



THE CONSENT OF THE GOVERNED: ENFORCING CITIZENS' RIGHT TO VOTE

**REPORT BY
THE TASK FORCE ON THE RULE OF LAW
AND THE ELECTION LAW COMMITTEE**

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Immediately after declaring the “unalienable rights” of “life, liberty and the pursuit of happiness,” the Declaration of Independence states that “to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.” From our nation’s beginning, it was the voters of the new American states who gave legitimacy to their state governments and, upon the ratification of the new Constitution, to their newly created federal government. Our nation’s recognition of those entitled to vote – to grant “just powers” to elected leaders and representatives – has broadened over time to include former slaves, women, Native Americans, naturalized citizens and those who do not own property. This broadened commitment to the right to vote has reflected the critical role of the electoral process in securing “the consent of the governed” that is the very foundation of our democracy and the basis for its legitimacy.

Yet the “consent of the governed” has been put at risk by the extraordinary array of actions described below that threaten to undermine the legitimacy of the American electoral process in both state and federal elections. For the reasons set forth in this report – and as previously voiced by our Association¹ – we believe it is the duty of lawyers throughout our nation to speak loudly and to act effectively, both individually and through their professional associations, to oppose the current actions by state legislatures and executives to limit our citizens’ right to vote or to disregard their votes if unfavorable to those who control the reins of government. As professionals pledged to uphold our state and federal Constitutions and the rule of law, we must not stand by as mere witnesses when the most fundamental principle of our democracy is undermined by representatives of any political party. Rather, we must use our professional standing and our roles in the communities we serve to remind our fellow citizens – on all sides of the political spectrum – of the critical role of our citizens’ right to vote as the very foundation of our democracy and the rule of law in our nation. If we fail to do so, we too will bear responsibility for the erosion of the democratic social contract that binds our nation together.

In the following sections of this report, we briefly summarize the wave of actions in state legislatures, executive chambers and even courts that threaten democracy and the rule of law in our country. We then discuss two major federal legislative proposals — H.R.4 (the “John Lewis Voting Rights Advancement Act” which has recently been revised and passed by the House of

¹ Sheila S. Boston and Stephen Kass, *New York City Bar Association Calls on American Lawyers to Support the Rule of Law*, NEW YORK CITY BAR ASSOCIATION (Dec. 24, 2020), available at: <https://www.nycbar.org/media-listing/media/detail/calling-american-lawyers-to-action-support-the-rule-of-law> (all websites last visited on September 10, 2021).

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

Representatives as the “John R. Lewis Voting Rights Advancement Act of 2021”) and H.R.1/S.1,² (the “For the People Act”) — aimed at prohibiting and, where necessary, remedying state actions that have the intention or the effect of curtailing the voting rights of any group of citizens. (A modified version of the For the People Act, known as the “Freedom to Vote Act,” was introduced in the Senate on September 14, 2021). We also address the importance of Senate action to reduce the paralyzing effect of its current “filibuster” rules so that these, and other, issues of supreme importance to our nation can be debated and acted upon in accordance with fair-minded and reasonable democratic procedures. Finally, we turn to the role of lawyers, bar associations and law schools throughout our country in resisting the erosion of democracy and rebuilding a sense of public trust in the impartiality of our electoral process.

I. STATE LEGISLATION SUPPRESSING VOTING RIGHTS

A. Laws Restricting Voting Access

In the first half of 2021, there has been legislation introduced in nearly every state to restrict access to voting. Some of these provisions are now enshrined in law, and others are bills in various stages of the legislative process.³

Specifically, the Legislatures of Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Nevada, Oklahoma, Texas, Utah, and Wyoming have all enacted laws restricting voting in a variety of ways. Some make it more difficult to vote by mail, by, for example: shortening the timeframe to request mail ballots; making it more difficult to automatically receive a mail ballot by culling absentee voting lists or prohibiting officials from sending ballots without affirmative requests for them; making it more challenging for voters to deliver their mail ballots by shortening delivery deadlines, prohibiting voter assistance

² The New York City Bar Association has consistently supported efforts towards voter reform in New York State that mirror H.R.1. The Association’s Election Law Committee has, for example, long advocated for “no excuse” absentee voting. *See e.g.*, Report on Legislation by the Election Law Committee and Government Ethics and State Affairs Committee (updated and reissued May 2021), *available at*: <https://s3.amazonaws.com/documents.nycbar.org/files/2017377-NoExcuseAbsenteeVoting.pdf> (“A no-excuse absentee voting system is likely to reduce both poll lines and the administrative burden on election officials, thereby decreasing the total cost of administering elections.... [A “no-excuse” system also] removes the principal basis for challenging absentee ballots, therefore the number of challenged and litigated ballots will decrease”). The Election Law Committee has also advocated for early voting, noting that early voting would also ease the burden placed on election administrators during a high volume Election Day. *See e.g.*, “Support for Early Voting in New York State,” (reissued Jan. 2019), *available at*: <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-for-early-voting-in-new-york-state>. And the Committee has strongly advocated for New York to permit election day registration. *See e.g.*, Assembly Hearing Testimony, “Improving Opportunities to Vote in New York State” (Nov. 2018), *available at*: <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/assembly-hearing-changes-to-voting-in-new-york>. Currently, state law provides that a new voter must register twenty-five days in advance of the election (even though the state constitution permits registration up until the tenth day prior to an election). The Committee has noted that these deadlines are restrictive and dissuade potential voters from exercising their rights to vote if they fail to act consistently with these arbitrary and extensive periods of time. Expanded voter registration and enrollment procedures would allow greater participation and have the potential to improve turnout. *See id.*

³ *See* “Voting Laws Roundup: July 2021,” BRENNAN CENTER FOR JUSTICE (July 22, 2021), *available at*: <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021>.

in returning ballots, or limiting the availability of drop boxes; imposing stricter signature requirements for mail voting; or otherwise imposing stricter or new voter identification laws for mail voting.⁴ The most recent legislature to take such action was Texas, which in a special legislative session in late August imposed highly restrictive requirements that combine many of these measures and together make Texas among the leaders in voter suppression.⁵

Some of the new laws also make in-person voting more difficult by, for example: imposing new or stricter voter identification requirements for voting in person; increasing the likelihood of voter roll purges; eliminating election day registration; limiting the availability of polling places; reducing polling location hours; shortening the early voting period, limiting election officials' discretion to offer additional early voting locations, and standardizing early voting dates and hours, and thus reducing the hours of many locations.⁶ Some states have even banned "line warming," whereby food and water are provided to voters waiting in long lines to cast their ballots.⁷

B. Proposed Legislation Moving Through State Legislatures

In many other states, legislation to restrict voting has been introduced and is somewhere in the legislative process, but has not yet been enshrined into law. These states include Michigan, Minnesota, Pennsylvania, Rhode Island, Texas, and Wisconsin. Some of these bills would restrict voting by mail, make it more difficult to obtain absentee ballots, prohibit unsolicited mail ballots, and make it more difficult to obtain assistance in submitting ballots. Other pending bills would impose new or stricter voter identification requirements for voting by mail and/or in person. Some would expand voter purging practices, leading to the risk of improper removal of voters from the

⁴ See *id.*

⁵ See J. David Goodman, Nick Corasaniti, and Reid J. Epstein, "Texas GOP Passes Election Bill, Raising Voting Barriers Even Higher," THE NEW YORK TIMES (Aug. 31, 2021; updated Sept. 7, 2021), available at: <https://nytimes.com/2021/08/31/us/politics/texas-voting-rights-bill.html>.

