



**Written Testimony of Janai Nelson  
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**Submitted to the  
United States Senate Committee on Rules & Administration**

**In connection with its March 12, 2024 hearing entitled**

**“Administration of Upcoming Elections”**

## I. INTRODUCTION

Chairwoman Klobuchar, Ranking Member Fischer, and members of the Committee:

My name is Janai Nelson, and I am President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”). Thank you for the opportunity to testify today regarding the state of voting rights for Black Americans, both on the ground and in the courts, and the urgent need for congressional action to protect and secure the fundamental freedom to vote. My testimony is informed by LDF’s extensive experience litigating under the Voting Rights Act and other key federal voting rights protections, as well as our on-the-ground election protection work in multiple states.

We meet today at a perilous moment for American democracy. Last week was the 59<sup>th</sup> anniversary of Bloody Sunday, when heroes such as John Lewis were brutally beaten by state troopers on the Edmund Pettis bridge for demanding the right to vote, leading to the passage of the Voting Right Act (“VRA”). Yet more than a decade after the Supreme Court’s *Shelby County* decision gutted the heart of the VRA and invited Congress to update the Act’s preclearance coverage framework to maintain its protections,<sup>1</sup> Congress has failed to act in accordance with its duty to enforce the Fourteenth and Fifteenth Amendments to the U.S. Constitution; and failed to use its Elections Clause power to set minimum standards for access to the fundamental right to vote across the country.

Unfortunately, in that decade, the landscape around election administration and voting rights has shifted markedly. States such as Alabama, North Carolina, and Texas moved to enforce or enact harsh voting restrictions within days or even hours of the *Shelby County* decision; and this was followed by a wave of such laws across the country.<sup>2</sup> More recently, in some states, a false narrative around stolen elections, including the “Big Lie,” has stoked a backlash against the growing participation by voters of color in our multiracial democracy. As we head towards the 2024 election, this false narrative continues to drive targeted efforts to disenfranchise voters of color. This month, the New York Times reported on a coordinated, multi-state effort

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<sup>1</sup> *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (“We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions.”).

<sup>2</sup> Thurgood Marshall Inst., *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder (Shelby County)* (Oct. 6, 2021), <https://tminstituteldf.org/publications/democracy-diminished/>.

to pressure local officials to remove voters from the registration rolls in violation of federal protections against wrongful and discriminatory purges.<sup>3</sup>

Black Americans have faced this backlash and onslaught with a shredded shield—precisely when we’ve needed strong voting rights protections, destructive court decisions combined with inaction by Congress have stripped them away. The result has been alarming backsliding on our most fundamental right. Instead of our democracy becoming more inclusive and more equal, we’ve seen disturbing racial turnout disparities continue to rise.

Right now, we are at a crossroads. The question before us is whether the United States will live up to its highest ideals to embrace the inclusive, multi-racial, multi-ethnic democracy it must become; or will we backslide, losing our grip on our fundamental values, our democratic institutions, and the future of our multi-racial democracy.

The state of voting rights for Black Americans is tenuous. Longstanding protections have been weakened and are under further threat. This is an urgent crisis for voters of color, and for our democracy. We implore Congress to act to protect our rights.

### **A. Statement of Purpose**

My testimony today seeks to provide this Committee with insight into the current state of voting rights for Black Americans, and to highlight the urgent need for congressional action. My testimony is informed by our on-the-ground experience working to protect the vote in Black communities across multiple states, which we hope will contribute to your discussions as you consider election-related legislation within your jurisdiction, and also assist your colleagues on other relevant committees. In the pages below I will describe the specific challenges Black voters continue to face in casting their ballots; discuss the limits of the current legal framework protecting Black Americans, and indeed all Americans, from voting discrimination; and detail how Congress can address these problems through much-needed pending legislation.

### **B. LDF and Our Work**

Founded in 1940 under the leadership of Thurgood Marshall, LDF is America’s premier legal organization fighting for racial justice. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF was launched at a time when the nation’s aspirations for equality and due process of law were stifled by widespread state-sponsored racial

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<sup>3</sup> Alexandra Berzon & Nick Corasaniti, *Trump’s Allies Ramp Up Campaign Targeting Voter Rolls*, N.Y. Times (Mar. 3, 2024), <https://www.nytimes.com/2024/03/03/us/politics/trump-voter-rolls.html>.

inequality. From that era to the present, LDF’s mission has been transformative—to achieve racial justice, equality, and an inclusive society, using the power of law, narrative, research, and people to defend and advance the full dignity and citizenship of Black people in America.

Since its founding, LDF has been a leader in the fight to secure, protect, and advance the voting rights of Black voters and other communities of color.<sup>4</sup> LDF’s founder Thurgood Marshall—who litigated LDF’s watershed victory in *Brown v. Board of Education*,<sup>5</sup> which set in motion the end of legal segregation in this country and transformed the direction of American democracy in the 20th century—referred to *Smith v. Allwright*,<sup>6</sup> the 1944 case ending whites-only primary elections, as his most consequential case. He held this view because he believed that the right to vote, and the opportunity to access political power, was critical to fulfilling the guarantee of full citizenship promised to Black people in the 14th Amendment to the U.S. Constitution. LDF has prioritized its work protecting the right of Black citizens to vote for more than 80 years—representing Dr. Martin Luther King Jr. and the marchers in Selma, Alabama in 1965, advancing the passage of the Voting Rights Act and litigating seminal cases interpreting its scope, and working in communities across the South to strengthen and protect the ability of Black citizens to participate in a political process free from discrimination.

In addition to a robust voting rights litigation docket, LDF has been active in protecting voting rights on the ground in the context of ongoing elections. LDF is a founding member of the non-partisan civil rights Election Protection Hotline (1-866-OUR-VOTE), presently administered by the Lawyers’ Committee for Civil Rights Under Law. In addition, LDF has monitored elections for more than a decade through our Prepared to Vote initiative (“PTV”) and, more recently, through our Voting Rights Defender (“VRD”) project, which place LDF staff and volunteers on the ground for primary and general elections to conduct non-partisan election protection, poll monitoring, and to support Black political participation in targeted jurisdictions—primarily in the South. During primary and general elections over the last two years, LDF has had staff on the ground in seven states (AL, FL, GA, LA, MS, SC, TX), and also engaged in monitoring various media platforms for misinformation, disinformation, or intimidation related to elections.

## **II. BLACK VOTERS FACE CONTINUED BARRIERS TO PARTICIPATION**

LDF’s work on the ground and in the courts makes plain that six decades after the enactment of the Voting Rights Act, Black Americans continue to face substantial

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<sup>4</sup> LDF has been an entirely separate organization from the NAACP since 1957.

<sup>5</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>6</sup> *Smith v. Allwright*, 321 U.S. 649 (1944).

barriers to political participation. The result has been significant increases in racial turnout disparities. New technologies threaten to amplify existing threats in this consequential election year.

### **A. Racial Turnout Disparities Persist**

The disturbing growth in racial disparities in voter turnout is a troubling yet defining aspect of our current post-*Shelby County* electoral landscape. These disparities indicate that restrictive state laws and underenforcement of federal laws continue to threaten Black Americans' equal opportunity to participate in our elections.

Our most recent presidential and mid-term elections have featured relatively high turnout compared with historical averages. This is a positive development, but these aggregate numbers do not negate the more disturbing picture just below the surface. White voters remain over-represented in the U.S. electorate, at a steep cost to the voices of, and responsiveness to, communities of color.

Even in the 2020 presidential election—where 66.8% of citizens over age 18 turned out, the highest rate since 1900<sup>7</sup>—white voters were a disproportionate share of the electorate. White voter turnout was approximately eight percentage points higher than that of Black Americans, and more than 12 points higher than the rate for people of color overall.<sup>8</sup> This reflected an historical trend. These gaps have been stubbornly large for decades, and persisted at substantial levels even during President Obama's historic run for the presidency.<sup>9</sup>

While racial disparities in turnout have been relatively consistent that does not mean they are natural or unrelated to election conditions. As barriers to the ballot for voters of color increase, so too have turnout disparities. After the U.S. Supreme Court gutted the VRA's "preclearance" protection in *Shelby County* in 2013, states immediately responded by making it harder to vote.<sup>10</sup> Turnout disparities between white and Black voters increased substantially in *Shelby County's* aftermath in five out of the six states that were fully covered under the VRA's preclearance

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<sup>7</sup> Michael McDonald, *Voting Statistics*, U.S. Elections Project (2020), <https://www.electproject.org/election-data/voter-turnout-data>.

<sup>8</sup> *Voting and Registration in the Election of November 2020*, U.S. Census Bureau, tbl.4b, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>; see also Kevin Morris & Coryn Grange, *Large Racial Turnout Gap Persisted in 2020 Election*, Brennan Ctr. for Just. (Aug. 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election>.

<sup>9</sup> *Id.* During the 2008 and 2012 elections the disparity was 9.3 and 8.0 percentage points, respectively.

<sup>10</sup> Thurgood Marshall Inst., *Democracy Diminished supra* note 2.

protections.<sup>11</sup> In Alabama, for example, Black and white voter turnout was roughly equal in the 2012 presidential election;<sup>12</sup> but, in the aftermath of the *Shelby County* decision and new state-enacted restrictions on voting, the disparity has grown, with Black turnout (54.8%) lagging nearly 8 points behind white turnout (62.5%) in 2020.<sup>13</sup>

This trend continued in 2022. In Georgia, the disparity in turnout between white and Black voters in both the primary and general elections was higher than at any point in the past decade.<sup>14</sup> Disparities between white and Black turnout in mid-term elections have continued to grow in North Carolina, from a five-point disparity in 2014 to eight points in 2018 to a disturbing 16 points in 2022.<sup>15</sup> South Carolina had

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<sup>11</sup> Kevin Morris, Peter Miller & Coryn Grange, *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act Facebook Twitter*, Brennan Ctr. for Just. (Aug. 20, 2021), <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights>. It is important to note that turnout disparities were at an historical low in 2012 and so some of this increase was likely a return to historical patterns; but given the well-documented backsliding on voting accessibility for Black voters in these jurisdictions it is likely that additional barriers played at least some role.

<sup>12</sup> See U.S. Census Bureau, *Table 4b: Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020*, <https://www2.census.gov/programs-surveys/cps/tables/p20/585/table04b.xlsx>.

<sup>13</sup> See *id.*

<sup>14</sup> Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 2023 WL 7037537, at \*68 (N.D. Ga. Oct. 26, 2023); see also Kevin Morris, *Despite High Voter Turnout, Racial Gap Persisted in Georgia Primary*, Brennan Ctr. for Just. (Aug. 15, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/despite-high-voter-turnout-racial-gap-persisted-georgia-primary>; Sara Loving & Kevin Morris, *Georgia's Racial Turnout Gap Grew*, Brennan Ctr. for Just. (Dec. 16, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/georgias-racial-turnout-gap-grew-2022>.

<sup>15</sup> Bob Hall, *NC Voter Turnout in the Midterms: What the Data Show for Various Groups*, Pulse (Dec. 8, 2022), <https://pulse.ncpolicywatch.org/2022/12/08/nc-voter-turnout-in-the-midterms-whatthe-data-show-for-various-groups/#sthash.QNHe0dH5.w2aLakDb.dpbs>; Statement of Damon T. Hewitt, *Before the Subcomm. on Elections, Hr'g on "State and Local Perspectives on Election Administration" 13, 2022 Lookback Series: Successes in the 2022 Midterm Elections*, (Mar. 10, 2023), [https://cha.house.gov/\\_cache/files/b/2/b28d0f70-d970-4da6-b7a8-9a1662e65cec/6C84640E7D64D929A4F9400445FB871A.damon-hewitt-house-admin-elections-subcommittee-testimony-3.10.23.pdf](https://cha.house.gov/_cache/files/b/2/b28d0f70-d970-4da6-b7a8-9a1662e65cec/6C84640E7D64D929A4F9400445FB871A.damon-hewitt-house-admin-elections-subcommittee-testimony-3.10.23.pdf).

a greater than 15-point gap between white voters and voters of color.<sup>16</sup> Louisiana had nearly a 15-point turnout disparity between eligible white and Black voters.<sup>17</sup>

## **B. Restrictive Voting Laws Target Black Turnout**

In 2020, Black and Brown voters faced significant barriers to the ballot across the country.<sup>18</sup> Voters of color nonetheless made their voices heard, turning out in record numbers despite a life-threatening pandemic, hurricanes in several states, and threats of violence at the polls. The arc of voter suppression extended beyond Election Day in an unprecedented campaign to disrupt the counting and certification of ballots and overturn the election's results.<sup>19</sup> Despite these obstacles, voters elected the first female Vice-President of the United States, who is also the first Vice-President of African and Asian descent. And the State of Georgia elected its first Black and first Jewish U.S. Senators.

This step towards a more inclusive democracy triggered an intense backlash, including a violent insurrection and increased state efforts to block access to the ballot. With the former president and his allies aggressively pursuing a false

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<sup>16</sup> Statement of Marcia Johnson, *Before the Subcomm. on Elections, Hr'g on "State and Local Perspectives on Election Administration"* 13, *2022 Lookback Series: Successes in the 2022 Midterm Elections*, (Mar. 28, 2023), <https://www.rules.senate.gov/imo/media/doc/Marcia%20Johnson's%20Senate%20Rules%20Committee%20Testimony%203.24%20-%20Revised%20Clean.pdf>.

<sup>17</sup> Statement of Damon T. Hewitt, *supra* note 15, at 11.

<sup>18</sup> Thurgood Marshall Inst., *Democracy Defended* (Sept. 2, 2021), [https://www.naacpldf.org/wp-content/uploads/LDF\\_2020\\_DemocracyDefended-1-3.pdf](https://www.naacpldf.org/wp-content/uploads/LDF_2020_DemocracyDefended-1-3.pdf).

