



**TESTIMONY OF  
WENDY WEISER**

**VICE PRESIDENT FOR DEMOCRACY AT THE  
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW<sup>1</sup>**

**HEARING ON PROTECTING A PRECIOUS, ALMOST SACRED RIGHT: THE JOHN  
R. LEWIS VOTING RIGHTS ADVANCEMENT ACT**

**BEFORE THE SENATE JUDICIARY COMMITTEE**

**October 6, 2021**

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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 Vice President for Democracy and Director of the Brennan Center's Democracy Program. I have authored numerous nationally recognized reports and articles on voting rights and elections. My work has been featured in academic journals and numerous media outlets across the country. I have served as counsel in many voting rights lawsuits, including lawsuits under Sections 2 and 5 of the Voting Rights Act. I have testified previously before Congress, and before several state legislatures, on a variety of issues relating to voting rights and elections, including the Voting Rights Act. My testimony does not purport to convey the views, if any, of the New York University School of Law.

Thank you for the opportunity to testify in support of strengthening the Voting Rights Act (“VRA”), a law that has played a critical role in safeguarding American democracy against persistent discrimination in the election system. The Brennan Center for Justice at NYU School of Law strongly supports Congress’s efforts to restore and revitalize the VRA, through the John R. Lewis Voting Rights Advancement Act (the “Act” or “John Lewis Voting Rights Act”).<sup>2</sup>

The need to strengthen the Voting Rights Act is urgent. A decade’s worth of efforts to restrict voting rights sharply escalated this year, with at least 19 states passing 33 laws in 2021 to make it harder for Americans to vote, according to the Brennan Center’s latest count released this week.<sup>3</sup> Many of these new state laws target voters of color,<sup>4</sup> piling layer upon layer of discriminatory voting practices and exacerbating persistent racial and ethnic disparities in voting access. Even during the 2020 general election, an election with historically high turnout, participation remained starkly unequal: 70.9 percent of white voters cast ballots, compared to 58.4 percent of voters of color.<sup>5</sup>

At the same time, we are at the start of a redistricting cycle that is expected to be rife with racial discrimination and severe gerrymandering targeting communities of color.<sup>6</sup> Indeed,

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<sup>2</sup> I, along with my Brennan Center colleagues, have previously testified in support of the John Lewis Voting Rights Act and I incorporate that testimony herein. See *Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-WeiserW-20210816.pdf>; *Hearing on the 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 for Democracy, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>; *Hearing on Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*, 117th Cong. (2021) (testimony of Kevin Morris, Researcher, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/Morris%20-%20Written%20Testimony.pdf>; *Hearing on Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, Before the H. Comm. on House Administration, Subcomm. on Elections*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/2021-06-22%20Waldman%20-%20Testimony.pdf>; *Hearing on the Implication of Brnovich v. Democratic National Committee and Potential Legislative Responses, Before the H. Comm. On Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Sean Morales-Doyle, Acting Director, Voting Rights and Elections Program, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210716/113905/HHRG-117-JU10-Wstate-Morales-DoyleS-20210716.pdf>.

<sup>3</sup> Brennan Center for Justice, “Voting Laws Roundup: October 2021,” October 4, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021>.

<sup>4</sup> See, e.g., Brennan Center for Justice, “How New State Voting Laws could Impact Voters,” September 1, 2021, <https://www.brennancenter.org/our-work/research-reports/how-new-state-voting-laws-could-impact-voters>,

<sup>5</sup> Kevin Morris and Coryn Grange, “Large Racial Turnout Gap Persisted in 2020,” *Brennan Center for Justice*, August 6, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election>.

<sup>6</sup> Michael Li, “The Redistricting Landscape, 2021-22,” *Brennan Center for Justice*, 2021, <https://www.brennancenter.org/our-work/research-reports/redistricting-landscape-2021-22>.

the redistricting state plans released to date are proving the predictions correct.<sup>7</sup> This wave of vote suppression and redistricting abuse is part of an alarming effort to whittle down the American electorate and subvert the democratic process. It strikes at the foundation of our democracy and demands a response.

Unfortunately, the current Voting Rights Act is not sufficient to meet the challenge, in part because the U.S. Supreme Court has seriously hampered its effectiveness. In its 2013 decision in *Shelby County v. Holder*,<sup>8</sup> the Court gutted the law's most powerful provision, the preclearance requirement of Section 5. For decades, preclearance had stopped hundreds of discriminatory voting practices from ever going into effect in states and localities where discrimination was most pervasive.<sup>9</sup> More recently, in *Brnovich v. Democratic National Committee*, the Court further weakened the ability of voters to combat voting discrimination by making it harder to challenge discriminatory practices in court under the nationwide protections in Section 2 of the law.<sup>10</sup>

Although *Shelby County* and *Brnovich* seriously damaged the Voting Rights Act, both decisions make clear that Congress has the power to restore and bolster the law. In *Shelby County*, the Court invited Congress to reinstate Section 5 preclearance by crafting a new coverage formula that was responsive to current conditions.<sup>11</sup> In *Brnovich*, a decision based on statutory interpretation, the Court made clear that Congress is responsible for shaping Section 2 of the law.<sup>12</sup> And in both cases, the Court recognized that the Fourteenth and Fifteenth Amendments gave Congress the power to design a robust VRA to root out the entrenched

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<sup>7</sup> In Ohio, for example, the state's newly enacted legislative maps create a durable Republican supermajority by, in part, targeting and diluting the voting strength of Black and Muslim communities. See Michael Waldman, "Ohio's New Voting Maps Violate Its Own Constitution," *Brennan Center for Justice*, September 29, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/ohios-new-voting-maps-violate-its-own-constitution>. Meanwhile, in Texas, the state senate just this week passed a redistricting plan for that body that aggressively fractures minority communities in Tarrant County, joining large portions of the Latino and Black communities in Fort Worth to a district spanning seven rural counties and destroying a functioning coalition or crossover district. See *Hearing of Senate Select Comm. on Redistricting*, September 24, 2021 (testimony of Michael C. Li, Senior Counsel, Brennan Center for Justice), [https://www.brennancenter.org/sites/default/files/2021-09/Texas%20Senate%20Select%20Committee%20on%20Redistricting%2009.24.21\\_0.pdf](https://www.brennancenter.org/sites/default/files/2021-09/Texas%20Senate%20Select%20Committee%20on%20Redistricting%2009.24.21_0.pdf). Similarly, the state's proposed congressional plan would not create any new electoral opportunities for Latino, Black, or Asian communities, despite the fact that communities of color accounted for over 95 percent of the state's population growth last decade. See James Barragán et al., "Texas reduces Black and Hispanic majority congressional districts in proposed map, despite people of color fueling population growth," *The Texas Tribune*, September 27, 2021 <https://www.texastribune.org/2021/09/24/texas-congressional-redistricting/>.

<sup>8</sup> 570 U.S. 529, 556–57 (2013).

<sup>9</sup> For example, between 1999 and 2005, 153 voting changes were withdrawn and 109 were superseded by altered submissions. See Myrna Pérez and Vishal Agraharkar, "If Section 5 Falls: New Voting Implications," 5, *Brennan Center for Justice*, June 12, 2013, [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Section\\_5\\_New\\_Voting\\_Implications.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Section_5_New_Voting_Implications.pdf). That figure does not include the hundreds of voting changes that were deterred because jurisdictions knew they would not withstand VRA review. See also *Shelby Cty.*, 570 U.S. at 571 (Ginsburg, J., dissenting) (noting that VRA stopped almost 1200 voting laws in covered areas from taking effect between 1965 and 2006).

<sup>10</sup> 141 S. Ct. 2321 (2021).

<sup>11</sup> *Shelby Cty.*, 570 U.S. at 557 ("Congress may draft another formula based on current conditions.").

<sup>12</sup> See generally *Brnovich*, 141 S. Ct. 2321 (holding premised on an interpretation of the current text of Section 2).

problem of race discrimination in voting.<sup>13</sup> That is precisely what Congress has done in the John Lewis Voting Rights Act.

