



**STATEMENT OF DAMON T. HEWITT  
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**U.S. SENATE JUDICIARY COMMITTEE HEARING:**

***“The Right Side of History: Protecting Voting Rights in America”***

**MARCH 12, 2024**

## I. Introduction

Chair Durbin, Ranking Member Graham, and Members of the Judiciary Committee of the U.S. Senate, my name is Damon T. Hewitt, and I am the President and Executive Director of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on the need to protect voting rights in America by restoring the Voting Rights Act.

The Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. We litigate cases on behalf of voters who are traditionally disenfranchised or face the fiercest voter suppression tactics. The Lawyers' Committee also convenes the nation's largest nonpartisan voter protection effort, the Election Protection coalition, through we coordinate a suite of voter assistance hotlines, including 866-OUR-VOTE, which our organization administers. The Election Protection Coalition works year-round with almost four hundred national, state, and community partner organizations to provide Americans from coast to coast with comprehensive voting information and resources.

Our work enables us to see firsthand the barriers that voters currently face, along with the challenges that those who defend the right to vote take on, over ten years after the Supreme Court's decision in *Shelby County v. Holder*.

As the late Congressman John Lewis said, "Voting is the most powerful, non-violent tool we have to create a more perfect union."<sup>1</sup> And as President Lyndon Baines Johnson said upon urging Congress to pass the Voting Rights Act, "there can and should be no argument: every American citizen must have an equal right to vote."<sup>2</sup>

No eligible person of voting-age, particularly historically disenfranchised Black voters, should be confronted with barriers designed to make it more difficult for them to register to vote or to cast a ballot. Nor should we be limited to "participating in an empty ritual" in which the ballots we cast are rejected or rendered meaningless by discriminatory procedures or redistricting practices.<sup>3</sup> Moreover, we should not be subject to court decisions that systematically neuter the reach of longstanding civil rights laws. But somehow it has come to all of this. The reality is that with each successive election cycle our democracy is increasing danger.

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<sup>1</sup> John Lewis, *The March for Civil Rights*, NAT'L CONST. CTR. (Sept. 17, 2013), <https://constitutioncenter.org/news-debate/americas-town-hall-programs/congressman-john-lewis-the-march-for-civil-rights>.

<sup>2</sup> Lyndon B. Johnson, *Transcript of the Johnson Address on Voting Rights to Joint Session of Congress*, NEW YORK TIMES (Mar. 16, 1965), <https://archive.nytimes.com/www.nytimes.com/books/98/04/12/specials/johnson-rightsadd.html>.

<sup>3</sup> Martin Luther King, Jr., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES 307 (2003).

It is no coincidence that so many of the attacks on our democracy have been bolstered by the failure of Congress to restore the full protections of the Voting Rights Act, even as the U.S. Supreme Court continues to hobble its reach and remedies. The Voting Rights Act was specifically enacted to increase registration and participation of Black voters, and to combat racial discrimination in voting.<sup>4</sup> It has been over a decade since the *Shelby County* decision gutted the most important provision of the Voting Rights Act—the preclearance provision in Section 5 of the Act, which made it possible to stop discriminatory voting laws before they could be implemented in jurisdictions with a history of voting discrimination.<sup>5</sup> As a result, the floodgates of voter suppression have been wide open, and the health of our democracy has deteriorated. Justice Ruth Bader Ginsburg’s famous dissent admonishing the majority decision in *Shelby County* seems more prophetic with each new wave of voter suppression laws “[t]hrowing 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” seems more prophetic with each new wave of voter suppression laws.<sup>6</sup> Senators, voters of color are feeling the storm.

My testimony explains how we went from being protected by the umbrella of the Voting Rights Act’s preclearance regime to being drenched by wave after wave of suppressive actions by state legislatures and courts around the country. It examines the impact of the Supreme Court decisions in *Shelby County*, *Brnovich v. DNC*, and other cases, that have systematically cut back the scope and legal protections of the Voting Rights Act. It details a range of state laws that suppress the voices of voters of color, made possible by the gutting of Section 5. And it speaks to the steady drip of new challenges our litigators face in defending the right to vote in the courts, and the headwinds voters must face when casting a ballot, as seen by our Election Protection staff and our partners on the ground.

But we are also called to recognize an opening in the clouds where we see one. In *Shelby County*, the Court acknowledged that racial discrimination in voting continues to exist and invited Congress to act. That invitation can, and must, be accepted by Congress by passing legislation like the John R. Lewis Voting Rights Advancement Act.

In the decade-plus since *Shelby County*, Congress has been derelict in its duty to restore the law that transformed American democracy; a bill that an overwhelming bipartisan majority previously enthusiastically supported, reauthorized and strengthened multiple times. But now, states with a history of voting discrimination are no longer subject to preclearance requirements and have become emboldened to

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<sup>4</sup> *The Senate Passes the Voting Rights Act*, U.S. SENATE (Aug. 4, 1965), [https://www.senate.gov/artandhistory/history/minute/Senate\\_Passes\\_Voting\\_Rights\\_Act.htm](https://www.senate.gov/artandhistory/history/minute/Senate_Passes_Voting_Rights_Act.htm).

<sup>5</sup> *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013).

<sup>6</sup> *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

devise new methods to make it harder for voters of color to vote.<sup>7</sup> And courts from the U.S. Supreme Court to federal district courts have been whittling away at the remaining provisions of the VRA.

As Congress considers new legislation to protect voting rights, it is important to reflect on why the VRA was passed in the first place. States with large numbers of people of color continuously passed laws that created barriers to voting, targeting Black voters with surgical precision. The burgeoning power of voters of color is exactly why some states sought to purposefully and selectively winnow the electorate. At times they tried to justify these laws under the guise of election integrity and efficiency of election administration. But their discriminatory intent and effects were plain as day.

History is now repeating itself. Once more, as the proportion of Black voters and other voters of color has increased in key states, we have seen targeted voter suppression laws reemerge as a means to silence our voices and curtail our power. Because voters of color often have disproportionately less resources than other voters,<sup>8</sup> and sometimes exhibit small but significant differences in voting behaviors and preferences,<sup>9</sup> tailored changes can be critical. Rather than the blanket denial of the right to vote through Jim Crow laws and physical force, like we saw before the Civil Rights Era, modern-day voter suppression tactics are often packages of dozens of less obvious restrictions that separately or together amount to substantial disenfranchisement. Today, the door to the voting booth is not physically barred or marred by violence; but it does lie in a maze, stuffed with individual trap-door restrictions of various types. Collectively, these obstacles have a devastating impact that are as discriminatory as they are anti-democratic. Our nation can and should do better.

In 1965 when it first passed the VRA, Congress realized that it had to act. It realized that it was untenable to have a country in which some citizens could vote freely and others could not. Now, given the record of renewed voting discrimination in the last decade, Congress must act again, channeling that same sense of moral clarity.