<sup>19</sup> Simon Romero, Shaila Dewan & Giulia McDonnell Nieto del Rio, *In a Year of Protest Cries, Now It's 'Count Every Vote!' and 'Stop the Steal!'*, N.Y. Times (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/us/electionprotests-vote-count.html>; Bill Bostock, *Videos show Trump protestors chanting 'count those votes' and 'stop the count' outside separate ballot-counting sites in Arizona and Michigan*, Bus. Insider (Nov. 5, 2020), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11>; Jake Lahut, *Dozens of pro-Trump protesters chant 'Fox News sucks' outside major election HQ in Arizona, with several reportedly trying to get inside as voters are being counted*, Bus. Insider (Nov. 4, 2020), <https://www.businessinsider.com/video-fox-news-sucks-chant-crowd-outside-maricopa-election-arizona-2020-11>; Maura Ewing et al, *Two charged with carrying weapons near Philadelphia vote-counting site amid election tensions*, Wash. Post (Nov. 6, 2020), <https://www.washingtonpost.com/nation/2020/11/06/philadelphiaattack-plot-vote-count-election/>; National Task Force on Election Crises, *Strengthening Our Elections and Preventing Election Crises: Lessons and Recommendations from the 2020 General Election* (2021), [https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/600192b45103a7521617d636/1610715829231/ElectionTF-Report\\_2021.pdf](https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/600192b45103a7521617d636/1610715829231/ElectionTF-Report_2021.pdf).

narrative that the election had been stolen, the January 6th insurrection attempted to thwart the peaceful transfer of power and undermine trust in our democracy.<sup>20</sup>

Legislators then introduced more than 400 bills across nearly every state aiming to restrict the franchise.<sup>21</sup> Many of these measures became law. Since 2021, more than 20 states have enacted at least 59 restrictive voting laws.<sup>22</sup> Separately, through 2021, seventeen states enacted 32 laws to criminalize, politicize, or interfere with election administration.<sup>23</sup> At least 12 similar laws across seven states were added in 2022.<sup>24</sup> These include measures to shift authority over elections from executive agencies or nonpartisan bodies to the legislature; roll back local authority through centralization and micromanagement; and criminalize good-faith mistakes or decisions by voters and elections officials.<sup>25</sup>

Critically, many of these laws are targeted at blocking pathways to the ballot box that Black and Latino voters used successfully in 2020. For example, after Black voters increased their usage of absentee ballots as a result of the pandemic, S.B. 90 in Florida severely curtailed the use of unstaffed ballot return drop boxes and effectively eliminated community ballot collection.<sup>26</sup> And in Georgia and Texas, after strong early in-person turnout among Black voters, lawmakers initially moved to outlaw or limit Sunday voting in a direct attack on the “souls to the polls” turnout efforts undertaken by many Black churches to mobilize voters to engage in collective

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<sup>20</sup> Statement of Janai Nelson, Pres. & Director-Counsel of NAACP Legal Def. & Educ. Fund, Inc., *Submitted to the U.S. House of Representatives Select Comm. to Investigate the January 6th Attack on the United States Capitol* (May 3, 2022), <https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Statement-for-Select-Committee-to-investigate-January-6-Attack-on-the-Capitol-FINAL-05.03.2022.pdf>.

<sup>21</sup> Brennan Ctr. for Just., *Resource: Voting Laws Roundup: December 2021* (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>.

<sup>22</sup> Brennan Ctr. for Just., *Voting Laws Roundup: October 2022* (Oct. 6, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022>; Brennan Ctr. for Just., *Voting Laws Roundup: October 2023* (Oct. 19, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2023>.

<sup>23</sup> Mem. from the States United Democracy Center, Protect Democracy, and Law Forward to Interested Parties (Dec. 23, 2021), at 2, [https://s3.documentcloud.org/documents/21169281/democracy-crisis-in-the-making-report-update\\_12232021-year-end-numbers.pdf](https://s3.documentcloud.org/documents/21169281/democracy-crisis-in-the-making-report-update_12232021-year-end-numbers.pdf)

<sup>24</sup> Brennan Ctr. for Just., *Voting Laws Roundup: December 2022* (Dec 19, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022>.

<sup>25</sup> Mem. from the States United Democracy Ctr., Protect Democracy, and Law Forward to Interested Parties (Dec. 23, 2021), at 2, [https://s3.documentcloud.org/documents/21169281/democracy-crisis-in-the-making-report-update\\_12232021-year-end-numbers.pdf](https://s3.documentcloud.org/documents/21169281/democracy-crisis-in-the-making-report-update_12232021-year-end-numbers.pdf).

<sup>26</sup> *See generally* Compl. for Declaratory & Injunctive Relief, *Fla. State Conf. of Branches & Youth Units of NAACP v. Lee*, No. 4:21-cv-00187-WS-MAF (N.D. Fla. May 6, 2021), ECF No. 1.



civic participation.<sup>27</sup> In both states, after advocacy from LDF and others, lawmakers eventually removed these blatantly discriminatory provisions from the omnibus voting bills under consideration—although in both states, the final forms of the enacted bills remained extremely harmful to voters of color.<sup>28</sup>

After robust Black turnout in the January 2021 runoff led to the election of Georgia’s first Black U.S. senator, Georgia lawmakers decided to sharply reduce the number of early voting days in future runoff elections. The same law also hampers vote-by-mail, cuts back on early voting, and more.<sup>29</sup> The 2021 omnibus voting law in Texas eliminates several common-sense voting methods, including “drive-thru” voting and 24-hour early voting, that greatly increased accessibility for voters with disabilities and voters of color in Texas’s largest cities in 2020.<sup>30</sup>

Several of these restrictive laws contributed directly to the barriers to participation by Black voters described in the section below. In addition, as evidenced by the widening racial turnout disparities described above, many of these laws achieved their intended effect.

### **C. Barriers Black Voters Have Encountered on the Ground**

In prior Congressional testimony, including before this Committee, LDF has detailed a litany of challenges Black voters have faced in recent elections.<sup>31</sup>

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<sup>27</sup> Letter from Sam Spital et al., NAACP Legal Def. Fund, to Texas Senate (May 29, 2021), <https://www.naacpldf.org/wp-content/uploads/LDF-Conference-Committee-Report-Opposition-Senate-20210529-1.pdf>; Letter from John Cusick et al., NAACP Legal Def. Fund et al., to Georgia House of Representatives, Special Comm. on Election Integrity (Mar. 14, 2021), <https://www.naacpldf.org/wp-content/uploads/LDF-SPLC-Written-Testimony-on-SB202-3.18.21.pdf>.

<sup>28</sup> See Press Release, NAACP Legal Def. Fund, LDF Files Lawsuit Against the State of Florida Over Suppressive Voting Law (May 6, 2021), <https://www.naacpldf.org/press-release/ldf-files-lawsuit-against-the-state-of-florida-over-suppressive-voting-law/>; Press Release, NAACP Legal Def. Fund, Civil Rights Groups Sue Georgia Over New Sweeping Voter Suppression Law (Mar. 30, 2021), <https://www.naacpldf.org/press-release/civil-rights-groups-sue-georgia-over-new-sweeping-voter-suppression-law/>.

<sup>29</sup> See S.B. 202, 2021-2022 Leg. Sess (Ga. 2021), <https://www.legis.ga.gov/api/legislation/document/20212022/201498>.

<sup>30</sup> Compl. for Declaratory & Injunctive Relief, *Houston Justice v. Abbott*, No. 5:21-cv-00848 (W.D. Tex. Sept. 7, 2021), ECF No. 1, <https://www.naacpldf.org/wp-content/uploads/Houston-Justice-et-al.-v.-Abbott-et-al.-Complaint.pdf>; see also Press Release, NAACP Legal Def. Fund, Lawsuit Filed Challenging New Texas Law Targeting Voting Rights (Sept. 7, 2021), <https://www.naacpldf.org/press-release/lawsuit-filed-challenging-new-texas-law-targeting-voting-rights/>.

<sup>31</sup> Test. of Adam Lioz, *Before the Comm. on Rules & Admin., Hr’g on “State and Local Perspectives on Election Administration”* 12-15, (Mar. 28, 2023), <https://www.naacpldf.org/wp-content/uploads/LDF-Senate-Rules-Testimony-4-4-23.pdf>; Test. of Deuel Ross, *Before the House Comm. on House Admin. Subcomm. on Elections, Hr’g on “American Confidence in Elections: Ensuring Every Eligible American Has the Opportunity to Vote – and for their Vote to Count According to Law”* 5-6 (May. 24, 2023),

Unfortunately, these barriers to the ballot persist. In this section, we briefly summarize our past testimony and report on subsequent developments.

### 1. *Elections Took Place Under Discriminatory Districts*

Congressional and legislative maps produced by states following the decennial census count failed to reflect America’s emerging multiracial democracy. Though the growth of Black people and other people of color fueled population growth, the voting strength of communities of color was diluted through racial gerrymandering. After the Supreme Court undercut the federal VRA’s preclearance protections, states have taken steps to draw discriminatory districting maps that disenfranchise Black and Brown voters. Of the nine states that were previously required to submit district maps for “preclearance” by federal officials or a court, six of these states have faced lawsuits challenging their maps for racial discrimination.<sup>32</sup> In litigation involving LDF alone, courts in Alabama,<sup>33</sup> Louisiana,<sup>34</sup> and South Carolina<sup>35</sup> (all states previously covered by the VRA’s preclearance protections)<sup>36</sup> found that state-created maps were racially discriminatory.

The results were often egregious. In Alabama, a unanimous three-judge court found that, despite white residents shrinking to only about 65% of the population, the

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<https://www.naacpldf.org/wp-content/uploads/HHRG-118-HA08-Wstate-RossD-20230524-1.pdf>; Test. of Sherrilyn Ifill, *Before the House Comm. on the Jud., Subcomm. on the Const., C.R., & C.L., Hr’g on “Voter Suppression and Continuing Threats to Democracy”* 11-12 (Jan. 20, 2022), <https://docs.house.gov/meetings/JU/JU10/20220120/114336/HHRG-117-JU10-Wstate-IfillS-20220120.pdf>.

<sup>32</sup> All About Districting, Cases, <https://redistricting.ils.edu/cases/?cycles%5B%5D=2020&states%5B%5D=Alabama&states%5B%5D=Alaska&states%5B%5D=Arizona&states%5B%5D=Georgia&states%5B%5D=Louisiana&states%5B%5D=Mississippi&states%5B%5D=South%20Carolina&states%5B%5D=Texas&states%5B%5D=Virginia&sortby=&page=1>.

<sup>33</sup> Prelim. Inj. Mem. Op. & Order, *Milligan v. Merrill*, No. 2:21-cv-01530-AMM, 2021 WL 5979497 (N.D. Ala. Nov. 23, 2021), ECF No. 107, [https://www.naacpldf.org/wp-content/uploads/PRELIMINARY-INJUNCTION-MEMORANDUM-OPINION-AND-ORDER.-Signed-by-Judge-Anna-M-Manasco-on-1\\_24\\_2022.-1.pdf](https://www.naacpldf.org/wp-content/uploads/PRELIMINARY-INJUNCTION-MEMORANDUM-OPINION-AND-ORDER.-Signed-by-Judge-Anna-M-Manasco-on-1_24_2022.-1.pdf).

<sup>34</sup> Ruling & Order, *Robinson v. Ardoin*, No. 3:22-cv-00211-SDD-SDJ (M.D. Ala. June 6, 2022), ECF No. 173, <https://www.naacpldf.org/wp-content/uploads/Robinson-v.-Ardoin-Ruling-and-Order-Preliminary-Injunction.pdf>; *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022).

<sup>35</sup> Findings of Fact & Conclusions of Law, *S.C. State Conf. of the NAACP v. Alexander*, No.: 3:21-cv-03302-MGL-TJH-RMG 23 WL 118775 \*15 (D.S.C. Jan. 6, 2023), ECF No. 493, [https://www.aclu.org/wp-content/uploads/legal-documents/order\\_-\\_south\\_carolina\\_state\\_conference\\_of\\_the\\_naacp\\_v.\\_alexander.pdf](https://www.aclu.org/wp-content/uploads/legal-documents/order_-_south_carolina_state_conference_of_the_naacp_v._alexander.pdf).

<sup>36</sup> U.S. Dep’t of Just., *Jurisdictions Previously Covered by Section 5* (Nov. 9, 2021), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

State drew congressional maps that boosted white political power and ensured that white voters exerted absolute control over 86% of the state’s seven congressional districts—leaving the 27% of Black Alabamians with a meaningful voice in only one of seven (14%) of districts in a scenario akin to a one-person, half-a-vote.<sup>37</sup> In South Carolina, three judges unanimously found that the State intentionally removed Black voters from a congressional district and made a “mockery” of traditional districting rules.<sup>38</sup>

Yet, as a result of appeals to the Supreme Court, injunctions requiring legislatures to redraw racially discriminatory maps—including injunctions issued months prior to the 2022 election in Alabama and Louisiana—were frozen, resulting in the use of discriminatory maps in the 2022 midterms. Because these cases were put on hold, hundreds of thousands of Black voters cast ballots in districts that *courts had already ruled* violated the Voting Rights Act. This means that the congressional delegation from these states, as well as the election of other officials, was produced through a process infected with state-sponsored racial discrimination.

Discriminatory redistricting was not limited to congressional and state legislative maps. Local redistricting efforts also produced discriminatory maps in jurisdictions previously covered under Section 5. For example, in November 2021, the Commissioners Court in Galveston County, Texas enacted a redistricting plan that dismantled the county’s sole majority-minority district, Precinct 3, comprised of a 60% combined Black and Latino population.<sup>39</sup> This was the County’s second attempt to eliminate Precinct 3; the Department of Justice interposed an objection pursuant to VRA Section 5 against the County’s prior attempt after the 2010 Census because it resulted in a “retrogression in minority voting strength.”<sup>40</sup> This time, multiple lawsuits were filed, and both the district court and a panel of the Fifth Circuit held that the County’s plan violated Section 2.<sup>41</sup> The case is currently pending rehearing

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<sup>37</sup> See Stipulation of Facts, *Milligan v. Merrill*, No. 2:21-cv-01530-AMM (N.D. Ala. 2021), ECF No. 53.

<sup>38</sup> Findings of Fact & Conclusions of Law, *supra* note 35, at \*15.

<sup>39</sup> Findings of Fact & Conclusions of Law, *Petteway v. Galveston Cnty.*, No. 3:22-cv-57 5-6 (S.D. Tex. Oct. 13, 2023), [https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/TX\\_322-cv-57\\_10-13-23.pdf](https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/TX_322-cv-57_10-13-23.pdf).

<sup>40</sup> Review of Compl. from Thomas E. Perez, Asst. Att’y Gen. of U.S. Dep’t of Just. Off. of C.R., to James E. Trainor III, Esq., Beirne, Maynard & Parsons, [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l\\_120305.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120305.pdf).

