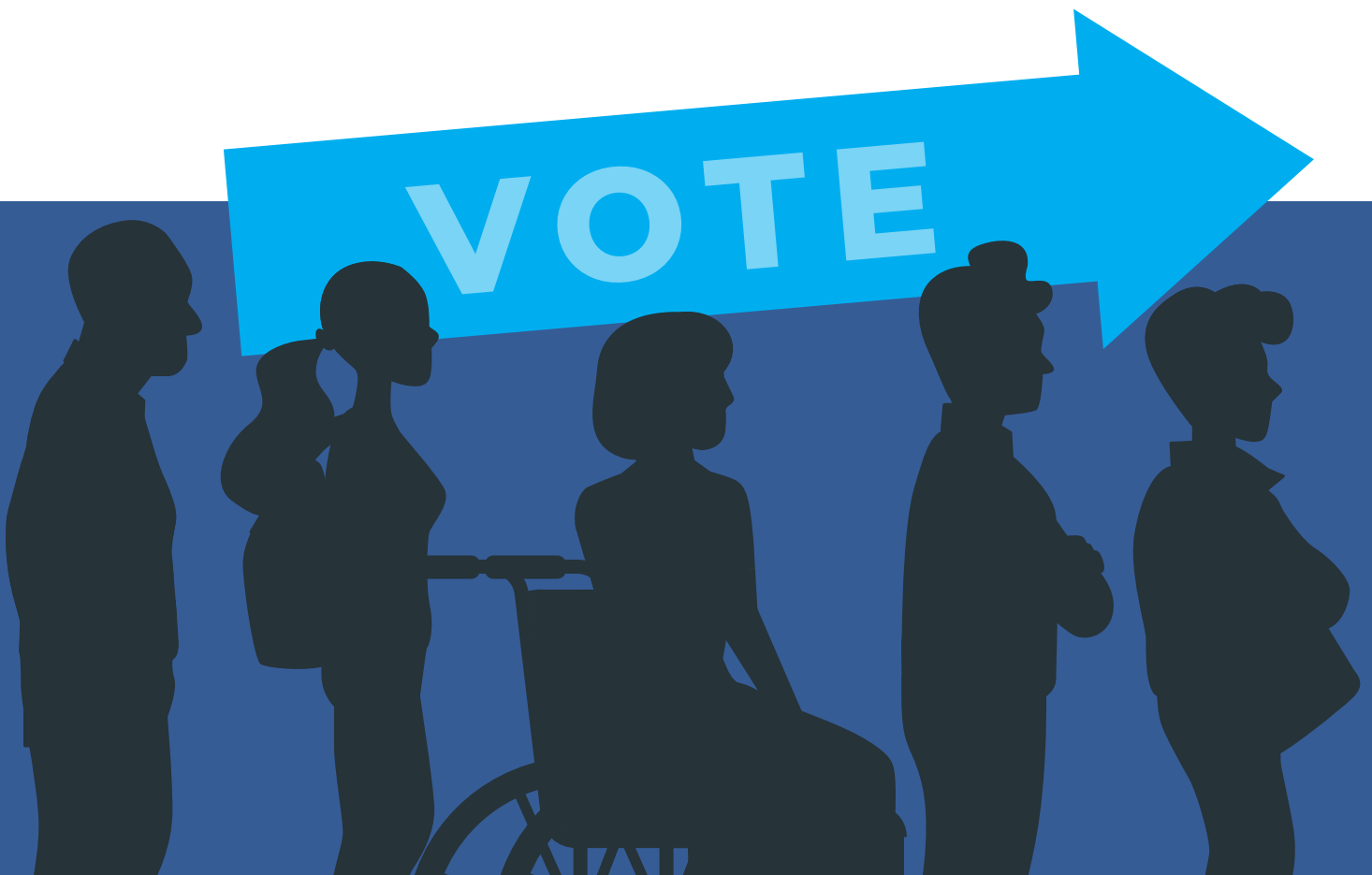




Practice-Based Preclearance:

Protecting Against Tactics Persistently Used
to Silence Minority Communities' Votes

NOVEMBER 2019



About the Organizations

Asian Americans Advancing Justice | AAJC

Rooted in the dreams of immigrants and inspired by the promise of opportunity, Asian Americans Advancing Justice | AAJC (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 is a national 501 (c)(3) nonprofit founded in 1991 in Washington, D.C.

MALDEF (Mexican American Legal Defense and Educational Fund)

Founded in 1968, MALDEF is the nation's leading Latino legal civil rights organization. Our commitment is to protect and defend the rights of all Latinos living in the United States and the constitutional rights of all Americans. MALDEF has focused its efforts in protecting and promoting equal rights for Latinos, and constitutional rights for all, in four core program areas — education, employment and economic advancement, immigrants' rights, and voting rights and political access. Over the course of its 50-year history, MALDEF's litigation and advocacy efforts have spurred reforms and led to new laws and policies with wide-ranging impact for the Latino community and the nation as a whole.

NALEO Educational Fund

NALEO Educational Fund is the leading non-profit, non-partisan organization that facilitates full Latino participation in the American political process, from citizenship to public service. Our constituency encompasses the more than 6,700 Latino elected and appointed officials nationwide, and includes Republicans, Democrats and Independents serving at all levels of government. NALEO Educational Fund is dedicated to ensuring that Latinos have an active presence in our democratic process, and to that end, we engage in a broad range of census, civil rights and election policy development and voter engagement efforts.

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EXECUTIVE SUMMARY

Section 5 of the Voting Rights Act (VRA) was instrumental in furthering the VRA's goals from its inception in 1965 until the Supreme Court's 2013 *Shelby County v. Holder* decision. When *Shelby County* was decided, Section 5 required states and local jurisdictions with a history of discrimination in voting against racial, ethnic, and language minorities to obtain federal approval for every proposed voting-related change before it could go into effect. This provision prevented the implementation of many voting changes that would have denied voters of color a voice in our democracy, from discriminatory polling place changes or closures to dilutive redistricting, and had a deterrent effect that prevented would-be bad actors from proposing discriminatory changes.

Without a fully-functioning Section 5 in place, states and local jurisdictions have employed a number of tactics to discriminate against voters of color, including shortening voting hours and days, erecting new barriers to voter registration, purging eligible voters from the rolls, implementing restrictive voter identification laws, closing polling places, and reconfiguring voting districts. But even when a coverage formula based on a jurisdiction's history of violating the Constitution and VRA was in effect, it could not always reach incidents of discrimination against newly emerging or mobilizing communities of voters of color living in places without an established record of VRA violations. Congress must enact a new geographic coverage formula for Section 5, and complement it with a provision—practice-based preclearance—that targets the known tactics policymakers have repeatedly used to silence minority voters whose presence is growing.

It is increasingly the case that our nation's most rapidly growing racial, ethnic, and language-minority communities are present in cities and states where they did not have a significant presence in the past. Throughout American history, conditions like these have triggered the use of particular tools to preserve the balance of political power between majority and emerging minority communities. From the widespread backlash against the successes of Reconstruction to today's simultaneous resurgence of anti-immigrant sentiment and adoption of measures like citizenship documentation requirements to register to vote, state and local lawmakers have established a pattern that the VRA is designed to combat.

Practice-based preclearance would focus administrative or judicial review narrowly on suspect practices that are most likely to be tainted by discriminatory intent or to have discriminatory effects, as demonstrated by broad historical experience. A practice-based preclearance coverage formula would extend to any jurisdiction across the country that is home to a racially, ethnically, and/or linguistically diverse population and is seeking to adopt a covered practice, in spite of advance notice of its discriminatory potential. Diverse jurisdictions under the Voting Rights Advancement Act of 2019 are states and political subdivisions where two or more racial, ethnic, or language-minority groups each represent 20 percent or more of the voting-age population or where a single language-minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision. Based on the most recent Census Bureau data, 15

whole states, the District of Columbia, and 801 counties or county equivalents (25.9 percent of all counties in the country) currently satisfy this threshold. This represents 6.9 percent of all counties in the Northeast portion of the country, 4.6 percent of all counties in the Midwest, 42 percent of all counties in the South, and 31.3 percent of all counties in the West. These jurisdictions would not be required to preclear all their voting-related changes, only those that are most frequently and fundamentally discriminatory based on their historical use to silence the political voices of communities of color.

The following practices would need to be precleared if adopted in a diverse state or political subdivision:

1. **Changes in Method of Election:** Where voters of color have overcome first-generation barriers to the ballot, manipulation of elections to ensure majority domination has become popular. For example, numerous lawmakers in places with growing and mobilizing minority communities have adopted at-large and multimember districts in which white majorities can outvote those cohesive minority communities. Two separate analyses of voting discrimination have found that discriminatory changes in method of election occur with great frequency in the modern era. For example, since 1957, there have been at least 1,753 legal and advocacy actions that successfully overturned a discriminatory change in method of election because of its discriminatory intent or effects.
2. **Redistricting:** Persistently high rates of residential segregation and racially polarized voting have made it possible for people with discriminatory motives to use the redistricting process to deny political power to emerging or sizeable minority populations. The complexity and obscurity of redistricting have enhanced its attractiveness as a tool for limiting minority voters' influence at times when racial motives generally are not socially acceptable. Two separate analyses of voting discrimination have found that discriminatory redistricting changes occur with great frequency in the modern era. For example, 982 redistricting plans have been challenged and invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.
3. **Annexations or Deannexations:** Annexations or deannexations dilute minority political power by selectively altering the racial and ethnic makeup of a jurisdiction's electorate. In recent history these changes have often taken place quietly – often without the immediate notice required under pre-*Shelby County* Section 5 – and at times when minority voters' strength was growing within the political jurisdiction. Two separate analyses of voting discrimination have found that discriminatory annexations or deannexations occur with great frequency in the modern era. For example, at least 219 annexations or deannexations have been challenged and invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.

4. **Identification and Proof of Citizenship Requirements:** Over the past twenty years, in places where African American voters have mobilized in historic numbers, and communities of color with immigrant origins are making a mark as patriotic naturalized citizens and first- and second-generation Americans, restrictive identification requirements have become an increasingly popular intervention. ID laws impose prerequisites to registering or voting that go above and beyond the legal minimum requirement of attestation to adulthood and U.S. citizenship, and that voters of color are disproportionately unable to satisfy. Two separate analyses of voting discrimination have found that discriminatory identification and citizenship requirements occur with great frequency in the modern era. For example, at least 52 attempts to implement discriminatory voter ID requirements have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.

5. **Polling Place Closures and Realignments:** Residential segregation has made racially-motivated manipulation of polling place locations an effective tool for deterring voters of color. With in-person voting enjoying sustained popularity and importance, in light of factors like the growing population of limited-English proficient voters, a trend of polling place closures threatens to dampen the electoral influence of underrepresented communities who have consistently lost access to voting resources when polling places are consolidated. Two separate analyses of voting discrimination have found that discriminatory polling place closures or realignments occur with great frequency in the modern era. For example, at least 295 attempts to move or close polling locations have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.

6. **Withdrawal of Multilingual Materials and Assistance:** Throughout history, policymakers with discriminatory motives have ascribed to limited-English proficient Americans allegations of ignorance, mental deficiency, and a dangerous other-ness, and have sought to deny them a political voice by imposing explicit or de facto English literacy prerequisites to voting. In the modern era, election administrators exclude language-minority voters by eliminating and obstructing multilingual assistance and the channels through which it is provided. Two separate analyses of voting discrimination have found that discriminatory barriers to language access occur with great frequency. For example, courts and lawmakers have taken remedial action to combat discriminatory effects or intent in at least 84 instances of obstruction, withdrawal, or severe neglect of language assistance services since 1957.

Congress and the President must work to ensure that the VRA provides effective protections to all voters of color, whether or not they live in jurisdictions with established histories of discriminatory election policymaking. A practice-based trigger would ensure that the VRA tracks known patterns of discrimination and redresses the most problematic restrictions adopted under the circumstances that

make them likely to be unfair, before they take effect and without the crushing cost of litigation.

Introduction

The Voting Rights Act of 1965 (the VRA) has often been called “the crown jewel” of our nation’s civil rights law – including by President Ronald Reagan when endorsing the 1982 reauthorization of the VRA.¹ As one of our most fundamental rights, voting is the most basic form of participation in our democracy and is “preservative of all rights.”² The single most effective civil rights law enacted by Congress, the VRA addresses voting discrimination through both preventive protections and remedial measures. In particular, Section 5 of the VRA (Section 5) was instrumental from its inception in 1965 until the 2013 *Shelby County v. Holder* decision by the U.S. Supreme Court in furthering the VRA’s goals. Section 5 requires states and local jurisdictions with a history of racial discrimination in voting to submit every proposed voting-related change to either the U.S. Department of Justice (DOJ) or a federal court in the District of Columbia for approval, or “preclearance,” before the change goes into effect. Section 5’s success was due in large part to its function as a cost-effective dispute resolution mechanism and as an alternative to protracted litigation.³ Section 5 prevented the implementation of many voting changes that would have harmed minority voting rights, from discriminatory precinct changes to dilutive redistricting. At the same time, Section 5 deterred even more discriminatorily-conceived voting changes from being proposed in the first place.

Section 5 should also be celebrated as one of the first and most effective alternative dispute resolution (ADR) provisions. Preclearance permits faster, less costly resolution of disputes over potentially discriminatory voting changes versus more cumbersome and resource-intensive court litigation. Like other ADR mechanisms, preclearance involves streamlined review by a non-judicial officer who considers both sides of the dispute. Unlike mandatory ADR in other contexts, Section 5 allows jurisdictions to bypass the non-judicial review and proceed directly to the D.C. federal court, as well as to receive expedited review that bypasses the appellate court of the district court’s decisions. VRA litigation generally involves fee awards for prevailing plaintiffs. Preclearance saves taxpayers in covered jurisdictions a considerable amount of money because the jurisdiction can obtain quick decisions without having to pay attorneys, expert witnesses, or prevailing plaintiff’s fees and costs that are incurred in complex and expensive litigation.⁴

¹ E.g., Associated Press, “Reagan backs voting rights act,” THE TELEGRAPH (November 7, 1981), <https://news.google.com/newspapers?nid=2209&dat=19811107&id=naErAAAIBAJ&sjid=hfwFAAAAIBAJ&pg=6871,1296888>.

² *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

³ While Section 2 of the VRA continues to afford an after-the-fact opportunity to challenge minority vote dilution, Section 2 litigation is among the costliest and most time-consuming, for both sides, in the civil rights arena. See, e.g., Christopher S. Elmendorf and Douglas M. Spencer, “Administering Section 2 of the Voting Rights Act After Shelby County,” 115 *Columbia Law Review* 2143 (2015).

⁴ NAACP Legal Defense and Educational Fund, *The Cost (In Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation* (2018), https://www.naacpldf.org/wp-content/uploads/Section-2-costs-08.13.18_1.pdf.

Unfortunately, in June 2013, the Supreme Court dealt a blow to the VRA by striking down the Section 4(b) coverage formula which determined which jurisdictions were covered by Section 5, in a narrow five-to-four decision in *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013). This decision left millions of voters of color at the mercy of discriminatory voting changes, without the ability to stop voting discrimination before it occurs, and the country without an efficient mechanism to resolve voting rights disputes, just as such disputes are rising with respect to emerging minority populations and their growing political voice.

The years following the *Shelby County* decision have seen an increase in voting discrimination, particularly in the locations that were previously covered by Section 5. From shortening voting hours and days, erecting new barriers to voter registration, purging eligible voters from the rolls, implementing strict voter identification laws, and closing polling places to reconfiguring election systems and voting districts, states and local jurisdictions have employed a number of tactics to discriminate against voters of color in recent years.⁵ Immediately after the *Shelby County* decision, previously-covered jurisdictions moved to implement voting changes that they knew would not have been precleared prior to the decision. In fact, on the day of the *Shelby County* decision, the Texas Attorney General tweeted, “Eric Holder can no longer deny #VoterID in #Texas after today’s #SCOTUS decision. #txlege #tcot #txgop;” “Texas #VoterID law should go into effect immediately b/c #SCOTUS struck down section 4 of VRA today. #txlege #tcot #txgop;” and “With [sic] today’s #SCOTUS decision #Texas should be freed from Voting Rights Act Preclearance. #txlege #tcot #txgop.”⁶ North Carolina moved to enact an extensive voter suppression bill, less than two months after the decision that included a strict photo ID requirement, reduced early voting, eliminated same-day registration, and ended annual voter registration drives, among other voting restrictions.⁷ The bill that was enacted was much broader and more restrictive in scope than initially proposed – a direct result of the Supreme Court’s decision.⁸

Similarly, Arizona immediately implemented a controversial change after the *Shelby County* decision that had previously been subject to a “More Information Request” (MIR) from the DOJ. MIRs usually signal to a jurisdiction that a change raises concerns and might not be approved. The change Arizona advanced—which made it a felony to possess anyone else’s early ballot, whether or not it was filled out—would have had a negative effect on Native American voters in particular.

⁵ E.g., Wendy R. Weiser and Max Feldman, Brennan Center for Justice, *The State of Voting 2018* (June 5, 2018), <https://www.brennancenter.org/our-work/research-reports/state-voting-2018>.

⁶ Matt Vasilogambros, “That Was Quick, Texas Moves Forward With Voting ID Law After Supreme Court Ruling,” NATIONAL JOURNAL (June 25, 2013), <https://web.archive.org/web/20130628065520/https://www.nationaljournal.com/politics/that-was-quick-texas-moves-forward-with-voter-id-law-after-supreme-court-ruling-20130625/>.

⁷ North Carolina H.B. 589 (2013).

⁸ Mark Joseph Stern, “North Carolina’s ‘Monster’ Voter-Suppression Law Is Dead,” SLATE (May 15, 2017), <https://slate.com/news-and-politics/2017/05/north-carolinas-voter-suppression-law-was-apparently-too-racist-for-the-supreme-court.html>; David A. Graham, “North Carolina’s Deliberate Disenfranchisement of Black Voters,” THE ATLANTIC (July 29, 2016), <https://slate.com/news-and-politics/2017/05/north-carolinas-voter-suppression-law-was-apparently-too-racist-for-the-supreme-court.html>.