⁶ See "Voting Laws Roundup: May 2021," BRENNAN CENTER FOR JUSTICE (May 28, 2021), available at: <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

⁷ See "2021 Round-Up: Efforts to Restrict Voting in the States," Democracy Docket (May 21, 2021), available at: <https://www.democracymarket.com/news/2021-round-up-efforts-to-restrict-voting-in-the-states/>.

New York State Election Law does not prohibit giving food or water to voters waiting on line, within certain parameters. A provision added by Chapter 414 of the 1992 Session Laws allows an exception for items costing less than \$1, as long as there is no identification of the person or entity providing the refreshment:

§ 17-140. Furnishing money or entertainment to induce attendance at polls. Any person who directly or indirectly by himself or through any other person in connection with or in respect of any election during the hours of voting on a day of a general, special or primary election gives or provides, or causes to be given or provided, or shall pay, wholly or in part, for any meat, drink, tobacco, refreshment or provision to or for any person, other than persons who are official representatives of the board of elections or political parties and committees and persons who are engaged as watchers, party representatives or workers assisting the candidate, ***except any such meat, drink, tobacco, refreshment or provision having a retail value of less than one dollar, which is given or provided to any person in a polling place without any identification of the person or entity supplying such provisions,*** is guilty of a Class A misdemeanor.

ELN § 17-140 (emphasis added). So, for example, giving voters a cup of water or some pretzels or chips is permissible.

rolls, and others would increase barriers to voter registration. Some order reviews of voter registration databases in counties with large populations, targeting Democratic-leaning cities.^{8,9}

C. Undermining Election Results and the Electoral Process

Numerous states also have enacted laws that potentially undermine the integrity of election results, or that jeopardize the very existence of our electoral process. Some states, including Georgia, Iowa, and Montana, have enacted laws expanding the powers and/or access of poll watchers, which may lead to voter intimidation and harassment at the polls. Other new laws punish local election officials for technical mistakes, by imposing fines, stripping the officials of power, and creating new criminal laws applicable to election officials.¹⁰

In response to decisions by many election officials made during the Covid pandemic to make voting easier and safer, many states have proposed—and some have enacted—laws limiting executive and local power, for example by disallowing emergency actions without legislative approval, or by prohibiting local officials from any suspension or modification of election law whatsoever. For example, Georgia’s recently passed law gives the legislature the ability to choose the members of the state board of elections, including removing the voting power of the elected secretary of state, and giving the board unprecedented power to remove and replace local election officials, and to allow unlimited challenges to voter eligibility that has the potential to significantly chill participation.¹¹ It now appears that the legislature has ordered a “performance review” of the election board in Fulton County, the first step under the new legislation in replacing election officials with partisans who would be selected by the legislative majority.¹²

Florida’s sweeping law potentially gives the governor power to appoint partisans to the elections board.¹³ Kansas legislators overrode the governor’s veto to pass a law prohibiting the

⁸ See “Voting Laws Roundup: May 2021,” BRENNAN CENTER FOR JUSTICE (May 28, 2021), *available at*: <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>; *see also* Taylor Romine and Rachel Janfaza, “Michigan Senate passes 3 voting bills with new restrictions,” CNN (June 16, 2021), *available at*: <https://www.cnn.com/2021/06/16/politics/michigan-senate-passes-voting-bills/index.html>; Marie Albiges and Jonathan Lai, “GOP’s major election overhaul advances in Pa. House as Democrats call it a ‘fare’” SPOTLIGHT PA (June 15, 2021), *available at*: <https://www.spotlightpa.org/news/2021/06/pa-gop-election-law-overhaul-voter-id-advances-house/>.

⁹ It should also be noted that many laws expanding voting access have been introduced as well, and that legal challenges to certain of the restrictive voting laws are underway. *See* “Voting Laws Roundup: July 2021,” BRENNAN CENTER FOR JUSTICE (July 22, 2021), *available at*: <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021>.

¹⁰ *See* “Voting Laws Roundup: May 2021,” BRENNAN CENTER FOR JUSTICE (May 28, 2021), *available at*: <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

¹¹ *See* Anthony Izaguirre, “GOP lawmakers seek greater control over local elections,” AP NEWS (Mar. 27, 2021), *available at*: <https://apnews.com/article/donald-trump-politics-legislature-local-elections-bills-73b331234cec8c966bb2308f6ed1696e>.

¹² *See* Nick Corasaniti, “Georgia Republicans edge toward a takeover of elections in Fulton County, the state’s largest,” THE NEW YORK TIMES (July 29, 2021), *available at*: <https://www.nytimes.com/2021/07/29/us/politics/georgia-republicans-elections-fulton-county.html>.

¹³ *See* Nathaniel Rakich and Elena Mejia, “Where Republicans Have Made It Harder To Vote (So Far),” FIVETHIRTYEIGHT (May 11, 2021), *available at*: <https://fivethirtyeight.com/features/republicans-have-made-it>.

executive and judicial branches of government from altering election law, giving the legislature exclusive jurisdiction in that area.¹⁴ In Arizona, the law now strips the Secretary of State’s legal authority to oversee elections, giving that power instead to the attorney general. The legislation shifts the authority only through January 2023, when new elected officials would take office after the next election.¹⁵ Arkansas has passed a law allowing the state board of elections to decertify elections results if they find violations of voter registration requirements or election laws and even, in “severe” cases, to take over county election operations.¹⁶

D. Legislative Restrictions on State Courts

Finally, years-long efforts in many states to undermine the independence of state courts reached an unfortunate crescendo in 2021. As of mid-May, 26 states had proposed 93 bills that would politicize or undermine the independence of state courts. At least some of these legislative efforts appeared to be directly responsive to the role of state courts in protecting voting during the 2020 election. For example, eight states’ bills were proposed that weakened state courts’ power in election-related cases, created new tribunals to hear such cases, or targeted individual judges for decisions they made in election cases. And in 21 states, proposed legislation would impact election cases (among others) by changing how judges are selected, which courts hear cases involving the state, or how judicial decisions get enforced.¹⁷

In our judgment, these new laws and legislative proposals collectively constitute a clear and present threat to our democracy, striking at the very heart of our nation’s Constitutional government and treating the “consent of the governed” as an obstacle to be circumvented, overridden or ignored. They demand a Congressional remedy, as discussed below.

II. THE VOTING RIGHTS ACT OF 1965

When the Voting Rights Act¹⁸ (VRA) was enacted in 1965, our nation appeared to have turned a corner in realizing the promise of democracy for all citizens under the Fourteenth and Fifteenth Amendments to the United States Constitution. Racially discriminatory voting suppressive policies and laws had been found to be “an insidious and pervasive evil” by an overwhelming majority of the Congress,¹⁹ and states and localities which had historically pursued

[harder-to-vote-in-11-states-so-far/](#).

¹⁴ *See id.*

¹⁵ *See* Michael Wines, “In Arizona, G.O.P. Lawmakers Strip Power From a Democrat,” THE NEW YORK TIMES (June 25, 2021), available at: <https://www.nytimes.com/2021/06/25/us/Arizona-Republicans-voting.html>.