My testimony today explains how the John Lewis Voting Rights Act is an appropriate, carefully tailored exercise of congressional authority to combat the ongoing scourge of voting discrimination. First, I argue that geographic coverage for preclearance is essential to stopping voting discrimination because the problem is especially acute and intractable in certain states and localities. Second, I argue that the bill’s geographic coverage formula is extremely well designed to identify the regions where voting discrimination is most persistent, pervasive, and current, hewing closely to the standards Supreme Court articulated in *Shelby County*. In particular, I explain why it is appropriate and necessary for the formula to include a twenty-five-year review period (coupled with a ten-year coverage period and strong bail-out provisions), to take account of consent decrees as key evidence of voting rights violations, and to subject political subdivisions in covered states to preclearance. Finally, I explain why Congress must also restore Section 2 of the Voting Rights Act, to ensure powerful tools to fight voting discrimination in jurisdictions not subjected to preclearance.

The crisis facing our democracy today can only be solved by Congress. Congress has broad authority under the Constitution to ensure free and fair access to the ballot box and equal voting power for all Americans. We strongly urge you to exercise that power to pass the John Lewis Voting Rights Act, alongside the Freedom to Vote Act (S. 2747), to protect Americans from ongoing and novel attempts to sabotage elections and discriminate in the voting process.

## **I. Geographic Preclearance Is Necessary Because Discrimination is Especially Widespread and Persistent in Certain Jurisdictions**

The John Lewis Voting Rights Act would revive the law’s preclearance requirements for voting changes in two sets of circumstances: (1) when those changes are made in jurisdictions where voting discrimination is particularly pervasive and persistent (“geographic coverage”), and (2) when the voting changes at issue are of a type frequently adopted for discriminatory purposes wherever they occur (“known practices coverage”).

To determine which jurisdictions would be subject to geographic coverage, the Act replaces the previous static coverage formula with an updated, dynamic formula that covers jurisdictions based on a recent, widespread, and persistent record of violations of the law against race discrimination in voting. Specifically, the formula counts the jurisdiction’s legal violations reflected in court orders, objection letters by the Department of Justice, and settlements, consent decrees, or other agreements that indicate there was discrimination and led to a change in voting practices. A state is only covered if there have been fifteen violations in the state in the last twenty-five years, or ten violations if at least one of them was a violation by the state itself. A subdivision is only covered if it commits three violations in the same period.

Historian Peyton McCrary, who served in the Department of Justice for 26 years, previously testified in the House Judiciary Committee to the exhaustive study he conducted

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<sup>13</sup> *Id.* at 2331; *Shelby Cty.*, 570 U.S. at 553.

analyzing the number of violations committed in each state and locality.<sup>14</sup> Based on the standards articulated in the House of Representatives’ version of the bill in the 116th Congress, Professor McCrary concluded that eight states were likely to be covered under that formula (Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas)<sup>15</sup> and that three more states were on the cusp (California, New York, and Virginia).<sup>16</sup> He also found that five counties would likely be covered under the earlier bill.<sup>17</sup> Under the standards in the bill currently before the Senate, the Brennan Center estimates that Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia would likely be covered, along with Cook County, Illinois, and that Alabama and Florida are on the cusp. The record before Congress shows that preclearance is sorely needed in these states and localities, and that race discrimination in voting is a much more significant problem in these jurisdictions than in the rest of the country.

In 1965, Congress wisely recognized that it could not rely on a mere prohibition on “tests and devices” to effectively stamp out racial discrimination in jurisdictions that were determined to keep voters of color from the polls. Nor could it rely solely on affirmative litigation under Section 2 of the VRA, which is costly, slow, and often allows discriminatory rules to govern pending a decision.<sup>18</sup> As I describe below, certain jurisdictions continue to demonstrate a determination to restrict voting access and to do so in ways that target voters of color. They adapt their discriminatory tactics to adjust to court decisions, demographic shifts, and voting habits. As a result, Congress cannot rely solely on legislation that targets pre-identified discriminatory practices or litigation to stop voting discrimination. So long as states and localities remain determined to discriminate, only preclearance can effectively remedy race discrimination in these jurisdictions.

#### **A. Voting Discrimination is Widespread in States Likely to be Covered**

The Brennan Center and others have submitted reams of evidence of recent and persistent race discrimination in states likely to be covered by the John Lewis Voting Rights Act. That evidence was collected in the June 24, 2021 testimony of Brennan Center president, Michael

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<sup>14</sup> Peyton McCrary is a Professorial Lecturer at George Washington University Law School, where he co-teaches a course on voting rights. He served as a Historian with the Voting Section of the Department of Justice’s Civil Rights Division for 26 years, from 1990 to 2016. He has worked extensively as a consultant and expert witness in voting rights litigation and has published at least twenty book chapters, journal articles, and law review articles on the subject. *See Hearing on the Oversight of the Voting Rights Act: Potential Legislative Reforms Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-McCraryJ-20210816.pdf>.

<sup>15</sup> *Id.* at Exhibit 1.

<sup>16</sup> *Id.* at Exhibit 2. Note that Virginia would, in fact, almost certainly be covered under the House bill that passed earlier this summer, because of changes between that bill and the one from 2019.

<sup>17</sup> Those are: Los Angeles County, California; Cook County, Illinois; Westchester County, New York; Cuyahoga County, Ohio; and Northampton County, Virginia. *Id.* at Exhibit 3.

<sup>18</sup> *See* Wendy Weiser, testimony on *Oversight of the Voting Rights Act: A Continuing Record of Discrimination* (detailing why Section 2 litigation is inadequate and inefficient).

Waldman, before the House of Representatives,<sup>19</sup> as well as in prior testimony I and my colleagues delivered before Congress this year.<sup>20</sup> It was also collected in the extensive reports that the Leadership Conference on Civil and Human Rights submitted laying out the record of discrimination in these states,<sup>21</sup> among other testimony.

But perhaps the most compelling evidence of the extent of discrimination in those states is the list of voting rights violations that will be considered under the new formula itself. Professor McCrary found that there were a staggering 143 violations over the last 25 years in the eight states likely to be covered by the 2019 formula, and another 32 violations in the three states that were close to meeting the coverage requirements (for a total of 175 violations).<sup>22</sup> (Professor McCrary prepared his analysis based on the definition of violations in the 2019 version of the bill that passed the House; because that definition was expanded somewhat this year, the number of violations is likely even larger.) Under the formula in the bill before this Senate, the Brennan Center estimates that there are more than 150 violations over the past 25 years in the 11 states over or near the threshold for coverage.

## **B. The Problem of Voting Discrimination is Worse in States Likely to Be Covered**

There is also ample evidence that the scourge of voter suppression is worse in the states and localities expected to be covered than in the rest of the country. Again, the list of state violations illustrates this clearly. Professor McCrary's analysis found 143 violations over the past 25 years in the 8 states likely to be covered under the 2019 bill, but only 54 combined violations

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<sup>19</sup> Michael Waldman, testimony on *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*.

<sup>20</sup> See *Hearing on S.1, The For the People Act, Before the S. Comm. on Rules & Administration*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice),

<https://www.brennancenter.org/sites/default/files/2021-03/2021-03-22%20Waldman%20-%20Testimony.pdf>; Wendy Weiser, testimony on *Oversight of the Voting Rights Act: A Continuing Record of Discrimination*; Kevin Morris testimony on *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*; Michael Waldman, testimony on *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*; Sean Morales-Doyle, testimony on *The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses*; Wendy Weiser, testimony on *Oversight of the Voting Rights Act: Potential Legislative Reforms*.

<sup>21</sup> *Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Wade Henderson, Interim President and CEO, The Leadership Conference on Civil and Human Rights and Exhibits 1a–10, incorporated by reference therein), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816.pdf>; see also Exhibits 1a–10, <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4688>.

<sup>22</sup> *Hearing on the Oversight of the Voting Rights Act: Potential Legislative Reforms Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-McCraryJ-20210816.pdf> at Ex. 1. AL (14), FL (10), GA (25), LA (16), MS (18), NC (11), SC (15), TX (34); CA (12), NY (12), VA (8).

in the 39 states not above or close to the threshold for coverage.<sup>23</sup> In fact, there were more violations in Georgia and Texas alone than there were in those 39 states combined.<sup>24</sup> The Brennan Center estimates that under the current bill before the Senate, the 7 states that are likely to meet the coverage threshold have at least 120 total violations over the past 25 years, while the 39 states that are not close to coverage have fewer than 50.