Because so few Native Americans have home mail delivery, “[t]hey rely on post office boxes that are often very far from their homes so families commonly ‘pool’ their mail, meaning one person who is going to town would collect it for everyone else to drop it off at the post office.”⁹ The law would have made such a person a potential felon. It was withdrawn when Section 5 preclearance applied prior to the *Shelby County* decision, and remains unresolved after the move to instate it post-decision.¹⁰ These incidents, along with the many additional instances of voting discrimination that have occurred both before and after *Shelby County*, demonstrate the need for Congress to respond to the Supreme Court’s charge and enact legislation to restore and strengthen the VRA based on recent evidence of voting discrimination – of which there is plenty.

The Need for Restoring and Strengthening the Voting Rights Act

The Perceived Threat of Increasing Political Influence by Emerging and Existing Minority Populations

It has been long understood that in heterogeneous societies the majority group has an incentive to become hostile toward minority groups when either political or economic resources are at stake. This observation is known as the power-threat hypothesis.¹¹ It applies to the United States, which has become more diverse over time and will continue to do so. The Census Bureau projects that by 2045 the country will become “majority-minority” – at which point the non-Hispanic white alone population will comprise less than 50 percent of the nation’s total population.¹² Hispanics or Latinos are already the largest minority group in the country.¹³ The populations that will be fastest growing between 2018 and 2060 are projected to be the following, starting with the fastest: multiracial population (197.8 percent), Asian Americans (101 percent), Latinos (93.5 percent), Native Hawaiian and Pacific Islanders (45.9 percent), African Americans (41.1 percent), and American Indian and Alaska Natives (37.7 percent).¹⁴ The Census Bureau projects a decline in the growth rate of the non-Hispanic white population of -9.5 percent.¹⁵

Meanwhile, researchers have studied the reaction of the white majority to projected demographic changes in their home communities and the nation. Members of a

⁹ Natalie A. Landreth, Native American Rights Fund, Written Testimony Submitted in Connection with a Hearing of the House Judiciary Committee on Evidence of Current and Ongoing Voting Discrimination, September 10, 2019, <http://docs.house.gov/meetings/JU/JU10/20190910/109895/HHRC-116-JU10-Wstate-LandrethN-20190910.pdf>.

¹⁰ *Id.*

¹¹ Christopher Sebastian Parker and Christopher C. Towler, “Race and Authoritarianism in American Politics,” *22 Annual Review of Political Science* 503 (May 2019) [hereinafter “Race and Authoritarianism”].

¹² Census Bureau, 2017 National Population Projections: Projected race and Hispanic origin (Table 4), <https://www.census.gov/data/tables/2017/demo/popproj/2017-summary-tables.html>.

¹³ *E.g.*, CNN, “Hispanics in the US Fast Facts” (March 6, 2019),

<https://www.cnn.com/2013/09/20/us/hispanics-in-the-u-s-/index.html>.

¹⁴ Sandra L. Colby and Jennifer M. Ortman, Census Bureau, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060*, Doc. P25-1143 (March 2015),

<https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf>.

¹⁵ *Id.*

majority racial or ethnic group experience feelings of resistance against minorities, and inclinations toward repression, that begin to increase when the majority learns that they are soon to become the minority, with the perception of the threat being roughly proportionate to the presence of the minority relative to the majority.¹⁶ In response to the news that the country would become majority-minority in 2045, a Pew Research Center study found that whites were half as likely to say having a majority non-white population would be good for the country as minority participants in the study; about three-in-ten whites (28 percent) said this change would be bad for the country.¹⁷ Whites were also more likely than minority participants to say that a majority non-white population would lead to more racial and ethnic conflicts (53 percent versus 43 percent) and that it would weaken American customs and values (46 percent versus 24 percent).¹⁸ These feelings and reactions are not new – history shows that fear that a new demographic group, such as immigrants, might wield “too much electoral power” has often resulted in legislation aimed to curb that group’s ability to vote.¹⁹

It is important to understand the power-threat hypothesis and the Pew Research Center’s findings not just as they relate to the concept of a majority-minority country in 2045, but against the backdrop of the demographic changes we have already seen over the past decades. During the VRA’s more than 50-year history, each racial and ethnic group grew, but communities of color significantly outpaced non-Hispanic whites.²⁰ Over the last two decades, Asian Americans have been the fastest growing racial or ethnic minority, followed by Latinos.²¹ While there are states and localities where communities of color have traditionally resided in larger numbers, communities of historically underrepresented voters are now emerging in other areas of the country. For example, Asian American voters have long been concentrated in jurisdictions in the western United States, including Hawaii and California, but between 2000 and 2010, Georgia and North Carolina were two of the three states with the fastest-growing Asian American populations in the United

¹⁶ Race and Authoritarianism, *supra* n.11.

¹⁷ Kim Parker, Rich Morin, and Juliana Menasce Horowitz, Pew Research Center, “Views of demographic changes” (March 21, 2019), <https://www.pewsocialtrends.org/2019/03/21/views-of-demographic-changes-in-america/>.

¹⁸ *Id.*

¹⁹ Alexander Keyssar, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 67 (Basic Books: 2009) [hereinafter “The Right to Vote”].

²⁰ *E.g.*, Associated Press, “Census: Every Ethnic, Racial Group Grew, but Whites Slowest” (June 23, 2017), <https://www.nbcnews.com/news/nbcblk/census-every-ethnic-racial-group-grew-whites-slowest-n775591>; Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, Census Bureau, *Overview of Race and Hispanic Origin: 2010*, Doc. C2010BR-02 (March 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

²¹ Charles Lam and Associated Press, “Asians Remain Fastest-Growing US Group as Pacific Islanders, Mixed-Race Numbers Grow: Census,” NBC NEWS (July 29, 2016), <https://www.nbcnews.com/news/asia-america/asians-remain-fastest-growing-us-group-pacific-islanders-mixed-race-n597711>; Associated Press, “These Are the Fastest-Growing Racial Groups in America,” *FORTUNE* (June 23, 2016), <https://fortune.com/2016/06/23/census-bureau-race-age/>.

States. Today, almost one in four Asian Americans lives in the South.²² Georgia has also seen its Latino population more than double during this period.²³ Between 2007 and 2014, five of the ten U.S. counties whose Latino populations grew most rapidly were in North or South Dakota,²⁴ two states whose overall Latino populations still account for less than ten percent of their residents, and are dwarfed by Latino communities in states like New Mexico, Texas, and California.²⁵

It is precisely this rapid growth of different racial or ethnic populations that results in the perception that emerging communities of color are a threat to those in political power. In response to that threat, the political establishment implements voting-related changes to make it more difficult to vote and to dilute the voting power of that threatening population. The actions are often motivated by direct intentional discrimination or are cloaked in pretextual justifications – such as protection of incumbents’ seniority, competitiveness, or continuity of representation. An assessment of elections under the VRA’s protections reveals a pattern of jurisdictions’ use of discriminatory tactics to silence the voices of emerging communities just as they begin to grow to a point where they can flex their political muscle and have their voices heard.

There are strong indications that rapid, visible growth of emerging racial or ethnic populations fosters perceptions that communities of color may pose a threat to existing political power structures. From America’s founding, lawmakers denied enslaved African Americans the right to vote, and free African Americans were either formally excluded or barred in practice from voting by property ownership requirements and other stringent voter qualifications. Although the growth of America’s abolitionist movement, the Union’s victory in the Civil War, and Reconstruction in the South eliminated many voting impediments, concerns about the political power of the African American vote dominated America’s political discourse, and inspired backlash in the form of “black codes” and organized efforts to incarcerate, intimidate, and prevent African Americans from voting. The collapse of Reconstruction in 1877 further normalized these voter suppression tactics, and they became the ideological foundation of Jim Crow:

²² E.g., Asian Americans Advancing Justice, *A Community of Contrasts: Asian Americans, Native Hawaiians and Pacific Islanders in the South* (2014), https://www.advancingjustice-aajc.org/sites/default/files/2016-09/2014_Community%20of%20Contrasts.pdf; Terry Ao Minnis, “Asian Americans Advancing Justice – AAJC, Section 5 of the Voting Rights Act and Asian American Voters” (June 20, 2016), <https://www.advancingjustice-aajc.org/sites/default/files/2016-09/Section%205%20of%20the%20VRA%20and%20Asian%20Americans.pdf>; Gustavo Lopez, Neil G. Ruiz, and Eileen Patten, Pew Research Center, “Key facts about Asian Americans, a diverse and growing population” (September 8, 2017), <https://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>.

²³ Antonio Flores, Pew Research Center, “How the U.S. Hispanic population is changing” (September 18, 2017), <https://www.pewresearch.org/fact-tank/2017/09/18/how-the-u-s-hispanic-population-is-changing/>.

²⁴ Renee Stepler and Mark Hugo Lopez, Pew Research Center, “Fast-growing and slow-growing Hispanic counties” (September 8, 2016), <https://www.pewresearch.org/hispanic/2016/09/08/2-fast-growing-and-slow-growing-hispanic-counties/> [hereinafter “Fast-growing Hispanic counties”].

²⁵ Renee Stepler and Mark Hugo Lopez, Pew Research Center, “Ranking the Latino population in the states” (September 8, 2016), <https://www.pewresearch.org/hispanic/2016/09/08/4-ranking-the-latino-population-in-the-states/>.

“Even before Reconstruction came to a quasi-formal end in 1877, black voting rights were under attack. Elections were hotly contested, and white Southerners ... engaged in both legal and extralegal efforts to limit the political influence of freedmen. In the early 1870s, both in the South and in the border states, districts were gerrymandered (i.e., reshaped for partisan reasons), precincts reorganized, and polling places closed to hinder black political participation.”²⁶

Native Americans have also been excluded since our country’s founding from the political process. The original text of the Constitution excluded “Indians not taxed” from the population basis for apportioning congressional seats among the states. In 1866, Congress adopted the Fourteenth Amendment, after the Civil War, granting citizenship to “[a]ll persons born or naturalized in the United States” except those not “subject to the jurisdiction thereof”—a provision specifically intended to exclude Native Americans from the franchise. These are examples of the concerted effort to deny the right to vote of Native Americans. During debate on the Fourteenth Amendment, “Senators expressed dual concerns that Indians were an inferior race and therefore not worthy of citizenship and that, if granted citizenship and the right to vote, their numbers could overwhelm the votes of white citizens in the western territories.”²⁷

Immigrant communities have frequently attracted similar hostility when they grew large enough to potentially exercise political influence. In the late nineteenth century, a strong sentiment against universal suffrage began to increase as “opponents of universal suffrage consistently couched their opinions in language redolent with class, ethnic, and racial hostility.”²⁸ Public antipathy extended to people with disfavored European national origins, such as the Irish, and intensified in the form of anti-immigrant attitudes about Latinos and Asian Americans. For example, “in Texas, Mexican immigrants were described as a ‘political menace,’ as ‘foreigners who claim American citizenship but who are as ignorant of things American as the mule.’”²⁹ At the end of the nineteenth century, most Americans supported both excluding people of Chinese origin from voting and from entering the country.³⁰ Provisions in state constitutions included language like the following, from California: “no native of China shall ever exercise the privileges of an elector in this State.”³¹ California’s constitution also prohibited from voting any “person who shall not be able to read the Constitution in the English language and write his name,” in response to the perception that foreign-born residents and Mexican

²⁶ The Right to Vote at 84, *supra* n.19.

²⁷ Bryan L. Sells, Written Testimony Submitted in Connection with a Hearing of the House Judiciary Committee on Legislative Proposals to Strengthen the Voting Rights Act, October 17, 2019, <http://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-SellsB-20191017.pdf>, [hereinafter “Sells Testimony”].

²⁸ The Right to Vote at 98, *supra* n.19.

²⁹ *Id.* at 99.

³⁰ *Id.* at 113.

³¹ *Id.* at 114.

Americans were immigrating in waves and forming a potential “ignorant foreign vote.”³²

Within the past two decades, these same patterns of restrictive lawmaking in response to political presence and mobilization have repeated in many parts of the country. In North Carolina, African American voter turnout surged during the presidential elections of 2008 and 2012: in 2000 the non-Hispanic white turnout rate was more than ten points higher than the African American participation rate, whereas in 2008, non-Hispanic white and African American voting rates were identical.³³ Legislators wrote a wide-ranging package of restrictions on voting, famously deemed by a panel of federal judges to have targeted black voters “with almost surgical precision,”³⁴ in the wake of the *Shelby County* decision and with the mobilization of the state’s black voting community fresh in their memory; the package was ultimately held to be intentionally discriminatory against African American voters.³⁵

Latino and Asian American voters have been historically stereotyped as foreigners,³⁶ regardless of their citizenship status. Where Latino and Asian American communities have grown most dramatically, anti-immigrant measures have followed to mitigate the perceived socio-political threat to historical white majorities.³⁷

For example, Prince William County, Virginia, made headlines when its Board of County Supervisors adopted a resolution in 2007 to mandate local officials’ active participation in immigration enforcement activities and to exclude people with immigrant origins from accessing public services and benefits. Lawmakers hoped to discourage at least some immigrant settlement generally; then-Board chair Corey Stewart commented, “We are ground zero in this debate on immigration. We’ve got a responsibility to do it right.”³⁸ At the time, Latino and Asian American populations in the county were increasing rapidly; according to Census data, the County’s Latino

³² *Id.* at 117.

³³ Census Bureau, Current Population Survey, Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race, and Hispanic Origin, for States: November 2000 (Table 4a), <https://www.census.gov/data/tables/2000/demo/voting-and-registration/p20-542.html>; Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008 (Table 4b), <https://www.census.gov/data/tables/2008/demo/voting-and-registration/p20-562-rv.html>.

³⁴ *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

³⁵ Sarah Childress, “Court: North Carolina Voter ID Law Targeted Black Voters,” FRONTLINE (July 29, 2016), <https://www.pbs.org/wgbh/frontline/article/court-north-carolina-voter-id-law-targeted-black-voters/>.

³⁶ For example, a Latino Decisions poll conducted for the National Hispanic Media Coalition found that non-Hispanic whites overestimated the percentages of U.S. Latinos who are immigrants, and who are undocumented. National Hispanic Media Coalition and Latino Decisions, *The Impact of Media Stereotypes on Opinions and Attitudes Towards Latinos 2* (September 2012), <http://www.nhmc.org/sites/default/files/LD%20NHMC%20Poll%20Results%20Sept.2012.pdf>.

³⁷ Audrey Singer, Jill H. Wilson, and Brooke DeRenzis, Metropolitan Policy Program at Brookings, *Immigrants, Politics, and Local Response in Suburban Washington* (February 2009), https://www.brookings.edu/wp-content/uploads/2016/06/0225_immigration_singer.pdf.

³⁸ Ian Urbina and Maria Newman, “Virginia County Votes to Deny Services to Illegal Immigrants,” N.Y. TIMES (October 17, 2007), <https://www.nytimes.com/2007/10/17/us/17prison-cnd.html>.

population grew 229.7 percent and its Asian population grew 201.9 percent between 2000 and 2012. During that same period, the non-Hispanic white population increased by only 41.2 percent.³⁹ The County's new residents were either citizens or potential future voters, and in spite of officials' efforts to make the jurisdiction less welcoming and attractive to families from underrepresented communities, they have already changed the face of politics in Prince William County. In November 2017 the County's voters elected two of the first Latinas ever to serve in the Virginia House of Delegates, Elizabeth Guzman and Hala Ayala.

State and federal officials that represent rapidly growing Latino and Asian American constituencies have advocated similar legislation just as emerging communities in their jurisdictions have gained visibility and political attention. Between the 2000 and 2010 Censuses, Alabama's Latino population increased by more than 144 percent,⁴⁰ and in 2011, the state enacted H.B. 56, considered one of the harshest immigration enforcement laws in the country at the time. The law would have required immigration status checks during property rental and other commercial transactions, involved schools in investigating students and their families, and explicitly created a new barrier to voting by mandating that newly registering voters present documentation of their citizenship. That same year, Alabama also adopted a strict voter identification requirement.

In other states that experienced similar dramatic demographic change, including Georgia and South Carolina, legislative efforts to deny U.S. citizenship to American-born children of undocumented immigrants arose in lockstep with the increasing presence of Latino and Asian American communities:⁴¹ South Carolina's Latino population was the fastest-growing in the nation between 2000 and 2010, and by 2010, Georgia's Latino population was the tenth-largest in the country.⁴² Members of Congress from many of these same states have championed federal legislation to enact a birthright citizenship restriction; in the 116th Congress, the Birthright Citizenship Act of 2019, H.R. 140, has multiple co-sponsors from the Georgia, North Carolina, Texas, Florida, and South Carolina Congressional delegations.

These are some examples of discriminatory lawmaking that has played out in jurisdictions with growing and/or changing minority populations.

³⁹ Prince William County, "The Prince William Report: Prince William County Demographic and Economic Newsletter" (January – March 2014), <https://www.pwcgov.org/government/dept/doit/gis/Documents/demographics/Prince%20William%20Report%202014%201st%20Q.pdf>.

⁴⁰ Sharon R. Ennis, Merarys Rios-Vargas, and Nora G. Albert, Census Bureau, *The Hispanic Population: 2010*, Doc. C2010BR-04 (May 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> [hereinafter "The Hispanic Population"].

⁴¹ See Shankar Vedantam, "State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship," WASHINGTON POST (Jan. 5, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503134.html>; *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (*holding Fourteenth Amendment grants U.S. citizenship to native-born children of alien parents*).

⁴² Pew Research Center Fact Sheet, "Latinos in the 2010 Elections: Georgia" (October 15, 2010), <https://www.pewresearch.org/hispanic/2010/10/15/latinos-in-the-2010-elections-georgia/>; The Hispanic Population, *supra* n. 40.

Restoring and Strengthening the Preclearance Structure

Recent evidence of continued voter discrimination makes clear that Section 5 is as needed today as it was in 1965. Voters of color continue to experience discrimination at every stage in the voting process, from registration to changes in election systems and districts. Chief Justice Roberts himself recognized that “voting discrimination still exists; no one doubts that” in the majority opinion in *Shelby County*.⁴³ Given the efficacy of Section 5 and the ongoing and escalating challenges to minority voting rights, Congress must enact a substitute coverage formula that takes account of recent historical experience to ensure that modern, repeat voting rights violators preclear their voting changes prior to implementation.