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<sup>7</sup> *Voting Laws Roundup: February 2023*, BRENNAN CTR. JUST. (Feb. 27, 2023), [https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2023?ms=gad\\_voter%20registration%20laws\\_605077783423\\_8626214133\\_137566775723&gclid=CjwKCAjwrpOiBhBVEiwA\\_473dHdkJ1WnwIOgwW3Ew8YUFHncOj6FuMqLML6cTQrt1MPujgU38Hc2\\_xoC3TEQAvD\\_BwE](https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2023?ms=gad_voter%20registration%20laws_605077783423_8626214133_137566775723&gclid=CjwKCAjwrpOiBhBVEiwA_473dHdkJ1WnwIOgwW3Ew8YUFHncOj6FuMqLML6cTQrt1MPujgU38Hc2_xoC3TEQAvD_BwE).

<sup>8</sup> Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDERAL RESERVE (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html>.

<sup>9</sup> Geoffrey Skelley, *A Record Number Of Black Americans Could Vote Early This Year*, FIVETHIRTYEIGHT (Sept. 21, 2020), <https://fivethirtyeight.com/features/a-record-number-of-black-americans-could-vote-early-this-year/>.

## II. Impact Of Recent Supreme Court Decisions

Fifty-nine years ago, in March 1965, President Lyndon Johnson responded to the protestors who crossed the Edmund Pettis bridge to march from Selma to Montgomery by introducing the Voting Rights Act. Less than six months later, Congress passed the legislation that transformed American Democracy. The law includes two significant provisions, Section 2 and Section 5. Section 2 is the general provision that allows the Department of Justice and private parties to challenge voting discrimination nationwide.<sup>10</sup> Section 5 requires jurisdictions with a history of discrimination in voting, based on a formula under Section 4(b) of the law, to submit all voting changes for federal review by the Department of Justice or the District Court in the District of Columbia before they could be implemented.<sup>11</sup> From 1965 to the time that the U.S. Supreme Court, in *Shelby County*, nullified Section 5 by finding its governing formula unconstitutional, thousands of discriminatory voting changes were never put into effect.<sup>12</sup>

Before the *Shelby County* decision Sections 2 and 5 worked together to both prevent and remedy voting discrimination. However, in 2013, when it struck down the formula governing Section 5, the Court noted that Section 2 was an effective tool to remedy voting discrimination.<sup>13</sup> But events since the *Shelby County* decision illustrate what a blow that decision has been to preventing voting discrimination.

Jurisdictions covered by Section 5 had to make the case that a voting change did not have a discriminatory purpose or effect. The provision against discriminatory purpose is the same as that of the Fourteenth and Fifteenth Amendment prohibitions against voting discrimination of voters of color.<sup>14</sup> Effect is defined as retrogression -- a change that would diminish the ability of voters of color (often referred to in case law as “minority voters”) to vote or to elect their preferred candidate of choice.<sup>15</sup> The Section 5 review process was very effective in preventing voting discrimination and did so in an efficient manner that was transparent and provided covered jurisdictions the opportunity to make the case that their voting change was not discriminatory. As determined by the 2014 National Commission on Voting Rights, from 1965 to 2013, the Department of Justice issued approximately 1,000 determination letters denying preclearance of over 3,000 voting changes. These included objections to over 500

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<sup>10</sup> 52 U.S.C. § 10301

<sup>11</sup> 52 U.S.C. §§ 10303(b), 10304

<sup>12</sup> *Protecting Minority Voters: Our Work Is Not Done, A Report by the-National Commission on Voting Rights*, Lawyers’ Committee for Civil Rights Under Law 56 (June 2014), <https://www.lawyerscommittee.org/wp-content/uploads/2023/06/2014-National-Commission-on-Voting-Rights-Report-Convened-by-Lawyers-Committee.pdf>.

<sup>13</sup> *Shelby County*, 570 U.S. at 557.

<sup>14</sup> 52 U.S.C. §10304(c)

<sup>15</sup> 52 U.S.C. § 10304(b), (d)

redistricting plans and nearly 800 election method changes.<sup>16</sup> Each objection benefited tens of thousands, hundreds of thousands or millions of voters depending on the voting change denied preclearance.

Section 5 also had a deterrent effect because jurisdictions subject to the provision knew they had to show that voting changes were not discriminatory. An operative Section 5 also allowed for notice and transparency. Because covered jurisdictions had to submit their voting changes for review, affected communities were aware of the changes and could weigh in on the impact that voting changes would have on their community. Overall, Section 5 not only made affected voters of color aware of the changes that could affect their ability to vote free from discrimination, it stopped those discriminatory voting changes from going into effect. And, by stopping discriminatory voting changes from going into effect, Section 5 prevented states from passing laws that would make it harder for voters to cast a ballot than their white counterparts.

The *Shelby County* decision not only neutered Section 5 of the Voting Rights Act, but it also emboldened those jurisdictions previously subject to federal review that immediately began to pass suppressive legislation targeting voters of color. These efforts will be discussed further below.

However, *Shelby County* is not the only Supreme Court decision that has weakened the Voting Rights Act. In 2021, the Supreme Court further weakened the Voting Rights Act in *Brnovich v. DNC* by making it harder to challenge voting discrimination under Section 2.<sup>17</sup> The Supreme Court changed the standard for bringing litigation to challenge vote denial in a case that challenged Arizona's voting laws that did not allow out-of-precinct voting and limited who could collect absentee ballots. The Court established new, narrow and nebulous "guideposts" that plaintiffs must show to successfully establish a Section 2 vote denial violation.<sup>18</sup>

Many of the "guideposts" are novel and have little to do with analyzing the actual racial impact of challenged laws and policies. One of these problematic guideposts is that courts use voting practices in use in 1982 as a point of reference for the legitimacy of challenged practices today. Another warns against the so-called exaggeration of "small" differences in impact of a law or policy on voters of color, without an understanding that even "small" percentage differences can translate into tens of thousands of voters of color unlawfully losing their right to vote.<sup>19</sup>

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<sup>16</sup> *Protecting Minority Voters: Our Work Is Not Done*, A Report by the National Commission on Voting Rights, Lawyers' Committee for Civil Rights Under Law 56 (June 2014), <https://www.lawyerscommittee.org/wp-content/uploads/2023/06/2014-National-Commission-on-Voting-Rights-Report-Convened-by-Lawyers-Committee.pdf>.

<sup>17</sup>141 S. Ct. 2321 (2021)

<sup>18</sup> *Id.* at 2336.

<sup>19</sup> *Id.* at 2338–40.

The requirement that courts look back to 1982 does not make any sense because today's world is different from the world in 1982. Yet, under *Brnovich*, if a state saw a significant shift in the methods that Black voters were using to vote between 2018, 2020, and 2022 and then changed its laws to prevent those voters from using their preferred method of voting, this “guidepost”—if read literally—would favor upholding that law. *Brnovich* has led to a narrowing of Section 2 and consequently limited the ability of civil rights organizations and the Department of Justice to challenge discriminatory vote denial laws that result in the abridgement of the right to vote based on race or color.

