

Testimony of

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Hearing on the Implications of *Brnovich v. Democratic National Committee*  
and Potential Legislative Responses

Before the House Committee on the Judiciary,  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
In the United States House of Representatives

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Thank you for the opportunity to testify about the Supreme Court’s recent decision in *Brnovich v. Democratic National Committee* and how Congress should respond. The Brennan Center for Justice at NYU School of Law is disappointed by the damage the Court has done yet again to one of the greatest pieces of legislation this body ever passed, the Voting Rights Act of 1965. We share this committee’s concern about the impact the Court’s decision will have and applaud your prompt consideration of the proper congressional response. It will take the efforts of many—organizers, advocates, and voters themselves—to ensure that voting rights are protected in the wake of the decision. But only Congress can provide voters the legal protections they need, restore the Voting Rights Act to its former glory, and pass the For the People Act to set a new standard for open elections, free from discrimination, across the country.

**I. Congress must once again meet the moment and protect voting rights.**

In 1965, our democracy was in crisis. In fact, for its entire history our nation had failed to truly live up to the ideals of democracy and political equality so powerfully written into the Declaration of Independence and Preamble to our Constitution. And for almost a century, it had failed to live up to the promise of the Fifteenth Amendment, that the right to vote would not be denied or abridged on account of race. But in 1965, thanks to the heroism and sacrifice of so many, including your former colleague, Congressman John Lewis, the world finally saw these failures as a crisis. And Congress met the moment, passing a transformative law that finally set the country on a path towards an inclusive democracy that provided people of color and Native Americans the opportunity to participate equal to that of their fellow citizens.<sup>2</sup>

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<sup>1</sup> The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. I am the Acting Director of the Voting Rights and Elections Program. My testimony does not purport to convey the views, if any, of the New York University School of Law.

<sup>2</sup> Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

In 1982, after the Supreme Court undermined the effectiveness of that law with a decision that made it harder to challenge discriminatory voting rules and electoral and districting schemes by requiring proof of discriminatory intent,<sup>3</sup> Congress met the moment once again. With the 1982 amendments to the Voting Rights Act, Congress made clear that it intended the law to reach all race discrimination, not just the rules that were plainly motivated by bigotry.<sup>4</sup> The Supreme Court recognized this call to eliminate racism from our elections, applying the “totality of the circumstances” test Congress provided for evaluating whether state action produced discriminatory results in *Thornburg v. Gingles* in 1986 and for decades thereafter.<sup>5</sup>

Now, in 2021, our democracy is once again in crisis. Voters, who turned out in record numbers last fall, are facing a backlash wave of restrictive voting laws more significant than we have seen since before the Voting Rights Act was enacted.<sup>6</sup> As of June 21, 17 states had enacted 28 laws restricting voting access.<sup>7</sup> And this is just the latest wave in an almost decade-long trend of restrictive action following the Supreme Court’s 2013 *Shelby County v. Holder* decision.<sup>8</sup> In fact, the Court has issued a series of decisions that have dealt blow after blow to voting rights, and *Brnovich* is just the latest.<sup>9</sup> While the *Shelby County* decision helped open the floodgates of efforts to roll back voting rights, the *Brnovich* decision weakened one of the tools we might otherwise use to stem the tide. As it has before, Congress must meet this moment.

## **II. The *Brnovich* opinion undermines Congress’s goals of addressing race discrimination in voting and does harm to Section 2’s effectiveness.**

In its opinion in *Brnovich*, the Court’s majority ignores the clear intention of Congress in crafting Section 2: to provide a powerful tool to root out race discrimination in voting and representation. The majority also departs from decades of precedent enforcing Section 2 according to that intention. The opinion does not provide a new rule to guide the application of Section 2 by lower courts, but instead creates a new set of so-called “guideposts” that are poorly designed to identify and eradicate discriminatory policies and practices.<sup>10</sup>

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<sup>3</sup> See *Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>4</sup> “This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2.” S. Rep. 97-417, at 2 (1982).

<sup>5</sup> *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986).

<sup>6</sup> *Voting Laws Roundup: May 2021* (hereinafter “Voting Laws Roundup”), Brennan Center for Justice, accessed July 13, 2021, available at <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

<sup>7</sup> *Id.*

<sup>8</sup> *The Effects of Shelby County v. Holder*, Brennan Center for Justice, (Aug. 6, 2018), available at <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.

<sup>9</sup> See, e. g., *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).