At the same time, our nation’s most rapidly growing racial, ethnic, and language-minority communities are present today in cities and states in which they did not have a significant presence in the past. If preclearance reaches only places where discrimination has been observed and sanctioned in the past, this invaluable tool will neglect the needs of emerging populations that are only just beginning to experience discrimination inspired by their growing visibility. Thus, a legislative response to the *Shelby County* decision must include not only a new geographic coverage formula for Section 5, but a complementary provision that targets the known practices policymakers have repeatedly used to silence growing minority electorates.

History shows that jurisdictions favor use of certain practices that have proven to be effective in voter suppression order to diminish the insurgent political threat posed by fast-growing or fast-mobilizing minority groups. Practice-based preclearance, or known practices coverage, narrowly focuses administrative or judicial review on these suspect practices that are most likely to be tainted by discriminatory intent or to have a discriminatory effect, as demonstrated by broad historical experience, including more than fifty years of VRA-based litigation. For example, known discriminatory practices involving methods of election, redistricting, annexations, polling place relocations, and interference with language assistance accounted for less than half of practices for which preclearance was sought between 1990 and 2012, but nearly two-thirds of preclearance denials between 1990 and 2013.⁴⁴

A known practices coverage formula would require review of certain voting-related changes—performed by either the DOJ or the federal District Court in Washington, DC—prior to implementation of that change and would extend to any jurisdiction across the country that is home to a racially, ethnically, and/or linguistically diverse population and is seeking to adopt a covered practice. Diverse jurisdictions covered by the Voting Rights Advancement Act of 2019’s practice-based preclearance provisions are states and political subdivisions in which two or more racial, ethnic, or language-minority groups each represent 20 percent or more of the voting-age population or in which a single language-minority group represents 20 percent or

⁴³ *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁴⁴ Based on authors’ original analysis of Lawyers Committee for Civil Rights Under Law’s database of objections to preclearance submissions, and records of the Department of Justice’s Voting Section in the Civil Rights Division.

more of the voting-age population on Indian lands located in whole or in part in the political subdivision. According to the 2013-2017 American Community Survey 5-year estimates, 15 states in whole, the District of Columbia, and 801 counties or county equivalents across the country (making up 25.9 percent of all counties in the country) currently satisfy this threshold qualification.⁴⁵ This represents 6.9 percent of all counties in the Northeast portion of the country, 4.6 percent of all counties in the Midwest, 42 percent of all counties in the South, and 31.3 percent of all counties in the West. These jurisdictions would not be required to preclear all their voting changes. They would preclear only the practices identified in law as having been the most frequently and fundamentally discriminatory on the basis of their shown historical use to silence the political voices of communities of color. This mechanism ensures that practice-based preclearance is narrowly-tailored.

Known Practices as Proven Tactics to Discriminate in Voting

The Voting Rights Advancement Act of 2019, H.R. 4, would require preclearance of six different voting changes most likely to discriminatorily affect access to the vote in diverse jurisdictions whose minority populations are attaining visibility and influence.

Two separate analyses of voting discrimination have found that these known practices occur with great frequency in the modern era. One study conducted by Professor Morgan Kousser compiled instances of Section 2 cases where plaintiffs prevailed, objections under Section 5 and More Information Requests that resulted in changes in voting practices, challenges under the Fourteenth or Fifteenth Amendments where plaintiffs prevailed, Section 203 and 208 cases under the VRA where plaintiffs prevailed, cases based on a failure to make a Section 5 submission, and settlements and consent decrees under Section 2 or any other provisions that were favorable to minority voters, from 1957 to present where one of the known practices was implicated. The other study, conducted by the authors of this report, looked at all Section 5 objections and a developing set of Section 2 cases resulting in a decision or favorable settlement for plaintiffs since 1982, drawing in part on the work of Professor Ellen Katz and the University of Michigan Law School's Voting Rights Initiative, and the Lawyers Committee for Civil Rights Under Law. In both instances, the studies showed that known practices predominated among confirmed violations, and were repeatedly and consistently problematic. We describe the history and effects of those known practices below.

Changes in Method of Election That Entrench Majority Dominance

Lawmakers have a long, established history of manipulating methods of election to dilute the voting power of disfavored minority populations. “Method of election” refers to the system for electing members of a body and may include features affecting the size and composition of the electorate that votes for a given seat, the timing of election for certain seats, and the number or percentage of votes required to win an election. By manipulating these features, policymakers can ensure that

⁴⁵ Based on authors' original analysis of Census Bureau data, available in custom format at <https://data.census.gov/cedsci/> and <https://dataferrett.census.gov/>.

even where voters of color are able to cast their ballots, the strength of their votes is diminished. Discriminatory methods of election artificially construct seats, districts, or staggered elections in which white voters are likely to outvote voters of color, in jurisdictions in which voters of color and white voters generally vote for opposing candidates. In so doing, manipulations of methods of election threaten the basic guarantee that each vote counts equally.⁴⁶

The Discriminatory Intent and Effect of Changes in Method of Election

There are a wealth of confirmed Section 2 violations involving, and Section 5 objections to, changes in method of election that indicate that they are a tactic used to react in opposition to the perceived threat of a non-white voting bloc by minimizing the value of that community's voting power. Their potential to effectively prevent minority voters from electing representatives in fair proportion to their share of population is not only intuitive, but it is proven in practice where there are sizeable minority populations that have not yet reached the status of being a majority. Changing the method of election for particular seats is most often a neutral act on its face, and likely became popular because its discriminatory effects, or its discriminatory intent, may not always be immediately apparent.

Jurisdictions have frequently adopted at-large and multi-member districts to dilute minority votes. In an at-large election system, multiple seats on an electoral body are up for election simultaneously, and all of the jurisdiction's voters cast ballots for each of the open seats. In a multi-member election, a jurisdiction is divided into districts, and in each, resident voters all vote for each of multiple seats representing the district. In either system, where communities of color and white majorities consistently support different candidates and vote effectively as racial blocs, white majorities can regularly outvote minorities and sustain political control. This is especially true when at-large elections are coupled with majority-vote requirements that seat only candidates who receive at least 50 percent of the vote.

At-large and multi-member elections for local office gained popularity just as the successes of Reconstruction motivated white majorities to seek more creative barriers for voters of color. Congress took a definitive step away from at-large elections as early as 1842 when, in view of the benefits of uniformity and of giving voice to more members of the electorate, it adopted the Apportionment Act of 1842 and mandated that Representatives be elected from discrete single-member districts.⁴⁷ Many states followed suit. Nonetheless, after the Civil War, municipalities in the South began to adopt at-large election systems to ensure that even if and where voters of color overcame hurdles to registering and voting, the weight of their votes could be cabined and limited.

⁴⁶ NAACP Legal Defense and Educational Fund, Asian American Justice Center, and Mexican American Legal Defense and Educational Fund, *The Impact of Redistricting in YOUR Community* 14-19 (2010), <https://www.maldef.org/wp-content/uploads/2019/01/redistricting.pdf>.

⁴⁷ United States House of Representatives, "Whereas: Stories from the People's House" (April 16, 2019), <https://history.house.gov/Blog/2019/April/4-16-Apportionment-1/>.

One classic example of the perniciousness of at-large systems is what is known as the “Galveston plan.” In the 1890s in Galveston, Texas, the city adopted a five-seat city council elected entirely at-large, resulting in the election of an all-white city council to represent a town that was then 22 percent African American.⁴⁸ Even after the advent of the VRA, at-large elections remained disproportionately popular in jurisdictions whose discriminatory inclinations were well-established. In 1968, all but six of Texas’s 185 home-rule cities elected city councilmembers at-large.⁴⁹ In 1976, 75 percent of southern cities with a population of at least 25,000 were still conducting at-large city council elections, compared to just 47 percent of cities elsewhere around the country.⁵⁰

The history of discriminatory use of changes in method of election is extensive and ongoing.⁵¹ For example, in *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986), the district court found that “in the 1960s the State of Alabama enacted numbered-place laws with the specific intent of making local at-large systems, including those used in county commissioner elections, more effective and efficient tools for keeping black voters from electing black candidates,” consistent with the State’s track record of limiting the influence of African American voters during that time period.⁵² The district court found that hundreds of Alabama’s jurisdictions continued to intentionally employ at-large elections to discriminate against African American voters. As recently as September 2019, citizens challenged Mississippi’s two-tiered system for winning statewide office, which requires candidates to win both the popular vote and a majority of the state’s 122 House districts.⁵³ Under this scheme, no African American has held statewide office in Mississippi since Reconstruction.

The timing of changes in method of election is also often suspect.⁵⁴ For instance, in the immediate aftermath of the passage of the VRA, Mississippi amended state law to empower each county board of supervisors to adopt at-large elections, in place of the previous electoral scheme dictated by law of five single-member districts.⁵⁵ The

⁴⁸ Chandler Davidson and George Korb, “At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence,” 43 *The Journal of Politics* 982, 989-990 (November 1981).

⁴⁹ Philip W. Barnes, “Alternative Methods of Electing City Council in Texas Home Rule Cities,” 16 *Public Affairs Comment* 1 (May 1970).

⁵⁰ Albert K. Karnig, “Black Representation on City Councils,” 12 *Urban Affairs Quarterly* 235 (December 1976).

⁵¹ E.g., J. Morgan Kousser, “Protecting the Right to Vote,” *LOS ANGELES TIMES* (September 28, 2012), <https://www.latimes.com/opinion/la-xpm-2012-sep-28-la-oe-kousser-voter-id-20120928-story.html> [hereinafter “Protecting the Right to Vote”]; cf. Ellen Katz with Margaret Aisenbrey, Anna Baldwin, Emma Cheuse, and Anna Weisbrodt, Voting Rights Initiative of the University of Michigan Law School, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (December 2005), https://www.law.berkeley.edu/files/kats_discrimination_in_voting.pdf; Philip P. Frickey, “Majority Rule, Minority Rights, and the Right to Vote: Reflections upon a Reading of Minority Vote Dilution,” 3 *Law & Inequality: A Journal of Theory and Practice* 209, 228-230 (1985).

⁵² *Dillard*, 640 F. Supp. at 1356.

⁵³ *McLemore v. Hosemann*, No. 3:19-cv-00383-DPJ-FKB (filed 5/30/19),

<https://www.documentcloud.org/documents/6102478-Mississippi-Elections-Lawsuit.html>.

⁵⁴ Protecting the Right to Vote, *supra* n.51.

⁵⁵ Morgan Kousser, “Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law,” 27 *University of San Francisco Law Review* 551, 558 (November 1993).

Supreme Court struck down Mississippi's changes in *Allen v. Board of Elections*, 393 U.S. 544 (1969). In its decision, the Supreme Court stated, "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of race."

The long and widely-recognized history of manipulation of methods of election as a means of diluting votes has confirmed this tactic's effectiveness, and supports an inference that jurisdictions that employ these tools seek to intentionally limit the growing political voices of minority voting groups. For instance, in 1991, the DOJ issued an objection to a proposal by Refugio Independent School District in Refugio County, Texas, to elect its school board members using a structure of two at-large seats and five single-member districts. The School District had made a previously unsuccessful attempt to implement the plan that the DOJ had also blocked.⁵⁶ Similarly, in 2001, the Haskell Consolidated Independent School District in Texas unsuccessfully sought permission to convert from a single-member district to an at-large electoral system. Its request came less than a decade after the jurisdiction had settled VRA litigation that challenged the previous use of at-large elections and agreed to implement single-member districts that ensured electoral opportunities for Latino voters.⁵⁷ That jurisdictions adopt methods of elections with direct awareness of how they disadvantage minority communities demonstrates the persistence of intentional efforts to dilute minority voting power across the country.

Inversely, the disuse of at-large and multi-member elections and other methods of election that promote majority rule in favor of discrete districts has proven its worth as a means of ensuring that every vote carries equal weight. Scholarly work that studied the effect of the VRA in the South "demonstrate[d] that the substantial increases in minority representation since 1970 are due primarily to the elimination of at-large elections and other devices that can dilute minority voting strength."⁵⁸

Discriminatory Changes in Method of Election in Practice

Florida

In 1992, Osceola County, Florida voters passed a charter amendment by referendum to adopt single-member districts to replace its at-large electoral system. As a result, Osceola County elected its first Hispanic county commissioner in 1996. But during the same time, Osceola County's demographics were dramatically changing. In 1980 Latinos made up only 2 percent of the total population, whereas by 2000, Hispanics made up almost 30 percent of the total population.⁵⁹ There was widespread understanding among Commissioners serving in the mid-90s that these changes in

⁵⁶ Department of Justice, Letter to Judy Underwood, Esq., April 22, 1991, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2340.pdf>.

⁵⁷ Department of Justice, Letter to Cheryl T. Mehl, September 24, 2001, <https://www.justice.gov/crt-0>.

⁵⁸ Peyton McCrary, "Bringing Equality to Power: How the Federal Courts Transformed the Electoral Power of the South, 1960-1990," 5 *University of Pennsylvania Journal of Constitutional Law* 665, 669 (2003).

⁵⁹ *United States v. Osceola County, Florida*, 475 F. Supp. 2d 1220, 1222 (M.D. Fla. 2006).

the County's population would give Hispanic voters the opportunity to elect candidates of their choice in one or more single-member districts.⁶⁰

It was in this context that the County began moving almost immediately to review the switch to single-member districts. Officials established a Charter Review Advisory Commission in 1995, composed of only non-Hispanic whites, and tasked it with considering a potential return to at-large elections. The Charter Review Advisory Commission recommend a switch back to at-large elections, with very little public input, and the Board decided to accept the recommendation and pose the issue to voters via referendum. The County held single-member district elections in 1996, and elected the first Hispanic to the County Board, but on the same ballot voters also approved the referendum to switch back to at-large elections. The successful Hispanic candidate, Robert Guevara, won in spite of a campaign marked by racial overtures. His opponent "sent a campaign mailer that depicted Guevara with darker skin and portrayed him as 'Night' and Owens as 'Day,'"⁶¹ and candidates warned that residents would not "want Osceola to turn into another Miami."⁶²

The DOJ sued the County in 2002, and alleged violations of Sections 2 and 208 of the VRA, because that County had also failed to ensure adequate language assistance for its Spanish-speaking voters. The district court held that the County's switch back to at-large elections had a discriminatory effect on Hispanic voters and was thus in violation of Section 2 of the VRA. Before ruling on the merits, the district court noted in its decision to grant the federal governments' motion for a preliminary injunction that there was "considerable evidence to suggest that defendant's institution and maintenance of an at-large voting system was motivated by a desire to dilute the vote of an emerging Hispanic population." The Court found that the County's articulated concerns about parochialism under a single-member system "ring[] hollow" and instead were a "rationalization or pretext under the circumstances for diluting the Hispanic vote in Osceola County."⁶³ This incident illustrates how and why jurisdictions not covered by Section 5 have moved toward at-large elections just when demographics shifted enough to enable cohesive minority populations to elect candidates of choice.

South Dakota⁶⁴

In 1991, the South Dakota legislature created a new district, District 28, which would elect two state representatives from discrete single-member districts in order to protect minority voting rights; by contrast, in every other state legislative district, voters were to elect one state Senator and two state Representatives at-large.⁶⁵ House District 28A, which included the Cheyenne River Sioux Reservation and

⁶⁰ Complaint, *United States v. Osceola County, Florida*, No. 6:05-cv-1053-ORL-31DAB (M.D. Fla. 2006), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/osceola2_comp_0.pdf.

⁶¹ *Osceola County*, 475 F. Supp. 2d at 1222.

⁶² *Id.*

⁶³ Decision on Motion for Preliminary Injunction, *United States v. Osceola County, Florida*, No. 6:05-cv-1053-ORL-31DAB (M.D. Fla. June 26, 2006) (transcript of bench order on file with authors).

⁶⁴ Sells Testimony, *supra* n.27.

⁶⁵ *Id.*

portions of the Standing Rock Sioux Reservation, was comprised of 60 percent American Indians of voting-age. Five years later, however, the legislature changed the method of election for this area by abolishing House Districts 28A and 28B and required candidates to run at-large in District 28, after an American Indian candidate won the Democratic primary in District 28A in 1994. The reconstituted House District 28 had an American Indian voting-age population of only 29 percent.

Plaintiffs challenged the change under Section 2 of the VRA, but the courts did not rule on their claim because, in the interim, the South Dakota Supreme Court held that the Legislature exceeded its constitutional authority when it enacted the 1996 redistricting plan that abolished the single-member districts in question. The Court therefore declared the 1996 plan null and void. During trial on the VRA claim, expert analysis of the six legislative contests between 1992-1994 involving American Indian and non-American Indian candidates in District 28 held under the 1991 plan showed American Indian voters favored the American Indian candidates at an average rate of 81 percent, while whites voted for the white candidates at an average rate of 93 percent. In all six of the contests the candidate preferred by American Indians was defeated. After the preexisting 1991 plan was reinstated, the first Native American in history was elected to South Dakota's state house from the Cheyenne River Sioux Indian Reservation during the ensuing special election for District 28A.

Texas

In June 2013, just three weeks after the *Shelby County* decision, Mayor Johnny Isbell of Pasadena, Texas announced a plan to change the method of electing members to the city council, from eight members elected from districts, to a council with six district representatives and two seats elected at-large. He said at the time, the "Justice Department can no longer tell us what to do."⁶⁶ Incumbents in Pasadena were facing increasing opposition from the growing Latino electorate, which accounted for about a third of the voters in the city, but more than half of the city's total population.⁶⁷ The change proposed by the Mayor, which was approved by city voters, would have forestalled election of a majority of Latino-preferred city councilmembers, because elections in Pasadena were characterized by racially polarized voting and the city's white population would effectively control the outcome of elections for the at-large seats.