In addition, the Brennan Center has submitted multiple studies for the record that demonstrate that vote suppression and discriminatory voting outcomes are worse in the states likely to be covered by preclearance:

- After the *Shelby County* decision, jurisdictions formerly subject to preclearance increased their voter purge rates more than noncovered jurisdictions. Two million fewer voters would have been purged between 2012 and 2016 if formerly covered jurisdictions continued to remove voters at the same rate as noncovered jurisdictions.<sup>25</sup> And 1.1 million fewer individuals would have been removed from voter rolls between 2016 and 2018 if formerly covered jurisdictions continued to remove voters at the same rate as non-covered jurisdictions.<sup>26</sup>
- Racial and ethnic turnout gaps are growing faster in the eight states likely to be subject to preclearance than in the rest of the country. Seven of these states had white-nonwhite turnout gaps that grew more than the national rate of 4.6 percentage points between 2012 and 2020. South Carolina’s gap widened the most, expanding by a staggering 21.2 percentage points in that period.<sup>27</sup>
- This rapid growth is a complete reversal of a trend that the Supreme Court pointed to in the *Shelby County* decision as evidence that racial discrimination was abating.<sup>28</sup> In 2012, seven of these eight states had Black voter turnout higher than that of white voters, and the Court noted that the Black-white gap was closed or closing. In 2020, the reverse was true—in only one of the eight states was Black turnout higher than white turnout. Louisiana, South Carolina, and Texas had higher turnout gaps in 2020 than at any point in the past 24 years.<sup>29</sup>

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<sup>23</sup> *Id.* at Ex. 2. AK (2), AR (2), AZ (4), CO (2), HI (1), IL (4), MA (5), MI (3), MO (1), MT (5), NE (2), NV (1), NJ (2), NM (3), ND (2), OH (4), PA (2), SD (2), TN (2), WA (3), WI (1), WY (1). In addition, Professor McCrary lists no violations for CT, DE, ID, IN, IA, KS, KY, ME, MD, MN, NH, OK, OR, RI, UT, VT, WV.

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

<sup>25</sup> Kevin Morris et al, “Purges: A Growing Threat to the Right to Vote,” 3–4, *Brennan Center for Justice*, July 20, 2018, <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote>.

<sup>26</sup> Kevin Morris, “Voter Purge Rates Remain High, Analysis Finds,” *Brennan Center for Justice*, August 1, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

<sup>27</sup> Kevin Morris, Peter Miller, and Coryn Grange, “Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act,” *Brennan Center for Justice*, August 20, 2021, <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights> (see chart detailing “White-Nonwhite Turnout Gap Since *Shelby County*, 2012-2020 Presidential Election”).

<sup>28</sup> *Shelby Cty.*, 570 U.S. at 548 (“Census Bureau data from the most recent election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent.”).

<sup>29</sup> Morris, Miller, and Grange, “Racial Turnout Gap Grew.”

- The worst “monster” vote suppression bills passed this year—omnibus bills that restrict voting in multiple ways—were in Texas and Georgia, two states expected to be covered by preclearance.<sup>30</sup> North Carolina—another state likely to be covered—modeled this practice of adopting a “monster” vote suppression law when it began working on its omnibus bill the day after the *Shelby County* decision was handed down in 2013.<sup>31</sup> The bill was later struck down as racially discriminatory.<sup>32</sup> Florida, which could soon come into coverage because of its multiple violations (and which would likely be covered under the House version of the bill), also passed a “monster” bill this year. Iowa, which will likely not be covered, did the same.
- According to 2019 testimony by Professor J. Morgan Kousser, 82.6 percent of successful Section 2 actions since the passage of Voting Rights Act in 1965 concerned jurisdictions previously subject to preclearance.<sup>33</sup>

### C. Absent Preclearance, Voting Discrimination Remains Intractable in States Likely to be Covered

Further, the record in the formerly covered jurisdictions since the *Shelby County* decision demonstrates both that these jurisdictions continue to pose a high risk of discrimination absent preclearance and that they were appropriately targeted for coverage in the first place. As soon as the Supreme Court invalidated the previous coverage formula in *Shelby County*, many of these jurisdictions rushed to enact intentionally discriminatory laws.<sup>34</sup> Infamously, Texas announced less than 24 hours after the decision that it would implement an extremely restrictive voter identification requirement that had previously been blocked by preclearance and was later found by a court to be intentionally discriminatory.<sup>35</sup> Less than two months later, North Carolina, enacted its omnibus voting law that prompted the oft-repeated finding by the Fourth Circuit Court of Appeals that the law was intentionally discriminatory and “target[ed] African Americans with almost surgical precision.”<sup>36</sup> It took years of resource-intensive litigation to

<sup>30</sup> Brennan Center for Justice, “Voting Laws Roundup: October 2021.”

<sup>31</sup> *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); see also Brennan Center for Justice, “Voting Laws Roundup 2013,” December 19, 2013, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2013>.

<sup>32</sup> *McCrory*, 831 F. 3d at 215.

<sup>33</sup> *Legislative Proposals to Strengthen the Voting Rights Act, Before the H. Comm. On Judiciary, Subcomm. On the Constitution, Civil Rights & Civil Liberties*, 116th Cong. (2019) (testimony of Professor J. Morgan Kousser, California Institute of Technology), <https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf>. Professor Kousser included settlements and consent decrees as successes. He also found that 81.7 percent of successful voting rights actions brought under the Fourteenth or Fifteenth Amendments, and Section 2, Section 203, or Section 208 of the VRA concerned jurisdictions previously subject to preclearance.

<sup>34</sup> Tomas Lopez, “Shelby County: One Year Later,” *Brennan Center for Justice*, June 24, 2014, <https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>; see also *Bronovich*, 594 U.S. \_\_\_, slip. op. at 9 (2021) (Kagan, J., dissenting).

<sup>35</sup> “Statement by Texas Attorney General Greg Abbott,” June 25, 2013, <https://perma.cc/SL53-AFSG>; *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc).

<sup>36</sup> *McCrory*, 831 F.3d. at 214. *McCrory* was not the only case where a federal court found that a jurisdiction acted with discriminatory intent post-*Shelby County*. In 2017, the Southern District of Texas found that the city of Pasadena, Texas’s post-*Shelby County* city council electoral scheme was enacted with an intent to discriminate against Latino voters. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 721 (S.D. Tex. 2017) (“Each *Arlington Heights* factor supporting finding discriminatory intent . . . is present in this case.”).



block these laws; during those years, millions of voters faced unconstitutional barriers to the right to vote, with more burdens directed at minority voters.

This recent history demonstrates that, for jurisdictions with an extensive record of voting discrimination, preclearance is a necessary tool for rooting out that discrimination. As the record amply shows, lawmakers and officials in those states tend to be both persistent and creative in their efforts to discriminate against voters of color. Many of the states and localities likely to be covered under preclearance have now piled voting restriction upon voting restriction, even as earlier restrictions have been struck down by the courts in what amounts to judicial whack-a-mole.<sup>37</sup> In other words, they engage in exactly the sort of “ingenious discrimination” that President Johnson described as he called for passage of the VRA in 1965.<sup>38</sup> This ingenuity is why case-by-case adjudication and practice-based preclearance are insufficient tools, on their own, for preventing discrimination as it is practiced today.

For example, even after a voter ID law was struck down by a federal court in 2017 because it was found it to be discriminatory (and intentionally so), the state of Texas adopted different restrictive laws when it returned to session in both 2019 and 2021. This year, for instance, the legislature’s omnibus voting law prohibits practices like 24-hour voting and drive-through polling places that have been used by local election officials in the state’s large, diverse counties to facilitate voting. The new law also creates over-broad and vague criminal offenses that will chill efforts of those seeking to assist voters to ensure real, practical access to the ballot, making it more difficult for voters with limited English proficiency to obtain the help they need (and to which they are entitled under federal law)—a burden that will fall disproportionately on Latino and Asian voters.<sup>39</sup>

Georgia too has persisted in its efforts to suppress the vote. From the enactment of the nation’s first strict voter ID law in 2005<sup>40</sup> through the passage of the “monster” bill S.B. 202 in 2021,<sup>41</sup> the state legislature has repeatedly enacted laws to make voting harder.<sup>42</sup> The Secretary of State has also adopted aggressive policies blocking registrations by eligible voters or

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<sup>37</sup> See, e.g., *Veasey*, 830 F.3d 216 (invalidating strict voter ID law that had previously been blocked by preclearance), *but see* TX S.B. 5 (2017) (imposing similar but less strict voter ID requirements), TX H.B. 1888 (2019) (restricting mobile early voting), TX S.B. 2930 (2021) (limiting voters who can vote by mail), TX S.B. 1111 (2021) (increasing risk of faulty voter purges), TX S.B. 1 (2021) (omnibus bill with several restrictive provisions).