<sup>41</sup> *Petteway v. Galveston Cnty.*, 2023 WL 6786025 (S.D. Tex. Oct. 2023), *stayed*, 86 F.4th 214 (5th Cir. 2023).

by the full Fifth Circuit, which will reconsider existing precedent allowing for coalition opportunity districts.<sup>42</sup>

## 2. *Mass Challenges to Voter Eligibility*

Ahead of crucial 2022 elections, extremist groups and other partisan actors weaponized state laws to launch mass challenges to voter eligibility in several key states such as Florida and Georgia.<sup>43</sup> These frivolous challenges sought to prevent eligible citizens from freely exercising the franchise.<sup>44</sup> This trend continued in 2023 and will continue in increasing numbers in 2024, as reported by several groups carrying out these challenges.<sup>45</sup>

Recent technological developments have amplified the risk of frivolous mass voter challenges. Eagle AI is a tool that allows users to generate thousands of mass voter challenges in just a few clicks.<sup>46</sup> Using unreliable data, the tool gives conspiracy theorists the ability to inundate election officials, risking election administration failures and potentially intimidating voters whose eligibility is being questioned.

The technology's developers have shopped it around to counties and states as a tool to conduct list maintenance, and at least one county in Georgia is currently beta testing it.<sup>47</sup> Adoption by governmental entities to perform list maintenance raises significant concerns because of how unreliable and potentially discriminatory the tool is. As Georgia's elections director noted, "EagleAI draws inaccurate conclusions and then presents them as if they are evidence of wrongdoing."<sup>48</sup>

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<sup>42</sup> *Petteway v. Galveston Cnty.*, 86 F.4th 1146 (5th Cir. 2023).

<sup>43</sup> Test. of Adam Lioz, *supra* note 31, at 12-15.

<sup>44</sup> *Id.*

<sup>45</sup> Berzon & Corasaniti, *supra* note 3.

<sup>46</sup> It was developed by the "Election Integrity Network," the same organization campaigning for states to exit the bipartisan Electronic Registration Information Center ("ERIC"). Caroline Haskins, *A new tool targets voter fraud in Georgia – but is it skirting the law*, The Guardian (Feb. 26, 2024), <https://www.theguardian.com/us-news/2024/feb/26/eagleai-georgia-voter-registration-election>.

<sup>47</sup> *Id.*

<sup>48</sup> Jane C. Timm, *Inside the Right's Effort to Build a Voter Fraud Hunting Tool*, NBC News, (Aug. 17, 2023), <https://www.nbcnews.com/politics/2024-election/conservatives-voter-fraud-hunting-tool-eagleai-cleta-mitchell-rcna97327>.

### 3. Polling Location Problems

In Georgia,<sup>49</sup> Louisiana,<sup>50</sup> and Mississippi<sup>51</sup> changes to polling locations led to widespread voter confusion and delays during early voting and on Election Day during elections in 2022 and 2023. In many instances, these changes, which included closures, relocations, and consolidations, were poorly communicated to voters or not communicated at all.<sup>52</sup> These changes to assigned polling stations disproportionately affected Black and other voters of color.<sup>53</sup> On the ground, voters faced the additional burden of late opening of polling facilities, which led to delays to the election process and long lines.<sup>54</sup>

Voters with physical disabilities, who are disproportionately Black, faced a unique set of challenges while voting in person during elections in 2022 and 2023 throughout the South. Polling places in multiple Southern states lacked accessible parking and entrances.<sup>55</sup> In addition, several states have enacted legislation that imposes additional burdens on voters with disabilities who need assistance at the polls. In 2021, Texas enacted SB 1, which, among other things, requires those providing assistance to disclose certain personal information and swear an oath under the penalty of perjury. Multiple individuals with disabilities testified during a trial concerning claims challenging SB 1 in fall 2023 that SB 1's assistance

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<sup>49</sup> Test. of Adam Lioz, *supra* note 31, at 16.

<sup>50</sup> *Id.* at 16-17.

<sup>51</sup> *Id.* at 17-19.

<sup>52</sup> Ashton Pittman & William Pittman, *Mississippi Officials Made 164 Voting Precinct Changes Since November 2022*, Miss. Free Press (Aug. 7, 2023), <https://www.mississippifreepress.org/35295/mississippi-officials-made-161-voting-precinct-changes-since-november-2022>; Ashton Pittman & William Pittman, *State Has Wrong or Missing Addresses for 92 Voting Precincts, MFP Investigation Finds*, Miss. Free Press (Nov. 7, 2023), <https://www.mississippifreepress.org/37388/state-has-wrong-or-missing-addresses-for-92-voting-precincts-mfp-investigation-finds>; Ashton Pittman & William Pittman, *Mississippi Election Officials Have Made 98 Polling Place Changes Since 2020, Investigation Finds*, Miss. Free Press (Nov. 4, 2022), <https://www.mississippifreepress.org/28941/mississippi-election-officials-have-made-97-polling-place-changes-since-2020-investigation-finds>; Ashton Pittman & William Pittman, *Mississippi Officials Moved Three Times More Polling Places Than Reported for 65,000 Voters*, Miss. Free Press (Oct. 31, 2020), <https://www.mississippifreepress.org/6577/mississippi-officials-moved-three-times-more-polling-places-than-reported-for-65000-voters>.

<sup>53</sup> Pittman & Pittman, *Mississippi Officials Moved Three Times More Polling Places Than Reported for 65,000 Voters*, *supra* note 51.

<sup>54</sup> Test. of Adam Lioz, *supra* note 31, at 19-21.

<sup>55</sup> *Id.* at 12-15.

restrictions deterred them from seeking assistance and deterred potential assistors from providing it.<sup>56</sup>

Election administration problems at polling locations created significant barriers for voters during elections in 2022 and 2023. For example, Hinds County, which is approximately 70% Black, experienced extensive ballot shortages during the 2023 Mississippi statewide election.<sup>57</sup> Up to nine polling locations ran out of ballots multiple times during Election Day, some before noon.<sup>58</sup> This caused hours-long lines, resulting in many voters leaving the polling place without voting.<sup>59</sup>

#### 4. *Issues with Early Voting*

Accessible and common-sense voting methods have also been rolled back. Early voting, for example, proved critical to the record-breaking voter turnout of Black and Latino voters during the 2020 general election. Nonetheless, it has been eliminated or curtailed in Arizona and Texas.<sup>60</sup> In Texas, “drive-thru” and 24-hour early voting were used in large numbers in Harris County in 2020, disproportionately by Black and Latino voters. The Texas legislature banned both methods of voting, adding to the burdens imposed on voters who have difficulty getting to voting locations during traditional hours.<sup>61</sup>

#### 5. *Restrictions on Absentee Voting and Vote-By-Mail*

Restrictions on absentee and mail voting increased the time, cost, and risk associated with voting. States eliminated or severely limited the use of vote-by-mail ballot drop boxes, which Black and Latino voters depended on in 2020.<sup>62</sup> At least one

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<sup>56</sup> Proposed Findings of Fact & Conclusions of Law, *La Union Del Pueblo Entero, et al v. Gregory W. Abbott, et al*, No. 5:21-cv-00844-XR 273 (W.D. Tex. Jan. 20, 2024), ECF No. 856.

<sup>57</sup> Shaunicy Muhammad, *‘Human Error’ Caused Hinds County Election Day Ballot Shortages, Commissioners Say*, Miss. Free Press (Dec. 20, 2023), <https://www.mississippifreepress.org/38457/human-error-caused-hinds-county-election-day-ballot-shortages-commissioners-say>.

<sup>58</sup> Paul J. Weber, *Texas releases another audit of elections in Harris County, where GOP still challenging losses*, AP News (Oct. 19, 2023), <https://apnews.com/article/texas-voting-harris-county-4ac9b393ad1d7b91d92232d34620818c>.

<sup>59</sup> Michael Goldberg, *Voting rights groups push for answers from Mississippi election officials about ballot shortages*, AP News (Dec. 7, 2023), <https://apnews.com/article/mississippi-election-ballot-shortage-hinds-county-f669843c918edcc2af15667fb2399f0b>.

<sup>60</sup> *Id.* at 5, 22-23; Test. of Deuel Ross, *supra* note 31, at 5-6.

<sup>61</sup> Test of Adam Lioz, *supra* note 31, at 22.

<sup>62</sup> *Id.* at 22.

state required voters to include their state-issued ID number or Social Security Number on their mail ballot application without providing an alternative for voters who did not have such information.<sup>63</sup> Further, new ID requirements led to a record number of rejected absentee applications and mail ballots.<sup>64</sup> Florida’s S.B. 90 eliminated the ability of voting advocates to assist with turning in absentee ballots after many Black voters adjusted to the pandemic by voting absentee.<sup>65</sup>

State legislatures have passed a wave of new laws restricting the ability of mail voters to receive assistance. Texas’s SB 1, enacted in 2021, requires assistors to fill out additional information on the mail-ballot carrier envelope and makes it a crime to compensate, offer, or receive compensation for providing assistance, deterring would-be assistors, like a person’s paid caregiver or an employee of a civic engagement organization, and increasing the risk that the ballot will be rejected for clerical errors.<sup>66</sup> In 2023, Mississippi enacted SB 2358, which imposes criminal penalties for helping a voter “collect and transmit” their mail ballot.<sup>67</sup> A federal court preliminarily enjoined the new law as a likely violation of Section 208 of the Voting Rights Act.<sup>68</sup> Alabama appears poised to enact SB 1, another bill that restricts vote-by-mail assistance by criminalizing many common forms of assistance, such as paying \$5.00 for gas money for someone who agrees to drive to the registrar’s office to deliver an absentee ballot.<sup>69</sup> These laws impose additional burdens not only on voters with disabilities, but also hamper organized voter turnout drives.

These legislative attacks are part of a broader, concerted effort to limit the vote-by-mail process and undermine public trust in it. Litigation has been filed in Mississippi, Illinois, and North Dakota challenging post-Election Day return dates for mail ballots, asserting a fringe legal theory that federal law setting the date of federal elections prohibits states from counting timely cast mail ballots received after

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<sup>63</sup> *Id.* at 25.

<sup>64</sup> *Id.* at 25.

<sup>65</sup> Test. of Sherrilyn Ifill, *supra* note 31, at 11-12.

<sup>66</sup> SB 1 § 6.05-06, 87th Leg. (TX 2021), <https://legiscan.com/TX/text/SB1/id/2424492>.

<sup>67</sup> SB 2358, 2023 Reg. Sess. (Miss. 2023), <https://legiscan.com/MS/text/SB2358/id/2749983/Mississippi-2023-SB2358-Enrolled.html>.

<sup>68</sup> Prelim. Inj. Order, *Disability Rts. Mississippi v. Fitch*, No. 3:23-CV-350-HTW-LGI (S.D. Miss. 2023), <https://www.aclu.org/documents/disability-rights-mississippi-v-fitch-pi-order>.

<sup>69</sup> SB 1, 2024 Reg. Sess. (AL 2024), <https://legiscan.com/AL/amendment/SB1/id/203912>.

Election Day.<sup>70</sup> If successful, these lawsuits would increase the risk of rejected ballots for tens of thousands of mail voters, including military members, students, and individuals with disabilities, who rely on post-Election Day return dates. In Florida, an administrative challenge has been filed against a rule promulgated by the Secretary of State allowing voters to request a mail ballot through a designee.<sup>71</sup> And public officials, like the Mississippi Secretary of State, have publicly discouraged voters from voting by mail “if at all possible” because of purported USPS mail delays,<sup>72</sup> even though USPS delivered nearly 99% of trackable ballots from voters to election officials within three days during the 2022 midterm elections.<sup>73</sup>

## 6. Criminalization of Voting

One of the most alarming trends of the post-2020 environment has been the criminalization of the voting process. Between 2020 and 2022, twenty-six states created or heightened punishments for a total of 120 election-related crimes, largely in Southern states previously covered under Section 5.<sup>74</sup> These laws target voters, assistants, and civic organizations with criminal penalties for benign activities related to the voting process. For example, Georgia’s S.B. 202 criminalizes the distribution of food and water to voters waiting in line, a practice known as “line warming” or “line relief.”<sup>75</sup> And as noted above, there is a new wave of laws criminalizing the provision of needed assistance to absentee or mail voters.

Under the guise of ferreting out election fraud, some states have even created new police forces to criminalize the voting process. Created in 2022, Florida’s election crimes police force has targeted minority voters and chilled civic participation while

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<sup>70</sup> *Republican Nat’l Comm. v. Wetzel*, No. 1:24-cv-25-LG-RPM (S.D. Miss 2024); *Splonskowski v. White*, No. 1:23-cv-00123 (D.N.D. 2023); *Bost v. Illinois State Board of Elections*, No. 1:22-cv-02754 (N.D. Ill. 2022).

<sup>71</sup> *Boydston v. Department of State Division of Elections*, No. 23-004487RP (Fla. Div. of Admin. Hr’gs, 2023).

<sup>72</sup> Tweet from Sec. Michael Watson (Feb. 7, 2024), <https://twitter.com/MichaelWatsonMS/status/1755237396294045970>.

<sup>73</sup> U.S. Postal Serv., *2022 Post-Election Analysis: Successfully delivering the nation’s election mail during the 2022 midterm elections* (2022), <https://about.usps.com/what/government-services/election-mail/pdf/usps-2022-post-election-analysis.pdf>.

<sup>74</sup> Benjamin Barber, *Criminalizing voters in Southern states*, Facing South (Jan. 27, 2023), <https://www.facingsouth.org/2023/01/criminalizing-voters-in-southern-states>.

<sup>75</sup> H.B. 540 § 22, Act 632, Reg. Sess. (Ga. 2010); see also O.C.G.A. § 21-2-414(a)(1), (a)(3).



achieving only a handful of successful prosecutions.<sup>76</sup> Other states, including Georgia, Texas, and Ohio, have proposed their own specialized units to investigate and prosecute election fraud.<sup>77</sup> States like Florida have also targeted returning citizens, passing laws requiring them to pay all judicially mandated financial obligations in order to register to vote and cast their ballots, and conducting high-profile arrests for voting while ineligible.<sup>78</sup>

## 7. Threats to Election Officials

Election officials have experienced unprecedented threats to their safety and privacy since the 2020 election. Large numbers of election officials have expressed concern for their safety while carrying out their duties.<sup>79</sup> Some have even been harassed and threatened while on the job, including Secretaries of the States who are responsible for certifying election results.<sup>80</sup> As we heard in powerful testimony to the January 6th Committee, Black election workers Ruby Freeman and Shaye Moss had their lives turned upside down by a relentless campaign of threats and harassment sparked by Rudy Giuliani's false accusations.<sup>81</sup> Mr. Giuliani was ultimately found liable for defamation by a federal jury and ordered to pay nearly \$150 million in damages, in recognition of the steep cost two diligent election workers had paid for doing their jobs.<sup>82</sup>

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<sup>76</sup> John Kennedy, *Florida Election Crimes Office Dealt with 1,300 Complaints, Continues to Stir Controversy*, USA Today Florida (Jan. 17, 2024), <https://www.tallahassee.com/story/news/politics/2024/01/17/first-annual-report-shows-florida-election-crimes-office-1300-complaints-draws-controversy/72255279007/>.

<sup>77</sup> Mac Brower, *Criminalizing Elections Is on Red States' Agenda This Year*, Democracy Docket (Feb. 21, 2023), <https://www.democracymarket.com/analysis/criminalizing-elections-is-on-red-states-agenda-this-year/>.

<sup>78</sup> Test. Of Adam Lioz, *supra* note 31, at 28-29.

<sup>79</sup> Ruby Edlin & Lawrence Norden, *Poll of Election Officials Shows High Turnover Amid Safety Threats and Political Interference*, Brennan Ctr. For Just. (Apr. 25, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/poll-election-officials-shows-high-turnover-amid-safety-threats-and>.

<sup>80</sup> Test. Of Sherrilyn Ifill, *supra* note 31, at 14-15.

<sup>81</sup> Select Comm. to Investigate the January 6<sup>th</sup> Attack on the U.S. Capital, H.R. 117<sup>th</sup> Cong. 2<sup>nd</sup> Sess., Final Report on the Select Committee to Investigate the January 6<sup>th</sup> Attack on the United States Capital (Dec. 2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf> at 305-307.

<sup>82</sup> Daniel Barnes, et al., *Rudy Giuliani Hit with \$148M Verdict for Defaming Two Georgia Election Workers*, NBC News, Dec. 15, 2023, <https://www.nbcnews.com/politics/politics-news/rudy-giuliani-hit-148m-verdict-defaming-two-georgia-election-workers-rcna129807>.

As threats against good-faith election officials and workers rise, there has been an exodus of paid workers and volunteers who have stopped staffing polling locations.<sup>83</sup> Lawmakers have exacerbated the problem by passing laws that put election workers at risk of criminal penalties for fulfill their duties.<sup>84</sup> In 2023, at least three states enacted laws that imposed criminal penalties on election officials for performing benign election administration activities. Arkansas’s HB 1411 made it a crime for an election official to send an unsolicited mail ballot, while Georgia’s SB 222 expanded a prior law making it a crime for election officials to accept third-party funding to support election administration.<sup>85</sup>

#### **D. LDF’s Recent and Ongoing Voting Rights Litigation**

LDF’s extensive voting rights litigation docket illustrates ongoing barriers to equal representation, highlights the resources required to fix problems after the fact, and exposes the shortcomings of the existing legal regime.

##### *1. Redistricting and Racial Vote Dilution*

Despite the growth of communities of color over the last decade, congressional and legislative maps following the 2020 Census failed to reflect the nation’s increased diversity.<sup>86</sup> Racial vote dilution has systemically deprived Black and Latino voters of a meaningful opportunity to elect candidates of their choice. LDF has brought a series of lawsuits challenging congressional, state legislative, and local government maps on behalf of Black voters who were unlawfully gerrymandered out of political power in several states.

##### *i. Alabama: Allen v. Milligan*

In 2021, Alabama enacted a redistricting plan for its seven congressional districts. The new map divided the eighteen counties in Alabama’s Black Belt in a way that prevented the Black community from electing candidates of their choice. The Black Belt is a “community with a high proportion of similarly situated black voters who share a lineal connection ‘the many enslaved people brought there to work in the antebellum period.’”<sup>87</sup> This cracking of the Black Belt denied the Black voters there the opportunity to elect candidates of their choice. Despite Black voters casting

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<sup>83</sup> Test. of Adam Lioz, *supra* note 31, at 28-29.

<sup>84</sup> *Id.*, at 28-29.

<sup>85</sup> Brennan Ctr. for Just., *Voting Laws Roundup: 2023 in Review*, (Jan. 18, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review>.

<sup>86</sup> Test. of Deuel Ross, *supra* note 31, at 7-8.

<sup>87</sup> *Allen v. Milligan*, 143 S. Ct. 1487, 1495 (2023).

on average over 90% of their ballots for their preferred candidates, bloc voting by the white majority uniformly cancelled out their votes. As a result of this cracking and racially polarized voting, Black Alabamians—who comprise 27% of the state’s population—formed the majority in only one of the state’s seven districts. The impact of this map is that white Alabamians who are only 65% of the population controlled elections in 86% of the state’s seven congressional districts.<sup>88</sup> LDF, along with the American Civil Liberties Union, ACLU of Alabama, Hogan Lovells LLP, and Wiggins, Childs, Pantazis, Fisher & Goldfarb filed a lawsuit on behalf of Greater Birmingham Ministries, the Alabama State Conference of the NAACP, and several individuals challenging the state’s redistricting plan under Section 2 of the Voting Rights Act. The lawsuit demanded that the state create a second district that gives Black Alabamians an equal chance to see their preferred candidates represent them in Congress.<sup>89</sup>

In January 2022 a three-judge panel in the district court in the Northern District of Alabama unanimously agreed with the plaintiffs. It found that the map likely violated Section 2 of the VRA and granted a preliminary injunction that required the state to draw a new map.<sup>90</sup> However, the Supreme Court halted the preliminary injunction by a 5-4 decision pending a merits decision in the case.<sup>91</sup> The result of this stay was that Alabama used a map that has been held to be discriminatory as the basis for the 2022 congressional elections in the state. As expected under this map, Alabamians elected only one Black person to Congress in 2022 out of seven seats.<sup>92</sup>

On June 8, 2023, the Supreme Court issued a landmark 5-4 decision affirming and restoring the district court’s preliminary injunction.<sup>93</sup> On remand, the Alabama Legislature drew a new map that still would not create a second opportunity district for Black voters. The district court rejected the State’s proposal, and the Supreme Court denied Alabama’s motion for a stay. On October 5, 2023, the district court adopted a new map, which, for the first time in history, creates a second congressional district where Black voters in Alabama will have an opportunity to elect candidates

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<sup>88</sup> See Stipulation of Facts, *supra* note 37.

<sup>89</sup> Compl., *Milligan v. Merrill*, No. DC-775038/000001-16632740 ¶¶ 3-7, (N.D. Ala. Nov. 15, 2021), <https://www.naacpldf.org/wp-content/uploads/COMPLAINT-Milligan-v.-Merrill-1.pdf>.

<sup>90</sup> Prelim. Inj. Mem. Op. & Order, *supra* note 33.

<sup>91</sup> Grant of Appls. for Stays or Injunctive Relief, *Merrill v. Milligan*, Nos. 21A375 (21–1086) & 21A376 (21–1087) (595 U.S. 2022), [https://www.brennancenter.org/sites/default/files/2022-10/Merrill\\_stay\\_opinion\\_dissent.pdf](https://www.brennancenter.org/sites/default/files/2022-10/Merrill_stay_opinion_dissent.pdf).

<sup>92</sup> U.S. Cong., *Members of the U.S. Congress*, <https://www.congress.gov/members?q=%7B%22member-state%22%3A%22Alabama%22%2C%22congress%22%3A118%7D>.

<sup>93</sup> *Allen v. Milligan*, 143 S. Ct. 1487.

of choice this November.<sup>94</sup> However, Alabama continues to dispute this result, and the district court has now set a date for a full trial on the merits to begin on February 3, 2025.<sup>95</sup>

*ii. Louisiana: Robinson v. Landry*

In March 2022, LDF, the ACLU, ACLU of Louisiana, and Paul, Weiss, Rifkind, Wharton & Garrison LLP filed a lawsuit on behalf of the Louisiana State Conference of the NAACP, Power Coalition for Equity and Justice and nine individual voters, challenging the congressional redistricting maps passed by the Louisiana legislature as a violation of Section 2 of the Voting Rights Act.<sup>96</sup> The lawsuit alleged that the maps diluted the voting power of Black Louisianans by failing to provide Black voters an equal opportunity to elect their candidates of choice in a second congressional district. The discriminatory map was vetoed by Louisiana Governor Bel Edwards, but the legislature voted to overturn the veto.<sup>97</sup> On June 6, 2022, the map was blocked by a federal judge who ruled that it was racially discriminatory and likely violated the Voting Rights Act, and a motions panel of the Fifth Circuit Court of Appeals in New Orleans agreed.<sup>98</sup> The court's determination required legislators to draw a new map with two districts where Black voters can elect candidates of choice

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<sup>94</sup> Inj., Order, & Court-Ordered Remedial Map, *Milligan v. Allen*, No. 2:21-cv-01530-AMM (N.D. Ala. Oct. 23, 2023), [https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AL\\_221-cv-1530\\_311.pdf](https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AL_221-cv-1530_311.pdf).

<sup>95</sup> Order, *Milligan v. Allen*, No. 2:21-cv-01530-AMM (N.D. Ala. Jan. 11, 2024), [https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AL\\_221-cv-1530\\_324.pdf](https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AL_221-cv-1530_324.pdf).

<sup>96</sup> Compl., *Robinson v. Ardoin*, No. 3:22-cv-00211-SDD-SDJ (M.D. La. Mar. 30, 2022), <https://www.naacpldf.org/wp-content/uploads/LA-Redistricting-Suit-3.30.22.pdf>.

<sup>97</sup> Press Release, NAACP Legal Def. Fund, Louisiana Legislature Overturns Governor's Veto of Map Lacking a Second Majority-Black Congressional District; Civil Rights Groups File Suit Under Voting Rights Act (Mar. 30, 2022), <https://www.naacpldf.org/press-release/louisiana-legislature-overturns-governors-veto-of-map-lacking-a-second-majority-black-congressional-district-civil-rights-groups-file-suit-under-voting-rights-act>; Wesley Muller & Greg LaRose, *Louisiana Legislature overrides Gov. Edwards' veto of congressional map*, La. Illuminator (Mar. 30, 2022), <https://lailluminator.com/2022/03/30/louisiana-legislature-overrides-gov-edwards-veto-of-congressional-map/>; Mark Ballard et al., In an historic vote, Louisiana Legislature overturns governor's veto on congressional maps, *The Advocate* (Mar. 30, 2022), [https://www.theadvocate.com/baton\\_rouge/news/politics/legislature/in-an-historic-vote-louisiana-legislature-overturns-governors-veto-on-congressional-maps/article\\_fecf9998-b04c-11ec-be24-17a2c1389e4d.html](https://www.theadvocate.com/baton_rouge/news/politics/legislature/in-an-historic-vote-louisiana-legislature-overturns-governors-veto-on-congressional-maps/article_fecf9998-b04c-11ec-be24-17a2c1389e4d.html).

<sup>98</sup> Ruling & Order, *Robinson v. Ardoin*, No.3:22-cv-00211-SDD-SDJ (M.D. La. June 6, 2022), <https://www.naacpldf.org/wp-content/uploads/Robinson-v.-Ardoin-Ruling-and-Order-Preliminary-Injunction.pdf>; *Ardoin v. Robinson*, No. 21A814, (5th Cir. Jun. 28, 2022).

to be used during upcoming elections, while litigation continued.<sup>99</sup> On June 28, 2022, the U.S. Supreme Court granted Louisiana’s bid to temporarily halt the district court’s ruling, allowing the discriminatory map to be used in the 2022 mid-term election.<sup>100</sup> Nearly a year later, following its decision in *Allen v. Milligan*, the Supreme Court lifted its stay, allowing the case to proceed in the lower courts.<sup>101</sup> On November 11, 2023, the Fifth Circuit Court of Appeals affirmed the district court’s ruling that the State had likely violated the Voting Rights Act, but vacated the injunction for procedural reasons and set a timeline for the legislature or district court to act to install a new congressional map in time for the 2024 elections.<sup>102</sup>

The legislature took that opportunity and, on January 19, 2024, enacted a new congressional map with a second majority-Black district. On February 1, 2024, a number of self-described “non-African American” plaintiffs brought a new suit, *Callais v. Landry*, challenging the new map as a purported racial gerrymander.<sup>103</sup> This litigation is ongoing and may impact what congressional map will be used in 2024 election.

*iii. South Carolina: Alexander v. South Carolina NAACP*

In 2021 and 2022, South Carolina enacted new post-Census maps for its congressional and state legislative districts. LDF, along with the American Civil Liberties Union, the ACLU of South Carolina, Boroughs Bryant LLC, Arnold & Porter, and the general counsel’s office of the NAACP brought suit on behalf of the South Carolina State Conference of the NAACP and an individual voter, claiming that the districts in the congressional and state House maps were racially gerrymandered and designed with a discriminatory purposes under the Fourteenth and Fifteenth Amendments of the U.S. Constitution.<sup>104</sup> In 2022, South Carolina

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<sup>99</sup> *Id.*.

<sup>100</sup> Misc. Order, *Ardoin v. Robinson*, 597 U.S. — (June 28, 2022), [https://www.supremecourt.gov/orders/courtorders/062822zr1\\_9ol1.pdf](https://www.supremecourt.gov/orders/courtorders/062822zr1_9ol1.pdf).

<sup>101</sup> Order dismissing the writ of certiorari before judgment as improvidently granted, and vacating the stay entered on June 28, 2022, *Ardoin v. Robinson*, S. Ct. No. 21-1596, 5th Cir. No. 22-30333 (June 26, 2023), [https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/LA\\_22-30333\\_237-1\\_13cvCoI.pdf](https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/LA_22-30333_237-1_13cvCoI.pdf).

<sup>102</sup> *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023).

<sup>103</sup> Compl., *Callais et al. v. Landry*, No. 3:24-cv-00122 (W.D. La. Jan. 31, 2024), [https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/LA\\_324-cv-122\\_1.pdf](https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/LA_324-cv-122_1.pdf).

<sup>104</sup> NAACP Legal Def. Fund, *Trial Wraps Up in Voting Rights Case Challenging South Carolina’s Congressional Map* (Nov. 29, 2022), <https://www.naacpldf.org/press-release/trial-wraps-up-in-voting-rights-case-challenging-south-carolinas-congressional-map/>.

adjusted South Carolina state House district lines in some of the most historically significant areas of the state for Black voters by passing a new map in response to the lawsuit. Passage of the maps stems from a private settlement between the parties.<sup>105</sup> The congressional challenge continued forward in litigation. In January 2023, after an eight-day trial, a unanimous three-judge panel held South Carolina’s Congressional District 1 was a racial gerrymander and was designed with a discriminatory purpose. The panel determined that the South Carolina legislature “bleached” Black voters out of a district, made a “mockery” of traditional districting principles, and that race rather than partisan affiliation explained the design of Congressional District 1.<sup>106</sup> As a result of the injury caused by this congressional map, the panel issued a permanent injunction enjoining the state from conducting an election until a constitutionally valid plan is approved by the court. While the case is currently pending before the Supreme Court, the 2022 elections were held prior to the lower court’s ruling, and hence took place under the discriminatory map.<sup>107</sup> Oral argument took place on October 11, 2023.<sup>108</sup> Both parties asked for a ruling by January 2024, but as of this date, the Supreme Court has not issued a decision. Defendants have indicated that they plan to seek a stay of the permanent injunction and allow elections to proceed in 2024 under the discriminatory congressional map yet again, which Plaintiffs will oppose.

*iv. Louisiana: Nairne v. Landry*

In 2022, LDF challenged Louisiana’s state legislative maps that disenfranchised and discriminated against Black residents in violation of Section 2 of the Voting Rights Act.<sup>109</sup> LDF, the American Civil Liberties Union, ACLU of Louisiana, Cozen O’ Connor, and attorneys Ron Wilson and John Adcock brought suit

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<sup>105</sup> NAACP Legal Def. Fund, *South Carolina Passes New Redistricting Maps Following Civil Rights Legal Challenge* (June 22, 2022), <https://www.naacpldf.org/news/south-carolina-passes-new-redistricting-maps-following-civil-rights-legal-challenge/>.

<sup>106</sup> Findings of Fact & Conclusions of Law, pg 15, *South Carolina State Conference of the NAACP v. Alexander*, No.: 3:21-cv-03302-MGL-TJH-RMG 15 (D. S.C. Columbia Div. Jan. 6, 2023), [https://www.aclu.org/wp-content/uploads/legal-documents/order\\_-\\_south\\_carolina\\_state\\_conference\\_of\\_the\\_naACP\\_v.\\_alexander.pdf](https://www.aclu.org/wp-content/uploads/legal-documents/order_-_south_carolina_state_conference_of_the_naACP_v._alexander.pdf).

<sup>107</sup> Jurisdictional Statement, *Alexander v. The South Carolina State Conference of the NAACP*, No. 22-807 (2023), [https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/SC\\_22-807\\_1.pdf](https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/SC_22-807_1.pdf).

<sup>108</sup> NAACP Legal Def. Fund, *Oral Arguments Wrap in U.S. Supreme Court Case Challenging South Carolina’s Congressional Map for Racial Discrimination* (Oct. 11, 2023), <https://www.naacpldf.org/press-release/oral-arguments-wrap-in-u-s-supreme-court-case-challenging-south-carolinas-congressional-map-for-racial-discrimination/>.

<sup>109</sup> Compl. for Declaratory and Injunctive Relief, *Nairne v. Ardoin*, No. 3:22-cv-00178-SDD-SDJ (M.D. La. March 14, 2022), [https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/Complaint\\_3.14.22.pdf](https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/Complaint_3.14.22.pdf).

on behalf of the Louisiana State Conference of the NAACP, Black Voters Matter, and four individuals, advocating for drawing three additional majority-Black districts in the state Senate and six additional majority-Black districts in the state House, in order to ensure that Black voters had an equal opportunity to participate in the political process and elect representatives of their choice. In February 2024, the district court ruled in favor of Louisiana voters and condemned the packing and cracking of Black communities within the maps.<sup>110</sup> Emphasizing the importance of upholding the principles of equal representation for all citizens, the court has now mandated remedial measures to rectify the discriminatory boundaries of the previously enacted map.

*v. Arkansas: Christian Ministerial Alliance et al. v. Thurston*

On May 23, 2023, LDF, along with attorney Arkie Byrd and O'Melveny & Myers LLP, filed a lawsuit on behalf of the Christian Ministerial Alliance and five individual Black voters alleging a racial gerrymandering claim under the Fourteenth Amendment and an intentional race discrimination claim under the Fourteenth and Fifteenth Amendments, both arising out of the Arkansas legislature's 2021 Congressional redistricting plan.<sup>111</sup> In this plan, Pulaski County, the most populous and diverse county in Arkansas and the long-time heart of the Second Congressional District, was split into three separate congressional districts. This cracking targeted southeastern Pulaski County, well-known as the state's largest community of Black voters. In February 2024, a three-judge district court issued a unanimous order denying Defendants' motion to dismiss on both claims.<sup>112</sup> The parties are engaged in discovery.

*vi. Arkansas: Christian Ministerial Alliance et al. v. Arkansas*

In June 2019, LDF filed a lawsuit under Section 2 of the Voting Rights Act on behalf of the Christian Ministerial Alliance, the Arkansas Community Institute, and three individual Black voters, challenging the method of electing judges to the

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<sup>110</sup> Ruling & Order, *Nairne v. Ardoin*, No. 3:22-cv-00178-SDD-SDJ (M.D. La. Feb. 8, 2024), [https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/LA\\_322-cv-178\\_233.pdf](https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/LA_322-cv-178_233.pdf).

<sup>111</sup> Press Release, NAACP Legal Def. Fund, Black Arkansas Voters Sue Over Racially Gerrymandered Congressional Map (May 23, 2023), <https://www.naacpldf.org/press-release/black-arkansas-voters-sue-over-racially-gerrymandered-congressional-map/>.

<sup>112</sup> Explanatory Order, *Christian Ministerial Alliance, et al. v. Thurston*, No. 4:23-cv-471 (E.D. Ark. Feb. 2, 2024), [https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/AR\\_423-cv-471\\_2-2-24\\_Order.pdf](https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/AR_423-cv-471_2-2-24_Order.pdf).

Arkansas Supreme Court and Court of Appeals, which dilute the voting strength of Black voters in Arkansas.<sup>113</sup> Co-counsel with LDF in this matter were , Arkie Byrd, Shearman & Sterling LLP, and Howell Shuster & Goldberg LLP. On July 25, 2023, the Court issued an opinion in favor of the Defendants.<sup>114</sup> While LDF filed a motion for reconsideration in August 2023, the Court ordered the case stayed in light of the Eighth Circuit’s decision in *Arkansas State Conference of the NAACP v. Arkansas Board of Apportionment* that there is no implied private right of action under Section 2 of the Voting Rights Act, delaying resolution of LDF’s motion.<sup>115</sup>

*vii. Alabama: McClure v. Jefferson County Commission*

In April 2023, LDF, along with Wiggins, Childs, Pantazis, Fisher & Goldfarb, filed a lawsuit on behalf of Greater Birmingham Ministries, the Metro-Birmingham Branch of the NAACP, the Alabama State Conference of the NAACP, and an individual Black voter, challenging the Jefferson County Commission’s redistricting plans as an unconstitutional racial gerrymander in violation of the Fourteenth Amendment.<sup>116</sup> This litigation is ongoing, and trial is set for October 2024.

*2. Vote Suppression*

LDF is also actively challenging restrictive voting laws across several states to ensure election workers can effectively execute their lawful duties and that Black, Latino, and other voters have equal access to the ballot.

*i. Florida: Florida NAACP v. Lee*

In Florida, LDF, along with Benjamin Duke, Cyrus Nasser, Ellen Choi, Nia Joyner, Covington & Burling LLP, and Nellie King, challenged multiple provisions of S.B. 90 on behalf of the Florida State Conference of the NAACP, Disability Rights Florida, and Common Cause, including 1) restrictions and new requirements for standing vote-by-mail applications; 2) limits on where, when, and how drop boxes can

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<sup>113</sup> NAACP Legal Def. Fund, *Case: Christian Ministerial Alliance Et Al. V. Arkansas* (June 10, 2019), <https://www.naacpldf.org/case-issue/christian-ministerial-alliance-et-al-v-arkansas/>.

<sup>114</sup> Order, *Christian Ministerial Alliance et al. v. Sanders*, No. 4 :19-cv-00402-JM (E.D. Ark. July 25, 2023) [[https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AR\\_419-cv-402\\_Order\\_7-25-23.pdf](https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AR_419-cv-402_Order_7-25-23.pdf)].

<sup>115</sup> Order, *Christian Ministerial Alliance et al. v. Sanders*, No. 4 :19-cv-00402-JM (E.D. Ark. Nov. 21, 2023) [[https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AR\\_419-cv-402\\_198.pdf](https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AR_419-cv-402_198.pdf)].

<sup>116</sup> Press Release, NAACP Legal Def. Fund, *Black Voters Sue Jefferson County Commission for Racial Gerrymandering* (April 7, 2023), <https://www.naacpldf.org/press-release/black-voters-sue-jefferson-county-commission-for-racial-gerrymandering/>.



be used; and 3) a vague and overbroad definition of solicitation that prohibited certain conduct near polling places, including potentially criminalizing offering free food, water, and other relief to Florida voters waiting in long lines.<sup>117</sup>

On March 31, 2022, the district court ruled that S.B. 90 violated Section 2 of the Voting Rights Act, and was motivated by racial discrimination in violation of the First and Fourteenth Amendments to the United States Constitution.<sup>118</sup> Over a year later, on April 27, 2023, the Eleventh Circuit largely reversed the District Court’s decision.<sup>119</sup> The Eleventh Circuit did, however, find that the second half of SB 90’s solicitation definition, “which prohibits engaging in any activity with the . . . effect of influencing a voter,” is “impermissibly vague in all of its applications.”<sup>120</sup> While LDF and other plaintiffs filed a petition for rehearing en banc by the Eleventh Circuit, that petition was denied.

*ii. Georgia: Sixth District of the African Methodist Episcopal Church v. Kemp*

After Georgia voters turned out in record numbers for the 2020 presidential election and U.S. Senate elections in early 2021, state legislators passed S.B. 202, a sweeping racially discriminatory and other unconstitutional and illegal omnibus law that by its individual and collective provisions disenfranchises voters, particularly voters of color.<sup>121</sup> S.B. 202 bans line relief, restricts access to and usage of drop boxes and mobile voting units, and imposes new voter ID requirements for absentee voting. In 2021, LDF, along with the American Civil Liberties Union, ACLU of Georgia, SPLC, Wilmer Hale, and Davis Wright Tremaine sued state officials on behalf of the Sixth District of the African Methodist Episcopal Church, the Georgia Muslim Voter Project, Women Watch Afrika, Latino Community Fund Georgia, the Delta Sigma Theta Sorority, Inc., the Arc of the United States, Georgia ADAPT, and Georgia Advocacy Office challenging provisions in S.B. 202 on the grounds that they violate

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<sup>117</sup> Test. of Sherrilyn Ifill, *supra* note 31, at 23; Press Release, NAACP Legal Def. Fund, LDF Files Lawsuit Against the State of Florida Over Suppressive Voting Law (May 6, 2021), <https://www.naacpldf.org/press-release/ldf-files-lawsuit-against-the-state-of-florida-over-suppressive-voting-law/>.

<sup>118</sup> *League of Women Voters of Florida, Inc., et. al v. Lee*, 595 F.Supp.3d 1042 (N.D. Fla. 2022).

<sup>119</sup> *League of Women Voters of Florida, Inc., et. al v. Florida Secretary of State*, 66 F.4th 905 (11th Cir. 2023).

<sup>120</sup> *League of Women Voters of Fla. Inc. v. Fla. Sec’y of State*, 66 F.4th 905, 947 (11th Cir. 2023) (internal quotations and citations omitted).

<sup>121</sup> NAACP Legal Def. Fund, *LDF’s Lawsuit Challenging Georgia’s Voter Suppression Law*, <https://www.naacpldf.org/naacp-publications/ldf-blog/important-facts-about-ldfs-lawsuit-challenging-georgias-voter-suppression-bill/>.

Section 2 of the Voting Rights Act, Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Civil Rights Act of 1964, and the First, Fourteenth, and Fifteenth Amendments to the U.S. Constitution.<sup>122</sup> In order to seek relief for the 2024 elections, LDF filed five preliminary injunction motions. The federal court granted two of these motions – one enjoining the date-of-birth requirement on absentee ballot envelopes and another enjoining one portion of the line-relief ban.<sup>123</sup>

S.B. 202 restricts line-relief activities in two ways. First, it provides for a restrictive zone around polling locations that extends “150 feet of the outer edge of any building within which a polling place can be established (the “Buffer Zone”) and then “25 feet of any voter standing in line to vote at any polling place” (the “Supplemental Zone”) even after the 150-foot restriction.<sup>124</sup> Practically, this effectively prohibits line-relief activities altogether. In LDF’s litigation, the court recently granted our preliminary-injunction motion seeking to block the Supplemental Zone restriction for upcoming election. In that decision, the court enjoined the ban on providing food and drink more than 150 feet beyond the entrance of a polling location because it is substantially likely to be an unconstitutional restriction on expressive conduct under the First Amendment.” As of March 2024, the litigation is still ongoing.

*iii. Texas: Houston Justice v. Abbott*

In Texas, LDF is challenging S.B. 1, an omnibus law containing several vote suppression provisions, particularly targeting the means and methods of voting primarily used by Black and Latino voters.<sup>125</sup> Among its many restrictions, S.B. 1 eliminates drive-thru voting and 24-hour voting, restricts early voting hours, and restricts vote-by-mail opportunities and application distribution, innovations that had given local counties the options and flexibility they needed to help eligible voters of all backgrounds and abilities cast a ballot, and that Black and Latino voters had disproportionately relied on to vote. S.B. 1 also imposes burdens and intrusive documentation requirements on individuals who provide voters with assistance or

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<sup>122</sup> First Amended Compl., *Sixth District of the African Methodist Episcopal Church, et. al v. Kemp*, No. 1:21-cv-01284-JPB (N.D. Ga. May 24, 2021), [https://www.naacpldf.org/wp-content/uploads/Amended-Complaint-in-AME-v.-Kemp\\_5.24.2021.pdf](https://www.naacpldf.org/wp-content/uploads/Amended-Complaint-in-AME-v.-Kemp_5.24.2021.pdf).

<sup>123</sup> Press Release, NAACP Legal Def. Fund, Federal Court Sides with Civil Rights Groups and Lifts Georgia’s Line Relief Ban, Birthdate Requirement on Absentee Ballot Envelopes for 2024 Elections (Aug. 18, 2023), <https://www.naacpldf.org/press-release/federal-court-sides-with-civil-rights-groups-and-lifts-georgias-line-relief-ban-birthdate-requirement-on-absentee-ballot-envelopes-for-2024-elections/>.

<sup>124</sup> H.B. 540 § 22, Act 632, Reg. Sess. (Ga. 2010); see also O.C.G.A. § 21-2-414(a)(1), (a)(3).

transport them to the polls, subjecting the assistants to the threat of criminal penalties for violations. S.B. 1 additionally broadens, in inscrutably vague terms, the definition of obstructing a poll watcher, another criminal offense that can be charged against election officials. While S.B. 1 threatens criminal penalties against election officials, it grants partisan actors enhanced power: it entitles partisan poll watchers to move freely within a polling place, limits the circumstances in which a poll watcher may be removed, and preserves the ability of political parties to distribute unlimited mail-in ballot applications while prohibiting election officials to do the same.

LDF, along with The Arc, Reed Smith and ArentFox Schiff, challenged S.B. 1 and its various provisions under Section 2 of the Voting Rights Act in that it was enacted with the intent to discriminate against Black and Latino voters and will have a discriminatory result; the Fourteenth and Fifteenth Amendments to the U.S. Constitution as intentional race discrimination in voting; and the First and Fourteenth Amendments to the U.S. Constitution as an undue burden on the right to vote, in addition to other claims. LDF participated in an extensive, six-week trial last fall on most claims, and while waiting for a decision, continues to prepare for a second round of trial addressing discriminatory intent claims.

Prior to *Shelby County*, none of the laws described above, which LDF and our clients have been forced to expend significant resources challenging in court, would have gone into effect without examination by a voting rights expert in the Department of Justice or a court to determine whether they were racially discriminatory. Given that some have proven to be so as a result of protracted litigation, it's likely that many of the provisions referenced above would have been blocked prior to going into effect—both protecting voters and saving civil rights organizations such as LDF and defendant jurisdictions substantial time and resources.

### **E. The Emerging Threat of AI in Elections**

The emergence of artificial intelligence (AI) technology presents many risks to civil rights as it threatens to amplify existing systemic biases in our economy, the criminal legal system, and other arenas.<sup>126</sup> Similarly, AI threatens to turbocharge existing election disinformation efforts, which have historically been targeted at Black communities and other communities of color. The late Harvard Law School professor and LDF attorney Lani Guinier taught us that Black Americans often serve

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<sup>126</sup> See e.g. Puneet Cheema et al., *To 'keep Americans safe,' Biden's AI executive order must ban these practices*, The Hill (Aug. 18, 2023), <https://thehill.com/opinion/civil-rights/4156858-to-keep-americans-safe-bidens-ai-executive-order-must-ban-these-practices/>.

as the canaries in the coal mine when it comes to threats to our democracy, and AI is yet another example.<sup>127</sup>

There is a long history of disinformation directed towards Black communities. From control and manipulation of information during slavery<sup>128</sup> to publishing contact information for those attempting to register to vote in the Jim Crow era with often violent consequences (now known as “doxxing”)<sup>129</sup> to darkening images of Black candidates running for office in the wake of the Voting Rights Act,<sup>130</sup> this history is deep and disturbing.

The targeting of Black communities has continued through modern-day disinformation campaigns that make use of present technologies like robocalling and the Internet. A Senate Intelligence Committee investigation into Russian interference in the 2016 election found that “no single group of Americans was targeted by ... information operatives more than African-Americans.”<sup>131</sup> Black voters in 2020 received robocalls telling them if they voted by mail their information would

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<sup>127</sup> Lani Guinier & Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Harvard Univ. Press 2002).

<sup>128</sup> British missionaries seeking to convert enslaved people in the West Indies edited the Bible itself to remove its many references to slave rebellions or liberation (Exodus and the story of Moses, for example). Michel Martin, *Slave Bible From The 1800s Omitted Key Passages That Could Incite Rebellion*, NPR (Dec. 9, 2018), <https://www.npr.org/2018/12/09/674995075/slave-bible-from-the-1800s-omitted-key-passages-that-could-incite-rebellion>. Most slave states in the U.S. took this even further by making it unlawful to teach enslaved persons to read or write at all. Smithsonian American Art Museum, *Literacy as Freedom* (n.d.), <https://americanexperience.si.edu/wp-content/uploads/2014/09/Literacy-as-Freedom.pdf>.

<sup>129</sup> After Black people began attempting to register to vote in Mississippi, a law enacted in 1962 required the names of those taking literacy tests for voting to be published in a local newspaper once a week for two weeks. Black applicants whose names were published were quickly met with physical violence, loss of employment, or arrest on spurious charges. Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 28 (Univ. of N.C. Press, 1990).

<sup>130</sup> *U.S. v. Charleston*, 316 F.Supp.2d 268, 295 (D.S.C. 2003).

<sup>131</sup> Donna M. Owens, *Misinformation may only worsen for Black voters in lead-up to election, experts warn*, NBC News (May 3, 2022), <https://www.nbcnews.com/news/nbcblk/misinformation-may-only-worsen-black-voters-lead-election-experts-warn-rcna26924>. The disinformation included the creation of inauthentic social media accounts that posed as Black influencers and a meme that targeted Black and Latine voters on Facebook and Twitter with the message “avoid the line — vote from home. Text ‘Hillary’ to 59925.”

be used by police departments to track down old warrants and credit card companies to collect outstanding debts.<sup>132</sup>

AI threatens to supercharge the problem of targeted disinformation in at least three important ways. First, “deep fakes” can be used to mislead voters about candidate positions or trick voters into believing they are receiving disinformation from a trusted source.<sup>133</sup> We are already seeing this technology targeted at Black voters in the 2024 elections.<sup>134</sup> Second, AI can increase the power of microtargeting and therefore help bad actors spread disinformation with more precision.<sup>135</sup> Third, more effective disinformation can undermine public trust in democracy more broadly. Through a phenomenon known as the “liar’s dividend” the mere existence of deep fakes and other AI tools that blur reality may make it easier for unscrupulous politicians to dupe the public into believing that real audio or video has been manipulated by AI.<sup>136</sup> In addition, as noted above, we have seen AI deployed to promote questionable and potentially discriminatory voter purges.<sup>137</sup>

### **III. CURRENT LEGAL PROTECTIONS CANNOT MEET THE MOMENT**

A key reason that voting rights for Black Americans are tenuous and under threat is that longstanding federal protections are weakened and now insufficient. This is largely because of judicial decisions that have increasingly misinterpreted, narrowed, and eviscerated portions of the Voting Rights Act of 1965, and have failed to fully enforce the protections of the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

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<sup>132</sup> Maya Yang, *Rightwing election robocall fraudsters must spend 500 hours registering voters*, The Guardian (Nov. 30, 2022), <https://www.theguardian.com/us-news/2022/nov/30/jacob-wohl-jack-burkman-election-robocall-fraud-registering-voters>.

<sup>133</sup> For instance, during the recent New Hampshire primary in 2024, voters heard a robocall developed using AI that purported to be Joe Biden advocating for voters not to vote at all. Kevin Collier, *FCC Moves to Criminalize Most AI-Generated Robocalls*, NBC News (Jan. 31, 2024), <https://www.nbcnews.com/tech/tech-news/fcc-moves-criminalize-ai-generated-robocalls-rcna136347>.

<sup>134</sup> Marianna Spring, *Trump supporters target black voters with faked AI images*, BBC News (Mar. 4, 2024), <https://www.bbc.com/news/world-us-canada-68440150>.

<sup>135</sup> Spencer Overton, *State Power to Regulate Social Media Companies to Prevent Voter Suppression*, 53 U.C. Davis L. Rev. 1793, 1797 (2020).

<sup>136</sup> See Josh A. Goldstein & Andrew Lohn, *Deepfakes, Elections, and Shrinking the Liar’s Dividend*, Brennan Ctr. for Just. (Jan. 23, 2024), <https://www.brennancenter.org/our-work/research-reports/deepfakes-elections-and-shrinking-liars-dividend>.

<sup>137</sup> Haskins, *supra* note 46.

## A. The Voting Rights Act of 1965

For nearly 100 years following the Civil War, Congress abdicated its responsibility to enforce the Reconstruction Amendments. Black people were systematically disenfranchised by poll taxes,<sup>138</sup> literacy tests,<sup>139</sup> threats,<sup>140</sup> and lynching.<sup>141</sup> Finally, Congress—compelled by the Civil Rights Movement generally, and the violent events of Bloody Sunday in Selma, Alabama, specifically<sup>142</sup>—took its constitutional duty seriously by passing the VRA in 1965, justly described as “the crown jewel” of the Civil Rights Movement.<sup>143</sup> Passage and enforcement of the VRA has historically been a bipartisan enterprise as Republicans and Democrats have jointly recognized that voting rights for Black and Brown Americans is fundamental to our aspirations to an equal, just, and racially and ethnically inclusive democracy.<sup>144</sup>

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<sup>138</sup> Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: Univ. of Chicago Press 2004).

<sup>139</sup> Jason Morgan Ward, *Hanging Bridge: Racial Violence and America's Civil Rights Century* (N.Y.: Oxford Univ. Press 2016).

<sup>140</sup> Michael Fellman, *In the Name of God and Country: Reconsidering Terrorism in American History* (New Haven, CT: Yale Univ. Press 2010); U.S. Comm. on C.R., *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume VII: The Mississippi Delta Report* ch. 3 (n.d.), <https://www.usccr.gov/pubs/msdelta/ch3.htm>.

<sup>141</sup> Brad Epperly et al., *Rule by Violence, Rule by Law: The Evolution of Voter Suppression and Lynching in the U.S. South*, Soc. Sci. Rsch. Network (Mar. 1, 2016), <https://ssrn.com/abstract=3224412>.

<sup>142</sup> See Lyndon B. Johnson, *Special Message to the Congress: The American Promise, March 15, 1965* 281-87 (1966) (“At times history and fate meet at a single time in a single place to shape a turning point in man’s unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.”); Lyndon B. Johnson, *Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, August 6, 1965* 811-15 (1966) (“And then last March, with the outrage of Selma still fresh, I came down to this Capitol one evening and asked the Congress and the people for swift and for sweeping action to guarantee to every man and woman the right to vote. In less than 48 hours I sent the Voting Rights Act of 1965 to the Congress. In little more than 4 months the Congress, with overwhelming majorities, enacted one of the most monumental laws in the entire history of American freedom.”).

<sup>143</sup> See *Nw. Austin, Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198, 201 (2009) (the “historic accomplishments of the [VRA] are undeniable”).

<sup>144</sup> Following its initial passage, Congress reauthorized the VRA several times on a bipartisan basis. Republican presidents signed these VRA reauthorizations in 1970, 1975, 1982, and 2006. In 1982, President Reagan signed a bill that reauthorized the VRA for 25 years and strengthened it significantly by rejecting a 1980 Supreme Court ruling that would have forced voters to prove discriminatory intent to vindicate their rights. With these amendments Congress overrode *City of Mobile v. Bolden*, 446 U.S. 55 (1980). See, e.g., GovTrack, *Senate Vote \$178 in 1965 (89<sup>th</sup> Congress) To Agree to the Conference Report on S. 1564, The Voting Rights Act of 1965* (Aug. 4, 1965), <https://www.govtrack.us/congress/votes/89-1965/s178>; Pub. L. No. 91-285, 84 Stat. 314 (signed into law

Yet as Black voters and other voters of color are targeted by a wave of new restrictive voting laws, the Supreme Court has undercut the VRA, and Congress has failed to respond. Due to this inaction, state legislatures across the country recently conducted the first redistricting cycle in six decades without being bound by the full protections of the VRA.

1. *Preclearance Protection (VRA Section 5): Shelby County v. Holder*

For nearly five decades, states and local jurisdictions with a history of voting discrimination were required to secure pre-approval from the U.S. Attorney General or a federal court before making changes to their voting rules, practices, or procedures.<sup>145</sup> This “preclearance” protection was rooted in the principle that when it comes to a matter as fundamental as the right to vote, an ounce of prevention is worth a pound of cure.<sup>146</sup>

Preclearance succeeded in preventing discrimination before it occurred. As Congress recognized in 1965, case-by-case litigation alone is inadequate—too slow and too costly—to eradicate voting discrimination and prevent its resurgence.<sup>147</sup> Even if voters of color can muster the resources to sue, the discriminatory practices or procedures they challenge can remain in effect for years while litigation is pending. Preclearance relieves voters facing discrimination of the substantial burdens of litigation by “shifting the advantage of time and inertia” from the jurisdiction to the voters themselves.<sup>148</sup> As Justice Kennedy wrote in granting a stay of an election because of a failure to preclear voting changes, “permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election.”<sup>149</sup> Instead of voters having to go to court to prove that new election laws and practices are discriminatory, under preclearance jurisdictions with a history of discrimination must show that new voting laws and practices are *not* discriminatory. For example, when a polling site in a covered municipality is relocated, preclearance ensures that local officials first justify the shift and show the

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by President Richard Nixon on June 22, 1970); Pub. L. No. 94-73, 89 Stat. 402 (signed into law by President Gerald Ford on August 6, 1975); Pub. L. No. 97-205, 96 Stat. 134 (signed into law by President Ronald Reagan on June 29, 1982); Pub. L. No. 102-344, 106 Stat. 921 (signed into law by President George W. Bush on August 26, 1992).

<sup>145</sup> 52 U.S.C. § 10304.

<sup>146</sup> See Brief of Appellee Travis Cnty. at 11, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009).

<sup>147</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

<sup>148</sup> *Id.*

<sup>149</sup> *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., Circuit Justice).

change is not harmful to voters of color, instead of requiring voters to sue after the fact.

Preclearance at the federal level was effective at protecting voters of color without unduly burdening local election officials. In fact, some covered jurisdictions appreciated preclearance because the process ensured the use of best practices for fostering political participation, particularly among voters of color.<sup>150</sup> Covered jurisdictions also made clear that they viewed preclearance as a way to prevent expensive and prolonged litigation.<sup>151</sup>

In 2013, the Court struck at the heart of the Voting Rights Act through its decision in *Shelby County, Alabama v. Holder*.<sup>152</sup> The ruling undercut Section 5's preclearance regime not by invalidating preclearance itself, but rather by striking the formula Congress prescribed for determining which jurisdictions have a sufficient history of discrimination to require preclearance protection for their voters.<sup>153</sup>

The practical result was an abrupt halt to the successes of the VRA's preclearance provisions. As the late Justice Ruth Bader Ginsburg noted in her dissent to the *Shelby County* decision: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."<sup>154</sup>

The *Shelby County* decision allowed state and local governments to unleash discriminatory voter suppression schemes virtually unchecked.<sup>155</sup> At its pre-*Shelby County* strength, Section 5 would have prevented many of the voter suppression schemes that we have encountered since 2013.

Through our report "Democracy Diminished: State and Local Threats to Voting post-*Shelby County, Alabama v. Holder*," LDF tracks, monitors, and publishes a

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<sup>150</sup> See, e.g., Brief for the States of New York, California, Mississippi, and North Carolina as *Amici Curiae* in Support of Respondents at 3, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (describing preclearance as "a streamlined administrative process" that "fosters governmental transparency" and "provides substantial benefits to covered States and localities").

<sup>151</sup> See, e.g., *id.* at 8-10.

<sup>152</sup> 570 U.S. 529 (2013).

<sup>153</sup> *Id.* at 557 (holding that the coverage formula in Section 4(b) "can no longer be used as a basis for subjecting jurisdictions to preclearance," but "issu[ing] no holding on § 5 itself," and noting that "Congress may draft another formula based on current conditions").

<sup>154</sup> *Shelby Cnty.*, 570 U.S. at 590 (Ginsburg, J., dissenting).

<sup>155</sup> U.S. Comm. on C.R., *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report* (2018), [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf).



record of discriminatory voting changes in jurisdictions formerly protected by Section 5.<sup>156</sup> *Democracy Diminished* details the many tactics that state and local policymakers have implemented with alarming speed since the *Shelby County* decision, including barriers to voter registration, cuts to early voting, purges of the voter rolls, strict photo identification requirements that target voters of color, restrictions on absentee ballots, prohibiting the provision of water to voters waiting in long lines, and last-minute polling place closures and consolidations. Court findings in litigation filed by LDF and other organizations show that these measures have significantly impacted access to the vote.

2. *Nationwide Antidiscrimination Protections (VRA Section 2):*  
*Brnovich v. DNC and Allen v. Milligan*

Preclearance applied only to a subset of the nation's states and political jurisdictions with the worst history of voting discrimination, but Section 2 of the Voting Rights Act has always applied nationwide. As amended in 1982, it allows voters to file litigation against state or local practices that were enacted with discriminatory intent or that have a discriminatory effect on voters' ability to participate in the political process and elect their preferred candidates to office. While the Supreme Court's most recent Section 2 decision preserves it as a viable tool to protect Black voters, this key protection of the Voting Rights Act has also been weakened by another recent Supreme Court decision making it more difficult to bring Section 2 challenges.

i. *Brnovich v. DNC (2021)*

While *Shelby County* struck at the heart of the VRA, the Supreme Court more recently undermined the strongest complement to preclearance by weakening the protections afforded by Section 2 of the VRA. In the *Shelby County* decision, the Court assured the country that its decision would do little harm because it “in no way affect[ed] the permanent, nationwide ban on racial discrimination in voting found in [Section] 2.”<sup>157</sup> Indeed, the Court emphasized that “Section 2 is permanent, applies nationwide,” and broadly “forbids any ‘standard, practice, or procedure’ that ‘results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.’”<sup>158</sup>

Yet, in 2021, six Supreme Court justices dealt a substantial blow to Section 2 and the democratic ideals it was designed to protect in *Brnovich v. DNC*.<sup>159</sup> By

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<sup>156</sup> Thurgood Marshall Inst., *supra* note 10.

<sup>157</sup> *Shelby Cnty.*, 570 U.S. at 557.

<sup>158</sup> *Id.* at 536-37 (quoting 52 U.S.C. § 10301(a)).

<sup>159</sup> *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

weakening Section 2 of the Voting Rights Act based on its own views of how much discrimination is acceptable, a majority of the Supreme Court has once again diminished our democracy.

In *Brnovich*, the Court’s majority created five new factors—or “guideposts,” in Justice Alito’s terminology—to uphold a pair of Arizona laws that the *en banc* Ninth Circuit had found discriminatory in violation of Section 2.<sup>160</sup> The decision disregards the plain text of Section 2, ignores nearly four decades of settled precedent, and severely curtails the broad application of Section 2 that Congress intended, thus making it more difficult to ensure that every eligible citizen is able to freely exercise their right to vote. Justice Kagan explained in her *Brnovich* dissent that “to read [Section 2] fairly. . . is to read it broadly,”<sup>161</sup> and yet the majority opinion’s guideposts “all cut in one direction—toward limiting liability for race-based voting inequalities” and shielding discriminatory laws from Section 2 challenges.<sup>162</sup>

While the full scope of its impact is not yet clear, the risks are obvious. VRA Section 2 cases are already arduous and expensive; forcing voters to meet standards skewed towards masking discrimination will cause many meritorious actions to fail in court and many more never to be brought, providing fresh oxygen to discriminatory practices Congress sought to eliminate when it enacted the Voting Rights Act. Just as Congress in 1982 overrode the Court’s cramped interpretation of Section 2 in *City of Mobile v. Bolden*,<sup>163</sup> today Congress must override the *Brnovich* decision and restore the full power of one of our nation’s most important and successful civil rights laws: the Voting Rights Act of 1965.

*ii. Allen v. Milligan (2023)*

As noted above, in 2023 LDF and our co-counsel secured a landmark victory on behalf of our courageous clients to secure a second Alabama congressional district where Black voters can elect a candidate of choice.<sup>164</sup> Beyond its local significance, *Milligan* reaffirmed that Section 2 of the Voting Rights Act remains a viable tool that Black voters, other voters of color, and civil rights organizations that represent them can use to fight voting discrimination. States or localities considering changes to their election laws or maintaining existing practices and procedures that unfairly curtail

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<sup>160</sup> *Id.* at 2336-40 (opinion of the Court).

<sup>161</sup> *Id.* at 2361 (Kagan, J., dissenting).

<sup>162</sup> *Id.* at 2362 (Kagan, J., dissenting).

<sup>163</sup> 446 U.S. 55 (1980).

<sup>164</sup> *Allen v. Milligan*, 143 S. Ct. at 1498.

Black political participation should know that LDF and our allies can and will make full use of *Milligan* in 2024 and beyond.

*Milligan*, however, did nothing to repair the damage done to the Voting Rights Act by previous cases such as *Shelby County* and *Brnovich*. Indeed, it illustrates the egregious racial discrimination that goes unchecked in our elections and ultimately compromises the integrity of our institutions absent preclearance. The nation’s most successful and important voting rights law remains a shredded shield for Black voters—unable to meet the current moment of widespread attacks on Black political participation.

### 3. *Current Threats to Voting Rights Act*

The weakened VRA faces a new set of threats, with cases in the lower courts that threaten to further undermine Section 2. These include efforts to radically reinterpret Section 2 to prevent private individuals from even getting into court to seek enforcement of their Section 2 rights, and to prevent coalitions of different racial and ethnic groups from seeking redistricting plans that fairly reflect their joint voting strength.

#### *iii. VRA Section 2 Private Right of Action*

In November 2023, a two-to-one majority of the 8th Circuit ruled that Section 2 of the VRA contains no private right of action.<sup>165</sup> In January, the full 8th Circuit declined to revisit this ruling.<sup>166</sup>

In Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, the ruling bars both individuals and civil rights groups from bringing future lawsuits to uphold voting rights directly under a tool they have been using for nearly 60 years to challenge racial discrimination in voting.<sup>167</sup> It could leave enforcement of Section 2 solely in the hands of the U.S. Department of Justice, which historically has filed only a fraction of the overall cases enforcing Section 2.<sup>168</sup>

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<sup>165</sup> *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023).

<sup>166</sup> Order Denying Rehearing, *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), <https://www.aclu.org/cases/naacp-v-arkansas-board-of-apportionment?document=Order-Denying-Rehearing>.

<sup>167</sup> Janai Nelson, *Victims and advocates deserve a right to fight through the Voting Rights Act*, The Hill (Dec. 5, 2023), <https://thehill.com/opinion/civil-rights/4341253-victims-and-advocates-deserve-a-right-to-fight-through-the-voting-rights-act/>.

<sup>168</sup> Br. for Appellants, *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1218 n. 8 (8th Cir. 2023) (“Over the past forty years, there have been at least 182 Successful Section 2 cases; of those 182 cases, only 15 were brought solely by the Attorney General”) (citation omitted).

This ruling is also a stark departure from six decades of decisions in hundreds of Section 2 cases, including numerous Supreme Court decisions that have granted relief to private individuals under Section 2.<sup>169</sup> And the Court has explicitly recognized that Section 2, along with other provisions of the Voting Rights Act, are enforceable by private parties.<sup>170</sup> As the Court said in *Allen v. State Bd. of Elections*, “achievement of the Act’s laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.”<sup>171</sup> Although the divided decision of the Eighth Circuit panel remains an outlier, two Justices of the Supreme Court have also suggested, in a concurring opinion, that the existence of a private right of action under the VRA is an open question.<sup>172</sup>

Defendants in Section 2 lawsuits have also begun arguing that private litigants should also be barred from an alternative route of enforcing Section 2 left open by the Eighth Circuit’s recent decision: using 42 U.S.C Section 1983.<sup>173</sup> Section 1983 grants private individuals a cause of action to enforce “rights . . . secured by the Constitution and laws” of the United States against state actors.<sup>174</sup> In a recent North Dakota case related to Native voting rights, the District Court rejected this argument and held that Section 1983 clearly allows private litigants to enforce Section 2; but the state defendants have appealed this decision to the 8th Circuit, the same circuit that recently ruled that Section 2 itself contains no private right of action.<sup>175</sup>

#### *iv. Coalition Districts*

For decades, courts have entertained vote dilution claims under the Voting Rights Act of 1965 (“VRA”) on behalf of citizens comprised of a coalition of two or more

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<sup>169</sup> See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *Allen v. Milligan*, 143 S. Ct. 1487.

<sup>170</sup> *Morse v. Republican Party of Virginia*, 517 U.S. 186, 231-32 (1986) (affirming that the text, purpose, and history of the VRA permit private litigants to sue under Section 10 of the Voting Rights Act; *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969) (holding that Section 5 of the VRA was enforceable by private litigants because of its implied private right of action.

<sup>171</sup> *Id.* at 556.

<sup>172</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., joined by Thomas, J., concurring).

<sup>173</sup> *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-CV-civ-22, 2022 WL 2528256, at \*4-\*6 (D.N.D. July 7, 2022).

<sup>174</sup> *Id.*

<sup>175</sup> *Turtle Mountain Band of Chippewa Indians, et al v. Michael Howe*, No. 23-3655 (8th Cir. 2023).

racial groups.<sup>176</sup> The viability of a coalition claim has turned on an intensely local factual question: whether the two racial groups prefer the same candidates in elections, whether their candidates are usually defeated by a majority's bloc voting, and whether the groups can be drawn into a reasonably configured remedial district.<sup>177</sup> Fully aware of these cases, Congress has repeatedly declined to disturb these holdings or otherwise limit the availability of coalition claims.

Nevertheless, in November 2023, a three-judge panel of the Fifth Circuit issued a decision urging the full court to grant rehearing to reconsider its long-standing precedent allowing Section 2 coalition claims.<sup>178</sup> On November 28, the *en banc* court agreed to rehear the case, giving the Fifth Circuit the opportunity to further curtail the vitality of Section 2.

## **B. The U.S. Constitution**

In addition to undercutting the Voting Rights Act, courts have failed to give full effect to the Constitution's protections for the right to vote.

### *1. Burdens on the Right to Vote: Anderson-Burdick*

In addition to its protections against racial discrimination in voting, the Constitution protects all voters from laws that impose an undue burden on the right to vote. When considering whether a particular law or practice imposes an undue burden on voting, courts use the so-called *Anderson-Burdick* test, which involves a two-step inquiry.<sup>179</sup> A court first determines whether the challenged practice imposes a severe burden on voting rights, and if so, the court applies "strict scrutiny" in determining whether the practice violates the Constitution. If, however, the court does not view the burden on voting rights to be severe, it applies a balancing test, examining both the "character and magnitude" of the burden on the right to vote and

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<sup>176</sup> *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs.*, 906 F.2d 524, 526 (11th Cir. 1990); *Pope v. County of Albany*, 687 F.3d 565, 572 n.5 (2d Cir. 2012); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275-76 (2d Cir. 1994), *vacated on other grounds*, 512 U.S. 1283 (1994); *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992); *LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc); *LULAC v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1500-02 (5th Cir.), *vacated on state law grounds*, 829 F.2d 546 (5th Cir. 1987); *Jones v. City of Lubbock*, 727 F.2d 364, 383-84 (5th Cir. 1984); *Jones v. City of Lubbock*, 640 F.2d 777 (5th Cir. 1981). *See also* *Grove v. Emison*, 507 U.S. 25, 41 (1993) (assuming, without deciding, that it is "permissible" to aggregate "distinct ethnic and language minority groups" under Section 2).

<sup>177</sup> *See, e.g., Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988).

<sup>178</sup> *Petteway v. Galveston Cnty.*, 86 F.4th 214 (5th Cir. 2023), *vacated, rehearing en banc granted*, 86 F.4th 1146 (5th Cir. 2024).

<sup>179</sup> *Burdick v. Takushi*, 504 U.S. 428 (1992).

the justifications put forward by the state for the challenged practice along with the extent to which those interests make it necessary to burden the voters' rights.<sup>180</sup>

The Supreme Court's 2008 *Crawford* case was a particularly troubling application of *Anderson-Burdick*.<sup>181</sup> In upholding Indiana's strict photo identification requirement for in-person voting, the Court credited the state's interests in preventing fraud and upholding voter confidence, despite acknowledging that "[t]he record contains no evidence of any such [in person impersonation] fraud actually occurring in Indiana at any time in its history."<sup>182</sup> The ruling gives credence to pretextual justifications for barriers to the ballot that create actual burdens on voters while serving as solution in search of a problem.

Courts in recent years have continued to issue decisions making it more difficult to succeed in enforcing constitutional protections against undue burdens on the right to vote. Indeed, in many of these cases, federal appellate courts have reversed district court decisions finding that the challenged laws imposed undue burdens.<sup>183</sup> In effect, the courts have watered down the *Anderson-Burdick* test by giving wide deference to a jurisdiction's alleged justifications for burdening the right to vote and discounting the extent to which a particular provision burdens the right to vote.

## 2. *The Purcell Problem: A Double Bind for Voters*

In 2006, the Supreme Court articulated a principle that courts should be wary of ordering last-minute changes to election rules that could backfire by confusing

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<sup>180</sup> *Id.* at 429 ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seeks to vindicate' against 'the precise interest put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

<sup>181</sup> *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

<sup>182</sup> *Id.* at 194.

<sup>183</sup> See, e.g., *New Georgia Project v. Raffensberger*, 976 F.3d 1278 (11<sup>th</sup> Cir. 2020) (reversing district court decision finding that absentee ballot deadline imposed undue burden on voting during COVID emergency); *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 140 (5<sup>th</sup> Cir. 2020) (reversing district court decision finding that limiting ballot drop-boxes to one per county, regardless of the size of the county, unduly burdened access to voting); *A. Philip Randolph Inst. of Ohio v. LaRose*, 831 Fed. App'x 188, 190 (6<sup>th</sup> Cir. 2020) (reversing district court finding that limiting ballot drop-boxes to only one per county unduly burdened access to voting). See also Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill Rts. J. 59 (2021), <https://scholarship.law.wm.edu/wmbrj/vol30/iss1/3>.

voters.<sup>184</sup> Recently, courts have misapplied this guideline to reject changes that opened pathways for participation with no risk of confusion (such as extending ballot return deadlines).<sup>185</sup> Voters challenging election rules have ended up in a bind – it’s too early to sue before the harm is clear and documented, but it’s too late to sue if the election is around the corner.

An aggressive and overinclusive application of the *Purcell* theory has both shielded discriminatory barriers to the ballot and too often meant that elections go forward under redistricting plans that have been found to be racially discriminatory, even though the finding of discrimination is later affirmed. This type of drawn-out litigation where discriminatory laws remain in place while jurisdictions engage in delay tactics is the exact problem the preclearance protection of the Voting Rights Act was intended to address and prevent.

LDF’s *Milligan* litigation is a good example.<sup>186</sup> A three-judge federal district court unanimously found that Alabama’s congressional redistricting map unlawfully diluted minority voting strength under Section 2 of the VRA and ordered the map to be redrawn, but the Supreme Court reinstated the map for the 2022 elections in an unsigned order which relied on *Purcell*.<sup>187</sup> The Court ultimately affirmed the district court’s finding that the map violated plaintiffs’ rights under Section 2, meaning that the 2022 elections were conducted under an unlawful, racially discriminatory redistricting plan.<sup>188</sup>

#### **IV. CONGRESS MUST ACT TO RESTORE AND STRENGTHEN PROTECTIONS FOR BLACK VOTERS**

Persistent racial turnout disparities; ongoing state-level efforts to restrict participation; and legal protections undercut by recent Supreme Court decisions all confirm the urgent need for Congress to both restore and strengthen the Voting

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<sup>184</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”).

<sup>185</sup> See, e.g., *Merrill v. People First of Alabama*, 141 S. Ct. 25, 27 (2020) (Sotomayor, J., dissenting) (in a case litigated by LDF, explaining that the Court’s majority was wrong to rely on *Purcell* in staying a district court’s injunction granting relief to voting-rights plaintiffs, because the injunction “lift[ed] burdensome requirements rather than imposing them” and “d[id] not risk creating ‘voter confusion and consequent incentive to remain away from the polls’”).

<sup>186</sup> *Allen v. Milligan*, 143 S. Ct. 1487.

<sup>187</sup> Grant of Appls. for Stays or Injunctive Relief, *Merrill v. Milligan*, *supra* note 91; *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, B., joined by Alito, S., concurring).

<sup>188</sup> *Allen v. Milligan*, 143 S. Ct. 1487.

Rights Act and also to enact minimum standards for free, fair, and accessible elections so that Americans’ access to our most fundamental right does not depend upon where we happen to live.

#### A. John R. Lewis Voting Rights Advancement Act

The John R. Lewis Voting Rights Advancement Act (JLVRAA) restores, strengthens, and modernizes the Voting Rights Act by addressing the damage wrought by several Supreme Court and lower court decisions, and providing new ways to address voting discrimination as our population rapidly diversifies.<sup>189</sup>

Among other provisions, the JLVRAA restores VRA Section 5’s preclearance protections by updating the framework for determining which jurisdictions are subject to its requirements (addressing *Shelby County v. Holder*);<sup>190</sup> restores VRA Section 2’s vote denial protections to forcefully address discrimination wherever it occurs (addressing *Brnovich v. DNC*);<sup>191</sup> clarifies that VRA Section 2 contains a private right of action (addressing *Arkansas State Conference of the NAACP v. Arkansas Board of Reapportionment*);<sup>192</sup> clarifies that voters of different races or ethnicities can work together through “coalition” claims to prevent their voices from being weakened or drowned out by unfair districts or election methods (addressing *Petteway v. Galveston County, Texas*);<sup>193</sup> makes clear that proximity to an election should not be a barrier to relief unless there is real, irreparable harm to voters caused by changing the rules (addressing the misapplication of *Purcell v. Gonzalez*);<sup>194</sup> and adds a form of preclearance based upon known discriminatory practices that persist in locations with substantial diversity (modernizing the law’s protections).<sup>195</sup>

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<sup>189</sup> John R. Lewis Voting Rights Advancement Act of 2023, H.R. 14, 118th Cong. (hereinafter “JLVRAA”). The legislation has been introduced as S4 in the United States Senate, but its text is not yet available at Congress.gov so we refer hereinafter to the House version.

<sup>190</sup> JLVRAA § 5.

<sup>191</sup> JLVRAA § 2.

<sup>192</sup> JLVRAA § 9.

<sup>193</sup> JLVRAA § 2(b)(3).

<sup>194</sup> JLVRAA § 11(b).

<sup>195</sup> JLVRAA § 6.



## B. Freedom to Vote Act

The Freedom to Vote Act (FTVA)<sup>196</sup> is a critical complement to the JLVRAA that is under this Committee’s jurisdiction. Whereas the JLVRAA provides protections against voting discrimination, the FTVA sets affirmative minimum standards for election administration that ensure a basic floor of voting access for all voters no matter where they live. These include requiring states to implement critical programs that will significantly improve voting accessibility such as Automatic Voter Registration,<sup>197</sup> Same Day Registration,<sup>198</sup> Early Voting,<sup>199</sup> and Vote-By-Mail.<sup>200</sup>

Although in most cases the FTVA’s protections are not targeted specifically at protecting voters of color, in practice they would prevent states from rolling back the very voting methods that Black voters have used successfully in recent elections, such as early voting and vote-by-mail; and offer protections against other tactics that tend to be targeted at communities of color. As such, the legislation contains several provisions that would directly address the problems described above.

### *1. Protections against discriminatory congressional districts*

The FTVA contains several provisions governing the creation of congressional district maps, including a ban on partisan gerrymandering.<sup>201</sup> To complement the core protections in the federal Voting Rights Act and the JLVRAA, the FTVA lays out mandatory criteria for drawing congressional districts that prioritize protecting voters of color from vote dilution.<sup>202</sup>

### *2. Protections against frivolous challenges*

The National Voter Registration Act (“NVRA”) already provides voters with important protections regarding when and how they may be removed from voter rolls.<sup>203</sup> The FTVA amends Section 8 of the NVRA to strengthen these protections by requiring verifications and clarifying that certain unreliable indicators are not a legal

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<sup>196</sup> Freedom to Vote Act, S.1, 118th Cong. (2023) (hereinafter “FTVA”).

<sup>197</sup> FTVA § 1001-07.

<sup>198</sup> FTVA §§ 1031-32.

<sup>199</sup> FTVA § 1201.

<sup>200</sup> FTVA §§ 1301-05.

<sup>201</sup> FTVA §§ 5001-08.

<sup>202</sup> FTVA § 5003(b).

<sup>203</sup> 52 U.S. Code § 20507

basis for removal.<sup>204</sup> In addition, the FTVA prohibits the practice of voter “caging” which is often used as a predicate for mass challenges.<sup>205</sup> This involves sending mass mailings to voters and using undelivered mail to assemble a purge or challenge list.<sup>206</sup> Finally, the FTVA requires states to provide voters with the opportunity to register to vote during early vote and on Election Day,<sup>207</sup> which serves as a critical backstop to voter challenges to the extent these challenges are based upon allegations that voters are not properly registered.

### *3. Protections against polling location changes and long lines, and for line relief programs*

The restored preclearance mechanism created by the JLVRAA will protect voters in covered jurisdictions from polling location changes or consolidations that would leave voters of color worse off. Prior to *Shelby County*, covered states and localities were required to prove that proposed voting changes would not have a discriminatory effect on Black, Latino, Asian American, or Native American voters, and they were required to give the DOJ data from the U.S. Census Bureau about the racial impact of polling closures.

In addition, the FTVA creates minimum standards for notifying voters about polling place changes or closures for federal elections.<sup>208</sup> Critically, the FTVA also sets a clear standard that nobody should have to wait more than 30 minutes in line to vote.<sup>209</sup> As a backstop, the legislation also prevents states from outlawing the provision of basics such as water and snacks for voters who are forced to spend hours waiting to exercise their basic rights, sometimes in extreme heat or cold.<sup>210</sup>

### *4. Minimum standards for early voting and vote-by-mail*

Restored preclearance can protect voters in covered jurisdictions from rollbacks in early voting and vote by mail or absentee voting opportunities to the extent these rollbacks make voters of color less able to fully participate in the electoral process. In addition, the FTVA contains strong minimum standards for

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<sup>204</sup> FTVA § 1911.

<sup>205</sup> FTVA § 1901.

<sup>206</sup> Justin Levitt, *A Guide to Voter Caging*, BRENNAN CENTER FOR JUSTICE (Jun. 29, 2007), <https://www.brennancenter.org/our-work/research-reports/guide-voter-caging>

<sup>207</sup> FTVA § 1031.

<sup>208</sup> FTVA § 1601.

<sup>209</sup> FTVA § 1606.

<sup>210</sup> FTVA § 3701-02.

states to provide robust early vote and vote-by-mail opportunities.<sup>211</sup> For example, the legislation requires nearly two weeks of early voting opportunities that include weekends.<sup>212</sup>

#### 5. *Protections for election workers against threats, harassment, and intimidation*

In response a disturbing trend that threatens to hollow out the core of experienced officials who administer our decentralized election system, the FTVA contains added protections against threats, harassment, and intimidation of election workers and damage of election infrastructure.<sup>213</sup> As we saw vividly displayed through Ruby Freeman and Shaye Moss’s testimony to the January 6th Commission, harassment can upend the lives of diligent election officials and drive them out of the profession; and such attacks are often targeted at Black officials and other election workers of color.<sup>214</sup>

#### 6. *Protections against disinformation and deceptive practices*

As noted above, the increasing use of AI threatens to exacerbate historical and recent challenges with disinformation targeted at Black voters. The FTVA includes specific prohibitions of deceptive practices that can confuse voters about election participation or candidate endorsements.<sup>215</sup> Beyond the FTVA, we understand that Congress is exploring bipartisan legislation to address challenges specific to AI such as deepfakes and disclaimer requirements, and we urge this Committee to pursue effective legislation without losing focus on the FTVA itself.<sup>216</sup>

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<sup>211</sup> FTVA §§ 1201; 1301-05.

<sup>212</sup> FTVA § 1201.

<sup>213</sup> FTVA §§ 3101-02. The Senate version of the JLVRAA in the 118<sup>th</sup> Congress (S4) contains similar protections in Title II. Given the myriad ways in which our criminal legal system is systemically biased against Black Americans, we greatly appreciate the authors of both S1 and S4 for moderating the criminal penalties associated with these protections between the 117<sup>th</sup> and 118<sup>th</sup> Congresses to reflect a more sensible and less carceral approach to addressing the very real problem of election worker harassment.

<sup>214</sup> Statement of Janai Nelson, *supra* note 19.

<sup>215</sup> FTVA § 3201-06. Although we support these prohibitions, we strongly believe the associated criminal penalties should be aligned with those respecting election worker harassment referenced above.

<sup>216</sup> See, e.g., Protect Elections from Deceptive AI Act, S. 2770, 118<sup>th</sup> Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/2770/text?s=1&r=1&q=%7B%22search%22%3A%22s2770%22%7D>; REAL Political Advertisements Act, S. 1596, 118<sup>th</sup> Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate->

### 7. *Restoration of voting rights for returning citizens*

Laws that disenfranchise people with felony convictions have deeply racist roots, and ongoing discrimination in our criminal legal system (at times perpetuated through emerging technologies) means that Black Americans are stripped of their most fundamental right at starkly disparate rates.<sup>217</sup> Congress should end the practice of disenfranchisement in federal elections upon criminal conviction altogether;<sup>218</sup> and at a minimum should restore the right of all returning citizens to vote in federal elections, as the FTVA does.<sup>219</sup>

### 8. *Providing a federal statutory right to vote*

Courts have refused to robustly enforce constitutional protections against undue burdens on the right to vote. The FTVA provides a federal statutory right to vote and prevents states or localities rolling back or impairing that right without clear evidence that the policy at issue serves an important and specific need.<sup>220</sup> This is meant to address the shortcomings of the *Anderson-Burdick* standard, and prevent jurisdictions from asserting pretextual justifications such as fighting nonexistent voter fraud to defend unreasonable and often discriminatory barriers to the ballot.

## **V. CONCLUSION**

Voting rights for Black Americans are presently undermined and face increased threat. A backlash, rooted in a resurgence of white nationalist ideology, against recent robust political participation by communities of color and changing demographics both stoked a violent insurrection and unleashed a wave of voter suppression across the country. Recent elections have demonstrated that barriers to the ballot persist, driving widening racial turnout disparities. Black voters are forced to vote in districts that courts have already determined drown out their voices and discriminate against them on account of race. LDF and our allies maintain a robust litigation docket, but our legal protections have been weakened and are insufficient to meet the moment.

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bill/1596/text?s=2&r=1&q=%7B%22search%22%3A%22s1596%22%7D. LDF has not analyzed or taken a position on either piece of legislation.

<sup>217</sup> Christopher Uggen et al., *Locked Out 2022: Estimates of People Denied Voting Rights*, Sentence Project (Oct. 25, 2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/>.

<sup>218</sup> It can do so through legislation similar to the Inclusive Democracy Act. Inclusive Democracy Act of 2023, H.R. 6643, 118th Cong. (Dec. 6, 2023), <https://www.congress.gov/bill/118th-congress/house-bill/6643?s=1&r=23>.

<sup>219</sup> FTVA §§ 1701-09.

<sup>220</sup> FTVA §§ 3401-07.

Congress must act urgently to address barriers for Black voters that are a crisis for American democracy. This body has just one year to enact robust voting rights legislation to honor John Lewis and his fellow foot soldiers in Selma before the 60th anniversary of Bloody Sunday. A full decade after the disastrous *Shelby County* decision struck at the heart of the Voting Rights Act, it's long past time.