Plaintiffs challenged the change under the VRA. In a ruling on the merits for plaintiffs, a federal judge held that not only would the change have the effect of unlawfully diluting the Latino vote, but it was made intentionally to accomplish that aim. The district court stated, "The intent was to delay the day when Latinos would make up enough of Pasadena's voters to have an equal opportunity to elect Latino-

⁶⁶ SCOTUS Blog, "After Shelby County," (November 6, 2013), <https://www.scotusblog.com/media/after-shelby-county/>.

⁶⁷ Ana Campoy and Nathan Koppel, "Voting Rights Fights Crop Up," WALL STREET JOURNAL (November 1, 2013), <http://online.wsj.com/news/articles/SB10001424052702303843104579169900109920052>; Editorial, "Plans to Redistrict Pasadena City Council," HOUSTON CHRONICLE (August 15, 2013), <http://www.chron.com/opinion/editorials/article/Plans-to-redistrict-Pasadena-City-Council-4736602.php>.

preferred candidates to a majority of City Council seats. Recent population shifts and growth in Latino citizen voting-age and Spanish-surnamed registered voter population made it clear that this power shift was about to occur.”⁶⁸ Among pertinent facts that surfaced at trial, it emerged that a city official associated with Mayor Isbell instructed a vendor developing a targeted mailing list for a mailer urging support for the switch to the at-large plan to “pull out the Hispanic names” from that list. The district court issued a “bail-in” order, requiring Pasadena to preclear future voting changes. This was the first time a court issued a contested order requiring a jurisdiction to be subject to federal preclearance after the *Shelby County* decision.

Before *Shelby County*, this change would have undergone a preclearance review under Section 5 of the VRA, and would have faced long odds. The DOJ frequently denied preclearance for similar conversions from single-member districts to at-large seats because they would have had a retrogressive effect on minority voters. In the aftermath of *Shelby County*, this intentionally discriminatory manipulation of elections went into immediate effect. Pasadena only settled the case, dropped its appeal of the district court’s findings, and agreed to submit its voting changes for preclearance until 2023 after costly and protracted private litigation.⁶⁹

The Known Practice of Changing Methods of Election to Dilute Minority Voting Strength

The Voting Rights Advancement Act would require jurisdictions with diverse electorates to obtain preclearance of any proposal to add or replace one or more single-member districts with one or more at-large or multi-member seats on a governing body. The law would focus scrutiny on changes to methods of election that lawmakers and administrators propose for jurisdictions with sizable minority populations. In these locations, racial bloc voting often occurs, and electoral schemes that favor majorities are likely to negatively affect cohesive minority communities. We find that at least 329 laws or proposals that would have changed the method of a jurisdiction’s election system have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982.⁷⁰ Since 1957, according to Professor Kousser’s research, there have been at least 1,753 total actions successfully overturning a discriminatory change in method of election, and most of these

⁶⁸ *Patino v. Pasadena*, 230 F. Supp.3d 667, 725 (S.D. Tex. 2017).

⁶⁹ Ernest I. Herrera, Mexican American Legal Defense and Educational Fund, Written Testimony Submitted in Connection with Oversight Hearing of the House Judiciary Committee on Enforcement of the Voting Rights Act in Texas 5-6, May 3, 2019, <https://docs.house.gov/meetings/JU/JU10/20190503/109387/HHRG-116-JU10-Wstate-HerreraE-20190503.pdf>.

⁷⁰ This and subsequent citations to the authors’ research are based on the authors’ review of all Section 5 objections and a developing set of Section 2 cases resulting in a decision or favorable settlement for plaintiffs since 1982, drawing in part on the work of Professor Ellen Katz and the University of Michigan Law School’s Voting Rights Initiative, and the Lawyers Committee for Civil Rights Under Law. For the purposes of this report, instances of discriminatory method of election practices include the use of at-large voting systems, majority vote requirements, numbered post requirements, and staggered terms.

occurred between 1982 and the present.⁷¹ For example, more than 80 percent of discriminatory at-large election schemes catalogued by Professor Kousser were adopted since 1982.

California adopted the California Voting Rights Act in 2001 to streamline challenges alleging vote dilution where there is an at-large election and racially polarized voting.⁷² The law has served as a beneficial deterrent to the maintenance of at-large systems as local demographics change, and a complement to the VRA. Dozens of jurisdictions throughout the state have switched their long-standing at-large systems to district elections, and have done so absent litigation. Recently, Asian American voters successfully challenged the use of at-large elections in Santa Clara, California's city elections.⁷³ The CVRA demonstrates the gains possible under a federal formula that promotes quick and cost-efficient resolution of problematic at-large systems in demographically changing jurisdictions. Research shows that under the CVRA, "[a]t least 389 local school boards, city councils, community college boards, hospital or water districts have at least begun the process of ending at-large elections."⁷⁴ Furthermore, these conversions under the CVRA to end local at-large systems are in jurisdictions that might later attempt to revert to an at-large system in whole or in part. A preclearance requirement for this type of action would serve as a deterrent against a switch designed to dilute the vote of minority citizens, and would prevent discriminatory reversion to at-large systems in those jurisdictions.

Redistricting After Significant Demographic Change

Redistricting is the process by which census data are used to periodically redraw the boundaries of electoral districts within a state. Redistricting takes place every ten years, soon after jurisdictions receive population data from the decennial census. This process affects districts at all levels of government — from local school boards and city councils to state legislatures and the United States House of Representatives. How districts are drawn often determines whether a community can elect representatives of choice. Redistricting also influences elected officials' responsiveness to constituents' needs.

⁷¹ Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors. Note also that the prevalence of known practices among successful VRA and constitutional actions is an important, but not exclusive, indicator of the frequency of their use during any given period of time. Factors determinative of the historical numbers we report here include loss of preclearance coverage in 2013 and resulting dramatic decline in awareness of and capacity to challenge discriminatory use of known practices; and lawmakers' increasing appreciation of the VRA's effectiveness over the course of its lifespan, which caused many to involuntarily alter their behavior.

⁷² E.g., Lawyers Committee for Civil Rights of the San Francisco Bay Area, "The California Voting Rights Act: Fact Sheet (Spring 2014), https://www.lccr.com/wp-content/uploads/2014_CVRA_Fact_Sheet.pdf.

⁷³ CBS San Francisco Bay Area, "Santa Clara Splits Districts After Lawsuit Proves At-Large Voting Hurt Asian Candidates" (July 24, 2018), <https://sanfrancisco.cbslocal.com/2018/07/24/santa-clara-splits-districts-after-lawsuit-proves-at-large-voting-hurt-asian-candidates/>.

⁷⁴ Morgan Kousser, California Institute of Technology, Written Testimony Submitted in Connection with a Hearing of the House Judiciary Committee on Legislative Proposals to Strengthen the Voting Rights Act, October 17, 2019, <https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf>.

In the 1960s, the Supreme Court established the “one person, one vote” rule, one of the most basic principles of redistricting. This principle requires that legislative and congressional districts be of equal population: the Supreme Court has held that state and local legislative districts’ populations can differ by no more than ten percent, unless justified by some “rational state policy.”⁷⁵ However, congressional districts must be virtually equal in population, unless justified by some “legitimate state objective.”⁷⁶ The starting point for redrawing a district, therefore, is to determine its “ideal” population. For a single-member district plan, the “ideal” population is equal to the total population of the jurisdiction divided by the total number of districts. Any amount less or greater than this number is called a “deviation.” The law allows for some deviations in state and local redistricting plans, but when redrawing congressional plans, drawers must strive for the “ideal” population.

Like changes to methods of election, redistricting changes can alter the voting strength of voters of color, without directly preventing those voters from casting ballots. Legislators and their advisors have often created redistricting plans with relatively little public involvement or engagement. For most residents in jurisdictions, the details and effects of district plans are not easy to decode. The indirect and obscure nature of redistricting enhances the odds that the process will be used to limit the influence of emerging communities. In addition, the practical necessity of regular redistricting to ensure representation based on population change has contributed to the rise of a long and prolific history of intentional design of electoral districts to reduce underrepresented communities’ opportunities to elect candidates of choice.

The Discriminatory Intent and Effect of Redistricting After Significant Demographic Change

Discrimination in redistricting commonly occurs when minority communities that are connected geographically, linguistically, and by culture and interest are prevented from electing the candidates of their choice through two different methods. In some cases, these populations are dispersed between multiple districts to prevent the presence of a large enough population in any single district for the minority community to determine or influence the outcome of elections. In other cases, minority communities are concentrated in a single or small number of districts in a way that artificially limits their impact on election outcomes.

Redistricting plans that dilute the votes of underrepresented communities are most likely to have discriminatory effects in diverse jurisdictions with sizable minority populations, and are most likely to be adopted where those minority populations reach critical mass or mobilize effectively to exercise their potential political influence. For example, 86 percent of the DOJ’s objections to intentionally discriminatory redistricting plans lodged between 1982 and 2013 concerned jurisdictions in which at least two racial or ethnic groups each made up at least 20

⁷⁵ See *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973).

⁷⁶ See *Karcher v. Daggett*, 462 U.S. 725 (1983).

percent of voting-age population, according to our original analysis of a list of objections compiled by the Lawyers Committee for Civil Rights Under Law.

Policymakers have designed and adopted redistricting plans with explicit reference to and implicit understanding of their potential negative effects on historically underrepresented communities. As former member of the U.S. Commission on Civil Rights Abigail Thernstrom once wrote, “[Southern politicians] realized that while it had become nearly impossible to limit black voters’ access to the ballot box, it was still possible to limit the power of the votes they cast. And in the years immediately following the enactment of the Voting Rights Act, a growing number of southern jurisdictions...reconfigured state legislative districts...in an effort to reduce the effect of the newly surging black vote and to maintain white supremacy.”⁷⁷ Over the past decade, redistricting for racial ends continued. Recent reports revealed that deceased redistricting consultant Thomas Hofeller advised state legislatures in North Carolina, Texas, Missouri, Virginia, and elsewhere, and used race as a primary factor to design maps that would limit the influence of minority communities.⁷⁸ In another contemporary incident, former Member of Congress Mel Watt testified in a lawsuit concerning post-2011 redistricting in North Carolina that a mapmaker told him that he was drawing boundaries to create a district with a designated percentage of its electorate from a minority community; Congressman Watt’s testimony helped the Supreme Court conclude that the resulting plan was unconstitutional.⁷⁹

When lawmakers have adopted redistricting plans in order to limit minority voters’ influence just as they are poised to exercise it, they have frequently failed to justify their decision-making in race-neutral terms. Some reviewing courts have described these plans as bearing “uncomfortable resemblance to political apartheid”⁸⁰ and “extreme and bizarre.”⁸¹ Discriminatory redistricting plans that restrain emerging communities’ political influence create obvious mismatches between the preferences of the electorate and the officials who represent them, where minority community members’ preferences depart from those expressed by white majorities.

The historical record is full of examples of proposed redistricting plans that limit the political voice and voting strength of emerging communities. For example, South Dakota’s statewide redistricting plan packed one district with 90 percent American Indians next to a district with 30 percent American Indians.⁸² In a 1991 example of

⁷⁷ Abigail Thernstrom, “Redistricting, Race, and the Voting Rights Act,” NATIONAL AFFAIRS (Spring 2010), <https://www.nationalaffairs.com/publications/detail/redistricting-race-and-the-voting-rights-act>.

⁷⁸ E.g., David Daley, “GOP Racial Gerrymandering Mastermind Participated in Redistricting in More States Than Previously Known, Files Reveal,” THE INTERCEPT (September 23, 2019), <https://theintercept.com/2019/09/23/gerrymandering-gop-west-virginia-florida-alabama/>.

⁷⁹ Daniel Tokaji, “Restricting Race-Conscious Redistricting,” THE REGULATORY REVIEW (July 31, 2017), <https://www.theregreview.org/2017/07/31/tokaji-restricting-race-conscious-redistricting/>; *Cooper v. Harris*, 581 U.S. ____ (2017).

⁸⁰ Nina Totenberg, “Questions of Race and Redistricting Return to the Supreme Court,” NPR MORNING EDITION (December 5, 2016), <https://www.npr.org/2016/12/05/504188630/questions-of-race-and-redistricting-return-to-the-supreme-court>.

⁸¹ *Bush v. Vera*, 517 U.S. 952, 971 (1996).

⁸² *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006).

“cracking,” the community in Los Angeles’s Koreatown, covering an area just over a square mile in size, was split into four city council districts and split into five different state assembly districts.⁸³ This fracturing was patently problematic after the 1992 riots in Los Angeles, during which an estimated \$1 billion in damages occurred, concentrated mainly on businesses operated by Koreans and other Asian immigrants in Koreatown. As a result of being divided among different districts, residents were unable to influence their representatives to respond adequately to the collective needs in Koreatown.

Discriminatory Redistricting in Action

California

The Kern County, California Board of Supervisors adopted a redistricting plan in 2011 for its five-district county plan based on 2010 U.S. Census data. The plan contained one district – District 5 – where Latinos constituted a majority of the eligible voters, but divided another politically cohesive Latino community in the northern part of Kern County into two supervisorial districts, neither one of which had sufficient Latino population to enable Latino voters to elect a candidate of their choice. In 2016, Latino residents sued, arguing that the plan violated Section 2 of the VRA.⁸⁴

During trial, the County contended that historical KKK activity in Kern County was nothing more than “morality policing” as opposed to the white-supremacist activity it was. Finding this and other arguments in defense unavailing, the District Court held in February 2018 that the redistricting plan violated Section 2 of the VRA because it unlawfully fractured a large cohesive Latino community, dividing their votes across two districts and thereby diluting Latino voters’ ability to participate effectively in the political process.⁸⁵ After negotiations, a remedial plan was put in place that added a second Latino-majority district in Kern County, allowing Latino voters to finally have their votes counted equally.

Texas

In 2011, as Texas undertook redistricting for Congressional and state legislative seats, the state’s rapid Latino population growth resulted in gain of four additional seats in Congress. Yet the new district map ultimately approved by the Texas Legislature failed to create even one new district in which Latino or other minority voters were likely to have the opportunity to elect a candidate of their choice. A three-judge federal district court reviewing the plan found clear evidence that the map was enacted with the intent to discriminate against Latinos and African Americans, pointing to email messages between legislative staff that revealed a plot to move important landmarks and active voting minority communities away from districts in

⁸³ Terry Ao Minnis, “Asian Americans & Redistricting: The Emerging Voice,” 13 *Journal of Law in Society* 23, 25-26 (2011).

⁸⁴ Complaint, *Luna v. County of Kern*, No. 1:16-cv-00568-DAD-JLT (E.D. Cal. 2018), <http://www.maldef.org/assets/pdf/2016-04-22-Complaint.pdf>.

⁸⁵ *Id.*

which minority voters were previously able to exert notable influence.⁸⁶ About 60 percent of Dallas County districts for the Texas House would have contained white majorities even though white voters only constituted about one-third of the County's electorate; districts themselves appeared "jagged [and] bizarrely shaped."⁸⁷ "The only explanation Texas offers for this pattern is 'coincidence', but if this was coincidence, it was a striking one indeed," U.S. Circuit Judge Thomas B Griffith noted.⁸⁸

Under the weight of pre-*Shelby County* administrative and court decisions invalidating its 2011 redistricting plans because of a discriminatory purpose, the Texas legislature eventually adopted a court-originated interim map in 2013. Further litigation and more findings that these subsequent maps repeated discriminatory features of the original maps followed. The matter was not concluded until the Supreme Court issued a final decision in 2018 that in effect approved many of the districts adopted in 2013 and others that courts had ordered in intervening years to ensure fair opportunity to elect representatives in communities of Latino voters. Even though the Supreme Court did not specifically find discriminatory purpose in the legislature's adoption of the 2013 map, it did not disturb or dispute the determination that the 2011 maps were infected with the discriminatory intent to limit the influence of voters of color.

Virginia

As local officials in Pittsylvania County, Virginia undertook redistricting for the school board and board of supervisors after the 2000 Census, they were emerging from a decade during which the County's African American population – 23.7 percent of residents – had finally achieved ability to elect a candidate of their choice from just one of seven single-member districts used to elect school board members and county supervisors. This shift in power seemingly raised concerns in a community perhaps most famous for the Reconstruction-era "Danville Riot," in which white and African American residents battled against each other in public after a multiracial coalition took control of the city council. In 2001, county officials proposed to reduce the African American voting-age population of the one opportunity district in the jurisdiction to less than 50 percent.⁸⁹

⁸⁶ Memorandum Opinion, *Texas v. United States*, No. 11-1303 (TBG-RMC-BAH) (D. D.C. 2012), <http://electionlawblog.org/wp-content/uploads/texas-redistricting-district-court.pdf>.

⁸⁷ Jose Garza, Mexican American Legislative Caucus, Texas House of Representatives, Written Testimony Submitted in Connection with Oversight Hearing of the House Judiciary Committee on Enforcement of the Voting Rights Act in Texas 10, May 3, 2019, <https://docs.house.gov/meetings/JU/JU10/20190503/109387/HHRG-116-JU10-Wstate-GarzaJ-20190503.pdf>.

⁸⁸ Robert Barnes, "Texas redistricting discriminates against minorities, federal court says," WASHINGTON POST (August 28, 2012), https://www.washingtonpost.com/politics/texas-redistricting-discriminates-against-minorities-federal-court-says/2012/08/28/f6e6a2e0-f156-11e1-892d-bc92fee603a7_story.html.

⁸⁹ Department of Justice, Letter to William D. Sleeper, County Administrator, and Fred M. Ingram, Board of Supervisors Chair, Pittsylvania County, April 29, 2002, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/VA-1290.pdf>.

The circumstances surrounding the proposed redesign of Pittsylvania County's electoral districts exacerbated the opportunity for and likelihood of discrimination occurring. Racial polarization in voting in the County was extreme, and experts found that small differences in the composition of the electorate assigned to a district could sway election results.⁹⁰ As the County Board deliberated over its redistricting plan, moreover, it refused to consider or review alternate plans proposed by advocates for the County's African American community, and chose a retrogressive plan even though it was very aware that there were other possibilities that were similar but extended more political opportunity to underrepresented voters.⁹¹ Because the County unnecessarily, but knowingly, adopted a plan that would imperil mobilizing minority voters' opportunity to influence local politics, the DOJ determined that its officials purposefully discriminated through its redistricting process.