<sup>10</sup> *Brnovich v. Democratic National Committee*, 594 U.S. \_\_\_, slip. op. at 13 (2021).

**A. The Court’s majority departs from longstanding precedent that was guided by congressional intent and aimed at identifying discriminatory results.**

The first mistake of the *Brnovich* majority was to shift the focus of its analysis away from what Congress intended: an evaluation of how voting rules interact with the persistent effects of race discrimination on our society.

The 1982 Amendments to Section 2 clarified that the law was meant to reach voting rules and electoral and districting schemes that produced discriminatory results, even if there was not definitive proof that they were motivated by a discriminatory purpose.<sup>11</sup> More specifically, Congress wanted to ensure that the law accounted for the way that facially neutral policies interacted with the real-life effects of race discrimination. Congress designed the “totality of the circumstances” test to require courts to consider “the impact of the challenged practice and the social and political context in which it occurs” by conducting “a searching practical evaluation of the ‘past and present reality.’”<sup>12</sup>

Four years later, when the Supreme Court first interpreted the amended Section 2 in *Thornburg v. Gingles*, the Court embraced guidance from the Senate Judiciary Committee report on the 1982 amendments.<sup>13</sup> That report gave some examples of the circumstances that might be relevant when evaluating allegedly discriminatory results—examples that have become known as the “Senate Factors.”<sup>14</sup> The Senate Factors guided courts in conducting the “intensely local appraisal” of how race functioned in the jurisdiction in order to determine whether a disparate impact could in fact be deemed a “discriminatory result,” or if it was merely a statistical anomaly.

After *Gingles*, federal courts consistently used this non-exclusive list of relevant factors to assess both “vote dilution” and “vote denial” claims<sup>15</sup> under Section 2.<sup>16</sup> In “vote denial” cases, courts applied the Senate Factors to assess whether a disparate burden on a protected class of voters imposed by a challenged policy or practice is “caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.”<sup>17</sup>

In *Brnovich*, the majority departs substantially from this precedent—and from the congressional intent that spawned it. The majority acknowledges that certain of the Senate

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<sup>11</sup> S. Rep. 97-417, at 2 (1982).

<sup>12</sup> *Id.* at 30, 67.

<sup>13</sup> *Gingles*, 478 U.S. at 44.

<sup>14</sup> S. Rep. No. 97-417, at 28, 29.

<sup>15</sup> The *Gingles* decision arose in the context of a claim of “vote dilution,” i.e., a claim that a policy diluted the power of minority votes. By contrast, a claim of “vote denial,” like the claim in *Brnovich*, alleges that a policy placed a burden on the ability of minority voters to vote.

<sup>16</sup> See, e.g., *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); *Mich. APRI v. Johnson*, 833 F.3d 656 (6th Cir. 2016); *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016).

<sup>17</sup> See, e.g., *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

Factors may be relevant to applying the discriminatory results test, and expressly states that it is not creating a new test for evaluating claims,<sup>18</sup> but then ignores the Senate Factors entirely in its own analysis. The opinion expressly downplays the importance of taking the persistent “differences in employment, wealth, and education” created by centuries of discrimination into account,<sup>19</sup> focused instead on a set of five new “guideposts.”<sup>20</sup>

Contrary to the central mission of the “totality of the circumstances” test, these guideposts are not focused on the past and present race discrimination in the jurisdiction or how the challenged voting rule interacts with it to produce racially disparate burdens on voting.

**B. The Court’s new “guideposts” are poorly designed and will make it difficult to identify and root out race discrimination in voting.**

Due in large part to their departure from congressional intent, the Court’s guideposts are simply poor tools for evaluating whether voting policies and practices produce discriminatory results.

The first guidepost is “the size of the burden imposed by a challenged voting rule.”<sup>21</sup> The majority says that Section 2’s prohibition of the “denial or abridgment” of the right to vote does not reach what are merely the “usual burdens of voting.”<sup>22</sup> But in applying this guidepost, the majority uses it to bat away what are actually severe burdens for some voters as “mere inconveniences.” While dropping a ballot into the mail may impose nothing more than the “usual burdens of voting” on many voters, there was ample evidence in the record in this case that this was not true for many others, including, in particular, Native American voters. Only 18% of Native American voters in Arizona’s rural counties receive home mail delivery, many have to travel long distances to get to a mailbox or a polling place, and many do not have cars to help them make those trips.<sup>23</sup> As Justice Kagan notes, “what is an inconsequential burden for others is for these citizens a severe hardship.”<sup>24</sup>

The second guidepost is “the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982.”<sup>25</sup> The majority uses 1982 as the benchmark for evaluating the burden imposed by a voting rule because that was the year Congress last amended Section 2. Of course, Congress was not satisfied with voting practices in 1982—that is why it amended Section 2 to make it a more effective tool for challenging those practices. Consider what it would mean to cement the status quo of 1982 into place: in the presidential election that preceded the 1982 amendments to Section 2, there was a 12.3-point gap between the

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<sup>18</sup> *Brnovich*, slip. op. at 20.