The attack on the Voting Rights Act has continued even in Supreme Court decisions that found a violation under Section 2. In his concurring opinion, Justice Kavanaugh noted “... the authority to conduct race-based redistricting cannot extend indefinitely into the future.<sup>20</sup> He also added that however Alabama did not raise such an argument.<sup>21</sup> States such as Georgia have seized on what it sees as an invitation to raise this argument in litigation challenging the state's redistricting as discriminatory.<sup>22</sup> Although we maintain that the argument that Section 2 is subject to some sort of amorphous stopwatch is frivolous, the attack on the Voting Rights Act continues and Congress must act to preserve it and to restore its full protections, lest this iconic legislation that transformed American Democracy become a shell at the time that states continue to pass suppressive legislation.

### III. Examples of Post-Shelby Legislation in Texas, Georgia and Florida

In the wake of the *Shelby County* decision and, subsequently, in reaction to repeated false claims that the 2020 presidential election was stolen as a result of massive voter fraud and other baseless assertion, Texas, Georgia and Florida, among other states, enacted suppressive voting legislation targeting Black voters and other voters of color and methods of voting which have increasingly been used by Black voters as well as other voters of color.

Some of the more egregious examples are summarized below, but do not include all the efforts by State legislators to roll back the clock on voting rights in the aftermath of the gutting of preclearance under Section 5 of the Voting Rights Act.

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<sup>20</sup> *Milligan*, 599 U.S. at 45.

<sup>21</sup> *Id.*

<sup>22</sup> See Brief of the State of Georgia, *Alpha Phi Alpha Fraternity, Inc. et al. v. Sec. of State of Georgia*, p. 64 No. 23-13914 (Feb. 7, 2024).

## a. TEXAS

### 1. TX SB 14 (2011)<sup>23</sup>

Within hours after the Supreme Court handed down its decision in *Shelby County*,<sup>24</sup> gutting Section 5 of the Voting Rights Act and its preclearance requirement, Texas took action to implement Senate Bill 14 (“SB 14”), a restrictive voter ID law. The law had been on hold because neither the DOJ nor the District Court for the District of Columbia had precleared the law under Section 5 of the Voting Rights Act because of its discriminatory effect on Black and Latinx voters.<sup>25</sup>

After the State began its efforts to implement SB 14 following the *Shelby County* decision, the Lawyers’ Committee, other civil rights organizations, and the Department of Justice, filed litigation under Section 2 of the Voting Rights Act in the United States District Court for the Southern District of Texas and those litigations were later consolidated by the District Court.<sup>26</sup>

This legal challenge was ultimately successful in the District Court, with the Court finding, among other things, that the law had an “impermissible discriminatory effect against Hispanic and Black voters and was imposed with an unconstitutional discriminatory purpose. Not satisfied with the outcome in the District Court, the State filed an appeal in the Fifth Circuit, which affirmed the discriminatory result ruling of the District Court, and remanded the finding of purposeful discrimination back to the District Court. Subsequently, the District Court granted a motion by the United States to dismiss its discriminatory purpose claim after Texas changed the challenged voter ID law. Although the District Court found in favor of the individual and organizational plaintiffs’ discriminatory intent claim upon remand and entered a permanent injunction in their favor, the Fifth Circuit reversed, concluding that those plaintiffs’ claims were moot as a result of the state subsequent enactment of the new voter ID law.

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<sup>23</sup> S.B. 14, 82nd Leg., Reg. Sess. (Tex. 2011).

<sup>24</sup> *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013).

<sup>25</sup> *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated and remanded*, 570 U.S. 928 (2013).

<sup>26</sup> *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *aff’d in part, vacated in part, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *on reh’g en banc*, 830 F.3d 216 (5th Cir. 2016), and *aff’d in part, vacated in part, rev’d in part sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016); *cert. denied, Abbott v. Veasey*, 580 U.S. 1104 (2017); *order on remand, granting United States’ motion for voluntary dismissal of its discriminatory purpose claim under § 2 of the VRA. Veasey v. Abbott*, 248 F. Supp. 3d 833 (S.D. Tex. 2017); *order on remand finding that individuals and advocacy groups established state’s racially discriminatory intent or purpose of in enacting the voter ID law, in violation of § 2 of VRA., Veasey v. Abbott*, 249 F. Supp. 3d 868 (S.D. Tex. 2017); *reversing as moot the permanent injunction in favor of individual and advocacy group plaintiffs*, 888 F.3d 792, *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).



Undeterred by the successful legal challenge to SB 14, Texas subsequently continued to enact discriminatory voting laws in the absence of the enforcement of the preclearance provisions of Section 5 of the Voting Rights Act as described below.

## 2. TX SB 1 (2021) <sup>27</sup>

In the wake of the 2020 general election and unfounded claims of widespread “voter fraud,” Texas enacted another omnibus voter suppression bill, TX SB 1 in 2021, following in the footsteps of other states, such as Georgia and Florida, which sought to roll back voting methods and procedures which were increasingly being used by Black voters and other voters of color following the 2020 election.

Although the purported purpose of SB 1 was to detect and punish fraud, Keith Ingram, the Director of Elections within the Texas Secretary of State’s office, testified during a Texas legislative hearing in March 2021 in reference to the 2020 election held in the midst of the COVID pandemic, that “in spite of all the circumstances, Texas had an election that was smooth and secure,” and further that “Texans can be justifiably proud of the hard work and creativity shown by local county elections officials.”<sup>28</sup>

Nevertheless, TX SB 1 included new restrictions on providing assistance to voters with limited English proficiency or physical disabilities at the polls; new restrictions on early voting; a ban on absentee ballot drop boxes and drive-thru voting; new requirements for the acceptance of mail-in ballot applications; and provisions expanding the power of partisan poll watchers, which increases the potential for harassment of voters and poll workers by partisans in the polling place.

The Lawyers’ Committee and other civil rights groups filed litigations in Texas state and federal courts challenging provisions of SB 1, including five lawsuits which were consolidated by the U.S. District Court for the Western District in Texas in which DOJ filed a Statement of Interest on behalf of the United States<sup>29</sup> as well as a separate litigation filed in the District Court of Harris County, 198<sup>th</sup> Judicial District,

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<sup>27</sup> S.B. 1, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>28</sup> Taylor Goldenstein, Jeremy Blackman, *Did a ‘smooth and secure’ 2020 Election cost the Texas Secretary of State her job?*, Houston Chronicle (May 24, 2021), <https://www.houstonchronicle.com/politics/texas/article/Texas-Secretary-of-State-Ruth-Hughes-resigns-under-16195586.php>.