The Known Practice of Redistricting in Diverse Jurisdictions to Dilute Minority Voting Strength

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance of redistricting plans that would be implemented when there has been significant recent growth of a racial, ethnic, or language-minority group, to ensure that redistricting does not result in vote dilution. Historical evidence indicates that in these conditions of racial or ethnic diversity, the redistricting process inherently poses the greatest likelihood of discriminatory effect and is most likely to be tainted with discriminatory intent. Protection against discriminatory redistricting plans is made necessary by the long history of use of redistricting to limit newly mobilized minority voters' opportunity to elect their candidate of choice; preclearance coverage would ensure that a voting change whose discriminatory history is tied to its secretive nature is subjected to greater public scrutiny.

According to our research, at least 389 redistricting plans have been challenged and invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982. A review encompassing a broader range of matters found that since 1957 there have been 982 successful actions that overturned discriminatory redistricting proposals; a large majority of these occurred between 1982 and the present.⁹² Historical experience tells us that resolving these violations without litigation would be preferable for all parties. In December 2018, redistricting litigation in North Carolina had already cost \$5.6 million in taxpayer dollars.⁹³ The litigation related to Texas's redistricting

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors.

⁹³ Taft Wireback, "North Carolina's redistricting cases cost taxpayers \$5.6 million and counting," GREENSBORO NEWS & RECORD (January 6, 2018), https://www.greensboro.com/news/local_news/north-carolina-s-redistricting-cases-cost-taxpayers-million-and-counting/article_7acfc513-e4fa-5f03-bcfd-499594dba6bd.html.

scheme was also a multi-million dollar affair, ultimately paid by taxpayers for the discrimination of government officials.⁹⁴

Annexations and Deannexations That Reduce Minority Share of the Electorate

Annexations and deannexations change the composition of the electorate eligible to vote in a given jurisdiction, and like redistricting and changes in method of election, they can diminish the political influence of racial and ethnic communities without explicitly declaring those intentions. When policymakers have altered municipal boundaries to selectively include or exclude certain populations, their efforts have had significant social effects beyond excluding people living outside a town or district from elections. Communities of color intentionally excluded from a given jurisdiction lose access to infrastructure and services like trash collection and fire department protection, in addition to their voice in political affairs. Their home values may decrease and exposure to health risk increase incidental to their political exclusion. Racial and ethnic patterns in annexation decisions also reinforce social notions of the value and character of neighborhoods that have hurt underrepresented Americans and cemented disparities in access to employment, education, and other important opportunities for social and economic mobility.

The Discriminatory Intent and Effect of Annexations and Deannexations

Civil rights laws' early successes inspired the use of tactics to covertly suppress the political voice of emerging communities, while enduring residential racial segregation and racially polarized voting have made it possible for annexations and deannexations to become a recurring method of vote dilution. The dissimilarity index, a measure of how many people would need to move to achieve perfect integration, has improved for American cities between 1970 and 2010, but it is still true that in the typical urban area, well more than half of black residents would have to move residences to undo racial segregation.⁹⁵ Patterns of similar voting by groups of people who share minority racial and ethnic backgrounds also persist nationally⁹⁶ and in discrete jurisdictions.⁹⁷ As a result of these phenomena, officials who perceive a political threat from cohesive populations of color are able to isolate those disfavored groups using geographic criteria, and boundary interventions with precision to achieve desired political results. Annexations have frequently been

⁹⁴ By 2014, three years after its commencement, litigation concerning the Texas legislature's redistricting plan had already cost the state nearly \$4 million; litigation would continue for several additional years and reach as far as the Supreme Court, entailing very significant additional cost. Peggy Fikac and David Saleh Rauf, "Taxpayers' tab for redistricting battle nears \$4 million," HOUSTON CHRONICLE (August 9, 2014), <https://www.houstonchronicle.com/news/politics/texas/article/Taxpayers-tab-for-redistricting-battle-nears-4M-5677830.php>.

⁹⁵ THE ECONOMIST, "Segregation in America," (April 4, 2018), <https://www.economist.com/graphic-detail/2018/04/04/segregation-in-america>.

⁹⁶ E.g., Zack Beauchamp, "The midterm elections revealed that America is in a cold civil war," Vox (November 7, 2018), <https://www.vox.com/midterm-elections/2018/11/7/18068486/midterm-election-2018-results-race-surburb>

⁹⁷ Philip Bump, "Mississippi's special election is taking place in one of the most racially polarized states in the country," WASHINGTON POST (November 23, 2018), <https://www.washingtonpost.com/politics/2018/11/23/mississippis-special-election-is-taking-place-one-most-racially-polarized-states-country/>.

proposed for the purpose of diminishing the relative strength of minority communities.⁹⁸

Lawmakers pursuing discriminatory ends through annexation and deannexation have circumvented places with significant minority populations and gone to extraordinary lengths to add white neighborhoods to their numbers. For example, in 1972, Lake Providence, Louisiana's population was evenly divided between white and African American communities. Two nearby areas requested annexation by Lake Providence; one had a largely African American population while the other was majority white. Lake Providence incorporated the white area and rejected the request from the African American area, and its decisions left the town with an electorate featuring a secure white majority.⁹⁹ Similarly, in 1986, officials in Augusta, Georgia adopted a policy of rejecting annexations that would alter its racial makeup, and in furtherance of it, conducted community surveys in an effort to identify majority white areas for potential annexation.¹⁰⁰

Discriminatory annexation plans often defy logic, or are adopted by proponents who obscure their true intent. For example, in the landmark case of an Alabama state law redrawing electoral boundaries in the city of Tuskegee, lack of a believable rationale led the court to conclude that a proposed plan violated the Fifteenth Amendment. A deannexation in that case would have transformed a square-shaped boundary into a 28-sided figure that excluded much of the city's African American community from its outer limits.¹⁰¹ In McClellanville, South Carolina, white officials discouraged minority community leaders from requesting annexation, foreshadowing rejection of any proposal that would have altered the town's demographic makeup. However, the same officials lied about those leaders' interest in annexation in submissions to the DOJ, in apparent hope of concealing the officials' racial motivations for resisting annexation.¹⁰²

Annexations and deannexations in diverse jurisdictions tend to disadvantage communities that have historically been targets of discrimination in voting. Sophisticated study of residential files and Census data revealed that over a broad geographic area and multiple individual transactions, communities with African American majority populations were the least likely to be annexed by a larger jurisdiction.¹⁰³ Moreover, majority white towns were "much less likely to annex black

⁹⁸ Nina Perales, Mexican American Legal Defense and Educational Fund, Testimony before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights Regarding Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After *LULAC v. Perry* 24, July 13, 2006, <https://www.judiciary.senate.gov/imo/media/doc/7-13-06ninaperales.pdf>.

⁹⁹ Department of Justice, Letter to Town of Lake Providence, Louisiana, December 1, 1972, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1280.pdf>.

¹⁰⁰ Department of Justice, Letter to Hon. Charles A. DeVaney, Mayor, Augusta, Georgia, July 27, 1987, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-2170.pdf>.

¹⁰¹ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

¹⁰² Department of Justice, Letter to Philip A. Middleton, Attorney at Law, re: the Town of McClellanville, South Carolina, May 6, 1974, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-1090.pdf>.

¹⁰³ *E.g.*, Daniel T. Lichter, Domenico Parisi, Steven Michael Grice, and Michael Taquino, "Municipal Underbounding: Annexation and Racial Exclusion in Small Southern Towns," 72 *Rural Sociology* 47 (March 2007), <https://eric.ed.gov/?id=EJ3806506>.

populations” even where a potential annexation would not have created a new black majority.¹⁰⁴

Discriminatory Annexations and Deannexations in Action

Alabama

In 1989, a federal court found in favor of private citizens challenging the use of at-large election districts in Foley, Alabama. In the following years, as the city adopted amended election procedures that expanded opportunities for its African American voters, it also sought to annex a number of areas outside its boundaries. The DOJ objected to several of these because they would have increased the town’s white population disproportionately. It eventually became clear that a pattern amounting to a discriminatory city policy on annexation was in place; for example, a majority-black area had requested annexation and been rejected at the same time that city officials were proactively petitioning majority-white areas to join the jurisdiction.¹⁰⁵ Plaintiffs challenged this racially-selective standard under Section 2 of the VRA in 1994. To settle local residents’ claims against it, the city agreed to a statement that acknowledged that if proven, these allegations would constitute violations of the Constitution. The city committed to accepting the annexation of any of several adjacent areas under consideration if the residents of a discrete area voted in favor of it, to ensure fair and consistent treatment of all potential constituents.¹⁰⁶

Texas

In 1997, city officials in Webster, Texas proposed to annex an area with a predominantly white population located just outside the city. Reviewers concluded that if approved, the annexation would decrease the city’s Latino population from 19 percent down to 15 percent of residents, and its African American population from five percent to 4.2 percent, by adding about 1,160 white residents.¹⁰⁷ In addition, in its review of the annexation proposed by Webster officials, the DOJ uncovered a predominantly Hispanic outlying area that was not considered for annexation by city officials. If annexed at the same time as the outlying white area, this tract would have reduced the possibility of minority vote dilution, and Webster’s single Latino city councilmember and other community leaders had in fact proposed that the area in question be annexed, to no avail.¹⁰⁸

After an extensive investigation into the operation of city government in Webster, the DOJ concluded its review of Webster’s Section 5 submission by stating, “the city’s application of its annexation policy and the city’s annexation choices appear to have been tainted...by an invidious racial purpose,” and found that proponents’

¹⁰⁴ *Id.*

¹⁰⁵ Department of Justice, Letter to Fred G. Mott, City Administrator, Foley, Alabama, November 6, 1989, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AL-1780.pdf>.

¹⁰⁶ *Dillard v. City of Foley*, 926 F. Supp. 1053 (M.D. Ala. 1996).

¹⁰⁷ Department of Justice, Letter to Randall B. Strong, Attorney, re: City of Webster, Texas, March 17, 1997, http://www.usdoj.gov/crt/voting/sec_5/ltr/l_031797.pdf.

¹⁰⁸ *Id.*

claims of ignorance of the race of residents of the areas in question were “at best disingenuous.”¹⁰⁹ Webster’s refusal to consider the annexation of an area that would have minimized the dilutive effect of the all-white annexation made clear that discrimination was an animating motivator for adoption of the change.

California

The City of Hanford in Kings County, California sits in the San Joaquin Valley, a rich agricultural region whose population diversified significantly in recent decades with ebbs and flows of farmworker migration. Hanford’s Asian and Latino populations were growing relative to populations of other races and ethnicities. Against this backdrop, Hanford submitted 73 proposed annexations for preclearance in 1992. Some of these were adopted and implemented without being precleared, despite their significant effect on the Hanford electorate: the DOJ noted disapprovingly that “nearly half of the city’s...population reside[d] in these unprecleared annexed areas.”¹¹⁰

In a letter objecting to their implementation, the DOJ raised acute concerns with the series of annexations that Hanford seemingly sought to hide. In aggregate, the addition of designated areas reduced the Latino proportion of city’s population by 6.5 percentage points. At the time, the City held at-large elections with staggered terms, and Latino voters could not under that system elect candidates of their choice because voting was racially polarized and dominated by the white majority that the annexations had reinforced.¹¹¹ Annexations to the city went forward only after it adopted a system of single-member district elections that extended electoral opportunities to underrepresented components of the city’s population; today, two Latino members sit on the Hanford City Council.

The Known Practice of Annexation or Deannexation to Dilute Minority Voting Strength

The Voting Rights Advancement Act would require preclearance of proposed annexations and deannexations only where a proposed change would significantly alter the racial or ethnic composition of the electorate in a diverse jurisdiction. The law would mandate pre-implementation review only in those jurisdictions in which multiple racial or ethnic groups constitute 20 percent of the voting-age population, or a single language-minority group accounts for at least 20 percent of voting-age residents on Indian land. In those jurisdictions, only changes that would decrease by at least 3 percent a racial, ethnic, or language-minority group’s share of a jurisdiction’s voting-age population would require preclearance. This formula focuses tightly on boundary changes that have an established pattern of discriminatory purpose and effect based on their context.

¹⁰⁹ *Id.*

¹¹⁰ Department of Justice, Letter to Michael J. Noland, Esq. re: the City of Hanford, California, April 5, 1993, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/CA-1040.pdf>.

¹¹¹ *Id.*

According to our research, at least 62 annexations or deannexations have been challenged and invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982. Professor Kousser's research shows that since 1957, there have been 219 successful actions to block discriminatory annexations or deannexations, 179 of them occurring since 1982.¹¹²

Restrictive Identification and Proof of Citizenship Requirements

At the outset of the VRA era, lawmakers who desired to limit the influence of voters of color often imposed prerequisites to registering or voting that went above and beyond the legal minimum qualifications of adulthood and U.S. citizenship. By design, these laws demanded actions that underrepresented voters were disproportionately unable to take, such as payment of poll taxes, and demonstration of English literacy. After federal protections of the equal right to vote evolved to specifically prohibit prerequisites like these, some states and localities responded by accelerating adoption of a similar alternative: strict documentary identification requirements to register or vote. The nation's first statewide proof of citizenship mandate for registering voters became law in Arizona in 2004, and the first statewide strict voter ID requirements appeared in 2005 in Indiana and Georgia, on the heels of the Help America Vote Act of 2002's codification of individual identification requirements for certain newly-registered voters.

The Discriminatory Intent and Effect of Restrictive Identification Requirements

A strong, growing body of evidence demonstrates the discriminatory intent and effect of voter ID laws. No proponent of strict ID requirements has ever produced credible evidence of widespread impersonation fraud in the registration or voting processes that identification checks would allegedly prevent. This lack of evidence is not surprising. Common sense tells us that individuals pretending to be either qualified unregistered citizens or actual registered voters could alter the outcome of very few, if any, elections without extraordinary effort, and hence would have no reason to try. At the same time, voter participation rates have declined from the 1950s to the 2010s.¹¹³ American democracy has not suffered because too many citizens have voted, but because too few have. Political operatives and government officials confirm that strict ID requirements are political gamesmanship. For example, North Carolina political consultant Carter Wrenn said of related

¹¹² Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors.

¹¹³ Census Bureau, Current Population Survey, Reported Voting and Registration by Race, Hispanic Origin, Sex and Age Groups: November 1964 to 2018 (Table A-1), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html>.

developments in his state, “Of course [voter ID laws are] political. Why else would you do it?”¹¹⁴

Now that some strict voter identification requirements have been in effect for a decade or more, there is ample evidence that racial, ethnic, and linguistic minorities are statistically least likely to be able to meet ID mandates, and statistically most likely to expect and to experience exclusion on grounds of failure to provide an identification document. Identification prerequisites to vote are therefore widely understood to have likely discriminatory effects. For example, former Texas State Representative Todd Smith said of that state’s provision, “If the question is are the people that do not have photo IDs more likely to be minority than those that are not, I think it’s a matter of common sense that they would be.”¹¹⁵ In 2014, Texas State Senator Rodney Ellis “testified that all of the legislators knew that [Texas’s] SB 14, through its intentional choices of which IDs to allow, was going to affect minorities the most.”¹¹⁶

In 2006, the Brennan Center for Justice found that 25 percent of African Americans and 16 percent of Latinos did not have a current, valid government-issued photo ID, compared to 11 percent of all adult U.S. citizens surveyed.¹¹⁷ Since then, a long and constantly growing line of surveys and studies have shown that underrepresented voters disproportionately lack the identification documents they may need to register and to vote in person. For example, a February 2015 analysis by Dr. Vanessa Perez, based on the 2012 American National Elections Study, concluded that only 5 percent of white voters compared to 10 percent of Latino voters and 13 percent of African American voters lack “government-recognized photo ID.”¹¹⁸ Professors Matt Barreto and Gabriel Sanchez surveyed eligible Texas voters in 2014 and found that Latinos were 2.42 times more likely than whites to report lack of a usable ID, and African Americans 1.78 times more likely than whites.¹¹⁹ In 2017, Professors Eitan Hersh and Stephen Ansolabehere compared Texas’ voter registration list to lists of Texans who held each of the identification documents accepted at the state’s polling places, and found that 3.6 percent of registered non-Hispanic white voters

¹¹⁴ William Wan, “Inside the Republican creation of the North Carolina voting bill dubbed the ‘monster’ law,” WASHINGTON POST (September 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html.

¹¹⁵ *Veasey v. Perry*, 71 F. Supp.3d 627, 657 (S.D. Tex. 2014).

¹¹⁶ *Id.*

¹¹⁷ Brennan Center for Justice, New York University School of Law, *Citizens Without Proof: A Survey Of Americans’ Possession Of Documentary Proof Of Citizenship And Photo Identification* (2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

¹¹⁸ Vanessa M. Perez, Ph.D., Project Vote, *Americans Without Photo ID: A Breakdown of Demographic Characteristics 1* (February 2015), <http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf>.