<sup>38</sup> Lyndon B. Johnson, “Special Message to the Congress: The American Promise,” *The American Presidency Project*, March 15, 1965, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise>.

<sup>39</sup> Complaint for Declaratory and Injunctive Relief, *LUPE v. Abbott*, (W.D. Tex 2021) (No. 5:21-cv-844).

<sup>40</sup> GA Act No. 53 (H.B. 244) (2005).

<sup>41</sup> GA S.B. 202 (shortening window to apply for a mail ballot, prohibiting the unsolicited distribution of mail ballot applications, limiting the availability of mail ballot drop boxes, and imposing harsher voter ID requirements on mail voting).

<sup>42</sup> See also GA H.B. 92 (2011) (cutting back early voting); GA H.B. 268 (2017) (making voter registration more difficult).

removing them from the rolls.<sup>43</sup> And when litigation has halted or stalled one law or practice, the legislature has been quick to replace it with another.<sup>44</sup>

But Georgia’s lawmakers are not just dogged in their efforts to engage in vote suppression and discrimination; they are also adaptive and innovative. In 2020, the demographics of mail voting shifted dramatically. The percentage of mail voters that were white dropped precipitously while the percentage of mail voters who were Black surged.<sup>45</sup> Nearly 30 percent of Georgia’s Black voters cast their ballot by mail in 2020, while just 24 percent of white voters did.<sup>46</sup> The legislature’s response was quick: just months after the 2020 elections, it passed S.B. 202, a bill that placed a number of new restrictions on mail voting.<sup>47</sup> S.B. 202 also included a number of fairly novel restrictions, such as a ban on handing out water and snacks to voters waiting in line—a particularly sinister method of burdening voters of color by exploiting the fact that they already wait in disproportionately long lines to cast their ballots.<sup>48</sup> In short, Georgia provides another example of “ingenious discrimination” that requires Congress to act.

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In short, a robust preclearance regime is necessary to combat the ongoing assault on voting in key states and localities. If preclearance had been in effect in Georgia and Texas and the other likely covered states this year, as it was before *Shelby County*, the restrictive voting bills that these states recently enacted would not have been able to go into effect unless and until the states proved that those laws would not discriminate against racial, ethnic, or language

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<sup>43</sup> Stanley Augustin, “Voting Advocates Announce a Settlement of ‘Exact Match’ Lawsuit in Georgia,” *Lawyers’ Committee for Civil Rights Under Law*, February 10, 2017, <https://www.lawyerscommittee.org/voting-advocates-announce-settlement-exact-match-lawsuit-georgia/>; Morris, “Purges: A Growing Threat to the Right to Vote;” Morris, “Purge Rates Remain High.”

<sup>44</sup> When a federal court blocked Georgia’s original voter ID law, *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1366, 1370 (N.D. Ga. 2005), the legislature passed an amended law in 2006. That law was also temporarily enjoined, *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006), but eventually upheld by the district court and the Eleventh Circuit, in part, after the state conducted a voter education campaign. *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1380 (N.D. Ga. 2007); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009). When litigation spelled an end to the Secretary’s “exact match” registration policy, Stanley Augustin, “Voting Advocates Announce a Settlement of ‘Exact Match’ Lawsuit in Georgia,” *Lawyers’ Committee for Civil Rights Under Law*, February 10, 2017, <https://www.lawyerscommittee.org/voting-advocates-announce-settlement-exact-match-lawsuit-georgia/>, the Georgia legislature enacted a similar policy into law only months later, GA H.B. 268 (2017), which it has since largely abandoned after further litigation, Stanley Augustin, “Georgia Largely Abandons its Broken Exact Match Voter Registration Process,” *Lawyers’ Committee for Civil Rights Under Law*, April 5, 2019, <https://www.lawyerscommittee.org/georgia-largely-abandons-its-broken-exact-match-voter-registration-process/>.

<sup>45</sup> Kevin Morris, “Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most,” *Brennan Center for Justice*, March 16, 2021, <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>.

<sup>46</sup> *Id.*

<sup>47</sup> GA S.B. 202 (shortening window to apply for a mail ballot, prohibiting the unsolicited distribution of mail ballot applications, limiting the availability of mail ballot drop boxes, and imposing harsher voter ID requirements on mail voting).

<sup>48</sup> See Hannah Klain, et al., “Waiting to Vote: Racial Disparities in Election Day Experiences,” 4, *Brennan Center for Justice*, 2020, [https://www.brennancenter.org/sites/default/files/2020-06/6\\_02\\_WaitingtoVote\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf) (finding that Latino and Black voters were more likely than white voters to report long wait times, and waited longer generally).

minorities. Preclearance will also be critical to protecting communities of color from discriminatory decision-making during the redistricting process at the congressional, state, and local levels this year.

## **II. The Geographic Coverage Formula Meets the Constitutional Standards Set by the Supreme Court in *Shelby County v. Holder* and is Necessary to Root Out Discrimination**

The Supreme Court has repeatedly affirmed Congress' broad powers under the Fourteenth and the Fifteenth Amendments to craft legislation to root out discrimination in voting.<sup>49</sup> But, as the extensive record before this Congress shows, existing legal protections are currently woefully insufficient “to remedy the ‘insidious and pervasive evil’ of racial discrimination”<sup>50</sup> as states and localities across the country step up their attacks on voting rights. A preclearance regime is the sort of “strong medicine” that is necessary and constitutionally justified to combat the pervasive race discrimination in voting, especially in those areas where discrimination is most persistent.<sup>51</sup>

Indeed, many of the touchpoints for justifying preclearance that the Supreme Court identified in *Shelby County* are present today, especially in the jurisdictions that would likely be covered under the John Lewis Voting Rights Act. Apart from the anomalous surge in Black voter turnout in 2012, there is and has long been a dramatic racial voter turnout gap.<sup>52</sup> In addition, states consistently engage in “[b]latantly discriminatory evasions of federal decrees,” passing new voter restrictions soon after old ones are struck down by the courts.<sup>53</sup> And minority candidates remain dramatically underrepresented relative to their population in legislatures and courts across the country.<sup>54</sup> In short, the justification for preclearance remains powerful.

As the Court explained in *Shelby County*, a geographic coverage formula must be rationally related to the problem it is trying to address and “justified by current needs.”<sup>55</sup> The updated coverage formula clearly meets that test.

First, the formula is more than “sufficiently related to the problem that it targets.”<sup>56</sup> Indeed, in targeting jurisdictions for coverage, the Act’s formula relies on the best evidence available to determine where the problem of discrimination is greatest: established violations of law. Rather than relying on proxies like the old formula, this formula identifies discrimination by looking to specific findings of violations of federal voting rights laws, as described in Section I. A high volume of litigation in and of itself is a probative way to identify where persistent

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<sup>49</sup> *Katzenbach*, 383 U.S. 301 (1966) (upholding the constitutionality of the 1965 preclearance regime); *Georgia v. United States*, 411 U.S. 526 (1973) (upholding the constitutionality of the 1970 preclearance regime); *City of Rome*, 446 U.S. 156 (1980) (upholding the constitutionality of the 1975 preclearance regime); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999) (upholding the constitutionality of the 1982 preclearance regime); *Shelby Cty.*, 570 U.S. at 553; *Brnovich.*, 141 S. Ct. at 2331.

<sup>50</sup> *Shelby Cty.*, 570 U.S. at 535 (quoting *Katzenbach* at 309).

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at 540.

<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> *Id.* at 536; *see also Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203.

<sup>56</sup> *Shelby Cty.*, 570 U.S. at 551.

discrimination is taking place; where a jurisdiction is repeatedly discriminating against its citizens, one would expect those citizens to file repeated lawsuits. The Act goes further and actually requires successful litigation. Requiring actual violations of the law to build a record of discrimination ensures that jurisdictions will only fall into coverage because of objective evidence produced by the Department of Justice or sanctioned by a federal court. And, as I flesh out in greater length below, consent decrees are one of those critical pieces of evidence of discrimination.