<sup>19</sup> *Id.* at 25.

<sup>20</sup> *Id.* at 13.

<sup>21</sup> *Id.* at 16.

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

<sup>23</sup> *Id.* at 36 (Kagan, J., dissenting).

<sup>24</sup> *Id.* at 38.

<sup>25</sup> *Id.* at 17.

turnout rates of white, non-Hispanic citizens and Black citizens.<sup>26</sup> By 2016, this gap had shrunk to 5.9 points—and in 2012, Black voters actually turned out at a higher rate than their white counterparts.<sup>27</sup> Unfortunately, racial gaps in registration and voting persist today, especially in midterm years, but we have taken great strides in the last forty years.

Moreover, looking to the practices in place in 1982 is simply not a helpful standard for rooting out discrimination today. Thankfully, voting practices have come a long way since 1982, when early voting was essentially non-existent and election officials could scarcely imagine electronic pollbooks and online voter registration. But new and improved systems can still discriminate against voters of color, and asking whether a system existed in 1982 does not answer the question of whether it provides voters of color an equal opportunity to vote today.

The third guidepost is the “size of any disparities in a rule’s impact on members of different racial or ethnic groups.”<sup>28</sup> The majority says that “[s]mall disparities are less likely than large ones to indicate that a system is not equally open.”<sup>29</sup> But the Court’s application of this principle, if taken to its logical extreme, would allow a truly discriminatory policy to stand so long as it did not disenfranchise too many voters. Additionally, while the Court provides no bright line for what sort of disparity is “too small” to raise a concern, it suggests a willingness to turn a blind eye to policies that disenfranchise thousands of voters. Because the out-of-precinct voting policy at issue in Arizona results in the disenfranchisement of less than one percent of Arizonans, the majority dismisses the fact that thousands of voters of color and Native American voters in Arizona had their ballots thrown out at a rate twice that of white voters.<sup>30</sup>

The fourth guidepost requires courts to “consider the opportunities provided by a State’s entire system of voting when assessing the burden imposed by a challenged provision.”<sup>31</sup> The majority’s application of this guidepost seems to allow a jurisdiction to impose restrictions on one method of voting so long as there is another available. This logic relies on an unrealistic view of how burdens impact voters. A voter whose ballot is tossed out because she showed up at the wrong polling place on Election Day does not suffer less because she could have voted early. And restrictions on a method of voting that is particularly accessible for certain voters because of the realities of their lives—like ballot collection is for rural Native American voters in Arizona—are not canceled out by the availability of other, less accessible methods.

The fifth and final guidepost is “the strength of the state interests served by a challenged voting rule.”<sup>32</sup> As phrased, this guidepost is not exactly new. In fact, it is built into one of the Senate Factors, which requires an assessment of whether the connection between the state

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<sup>26</sup> See U.S. Census Bureau, *Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964 to 2018*, available at <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html>.

<sup>27</sup> See *id.*

<sup>28</sup> *Brnovich*, slip. op. at 18.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 10.

<sup>31</sup> *Id.* at 18.

<sup>32</sup> *Id.* at 19.

interest and the rule in question is “tenuous.”<sup>33</sup> The Court’s application of this guidepost, however, suggests that the mere invocation of the specter of voter fraud is enough to justify a discriminatory policy. This is not the first time the Court has accepted a state’s claim that its restrictive voting laws were aimed at preventing voter fraud. But the Court’s embrace of this pretextual justification for race discrimination is particularly troubling at this moment. For years now, the idea that our elections are haunted by rampant voter fraud has been so thoroughly debunked and exposed as a lie that it is scarcely worth rehashing here.<sup>34</sup> But the true threat that this lie poses to our democracy has only become more clear in the months that led up to the *Brnovich* decision, when the lie became a rallying cry for violent mobs attacking the Capitol in an attempt at overturning the valid results of the 2020 presidential election.