¹¹⁹ Matt A. Barreto and Gabriel R. Sanchez, Expert Report, *Accepted Photo Identification and Different Subgroups in the Eligible Voter Population, State of Texas, 2014* 18, *Veasey v. Perry*, No. 2:13-cv-193 (S.D. Tex. June 27, 2014).

appeared to lack qualifying voter ID, compared to 7.5 percent of African American, and 5.7 of Latino voters.¹²⁰

Studies of voter turnout confirm that racial and ethnic disparities in possession of ID documents have a disproportionate effect on voters of color. According to analysis of exit surveys of Texas, Pennsylvania, and Virginia voters, conducted after the adoption of stricter voter ID requirements, revealed that black voters were 4.5 times more likely than non-black voters to have been unable to vote because of an ID-related problem.¹²¹ A 2016 study of voting in Michigan by Professors Phoebe Henninger, Marc Meredith, and Michael Morse found that minority voters were 2.5 to six times more likely than non-Hispanic white voters to go to the polls without a photo ID.¹²²

Underrepresented racial, ethnic, and language-minority voters are also more likely than white voters to lack proof of their U.S. citizenship and other precursor documents they may need to obtain a voter ID or to register to vote. For example, a 2012 survey of 18- to 29-year old eligible voters by the Black Youth Project found that more than 84 percent of potential white voters had access to their birth certificates, and 47.5 percent had a U.S. passport. In comparison, just 73.3 percent of African Americans and 55.1 percent of Latinos had their birth certificates, and only 22 percent of African Americans and 37.1 percent of Latinos had current passports.¹²³ Another study showed that Asian Americans were over 20 percent less likely to have two forms of identification compared to whites.¹²⁴ The approximately 1,800,000 Puerto Rican-born adults¹²⁵ living on the mainland United States face a unique high barrier to proving their citizenship. In 2009, the Puerto Rican government adopted new standards for official birth certificates, and simultaneously invalidated all Puerto Rican birth certificates issued before 2010.¹²⁶ Since the adoption of the new standards, all Puerto Rican-born voters that seek to register to vote in a state with a

¹²⁰ Stephen Ansolabehere and Eitan D. Hersh, "ADGN: An Algorithm for Record Linkage Using Address, Date of Birth, Gender, and Name," 4 *Statistics and Public Policy* 1, 8 (October 12, 2017), <https://www.tandfonline.com/doi/pdf/10.1080/2330443X.2017.1389620?needAccess=true>.

¹²¹ Kelly S. McConville, Lynne Stokes, and Mary Gray, "Accumulating Evidence of the Impact of Voter ID Laws: Student Engagement in the Political Process," 5 *Statistics and Public Policy* 1 (January 15, 2018).

¹²² Phoebe Henninger, Marc Meredith, and Michael Morse, "Who Votes Without Identification? Using Affidavits from Michigan to Learn About the Potential Impact of Strict Photo Voter Identification Laws" 3, prepared for the 2018 Election Sciences, Reform, and Administration Conference (July 13, 2018), <https://esra.wisc.edu/papers/HMM.pdf>.

¹²³ Jon C. Rogowski and Cathy J. Cohen, Black Youth Project, "Black and Latino Youth Disproportionately Affected by Voter Identification Laws in the 2012 Election" 7-8, http://blackyouthproject.com/wp-content/uploads/2015/11/voter_id_effect_2012.pdf.

¹²⁴ Matt A. Barreto, Stephen A. Nuño, and Gabriel A. Sanchez, "Voter ID Requirements and the Disenfranchisement of Latino, Black and Asian Voters" 10, Prepared for presentation at 2007 American Political Science Association Annual Conference (September 1, 2007), [https://www.brennancenter.org/sites/default/files/legal-work/63836ceea55aa81e4f_hlm6bhkse\(1\).pdf](https://www.brennancenter.org/sites/default/files/legal-work/63836ceea55aa81e4f_hlm6bhkse(1).pdf).

¹²⁵ Census Bureau, American Community Survey (1-year), Place of Birth by Nativity and Citizenship Status: 2017 (Table B05002), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_B05002&prodType=table.

¹²⁶ U.S. Department of State, "New Requirements for Passport Applicants with Puerto Rican Birth Certificates" (October 29, 2010), <https://2009-2017.state.gov/r/pa/prs/ps/2010/10/150173.htm>.

proof-of-citizenship requirement must either have a U.S. passport, or go through additional procedures and pay fees to obtain a new birth certificate after July 2010.

Naturalized citizens' ability to obtain the requisite documents to satisfy strict identification requirements may be even more constrained. As of 2017, Census data showed that 65.4 percent of eligible Asian American, Native Hawaiian and Pacific Islander voters; 24.9 percent of eligible Latino voters; and 7.7 percent of eligible black voters were naturalized citizens, compared to just three percent of non-Hispanic white voters. If naturalized and derivative citizens need a replacement certificate of citizenship or naturalization to register or vote, they face a major hurdle: certificates of citizenship presently cost \$1,170 and replacement certificates of naturalization cost \$555. In addition, to obtain a replacement, the average wait is between 75 days and eight and a half months for the Department of Homeland Security to process an application for a citizenship document, as of August 2019.¹²⁷

Although state-issued IDs are generally offered for free in states that require voters to display them to vote, the documents that voters must present to obtain these free IDs are not necessarily free. For example, in Texas, applicants for a free Election Identification Certificate must provide proof of U.S. citizenship; that proof, in turn, may cost anywhere from \$22, the minimum price of an official copy of Texas birth certificate, to \$1,170, the price of a certificate of citizenship that documents the status of a person who obtained U.S. citizenship as a minor through his or her parent(s). Sammie Bates, a Texan voter born in 1940, testified in 2014 trial proceedings concerning the state's strict voter ID rule that she needed to obtain an out-of-state birth certificate for \$43 in order to get a voter ID, but could not afford to do so. "We couldn't eat the birth certificate, and we couldn't pay rent with the birth certificate," she told the court.¹²⁸ Taking into account the time and expense necessary to gather precursor documents, travel to an ID-issuing location, and wait in line to complete a transaction, researchers recently estimated that North Carolina eligible voters without ID would have to expend the equivalent of between \$4.8 million and \$9 million in the aggregate to comply with the ID law adopted by the state legislature in 2013.¹²⁹ Furthermore, voter ID requirements also disproportionately affect voters of color given that "citizens without proof" are also more likely to lack regular access to transportation, and less likely to enjoy flexible work and family care schedules.¹³⁰

In sum, legislators have enacted heightened ID requirements for voters without logical, factually-supported reasons, knowing that a larger percentage of qualified

¹²⁷ U.S. Citizenship and Immigration Services, "Historical National Average Processing Time for All USCIS Offices," <https://egov.uscis.gov/processing-times/historic-pt>.

¹²⁸ Jessica Huseman, "State's failures led to voter ID problems in 2016," TEXAS TRIBUNE (May 2, 2017), <https://www.texastribune.org/2017/05/02/texas-failures-led-voter-id-problems-2016-election/>.

¹²⁹ Stuart Shapiro and Deanna Moran, "The Costs of Voter ID Requirements," REGULATORY REVIEW (January 8, 2019), <https://www.theregreview.org/2019/01/08/shapiro-moran-burden-voter-identification/>.

¹³⁰ For example, both a 2011 analysis by the Brennan Center for Justice and a 2012 preclearance objection lodged by the Department of Justice found that eligible Texan Latino voters were more likely than others to live at a considerable distance from the closest state identification-issuing office, and to lack access to a convenient means of transportation to that location. See Sundeep Iyer, Brennan Center for Justice, "Unfair Disparities in Voter ID" (September 13, 2011), <https://www.brennancenter.org/our-work/analysis-opinion/unfair-disparities-voter-id>.

minority voters cannot satisfy them. Minority voters are not only less likely than whites to possess voter ID, but also more likely to be asked for it at registration or when voting,¹³¹ and less likely to have election administrators answer their questions about voter ID laws satisfactorily.¹³² It is therefore regrettably unsurprising that polls and surveys conducted after the 2014 and 2016 elections consistently indicated that strict voter ID requirements caused more voters of color to misunderstand voting rules and not participate than their white counterparts.¹³³

Discriminatory Voter ID and Proof of Citizenship Requirements in Action

Ohio

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. The law would have applied to any voter challenged on the basis of his or her citizenship, and would have required election judges processing challenges to distinguish between native-born and naturalized citizens, and to single out naturalized Americans for extra scrutiny. Whereas native-born Americans would not have been subject to demands for documentation, any challenged voter who professed to be a naturalized citizen would have been asked to immediately produce proof of citizenship, or in the alternative, to vote a provisional ballot that would only be counted if the voter displayed proof of citizenship to an elections official within ten days of attempting to vote. Prior to adoption of this legislation, Ohio law allowed any challenged naturalized voter to swear an oath affirming his or her citizenship in lieu of producing original documentation.

¹³¹ E.g., R. Michael Alvarez, Stephen Ansolabehere, Adam Berinsky, Gabriel Lenz, Charles Stewart III, Thad Hall, *2008 Survey of the Performance of American Elections: Final Report 3*, https://elections.delaware.gov/pdfs/SPAE_2008.pdf; Lonna Rae Atkeson, Yann P. Kerevel, R. Michael Alvarez, and Thad E. Hall, "Who Asks For Voter Identification? Explaining Poll-Worker Discretion," *76 Journal of Politics* 944 (October 2014).

¹³² When Professors Ariel R. White, Noah L. Nathan, and Julie K. Faller sent test inquiries about voter ID laws to more than 7,000 election administrators in 48 states in 2014, they found that when their messages came from Latino aliases or were written in Spanish, they were significantly less likely to receive any response, or to receive a correct and complete response, than when they sent messages from non-Latino white aliases. Ariel R. White, Noah L. Nathan, and Julie K. Faller, "What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials," *109 American Political Science Review* 129 (February 2015).

¹³³ For example, post-election surveys conducted in Texas by Professors Jim Granato and Renée Cross of the University of Houston and Mark P. Jones of Rice University showed that in the state's 23rd Congressional District and in Harris County, Latino non-voters were substantially more likely than white non-voters to cite lack of a qualifying ID as a principal reason for their non-participation, even though strong majorities of people queried actually had a qualifying ID. Majorities of non-voters in both areas also incorrectly believed that they had to present an unexpired Texas driver's license or state ID to vote in person in 2016, and Latino non-voters were the least likely segment of survey subjects to correctly describe ID requirements. Mark P. Jones, Jim Granato, and Renée Cross, *The Texas Voter ID Law and the 2016 Election: A Study of Harris County and Congressional District 23* (April 2017), <http://www.uh.edu/hobby/voterid2016/voterid2016.pdf>; Mark P. Jones, Jim Granato, and Renée Cross, *The Texas Voter ID Law and the 2014 Election: A Study of Texas's 23rd Congressional District* (Aug. 2015), <https://www.bakerinstitute.org/media/files/files/e0029eb8/Politics-VoterID-Jones-080615.pdf>.

Ohio's voter challenge provision had a long history of being used discriminatorily, and demographic realities ensured that 2006 amendments to it would have disproportionately affected voters of color. The state legislature previously amended the same statute in 1868 to create a specialized mechanism for challenging voters with a "distinct and visible admixture of African blood," on the explicit basis of their race. In 2004, several Ohio voters pre-emptively filed suit to block an impending campaign to challenge voters at selected precincts serving populations of largely African American voters. As of 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 percent of the state's eligible electorate that year, they accounted for 47.8 percent of naturalized Ohioans eligible to cast ballots, who were potentially subject to additional restrictions on the franchise. 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 2006.¹³⁴

North Carolina

In 2013, less than two months after the Supreme Court's decision in *Shelby County v. Holder* freed North Carolina from its obligation to preclear voting law changes that would apply in its 40 covered counties, the state adopted a sweeping law that would have imposed a strict voter ID requirement upon in-person voters, among other provisions. Legislators' actions made it clear that the contours of this law – H.B. 589 – drew inspiration from a desire to reduce voting by underrepresented people of color, and from the free hand the state enjoyed post-*Shelby County* to adopt laws that a fully-functioning VRA would have blocked. The voter ID requirement that legislators enacted in 2013 would have conditioned receipt of a regular ballot at a polling place on presentation of a valid, unexpired photo ID. State IDs, military IDs, passports, and tribal identification cards were acceptable, while other common documents including student IDs and employer-issued identification would not have been accepted. These choices lawmakers made were deliberate: litigation revealed that the data legislators had requested and studied included statistics about the number of student IDs issued by the University of North Carolina, and the percentage of those issued to African American students.¹³⁵

Even though the Fourth Circuit Court of Appeals found that the legislature adopted H.B. 589 with unconstitutional discriminatory intent, and the Supreme Court specifically refused to reconsider this determination, this litigation was not the end for discriminatory voter ID requirements in North Carolina. In 2018, the same state legislature that acted with unconscionable discriminatory intent to adopt H.B. 589 placed a proposed constitutional amendment authorizing a voter ID requirement on the ballot, and voters approved the measure in November 2018. As of publication of

¹³⁴ *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 825-27 (N.D. Ohio 2006). Despite its confirmed unconstitutionality, the statute remains on the books and even underwent minor amendments in 2012. Ohio Rev. Code Ann. § 3505.20(A).

¹³⁵ *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 496 (M.D.N.C. April 25, 2016), *rev'd and remanded*, 831 F.3d 204 (4th Cir. 2016).

this report, a second voter ID law adopted by the state legislature, following the voter enactment and over a gubernatorial veto, is in effect pending further litigation.

Illinois

In 2009, St. Clair County, Illinois officials identified the town of Alorton as the locus of cases of suspected voter fraud.¹³⁶ The population of Alorton in 2009 was approximately 97 percent African American, and less than one percent non-Hispanic white; by contrast, the 2009 population of St. Clair County was approximately 29 percent African American, and just over 65 percent non-Hispanic white.

In the immediate run-up to Election Day on April 7, 2009, and in an effort allegedly aimed at eliminating fraudulent votes, authorities sent letters to 558 Alorton residents threatening each with cancellation of registration and invalidation of any absentee ballots they had already cast in the April 7 contest. County officials sought to require each of the voters to appear in person before a clerk to confirm their eligibility to vote, thereby effectively imposing an extraordinary identification requirement upon a discrete group of African American voters who constituted a minority within the larger, election-administering jurisdiction. The outcome of the matter suggests there was no objective factual basis for challenging the registrations of these 558 residents; however, there was no public access to official records that would indicate what, if any, justification there was for investigating suspected fraud.

Fortunately, affected voters took quick action and filed suit under the VRA, and secured a conference with a federal judge and County representatives within days. The County agreed to an injunction entered by consent decree, which committed it to sending letters to inform the 558 targeted voters that they could cast ballots in the April 7 election without taking further action to confirm their eligibility.¹³⁷

The Known Practice of Imposing Unjustified, Unnecessary Identification Requirements on Intending Voters

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance of any proposed restrictive identification prerequisites to registration that are more exacting than those in effect on the bill's effective date, and of any proposed identification prerequisites to obtaining a ballot that are more restrictive than the Help America Vote Act's (HAVA) requirements for first-time voters who have not yet conveyed to officials either their state identification card number or the last four digits of their Social Security number. Under HAVA, citizens who are new voters in a given state may affirm their identities in any one of numerous ways that do not necessarily mandate physical production of a government-issued document. Moreover, voters that the law requires to produce documentation have a long list of flexible options that includes not just photo-bearing state-issued drivers' licenses

¹³⁶ Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Supporting Memorandum of Law, *Chatman v. Delaney*, No. 3:09-cv-00259-CJP (S.D. Ill. April 3, 2009).

¹³⁷ Consent Order, *Chatman v. Delaney*, No. 3:09-cv-00259-CJP (S.D. Ill. April 3, 2009).

and IDs, but also non-photo documents including bills, paystubs, and official government correspondence.

Enhanced protection against discriminatory voter identification requirements is made necessary by the recent and wide proliferation of such laws, and the strong likelihood of legislators adopting strict identification rules with discriminatory intent, or in spite of their discriminatory effects. During the VRA's modern era, between 1982 and 2019, more than half of all states, and a number of political jurisdictions, adopted stronger identification prerequisites for voters that threatened to deprive qualified American voters of the franchise.¹³⁸

According to our research, at least 26 laws that would have toughened voter ID requirements have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982. Professor Kousser's research shows that since 1957, there have been 52 actions that prevented the implementation of discriminatory voter ID changes.¹³⁹ Use of modern voter ID requirements is a more recent phenomena employed with increased frequency and effectiveness in suppressing the right to vote. Some of these requirements were also found to violate other federal and state laws complementary to the VRA. For example, implementation of proof-of-citizenship demands from newly-registered voters ran afoul of the National Voter Registration Act in states including Kansas and Arizona by requiring more documentation from those desiring to register than the federal law allows the states to request.

Polling Places Closures and Realignment

Although modern voters in many jurisdictions enjoy more options for casting ballots than voters generally had at the time the VRA was adopted, in-person voting at temporary polling places remains the foundation of American elections. In-person voters can take advantage of interpretation services offered on location, which can be crucial for Americans not fully fluent in English. In fact, all in-person voters can seek assistance from poll workers to address questions or concerns they may have when casting their ballot.

For many voters, the ability to access polling places still determines whether or not they can participate in elections. According to the National Conference of State Legislatures, as of July 2019, 19 states still required voters to present one of a limited number of approved excuses in order to obtain an absentee or mail-in ballot that need not be cast in-person at a polling place. Even in states that offer no-excuse mail voting to all, voting without visiting a polling place requires advance planning and preparation. Most states require voters to send in absentee ballot requests days, or weeks, in advance of Election Day, and some make no emergency provision for people who do not meet the deadline but cannot get to a polling place. In sum,

¹³⁸ National Conference of State Legislatures, Voter ID History (May 31, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>.

¹³⁹ Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors.

consistently large numbers of eligible voters have no practical option but to cast a ballot in-person, and depend entirely upon ability to find and physically access polling places in order to do so. The percent of all voters who have voted in person has remained consistent or risen in recent years even as technologies have changed: according to the Election Assistance Commission, 71.1 percent of 2014 voters and 73.1 percent of 2018 voters visited a polling place.¹⁴⁰ As a result, people intent on limiting the electoral influence of underrepresented communities may manipulate the number and location of polling places as a tool of discrimination.

The Discriminatory Intent and Effect of Polling Place Closures and Realignment

Any analysis of the purpose and effects of polling place changes must begin with a look at the clientele that polling places serve. In 2005, the first year for collection of annual American Community Survey data, there were just over 288 million individuals in the U.S. and just over 197 million adult U.S. citizens eligible to vote. By 2017, the most recent year for which data is presently available, there were nearly 326 million individuals in the U.S. and more than 231 million adults U.S. citizens eligible to vote.¹⁴¹ The number of individuals eligible to naturalize and vote increased by about 50 percent during this 12-year window. These trends are not expected to abate in the foreseeable future; election administrators must expect and prepare to accommodate a growing electorate.