Second, the Act’s formula is justified by current needs. It “limit[s] its attention to the geographic areas where immediate action seem[s] necessary” by requiring that a jurisdiction show a pattern of proven instances of voter discrimination in recent years.<sup>57</sup> By looking at proven acts of discrimination, which are self-evidently “relevant to voting discrimination,” the law targets only those places where proven discrimination against voters of color not only exists, but exists “on a pervasive scale.”<sup>58</sup> And through other design mechanisms, described below, the law targets only those jurisdictions where the problem of discrimination is “current” and persistent.

For these reasons, and for the reasons set forth below, the Act’s preclearance regime is more than justified to target the constitutional evil of race discrimination in voting.

**A. The Review Period Is Well-Tailored to Identify States and Localities Where Discrimination Is a Persistent, Acute, and Current Risk**

The Act’s review formula is well-designed to identify and cover those jurisdictions where voting discrimination is pervasive, systematic, and recent. It provides for a dynamic and limited review period and considers objective, verifiable evidence to identify jurisdictions with a recent pattern of voting discrimination. Its key design features—a rolling 25-year review period, a 10-year coverage period, and a streamlined process for jurisdictions that have not committed discriminatory acts in the past 10 years to be released from coverage—ensure that the law targets only those jurisdictions where the problem of discrimination is current and persistent.

**1. Twenty-Five Years Is a Well-Established Review Period**

First, the Act’s preclearance coverage formula uses a 25-year review period to determine which states will be subject to up to 10 years of preclearance coverage. It covers states where, in the previous 25 years, the state and its political subdivisions have committed 10 voting rights violations if at least one violation was committed by the state, or in which political subdivisions within the state have committed 15 voting rights violations.

This framework for identifying pervasive patterns of discriminatory activity within a state is consistent with the history of the Voting Rights Act, which has long relied on 25-year increments. Congress twice previously determined that 25 years is an appropriate benchmark for preclearance coverage. In 1982, it reauthorized the preclearance provisions of the VRA for 25

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<sup>57</sup> *Id.* at 546 (quoting *Katzenbach*, 383 U.S. at 328).

<sup>58</sup> *Id.* (quoting *Katzenbach*, 383 U.S. at 308).

years until 2007.<sup>59</sup> In 2006, it again reauthorized the law for an additional 25 years.<sup>60</sup> Congress overwhelmingly passed these extensions—indeed, the Senate vote in 2006 was unanimous.<sup>61</sup>

In twice extending preclearance coverage for 25 years, Congress necessarily determined that discriminatory conditions at the beginning of that period were probative of a high risk of discrimination over the next 25 years. In fact, the 25-year review period in this bill is actually *shorter* than the effective review period previously adopted by Congress in 1982. The 1982 VRA reauthorization subjected states and localities to preclearance coverage through 2007 based on discriminatory activity from 1972, effectively using a review period of 35 years.

Twenty-five years is also a judicially-approved period. The Supreme Court affirmed the constitutionality of the 1982 VRA reauthorization—including its 25-year extension—in *Lopez v. Monterey County*.<sup>62</sup> And while the Court did later strike down the preclearance coverage formula that Congress reauthorized in 2006, it did not base its decision on the length of the coverage period Congress chose.<sup>63</sup>

## **2. The Coverage Formula Is Fine-Tuned to Identify Persistent Discrimination**

The Act’s formula is well-tailored to capture jurisdictions where voting discrimination is persistent and ongoing by combining a representative review period with a high threshold for coverage.

*First*, the review period needs to cover a long enough time period to identify jurisdictions with a persistent pattern of discrimination, when federal election and redistricting cycles happen in two-, four-, six- and ten- year increments. Twenty-five years fits the bill: it covers two redistricting cycles, four senate elections, and six presidential elections. That is enough time to ensure that a jurisdiction is not covered based on a small number of recent violations, but rather based on a consistent pattern of violations. The Supreme Court has recognized that it is appropriate to look to multiple elections to identify patterns of polarized voting, which is key to understanding and addressing voting discrimination.<sup>64</sup> The same principle applies to patterns of discrimination.

Professor McCrary’s analysis bears out the reasonableness of this approach: each of the covered states has at least one violation within the past twelve years, as well as at least one

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<sup>59</sup> History of Federal Voting Rights Laws, U.S. Dep’t of Just. (last updated July 28, 2017), <https://www.justice.gov/crt/history-federal-voting-rights-laws>.

<sup>60</sup> *Id.*

<sup>61</sup> The 2006 reauthorization of the Voting Rights Act passed the U.S. House of Representatives 390-33, and the U.S. Senate 98-0. Actions Overview: H.R. 9 – 109th Congress (2005–2006), U.S. Congress, accessed October 5, 2021, <https://www.congress.gov/bill/109th-congress/house-bill/9/actions>; see also Actions Overview: H.R. 3112 – 97th Congress (1981-1982), U.S. Congress, accessed October 5, 2021, <https://www.congress.gov/bill/97th-congress/house-bill/3112/actions>; Office of the Press Secretary, “Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006,” *George W. Bush White House*, July 27, 2006, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html>.

<sup>62</sup> 525 U.S. 266 (1999).

<sup>63</sup> *Shelby Cty.*, 570 U.S. 529.

<sup>64</sup> *Thornburg v. Gingles*, 478 U.S. 30, 52–53 (1986).

violation by the state—as opposed to only violations by subdivisions—and most have multiple violations.<sup>65</sup> In addition, each covered state has seen violations spread over a long time period; in no state are the violations concentrated in a time period shorter than 13 years.<sup>66</sup>

*Second*, the review period works together with the bill’s high numeric thresholds for violations to capture only places where the problem is longstanding and persistent. Requiring 15 violations before a state is covered—or 10 where at least one was committed by the state itself—guarantees that states only come into coverage when they have repeatedly engaged in discrimination. For example, North Carolina and its subdivisions received six violations through DOJ objection letters between 1996-2011 (one of which contains multiple independent violations).<sup>67</sup> Since the *Shelby County* decision in 2013, courts have entered three more judgments against the state for discriminatory voting laws (one of which contained several independent violations).<sup>68</sup> A shorter period of review would not be long enough to identify such a sustained pattern of misconduct. (A shorter review period would require a lower numeric threshold to be applied in any practical reality, as 10 violations in 15 years would be a shockingly high number of violations in such a short time period.)

*Third*, including a formula shorter than 25 years will miss repeat redistricting offenders due to the once-a-decade nature of redistricting. A 25-year review period, for example, reveals that Texas not only enacted discriminatory redistricting plans after the 2010 census but that it also did so after the 2000 census, in some cases discriminatorily targeting the same districts in *both* decades.<sup>69</sup> Congress should address such clear patterns of discrimination, and only a 25-year review period ensures that it can.

*Fourth*, a 25-year review period helps compensate for the lack of record-building and enforcement of voting rights over the last decade since *Shelby County*. Since 2013, litigation has been the only means for jurisdictions to accrue violations that count towards coverage. Litigation is a far cry from the preclearance process when it comes to identifying discrimination. It is reactive, costly, and time consuming. Litigants can only accomplish the kind of in-depth review of a policy required under the preclearance process *after* they file suit, which they can only do *after* they have identified a harmful policy. Even then, successful challenges often take years to make their way through the courts and the appeals process.

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<sup>65</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*; see also Thomas E. Perez to Robert T. Sonnenberg, Esq., April 30, 2012, <https://www.justice.gov/crt/voting-determination-letter-84> (DOJ objection letter issuing three violations against proposed comprehensive changes to school district reorganization).

<sup>68</sup> *Id.*; see also *North Carolina Conf. of NAACP v. McCrory*, 831 F. 3d 204 (4th Cir. 2016) (issuing five violations against an omnibus voting bill).

<sup>69</sup> *Texas v. United States*, 887 F.Supp.2d 133 (2012) (finding intentional discrimination in Texas congressional and state senate plans and retrogression in the 23rd Congressional District, among others); Ralph F. Boyd, Jr. to Geoffrey Connor, November 16, 2001, <https://www.justice.gov/crt/voting-determination-letter-26> (objecting to the Texas House of Representatives redistricting plan); *LULAC v. Perry*, 548 U.S. 399, 439-40 (2006) (discussing Texas’ dismantling the 23rd Congressional District in 2003 in response to increased Latino political effectiveness)..

### 3. At the Same Time, the Bill Targets Only Recent Discrimination

There are three additional design features of the John Lewis Voting Rights Act that make sure it only captures jurisdictions with a current risk of discrimination.

*First*, the Act’s framework is not frozen in time. It provides for a rolling review period, so that only states with a recent record of discrimination are covered. Once a violation is more than 25 years in the past, it will no longer count against the state. Not only does this ensure that only recent violations are used to trigger preclearance, it also provides a significant incentive for states on the cusp of coverage to straighten up their acts.

*Second*, preclearance coverage, even if triggered, lasts only for 10 years. After 10 years, DOJ reanalyzes the state’s record of violations over the previous 25 years. If the jurisdiction no longer meets the threshold number of violations, it exits coverage. This is in contrast to the prior preclearance formula, which only allowed states to exit coverage via the “bailout” process in Section 4(c) of the law or upon expiration of the provision’s 25-year renewal.

*Third*, as in the past, once a jurisdiction has not had any violations within the past decade, it is eligible to seek “bailout” from preclearance coverage. Thus, for example, if a state’s last violation was in 2011, it would be eligible for bailout in 2022. Prior to Shelby County, the bailout process was efficient and effective; since 1997, 50 jurisdictions across seven states have successfully bailed out of preclearance, according to the Department of Justice.<sup>70</sup> All but one of these jurisdictions did so via a consent decree with the Department of Justice, without contested litigation.<sup>71</sup> The Act further streamlines the bailout process to make it easier for eligible jurisdictions to seek and obtain bailout expeditiously.

In short, these provisions of the geographic coverage formula work together to ensure that preclearance coverage is limited to jurisdictions with recent, pervasive, and continuing records of discrimination.

#### **B. It Is Necessary and Appropriate to Cover Local Jurisdictions**

The John Lewis Voting Rights Act appropriately covers all subdivisions in covered states. The evidence from past practice under the VRA demonstrates that doing so is necessary to root out discrimination. Indeed, the vast majority of DOJ objection letters in states previously covered as a whole were directed to local and county governments within those states rather than to the state itself.<sup>72</sup> For example, all but 18 of the 104 voting changes that the Department of Justice objected to in Alabama while preclearance was in effect were to policies adopted in the state’s political subdivisions.<sup>73</sup> Similarly, in Louisiana, of the 13 voting changes that the

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<sup>70</sup> 5 U.S. Department of Justice, “Section 4 of the Voting Rights Act,” accessed August 13, 2021, <https://www.justice.gov/crt/section-4-voting-rights-act>.

<sup>71</sup> *Id.* The exception was a utility district in Texas, which was ultimately bailed out after a Supreme Court ruling in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>72</sup> U.S. Department of Justice, “Section 5 Objection Letters,” accessed October 5, 2021, <https://www.justice.gov/crt/section-5-objection-letters>.

<sup>73</sup> U.S. Department of Justice, “Section 5 Objection Letters,” accessed October 5, 2021, <https://www.justice.gov/crt/voting-determination-letters-alabama>.

Department of Justice objected to during the 25-year review period, all but one of those were local and county-level policies.<sup>74</sup>

The analysis of voting rights violations by Professor McCrary further demonstrates that discrimination pervades the local communities in the states likely to be covered. Every jurisdiction that Professor McCrary deemed likely to be covered by the John Lewis Voting Rights Act has at least one statewide violation, violations across at least five local jurisdictions in a broad geographic area, and violations distributed across the 25-year period.<sup>75</sup> Take Georgia, for example. Professor McCrary estimates that Georgia has 25 total violations over the 25-year period. These include four statewide violations and violations involving 19 different cities, counties, and school boards.<sup>76</sup>

That discrimination is prevalent in political subdivisions of covered states is no surprise. After all, the state and local government officials who perpetrate voting discrimination are all elected by or responsive to the same voters. When an area has a demonstrated record of discrimination, it is not unreasonable to presume that it pervades the political culture and that all jurisdictions within it are likely to be at significant risk of the same behavior.<sup>77</sup>

Moreover, although legislative acts by a state are high visibility affairs, it is harder to monitor the actions of the thousands of political subdivisions in a state in real time to identify discrimination. Absent preclearance for subdivisions, adverse changes enacted by local jurisdictions are much more likely to slide under the radar. And when they are found out and brought to light, the burden then falls on cash-strapped local groups to seek to block the change in court through a lengthy, time-consuming, and expensive process. Preclearance would level the playing field and make it harder for repeat offenders to evade sanction.

For these reasons, covering subdivisions is a well-established and court-approved approach under the Voting Rights Act. As noted above (*see supra* Sec. II), the Supreme Court repeatedly upheld the prior geographic coverage formula, including the provisions that consistently required all political subdivisions to seek preclearance based on a statewide inquiry. That choice is just as justified and necessary today.

C. **Consent Decrees Are Important, Judicially-Approved Tools for Fighting Discrimination and Should Count as Violations**

It is appropriate and necessary to count consent decrees as evidence of discrimination. That is because as legal remedies, consent decrees are just as forceful and authoritative as the other types of violations counted in the VRA, including final judgments, DOJ objection letters, and other settlements. They cause changes in voting laws or practices to eliminate discrimination and protect voting rights and are enforceable in court.

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<sup>74</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*. As there have been no DOJ objection letters since the *Shelby County* decision, all 13 of these objections took place by 2013.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> I use the word “presumptively” because, as I discuss further *infra*, jurisdictions with no actual record of recent discrimination will be able to avoid preclearance through the Act’s bailout process.



Consent decrees are strong indicators of states and localities where voting discrimination has occurred. Before entering a consent decree, a court must first determine that the agreement “‘is fair, adequate and reasonable’ and ‘is not illegal, a product of collusion, or against the public interest.’”<sup>78</sup> In so doing, “the court must assess the strength of the plaintiff’s case.”<sup>79</sup> A proposed decree is substantively fair if “it requires that a party bear the cost of the harm for which it is legally responsible.”<sup>80</sup> Applying this fairness analysis in the voting context, courts do not enter consent decrees unless there is a reasonable likelihood that a violation has occurred.<sup>81</sup> Courts do not simply “rubber stamp” consent decrees.<sup>82</sup> To the contrary, courts often reject proposed consent decrees for any number of reasons, demonstrating just how serious the inquiry is.<sup>83</sup> When a court enters a consent decree, it agrees to exercise ongoing jurisdiction and to supervise the parties’ implementation and compliance with that decree; it would not do so absent a clear showing that such supervision is needed.

Consent decrees have long been vital tools to stamp out discrimination. Indeed, past practice shows that many egregious voting rights violations have ended in consent decrees. For example, the *Dillard* cases in Alabama challenging discriminatory redistricting schemes in the mid-1980s resulted in a consent decree negotiated by plaintiffs and a class of defendants that resulted in voting changes in 197 political subdivisions.<sup>84</sup> This led to significant increases in Black elected officials throughout the state. In 1985, the year the litigation began, there were only 264 Black elected officials in political subdivisions in Alabama. By 1989, that number had risen to almost 560.<sup>85</sup> Other examples of consent decrees remedying blatant discrimination abound. In Long County, Georgia, a consent decree required the county to reform its voter challenge procedures after candidates baselessly challenged the citizenship status of voters solely because they had Hispanic or Spanish surnames.<sup>86</sup> Alameda County, California agreed to a consent decree in 2011 requiring it to provide language access materials required by Section 203 of the VRA—a consent decree that was necessary because it had failed to provide them

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<sup>78</sup> *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)).

<sup>79</sup> *United States v. North Carolina*, 180 F.3d at 581; see also *League of Women Voters of Va. v. Virginia State Bd. of Elec.*, 481 F. Supp. 580, 586 (W.D. Va. 2020); *Dillard v. City of Foley*, 926 F. Supp. 1053, 1062 (M.D. Ala. 1995).

<sup>80</sup> *United States v. Duke Energy Carolinas, LLC*, 499 F. Supp. 3d 213 (M.D.N.C. 2020) (quoting *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 86 (1st Cir. 1990)).

<sup>81</sup> See, e.g., *Dillard*, 926 F. Supp. at 1063–64.

<sup>82</sup> See, e.g., *U.S. S.E.C. v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014).

<sup>83</sup> See, e.g., *United States v. New York Housing Authority*, 347 F. Supp. 3d 182, 216–17 (S.D.N.Y. 2018) (rejecting a proposed consent decree because entering it was “not fair and reasonable and . . . its entry would dissuade the public interest.”); *Conservation Northwest v. Sherman*, 715 F. 3d 1181, 1185 (9th Cir. 2013) (vacating a consent decree because it would have “effectively amended [agency rules] without going through” proper administrative procedures); *St. Charles Tower, Inc. v. Kurtz*, 643 F. 3d 264, 270 (8th Cir. 2011) (vacating a consent decree because it improperly circumvented state law obligations, stating that litigants “cannot consent to do something that they lack the power individually to do”); *Phelps-Roper v. Heineman*, 710 F. Supp. 2d 890, 898–900 (D. Neb. 2010) (noting that “[e]ntry of a consent decree is a judicial act and is left to the district court’s informed discretion” and refusing to enter the proposed decree that would have barred police officers from arresting plaintiff because the court would not “place its judicial force behind a decree that expressly purport[ed] to abrogate” the city’s duty to arrest lawbreakers).

<sup>84</sup> See Jerome Gray and James U. Blacksher, “The Dillard Cases and Grassroots Black Political Power,” *Cumberland Law Review* 46 (2016): 312.

<sup>85</sup> *Ibid.*

<sup>86</sup> *United States v. Long County*, No. 2:06-cv-040, Dkt. No. 6 (S.D. Ga. 2006), available at <https://www.justice.gov/crt/united-states-district-court-southern-district-georgia-brunswick-division>.

according to the terms of a 1995 settlement.<sup>87</sup> Although they are strong indicators of discrimination, because they are court orders rather than private agreements, the vast majority of consent decrees do not contain admissions of liability.

Finally, counting consent decrees as violations does not create undesirable incentives. *First*, it does not create an incentive for plaintiffs to litigate weak claims because courts cannot enter consent decrees absent a strong case from the plaintiffs. A jurisdiction that believes it has a winning case would not agree to alter its voting policy based on a weak claim, regardless of the coverage formula. *Second*, counting consent decrees does not encourage defendants to litigate unnecessarily because all methods of resolving a lawsuit against a discriminatory law—judicial decisions, consent decrees, or settlements—count towards coverage. If a jurisdiction thinks it is likely to lose a voting discrimination case, it makes more sense to enter a consent decree rather than expend resources to litigate to a final judgment, as that judgment would still count towards coverage. *Third*, federal court rules ensure that plaintiffs cannot bully defendants into accepting consent decrees to avoid long litigation. For example, the possibility of court sanctions strongly discourages litigation of frivolous claims. On the other hand, *excluding* consent decrees from the coverage formula would create an undesirable incentive for plaintiffs to continue litigating strong claims to final judgment, where winning could result in greater relief and a judgment counting towards coverage. Such outcomes would waste party and judicial resources.

In short, consent decrees are vital components of any geographic coverage formula designed to identify where discrimination is occurring. We recommend that they be included without qualification.

### **III. The John Lewis Voting Rights Act Restores the Strength of Section 2, a Vital Tool to Stop Voter Discrimination Not Prevented By Preclearance**

The Act's amendments to Section 2 of the VRA are critical to restore the ability to fight voting discrimination that is not prevented by preclearance. The Supreme Court's recent *Brnovich v. DNC* decision diminished Section 2's strength, making it a much less effective tool for rooting out modern discriminatory voting laws and practices. The decision undermined Congress's clear intent in creating a powerful remedy to attack electoral laws and practices that interact with the ongoing effects of discrimination to produce discriminatory results in the voting process. However, the Supreme Court was explicit that its *Brnovich* ruling was based in statutory interpretation. Congress can therefore easily correct the Court's misinterpretation and restore Section 2 to its intended strength.

While the evidence is clear that voting discrimination is most pervasive in jurisdictions likely to be covered under the geographic coverage formula, the problem is by no means limited to those jurisdictions. As noted above, even though there were far fewer violations in states unlikely to be covered based on Professor McCrary's analysis of the 2019 bill, there were still 54 violations in those states in the last 25 years.<sup>88</sup> In fact, the problem is growing nationwide, as we

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<sup>87</sup> *United States v. Alameda County*, No. 3:11-cv-3262, Dkt. No. 21 (N.D. Cal. 2011), available at <https://www.justice.gov/crt/case-document/file/1176851/download>.

<sup>88</sup> Peyton McCrary, testimony on *Oversight of the Voting Rights Act*, Exhibit 2 (finding 54 violations during the review period in states not likely to be covered).

are witnessing a wave of voter suppression that is both larger and more widespread than any in recent memory. So far in 2021, 19 states have enacted 33 laws making it harder to vote.<sup>89</sup> Most of those are not likely to be covered under the formula in the bill before this Committee.<sup>90</sup> Among these are the “monster” vote suppression bills passed in Florida and Iowa (though Florida is close to meeting the threshold for coverage). The Brennan Center has also submitted to the congressional record a report summarizing the many instances of race-based vote suppression during the 2020 election and its aftermath, which demonstrates that voting discrimination extends well beyond states likely to be covered.<sup>91</sup> Preclearance alone cannot prevent all of these discriminatory laws and practices, but a robust Section 2 gives voters an opportunity to fight them.

We also know from past cases that Section 2 has been an effective tool for advancing voting rights across the country. According to a recent Brennan Center analysis, there were more than 20 successful redistricting cases just since 2006.<sup>92</sup> And while Professor Kousser’s 2019 review of successful voting rights actions demonstrated that they were concentrated in previously covered jurisdictions, he identified 225 successful Section 2 actions in non-covered jurisdictions.<sup>93</sup>

As the Brennan Center has been tracking, voting rights advocates continued to file suits under Section 2 in 2020 and 2021, including in jurisdictions not likely to be covered.<sup>94</sup> Although these cases are much harder to win after the *Brnovich* decision, at least one of the cases filed in a jurisdiction not likely to be covered by the Act has been successful so far—*Blackfeet Nation v. Stapleton*.<sup>95</sup> That case also provides a reminder about the significant role that Section 2 plays in addressing discrimination against Native American voters, the majority of whom live outside jurisdictions likely to be covered by preclearance.<sup>96</sup> The suit ended in a settlement providing an in-person voting location on the Blackfeet Indian Reservation.<sup>97</sup> The *Brnovich* case itself also concerned practices that imposed an outsized burden on those living on reservations. (Because the geographic coverage formula will only provide limited protection to Native American voters,

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<sup>89</sup> Brennan Center for Justice, “Voting Laws Roundup: October 2021.”

<sup>90</sup> *Ibid.*; Peyton McCrary, testimony on *Oversight of the Voting Rights Act*, 18–25.

<sup>91</sup> William Wilder, “Voter Suppression in 2020,” *Brennan Center for Justice*, August 20, 2021, [https://www.brennancenter.org/sites/default/files/2021-08/2021\\_08\\_Racial\\_Voter\\_Suppression\\_2020.pdf](https://www.brennancenter.org/sites/default/files/2021-08/2021_08_Racial_Voter_Suppression_2020.pdf).

<sup>92</sup> Brennan Center for Justice, “The Use of Section 2 to Secure Fair Representation,” August 13, 2021, <https://www.brennancenter.org/our-work/research-reports/use-section-2-secure-fair-representation>.

<sup>93</sup> Morgan Kousser, testimony on *Legislative Proposals to Strengthen the Voting Rights Act*.

<sup>94</sup> The Brennan Center tracked voting rights litigation across the country in 2020 and 2021 and found that plaintiffs brought 36 suits under Section 2 last year, when there were essentially no jurisdictions subject to preclearance. Twenty-one of these suits were filed against jurisdictions that are not likely to be covered by the Act. *See* Brennan Center for Justice, “Voting Rights Litigation Tracker 2020,” July 8, 2021, <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020>. So far in 2021, there have been Section 2 suits filed in Florida (which is not likely to be covered), Georgia, and Texas. *See* Brennan Center for Justice, “Voting Rights Litigation Tracker 2021,” August 2, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021>.

<sup>95</sup> *Blackfeet Nation v. Stapleton*, No. 4:20-cv-00095 (D. Mont. 2020).

<sup>96</sup> Census Bureau, “Decennial Census Data: Race,” <https://data.census.gov/cedsci/table?q=redistricting&tid=DECENNIALPL2020.P1&hidePreview=true>, last accessed October 5, 2021.

<sup>97</sup> *Blackfeet Nation*, No. 4:20-cv-00095, Dkt. No. 10 (D. Mont., Oct. 15, 2020), available at <https://storage.courtlistener.com/recap/gov.uscourts.mtd.65114/gov.uscourts.mtd.65114.10.0.pdf>.

the Brennan Center also wholeheartedly supports the inclusion of the Native American Voting Rights Act in the John Lewis Voting Rights Act.)

The revised Section 2 has two critical components to fight discriminatory voting laws and practices. *First*, it would codify the standard long used by most appellate courts for analyzing cases (the standard that the Supreme Court radically cut back in *Brnovich*). Under the previously applicable standard, first articulated by the Supreme Court in *Thornburg v. Gingles*,<sup>98</sup> courts conducted the “totality of the circumstances” analysis required by the 1982 Amendments to the VRA by looking to a non-exhaustive list of relevant factors set forth in this Committee’s report on those amendments (known as the “Senate Factors”).<sup>99</sup> In *Brnovich*, the Court departed from the clear intent of Congress, and this Committee, by suggesting that the Senate Factors were of limited relevance in evaluating “vote denial” claims.<sup>100</sup>

In turning away from the Senate Factors, the Supreme Court did not just depart from Congress’s intent, it also departed from a well-established test that was well designed to target discrimination. Under that test, courts examined “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>101</sup> They conducted an “intensely local appraisal” of how race functioned in the jurisdiction to determine whether a racially disparate impact should in fact be deemed a “discriminatory result,” or if it was merely a statistical anomaly.<sup>102</sup> In “vote denial” cases,<sup>103</sup> courts applied the Senate Factors to assess whether a challenged policy or practice that resulted in a disparate burden on a protected class of voters was “caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.”<sup>104</sup> The test did not stop every discriminatory practice.<sup>105</sup> In fact, even under the *Thornburg v. Gingles* standard, it was already difficult and expensive to bring a successful action under Section 2.<sup>106</sup> But it was an effective test used for years in almost every circuit that

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<sup>98</sup> 478 U.S. 30, 44.

<sup>99</sup> See, e.g., *Veasey*, 830 F.3d 216; *Mich. APRI v. Johnson*, 833 F.3d 656 (6th Cir. 2016); *League of Women Voters of N.C. 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>100</sup> 141 S. Ct. at 2340.

<sup>101</sup> S. Rep. No. 97-417 at 30, 67.

<sup>102</sup> *Thornburg*, 478 U.S. at 79 (quoting S. Rep. No. 97-417 at 190).

<sup>103</sup> See, e.g., *Veasey* 830 F.3d 216; *Mich. APRI*, 833 F.3d 656; *League of Women Voters of NC*, 769 F.3d 224; *Gonzalez*, 677 F.3d 383; *Sanchez*, 214 F. Supp. 3d 961.

<sup>104</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).

<sup>105</sup> See, e.g., *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (denying a Section 2 challenge to a voter ID law despite the fact that voters of color were far more likely to lack the requisite ID than white voters and assuming *arguendo* that the Senate Factors applied).

<sup>106</sup> Between the *Shelby County* decision and 2018, only 61 cases were filed under Section 2 nationwide. Only 23 of these were successful, and only 9 of those 23 alleged “vote denial” claims. Successfully litigating a Section 2 “vote denial” claim is difficult and expensive, and thus rare. See Br. of State and Local Election Officials, 15–19, *Brnovich v. Democratic National Committee*, 594 U.S. \_\_\_\_ (2021), available at [https://www.supremecourt.gov/DocketPDF/19/19-1257/166687/20210119142504286\\_Brnovich%20-%20State%20and%20Local%20Officials%20Amicus%20with%20Appendix.pdf](https://www.supremecourt.gov/DocketPDF/19/19-1257/166687/20210119142504286_Brnovich%20-%20State%20and%20Local%20Officials%20Amicus%20with%20Appendix.pdf).

considered a Section 2 vote denial case.<sup>107</sup> Under that test, courts would engage with the way that race—and modern race discrimination—actually functioned and interacted with voting in a particular jurisdiction. In *Brnovich*, the Court did the opposite, expressly diminishing the importance of taking into account the persistent “differences in employment, wealth, and education” created by centuries of discrimination.<sup>108</sup> By codifying the Senate Factors, the John Lewis Voting Rights Act will refocus courts on the facts that matter.

*Second*, the Act expressly disclaims the so-called “guideposts” that the *Brnovich* majority created. Those guideposts make it more difficult for courts to identify and prohibit race discrimination in voting. As opposed to the Senate Factors, which directed courts to determine how race interacts with other factors to produce voting disparities, these guideposts downplay the significance of the hallmarks of modern voter suppression.<sup>109</sup> The guideposts suggest that truly discriminatory practices should be ignored if they impact a relatively small number of voters, ignoring the fact that modern vote suppression is often accomplished by layering a series of discriminatory provisions on top of one another.<sup>110</sup> One guidepost inexplicably freezes the voting practices of 1982 in time as a benchmark against which to judge modern practices, even though there was no early voting and virtually no mail voting in 1982, and there was plainly still a problem with race discrimination at the time.<sup>111</sup> Finally, the Court’s guideposts sanction a state legislature’s use of the specter of voter fraud to justify discriminatory rules.<sup>112</sup>

The John Lewis Voting Rights Advancement Act corrects course, putting courts back on the path originally intended by Congress in its quest to root out discrimination from our nation’s elections. The Act restores a body of federal case law that effectively complemented the preclearance regime for decades to accomplish marked improvements to our democracy.

#### **IV. Conclusion**

As the record before this Committee shows, the scourge of voting discrimination has exploded across the country, and it is especially acute and pervasive in selected jurisdictions. The John R. Lewis Voting Rights Advancement Act is carefully crafted to target and root out that discrimination where it is most persistent. The Act’s preclearance provisions are not only eminently reasonable, justified, and consistent with the Constitution; they are also necessary to stem the relentless rise of discriminatory voting changes. Those preclearance provisions, coupled with new provisions to strengthen Section 2 of the VRA, would restore the VRA to its full strength before the Supreme Court dramatically weakened the law in *Shelby County* and *Brnovich*. That strength is badly needed now.

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<sup>107</sup> See, e.g., *Veasey* 830 F.3d 216; *Mich. APRI*, 833 F.3d 656; *League of Women Voters of NC*, 769 F.3d 224; *Gonzalez*, 677 F.3d 383; *Sanchez*, 214 F. Supp. 3d 961. In *Frank v. Walker*, 768 F.3d at 755, the Seventh Circuit assumed for the sake of argument that the Senate Factors applied, but expressed skepticism about the test.

<sup>108</sup> 141 S. Ct. at 2343.

<sup>109</sup> See Sean Morales-Doyle, testimony on *The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses*.

<sup>110</sup> *Brnovich*, 141 S. Ct. at 2338–39.

<sup>111</sup> *Id.* at 2338.

<sup>112</sup> *Id.* at 2340.

Both Sections 2 and 5 of the Act would work in tandem with another critical piece of legislation, the Freedom to Vote Act (S. 2747),<sup>113</sup> to protect voting rights for every American. The Freedom to Vote Act would set national bright-line standards for fair, secure, and accessible elections, including universal access to early and mail voting, automatic and same day voter registration, and a ban on partisan gerrymandering. These and other key provisions address barriers that disproportionately affect Black, Latino, Asian, and Native voters, but without requiring litigants to prove racial discrimination, which is not always feasible. And by making it easier for everyone to vote, they would also address harmful voting restrictions not covered by the VRAA—such as those targeting students and other young voters. The Freedom to Vote Act would immediately override existing discriminatory laws and practices, in most cases allowing them to be addressed prior to an election, which will not always be possible even under Section 2. And the VRAA would provide a mechanism to challenge discriminatory changes that were not previously anticipated in the Freedom to Vote Act’s national standards. In short, both bills are necessary to guarantee all Americans the freedom to vote.<sup>114</sup>

We strongly urge Congress to enact the John Lewis Voting Rights Act, as well as the Freedom to Vote Act, into law.

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<sup>113</sup> S. 2747, 117th Cong. (2021).

<sup>114</sup> For more on why it is essential to pass both the John Lewis Voting Rights Act and the reforms in the Freedom to Vote Act, see Letter of Support – The For the People Act and the John Lewis Voting Rights Advancement Act (June 8, 2021), <https://civilrights.org/resource/letter-of-support-the-for-the-people-act-and-the-john-lewis-voting-rights-advancement-act/>.