



**Testimony of
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For

Hearing on “Restoring the Voting Rights Act: Combating Discriminatory Abuses”

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Introduction

The Voting Rights Act of 1965 (VRA) has been vital to the prevention of actual and threatened discrimination aimed at Asian Americans in national and local elections, and for increasing their access to the ballot. And while the VRA continues to protect the voting rights of Asian Americans, its efficacy has been curtailed by the harmful and short-sighted decision of the Supreme Court in *Shelby County v. Holder*, 570 U.S. 2 (2013) (*Shelby County*). This testimony will discuss the need to restore and strengthen the VRA through modernizing coverage determinations for Section 5 preclearance, including the importance of the complementary practice-based preclearance to protect Asian American voters. While Asian Americans are among the nation’s fastest growing groups and are quickly becoming a significant electoral force in jurisdictions across the country, they will not be able to maximize their political power without the full and meaningful protection of their voting rights.

Citizenship and the ability to vote are inextricably intertwined – without one, the other is impossible to achieve. And for the better part of America’s history, the franchise was denied to the Asian American community due to their inability to gain citizenship. Racist laws barring Asian Americans from entering the country, staying in the country or voting in the country, among other exclusionary laws, were often driven by fear of the “other” and the potential threat to the political livelihood of those in power. This is not only a problem of the past but one that rears its ugly head today, as evidenced by the ongoing stereotype of Asian Americans as “outsiders,” “aliens,” and “perpetual foreigners.” As the fastest growing racial or ethnic group for almost the last two decades, Asian Americans are becoming more politically visible and viable in new jurisdictions across the country, especially in nontraditional gateway cities.

With this growth is an increase in racial appeals against Asian American candidates and efforts to erect barriers to the ballot for Asian American voters to silence their growing political power.

Practice-based preclearance, in conjunction with a restored coverage formula, is critical to protecting the emerging political voice of Asian American voters. In targeting practices that have been used through history to silence the political voice of emerging minority communities as they reach critical mass and are able to impact the outcome of elections, practice-based preclearance will ensure that these practices are reviewed in areas where Asian Americans and other communities of color are particularly vulnerable. That is, when Asian Americans and other communities of color are reaching the point where they are perceived as threats to incumbent power structures and review will ensure that the practice being proposed is not discriminatory or harmful to the minority community.

Organizational Information

Asian Americans Advancing Justice – AAJC (Advancing Justice – AAJC) is a national 501 (c)(3) nonprofit founded in 1991 in Washington, D.C. Rooted in the dreams of immigrants and inspired by the promise of opportunity, Advancing Justice – AAJC advocates for an America in which all Americans can benefit equally from, and contribute to, the American dream. Our mission is to advance the civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. Advancing Justice – AAJC fights for our civil rights through education, litigation, and public policy advocacy and serves to empower our communities by bringing local and national constituencies together and ensuring Asian Americans are able to participate fully in our democracy. In particular, Advancing Justice – AAJC works to eliminate barriers to the participation of Asian Americans in our nation's political process. This includes working to defend and enforce the Voting Rights Act (VRA), improving election systems and providing analysis of Asian American electoral participation. AAJC also provides training and technical assistance to local groups on a wide range of issues that remove barriers to voting, such as implementation of federal voting statutes and enforcing the language assistance provisions of the VRA.

Advancing Justice – AAJC is a member of Asian Americans Advancing Justice (Advancing Justice), a national affiliation of five civil rights nonprofit organizations that joined together in 2013 to promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities. The Advancing Justice affiliation is comprised Advancing Justice – ALC located in San Francisco, Advancing Justice – Los Angeles, Advancing Justice – AAJC located in Washington, D.C., Advancing Justice – Chicago, and Advancing Justice – Atlanta.

Advancing Justice – AAJC also has its Community Partners Network, a collaboration of nearly 250 community-based organizations in 37 states and the District of Columbia, which helps to further our reach and strengthen our understanding of the communities we represent. Established in 1995, the Community Partners Network has accumulated more than 20 years of experience in coalition-building as well as providing training and technical assistance to local

groups on advocacy and community education efforts. Through this network, we work to increase regional and local capacity to elevate community voices nationwide. In turn, the network provides us insight into the issues facing our diverse community. The states in which we have Community Partners are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

Need to Restore Section 5 to Protect Asian American Voters

Section 5 of the VRA prohibits the implementation by covered jurisdictions of “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” without first receiving approval, or “preclearance,” from DOJ or the U.S. District Court for the District of Columbia.¹ This “geographic” or “history-based” preclearance system identified covered jurisdictions if a) the state or political subdivision of the state maintained a “test or device,” restricting the opportunity to register and vote, and b) less than 50 percent of persons of voting age were registered to vote or vote in presidential election of 1964 (this date was updated with each extension of the VRA).² Section 5 applies to all voting changes in covered jurisdictions, including redistricting, annexation of other territories or political subdivisions, and polling place changes. Voting changes with a discriminatory purpose or with a retrogressive effect (i.e., where the change puts minorities in a worse position than if the change did not occur) will not be pre-cleared and the submitting jurisdiction would be prohibited from adopting the voting change.

In enacting the VRA in 1965, Congress recognized that previous efforts to litigate discriminatory voting practices were limited in their effectiveness as particularly recalcitrant jurisdictions would simply replace the struck-down discriminatory practice with another, newer discriminatory practice. Responding to the persistent nature of discriminatory schemes in voting, Congress developed a mechanism in the VRA to provide a “check” on whether proposed voting changes by particularly bad actors would be problematic for minority voters – Section 5 preclearance. This infrastructure (preclearance) has been critical to a) prevent discriminatory voting practices from going into effect, b) provide notice to the community about potential discriminatory changes and c) provide a cost-effective and swift mechanism to determine whether a proposed voting change should be approved. As a result, voting became more accessible to all communities.

¹ 52 U.S.C. § 10304.

² The following States are covered by Section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Only certain counties or towns in the following states are covered under Section 5: California, Florida, Michigan, New York, North Carolina, and South Dakota. It must be noted, however, that even if only a part of a jurisdiction is covered by Section 5, congressional and state legislative redistricting plans for the entire state must be submitted for review. For a detailed listing of counties and towns covered, please visit http://www.justice.gov/crt/about/vot/sec_5/covered.php. See also, <https://www.justice.gov/crt/about-section-5-voting-rights-act>.

Unfortunately, the U.S. Supreme Court weakened the VRA in *Shelby County*. The sharply divided Court ruled that the formula used to determine Section 5 jurisdictions was based on “decades-old data and eradicated practices,” despite the extensive Congressional record confirming that these areas continued committing acts of voting discrimination.³ Thus, while the Court did not invalidate Section 5, it rendered it useless by invalidating the formula that determined which jurisdictions must submit voting changes for preclearance. But at the same time, the Court recognized that “no one doubts” that voting discrimination still exists and invited Congress to pass legislation with a modernized formula.⁴

Aftermath of Shelby County v. Holder Decision

Since the Court invalidated the key enforcement provision of the VRA in 2013, voting discrimination is harder to stop. In states, counties, and cities across the country, legislators pushed through laws designed to make it harder for minorities to vote. For example, in 2013, mere months after the *Shelby County* decision, North Carolina – where the Asian American population increased by 82.7% between 2010 and 2020 – passed H.B. 589. The legislation restricted voting through a ban on paid voter registration drives; eliminated same-day voter registration; allowed voters to be challenged by any registered voter of the county in which they vote, rather than just their precinct; reduced early voting by a week; authorized vigilante poll observers with expanded range of interference; expanded the scope of who may examine registration records and challenge voters; repealed out-of-precinct voting; eliminated the flexibility in opening early voting sites at different hours within a county; and curtailed satellite polling sites for the elderly or voters with disabilities. In striking down the law, the Fourth Circuit found that the legislature purposefully and selectively decided to attack specific election laws that benefit African American voters in order to impede their political participation. In fact, the court noted that “the new provisions target African Americans with almost surgical precision” and “impose cures for problems that did not exist.”⁵ If Section 5 of the VRA was in full force, this litigation would not have been necessary. Indeed, one state senator noted that it was because of the Court’s decision in *Shelby County* that the legislature was free to “go with the full bill,” indicating his full awareness that the bill would never have received approval under the full protections of the VRA. In 2016, 14 states, including Alabama, Arizona, Mississippi, South Carolina, Texas, and Virginia—which were previously covered in full or in part by Section 5—passed new voting restrictions that included strict photo ID requirements and voter registration restrictions in place for the first time in a presidential election.⁶

³ *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2627 (2013).