The increasing size and diversity of the electorate, and the fact that so many voters still need to vote in-person at a polling place, is inconsistent with a trend to reduce polling places – in a sample of just 757 counties formerly covered under Section 5, there were 1,688 fewer polling places in 2018 than in 2012.¹⁴² Close investigation of factors like the sequence of events preceding proposed changes, and effects of changes on the distances between residential areas and assigned polling places reveal the discriminatory intent of many polling place closures. Dramatic changes to the number and location of polling places that happen close in time to major elections have proven to be particularly confusing and frustrating for voters; thus, when administrators adopt polling place reductions without inviting public feedback or conducting significant community outreach, as is often the case, the negative effects of those changes on vulnerable voters are all the more predictable, and all the more likely to have been the point. Although it is true that setting up fewer polling places can reduce the cost of an election, consolidations that save money can also serve impermissible motives. This can be particularly clear when, for example, it emerges that prospective cost savings are small, but the disruption a plan would cause is very significant and disproportionate to a certain minority group.

¹⁴⁰ U.S. Election Assistance Commission, *Election Administration and Voting Survey: 2018 Comprehensive Report 20* (June 2019), https://www.eac.gov/assets/1/6/2018_EAVS_Report.pdf.

¹⁴¹ Census Bureau, American Community Survey (1-year), Sex by Age by Citizenship Status: 2005 and 2017 (Table B05003).

¹⁴² Leadership Conference Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote 10* (September 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [hereinafter “Democracy Diverted”].

Schemes to reduce or relocate polling places have a disproportionate chilling effect on underrepresented voters of color, due in part to widespread residential segregation and socio-economic disparities.¹⁴³ When a jurisdiction closes some polling places and increases the number of voters assigned to each of the remaining polling locations, it is a virtual certainty that some of the jurisdiction's voters will need to travel farther to reach a polling place than they did before. Logistical hurdles like these disproportionately affect members of underrepresented communities. Nationally and consistently across time, Census and other data have shown that minority voters have relatively less access to means of transportation than white voters. As of 2015, just 6.5 percent of non-Hispanic white households, but 19.7 percent of African American households, 12 percent of Latino households, 11.3 percent of Asian/Pacific Islander households, and 13.6 percent of Native American households lacked access to a private vehicle.¹⁴⁴

Voters of color also have less flexibility in their work days, and more inflexible responsibilities to care for children and family members, which lessen their ability to access polling places when they move farther away. For example, when the Census Bureau last surveyed the population regarding work schedules in 2004, it found that while 30.9 percent of white workers said they could shift their working hours, just 20.7 percent of Latino workers and 21.2 percent of African American workers reported that same flexibility.¹⁴⁵ While Asian American men have similar flexibility compared to whites, Asian American women do not enjoy that same flexibility.¹⁴⁶

When jurisdictions consolidate or relocate polling places, the aggregate distance from residence to a polling place has often increased for historically underrepresented communities of color.

For example, county boards of election across the state of North Carolina changed the locations of about one-third of early voting polling places in 2014. Researchers found that the average white voter's distance from the nearest early voting site had increased by just 26 feet, while the average black voter's distance from the nearest early voting site had increased by a quarter of a mile.¹⁴⁷ In Alaska, numerous Native American voters live in rural, geographically isolated locations, and have found themselves at risk of being effectively barred from voting by proposed polling place closures and consolidations. A series of changes proposed in 2008 would have

¹⁴³ See, e.g., *id.*

¹⁴⁴ As of 2015, just 6.5 percent of non-Hispanic white households, but 19.7 percent of African American households, 12 percent of Latino households, 11.3 percent of Asian/Pacific Islander households, and 13.6 percent of Native American households lacked access to a private vehicle. National Equity Atlas, Policylink, USC Program for Environmental and Regional Equity, "Indicators: Car Access" (2015), https://nationalequityatlas.org/indicators/Car_access.

¹⁴⁵ Terence M. McMenamin, "A time to work: recent trends in shift work and flexible schedules," *Monthly Labor Review* 8 (Dec. 2007), <https://goo.gl/g1aPsR> [hereinafter "A time to work"]; Census Bureau, Current Population Survey 2018 Annual Social and Economic Supplement, Average Number of People per Family Household With Own Children Under 18, by Race and Hispanic Origin, Marital Status, Age, and Education of Householder (Table AVG3); Family Caregiver Alliance, *Caregiver Statistics: Demographics* (2016), <https://www.caregiver.org/caregiver-statistics-demographics>.

¹⁴⁶ A time to work, *supra* n.145.

¹⁴⁷ William Busa, *insightus*, *North Carolina's Shell Game of Electoral Apartheid: How the Board of Elections Shoved Black Voters Away From the Ballot Box in 2014* (November 23, 2015), https://insight-us.org/fair_places.html.

assigned some Alaskan voters to sites they could only reach by plane.¹⁴⁸ These proposals followed a string of 2004 proposals that left 24 Alaska Native villages without a polling place; the proposals were withdrawn only after the DOJ refused to preclear the closures and demanded more information about their effects on isolated voters.¹⁴⁹ In some of the most recent related litigation concerning voting locations for the 2016 election in northern Nevada, the Court noted that the closest planned early voting location to the Pyramid Lake Paiute Tribe's capital city was 32 miles away, while 21 other early voting locations were conveniently situated in and around Washoe County's non-Hispanic white population centers of Reno, Sparks, Incline Village and Sun Valley.¹⁵⁰ Instances like these magnify the disproportionately negative effects that access to transportation and workplace flexibility have on racial and ethnic minorities.

Persistent findings of longer wait times at polling places in communities of color support the proposition that individual polling place consolidation decisions form a pattern that hurts underrepresented voters in the aggregate. Numerous studies conclude that African American, Latino, and other voters of color wait longer at polling places today than non-Hispanic white voters, and are disproportionately likely to face a wait of 30 minutes or more. In 2019, professors published their analysis of cell phone geolocation data from the 2016 general election. Controlling for factors like ballot length, the study found that voters in majority black precincts waited more than 15 percent longer on average to vote than voters in majority non-Hispanic white precincts.¹⁵¹ These researchers concluded that there was "substantial and significant evidence of racial disparities in voter wait times."¹⁵² Responses to the 2006, 2008, 2012, and 2014 Cooperative Congressional Election Studies revealed that the average voter of color in those elections waited almost twice as long to vote as the average non-Hispanic white voter.¹⁵³ Professors Charles Stewart and Stephen Ansolabehere estimated that in 2012 alone, approximately 500,000-730,000 votes were likely lost to voters' unwillingness or inability to appear in person and wait for as long as necessary to vote at a polling place.¹⁵⁴ In light of racial and ethnic disparities in access to a smoothly-functioning polling place, it is clear that lost votes are disproportionately those of voters of color.

¹⁴⁸ Amici Curiae Brief of the Alaska Federation of Natives, Alaska Native Voters and Tribes in Support of Respondents 21-23 (filed February 1, 2013), *Shelby County v. Holder*, No. 12-96, https://www.narf.org/bloglinks/shelby_county_brief.pdf.

¹⁴⁹ *Id.* at 21-22.

¹⁵⁰ *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016).

¹⁵¹ M. Keith Chen, Kareem Haggag, Devin G. Pope, and Ryne Rohla, "Racial Disparities in Voting Wait Times: Evidence from Smartphone Data" 7 (September 4, 2019), <https://arxiv.org/pdf/1909.00024.pdf>.

¹⁵² *Id.* at 9.

¹⁵³ Stephen Pettigrew, "The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials," 132 *Political Science Quarterly* 3, 528-30 (2017), <http://www.stephenpettigrew.com/articles/pettigrew-2017-psq.pdf>.

¹⁵⁴ Charles Stewart, III and Stephen Ansolabehere, "Waiting in Line to Vote" (July 28, 2013), <https://www.eac.gov/documents/2017/02/24/waiting-in-line-to-vote-white-paper-stewart-ansolabehere/>.

Discriminatory Polling Place Closures and Relocations in Practice

North Dakota¹⁵⁵

Shortly before the November 2010 election, Benson County, North Dakota, announced that it was closing all but one of the county's polling places, including the two that were located on the Spirit Lake Indian Reservation. The Spirit Lake Tribe filed suit in federal district court, arguing that closing the precincts on the Reservation would make it difficult or impossible for many Indians to vote in violation of the federal and state constitutions and Section 2 of the VRA. The district court granted a preliminary injunction that required the county to maintain the two polling places on the Reservation. The court concluded that closing the precincts would have a discriminatory effect on American Indian voters who lacked access to transportation or to voting by mail. In 2012, the parties settled the case; the county agreed to keep the reservation polling places open in future general elections. The settlement also called for a series of meetings between county and tribal officials to foster communication between the two entities.

Virginia

Dinwiddie County, Virginia is home to a white majority and a substantial African American community that makes up about one-third of the population. Up until 1998, residents of the County's rural Darvills Precinct had voted for many years at the Darvills Community Center, which was damaged in a fire and rendered unusable. For the November 1998 general election, the Board of Supervisors selected a nearby Hunt Club to serve as a replacement polling place. The Club – which had a majority African American membership – installed a ramp to ensure access for disabled voters and made other improvements to enhance its suitability as a polling place.¹⁵⁶

After the election of 1998, petitioners asked County authorities to move this polling place from the Hunt Club to a church with a majority-white congregation, located about three miles from the Club. Although a majority of the petitioners were not voters in the Precinct in question or had not voted at the Hunt Club, and despite the proposed church's withdrawal from consideration, the Board of Supervisors adopted a resolution moving the polling place to a second majority-white church. Neither the Board nor petitioners appear to have advanced substantive concerns about the use of the Hunt Club in this process; instead, petitioners advocated a location "more centrally located."¹⁵⁷

The DOJ examined Census data for the county and concluded that what petitioners represented as "more centrally located" would amount to a location closer to majority-white residential neighborhoods, and farther from majority African-American areas. Moreover, the church location ultimately chosen could not be characterized accurately as central to the County. The lack of objective, reasonable

¹⁵⁵ Sells Testimony, *supra* n.27 at 19.

¹⁵⁶ Letter from U.S. Department of Justice to Benjamin W. Emerson re: Dinwiddie County (October 27, 1999), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/VA-1270.pdf>.

¹⁵⁷ *Id.*

justification for moving the polling place in question led the DOJ to conclude that the proposal was intentionally discriminatory and therefore unconstitutional.¹⁵⁸

Texas

In 2006, officials moved to adopt a series of significant changes to the election of governors of the North Harris Montgomery Community College District near Houston. Among them were dramatic proposed changes to polling place locations: officials sought to move the election date for seats on the Board of Trustees to a new date, and to open just 12 polling places for that election, instead of the total 84 polling places used for the previous Board election.¹⁵⁹

The proposal and details behind selection of the polling sites raised constitutional concerns. At the time that changes were proposed, there were more than 540,000 registered voters eligible to cast ballots for seats on the Board of Trustees. Twelve polling sites would have each served a staggering average of 45,000 potential voters, residing in a geographic area covering more than 1,000 square miles. Worse yet, the polling place locations chosen reflected severe racial and ethnic disparities. The polling location with the smallest proportion of voters of color assigned to it would have served about 6,500 voters, but the proposed location with the largest proportion of voters of color would have served more than 67,000 voters.¹⁶⁰

The DOJ concluded that the proposed consolidation of polling places for District elections was intentionally discriminatory. In the following years, advocates also successfully challenged the use of at-large elections for seats on the District's Board of Trustees.¹⁶¹ Because of the protections afforded by the VRA, the Board today includes two Latino members and two African American members.

The Known Practice of Closing and Relocating Polling Places to Increase the Distance Between Ballot Boxes and Communities of Color

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance of proposed reductions and relocations of polling places that would affect Census tracts with diverse populations, as well as reservations and land trust areas in which at least 20 percent of adult residents are members of a language minority group. The bill targets for scrutiny changes that would lessen the number of locations serving geographic concentrations of historically underrepresented voters.

¹⁵⁸ *Id.*

¹⁵⁹ Department of Justice, Letter to North Harris Montgomery Community College District, May 5, 2006, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2960.pdf>.

¹⁶⁰ *Id.*

¹⁶¹ Consent Judgment and Decree, *Hubbard v. Lone Star College System*, No. 4:13-cv-01635 (S.D. Tex. October 11, 2013).

The accelerating pace of polling place consolidation;¹⁶² the likelihood that closures will produce racially and ethnically disparate effects because of socioeconomic disparities and residential segregation; and the severity of the potential impact of polling place closures necessitate close scrutiny of specified proposals. At their worst, actual proposals to relocate polling places that arose during the VRA era would have made it virtually impossible for voters of color to exercise the franchise. Our democratic system cannot tolerate elections that incorporate such impenetrable barriers to the ballot, particularly those that discriminatorily affect voters from language and racial minority communities.

According to our research, at least 33 attempts to move or consolidate polling locations have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982. Professor Kousser's research shows that since 1957 there have been 295 instances where discriminatory polling place closures or consolidations were successfully overturned, 269 of them occurring since 1982.¹⁶³

Withdrawal of Multilingual Materials and Assistance

For the duration of America's democracy, linguistic ability and literacy have served as overt and implicit proxies for characteristics, including race and national origin, in provisions that have restricted access to the franchise. Connecticut adopted the nation's first statewide voter literacy test in 1855. The restriction dually targeted voters who were relatively less-educated and who belonged to a minority race, ethnicity, or national origin group, including a group of farmworkers of Puerto Rican origin who were deemed ineligible to vote in Windsor, CT as recently as 1956.¹⁶⁴ South Carolina adopted an "eight box law" in 1882 that mandated use of different ballot boxes for different races, such that ballots were not counted unless voters matched the correct ballot to the correct receptacle by reading signage.¹⁶⁵ The state of New York adopted a targeted English literacy requirement for voters in 1921, in the midst of accelerated Puerto Rican migration into the state.¹⁶⁶

Although federal law now prohibits literacy tests and outright prohibitions on voting based on linguistic ability, voters who are not fully fluent in English remain vulnerable to disenfranchisement based on the inability to navigate English-only election procedures. As of 2018, Census data indicate that more than 37 million American adults speak a language other than English, and more than 11.4 million of them are not yet fully fluent in English. Experience confirms that voters who are

¹⁶² Democracy Diverted, *supra* n.142.

¹⁶³ Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors.

¹⁶⁴ Connecticut Humanities, "Literacy Tests and the Right To Vote" (November 5, 2018), <https://connecticuthistory.org/literacy-tests-and-the-right-to-vote/>.

¹⁶⁵ Merrill Fabry, "A Brief History of Voting Problems on Election Day," TIME (November 8, 2016), <https://time.com/4531415/history-voting-problems-election-day/>.

¹⁶⁶ *E.g.*, Juan Cartagena, "Puerto Ricans and the 50th Anniversary of the Voting Rights Act," CENTRO VOICES e-Magazine, Center for Puerto Rican Studies, Hunter College, CUNY (August 2015), <https://centropr.hunter.cuny.edu/centrovoices/current-affairs/puerto-ricans-and-50th-anniversary-voting-rights-act>.

perceived as members of language-minority communities, or who are not fluent in English, are less likely to vote and more likely to encounter hostility at the polls than voters comfortable in English.

The Discriminatory Intent and Effect of Denying Language Assistance

Denials of, and other barriers to, language assistance in elections arose at a time when elected officials and election administrators were less likely to obscure their discriminatory intent than they are today, and their history reveals their modern-day purpose. For example, a pair of 1905 editorials in support of Arizona's English literacy requirement stated, first, that, "There is a foreign element in our voting population which is both illiterate and ignorant of our institutions," and, eleven days later, that, "We are referring, of course, to the ignorant Mexican vote."¹⁶⁷

Over the course of more than 150 years of enforcement of linguistic restrictions on voting, the targets of such laws are and were clear, regardless of the extent to which lawmakers announced their intentions explicitly. For example, poll watchers in south Phoenix, AZ during the 1964 presidential election observed white activists – including future Supreme Court Chief Justice William Rehnquist – systematically and selectively challenge black voters and people not yet fully fluent in English to confirm their residences and to read and interpret Constitutional passages to demonstrate sufficient literacy to vote.¹⁶⁸ As of 1970 – before Congress extended the VRA to protect language-minority citizens – Texas law forbid election administrators from using any language other than English except in limited circumstances, and forbid assistance to any voter except those physically unable to mark ballots. The Court that invalidated the state's prohibition on assistance to illiterate voters noted that evidence showed that "the majority of illiterate voters in Texas are members of the Mexican-American and Negro ethnic groups," and that "the effect of the statute may be to exclude many Mexican-Americans and Negroes from assistance."¹⁶⁹

Lawmakers who restrict or have sought to prohibit language assistance in elections enjoy easy access to Census data that document substantial overlap between voters not fully fluent in English and voters of color. According to 2017 American Community Survey data, more than half of the adult U.S. citizens most likely to need linguistic assistance with voting are Latino; in total, more than 85 percent of eligible voters who may not be able to vote in English are people of color. Restrictions on and denials of linguistic assistance in voting not only produce obviously and inevitably discriminatory results, but also lack legitimate justifications, particularly in

¹⁶⁷ Antonia Noori Farzan, "Racist History 101: When Arizona Blocked Spanish Speakers From Voting," PHOENIX NEW TIMES (March 19, 2018), <https://www.phoenixnewtimes.com/news/arizonas-racist-history-blocking-spanish-speakers-from-voting-10239647>; see also Kirk Branch, "'A Mockery in the Name of a Barrier': Literacy Test Debates in the Reconstruction-Era Congress, 1864-1869," 3 *Literacy in Composition Studies* (2015), <http://licsjournal.org/OJS/index.php/LICS/article/view/82/114>.

¹⁶⁸ Dennis Roddy, "Just our Bill," PITTSBURGH POST-GAZETTE (December 2, 2000), <http://old.post-gazette.com/columnists/20001202roddy.asp>.

¹⁶⁹ *Garza v. Smith*, 320 F. Supp. 131, 135 (W.D. Tex. 1970).

light of recent relative increase in the number of jurisdictions home to significant communities of language-minority voters.¹⁷⁰

Obstruction of language assistance and elimination of materials and assistance in languages other than English negatively affect voters of color at many points in the voting process. Eligible voters with limited English proficiency face threshold barriers to learning about elections and registering to vote. Although election alerts and voter registration forms convey or request basic information, even that basic information is unintelligible to millions of qualified American voters unless they have multilingual assistants; readers need only imagine the task of completing a voter registration form written in a language in which most Americans have no capacity – such as Navajo or Vietnamese – to understand how this is so.