<sup>29</sup> See Order Consolidating *OCA-Greater Houston v. Esparza*, No. 1:21-cv-780 (W.D. Tex.); *Houston Justice v. Abbott*, No. 5:21-cv-848 (W.D. Tex.); *LULAC Texas v. Esparza*, No. 1:21-cv-786 (W.D. Tex.) and *Mi Familia Vota v. Abbott*, No. 5:21-cv-920 into *La Unión del Pueblo Entero v. Abbott*, U.S. Dist. W.D. TX, No. 5:21-cv-844-XR, ECF Doc. 31 (W.D. Tex. 9/30/2021); Statement of Interest of the United States Regarding Section 208 Of The Voting Rights Act, 5:21-cv-00844-XR, ECF Doc. 641 (W.D. TX 06/23/23)

by the Lawyers' Committee on behalf of the Texas State Conference of the NAACP, Common Cause Texas and several individual plaintiffs.<sup>30</sup>

In 2022, after Texas enacted SB 1 in 2021, OCA-Greater Houston, one of the plaintiffs in the subsequent consolidated actions challenging SB 1, obtained an order modifying a previously entered permanent injunction to enjoin certain provisions of SB 1 which were in conflict with the earlier injunction and gave notice of the order to the Court in the consolidated actions challenging SB 1. The District Court in the consolidated actions subsequently dismissed the plaintiffs' claims to the extent that that they were mooted because of the modified injunction entered in the earlier action brought by OCA-Houston.<sup>31</sup>

Subsequently, in August 2023, the U.S. District Court for the Western District of Texas also struck down certain provisions of SB 1 which violated the Civil Rights Act of 1964 because they require officials to reject mail-in ballot applications and mail-in ballots based upon errors or omissions that are not material in determining whether voters are qualified under Texas law to vote or cast a mail ballot.<sup>32</sup>

A trial on the merits of the *La Union del Pueblo Entero v. Abbott*, litigation began in the Fall of 2023 and ended in February 2024. The parties are awaiting a decision by the District Court.

## 2. TX SB 924 (2023)<sup>33</sup>

Texas SB 924 was enacted in 2023 and allows for the consolidation of polling locations which are used for a general or special election in which county precincts are required, with the approval of county commissioners, courts, or County election boards, in counties with populations under 1.2 million persons.

The law effectively raises the cap on the number of voters assigned to a single precinct from 5,000 to 10,000 registered voters, creating the likelihood of long lines and delays at the polls. The law also burdens Black voters, seniors, and physically

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<sup>30</sup> Plaintiffs' Original Petition *Texas State Conference of the NAACP, et al., v. Greg Abbott, et al.*, 2021 WL 4066318 (Tex.189<sup>th</sup> Judicial Dist., September 7, 2021)

<sup>31</sup> *O.C.A. Greater Houston, et al, v, State of Texas*, U.S. District Court for the Western District of Texas, Case No. 1:15-CV-679-RP, 2022 WL 2019295 (W.D. Tex. June 6, 2022)(*Order granting in part and denying in part plaintiff's motion for modification of permanent injunction*); *La Union del Pueblo Entero v. Abbott*, U.S. District Court for the Western District of Texas, 5:21-cv-844-XR; ECF Doc. 438 (W.D. TX 6/14/22)(Plaintiffs' notice of Modified Permanent Injunction Regarding Sections 61.032, 61.033, And 64.0321 Of The Texas Election Code); *La Union del Pueblo Entero v. Abbott*, 5:21-cv-844-XR; ECF Doc. 444 (W.D. TX 7/12/22)(Order on mootness).

<sup>32</sup> *La Union del Pueblo Entero v. Abbott*, U.S. District Court for the Western District of Texas, 5:21-cv-844-XR, Summary Ruling on Section 101 Materiality Claims and Order on Pretrial Filings, ECF Doc. 724 (Aug. 17, 2023).

<sup>33</sup> S.B. 924, 88th Leg., Reg. Sess. (Tex. 2023); *88(R) History for SB 924*, Texas Legislature Online, <https://capitol.texas.gov/BillLookup/history.aspx?LegSess=88R&Bill=SB924>.

disabled voters with limited economic recourses who lack access to a personal vehicle and must use public transit or walk long distances to a polling location to cast their ballots.

### 3. TX SB 1933 (2023)<sup>34</sup> and TX SB 1750 (2023)<sup>35</sup>

In 2023, Texas also enacted two bills, SB 1933 and SB 1750, which specifically targeted Harris County’s administration of elections. Harris County has the largest and most diverse population in the state. The laws allow the Texas Secretary of State’s Office to take over the administration of Harris County’s elections, and to conduct unprecedented oversight of Harris County’s elections officials. Although Harris County filed a lawsuit in state court challenging TX SB 1730, the Texas Supreme Court upheld the law and the County dismissed its litigation challenging the law as a result of the Texas Supreme Court’s ruling.

#### b. GEORGIA

##### 1. SB 202 (2021)<sup>36</sup>

On March 25, 2021, the Georgia General Assembly passed SB 202<sup>37</sup> and Georgia’s Governor, Brian Kemp, signed SB 202 into law the same day.<sup>38</sup> SB 202, an omnibus voter suppression bill, was enacted on the heels of the 2020 general election and the proliferation of false claims by former President Donald J. Trump, his campaign, and allies that the election was stolen and the product of wide-scale voter fraud, particularly in Fulton County, which has a large Black voter population.<sup>39</sup>

SB 202 contains provisions which make it significantly harder for Black voters to cast absentee ballots that will count. These absentee ballot ID requirements include a mandate that voters include a Georgia Driver’s license number or Georgia State ID number on their absentee ballot application and, if they have neither, voters are required to copy another form of acceptable voter ID and attach the copies of ID documents along with other identifying information to both their absentee ballot applications and inside the absentee ballot envelope when returning the voted ballot.

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<sup>34</sup> S.B. 1933, 88th Leg., Reg. Sess. (Tex. 2023); *88(R) History for SB 1933*, Texas Legislature Online, <https://capitol.texas.gov/BillLookup/history.aspx?LegSess=88R&Bill=SB1933>.

<sup>35</sup> S.B. 1750, 88th Leg., Reg. Sess. (Tex. 2023); *88(R) History for SB 1750*, Texas Legislature Online, <https://capitol.texas.gov/BillLookup/history.aspx?LegSess=88R&Bill=SB1750>.

<sup>36</sup> S.B. 202, 156th Gen. Assemb., Reg Sess. (Ga. 2021).

<sup>37</sup> *Id.*

<sup>38</sup> *SB 202 Legislative History*, Georgia General Assembly, <https://www.legis.ga.gov/legislation/59827> (last visited Mar. 8, 2024).

<sup>39</sup> Nick Corasaniti, *Georgia G.O.P. Passes Major Law to Limit Voting Amid Nationwide Push*, New York Times (Mar. 25, 2021, updated Apr. 3, 2021), <https://www.nytimes.com/2021/03/25/us/politics/georgia-voting-law-republicans.html>.

This process makes it difficult for Black voters who do not have ready access to a copier, scanner, or smart phone, to access and copy the necessary ID documents to attach to their absentee ballot application or when returning the ballot if they do not have a Georgia driver's license or State ID number. It also makes the process of returning an absentee ballot application via the Secretary of State's electronic absentee ballot portal or by electronic submission to their county election offices more challenging because the Secretary of State has required voters to digitize their absentee ballot application forms with their "wet" signature applied to it in order to submit it electronically to the Secretary of State's office through the portal or to their county election offices.

Additionally, SB 202 criminalizes the "handling" of a completed absentee ballot application except by election officials, law enforcement officer, or a person assisting a disabled voter who signs an oath on the form that they provided assistance to the voter. This restriction makes it even more difficult for voters without ready access to a computer, scanner, or smart phone to comply with the requirements of SB 202 in submitting absentee ballot requests electronically to the Secretary of State and to county election offices.

SB 202 also significantly limits the accessibility of absentee ballot drop boxes to Black voters and other voters of color, particularly such voters residing in the Metro Atlanta counties which serve the state's largest populations of Georgia's Black voters and other voters of color. While all Georgia counties are required to have at least one drop box, counties are only permitted to have one additional drop box for every 100,000 active registered voters. Thus, this limitation directly targets the largest counties in the state, which include Fulton, DeKalb, Gwinnett and Cobb – all of which have significant populations of Black voters and other voters of color. As a result of this law, these counties will have fewer drop box locations available for their voters than in the 2020 election.

Moreover, SB 202 requires drop boxes to be available only during the dates and times of early in-person voting and all absentee ballot drop boxes must be located inside early voting locations and only available to be used by voters during the days and hours of early in-person voting. The option to use a drop box ends on the Friday prior to an election rather than at the end of voting at 7:00 p.m. on Election Day, as was permitted prior to SB 202. Thus, drop boxes are now essentially useless to voters who can vote early in-person at an early voting location or who cannot access early in-person voting during the limited hours and time frame in which drop boxes are available.

SB 202 also allows the State Election Board to take over county election boards, which would give the State Election Board, comprised of unelected members, unprecedented power to target jurisdictions with a large populations of Black voters for harassing investigations and control over election administration.

Perceived higher turnout by voters of color likely prompted SB 202. After the results of the Georgia senate races in early 2021, a Gwinnett County elections official in suburban Atlanta – a county in which people of color have been a growing proportion of the electorate – argued for voter restrictions saying, “They don’t have to change all of them, but they have got to change the major parts of them so we at least have a shot at winning.”<sup>40</sup>

In the absence of preclearance under Section 5 of the Voting Rights Act, any legal challenges to suppressive voting legislation in Georgia must proceed in federal or state courts, which require significant resources to be expended in the litigation of such claims under Section 2 of the Voting Rights Act or in challenges brought under the U.S. Constitution.

In fact, multiple litigations were filed in the immediate aftermath of the enactment of SB 202 in 2021 and this litigation is still ongoing.

In the course of the litigation, the District Court entered orders granting preliminary injunctions enjoining two provisions of SB 202: 1) the criminalization of “line relief,” i.e., the provision of food and water to voters waiting in long lines to vote outside of the 150-foot electioneering boundary immediately outside of a poll, which the District Court determined likely violated the First Amendment;<sup>41</sup> and 2) enjoining SB 202’s requirement that voters include their full and accurate date of birth on their absentee ballot return envelope or face rejection of their absentee ballots, determining that this provision likely violated the materiality provision of the Civil Rights Act of 1964.<sup>42</sup> The state defendants and Republican Party intervenors have appealed both of those orders to the Eleventh Circuit Court of Appeals.

Had the preclearance provision of Section 5 of the Voting Rights Act not been gutted by the *Shelby County* decision, it appears likely that neither DOJ nor the DC District court would have precleared SB 202 because of its discriminatory effect on Black voters and other voters of color in Georgia.

Since the enactment of SB 202 in 2021, the Georgia legislature has repeatedly tried to move forward with more legislation which would make it more difficult for

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<sup>40</sup> Michael Wines, *After Record Turnout, Republicans are Trying to Make it Harder to Vote*, N.Y. TIMES (Mar. 26, 2021), <https://www.nytimes.com/2021/01/30/us/republicans-voting-georgia-arizona.html>.

<sup>41</sup> See, *In re SB 202*, ECF Document No. 614, Order Granting in Part and Denying in Part Motion for a Preliminary Injunction enjoining Keith Gammage, Gregory W. Edwards and all named defendants in cases 1:21-cv-01284 and 1:21-cv-01259 from enforcing the Penalty Provision, initiating criminal prosecutions or otherwise imposing criminal penalties for violations of the Food, Drink and Gift Ban in the Supplemental Zone.

<sup>42</sup> See, *In re SB 202*, ECF Document No. 613, Order Granting in Part and Denying in Part Motion for a Preliminary Injunction Based on Immaterial Voting Requirements.

Black voters and other voters of color to exercise their right to vote and to have their votes count.

Some of these examples include:

1) The enactment of Georgia SB 441 in 2022, which authorizes the Georgia Bureau of Investigation to launch probes of election law fraud or other violations which could undermine the outcome of an election.<sup>43</sup> The bill also gives the bureau the authority to subpoena election records with signoff from the state's attorney general.<sup>44</sup>

2) The introduction of Georgia House Resolution 780, which seeks to amend the Georgia Constitution to include a ban on noncitizen voting in Georgia, despite the fact that the Georgia Constitution already limits the franchise to persons who are citizens of the United States and residents of Georgia.<sup>45</sup> The resolution is supported by Secretary of State, Brad Raffensperger, but has been stalled in the House having not received the required two-thirds majority vote which is needed to place a constitutional amendment referendum on the ballot.<sup>46</sup>

3) The introduction of four bills focused upon changes to ballots and ballot counts.<sup>47</sup>

4) The introduction of SB 446, a bill which seeks to substantially reduce early voting, which is very popular in the state.<sup>48</sup>

5) The introduction of SB 221, a bill which would end automatic voter registration despite evidence that it helps to ensure the accuracy of the Georgia voter registration rolls.<sup>49</sup>

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<sup>43</sup> S.B. 441, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

<sup>44</sup> *Id.*; see also: Kelly Mena, *Georgia passes bill giving state law enforcement agency power to investigate elections*, CNN (Apr. 5, 2022), <https://www.cnn.com/2022/04/05/politics/georgia-passes-election-investigation/index.html>.

<sup>45</sup> Georgia Constitution, GA CONST Art. 2, §1, ¶ II.

<sup>46</sup> Stanley Dunlap, *Bill to ban noncitizens from voting in Georgia elections stalls at key legislative deadline*, WABE (Mar. 1, 2024), <https://www.wabe.org/bill-to-ban-noncitizens-from-voting-in-georgia-elections-stalls-at-key-legislative-deadline/>.

<sup>47</sup> Dave Williams, *Four Georgia bills focus on changes to election ballots, counts*, The Current (Feb. 3, 2024), <https://thecurrentga.org/2024/02/03/four-georgia-bills-focus-on-changes-to-election-ballots-counts/>.

<sup>48</sup> S.B. 446, 157th Gen. Assemb., Reg. Sess. (Ga. 2024); Doug Richards, *Georgia senate bill would shorten early voting period*, 11 Alive News (Feb. 2, 2024), <https://www.11alive.com/article/news/politics/ga-senate-bill-shorten-early-voting-period/85-0c815ef0-27c3-4efa-813a-1527fc2adfa5>.

<sup>49</sup> S.B. 221, 157th Gen. Assemb., Reg. Sess. (Ga. 2024); Jeff Amy, *Georgia Republicans seek to stop automatic voter registration in state*, Assoc. Press (Feb. 22, 2024), <https://www.pbs.org/newshour/politics/georgia-republicans-seek-to-stop-automatic-voter-registration-in-state>.

6) The introduction of SB 355, which would prohibit ranked choice voting in Georgia beyond that which is offered to military or overseas voters.<sup>50</sup>

7) Beginning in 2021, so-called, “local bills,” were enacted to reconstitute county boards of election in order to remove Black Democrats who were previously appointed to serve as election board members as a result of a prior bi-partisan appointment process and replacing them with persons appointed by Republican County commissioners or other Republican leadership in the counties.<sup>51</sup>

## C. FLORIDA

### 1. FL SB 90 (2021)<sup>52</sup>

Florida enacted its post-2020 election omnibus voter suppression law, FL SB 90, purportedly to address the State’s concerns about election integrity notwithstanding that there was little to no evidence of massive voter fraud or other problems with the integrity of Florida’s elections at the time SB 90 was enacted.<sup>53</sup>

Nevertheless, SB 90 made numerous changes to Florida elections procedures, including making it more difficult to register to vote; restricting the ability to provide food and water to voters waiting in line to vote; imposing new restrictions on the provision of assistance to disabled or illiterate voters and to voters with limited English proficiency if they needed assistance in voting at the polls; making it more difficult to vote absentee; shortening the time frame in which voters can remain on the state’s automatic vote by mail list; and making it more difficult to use absentee ballot drop boxes, among other changes.<sup>54</sup>

The law also made changes to rules governing poll observers, which opened the door to the prospect that observers could intimidate both voters and election administrators at the polls, and the law made it more difficult for Florida agencies to settle election-related litigation without interference by the legislature or attorney general.<sup>55</sup>

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<sup>50</sup> S.B. 355, 157th Gen. Assemb., Reg. Sess. (Ga. 2024).

<sup>51</sup> James Oliphant and Nathan Layne, *Insight: Georgia Republicans purge Black Democrats from county election boards*, Reuters (Dec. 9, 2021), <https://www.reuters.com/world/us/georgia-republicans-purge-black-democrats-county-election-boards-2021-12-09/>; Nick Corasaniti and Reid J. Epstein, *How Republican States Are Expanding Their Power Over Elections*, New York Times (June 19, 2021), <https://www.nytimes.com/2021/06/19/us/politics/republican-states.html>.

<sup>52</sup> S.B. 90, 2021 Leg., Reg. Sess. (Fla. 2021)

<sup>53</sup> Eliza Sweren-Becker, *Florida Enacts Sweeping Voter Suppression Law*, Brennan Ctr. Just. (Apr. 30, 2021, updated May 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/florida-enacts-sweeping-voter-suppression-law>.

<sup>54</sup> *Id.*

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

Soon after the enactment of SB 90, civil rights and voter advocacy organizations filed lawsuits challenging the law under theories which included violations of the First, Fourteenth and Fifteenth Amendments of the U.S. Constitution, the Americans with Disabilities Act and the Voting Rights Act. The cases were subsequently consolidated for trial by the District Court.<sup>56</sup>

Following a bench trial before the Honorable Chief Judge Mark Walker, the Court entered a lengthy opinion striking down most of the suppressive and discriminatory aspects of the law.<sup>57</sup> Despite the District Court's having made detailed findings of fact supporting the opinion which highlighted evidence at trial which demonstrated the law was enacted with discriminatory purpose and had a discriminatory effect on Black voters, the Eleventh Circuit reversed much of Judge Walker's opinion and remanded the case to the District Court with specific instructions to determine whether the drop box restrictions and voter registration delivery provisions unduly burden the right to vote under the First and Fourteenth Amendments.

Subsequently, the Eleventh Circuit denied a petition for rehearing *en banc* and on February 8, 2024, and the District Court rejected the plaintiffs' remaining claims on remand, effectively ending the litigation.<sup>58</sup>

## **2. FL SB 524 (2022)<sup>59</sup>**

Florida Senate Bill 524 was enacted in 2022 in the wake of unfounded claims of mass voter fraud in the 2020 election. This bill created an Office of Election Crimes and Security within the Department of State which was effectively an election police force.

When the election police were first deployed to make arrests in August 2022 following the enactment of SB 524, the election police force conducted 20 arrests in August of 2022, which demonstrated a clearly disproportionate impact on Black Florida voters when 15 of the 20 persons arrested were Black, even though Black

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<sup>56</sup> See, *League of Women Voters of Florida, et al. v. Laurel M. Lee, et al.*, Case No. 4:21-cv-00186-MW-MAF, United States District Court for the Northern District of Florida, ECF Document 365 (Dec. 8, 2021).

<sup>57</sup> *League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042 (N.D. Fla. 2022), *aff'd in part, vacated in part, rev'd in part sub nom. League of Women Voters of Fla. Inc. v. Fla. Sec. of State*, 66 F.4th 905 (11th Cir. 2023).

<sup>58</sup> *League of Women Voters of Fla. Inc. v. Fla. Sec. of State*, 81 F.4th 1328 (11th Cir. 2023)(denying the petition for *en banc* review); and *League of Women Voters of Fla., Inc. v. Fla. Sec. of State*, No. 4:21CV186-MW/MAF, 2024 WL 495257 (N.D. Fla. Feb. 8, 2024)(final order denying the plaintiffs' remaining claims on remand).

<sup>59</sup> S.B. 524, 2022 Leg., Reg. Sess. (Fla. 2022).



voters only comprised 14.5 percent of the state’s population in the 2020 Census.<sup>60</sup> This significant racial disparity as well as the failure of the election police to secure convictions raised red flags about the racially disproportionate impact of the law as well as whether it was necessary or even effective.<sup>61</sup>

### 3. FL SB 7050 (2023)<sup>62</sup>

Florida enacted SB 7050 in 2023, which is another omnibus voter suppression law. SB 7050 took aim at third party voter registration groups, targeted mail-in ballots and absentee voting; and amended Florida’s list maintenance provisions, among other voting changes.<sup>63</sup>

Soon after the enactment of SB 7050, civil rights groups and voting advocates, including the Florida State Conference of Branches and Youth Units of the NAACP; League of Women Voters of Florida, and the Hispanic Federation, filed lawsuits challenging its provisions.<sup>64</sup>

On July 3, 2023, the Court in the *Hispanic Federation* litigation temporarily enjoined the provision of S.B. 7050 which bars persons who are not U.S. citizens from engaging in voter registration activities. On July 11, the Florida Secretary of State and Attorney General filed an appeal from this decision in the 11<sup>th</sup> Circuit.

On March 1, 2024, the District Court granted, in part, the plaintiffs’ motion in the *Hispanic Federation, et al.* action for summary judgment and permanently blocked the Florida Secretary of State from enforcing a provision of S.B. 7050 which bars persons who are not United States citizens from collecting or handling voter registration applications on behalf of third-party voter registration groups, finding that the provision violates the Equal Protection Clause of the 14th Amendment.

With respect to the League of Women Voter’s challenge to SB 7050, which is also consolidated with the Florida State Conference of Branches and Youth Units of

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<sup>60</sup> Sergio Bustos, *Crist decries voting-fraud arrests after body cam video shows voters shocked by felony charges*, Tallahassee Democrat (Oct. 20, 2022), <https://www.tallahassee.com/story/news/politics/elections/2022/10/19/charlie-crist-ron-desantis-voting-fraud-arrests-police-body-camera-florida/10539631002/>.

<sup>61</sup> Gary Fields et al., *New state voter fraud units finding few cases from midterms*, ASSOC. PRESS (Nov. 26, 2022), <https://apnews.com/article/2022-midterm-elections-voting-rights-florida-georgia-4db14ddccf37e4597cb9b7f20ec499b4>.

<sup>62</sup> S.B. 7050, 2023 Leg., Reg. Sess. (Fla. 2023).

<sup>63</sup> *Id.*

<sup>64</sup> The three lawsuits are: *Hispanic Federation, et al. v. Cord Byrd, et al.*, United States District Court for the Northern District of Florida, Case No. 4:23-cv-218 RH-MAF (filed May 23, 2023); *Florida State Conference of Branches and Youth Units of the NAACP v. Cord Byrd, et al.*, United States District Court for the Northern District of Florida, Case No. 4:23-cv-218-MW/MAF (filed May 24, 2023); and *League of Women Voters of Florida v. Moody*, United States District Court for the Northern District of Florida, 4:23-cv-00216-RH-MAF (filed May 24, 2023).

the NAACP action, the Court granted summary judgment to the Defendants on the League’s challenge to the “Felon Ban” provisions of SB 7050, which prohibit persons with certain disqualifying felony convictions from handling or collecting absentee ballots and imposes significant fines on organizations allowing such persons to collect or handle absentee ballots.<sup>65</sup> All three actions are still being litigated in the District Court as of the time of this summary.

#### IV. Litigation Challenges in Addressing Suppressive Laws

The Lawyers’ Committee works on the front lines of the legal fight to defend and expand equal and meaningful access to our democracy for communities of color. We see the effects of the judicial subversion of key provisions of the Voting Rights Act every day. This is not a theoretical exercise: courts are narrowly construing the reach of the provisions of the Voting Rights Act every day in ways that directly impact the ability of voters of color to participate in our elections on an equal basis with white voters.

As outlined above, the *Shelby County* and *Brnovich* decisions have opened the floodgates for states to pass new voting restrictions which target and disproportionately disenfranchise voters of color. But these decisions have not only emboldened anti-voter lawmakers to enact discriminatory voting laws. These decisions have also emboldened lower court judges to issue rulings that further dismantle the remaining protections of the Voting Rights Act, in particular Section 2, and that undermine the practical ability of voting rights litigators to effectively bring and win cases enforcing these protections. This has in turn emboldened defendants in these cases to advance novel and baseless arguments attacking the very foundations of Section 2.

Most prominently, in *Milligan*, decided last year, Alabama defended its discriminatory congressional redistricting plan—which created just one Black opportunity district out of seven total districts despite Black Alabamians making up more than one quarter of the state’s population—in part by arguing that the decades-old *Gingles* framework used by courts to evaluate whether a redistricting plan violates Section 2 requires jurisdictions to engage in constitutionally impermissible “race-based redistricting” and must be thrown out and replaced with an analysis comparing the challenged map to a “race-neutral benchmark.”<sup>66</sup> While the Court declined to endorse such a radical remaking of Section 2 jurisprudence, it did so in a narrow 5-4 ruling, with — as noted above — a concurrence issued by Justice Kavanaugh suggesting his willingness to strike down Section 2 entirely or apply it in

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<sup>65</sup> *League of Women Voters of Florida, Inc., et al. v. Cord Byrd, et al.*, Case No. 4:23-cv-216-MW/MAF, ECF Document No. 95 (Feb. 13, 2024).

<sup>66</sup> 599 U.S. 1, 23 (2023).

a “race-neutral” manner that would severely undermine its protections.<sup>67</sup> While Alabama did not initially raise this argument in *Milligan*, they later referenced it as they openly defied a lower court order to draw a second Black opportunity district,<sup>68</sup> and defendants have begun raising it in other cases and it will likely be before the Court in the near future.

Just as concerning, the Eight Circuit Court of Appeals in November of last year took the unprecedented step of ruling that Section 2 is not even enforceable by private plaintiffs. In *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, the court affirmed in a 2-1 decision the district court’s ruling—issued by a recently-appointed judge who had served as Arkansas Solicitor General a mere five years prior<sup>69</sup>—finding that only the Attorney General can bring cases enforcing the protections of Section 2.<sup>70</sup> Ignoring nearly six decades of rulings in hundreds of cases—including by the United States Supreme Court<sup>71</sup>—uniformly endorsing without question the ability of affected individuals to bring suit to enforce their rights under Section 2, the court instead engaged in a spurious and contorted legal analysis misapplying and cherry-picking canons of statutory construction in a thinly-veiled exercise of ends-means justification.<sup>72</sup> This decision prevented these plaintiffs from continuing their lawsuit challenging Arkansas’ discriminatory redistricting plan for its state House of Representatives—which packed Black voters, who make up sixteen percent of the state’s population, into just eleven percent of the House districts. Although we maintain that Section 1983 of the Civil Rights Act provides an alternative means for private persons and individuals to press claims under Section 2 of the Voting Rights Act, this ruling curtailing private rights of action under Section 2 currently applies to the Eighth Circuit, which covers states with total population over twenty million people. Further, in the few short months since this ruling,

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<sup>67</sup> *Id.* at 45 (Kavanaugh, J., concurring in part) (“Justice THOMAS notes, however, that even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future.”).

<sup>68</sup> See, e.g., Jemma Stephenson, “Alabama Attorney General’s Office says state is not defying redistricting court order,” *Alabama Reflector* (Sept. 22, 2023), available at <https://alabamareflector.com/2023/09/22/alabama-attorney-generals-office-reply-says-theyre-not-defying-redistricting-court-order/>.

<sup>69</sup> Hon. Lee P. Rudofsky was confirmed by the United States Senate in 2019 on a party-line vote after the Senate lowered the maximum time allowed for debate on district court nominees from thirty hours to just two hours. See *Lee Rudofsky*, *Ballotpedia*, [https://ballotpedia.org/Lee\\_Rudofsky](https://ballotpedia.org/Lee_Rudofsky) (last visited Mar. 8, 2024).

<sup>70</sup> 86 F.4th 1204 (8th Cir. 2023).

<sup>71</sup> See, e.g., *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 537 (2013) (“Both the Federal Government and individuals have sued to enforce § 2...”). See also *Morse v. Republican Party, Va.*, 517 U.S. 186, 240 (1996) (“Although [Section] 2, like [Section] 5, provides no right to sue on its face, ‘the existence of the private right of action under Section 2...has been clearly intended by Congress since 1965’”).

<sup>72</sup> See generally, Brief for the Lawyers’ Committee as Amicus Curiae, *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023) (Apr. 2022), <https://www.lawyerscommittee.org/wp-content/uploads/2022/04/Corrected-Amicus-Brief-of-Lawyers-Comm-in-Support-of-Arkansas-NAACP-No.-22-1395-paper-copies.pdf>.

defendants in numerous other Section 2 lawsuits across the country have begun asserting this same baseless argument.

Since *Brnovich* imposed its novel and unfounded set of “guideposts” for courts to consider when evaluating Section 2 vote denial claims, courts applying them have felt forced to ignore statistically significant racially disparate impact. In a recent decision out of Arizona, the court applied these guideposts in evaluating whether new restrictive voter registration provisions—including requiring voters who do not provide documentary proof of citizenship (“DPOC”) when registering to vote to be subject to investigation by county recorders—violate Section 2 of the Voting Rights Act. Despite finding that voters of color are *twice as likely as white voters* to register without providing DPOC and thereby be subjected to investigation, and that this was burdensome both in intimidating voters and in potentially requiring an eligible voter to take additional steps to confirm their citizenship, the court found that under the *Brnovich* framework this two-to-one racially disparate impact did not affect enough voters overall to violate Section 2.<sup>73</sup>

And courts are undermining enforcement of the Voting Rights Act in more subtle ways as well. Multiple circuit courts have begun issuing rulings preventing plaintiffs who bring intentional discrimination claims under Section 2 from obtaining the very evidence of impermissible legislative intent that would help prove these claims. For example, the Fifth Circuit ruled last year that documents evidencing the circumstances surrounding the proposal and passage of Texas SB 1—an omnibus voter suppression bill plaintiffs allege was designed to restrict access by voters of color—were shielded from discovery by legislative privilege, and that the legislators had not waived this privilege despite communicating this same information with third parties outside the legislature.<sup>74</sup> Similarly, in another Eighth Circuit decision issued last year, the court held that legislative privilege shielded North Dakota legislators from having to testify and turn over key evidence concerning the circumstances surrounding their enactment of a discriminatory redistricting plan, including legislators’ communications regarding Tribal input into the redistricting process, the identity of the map drawers and the criteria they followed in drawing the map, and racial polarization or demographic data considered during the redistricting process.<sup>75</sup>

Even where plaintiffs are able to demonstrate a violation, or that they have a high likelihood of demonstrating a violation, courts are increasingly content to allow elections to take place under a discriminatory redistricting plan or other restriction

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<sup>73</sup> *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at \*44-47 (D. Ariz. Feb. 29, 2024).

<sup>74</sup> *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 236 (5th Cir. 2023).

<sup>75</sup> *In re N. Dakota Legislative Assembly*, 70 F.4th 460, 465 (8th Cir. 2023) (granting petition for writ of mandamus to quash subpoenas from *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-0022 (D.N.D.); *id.* at fn.\*).

on access to voting before ordering that the violation be remedied. Known as the *Purcell* Principle after *Purcell v. Gonzalez*,<sup>76</sup> what was once a general principle that courts should carefully examine and balance the “harms attendant upon issuance or non-issuance of an injunction,” together with “considerations specific to election cases” that bear against changing voting laws on the eve of an election,<sup>77</sup> has been applied as acting as a practical bar to judicial intervention even months before an election.<sup>78</sup> For example, earlier in the *Milligan* case, the Supreme Court stayed the district court’s preliminary injunction ordering Alabama to draw a second Black opportunity district, citing *Purcell* despite the primary election still being more than four months away.<sup>79</sup> A district court judge in Georgia subsequently cited this stay in declining to enjoin state legislative and congressional maps it found likely violated Section 2.<sup>80</sup> As a result, both Alabama and Georgia held their 2022 elections on discriminatory maps despite plaintiffs showing they were likely to prevail in establishing a Section 2 violation.

The threats to equal access to democracy for voters of color are ever-present and show no signs of diminishing. At the same time, courts are steadily undermining the legal tools available to voters of color facing discriminatory voting laws, in particular Section 2 of the Voting Rights Act. Congress must act to restore the key protections of the Voting Rights Act and ensure that it remains viable as a legal defense against voter suppression in perpetuity.

## V. Conclusion

The record since the *Shelby County* decision demonstrates what voting rights advocates feared: that without an operational Section 5, voting discrimination would increase substantially. To help remedy suppressive state laws targeting voters of color, new litigation challenges in protecting the right to vote, and the firsthand barriers which voters of color face, the most important thing Congress can do is to pass the John Lewis Voting Rights Advancement Act (JLVRAA) to restore the strength of the VRA and prevent racial discrimination. Without legislation like the JLVRAA addressing the hole in the Voting Rights Act left by the *Shelby County* and other decisions, our democracy is at risk. The JLVRAA responds to the Supreme Court decisions weakening the VRA with provisions that strengthen the Voting Rights Act to address the discriminatory voting laws that voters of color increasingly face today.

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<sup>76</sup> 549 U.S. 1 (2006) (per curiam).

<sup>77</sup> *Id.* at 4-5.

<sup>78</sup> See, e.g., *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) (invoking *Purcell* in granting stay of lower court order in part on basis that, while “[t]he November election itself may be months away,” “important, interim deadlines . . . are imminent” more than five months prior to Election Day).

<sup>79</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 879-82 (2022).

<sup>80</sup> *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1326 (N.D. Ga. 2022).