⁴ *Id.* at 2619.

⁵ Robert Barnes and Ann E. Marimow, *Appeals Court Strikes Down North Carolina’s Voter-ID Law*, Washington Post, July 29, 2016, https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583_story.html?utm_term=.8e86e5a8273c. See also Complaint, *North Carolina State Conference of the NAACP et al. v. McCrory et al.*, No. 1:13-cv-658 (M.D.N.C. Aug. 12, 2013); Complaint, *League of Women Voters et al v. North Carolina et al.*, No. 1:13-cv-00660 (M.D.N.C. Aug. 12, 2013); and, Complaint, *U.S. v. The State of North Carolina*, No. 13-cv-861 (M.D.N.C. Sept. 30, 2013).

⁶ Brennan Center for Justice, Webpage on New Voting Restrictions in America, https://www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf.

More recently, in March 2021, Georgia Governor Brian Kemp signed into law Georgia Senate Bill 202 (“SB 202”), a bill that was introduced in the Georgia General Assembly just 35 days earlier. Several proponents of SB 202 explained that the intent of the bill was to reduce Georgian voter turnout, especially in light of the fact that a record number of votes were casted by Georgians in the 2020 General Election and 2021 Runoff Elections. Georgia achieved this unprecedented turnout, in part, by affording its voters several options for exercising their constitutional right to vote, not only in person on Election Day, but also through absentee-by-mail ballots that could be returned through the postal system or deposited in secure drop boxes. SB 202, which was rushed through in an erratic and non-transparent legislative process, eliminated many of these options and made accessing the ballot more difficult.

Advancing Justice – AAJC, Advancing Justice–Atlanta, and Advancing Justice – ALC brought a lawsuit challenged certain provisions of SB 202 under Section 2 of the VRA, as well as the First, Fourteenth, and Fifteenth Amendments to the United States Constitution.⁷ The challenged provisions include decreasing the time frame to request and receive absentee-by-mail ballots, limiting access to secure drop boxes, prohibiting election officials from proactively mailing absentee-by-mail ballot applications, impose additional identification requirements for absentee-by-mail ballots, and criminalizing certain return of completed ballot applications. The lawsuit contends that such voting restrictions intentionally discriminate against communities of color, specifically voting-eligible Asian American and Pacific Islander Georgians, disproportionately and negatively impact the voting ability of voting-eligible Asian American and Pacific Islander Georgians, and impose severe and unjustified burdens on the fundamental right to vote—all in violation of federal law.

Asian Americans and Pacific Islanders in Georgia vote absentee-by-mail at a substantially higher rate than the average voter in the state. During the 2020 General Election, approximately 40% of Asian American and Pacific Islander voters used absentee-by-mail voting, compared to about 26% of all Georgian voters on average. And during the 2021 Runoff Elections, approximately 34% of Asian American and Pacific Islander voters voted absentee-by-mail, compared to about 24% of all Georgian voters on average. As these statistics reflect, absentee-by-mail ballots facilitate greater Asian American and Pacific Islander participation in Georgia’s elections. The Asian American community has a higher proportion of foreign-born residents compared to other racial groups in Georgia, and limited English proficiency (LEP) remains common in the Georgia Asian American community. For context, more than one in five Asian American and Pacific Islander households in Georgia are LEP households. And while Asian Americans make up less than five percent of Georgia’s total population, they form approximately one quarter (24.39%) of the state’s LEP population. Newly naturalized citizens, first time voters, and LEP voters often need more time to review their ballot materials and/or seek assistance from

⁷ See, Press Release, Asian American Advocacy Groups File Lawsuit to Ensure Freedom to Vote, Mar. 25, 2021, <https://www.advancingjustice-atlanta.org/news/freedomtovote>; First Amended Complaint, *Asian Americans Advancing Justice – Atlanta v. Raffensperger*, No. 1:21-cv-1333 (N.D. Ga. Apr. 27, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.gand.288705/gov.uscourts.gand.288705.27.0.pdf> (First Amended Complaint Advancing Justice SB 202).

persons authorized under Georgia law. Absentee-by-mail voting allows these voters crucial time and resources that may be less available or accessible through in-person voting.

Further burdening the right of Georgian Asian Americans and Pacific Islanders is the reduced access to secure drop boxes. Before SB 202 was enacted, Georgia voters enjoyed the ability to safely and securely cast their ballots in one of 330 drop boxes in Georgia, most of which were freestanding outside of a building and often accessible 24 hours a day. Moreover, drop box locations were permitted to open as early as 49 days before Election Day, and did not close until 7:00 p.m. on Election Day. As a result of SB 202, the number of drop boxes will be reduced sharply. For example, in Gwinnett County, whose population is approximately 50% non-white and 12.5% Asian American and Pacific Islander, there were 23 ballot drop boxes during the 2020 election cycle. Under SB 202, that number will dwindle; likely, only six drop boxes will be permitted for a county of over 936,000 residents. Similarly, Fulton County, a county with over one million residents and the second largest Asian American and Pacific Islander population in the state, offered 36 drop boxes during the 2020 election cycle. But SB 202 would force Fulton County to cut the number of drop boxes to as few as nine. Combined with a drastic reduction in the hours these drop boxes will be made available, the reduction of drop boxes will harm Asian American and Pacific Islander voters in Georgia who will already face time constraints to navigate a further-complicated absentee-by-mail ballot system.

The effect of these restrictions on Asian American and Pacific Islander voters, in addition to other restrictions in SB 2020 that disproportionately affect communities of color, would not have passed muster under a Section 5 review, as voters of color would be worse off as a result of this voting change. Instead of a resource-efficient process to assess the proposed voting change (under preclearance), there are currently eight lawsuits challenging these provisions and many voters who will likely be harmed while these lawsuits work their way through the legal process.⁸

Ongoing Demographic Changes Coupled with Discrimination against Asian Americans Highlight the Need for Restoring and Modernizing the VRA in response to Shelby County v. Holder

Laws denying Asian Americans the opportunity to vote because of their inability to enter the country or naturalize continued until the mid-20th century, with the bar on Asian Americans from becoming United States citizens by federal policy lasting until 1943 and the racial criteria for naturalization remaining until 1952.⁹ Additionally, it was not until the passage of the 1965 Immigration Act and the end of race-based immigration quotas that Asian Americans were able to immigrate to the U.S. in large numbers. Since 1965, Asian American communities in the U.S.

⁸ See, Brennan Center, Voting Rights Litigation Tracker 2021: Georgia, <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021#georgia>.

⁹ See Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (prohibiting immigration of Chinese laborers; repealed 1943); Immigration Act of 1917, ch. 29, 39 Stat. 874, 874-98, and Immigration Act of 1924, ch. 190, 43 Stat. 153 (banning immigration from almost all countries in the Asia-Pacific region; repealed 1952); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. Rev. 405, 415 (2005).

have grown dramatically. According to Census 2020, Asian Americans continued to be among the nation's fastest growing racial group, with a national growth rate of 45.5% between 2000 and 2010; growing to over 24.0 million Asian Americans and making up 7.2% of the total population.¹⁰

Often viewed as a monolithic group, Asian Americans are exceedingly diverse with different needs. The previous decade showed the country's fastest growing Asian American ethnic groups as South Asian, with the Bangladeshi and Pakistani American populations doubling in size between 2000 and 2010.¹¹ Between 2010 and 2019, eleven Asian groups more than doubled in size, with some of the smaller groups growing the fastest.¹² Chinese Americans continue to be the largest Asian American ethnic group, numbering nearly 5.4 million nationwide, followed in size by Indian, Filipino, Vietnamese, and Korean Americans in 2019.¹³ In fact, these five groups plus Japanese accounted for 85% of all Asian Americans in 2019.¹⁴

Asian Americans are also geographically diverse and are growing fastest in non-traditional gateway communities. Asian American populations in Nevada, Arizona, North Carolina, and Georgia were the fastest growing nationwide between 2000 and 2010.¹⁵ Since 2010, the top 10 fastest growing Asian American populations were in North Dakota, South Dakota, Montana, Idaho, District of Columbia, Nebraska, Utah, Indiana, North Carolina, and South Carolina, with growth rates ranging between 81.3% to 137.2%.¹⁶ California had an Asian population of over 7.0 million in 2020, by far the nation's largest. It was followed by New York (2.2 million), Texas (1.8 million), New Jersey (1.0 million) and Washington (almost 940,000).¹⁷

¹⁰ Author's calculation based on U.S. Census Bureau Redistricting Data (PL 94-171) Table P1: Race from the 2010 (national at <https://data.census.gov/cedsci/table?q=table%20p1&tid=DECENNIALPLNAT2010.P1> and states at <https://data.census.gov/cedsci/table?g=0100000US%240400000&y=2010&d=DEC%20Redistricting%20Data%20%288PL%2094-171%29&tid=DECENNIALPL2010.P1&hidePreview=true> and) and the 2020 (<https://data.census.gov/cedsci/table?q=redistricting&g=0100000US,%240400000&tid=DECENNIALPL2020.P1&hidePreview=true>).