Voters with limited English proficiency may also find it difficult or impossible to locate a polling place or understand and take advantage of absentee voting options. Voters with internet access must frequently choose one or more links to get to personalized logistical information on election administration websites; however, a majority of such sites around the country are in English-only. Google Translate and similar tools do not produce complete or accurate translations of webpages, particularly when pages are not optimized for translating or screen-reading applications. Additionally, the language on websites and forms that is associated with voter information and transactions can be difficult for even advanced English speakers to understand. For instance, a Virginian not fully fluent in English who finds the state's online application for an absentee ballot, must enter information on a page that is in English only, and that requires the user to read and agree to the affirmation that, "I certify and affirm that the information provided to access my voter registration is my own or I am expressly authorized by the voter to access this information. I understand that it is unlawful to access the record of any other voter, punishable as computer fraud under Va. Code § 18.2-152.3."¹⁷¹

American voters seeking information in advance of an election might also consider calling local election officials, but many voters who are not yet fully fluent in English cannot hope or expect to speak to an official with whom they share a language in common. Even where administrators employ people who can provide live assistance, help can be hard to reach. Gila County, Arizona provides voter assistance in both Apache and Spanish. The County's website indicates – in English – that its Voter Outreach coordinator can provide information and personalized assistance in

¹⁷⁰ Between 2011 and 2016, the number of jurisdictions required to provide language assistance by reason of the size of their language minority voter communities increased from 248 to 263. Asian Americans Advancing Justice-AAJC, NALEO Educational Fund, and Native American Rights Fund, *Voting Rights Act Coverage Update 1-2* (December 2016), <https://advancingjustice-aaic.org/sites/default/files/2016-12/Section%20203%20Coverage%20Update.pdf>. Contemporary factors contributing to growth of the need for language assistance include accelerated migration of Puerto Rican Americans to the mainland and recent increases in annual numbers of newly-naturalized Americans, some of whom are exempt from English language tests due to advanced age or disability.

¹⁷¹ Virginia Department of Elections, "Voter Information Lookup," <https://vote.elections.virginia.gov/VoterInformation>.

Apache,¹⁷² but a constituent must effectively be able to navigate the County's website in English, or communicate effectively with an operator likely not fluent in Apache, in order to identify and get in contact with the employee who can provide comprehensible information.

Assuming a voter can overcome the foregoing barriers in a jurisdiction that does not provide competent or comprehensive language assistance, she must then marshal her courage and stamina to actually cast a ballot. In multilingual polling places, administrators can prepare pollworkers to expect limited-English proficient voters and to treat them with equal respect; otherwise, voters who are not fluent in English have encountered unfortunate, persistent hostility. During the 2012 election, voters reported to the Election Protection Coalition that they had been unlawfully prevented from obtaining language assistance at polling places from Suffolk County, New York to New Orleans, Louisiana. One of the worst such incidents occurred when a pollworker in Kansas City, Missouri asked a voter's interpreter to leave the polling place and threatened her with arrest.¹⁷³ Litigation brought by the DOJ against the city of Boston alleged Section 2 violations based on disrespectful treatment toward limited-English proficient Chinese- and Vietnamese-American voters during the 2004 elections, including these voters being ignored or improperly influenced in making ballot choices.¹⁷⁴ In 2004, Bayou La Batre, Alabama had its first Asian American candidate running a competitive race for city council 2004. A white incumbent and his supporters challenged about 50 Asian American voters at the polls during the primary elections. The challengers' rationale was that if the voters "couldn't speak good English, they possibly weren't American citizens."¹⁷⁵

Even assuming a limited-English proficient voter obtains a ballot, those documents are often written in advanced English. Ballotpedia's analysis of statewide ballot measures upon which citizens voted in 2018 found that their average grade level was between 19 and 20, meaning that it would require a graduate degree-level education to understand them.¹⁷⁶ Review of measures put before voters between 1997 and 2007 produced similar results,¹⁷⁷ and demonstrated that administrators wrote ballots at consistently high grade levels. The difficulty of reading and responding to potentially complex English on ballots and elsewhere in voter

¹⁷² Gila County Elections Department, "Voter Outreach and Language Assistance,"

http://www.gilacountyaz.gov/government/elections/voter_outreach_and_language.php.

¹⁷³ Election Protection, Lawyers' Committee for Civil Rights Under Law, *The 2012 Election Protection Report: Our Broken Voting System and How to Repair It* 44-45(2013), <https://866ourvote.org/wp-content/uploads/2018/11/EP2012-FullReport.pdf>.

¹⁷⁴ Angelo N. Ancheta, "Language Accommodation and The Voting Rights Act," in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER, 293-395 (2007), https://www.law.berkeley.edu/files/ch_11_ancheta_3-9-07.pdf.

¹⁷⁵ Brennan Center for Justice, "The Voting Rights Act: Protecting Voters for Nearly Five Decades" (February 26, 2013), <https://www.brennancenter.org/our-work/research-reports/voting-rights-act-protecting-voters-nearly-five-decades>.

¹⁷⁶ Ballotpedia, "Ballot measure readability scores" (2018), https://ballotpedia.org/Ballot_measure_readability_scores_2018.

¹⁷⁷ Doug Chapin, Election Academy, "Everything I Need to Know About Ballots I Learned In . . . GRAD SCHOOL? Readability As Usability" (October 26, 2011), <https://editions.lib.umn.edu/electionacademy/2011/10/26/everything-i-need-to-know-about/>.

information is compounded by the accelerated illiteracy rates, in any language, of voters who are not fully fluent in English.¹⁷⁸

In sum, language-minority voters – approximately 85 percent of whom are voters of color – encounter daunting hurdles to voting where administrators withdraw or otherwise prevent the provision of assistance in languages other than English. The effects of language assistance denials are predictable: as described in a recent news article, “LEP voters who aren’t accommodated...often have a difficult time exercising their right to vote. LEP voters have much lower participation rates than non-LEP voters, and studies have shown their participation rate is significantly higher where there are language accommodations.”¹⁷⁹

Furthermore, where the VRA’s provisions expand linguistic access to elections, they correspond with a positive effect on language minority voting communities’ rates of participation in elections and governance. For example, language-minority voters enjoy increased descriptive representation in local office the longer a jurisdiction has been subject to Section 203 of the VRA and has hosted federal observers.¹⁸⁰ Latinos who live in jurisdictions that provide Spanish election information and assistance are more likely to be registered to vote than Latinos who live in jurisdictions that operate monolingual elections,¹⁸¹ and more likely to vote as well.¹⁸² Over the course of the VRA’s language assistance provisions’ existence, language minority community members’ registration, voter turnout rates, and election to office, have all increased in the aggregate.¹⁸³ While ensuring that all of a jurisdiction’s voters are able to successfully communicate their preferences, effective language assistance also signals a philosophy of welcoming to voters of varying backgrounds. Its absence discourages members of language-minority communities regardless of their English-speaking ability, while its presence is associated with higher turnout of voters of color who both can and cannot vote in English.

¹⁷⁸ E.g., Jeanne Batalova and Michael Fix, “A Profile of Limited English Proficient Adult Immigrants,” 85 *Peabody Journal of Education* 511 (2010).

¹⁷⁹ Richard Salame, “Across the Country, Limited-English-Proficiency Voters Faced Obstacles,” *THE NATION* (November 12, 2018), <https://www.thenation.com/article/limited-english-proficiency-voters-midterms/>.

¹⁸⁰ E.g., Melissa J. Marschall and Amanda Rutherford, “Voting Rights for Whom? Examining the Effects of the Voting Rights Act on Latino Political Incorporation,” 60 *American Journal of Political Science* 3 (May 7, 2015).

¹⁸¹ E.g., Michael Parkin and Frances Zlotnick, “The Voting Rights Act and Latino Voter Registration: Symbolic Assistance for English-Speaking Latinos,” 36 *Hispanic Journal of Behavioral Sciences* 48 (2014).

¹⁸² E.g., Michael Jones-Correa, “Language Provisions Under the Voting Rights Act: Effectiveness and Implementation” (testimony presented to a public meeting of the Presidential Commission on Election Administration, Philadelphia, PA, September 4, 2013); Michael Jones-Correa, “Language Provisions Under the Voting Rights Act: How Effective Are They?,” 86 *Social Science Quarterly* 549 (2005).

¹⁸³ E.g., James T. Tucker, “Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act,” 10 *NYU Journal of Legislation and Public Policy* 206 (2006).

Discriminatory Denials of Language Assistance in Practice

Pennsylvania

Although its overall population growth has slowed in recent decades, Pennsylvania's Latino population has grown particularly rapidly. Between 2010 and 2018, its population of people born in Puerto Rico and other island territories ballooned by nearly 28 percent, to more than 164,000. Latino communities have a visible presence in Philadelphia and other urban centers in the state, but also in cities and counties with smaller populations that offer a high quality of life and attractive work opportunities. Luzerne County was one of the ten subjurisdictions in the nation with the fastest-growing Latino community between 2007 and 2014.¹⁸⁴ Over the course of the past three decades, the town of Hazleton in Luzerne County has acquired a majority-Latino population from a start of near-zero.¹⁸⁵

The rapid pace of demographic change in some places in Pennsylvania presaged some high-profile negative responses, such as the events of the 2001 and 2002 general elections in Berks County, Pennsylvania. Federal election monitors present during those elections documented a litany of egregious behaviors and obstructions of language assistance which became the basis of a successful VRA lawsuit against the County. A federal judge overseeing the case found that pollworkers had made audible hostile statements about Latino voters, including, "This is the U.S.A. – Hispanics should not be allowed to have two last names. They should learn to speak the language and we should make them take only one last name," "No Hispanics wake up before 9:30 a.m.," and, "They can't speak, they can't read, and they come into vote." Pollworkers also demanded photo identification not required by law from Latino voters, and selectively required only Latino voters to confirm their addresses because these individuals were presumed to "move a lot within the housing project." Several people reported that pollworkers prevented them from assisting voters not fluent in English, including community activist Luis Pazmino, who was physically pushed by an election judge who told him, "You're not supposed to be here."¹⁸⁶ DOJ officials and community activists brought these issues to the attention of local authorities and yet they persisted, so the Court charged County officials with knowledge that there were problems, and refusal to remedy them.

Concluding that this pattern of hostile treatment had discriminatory effects, the Court granted plaintiffs a preliminary injunction and mandated further negotiation of a specific plan of action to ensure fair treatment of Berks County's language minority voting population. Thanks to VRA protections, the County today provides extensive information about and assistance with elections in Spanish, and community organizers have declared voter mobilization efforts in 2016 and 2018 successful. "The numbers are unbelievable and show the community came out and

¹⁸⁴ Fastest-growing Hispanic counties, *supra* n.24.

¹⁸⁵ Charles F. McElwee, "Chain Migration Comes to Hazleton," CITY JOURNAL MAGAZINE (Spring 2018), <https://www.city-journal.org/html/chain-migration-comes-hazleton-15832.html>.

¹⁸⁶ *U.S. v. Berks Co.*, 250 F. Supp. 2d 525, 529-31 (E.D. Pa. 2003).

voted” in 2018, according to Michael Toledo, CEO of the Daniel Torres Hispanic Center in Reading, PA.¹⁸⁷

Alaska

Particularly for Alaska’s more geographically-isolated Native communities, language assistance is a crucial determinant of voter participation rates, so the VRA has long obligated numerous Alaskan communities to provide voting materials and assistance accessible to Alaska Native voters.¹⁸⁸ Between 2011 and 2016, the number of jurisdictions in the state covered under Section 203 of the VRA for Alaska Native languages more than doubled, from seven to 15, providing just one of many indicators of ongoing, robust demand for in-language elections materials.

Given the duration and breadth of the state’s experience carrying out federal language assistance provisions, it is particularly disappointing and telling that community advocates found it necessary to launch multiple, repetitive legal challenges of refusals to provide the same materials in-language as in English. In litigation filed in 2007, Yu’pik-speaking voters settled claims that local officials had failed to confirm the bilingual abilities of appointed translators and to provide them with translations of complex ballot language, among other deficiencies. Plaintiffs won specific commitments to recruit and train personnel and to secure equal air time for election announcements in Yu’pik and English from recalcitrant officials:¹⁸⁹ according to the Court, their “efforts to overhaul the language assistance program did not begin in earnest until after this litigation.”¹⁹⁰ Just four years later, plaintiffs’ attorneys returned to court to enforce two more localities’ identical obligations. Apparently, Alaska officials made a “policy decision” not to comply with Section 203 requirements in several other covered boroughs and Census Areas. According to the Court, “The State’s own documents show[ed] that the statewide bilingual coordinator was directed to deny language assistance to those areas. Coincidentally (or not so), the bilingual coordinator’s last day of employment was on December 31, 2012, the very day that the *Nick* agreement ended.”¹⁹¹

¹⁸⁷ Anthony Orozco, “Latinos encouraged by election turnout in Reading,” *READING EAGLE* (November 10, 2018), <https://www.readingeagle.com/news/article/latinos-encouraged-by-election-turnout-in-reading>.

¹⁸⁸ James Thomas Tucker, Natalie A. Landreth, and Erin Dougherty Lynch, “‘Why Should I Go Vote Without Understanding What I Am Going to Vote For?’ The Impact of First Generation Voting Barriers on Alaska Natives,” 22 *Michigan Journal of Race and Law* 328, 336-37 (2017), <https://repository.law.umich.edu/cqi/viewcontent.cgi?article=1074&context=mjrl> [hereinafter “Why Should I Go Vote”].

¹⁸⁹ Consent Decree and Settlement Agreement Between Plaintiffs Billy McCann and Arthur Nelson and Defendants Bethel, Alaska and Lori Strickler, in her capacity as Municipal Clerk, *Nick v. Bethel, Alaska*, No. 3:07-CV-0098 (TMB) (D. Alaska July 9, 2009), https://www.acluak.org/sites/default/files/nick_v._bethel_settlement.pdf.

¹⁹⁰ Order Re: Plaintiffs’ Motion for a Preliminary Injunction Against the State Defendants 8, *Nick v. Bethel, Alaska*, No. 3:07-cv-00098 (TMB) (D. Alaska July 30, 2008).

¹⁹¹ James Thomas Tucker, Written Testimony Submitted in Connection With a Hearing of the House Judiciary Committee on Discriminatory Barriers to Voting 3, September 5, 2019, <http://docs.house.gov/meetings/JU/JU10/20190905/109887/HHRG-116-JU10-Wstate-TuckerJ-20190905.pdf>.

In 2013, a group of tribal councils and Alaska Native voters charged state officials with continuing violation of the VRA and the Constitution by their refusal to provide information in Yu'pik that was available in English:

“In defending the latter claim, Alaska argued that the Fifteenth Amendment was inapplicable to Alaska Native voters. At the same time, state officials argued that Alaska Natives were entitled to less voting information than English-speaking voters. They rested their argument on a paternalistic belief that the State, not the voters, should determine what voting information provided to other voters was important enough for LEP Alaska Native voters to know before exercising their fundamental right to vote.”¹⁹²

In a ruling for these plaintiffs, the Court confirmed that officials' negligence had produced egregious results--Yu'pik voters were deprived of any and all critical pre-election information including copies of ballots, candidates' statements, and explanation of ballot measures. In order to ensure meaningful access for all voters, the court ordered sweeping, detailed remedial actions, from additional hires and production of specific items in specific languages, to preparation and use of standardized glossaries and training programs informed by native speakers of Alaska Native languages. The state remains subject to federal monitoring and court oversight today.¹⁹³

The Known Practice of Withdrawing In-Language Materials and Assistance That Are Available in English

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance before discontinuing provision of in-language materials or assistance, and before selectively altering the provision or distribution of materials and assistance in languages other than English. The bill would focus scrutiny on instances in which laws and policy decisions single language-minority voters out for less favorable treatment than English-speaking majorities, such as those occasions on which pollworkers purport to apply consistent limitations to people who offer to interpret for voters with limited proficiency, but do not treat people assisting voters with disabilities similarly.

According to our research, courts and lawmakers have taken remedial action to combat discriminatory effects or intent in at least 23 instances of obstruction, withdrawal, or severe neglect of language assistance services since 1982. This count of matters litigated excludes charges brought against recalcitrant jurisdictions solely on the basis of Section 4(e), 203, or 208 of the VRA, or any combination thereof, because such matters are commonly resolved absent allegations or findings of retrogression, discriminatory effects, or discriminatory intent. Professor Kousser's

¹⁹² *Id.* at 3-4.

¹⁹³ Terms of order and ongoing supervision listed in *Why Should I Go Vote*, *supra* n.188.

research, incorporating claims based on Sections 203 and 208 of the VRA, shows that since 1957, there have been 84 instances where restrictions to language access, including access to materials and translators, have been successfully overturned; 78 of these occurred since 1982.¹⁹⁴

Congressional Action Is Just As Necessary Today As It Was In 1965

Voters of color undoubtedly face significant and persistent barriers to the franchise based on their race, ethnicity, and language. After *Shelby County*, voters have suffered from the lack of voting protections and the necessity of litigation to secure the equal right to vote. However, Congress has the authority and the responsibility to modernize the VRA by enacting legislation to restore the vibrancy of Section 5 through an updated coverage formula. A modern VRA would make possible the timely and efficient resolution of voting rights disputes everywhere in the nation, especially where those disputes arise from negative legislative reactions to growing minority political influence.

America's demographics are changing rapidly. The tactics that sustain disparities in voter participation that inspired the VRA are in use in a wider cross-section of our communities than ever before, as voters of color are increasingly present and mobilizing in places that were previously homogeneous. The VRA's tools must be employed as responsively and creatively as are the changes to election policies that some lawmakers employ to silence emerging communities. We urge Congress to enact the Voting Rights Advancement Act and its practice-based preclearance formula to ensure ongoing progress toward a democracy that reflects the full diversity of our nation and provides effective protection to emerging and newly mobilized voters of color.

¹⁹⁴ Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors.