporations to Fight Restrictive Voting Laws*, New York Times (March 31, 2021), <https://www.nytimes.com/2021/03/31/business/voting-rights-georgiacorporations.html>; David Gelles, *Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating ‘Crystal Clear’ Opposition*, New York Times (March 31, 2021), <https://www.nytimes.com/2021/03/31/business/delta-coca-colageorgia-voting-law.html>; Andrew Ross Sorkin & David Gelles, *Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain*, New York Times (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/business/ceoscorporate-america-voting-rights.html?smtyp=cur&smid=tw-nytimes>.

<sup>100</sup> Kevin Draper et al., *M.L.B. Pulls All-Star Game From Georgia in Response to Voting Law*, New York Times (Apr. 6, 2021), <https://www.nytimes.com/2021/04/02/us/politics/mlb-all-star-game-moved-atlanta-georgia.html>.

<sup>101</sup> Kimberly Chin, *Will Smith Movie Pulls Production Out of Georgia Over GOP Voting Law*, Wall Street Journal (Apr. 12, 2021), <https://www.wsj.com/articles/will-smith-movie-emancipation-pulls-production-out-of-georgia-overgop-voting-law-11618257076>.

<sup>102</sup> Lakisha Lemons, *Faith leaders fight back against what they call voter suppression bills*, Spectrum News 1 (Apr. 14, 2021), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/04/14/faith-leaders-fight-back-against-voter-suppression-laws->

<sup>103</sup> Jocelyn Stewart, *People Died So I Could Vote*, Time Magazine (Sep. 23, 2014) <https://time.com/3423102/people-died-so-icould-vote/>.



in civic life—to have a voice in choosing the elected officials whose decisions impact our lives, families, and communities—is at the core of citizenship.

Congress has the explicit constitutional duty to protect the right of every eligible person to vote, and to ensure that each vote counts. Congress’ power remains undiminished and, in fact, includes the power to impose prophylactic measures to combat discriminatory election laws and practices before they take effect.

The people call on Congress once again to use the power enshrined in the Constitution, and entrusted to this body, to ensure the franchise for all citizens and to build a 21<sup>st</sup> century democracy that is representative of, and responsive to, our growing and diverse nation. Congress must seize this moment to take courageous action. Indeed, it is the obligation of this Congress to continue to uphold the principles of democracy—and to continue the great tradition of perfecting our union by protecting the right to vote.

## **Conclusion**

Congress has the constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race today just as it did in 1965 and 1982. The VRA’s preclearance process provided a quick, efficient, and non-litigious way of addressing America’s pervasive and persistent problem of voting discrimination, and most importantly to address it *before* the harm of disenfranchisement occurred. This Congress should not retreat from establishing a new preclearance framework that reflects the current conditions of the nation. Nor should it fail to address the attempted weakening of Section 2 by the *Brnovich* decision.

The VRA was drafted to rid the country of discrimination in voting—not to freeze voting rights at a set moment in history or to reduce discrimination to a level tolerable by some and now considered the norm across the country. The denial or abridgment of the right to vote can never be fully remedied. As the Supreme Court once stated, “Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>104</sup> The preclearance framework of the VRA, backed up by Section 2, was established expressly to address such harms. It is past time for Congress to fulfill its constitutional duty to the American people by once again taking up the charge of eradicating racial discrimination in voting and by renewing its commitment to protecting and strengthening the fundamental right to vote.

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<sup>104</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).