¹¹ Asian Pacific American Legal Center & Asian American Justice Center, *A Community of Contrasts: Asian Americans in the United States: 2011*, 9, http://www.advancingjustice.org/pdf/Community_of_Contrast.pdf ("Community of Contrasts") (Note: Figures are for the inclusive population, single race and multi-race combined, and are not exclusive of Hispanic origin, except for white, which is single race, non-Hispanic).

¹² Abby Budiman & Neil G. Ruiz, *Key facts about Asian Americans, a diverse and growing population*, Pew Research Center (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/> ("Pew Key Facts").

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Community of Contrasts at 8.

¹⁶ Author's calculation based on U.S. Census Bureau Redistricting Data (PL 94-171) Table P1: Race from the 2010 (national at <https://data.census.gov/cedsci/table?q=table%20p1&tid=DECENNIALPLNAT2010.P1> and states at <https://data.census.gov/cedsci/table?g=0100000US%240400000&y=2010&d=DEC%20Redistricting%20Data%20%288PL%2094-171%29&tid=DECENNIALPL2010.P1&hidePreview=true> and) and the 2020 (<https://data.census.gov/cedsci/table?q=redistricting&g=0100000US,%240400000&tid=DECENNIALPL2020.P1&hidePreview=true>).

¹⁷ Pew Key Facts.

A similar increase among Asian American voters can be seen. The number of eligible Asian American voters grew by almost 150% from almost five million in 2000 to over 11.5 million in 2020 (as compared to a growth rate of 24% for the total population over that same time period).¹⁸ The growth rate of eligible Asian Americans registering to vote (200%; from almost 2.5 million to over 7.3 million registered) and voting (236%; from just over 2 million to almost 7 million who voted) was even greater during that same time period.¹⁹ The 2020 election showed over 1.2 million additional eligible voters from the previous presidential election, and an even higher increase in Asian Americans who actually registered and voted.²⁰ This represents a 27.1% increase in registered Asian Americans and 36.4% increase in Asian Americans who voted between the 2016 and 2020 presidential elections.²¹ This growth will continue, with Asian American and Pacific Islander voters slated to make up five percent of the national electorate by 2025 and ten percent of the national electorate by 2044.²²

The ongoing and rapid growth of the Asian American community, and their political salience, combined with the historical and ongoing discrimination against Asian Americans to heighten the need for a responsive legislative solution in light of the *Shelby County v. Holder*. In particular, discrimination against Asian Americans has long been rooted in the false stereotype of Asian Americans as “outsiders,” “aliens,” and “perpetual foreigners.”²³ Based on this perception, Asian Americans were denied rights held by U.S. citizens, including the ability to vote for most of the country’s existence, despite being a presence since the mid-1800s.

The history of the discrimination against Asian Americans begins in the mid-19th century, with the initial migration to the U.S. of Chinese workers to work in the gold mines, the agricultural and garment industries, and as laborers building railroads on the west coast.²⁴ The end of the

¹⁸ Author’s calculations based on U.S. Census Bureau data https://www2.census.gov/programs-surveys/cps/tables/p20/585/table02_5.xlsx (2020 data points) and <https://www2.census.gov/programs-surveys/cps/tables/p20/542/tab04b.xls> (2000 data points).

¹⁹ *Id.*

²⁰ Author’s calculations of U.S. Census Bureau data available on voter participation in federal elections through its Current Population Survey.

²¹ *Id.*

²² Karthick Ramakrishnan & Farah Z. Ahmad, State of Asian Americans and Pacific Islanders, Center for American Progress and AAPI Data (2014), <http://ampr.gs/AAPIREports2014>.

²³ See, e.g., Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 *Pol. & Soc’y* 105, 108-16 (1999) (describing history of whites perceiving Asian Americans as foreign and therefore politically ostracizing them). Racial stereotyping of Asian Americans reinforces an image of Asian Americans as “different,” “foreign,” and the “enemy,” leading to stigmatization of Asian Americans, heightened racial tension, and increased discrimination. Spencer K. Turnbull, Comment, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 *UCLA Asian Pac. Am. L.J.* 72, 75 (2001); Terri Yuh-lin Chen, Comment, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 *Asian L.J.* 69, 72, 74-75 (2000); Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 *Hastings Women’s L.J.* 165, 181 (1995); Note, *Racial Violence Against Asian Americans*, 106 *Harv. L. Rev.* 1926, 1930-32 (1993); see also Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 *J. Personality & Soc. Psychol.* 447 (2005) (documenting empirical evidence of implicit beliefs that Asian Americans are not “American”).

²⁴ See Office of the Historian, *Chinese Immigration and the Chinese Exclusion Acts*, <https://history.state.gov/milestones/1866-1898/chinese-immigration> (“Office of the Historian”).

19th century marked the rise in anti-Chinese sentiment as Chinese immigrants were scapegoated for the lack of economic opportunity.²⁵ This scapegoating resulted in the 1875 Page Act, which barred immigrants deemed as “undesirable” and primarily targeted Asian immigrants.²⁶ Rooted in anti-Asian sentiment, the bill intended “to stop the flow of the ‘yellow peril’ to American shores.”²⁷

The Senate then passed the Chinese Exclusion Act and its progeny to deter immigration not only from “undesirables,” but from *all* new Chinese immigrants. The Chinese Exclusion Act—the first U.S. immigration law to bar an entire ethnic group—effectively prohibited Chinese immigrants to the U.S. for nearly 60 years.²⁸ The Act also barred all persons of Chinese descent from gaining citizenship.²⁹ The Geary Act of 1892 extended the Chinese Exclusion Act of 1882 for another ten years.³⁰ This bill singled out Chinese individuals, requiring them to obtain “certificates of residence,” and denied them the right to be released on bail upon application for a writ of habeas corpus. Chinese immigrants also could not bear witness in court.³¹ Instead, only a “credible white witness” could testify for them.³² Although economic security was touted as a reason for the Chinese Exclusion Act, the Act fit within a larger anti-Chinese movement intended to advance a racist agenda for white purity threatened by Chinese immigration.³³ In 2011, the Senate introduced and passed a resolution recognizing the discriminatory nature of the Chinese Exclusion Act and other laws against those of Chinese decent in America.³⁴

Chinese exclusionary laws paved the way for future immigration laws rooted in anti-Asian sentiment, and the Supreme Court issued harmful precedents by repeatedly upholding challenges to discriminatory laws against Asian immigrants and its progeny, establishing Congress’ plenary power on immigration matters.³⁵ Later legislation such as the Naturalization Act of 1906,³⁶ which allowed only “free white persons” and “persons of African nativity or persons of African descent” to naturalize, also survived constitutional challenges from immigrants seeking to overturn discriminatory policies against Asian immigrants, with two key U.S. Supreme Court cases – *Ozawa v. U.S.* (1922) and *U.S. v. Thind* (1923) – holding that Asian

²⁵ See George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875-1882*, Am. Ethnic Hist. J. 28, 28–46. (1986), https://www.jstor.org/stable/27500484?read-now=1&seq=1#page_scan_tab_contents (“Forbidden Families”).

²⁶ 18 Stat. 477, 43 Cong. Ch. 141.

²⁷ See *Forbidden Families* at 29, 28–46.

²⁸ 22 Stat. 58, 47 Cong. Ch. 126.

²⁹ *Id.*

³⁰ Pub. L. No. 52-60, 27 Stat. 25.

³¹ Maureen Fan, *An Immigrant’s Story: Against a Wall of Exclusion*, S.F. Chron. (Oct. 4, 2019), <https://www.sfchronicle.com/opinion/article/An-immigrant-s-story-Against-a-wall-of-14494875.php>.

³² *Id.*

³³ Office of the Historian.

³⁴ S. Res. 201, 112th Cong. (2011) (enacted), <https://www.congress.gov/bill/112th-congress/senate-resolution/201/text>.

³⁵ See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

³⁶ Pub. L. 59-338, 34 Stat. 596.

immigrants were not free white people and therefore, ineligible for naturalized citizenship.³⁷ The Immigration Act of 1924³⁸ expanded the reach of the Chinese Exclusion Act to prevent citizens from all Asian nations from immigrating to the United States, and these exclusionary laws remained in effect until they were repealed by the Magnuson Act in 1943.³⁹ Exclusionary laws changed the face of America. As a result, by 1960, only 877,934 Asian Americans lived in the United States.⁴⁰ That figure represented a mere half of one percent of the American population.⁴¹

Just over a year before the Magnuson Act was signed into law, President Franklin D. Roosevelt issued Executive Order 9066, which authorized the removal of people of Japanese ancestry from their homes and communities in the interest of “national security.” U.S. military leaders, without cause and with fabricated intelligence, feared that American citizens of Japanese descent would execute acts of sabotage against the government. Despite never having been accused of any crime and without trial or representation, approximately 120,000 U.S. residents of Japanese ancestry, half of whom were children, were incarcerated in federal detention. As a result, about 2,000 people died in incarceration from a series of causes, including infectious diseases, bad sanitation, or even shooting by guards.⁴² And more than 5,000 American babies were born in detention.⁴³ The Supreme Court upheld the laws and curfews implementing Executive Order 9066 against U.S. citizens of Japanese descent in a shameful series of opinions. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943). Although the Supreme Court ultimately overruled *Korematsu*, the Court simultaneously upheld the Muslim Ban, despite the efforts of the Fred Korematsu Institute, Gordon Hirabayashi, Minoru Yasui, and their descendants against injustice.⁴⁴ The legacy of exclusionary laws against Asian Americans and Japanese incarceration still impacts today’s policies, such as the Muslim Ban; modern detention imprisoning of families, including children; and the targeting and profiling of Chinese and Asian Americans and immigrants.⁴⁵

³⁷ *See, e.g., Ozawa v. United States*, 260 U.S. 178, 198 (1922) (Ozawa, a Japanese immigrant who had lived in the U.S. for over 20 years was “clearly ineligible for citizenship” because he “is clearly of a race which is not Caucasian”); *U.S. v. Thind*, 261 U.S. 204 (1923) (establishing the cancellation of an Indian national’s US citizenship due to the fact that he was not a “free white person” as commonly understood).

³⁸ Pub. L. 68-139, 43 Stat. 153.

³⁹ Pub. L. 78-199, 57 Stat. 600.

⁴⁰ Asian Americans Advancing Justice, *Inside the Numbers: How Immigration Shapes Asian American and Pacific Islander communities* 20 (2019), https://www.advancingjustice-aaajc.org/sites/default/files/2019-06/1153_AAJC_Immigration_Final_Pages_LR-compressed.pdf.

⁴¹ *Id.*

⁴² Gisela Perez Kusakawa, *The Korematsu Legacy: “Stand up for what is right!”*, AAJC (Jan. 30, 2020), <https://medium.com/advancing-justice-aaajc/the-korematsu-legacy-stand-up-for-what-is-right-4a19c5af491d>.

⁴³ *Id.*

⁴⁴ Karen Korematsu, *How the Supreme Court Replaced One Injustice with Another*, N.Y. Times (June 27, 2018), <https://www.nytimes.com/2018/06/27/opinion/supreme-court-travel-ban-korematsu-japanese-internment.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>.

⁴⁵ Asian Americans were also subject to other discriminatory laws during this time period. They were removed from their homes and confined to areas set aside for slaughterhouses and other businesses thought prejudicial to

Today, we see that the racist sentiments towards Asian Americans is not a passing fad but a continuing reality, fueled in recent years by a growing xenophobic and racist backlash against immigrants.⁴⁶ Numerous hate crimes have been directed against Asian Americans either because of their minority group status or because they are perceived as unwanted immigrants.⁴⁷ These attacks have grown exponentially with the COVID-19 pandemic, with racist harassment and violence directed toward Asian Americans who are wrongly blamed for the COVID-19 pandemic.⁴⁸ The current wave of anti-Asian racism and hate is not a new phenomenon but rather a part of the deep structural racism that has long impacted communities of color, and comes on the heels of years of attacks on immigrant communities by the Trump administration. Anti-Asian racism has manifested itself at many points throughout U.S. history, including with the “Yellow Peril” and the Chinese Exclusion Act of 1882; the incarceration of over 120,000 Japanese Americans during World War II; the murder of Vincent Chin in 1982 at the height of trade tensions with Japan, and the scapegoating and violence directed against Arab, Middle Eastern, Muslim, and South Asian communities after 9/11.

Practice-Based Preclearance Addresses Need to Modernize the VRA to Address Emerging and Growing Communities

Because of the changing demographics of this country, a fully restored and modernized VRA is needed more than ever.⁴⁹ A legislative solution to the *Shelby County* decision must include both a substitute coverage formula for jurisdictions based on a history of voting discrimination and a

public health or comfort. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (describing San Francisco ordinance). They were denied the right to own land and related real property rights. See, e.g., *Webb v. O’Brien*, 263 U.S. 313 (1923) (upholding California Alien Land Law prohibiting land rights for “aliens ineligible for citizenship”); *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding similar Alien Land Law in Washington); see also Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. Rev. 37 (1998) (describing the history of Alien Land Laws, which, while facially race-neutral, were passed in response to Japanese immigrants competing for agricultural land); see also *Oyama v. California*, 332 U.S. 633, 662 (1948) (Murphy, J., concurring) (noting that California’s Alien Land Law “was designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning or using agricultural land solely because he is a Japanese alien”). They faced a number of other discriminatory laws ranging from foreign miner taxes, directed at Chinese gold miners, to anti-Asian business regulations. See Sucheng Chan, *Asian Americans: An Interpretative History* 46-47 (1991). Both immigrant and native-born Asian Americans also experienced pervasive discrimination in everyday life. *People v. Brady*, 40 Cal. 198, 207 (1870) (upholding law providing that “No Indian. . . or Mongolian or Chinese, shall be permitted to give evidence in favor of, or against, any white man” against Fourteenth Amendment challenge); see also *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding segregation of Asian schoolchildren).

⁴⁶ See U.S. Dep’t of Justice, *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later*, at 4 (Oct. 19, 2011) (noting that the FBI reported a 1,600 percent increase in anti-Muslim hate crime incidents in 2001), http://www.justice.gov/crt/publications/post911/post911summit_report_2012-04.pdf.

⁴⁷ See, e.g., *Id.*, at 7-9 (discussing numerous incidents of post-9/11 hate crimes prosecuted by the DOJ).

⁴⁸ Since February 2020, almost 10,000 hate incidents targeting Asian Americans have been reported to Stop AAPI Hate (<https://stopaapihate.org/>) and the Asian American Advancing Justice affiliation’s Stand Against Hatred reporting site (<https://www.standagainsthatered.org/>) since the beginning of the pandemic.

⁴⁹ A fully restored and modernized VRA is one that would also address the disappointing Supreme Court decision in *Brnovich v. DNC*. See, Asian Americans Advancing Justice – AAJC, Press Release, Asian Americans Advancing Justice – AAJC Calls On Congress to Protect Freedom to Vote Following Supreme Court Decision in *Brnovich v. DNC*, July 1, 2021, <https://advancingjustice-aaic.org/press-release/advancing-justice-aaic-brnovich>.

mechanism that also addresses the needs of emerging communities of color that face discrimination aimed to silence their political influence by those currently in power. While Section 5 preclearance has served a powerful role in addressing voting discrimination conducted by persistent and perpetually bad actors with a history of engaging in voting discrimination, a history-based coverage formula alone is not enough to protect the voting rights of emerging minority populations. The reality is that more and more of the most rapidly growing racial, ethnic, and language-minority communities are found in cities and states where they were not previously in significant numbers.⁵⁰

History has borne out that “the pockets of most determined efforts to restrict minority voting rights were areas of the country where racial/ethnic groups made up a larger than average share of the population” because that is when “they will be more likely to have substantial influence on election outcomes.”⁵¹ An assessment by Professor Luis Fraga in testimony before the House Judiciary Committee shows that the U.S. has a long history of restricting the vote to specific segments of the population across the nation, which were often identified as a group based on race, ethnicity, national origin, and gender.⁵² The effort to exclude certain groups of voters was tied to a political advantage by other voters, often those in power. This was often resulted in “the expansion of the franchise to broader segments of the population occur[ing] simultaneously with both the maintenance of past restrictions for other segments of the population and new restrictions for growing segments of the population.”⁵³

Racial tensions often occur when groups of minorities grow rapidly in an area and where there is an increase in political relevance of that minority community, such as Asian American communities across the country.⁵⁴ This can lead to fear of and resentment toward Asian

⁵⁰ See U.S. Census Bureau, *America Counts Stories, 2020 Census Illuminates Racial and Ethnic Composition of the Country*, <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>.

⁵¹ Hearing on “The Need to Enhance the Voting Rights Act: Practice-Based Coverage” Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Judiciary Comm., 117th Cong. (July 27, 2021) (prepared statement of Professor Bernard L. Fraga) (“B. Fraga Testimony”), <http://docs.house.gov/meetings/JU/JU10/20210727/113962/HHRG-117-JU10-Wstate-FragaB-20210727.pdf>.

⁵² Hearing on “The Need to Enhance the Voting Rights Act: Practice-Based Coverage” Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Judiciary Comm., 117th Cong. (July 27, 2021) (prepared statement of Professor Luis Ricardo Fraga) (“L. Fraga Testimony”), <http://docs.house.gov/meetings/JU/JU10/20210727/113962/HHRG-117-JU10-Wstate-FragaL-20210727.pdf> and <http://docs.house.gov/meetings/JU/JU10/20210727/113962/HHRG-117-JU10-Wstate-FragaL-20210727-SD001.pdf>.

⁵³ B. Fraga Testimony.

⁵⁴ See generally Toni Monkovic, *Why Donald Trump Has Done Worse in Mostly White States*, *New York Times*, Mar. 8, 2016, http://www.nytimes.com/2016/03/09/upshot/why-donald-trump-has-done-worse-in-mostly-white-states.html?_r=0 (“Political scientists have written about the importance of tipping points in ethnic strife or resentment around the globe. It occurs when one group grows big enough to potentially alter the power hierarchy.”); see also Audrey Singer, Jill H. Wilson & Brooke DeRenzi, *Metropolitan Policy Program at Brookings, Immigrants, Politics, and Local Response in Suburban Washington* (2009), https://www.brookings.edu/wp-content/uploads/2016/06/0225_immigration_singer.pdf (noting that longtime residents of Prince William County, Virginia, perceived that their quality of life was diminishing as Latinos and other minorities settled in their

Americans by those in power, which can then result in hampering Asian Americans exercising their right to vote free of harassment and discrimination. Discriminatory attitudes toward Asian Americans and the aforementioned “perpetual foreigner” stereotype have been squarely embedded in the political process. Insidious manifestations of the stereotype can be found in the verbal attacks levied against Asian American candidates and voters, negative political ads that use the misconception of “Asia” as an enemy to the U.S., and manipulation of images of candidates in response to concerns about the growing political influence and opportunities of the community by attempting to trigger negative stereotypes of minority candidates. The following are examples of these types of manifestations:

- In April 2005, in Trenton, New Jersey, radio hosts used racial slurs and spoke in mock Asian gibberish during an on-air radio show. The hosts demeaned a Korean American mayoral candidate and made various other derogatory remarks. One of the hosts, Craig Carton, said:

Would you really vote for someone named Jun Choi [said in fast-paced, high-pitched, squeaky voice]? ... And here’s the bottom line. no specific minority group or foreign group should ever dictate the outcome of an American election. I don’t care if the Chinese population in Edison has quadrupled in the last year, Chinese, should never dictate the outcome of an election, Americans should... And it’s offensive to me... not that I have anything against uh Asians... I really don’t... I don’t like the fact that they crowd the goddamn blackjack tables in Atlantic City with their little chain smoking and little pocket protectors.⁵⁵

- In November 2005, a candidate of South Asian descent, Tom Abraham, running for City Council Seat 4 in Orange City, Florida was mocked by his opponent for his accent at a community forum. His opponent, Dan Sherrill, claimed that he could not understand him and was quoted by the *Orlando Sentinel* as saying, “I’m usually not prejudiced, but I don’t want an Indian in my government. As far as I know, he could be a nice guy, but these kind of people get embedded over here. You remember 9/11.” The *St. Petersburg*

neighborhoods); James Angelos, *The Great Divide*, New York Times, Feb. 20, 2009, http://www.nytimes.com/2009/02/22/nyregion/thecity/22froz.html?_r=3&pagewanted=1 (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing); Ramona E. Romero & Cristóbal Joshua Alex, *Immigrants Becoming Targets of Attacks*, National Campaign to Restore Civil Rights, Jan. 26, 2009, <http://rollback.typepad.com/campaign/2009/01/it-has-happened-again---in-early-december-less-than-a-month-after-seven-teenagers-brutally-attacked-and-killed-marcelo-luc.html> (describing the rise in anti-Latino violence where the immigration debate is heated in New York, Pennsylvania, Texas, and Virginia); Sara Lin, *An Ethnic Shift Is in Store*, Los Angeles Times, Apr. 12, 2007, <http://articles.latimes.com/2007/apr/12/local/me-chinohills12> (describing protest of Chino Hills residents to Asian market opening in their community where 39% of residents were Asian).

⁵⁵ Hearing on H.R. 9 Before the H. Subcomm. on the Const. of the H. Judiciary Comm., 109th Cong. 40 at 4 (2006) (prepared statement of K. Narasaki).

Times further reported that Sherrill said that voters wouldn't support Abraham if they saw and heard him.⁵⁶

- In August 2006, former Senator George Allen, while on the campaign trail, made the following announcement – before a predominantly Caucasian audience – about a 20-year-old South Asian staffer working for his opponent: “Let’s give a warm welcome to Macaca, here. Welcome to America and the real world of Virginia.” The term “macaca” is a racial slur in some parts of the world. Allen’s comments implied that the South Asian staffer, who was born and raised in Virginia, did not belong in America because of his appearance and ethnic background.⁵⁷
- In June 2010, State Senator Jake Knotts described South Carolina State Representative Nikki Haley, an Indian American who was running in the state’s gubernatorial race, as “[a] f---ing raghead... [w]e got a raghead in Washington; we don’t need one in South Carolina... [s]he’s a raghead that’s ashamed of her religion trying to hide it behind being Methodist for political reasons.” Knotts further stated he believed Haley had been set up by a network of Sikhs and was programmed to run for governor of South Carolina by outside influences in foreign countries.⁵⁸

These racist attitudes continue unabated over the last several election cycles. For example, during the 2017 local and statewide elections in New Jersey, Asian American candidates were targets of racist propaganda. *First*, in Edison, New Jersey, two school board candidates, Jerry Shi and Falguni Patel were targeted with anti-immigrant mailers that said "Make Edison Great Again" and calling for their deportation.⁵⁹ The mailers said that "[t]he Chinese and Indians are taking over our town," and "Chinese school! Indian school! Cricket fields! Enough is enough."⁶⁰ In Hoboken, New Jersey, Sikh mayoral candidate, Ravi Bhalla was targeted with racist flyers placed on car windshields in Hoboken with the message "Don't let TERRORISM take over our town!" above his picture.⁶¹ In 2018, the New Jersey Republican Party distributed campaign mailers about current Congressman Andy Kim (NJ-03), who was running as a challenger to then-Rep. Tom MacArthur, with the words “Something Is Real Fishy about Andy Kim,” in a typeface called Chop Suey with a picture of a dead fish on ice. In July 2021, Congressman Kim was again targeted in a video made by Republican challenger Tricia Flanigan, in which she says about Congressman Kim, “He doesn’t represent our interests. He is not one of us.” Congressman Kim responded that such words were deliberately used against him as an Asian American, and that

⁵⁶ S. Asian Americans Leading Together, *From Macacas to Turban Toppers: The Rise in Xenophobic and Racist Rhetoric in American Political Discourse* at 21 (2010), http://saalt.org/wp-content/uploads/2012/09/From-Macacas-to-Turban-Toppers-Report.small_.pdf (“SAALT Report”).

⁵⁷ *Id.* at 17.

⁵⁸ SAALT Report at 19.

⁵⁹ Amy B Wang, ‘DEPORT’: Racist campaign mailers target Asian school board candidates, *Washington Post*, Nov. 2, 2017, https://www.washingtonpost.com/news/education/wp/2017/11/02/deport-racist-campaign-mailers-target-asian-school-board-candidates/?utm_term=.c84f7d1ab7a2.

⁶⁰ *Id.*

⁶¹ Alyana Alfaro, *Racist Campaign Literature Surfaces in New Jersey*, *Observer*, Nov. 6, 2017, <http://observer.com/2017/11/racist-campaign-literature-surfaces-in-new-jersey/>.

“‘Not one of us’ are words that make many Asian Americans constantly feel like we are seen as foreigners in our own country.”⁶²

We have also seen efforts to undermine the political voice of Asian Americans, such as what happened during the 2004 primary elections in Bayou La Batre, Alabama. Supporters of a White incumbent, facing a Vietnamese American opponent during the primaries, challenged the eligibility of only Asian Americans at the polls by falsely accusing them of not being U.S. citizens or city residents, or of having felony convictions.⁶³ The losing incumbent’s rationale was “if they couldn’t speak good English, they possibly weren’t American citizens.”⁶⁴ DOJ’s investigation found the challenges racially motivated and prohibited interference from the challengers during the general election.⁶⁵ That year, Bayou La Batre elected its first Asian American to the City Council.⁶⁶ Similarly, in Harris County (Houston), Texas, during the 2004 Texas House of Representatives race, accusations of non-citizen voting were implied in the request for an investigation by the losing incumbent into the election resulting in the victory of Hubert Vo, a Vietnamese American.⁶⁷ While both recounts affirmed Vo’s victory, making him the first Vietnamese American state representative in Texas history, his campaign voiced concern that such an investigation could intimidate Asian Americans from political participation altogether in future elections.⁶⁸

Other discriminatory actions and comments aimed at Asian Americans and Asian American voters include:

- In April 2005 in Washington State, a citizen named Martin Ringhofer challenged the right to vote of more than one thousand people with “foreign-sounding” names. Mr. Ringhofer targeted voters with names that “have no basis in the English language” and “appear to be from outside the United States” while eliminating from his challenge voters with names “that clearly sounded American-born, like John Smith, or Powell,” and ultimately primarily targeted Asian and Hispanic voters.⁶⁹ In one of the counties

⁶² Mary Chao, ‘Not one of us’: Congressman Andy Kim responds to video by potential GOP challenger, NorthJersey.com (July 20, 2021; updated July 21, 2021), <https://www.northjersey.com/story/news/politics/2021/07/20/gop-candidate-tricia-flanigan-video-andy-kim-not-one-us/8034983002/>.

⁶³ See H.R. Rep. No. 109-478, at 45 (2006); *Challenged Asian Ballots in Council Race Stir Discrimination Concerns*, Associated Press, Aug. 30, 2004, at 2B.

⁶⁴ See DeWayne Wickham, *Why Renew Voting Rights Act? Ala. Town Provides Answer*, USA Today, Feb. 22, 2006, http://usatoday30.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-ac_t_x.htm (quoting defeated City Council incumbent Jackie Ladnier).

⁶⁵ See *id.*

⁶⁶ See Press Release, U.S. Dep’t of Justice, Justice Department to Monitor Elections in New York, Washington, and Alabama (Sept. 13, 2004), http://www.justice.gov/opa/pr/2004/September/04_crt_615.htm (“In Bayou La Batre, Alabama, the Department will monitor the treatment of Vietnamese-American voters.”).

⁶⁷ See *Decided Victory: Heflin’s Camp Swelled Store of Disinformation*, Houston Chronicle, Feb. 9, 2005, <http://www.chron.com/opinion/editorials/article/Decided-victory-Heflin-s-camp-swelled-store-of-1640120.php>.

⁶⁸ See *id.*; Thao L. Ha, *The Vietnamese Texans*, in *Asian Texans: Our Histories and Our Lives*, 263, 284-85 (Irwin A. Tang ed., 2007).

⁶⁹ *Id.*

where Mr. Ringhofer initiated his challenge, the county auditor declined to process the challenge and contacted the Department of Justice (DOJ) because of the challenge's apparent violation of state and federal law.⁷⁰

- During a 2009 Texas House of Representatives hearing, legislator Betty Brown suggested that Asian American voters adopt names that are “easier for Americans to deal with” in order to avoid difficulties imposed on them by voter identification laws.⁷¹ The statement made clear that Brown perceived the Asian American community's voice as unwelcome in American politics and notably cast Asian Americans apart from other “Americans.”
- On April 3, 2012, Washington, D.C. Councilmember and former mayor Marion Barry made disparaging remarks about Asian Americans at his Ward 8 primary election victory party. He stated, “We got to do something about these Asians coming in and opening up businesses and dirty shops ... They ought to go. I'm going to say that right now.”⁷² A few weeks later, Barry declared, “In fact, it is so bad, that if you go to the hospital now, you find a number of immigrants who are nurses, particularly from the Philippines.”⁷³

The Asian American community's population growth will only lead to increased efforts to undermine the political voice of Asian Americans. Asian Americans are potential swing voters⁷⁴ and are becoming numerous enough to make the difference in certain races, and they will be facing tried and true tactics often used to minimize the political impact of an emerging community.

Practice-Based Preclearance is Designed to Target Specific Practices in Specific Situations With a Likelihood for Inappropriate Use

Recognizing that throughout American history certain practices have historically been utilized to silence the political voice of communities of color, practice-based preclearance would require preclearance review (performed by either the Department of Justice or the federal District Court in Washington, D.C.) prior to implementation of certain suspect practices where it

⁷⁰ Letter dated April 5, 2005 from Franklin County Auditor to Martin Ringhofer.

⁷¹ R.G. Ratcliffe, *Texas Lawmaker Suggests Asians Adopt Easier Names*, Houston Chron., Apr. 8, 2009, <http://www.chron.com/news/houston-texas/article/Texas-lawmaker-suggests-Asians-adopt-easier-names-1550512.php>.

⁷² Tim Mak, *Report: Marion Barry: 'Dirty' Asian Stores*, Politico, Apr. 5, 2012, <http://www.politico.com/news/stories/0412/74866.html>.

⁷³ Tim Craig, *D.C.'S Marion Barry Called 'racist' for Remark About Filipino Nurses*, The Wash. Post, Apr. 24, 2012, http://www.washingtonpost.com/local/dc-politics/dcs-marion-barry-called-racist-for-remark-about-filipino-nurses/2012/04/24/gIQAX9WXft_story.html.

⁷⁴ See Caitlin Yoshiko Kandil, *Asian Americans' numbers and political influence are growing*, Los Angeles Times, Sept. 22, 2016, <http://www.latimes.com/socal/daily-pilot/entertainment/tn-wknd-et-0925-asian-american-voting-20160903-story.html>; Seung Min Kim, *The one big Senate race that Asian-Americans could decide*, Politico, Aug. 25, 2016, <https://www.politico.com/story/2016/08/senate-nevada-asian-american-voters-227366>.

would be most likely to be used in a discriminatory fashion.⁷⁵ Practice-based preclearance is particularly important for Asian American communities that are growing exponentially in numerous different cities and counties, and where they are beginning to emerge as a potential political power.

The coverage for practice-based preclearance would apply to diverse jurisdictions throughout the country, generally defined as those states and political subdivisions in which two or more racial, ethnic, or language minority groups each represent 20% or more of the voting-age population or in which a single language minority group represents 20% or more of the voting-age population on Indian lands located in whole or in part in the political subdivision.

The targeting of practice-based preclearance to those states and political subdivisions with these particular demographics ensures that the preclearance mechanism is aimed at those scenarios where the covered practices are more likely to be used in a discriminatory fashion and adapts to the ever-shifting demographics of our nation. As Professor Bernard Fraga noted in his testimony before, “the relationship between a state or county’s minority population size and efforts to disenfranchise minority voters has a solid historical, theoretical, and empirical basis.”⁷⁶ The delineated 20% threshold is rooted in the historical evidence that “once a racial/ethnic minority group grows large enough to make up 20% of a county’s voting-age population, the probability of at least one potential voting rights-related legal action reaches 50%.”⁷⁷ In analyzing voting rights actions under any federal or state statutes or constitutional provisions, Professor Bernard Fraga noted that since 1982, at least one potential violation occurred “in every state where a single racial/ethnic group has been at least 10% of the state’s voting-age population” and the first violation occurring in 61% of counties “when a single racial/ethnic minority group was 20% or more of the jurisdiction voting-age population.”⁷⁸

Setting the threshold to 20% of the voting-age population is reasonable as a point where there was a likelihood of voting violations “with diminishing returns to further increases in single minority group population size” before the probability begins to decrease after 50% minority” that also “minimizes the *overall* number of counties with violations that are missed and covered counties that have not had potential violations in the past.”⁷⁹ That is, the 20% threshold is “the point of equal likelihood of having a potential violation versus not[,]” with the likelihood of violation being more likely “until roughly 75% when the likelihood of a violation drops below 50-50 once again.”⁸⁰ To that end, having a demographic threshold that requires two groups comprised of 20% each of the voting-age population address both the fact that “in places

⁷⁵ See Asian Americans Advancing Justice, MALDEF, and NALEO, Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes (Nov. 2019), <https://www.advancingjustice-aaajc.org/report/practice-based-preclearance>. Note that practice-based preclearance could only apply in areas where history-based preclearance coverage is not in effect.

⁷⁶ B. Fraga Testimony.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

where a single minority group is more than 80% of the population, and therefore (numerical) minority racial/ethnic group is less than 20%, disenfranchisement is ... unlikely” and the changing current and future demographics of our nation.⁸¹

These jurisdictions would only be required to seek preclearance if they are making one of the covered changes, not all voting changes. These certain practices were targeted for their frequent use over the decades to silence an emerging community. Professor Luis Fraga in his testimony explores the different tactics of voter suppression used throughout the history of the U.S.⁸² What Professor Luis Fraga’s recounting of the sordid history shows is the repeated use of certain tactics to silence the burgeoning political power of certain communities that aligns with the covered practices under practice-based preclearance in the John R. Lewis Voting Rights Advancement Act.⁸³ These changes include changes related to

- methods of election
- annexations and deannexations
- redistricting
- documentation or proof of identity to vote or to register to vote such
- reduction in multilingual voting materials
- voting locations and availability and
- voter purges.

It is important to note that the practices have been designed to narrowly address the scenarios that would be most likely to be problematic.⁸⁴ Congress has continued refining the definitions of the covered practices, including more specificity in the most recently version of practice-based preclearance as passed by the House in August 2021.⁸⁵

Impact of Covered Practices on Asian Americans

The covered practices currently contemplated by practice-based preclearance have been shown to be used against Asian Americans. For example, Section 5 of the VRA has helped address discriminatory redistricting plans drafted in states with large Asian American communities. As shown in *Perry v. Perez*, 132 S. Ct. 934 (2012), the Texas Legislature drafted a redistricting plan, Plan H283, that had significant negative effects on the ability of minorities, and Asian Americans in particular, to exercise their right to vote. Since 2004, the Asian American community in Texas State House District 149 voted as a bloc with Latino and African American voters to elect Hubert

⁸¹ *Id.*

⁸² L. Fraga Testimony.

⁸³ *Id.*

⁸⁴ See Asian Americans Advancing Justice, MALDEF, and NALEO, Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes (Nov. 2019), <https://www.advancingjustice-aaajc.org/report/practice-based-preclearance> (also attached to testimony).

⁸⁵ Comparing HR4 as passed by the U.S. House of Representatives on August 24, 2021 to the version passed out of the U.S. House of Representatives during the 116th Congress shows changes, such as narrowing the definition of when practice-based preclearance would apply to redistricting.

Vo, a Vietnamese American, as their state representative. District 149 has a combined minority citizen voting-age population of 62%.⁸⁶ Texas is home to the third-largest Asian American community in the United States, growing 72% between 2000 and 2010.⁸⁷ In 2011, the Texas Legislature sought to eliminate Vo's State House seat and redistribute the coalition of minority voters to the surrounding three districts. Plan H283, if implemented, would have redistributed the Asian American population in certain State House voting districts, including District 149 (Vo's district), to districts with larger non-minority populations.⁸⁸ Plan H283 would have thus abridged the Asian American community's right to vote in Texas by diluting the large Asian American populations across the state.⁸⁹

At-large elections have impaired Asian American voters' ability to elect candidates of choice. For example, in Fullerton, California, a lawsuit was brought challenging the at-large election system on behalf of Asian Americans in 2015. At that time, Asian Americans made up 23% of the city's population and 20.9% of the citizen voting age population; but no Asian American served on Fullerton's City Council at that time.⁹⁰ In fact, in the entire existence of the city's history (beginning when it was founded in 1887), only two Asian Americans served on the city council. The at-large method of election coupled with the long history of discrimination against Asian Americans throughout Orange County (in which Fullerton sits) resulted in Asian American voters consistently being thwarted in electing their candidates of choice for city council.⁹¹ This discrimination was also borne out in Fullerton's elections and political processes. Even in the rare instance when Asian Americans were able to get elected to the city council, discrimination abound. In 1996, Councilmember Julie Sa's citizenship status was repeatedly questioned by Fullerton residents during Council meetings, harkening back to the racial undertones of the "perpetual foreign" as a white immigrant fellow councilmember was not subject to the same scrutiny. In fact, in one incident, "one of the residents mocked Sa's accent during his comments, stating, 'To put it in English that you will all understand, especially you Ms. Sa: You no sleep

⁸⁶ See United States and Defendant-Interveners Identification of Issues 6, *Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 29, 2011, Dkt. No. 53.

⁸⁷ See Community of Contrasts, Appendix B.

⁸⁸ See Martin Test. at 350:25-352:25. District 149 would have been relocated to a county on the other side of the State, where there are few minority voters. See <http://gis1.tlc.state.tx.us/download/House/PLANH283.pdf>.

⁸⁹ In fact, it was only due to Section 5 that the Texas Legislature was not able to dilute the Asian American community's right to vote. Despite the Asian American community's best efforts, the Texas Legislature pushed through this problematic redistricting plan. However, because of Section 5's preclearance procedures, Asian Americans and other minorities had an avenue to object to the Texas Legislature's retrogressive plan, and Plan H283 was ultimately rejected as not complying with Section 5. See *Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 19, 2011, Dkt. No. 45, ¶ 3. The U.S. Supreme Court vacated the District Court of the District of Columbia's ruling suspending Texas' redistricting map as moot in light of their decision in *Shelby*.

⁹⁰ Complaint, *Paik v. Fullerton*, No. 30-2015-00777673-CU-MC-CJC (Mar. 18, 2015), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/03/Complaint-1.pdf>.

⁹¹ The history of discrimination in Orange County began with strong anti-Asian American sentiments starting from the late 19th century that resulted in events such as the city-sanctioned burning down of Santa Ana's Chinatown to the campaigns for school segregation laws in order to keep members of the Asian American community separated from white children and has continued into the current era, with incidents such as the DOJ investigation that found consistent racial discrimination against minorities in the police and fire department's hiring practices between 1986 and 1993 and the racial profiling of young Asian Americans as alleged gang members. *Id.*

here, you no be on council.” In the 2014 election race for the 65th Assembly District, an opponent of a Korean American candidate disseminated campaign literature with the phrase “Not One of Us” next to the Korean American candidate’s photo. Plaintiffs settled the lawsuit, with the development of a district-based system for electing its city council that was to be presented for voter approval as part of the settlement.⁹²

Furthermore, the ability of Asian Americans to vote is also frustrated by sudden changes to poll sites without informing voters. For example, in 2001, primary elections in New York City were rescheduled due to the attacks on the World Trade Center. The week before the rescheduled primaries, advocates discovered a certain poll site, I.S. 131, a school located in the heart of Chinatown and within the restricted zone in lower Manhattan, was being used by the Federal Emergency Management Agency for services related to the World Trade Center attacks. The Board chose to close down the poll site and no notice was given to voters. The Board provided no media announcement to the Asian language newspapers, made no attempts to send out a mailing to voters, and failed to arrange for the placement of signs or poll workers at the site to redirect voters to other sites. In fact, no consideration at all was made for the fact that the majority of voters at this site were limited English proficient, and that the site had been targeted for Asian language assistance under Section 203.⁹³

With over two out of three Asian Americans being born outside of the U.S. today,⁹⁴ almost three out of every four Asian American speaks a language other than English at home and almost one in three Asian American is LEP.⁹⁵ As a result, a major obstacle facing Asian American voters is the language barrier. Navigating the voting process can be complicated and overwhelming, even for those who are fluent in English. Trying to understand how to access the ballot for citizens whose first language is not English is even more difficult. Furthermore, the complexity of voting materials makes voting even more challenging for voters with language barriers.