### C. The Court’s guideposts make it harder to challenge the modern-day approach to vote suppression.

The majority’s guideposts are particularly harmful because they downplay the significance of the hallmarks of modern voter suppression. Thanks to the Voting Rights Act, these days we rarely see blatantly race-based disenfranchisement of broad swaths of the electorate. Instead, as Congress noted in 2006, “discrimination today is more subtle.”<sup>35</sup> The *Brnovich* majority makes it harder to challenge these more subtle practices.

As Justice Kagan points out, in modern times, one of the “subtle” ways to accomplish discrimination “is to impose ‘inconveniences,’ especially a collection of them, differentially affecting members of one race.”<sup>36</sup> In state after state, in the name of so-called “election integrity,” legislatures have sliced away at each of the methods of voting available, sometimes through a series of cumulative changes to policy and other times through omnibus bills that make a number of changes across the system. They shave away access to mail voting by shortening the timeframe to request a ballot, limiting the methods for returning one, or imposing stricter signature requirements. They cut back on in-person voting by limiting early voting hours or requiring strict photo ID to vote. They trim voters from the rolls through laws that make faulty purges more likely or by limiting same-day registration.<sup>37</sup> While any one change might appear minor at first blush, the end result is death by a thousand cuts.

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<sup>33</sup> S. Rep. No. 97-417, at 29.

<sup>34</sup> See e.g., *Brnovich v. DNC*, Amicus Brief of Empirical Elections Scholars In Support of Respondents, available at [https://www.supremecourt.gov/DocketPDF/19/19-1257/166851/20210120181228016\\_19-1257%20Amici%20Curiae%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/19/19-1257/166851/20210120181228016_19-1257%20Amici%20Curiae%20Brief.pdf); Wendy R. Weiser, *The False Narrative of Vote-by-Mail Fraud*, Brennan Center for Justice, (Apr. 10, 2020), available at <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>; *Resources on Voter Fraud Claims*, Brennan Center for Justice, (Jun. 26, 2017), available at <https://www.brennancenter.org/our-work/research-reports/resources-voter-fraud-claims>; Douglas Keith and Myrna Pérez, *Noncitizen Voting: The Missing Millions*, Brennan Center for Justice, (May 5, 2017), available at [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_2017\\_NoncitizenVoting\\_Final.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_2017_NoncitizenVoting_Final.pdf); Justin Levitt, *The Truth About Voter Fraud*, Brennan Center for Justice, (Nov. 9, 2007), available at [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Truth-About-Voter-Fraud.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf).

<sup>35</sup> 109 Cong. Rec. H5159 (daily ed. Jul. 13, 2006) (statement of Rep. Jackson Lee).

<sup>36</sup> *Brnovich*, slip. op. at 23 (Kagan, J., dissenting).

<sup>37</sup> See generally Voting Laws Roundup.

A 2013 law passed by North Carolina in the wake of the *Shelby County* decision provides a perfect example. It imposed a strict photo identification requirement to vote, cut back on early voting, eliminated same-day registration and preregistration for 16- and 17-year-olds, and prohibited out-of-precinct voting. The Fourth Circuit Court of Appeals struck the law down as intentionally discriminatory, finding that it “target[ed] African Americans with almost surgical precision.”<sup>38</sup> But using the majority’s guideposts for assessing whether the law produced discriminatory results—typically a less difficult standard to prove than discriminatory intent—a skeptical court might view some of these restrictions, standing alone, as imposing a “mere inconvenience.” After all, many of them were restrictions of voting policies that did not even exist in 1982. And because each individual policy might only impact particular segments of the electorate, the burden they impose on voters of color may be too easily dismissed as a “small disparity.” And of course North Carolina claimed that it passed the law to prevent voter fraud, a claim the *Brnovich* majority is all too willing to accept without scrutiny. The fact that this North Carolina law that was unquestionably discriminatory bears many of the characteristics that prompt skepticism when following the majority’s guideposts demonstrates how ineffective those guideposts are at identifying discrimination.

These small, surgically precise cuts may not disenfranchise as many voters as literacy tests once did, but even those that defend them acknowledged the significance of their impact. When Justice Barrett asked the lawyer representing the Arizona Republican Party what its interest was in keeping the state’s out-of-precinct rule on the books, he responded candidly that striking it down would put his party “at a competitive disadvantage.”<sup>39</sup> In other words, while the Supreme Court might not have thought the policy impacted enough voters to matter, the parties to the election thought otherwise.

### **III. Congress must strengthen the Voting Rights Act in multiple ways and put new protections in place through the For the People Act.**

For the second time in less than a decade, the Supreme Court has done significant damage to the Voting Rights Act. To remedy the harm done by the *Shelby County* decision, we urge Congress to restore preclearance in the John Lewis Voting Rights Advancement Act. In light of the *Brnovich* decision, it is now also critical that Congress strengthen Section 2. But restoring the Voting Rights Act, while critical, is not enough. Congress must also pass the For the People Act in order to create a new national standard for voting and take some common tactics for restricting voting access off the table.

#### **A. Pass the John Lewis Voting Rights Advancement Act to restore preclearance.**

For decades, Section 5 of the Voting Rights Act, which requires jurisdictions with a history of race discrimination to submit changes to voting rules to the federal government for preclearance to ensure they are not discriminatory, was perhaps the most effective legislative remedy for civil rights violations in the history of our nation. It prevented discriminatory policies from ever going into effect. The Supreme Court rendered Section 5 inoperable through its decision in *Shelby County*. In order to provide protection against race discrimination in voting,

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<sup>38</sup> *North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

<sup>39</sup> Transcript of Oral Argument at 37-38, *Brnovich*, 594 U.S. \_\_\_\_ (No. 19-1257).

we urge Congress first to restore preclearance by passing the John Lewis Voting Rights Advancement Act. I refer this committee to the testimony of my colleague Wendy Weiser and others for a more detailed explanation of the urgency of passing that legislation.<sup>40</sup> For these purposes, suffice it to say that as voters face the most aggressive attack on voting rights in recent history, it is crucial that they not have to rely on filing and litigating lawsuits to stop discriminatory rules and practices after harm has already occurred.

**B. Strengthen Section 2 to provide full protection against race discrimination in voting.**

We strongly recommend that Congress also strengthen Section 2, and to do so in a detailed way so as to prevent courts from undermining congressional intent to give full protections against race discrimination in voting. Below I outline some key goals for such legislation and possible approaches to accomplish those goals.

**1. Establish appropriate considerations for determining whether a voting rule produces discriminatory results.**

One goal for a legislative fix for the harm done by the *Brnovich* decision is to ensure that the wrongheaded considerations put forth in the Court’s opinion will not prevent the identification of truly discriminatory voting practices. In the *Brnovich* decision, the Court undermines the effectiveness of the “totality of the circumstances” test by creating a new set of guideposts that betray the spirit of Section 2. One way to limit the damage done by the Court and to prevent courts from doing damage to future legislation is to be more explicit about the considerations that are relevant to determining whether a voting rule produces discriminatory results.

One approach toward this goal can be to provide a list of relevant factors in the statute akin to the Senate Factors, which courts looked to for so many years as part of the totality of circumstances test. Congress could draw on the Senate Factors themselves, but it need not be limited by them in crafting guidance for an effective analysis of the totality of the circumstances.

But whatever guidance Congress provides, it should make explicit the central role that historical and current discrimination must play in the courts’ analysis of Section 2 claims. It should reject the idea that we must simply accept pervasive structural inequality and institutional racism and its attendant impact on voting. Indeed, one purpose of a “results test” is to prevent bad actors from crafting facially neutral rules that take advantage of background racial and social conditions to accomplish discriminatory objectives while disguising any discriminatory intent. That is often how classic discriminatory devices like poll taxes and literacy tests functioned to accomplish their shameful objective. The question of how policies interact with those background conditions should be at the heart of the analysis.

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<sup>40</sup> *Hearing on Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties, 117th Cong. (2021)* (testimony of Wendy Weiser, Vice President, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>.



## **2. Limit the undue deference courts give states in justifying policies that produce disparate burdens.**

Congress understood in 1982 that it would often be all too easy for states to offer up “non-racial rationalizations” for discriminatory policies.<sup>41</sup> That is one of the reasons it created a results test. Justice Kagan is correct that “[t]hroughout American history, election officials have asserted anti-fraud interests in using voter suppression laws.”<sup>42</sup> The fact is that almost every piece of discriminatory voting legislation ever has been justified as an attempt to prevent fraud. Yet we know that our laws are already effective at preventing fraud and that recent suggestions that widespread voter fraud exists are a lie. Just this past year, the federal Cybersecurity and Infrastructure Security Agency (CISA) issued a statement declaring that the 2020 election “was the most secure in American history.”<sup>43</sup> Still, we are witnessing politicians attempt to justify the most aggressive legislative efforts to restrict the right to vote in generations by claiming that they seek to root out fraud.

If the Voting Rights Act is to be fully effective, Congress must make clear that the urgent, current threats to our democracy are race discrimination and efforts to abridge the right to vote, not widespread voter fraud. Thus, when a policy imposes a disparate burden on the right to vote of minority voters, courts should be skeptical of—not deferential to—state claims that the policy is necessary to protect election integrity.

There are a number of ways Congress might communicate the proper way of weighing disparate burdens and state interests. For years, federal courts evaluating Section 2 claims were quite effective at taking legitimate state interests, including the interest of preventing fraud, into account, while still evaluating whether the law or rule in question actually served those interests. So, one possible solution is to write some version of the ninth Senate Factor into the statute, directing courts to consider the tenuousness of the relationship between the policy at issue and the stated interest. Congress can also make explicit that a policy that imposes a disparate burden violates Section 2 if there are less discriminatory alternatives for accomplishing the claimed objective. Another option would be to require the jurisdiction defending a policy that produces a disparate burden to prove that the policy in question actually serves its stated interest. Congress might also consider using some combination of these options.

## **3. Make clear that there is no tolerable level of race discrimination in voting.**

Running throughout the *Brnovich* decision is an assumption that there are some discriminatory burdens on voting rights that Congress did not intend to reach—either because they impact a small number of voters, they fall short of completely denying the right to vote, or they burden only one method of voting but not another. The text of Section 2 already makes clear

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<sup>41</sup> S. Rep. No. 97-419, at 37.

<sup>42</sup> *Brnovich*, slip. op. at 27 (Kagan, J., dissenting).

<sup>43</sup> “Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees,” Cybersecurity & Infrastructure Security Agency (Nov. 12, 2020), available at <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

that “the denial *or abridgment* of the right of *any citizen*” to vote on account of race is illegal.<sup>44</sup> But the *Brnovich* decision suggests that Congress must provide even more clarity. New amendments to Section 2 must make clear that any amount of race discrimination in voting is too much.

A test can take account of smaller racial disparities while still considering the totality of the circumstances—it need not be a “pure” disparate impact test. The statute should make clear that truly discriminatory results cannot be ignored because relatively few people were denied the right to vote on account of race. It should also clarify that a discriminatory voting policy cannot be excused simply because a jurisdiction can point to other policies or methods of voting it provides that are not discriminatory.

### **C. Pass the For the People Act to set a new national standard for elections.**

Congress must do more than simply restore and strengthen the Voting Rights Act, however. To fully address the problem of voter suppression, it is also critical to enact the For the People Act, which we applaud the House for passing in March.<sup>45</sup> Division A of that bill, derived from the federal Voter Empowerment Act written and long championed by Representative Lewis, would set basic federal standards for voting access nationwide, filling critical gaps that the Voting Rights Act cannot. By requiring states to, among other things, modernize voter registration, allow two weeks of early voting and vote by mail, restore voting rights to formerly incarcerated citizens, and refrain from partisan gerrymandering, the For the People Act would take some of the most common tactics for restricting voting rights off the table. These tactics have often been used to target the same communities protected by the Voting Rights Act, but the For the People Act’s broad protections will also benefit many other groups, like student voters, who are not the focus of the Voting Rights Act’s safeguards. Setting a baseline standard for federal voting access will also help guard against uneven enforcement of anti-discrimination measures. Moreover, a national standard will make clear to the Court that it should not use 1982’s voting standards as a benchmark against which to evaluate today’s laws.

## **IV. Conclusion**

With these goals in mind, we urge Congress to meet the moment once again, restore the Voting Rights Act to its former glory, shore it up against future judicial erosion, and supplement it with national voting standards in the For the People Act. Thank you again for the opportunity to contribute to this conversation.

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<sup>44</sup> 52 U.S.C. § 10301 (emphasis added).

<sup>45</sup> See Leadership Conference on Civil and Human Rights, Letter of Support – The For the People Act and the John Lewis Voting Rights Advancement Act (June 8, 2021), available at <https://civilrights.org/resource/letter-of-support-the-for-the-people-act-and-the-john-lewis-voting-rights-advancement-act/>; see also *Hearing on Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>.