The withdrawal or denial of multilingual support create formidable hurdles for language-minority voters – approximately 85% of whom are voters of color – the effects of which are predictable: LEP voters “often have a difficult time exercising their right to vote[and have] much lower participation rates than non-LEP voters.”⁹⁶ In addition to the harmful effect the withdrawal or denial of multilingual support, the history of discriminatory intent in denying language assistance further indicates the problematic nature and purpose in denying

⁹² Settlement Agreement, *Paik v. Fullerton* (July 7, 2015), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/07/Settlement-Agreement-1.pdf>.

⁹³ The voters were only protected from this sudden change that would have caused significant confusion and lost votes because DOJ issued an objection under Section 5 and informed the Board that the change could not take effect. The elections subsequently took place as originally planned at I.S. 131, and hundreds of votes were cast on September 25. See Asian American Legal Defense and Education Fund, *Asian Americans and the Voting Rights Act: The Case for Reauthorization*, 41 (2006), <http://www.aaldef.org/docs/AALDEF-VRARReauthorization-2006.pdf>.

⁹⁴ Author’s calculation based on U.S. Census Bureau, 2019 ACS 1 Year Estimates, Table B16005D: Nativity by Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over (Asian Alone), <https://data.census.gov/cedsci/table?q=ACSDT1Y2019.B16005D&tid=ACSDT1Y2019.B16005D&hidePreview=true>.

⁹⁵ *Id.*

⁹⁶ *Id.*

multilingual support today.⁹⁷ The lack or denial of multilingual support has long been understood to interfere with a LEP voter’s free and fair access to the ballot and has been used for just that purpose.

Similar to the nefarious purpose behind the denial of multilingual support, the practice of creating additional and/or onerous documentary requirements for voting, such as proof of citizenship and voter ID, are often targeted at immigrants (i.e., naturalized citizens). These practices also serve to simply make it more difficult for them to access the ballot. Voter ID and proof of citizenship requirements disproportionately impact Asian Americans due to high rates of immigration and naturalization in the community. Studies show that Asian Americans and other communities of color are less likely to have photo IDs compared to whites.⁹⁸ Moreover, naturalized citizens’ ability to obtain the requisite documents needed to obtain the requisite photo IDs may be even more constrained as they often lack access to the required underlying documents such as naturalization documents, and there can be a significant cost to replacing such documents if they are even available.⁹⁹

Additionally, while not as prevalent, there are some states have treated their naturalized citizens as second-class citizens by placing additional requirements upon them in order to vote. For example, in 2006, Ohio enacted legislation that directed poll workers to require certain naturalized voters to present proof of U.S. citizenship before providing them with ballots or approving their provisional votes to be counted. In 2006, naturalized Ohioans were far more likely than all eligible voters to be historically underrepresented people of color. Even though African Americans, Latinos, and Asian Americans constituted just 14.3% of the state’s eligible electorate that year, they accounted for 47.8% of naturalized Ohioans eligible to cast ballots, who were potentially subject to additional restrictions on the franchise.¹⁰⁰ In Louisiana, a law on the books for almost 150 years required only naturalized citizens to submit proof of citizenship in person at their local registrar’s office after submitting their voter registration form.¹⁰¹ After a lawsuit was filed challenging this law following an increase in enforcement of the century-old law, Louisiana’s governor signed a bill that repealed the discriminatory requirement in 2016.¹⁰² More recently, in Mississippi, a lawsuit was filed in November 2019 challenging state law that imposes a documentary proof-of-citizenship requirement for voter

⁹⁷ Hearing on “Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual Support To Interfere with Free and Fair Access to the Ballot” Before the H. Subcomm. on Elections of the H. Administration Comm., 117th Cong. (May 24, 2021) (prepared statement of Terry Ao Minnis) (“Minnis Testimony”).

⁹⁸ See e.g., Barreto MA, Nuño S, Sanchez GR, Walker HL, The Racial Implications of Voter Identification Laws in America, American Politics Research, March 2019, 47(2): 238-249.

⁹⁹ Minnis Testimony.

¹⁰⁰ In light of its potential to incentivize racial and ethnic profiling of Ohio voters, and its likely discriminatory effects, a federal court permanently enjoined the law in October of 2006. *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 825-27 (N.D. Ohio 2006).

¹⁰¹ Maura Ewing, *Foreign-born citizens in Louisiana have had to take extra steps to register to vote — until now*, The World (June 5, 2016), <https://www.pri.org/stories/2016-06-06/foreign-born-citizens-louisiana-have-had-take-extra-steps-register-vote-until-now>.

¹⁰² *Id.*

registration on only naturalized citizens.¹⁰³ Documentary requirements have a negative effect on Asian American voters and interfere with their free and fair access to the ballot.

Efforts to purge voters from the voter rolls have fallen more heavily on voters of color, including Asian Americans. For example, Georgia has enacted various iterations of an “exact match” protocol since 2008: a voter registration protocol that places would-be voters in “pending” status on voter rolls if their voter registration data does not match exactly the same information as it appears in other state databases, such as driver services. In 2009, DOJ criticized Georgia’s protocol as “flawed” and “frequently subject[ed] a disproportionate number of African-American, Asian, and/or Hispanic voters to additional and . . . erroneous burdens on the right to register to vote.” The DOJ found that Asian American and Pacific Islander applicants were more than twice as likely as their white counterparts to be flagged under “exact match.” In advance of the November 2018 general election, the “exact match” protocol froze approximately 53,000 voter registrations, 80% of which belonged to people of color. The “exact match” protocol has been the subject of extensive litigation; although in 2019 the Georgia General Assembly largely ended the protocol with regard to identity data, eligible Georgia voters continue to be burdened by the “citizenship match” portion of the protocol, which flags voters as potential noncitizens based on data from the Department of Driver Services known to be outdated. Many of the affected voters are Asian American and Pacific Islander, as they are often voters who recently naturalized as citizens and/or obtained a Georgia driver’s license prior to naturalization. Additionally, Georgia aggressively purges voter registration rolls in a way that disproportionately harms Asian American and Pacific Islander voters. In 2019 alone, the state removed 313,000 voters from the rolls on the grounds that they moved from their voter registration address. A subsequent analysis revealed that 63.3% of the voters had not moved at all and that the flawed purge process predominantly impacted non-white voters in the Atlanta metro region, where the majority of Asian American and Pacific Islander voters in Georgia reside.¹⁰⁴

Conclusion

Despite the gains that have been made since the enactment of the VRA, more is left to be done, particularly in light of the damage done (and that continues to be done) by misguided Supreme Court decisions, including *Shelby County*. Voting discrimination, as Chief Justice Roberts acknowledged in his opinion in *Shelby County*, is still very real and very current. The U.S. Census Bureau forecasts that while the number of Asian immigrants will grow between now and 2040, the proportion of Asian Americans who are immigrants will decrease, with high naturalization rate and an increase of U.S.-born Asian Americans in the coming years. It is likely that voter

¹⁰³ Emily Wagster Pettus, *Voting suit challenges Mississippi law on citizenship proof*, AP (Nov. 18, 2019), <https://apnews.com/article/4ffb6d691734447baf51f72c65824142>.

¹⁰⁴ First Amended Complaint Advancing Justice SB 202. See also, Brief for Asian Americans Advancing Justice – AAJC, National Association of Latino Elected and Appointed Officials Education Fund, LatinoJustice PRLDEF, and Seventeen Other Organizations as Amici Curiae, *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018), <https://www.advancingjustice-aaajc.org/sites/default/files/2017-09/16-980%20obsac%20Asian%20Americans%20Advancing%20Justice%20et%20al.pdf>.

participation rates among the Asian American community, and indeed their political visibility, will only increase, particularly in new areas across the country. It is precisely for these reasons that restoring and modernizing the Voting Rights Act, including the addition of practice-based preclearance, is a top priority for Advancing Justice-AAJC.