¹⁶ *See* Michael R. Wickline and Rachel Herzog, “Bills to modify state’s laws pertaining to elections pass,” ARKANSAS ONLINE (Apr. 2, 2021), available at: <https://www.arkansasonline.com/news/2021/apr/02/bills-to-modify-laws-pertaining-to-elections-pass/>.

¹⁷ *See* Patrick Berry, Alicia Bannon, and Douglas Keith, “Legislative Assaults on State Courts,” BRENNAN CENTER FOR JUSTICE (May 19, 2021), available at: <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2021>.

¹⁸ Pub. L. 89-110, 79 Stat. 437, 52 USC §§ 10101, 10301-10314, 10501-10508, 10701-10702 (1965). Sections of the VRA will be referenced by their section of the act rather than their codification, for simplicity.

¹⁹ The vote after conference committee review was 79-18 in the Senate and 328-74 in the House of Representatives.

them “through unremitting and ingenious defiance of the Constitution” were put on notice that such measures would no longer be tolerated.²⁰ In particular, under Section 4(b) of the VRA, jurisdictions with significant histories of racially discriminatory voting laws and practices were designated “covered jurisdictions”²¹ and required, under Section 5 of the VRA, to secure advance federal approval of any changes in their voting laws and policies prior to such laws going into effect. The failure of earlier case-by-case court adjudications to provide meaningful relief was widely recognized. For the next forty years, Congress continued this commitment to expanding and assuring the right to vote for racial and language minorities by reauthorizing the VRA without any substantial dissent, most recently doing so in 2006, with nearly unanimous support.

With demographic changes in the population, and after the election of President Obama in 2008 produced a dramatic increase in minority voter turnout, support for expansion of the right to vote began to wane.²² In 2013, the United States Supreme Court, in a 5-to-4 ruling in *Shelby County, Alabama v. Holder*,²³ declared that the provisions of Section 4 of the VRA designating the covered jurisdictions subject to the preclearance requirement of Section 5 were unconstitutional. Since *Shelby*, the landscape for protection of minority voting rights has changed enormously. As discussed above, since the November 2020 election, legislation has been introduced in nearly every state to dilute or diminish the ability of vulnerable populations, including racial and language minorities, as well as seniors, youth and the disabled, to cast their ballots.²⁴ The long-held presumption of the right to vote and the need to protect it seems to be giving way to the pre-1965 notion that voters, especially those of color, must overcome various barriers before being entitled to exercise their franchise.²⁵

In addition, in a decision at the end of its recent term, *Brnovich v. Democratic National Committee*,²⁶ the Supreme Court for the first time considered the application of VRA Section 2, the statute’s residual operative provision after *Shelby County*, to two Arizona laws restricting the time, place and manner of voting. The 6-3 ruling dramatically lowered the threshold for restrictive state voting laws to pass muster under the VRA, significantly diminishing the statute’s ability to protect minority voters’ rights, even in after-the-fact litigation. Section III of this report describes the ways in which these two Supreme Court decisions have substantially weakened the protection afforded by the VRA.

²⁰ See *South Carolina v Katzenbach*, 383 US 301, 309 (1966).

²¹ VRA §4(b).

²² Remarks of Dale Ho, Esq., “Advocating for the Rule of Law,” New York State Bar Association webinar, June 3, 2021.

²³ *Shelby County, Ala. v. Holder*, 570 US 529 (2013).

²⁴ The Brennan Center for Justice reports that after the unprecedented voter turnout in the November 2020 elections, more than 400 voter suppressive bills were introduced in 49 states during the 2021 legislative session, and that by July 22, 2021, legislators in 18 states had enacted 30 new restrictive voting laws, surpassing the most recent period of significant voter suppressive bills in 2011. See “Voting Laws Roundup: July 2021,” BRENNAN CENTER FOR JUSTICE (July 22, 2021), available at: <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021>.

²⁵ Remarks of Professor Ted Shaw, Esq., “Advocating for the Rule of Law,” New York State Bar Association webinar, June 3, 2021.

²⁶ *Brnovich v. Democratic National Committee*, No. 19-1257, slip op., S.Ct., 2021 WL 2690267 (July 1, 2021).

The VRA was a landmark enactment designed to secure the voting rights guaranteed to all U.S. citizens by the Fourteenth and Fifteenth Amendments adopted after the Civil War. Both had given the Congress the power to enforce their guarantees “by appropriate legislation,”²⁷ but it took a century before this most momentous and effective voting rights provision was enacted to fulfill the constitutional promise that all Americans would be protected against racial discrimination at the ballot box. As explained by the U.S. Supreme Court in upholding the constitutionality of the VRA one year after its enactment, in considering passage of the act, Congress “explored with great care the problem of racial discrimination in voting. . . .” and concluded that it faced “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”²⁸ Litigation under previous statutes had proven ineffectual in combating racially discriminatory voting laws, as case-by-case court remedies were expensive, time consuming and failed to prevent those jurisdictions bent on denying voting rights from adopting new restrictive requirements not previously covered by any court orders.²⁹ The Court observed that “Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment,”³⁰ and adopted legal mechanisms which would afford no quarter to those seeking to suppress the vote.

The key provisions of the VRA included Section 2, which applied throughout the nation, prohibiting policies and practices which interfered with minority voters’ exercise of the franchise. Under Section 2, any jurisdiction was subject to suit if it enacted any prerequisite to voting “to deny or abridge the right of any citizen of the United States to vote” on account of race, color or membership in a minority language group.³¹ Section 2 requires the plaintiff to collect evidence, commence suit, endure litigation delays and carry the ultimate burden of demonstrating that the state or locality had engaged in a pattern or practice which had the intent or result³² of denying members of a racial or language minority an equal opportunity to participate in the political process in violation of the Fifteenth Amendment.³³ However, the Section 2 process is generally too time-

²⁷ U.S. Const. Amends. XIV, §5; XV, §2.

²⁸ *Katzenbach*, 383 US at 308-09.

²⁹ *Id.* at 314.

³⁰ *Id.* at 309.

³¹ VRA §2.

³² Originally, the VRA required plaintiffs to prove an invidious *purpose* (discriminatory intent) to obtain relief under Section 2. As part of the 1982 reauthorization, Congress reviewed the history of litigation under that section and amended the VRA to permit plaintiffs to meet their burden by a showing that the jurisdiction’s pattern or practice had the *result* of denying equal voting opportunities to racial minorities and minority language groups. See <https://www.justice.gov/crt/section-2-voting-rights-act#enforce>.

³³ VRA §2, as amended in 1982, currently provides in relevant part:

“(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in [section 10303\(f\)\(2\)](#) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally

consuming and expensive to enable private citizens to successfully commence suit against an offending jurisdiction, and voters can suffer disenfranchisement in multiple voting cycles while a Section 2 suit brought by the Attorney General is pending.

In recognition of these shortcomings in the reactive litigation process which had been made evident by previous federal enactments, Congress also included in enacting the VRA a new proactive preclearance requirement. Certain states and localities having a history of racially discriminatory voting practices would be accorded special coverage under the new law³⁴ and would have to obtain advance federal approval prior to making any changes in their election laws. This provision was designed “to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”³⁵ Section 5 of the VRA requires any “covered jurisdiction” specified in Section 4(b) that seeks to have its new law survive the preclearance process shall commence a declaratory judgment action before a three-judge federal district court³⁶ in the District of Columbia and carry the burden of persuading either the court or the United States Department of Justice (DOJ) that the proposed enactments were neither discriminatory in purpose nor in effect.³⁷ Until the covered jurisdiction does so, its proposed new voting law cannot go into effect.

The adoption of the preclearance provision had dramatic effects on restoring voting rights of racial minorities. As explained by Justice Ginsburg:

After a century’s failure to fulfill the promise of the Fourteenth and
Fifteenth Amendments, passage of the VRA finally led to signal

open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

³⁴ VRA §4(b). The formula established a particular state or subdivision as a “covered jurisdiction” if it was one in which:

“(1) the Attorney General determines maintained on November 1, 1964, any test or device [for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color], and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.”

³⁵ *Katzenbach*, 383 US at 328.

³⁶ *See* 28 USC §2284.

³⁷ VRA §5. The preclearance provision of Section 5 provides:

“Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission”

improvement on this front. “The Justice Department estimated that in the five years after [the VRA’s] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965.” Davidson, *The Voting Rights Act: A Brief History*, in *Controversies in Minority Voting* 7, 21 (B. Grofman & C. Davidson eds. 1992). And in assessing the overall effects of the VRA in 2006, Congress found that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.” Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (hereinafter 2006 Reauthorization), Section 2(b) (1), 120 Stat. 577.³⁸

Although great progress had been made in increasing access to the ballot, chiefly through the preclearance process, and the end of poll taxes, literacy tests and similar “first generation” exclusionary devices, “second generation” measures designed to dilute the votes of minorities, such as racial gerrymandering and at-large voting in cities with large Black minority populations, were actively being used by some of the same jurisdictions which had been covered by the Section 4(b) formula in 1965.³⁹ Accordingly, when the VRA came up for reauthorization by Congress in 1970, 1975, 1982 and 2006, on each occasion it was overwhelmingly approved with bipartisan support, using the same Section 4(b) formula for covered jurisdictions as in the 1965 VRA.⁴⁰

III. THE SUPREME COURT DECISIONS EVISCERATING THE VRA

Despite, or because of, the effectiveness of the VRA in reducing voting suppression aimed at minority voters, opponents continued to seek to dilute that statute’s effectiveness by attacking its two principal provisions, the Sections 4 and 5 preclearance requirement and the Section 2 general prohibition on efforts to suppress minority voting. Unfortunately, two decisions by the Supreme Court have done exactly that, as discussed below.

³⁸ *Shelby County*, 570 US at 562-63 (Ginsburg, J., dissenting).

³⁹ *Id.*

⁴⁰ See note 34, *supra*, for the text of the statutory formula. See H. Rep. Comm. on the Judiciary, *Voting Rights Advancement Act of 2019*, H.Rep. 116-317 (Nov. 29, 2019) (2019 House Judiciary Committee Report), at 14. The jurisdictions that were covered changed to some degree over the 48 year history of the VRA, but initially included Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 26 counties in North Carolina and one county in Arizona. 30 Fed. Reg. 9897 (August 6, 1965); *Katzenbach*, 383 U.S. at 318.

A. *Shelby County, Ala. v. Holder* (2013)

i. *Majority Opinion*

In 2013, the Supreme Court again had occasion to consider the constitutionality of the preclearance provision of the VRA, along with its formula for determining covered jurisdictions. In *Shelby County*, the Court struck down Section 4 of the VRA as unconstitutional and held that its formula could no longer be used as a basis for subjecting jurisdictions to preclearance.

The majority began its analysis by acknowledging that the Supremacy Clause of the Constitution made congressional enactments “the supreme Law of the Land,”⁴¹ but noted that it gave Congress no power to invalidate state laws. Further, the Tenth Amendment granted states power to regulate their own elections, subject to Congress’ power to determine the time and manner of state elections for the U.S. Senate and House of Representatives.⁴² The focus of the majority was on the principle of “equal sovereignty,” a concept the Court had discussed in its earlier VRA jurisprudence in a case called *Northwest Austin*,⁴³ and which it had there suggested might raise problems of federalism at some future point under the statute. In general, the Court explained, Congress was not free to differentiate among states in imposing extraordinary and disparate burdens, given the equal sovereignty of the states, absent exceptional conditions.⁴⁴ Citing *Northwest Austin*, the Court reiterated that the VRA “imposes current burdens and must be justified by current needs.”⁴⁵ Continuing, the Court further opined that any departure from equal treatment of all states must be sufficiently related to *current* conditions to pass constitutional muster. It noted that that had been the case when it upheld the VRA’s preclearance mechanism the year after its enactment in *Katzenbach*, citing the evidence Congress had found of the use of tests and devices and a low voting rate in the 1964 presidential election, rendering the original coverage formula of Section 4(b) “rational in both practice and theory” as its stringent remedies were directed to the jurisdictions where voting rights discrimination was most flagrant at that time.⁴⁶

The Court then proceeded to cite statistics showing that both voter registration and turnout had improved in the six original covered states in the intervening 50 years, without any commensurate adjustment to the Section 4(b) formula for determining covered jurisdictions. The Court criticized the formula for determining which jurisdictions were covered as based on “decades old data and eradicated practices,”⁴⁷ in that the first generation tests and devices at issue in 1965, like literacy tests, had been banned for decades and racial disparity in turnout was no longer evident. Congress’s reliance on second-generation barriers to voting, as opposed to the tests and devices which abridged access and the disproportionately low voter turn-out upon which

⁴¹ *Shelby County*, 570 US at 542, citing US Const., Art. VI, cl. 2.

⁴² US Const., Art I, §4.

⁴³ See *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 US 193 (2009).

⁴⁴ *Shelby County*, 570 US at 545, citing *Katzenbach*, 383 US at 334.

⁴⁵ *Shelby County*, 570 US at 536, citing *Northwest Austin*, 557 US at 203.

⁴⁶ *Shelby County*, 570 US at 546, citing *Katzenbach*, 383 US at 330.

⁴⁷ *Shelby County*, 570 US at 551.

the original enactment had been based, merely further demonstrated the “irrationality” of continued reliance on the coverage formula of Section 4(b), the Court stated.⁴⁸

The Court made a further substantive distinction between the discriminatory conduct which underlay the original coverage formula and the 2006 record of voting rights abridgement:

Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.⁴⁹

The Court then identified a “more fundamental” problem with the 2006 reauthorization.⁵⁰ To invoke its authority to act under the Fourteenth and Fifteenth Amendments, the Court held, “Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past.”⁵¹ In contrast to *Katzenbach*, the Court found, the DOJ in *Shelby County* had not even attempted to demonstrate the continued relevance in practice or in theory of the formula to the current problems. While acknowledging that Congress had compiled an extensive record (“thousands of pages”) in its hearings on reauthorization of the VRA in 2006, the Court concluded that it had failed to “shape a coverage formula grounded in current conditions”⁵² but instead “reenacted a formula based on 40-year-old facts having no logical relation to the present day.”⁵³ It did not opine on whether the 2006 record would have justified updating the coverage formula.

Citing Congress’s failure to update the coverage formula to tie it to current conditions, the Court declared Section 4(b) unconstitutional and no longer available for use in subjecting jurisdictions to preclearance. The Court expressly stated that it was not invalidating the preclearance mechanism of Section 5 (nor the national ban on racial discrimination in voting of Section 2), just the formula on which preclearance would be applied, and invited Congress to draft a new formula, based on current conditions justifying such extraordinary relief.⁵⁴

ii. *Dissenting Opinion*

Justice Ginsburg, writing for the four dissenting justices, noted the Court’s recognition since *Katzenbach* that preclearance was crucial to effective enforcement of Fifteenth Amendment rights. Although significant progress had been made, the large numbers of proposed election law changes proposed by covered jurisdictions since 1965 and which had been rejected by the DOJ

⁴⁸ *Shelby County*, 570 US at 554.

⁴⁹ *Shelby County*, 570 US at 554.

⁵⁰ *Shelby County*, 570 US at 554.

⁵¹ *Shelby County*, 570 US at 553.

⁵² *Shelby County*, 570 US at 553-54.

⁵³ *Shelby County*, 570 US at 554.

⁵⁴ *Shelby County*, 570 US at 557.

demonstrated the continuing vitality of the original 4(b) formulation.⁵⁵ Noting that the House and Senate Judiciary Committees had held a combined 21 hearings and produced 15,000 pages of legislative record, Justice Ginsburg cited “countless examples of flagrant racial discrimination,” including systematic evidence of continued intentional racial discrimination throughout covered jurisdictions establishing the continued need for preclearance based upon the original formulas.⁵⁶ She explained that second-generation barriers to voting, such as racial gerrymandering, at-large voting, and incorporating majority white suburbs into urban districts with majority black populations, significantly diluted the vote of racial minorities. While these tactics were more subtle than those which Congress had faced in 1965, they produced the same results, and had been recognized by the Court as doing so.⁵⁷ Moreover, the majority was ignoring the second-generation barriers which had been implemented in covered jurisdictions as replacements for the now-banished first generation laws which had originally prompted the preclearance regimen.⁵⁸

The dissenters also criticized the majority for failing to consider the substantial deference given to Congress by the Fourteenth and Fifteenth Amendments to enforce voting rights by appropriate legislation, noting that this was the first time the Court had refused to respect Congress’ chosen remedies.⁵⁹ The dissent argued that the majority had not changed the applicable standard of review from the rational basis test the Court had adopted in *Katzenbach*, i.e., that Congress could use any rational means to advance a legitimate objective, yet failed to apply that test.⁶⁰

The dissent also took issue with the majority’s reading of the equal sovereignty doctrine under *Katzenbach*, observing that the Court had there held that the doctrine “‘applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared,’”⁶¹ and that the majority’s reliance on dictum in *Northwest Austin* to apply the doctrine in a wholly new context was misplaced. Justice Ginsburg also noted other instances in which federal law treats states disproportionately.⁶²

Finally, reviewing the deep 2006 record before Congress, the dissent complained that the majority failed to consider that covered jurisdictions, such as Shelby County, had continued to display instances of intentional racial discrimination, showing the need for continued application of the existing preclearance formula.⁶³

⁵⁵ *Shelby County*, 570 US at 562-63 (Ginsburg, J., dissenting), citing *City of Rome v United States*, 466 US 156, 181 (1980). The dissent noted that DOJ had raised more objections to proposed laws in covered states between 1982 and 2004 (646) than it had between 1965 and 1982 (490), and had blocked 700 voting changes due to discrimination from 1982 - 2006. *Id.* at 571.

⁵⁶ *Shelby County*, 570 US at 565 (Ginsburg, J., dissenting).

⁵⁷ *Shelby County*, 570 US at 563-64 (Ginsburg, J., dissenting), citing, *inter alia*, *Reynolds v Sims*, 377 US 533 (1964).

⁵⁸ *Shelby County*, 570 US at 592 (Ginsburg, J., dissenting).

⁵⁹ *Shelby County*, 570 US at 566, 569 (Ginsburg, J., dissenting).

⁶⁰ *Shelby County*, 570 US at 568-69 (Ginsburg, J., dissenting), citing *Katzenbach*, 3853.

⁶¹ *Shelby County*, 570 US at 587 (Ginsburg, J., dissenting), quoting *Katzenbach*, 383 US at 328-29.

⁶² *Shelby County*, 570 US at 587-88 (Ginsburg, J., dissenting).

⁶³ *Shelby County*, 570 US at 585, 591 (Ginsburg, J., dissenting).

B. *Brnovich v Democratic National Committee* (2021)

During the early years after its enactment, VRA Section 2 was infrequently invoked, and only in cases involving claims of voter dilution, generally involving districting.⁶⁴ After the Court's decision in *Shelby County*, however, it became the sole remaining operational provision available to protect minority voting rights, although that protection could only become available after the challenged legislation was already in effect. The *Brnovich* case was the Supreme Court's first opportunity to apply Section 2 to state laws involving the time, place and manner of voting.

The case involved a challenge under VRA Section 2 to two aspects of Arizona's voting scheme: the first, its policy of discarding any ballots cast in person on election day at a precinct voting location other than the one to which the voter has been assigned; and the second, its law making it a crime for any person other than a voter's family, household member or caregiver, or a postal worker or elections official, to collect an early ballot on behalf of the voter. Both provisions were challenged on the ground that they had an adverse and disparate effect on the state's American Indian, Hispanic and African-American citizens' ability to vote, in violation of VRA Section 2 and the Fifteenth Amendment. The Court upheld both restrictions, reversing an *en banc* decision of the 9th Circuit Court of Appeals.⁶⁵

i. *Majority Opinion*

Justice Alito, writing for the six-justice majority, preliminarily declared that the Court would not be announcing a test to govern all VRA Section 2 challenges to election rules respecting time, place and manner of voting. Rather, it would identify certain "guideposts" useful for resolution of the controversies then before it.⁶⁶

The Court began its analysis by examining the text of Section 2, as amended in 1982. The "core" requirement found in Section 2(b), it said, was that voting be "equally open" to all voters regardless of race, and that the language further defined violation of the section as occurring "only where 'the political processes leading to nomination or election' are not '*equally open* to participation' by members of the relevant protected group '*in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.'"⁶⁷ While the majority acknowledged that an equal opportunity required a reviewing court to consider to some degree the minority voters' *ability to use* the equally open means, whether the *process* itself was "equally open" was the "touchstone" of the inquiry.⁶⁸ Further, it said that "any circumstance" having a bearing on whether the voting process was

⁶⁴ *Brnovich*, slip op. at 4, n. 2.

⁶⁵ *Democratic National Committee v Hobbs*, 948 F.3d 989 (9th Cir. 2020) (*en banc*). The Ninth Circuit invalidated both the out-of-precinct policy and the third-party ballot collection rule under the results test of §2, and the ballot collection rule under the section's intent test as well as under the Fifteenth Amendment. *Id.* at 1046.

⁶⁶ *Brnovich*, slip op. at 12-13.

⁶⁷ *Brnovich*, slip op. at 14, quoting VRA §2(b).

⁶⁸ *Brnovich*, slip op. at 15.

“equally open” and afforded “equal opportunity” may be considered in the judicial analysis.⁶⁹ The Court adopted a dictionary definition of “opportunity” as ““a combination of circumstances, time, and place suitable or favorable for a particular activity or action.””⁷⁰

Justice Alito then offered a non-exhaustive list of the types of circumstances which would be appropriate for consideration in time, place and manner inquiries under Section 2: 1) the size of the burden being imposed; 2) the extent to which a rule departs from the standard practice at the time of the 1982 amendment to Section 2(b) and whether the rule has a long pedigree; 3) the extent of the disparate impact on the minority; 4) other opportunities for voting provided by the state’s system; and 5) the strength of the state’s interest in the rule.⁷¹ Harkening back to the Court’s first case construing the amended VRA Section 2, *Thornburg v Gingles*,⁷² and its statement that “[t]he essence of a Section 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities” for minority and non-minority citizens to elect their chosen representatives, the Court discounted the relevance of the test factors announced in that vote dilution case. Those factors were derived from the Senate’s contemporaneous report during the reauthorization process (known as the Senate or *Gingles* factors) and included historical discrimination and its persisting effects. The *Brnovich* majority found, however, that in cases involving time, place and manner restrictions, those effects were “much less direct” than the five it had just listed.⁷³ The opinion went on to reject application of the disparate impact models employed in Title VII and Fair Housing Act cases, saying that a showing of necessity would be inappropriate in the voting rights context because it would invalidate many “neutral” voting rules having long pedigrees and would transfer election regulation from the states to the federal courts.⁷⁴ It concluded that the text of Section 2 does not require the state to demonstrate either an absolute necessity for the provision or the absence of any less restrictive alternative.⁷⁵ The Court noted that the 1982 amendments to Section 2 focused on “blatant direct impediments to voting,” and not “every facially neutral time, place and manner voting rule in existence,” as it characterized the dissent as doing.⁷⁶ No mention was made of Congress’ broad power to regulate time, place and manner of elections under the Elections Clause of the Constitution.⁷⁷

⁶⁹ *Brnovich*, slip op. at 16.

⁷⁰ *Brnovich*, slip op. at 15 (citation omitted).

⁷¹ *Brnovich*, slip op. at 15-19.

⁷² *Thornburg v Gingles*, 478 US 30 (1986).

⁷³ *Brnovich*, slip op. at 20, citing *Gingles*, 478 US at 36-37.

⁷⁴ *Brnovich*, slip op. at 20-21.

⁷⁵ *Brnovich*, slip op. at 29.

⁷⁶ *Brnovich*, slip op. at 23, n. 15, quoting S. Rep. 97-417, at 10 (1982).

⁷⁷ U.S. Const., art I, §4, provides:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.”

Analyzing the Arizona rules through its five-factored lens, the *Brnovich* Court held that neither Arizona policy violated VRA Section 2. Most notably, the majority upheld the state’s out-of-precinct voting policy because even though it made it “marginally harder” for racial minorities in Arizona to find their assigned voting location and avoid having their entire ballot discarded, the state offered other “easy” ways to vote, and found the resulting disparate impact on minority voters to be small.⁷⁸ It noted that out-of-precinct rules had a long pedigree and rejecting ballots cast at the wrong location was a penalty in wide use nationally. It rejected the view of the Court of Appeals that the state had failed to show why the less restrictive alternative of counting the national and statewide contests on ballots cast in the wrong location would be detrimental to election integrity, opting instead to credit the state’s claims that the rule reduced waiting time at the polls, affording closer polling locations to voters’ homes, and reduced confusion by insuring voters only received ballots with contests on which they were eligible to vote.⁷⁹

As for the third-party collection provision, the Court criticized the plaintiffs for failing to offer statistically supported evidence as to how much more likely minorities were to use third parties to return their ballots than were non-minorities, discounting both the anecdotal testimony presented at trial and the district court’s observations about an actual disparate impact.⁸⁰ The Court again noted that Arizonans have a number of ways to submit their ballots early. With respect to the state’s justifications for the measure, the majority criticized the Ninth Circuit’s finding that the state had failed to meet its burden because it had offered no evidence of early ballot fraud by third-party collectors in Arizona, and found sufficient unrelated reporting by a federal election reform commission more than a decade earlier that absentee ballot collection *could* be susceptible to fraud and voter intimidation, and opined that the state was not obligated to wait for evidence of fraud before taking action to prevent it.⁸¹ This analysis, the majority found, demonstrated that Arizona had shown a “compelling state interest” in enactment of the ballot collection measure, notwithstanding its disparate impact, which the majority characterized as “modest.”⁸²

ii. *Dissenting Opinion*

Justice Kagan, writing for the three dissenters, began by referencing the Court’s observation in *Katzenbach* that the VRA was enacted “[b]ecause States and localities continually ‘contriv[ed] new rules,’ mostly neutral on their face but discriminatory in operation, to keep minority voters from the polls. . . [and] [b]ecause ‘Congress had reason to suppose’ that States would ‘try similar maneuvers in the future’ [by] ‘pour[ing] old poison into new bottles’ to suppress minority votes.”⁸³ Much of the VRA’s success in reducing discrimination was attributable to its flexibility in meeting new forms of discrimination, which Justice Kagan described as “whack-a-mole,” by use of the preclearance process of Section 5.⁸⁴ She described the crudest and most direct

⁷⁸ *Brnovich*, slip op. at 27-28.

⁷⁹ *Brnovich*, slip op. at 29.

⁸⁰ *Brnovich*, slip op. at 31-32 & n. 19.

⁸¹ *Brnovich*, slip op. at 32-34.

⁸² *Brnovich*, slip op. at 34.

⁸³ *Brnovich*, dissenting op. at 2 (Kagan, J., dissenting).

⁸⁴ *Brnovich*, dissenting op. at 8 (Kagan, J., dissenting).

attempts at abridging minority voting rights in terms of the first generation literacy tests and poll taxes, which were eliminated in 1965. Since then, the second generation efforts of dilution of minority votes through discriminatory districting were before Congress in 1982 when it amended the standard to employ a results test. She noted that subsequent to *Shelby County*, voting discrimination has actually worsened, with the emergence of a new third generation of voter suppression laws.⁸⁵

Justice Kagan explained the gravity of the majority's ruling in her own words:

What is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America's greatness, and protects against its basest impulses. What is tragic is that the Court has damaged a statute designed to bring about “the end of discrimination in voting.”⁸⁶

The dissent recounted how in the first five years after enactment of the VRA, almost as many Blacks registered to vote in six Southern states as had done so in the entire century between the Fifteenth Amendment and the VRA.⁸⁷ And during the period from 1965 to 2006, using the Section 5 preclearance process, the Department of Justice stopped almost 1200 voting laws in covered jurisdictions from taking effect.⁸⁸ It was the success of Section 5 in blocking discriminatory laws from going into effect which enabled the majority in *Shelby County* to conclude that the Section 4 formulations for covered jurisdictions were no longer necessary, the dissenters opined.

Because of the preclearance regimen of the VRA, Justice Kagan observed, Section 2 was never meant to be the primary source of remediation from discriminatory voting laws. Instead it was designed merely as a backstop. After the *Shelby County* decision, however, it became the sole statutory means for obtaining redress.

Pointing to the 1982 Senate Report, Justice Kagan focused on the broad intent of the Congress in its amendment of Section 2 to bar all “discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups.”⁸⁹ As the equally broad language of Section 2 demonstrated, this broad mandate required the Court to give broad interpretation to the scope of the enactment. Any “voting qualification or prerequisite to voting or standard, practice, or procedure” is potentially covered by the section; when it “results” in a “denial or abridgement” of the right to vote based on race, meaning that a complete elimination of the franchise need not be found; regardless of the intent of the state actors; when, “based on the totality of the circumstances,” the state's electoral system is “not equally open” to members of a certain racial group in terms of them

⁸⁵ *Brnovich*, dissenting op. at 7 (Kagan, J., dissenting).

⁸⁶ *Brnovich*, dissenting op. at 3 (Kagan, J., dissenting).

⁸⁷ *Brnovich*, dissenting op. at 7.

⁸⁸ *Brnovich*, dissenting op. at 8, citing *Shelby County*, 570 US at 571 (Ginsburg, J., dissenting).

⁸⁹ *Brnovich*, dissenting op. at 12, quoting S. Rep. 97-417, at 28.

having “less opportunity than other members of the electorate to participate in the political process.”⁹⁰ The Senate Report had cautioned that a determination of whether the voting process is “equally open” necessarily ““depends upon a searching practical evaluation of the past and present reality”” in the jurisdiction.⁹¹ That was due to the finding by Congress at that time that ““since the adoption of the Voting Rights Act, [some] jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength.””⁹² Both the law and background conditions were encompassed in the totality of the circumstances test, reflecting the Supreme Court’s earlier recognition both of the ““demonstrated ingenuity of state and local governments in hobbling minority voting power””⁹³ and the obligation of the reviewing court to weigh the state’s need for the challenged policy.⁹⁴

Because of the ease with which states could advance facially racially neutral justifications for laws which, under the circumstances present in the jurisdiction, rendered the opportunity for minority participation in the electoral process less equal, and based upon their review of the legislative history and the Supreme Court’s own jurisprudence, the dissenters concluded that a jurisdiction defending a challenged provision which threatens abridgement of minority voting rights must show that it is necessary to achieve its asserted goal. The plaintiffs would then have to carry the ultimate burden of persuasion to show that a less discriminatory law would be equally effective in achieving the state’s purpose.⁹⁵ Put otherwise, Section 2 directs courts to strike down voting rules which unnecessarily create inequalities of access to the political process.⁹⁶ Because the majority had instead construed Section 2 to apply only to laws that “block or seriously hinder voting,” it had effectively departed from the drafters’ intent, from the statutory language and from the Supreme Court’s own jurisprudence, creating a new standard of “serious abridgement.”⁹⁷

The dissenters then addressed each of the five factors newly established by the majority. They explained that “mere inconvenience” even for usual burdens of voting was objectively impossible to determine and not a part of the inquiry required by Section 2; that the existence of “multiple ways to vote” was irrelevant, if the minority had a lesser opportunity to participate even in a single means of voting; that the rules in place in 1982 were not a meaningful measure of equal openness, given that Section 2 was meant particularly to disrupt the status quo; and that the state’s interest in the restriction had to be judged by a means-ends test, such that it had to be strictly

⁹⁰ *Brnovich*, dissenting op. at 13-15, quoting §2.

⁹¹ *Brnovich*, dissenting op. at 26, quoting *Johnson v De Grandy*, 512 US 997, 1018 (1994), quoting *White v Regester*, 412 US 755, 766 (1973), quoting S. Rep. 97-417, at 30.

⁹² *Johnson v De Grandy*, 512 US at 1018, quoting quoting S. Rep. 97-417, at 10 (discussing §5).

⁹³ *Brnovich*, dissenting op. at 16 (Kagan, J., dissenting), quoting *Johnson v De Grandy*, 512 US at 1018.

⁹⁴ *Brnovich*, dissenting op. at 17 (Kagan, J., dissenting), citing *Houston Lawyers’ Ass’n v Attorney General of Texas*, 501 US 419, 427 (1991).

⁹⁵ *Brnovich*, dissenting op. (Kagan, J., dissenting), at 18 & n. 5.

⁹⁶ *Brnovich*, dissenting op. (Kagan, J., dissenting), at 20.

⁹⁷ *Brnovich*, dissenting op. (Kagan, J., dissenting), at 21 & n. 7 (internal citation omitted).

necessary to effectuate the state's stated interest, as is the case in other anti-discrimination regimes such as housing, employment and banking.⁹⁸

The dissent reviewed the two Arizona policies before the Court and the majority's rationales for upholding them and found them violative of Section 2, in light of the evidence before the district court on the actual disparate impact of the provisions in diminishing voting opportunity for minority voters, given conditions on the ground. The majority had failed to conduct the searching practical evaluation of past and present reality as required under its own *Gingles* and *Regester* precedent in the totality of the circumstances test, adopted by the Senate and used by the Court of Appeals.⁹⁹ Justice Kagan noted particularly that the state had not shown the necessity of the discriminatory measures, nor pursued less restrictive alternatives to meet its stated goals.¹⁰⁰

Rejecting the majority's denigration of the federal government's responsibility to protect voters against voting laws that are racially discriminatory *in practice*, the dissent explained that the VRA was intended to replace local rules that needlessly made it harder for minorities to vote. This, said the dissent, was not an issue of states' rights versus the federal government, but rather, the right guaranteed to every American by the Fifteenth Amendment and the VRA to vote equally.¹⁰¹

IV. CONGRESSIONAL RESPONSE TO SUPREME COURT VRA DECISIONS

There can be little doubt that Congress has the power to regulate federal elections. Specifically, the Elections Clause of the Constitution confers upon Congress very broad powers to regulate federal elections. That Clause provides as follows:

The Times, Places and Manner of holding elections for Senators, and representatives, shall be prescribed in each [state] by the Legislature thereof, but the Congress may at times by Law make or alter such Regulations, except as Places of chusing [sic] Senators.

Although the text of the Elections Clause expressly refers to regulation of Congressional elections, it has been read expansively to include regulation of presidential elections as well.¹⁰² The U.S. Supreme Court has also stated that Congress has "ultimate supervisory power" over federal elections.¹⁰³ Moreover, the Supreme Court has repeatedly upheld Congress' power to

⁹⁸ *Brnovich*, dissenting op. (Kagan, J., dissenting), at 22-25.

⁹⁹ *Brnovich*, dissenting op. (Kagan, J., dissenting), at 33, citing *Johnson v DeGandy*, 512 US 997, 1018 (1994).

¹⁰⁰ Justice Kagan noted that Arizona had originally enacted a ballot collection ban prior to *Shelby County*, but the DOJ in a §5 preclearance review had expressed skepticism about it and Arizona repealed the measure. Once *Shelby County* was decided, the state reenacted a ballot collection ban, ignoring the concerns raised by the DOJ in the preclearance process. *Brnovich*, dissenting op. (Kagan, J., dissenting), at 37.

¹⁰¹ *Brnovich*, dissenting op. (Kagan, J., dissenting), at 28.

¹⁰² Suman Malempati, *The Elections Clause Obligates Congress to Enact a Federal Plan to Secure U.S. Elections Against Foreign Cyberattacks*, 70 Emory L. J. 417 (2020). Available at: <https://scholarlycommons.law.emory.edu/elj/vol70/iss2/4>.

¹⁰³ *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970).

enforce its regulatory powers pursuant to Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, both of which grant Congress the power to enforce those amendments “by appropriate legislation.”

This section of our report discusses how Congress can use this power to address both the Supreme Court decisions in *Shelby County* and *Brnovich* and the multiple new forms of voter suppression described in section I above.

A. Committee Hearings and Reports

Congress has taken seriously the need to respond to the Supreme Court’s *Shelby County* admonition that the equal sovereignty principle required congressional enactments which did not treat every state similarly to be sufficiently related to current conditions to meet constitutional standards. Multiple subcommittees began inquiries early in the 116th Congress to investigate the status of minority voting and administration of elections subsequent to the *Shelby County* decision.¹⁰⁴ Together they received thousands of pages of testimony, documents from more than 126 sources and reports from government agencies, non-governmental organizations and private citizens, including state and local governments, tribal officials, attorneys, scholars and members of Congress.¹⁰⁵ The most wide ranging examination, however, was undertaken by the House Committee on Administration, which, following the 2018 Congressional elections, reconstituted its Subcommittee on Elections (Elections Subcommittee) after its dissolution six years earlier. Its new chair was then-Representative Marcia L. Fudge, who launched an intensive ten-month effort to gather the contemporaneous evidence that the *Shelby County* majority had found untethered to the 2006 reenactment of the Section 4(b) coverage scheme.¹⁰⁶

In order to collect the required evidence, the Elections Subcommittee’s investigation held hearings in Alabama, Arizona, Florida, Georgia, North Carolina, North Dakota, Ohio and Washington, D.C., as well as an inaugural listening session in Texas. The Subcommittee found widespread instances of persistent discrimination in voting law changes enacted subsequent to *Shelby County*, including the purging of voter registration rolls, reduction in early voting opportunities, polling place closures and movement, voter identification requirements, lack of language access, discriminatory gerrymandering, and disproportionate targeting and discriminatory impact on Native Americans living in Indian country.¹⁰⁷ Numerous witnesses testified as to the especially pernicious effect of the voting restrictive laws in impoverished

¹⁰⁴ The House Committee on the Judiciary and its Subcommittee on the Constitution, Civil Rights and Civil Liberties held hearings to investigate barriers to voting and voting discrimination and to consider options for remedial legislation. See Hearings Before the H. Comm. on the Judiciary and Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 116th Cong. (2019), cited in 2019 House Judiciary Rep., at 13 & n. 13. The House Committee on Oversight also examined the issue. See Protecting the Right to Vote: Best and Worst Practices: Hearing Before the Subcomm. on Civil Rights and Civil Liberties of the H. Comm. on Oversight and Reform, 116th Cong. (May 1, 2019). 2019 House Judiciary Comm. Report at 13, n. 14.

¹⁰⁵ 2019 House Judiciary Comm. Report at 13 & nn. 15 & 16.

¹⁰⁶ See 2019 House Judiciary Comm. Report at 11ff, and Appendix, 113ff (Comm. on House Administration, Subcomm. on Elections, *Report on Voting Rights and Election Administration in the United States of America* (Nov. 2019) (Fudge Report)).

¹⁰⁷ 2019 House Judiciary Comm. Report at 12, 113 & 114; Fudge Report at 2-3.

communities having inadequate public transportation. The Subcommittee heard testimony as to how VRA Section 2 was a poor substitute for the preclearance process, requiring a lengthy and expensive process not occurring until after the implementation of discriminatory legislation and placing the burden on the federal government and affected voters to show discriminatory impact (the test before the Supreme Court's *Brnovich* decision making it even harder to assert a Section 2 claim). In the absence of the Section 5 preclearance process, it was virtually impossible to be aware of, much less bring a challenge to, every discriminatory voting law.¹⁰⁸ The Fudge Report concluded that discriminatory voting policies were proliferating after *Shelby County*, and that renewed and robust federal oversight was required to remedy the situation.¹⁰⁹

In addition to the Elections Subcommittee, the House Judiciary Committee reviewed the records and findings of the subcommittees and adopted the Fudge Report as part of its own record. In its report in November 2019 on H.R.4, the Judiciary Committee concluded that Section 2 (even prior to *Brnovich*) was ill-equipped to stem the tide of discriminatory legislation continuing to be enacted around the country and that Congress was required to accept the Supreme Court's invitation to create a new coverage formulation to be utilized in the Section 5 preclearance process. Doing so would permit the VRA "to operate as intended" by "stop[ping] discriminatory measures in certain jurisdictions with a recent history of discrimination *before* they can be enacted, as Congress had intended in passing the VRA."¹¹⁰ The Judiciary Committee also found that "in the time leading up to the VRA's reenactment in 2006 and continuing into the present, discriminatory voting measures have been highly concentrated in jurisdictions that were previously subject to preclearance under Section 4(b)."¹¹¹ Citing the reports issued during 2019 by the three 116th Congress subcommittees, the Judiciary Committee found that as of the issuance of its own report in November 2019, 23 states had enacted restrictive voting laws in the wake of *Shelby County* having eliminated the Section 5 preclearance requirement.¹¹²

Addressing the report of the Committee on Administration's Subcommittee on Elections, the Judiciary Committee stated:

The Subcommittee on Elections found an array of tactics in place used to suppress the votes of targeted communities and barriers that impede the free exercise of the right to vote. In the course of its investigation, the Subcommittee on Elections collected over 3,000 pages of wide-ranging testimony and evidence. Specifically, the Subcommittee on Elections found persistent discrimination in voting law changes such as purging voter registration rolls, cut backs to early voting, polling place closures and movement, voter ID requirements, implementation of exact match and signature match requirements, lack of language access and assistance, and

¹⁰⁸ Fudge Report, *passim*.

¹⁰⁹ 2019 House Judiciary Comm. Report at 241; Fudge Report at 130.

¹¹⁰ 2019 House Judiciary Comm. Report at 52 (emphasis in original).

¹¹¹ 2019 House Judiciary Comm. Report at 52.

¹¹² 2019 House Judiciary Comm. Report at 29 & n. 118.

discriminatory gerrymandering of legislative districts at the state, local, and federal level.¹¹³

The Judiciary Committee Report quoted at length from testimony given by Kristen Clarke, then the president and executive director of the Lawyers' Committee for Civil Rights Under Law and now Assistant Attorney General for Civil Rights of the United States, before the Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Civil Liberties, that her organization had received tens of thousands of discrimination complaints from voters since *Shelby County*. Many of the provisions complained of revealed systemic discrimination, Clarke testified, such as the consolidation of polling places, curtailment of early voting hours, purging of minority voters under the pretext of list maintenance, strict voter photo ID requirements and abuse of signature match rules to reject absentee ballots, and noted the preponderance of complaints came from jurisdictions previously subject to the preclearance requirement.¹¹⁴ Clarke also spoke of the increasing recalcitrance and hostility of election officials who were instituting discriminatory voting changes with impunity. She noted that between 2000 and 2010, the DOJ had received between 4500 and 5500 preclearance submissions each year, and concluded that the preclearance process had a deterrent effect which had now been lost.¹¹⁵

The Judiciary Committee Report explained that without the preclearance remedy, states would continue to enact discriminatory, although facially neutral, voting laws and succeed in disenfranchising African-American citizens even while VRA Section 2 lawsuits against them were pending. Upon losing the court battle, these states would “simply switch to some other method of voter suppression,” continuing the exclusion, such that minority voters would be continuously shut out of voting, even upon winning every single Section 2 suit they brought¹¹⁶—precisely the “whack-a-mole” strategy described by Justice Kagan in *Brnovich*.

The Judiciary Committee concluded that the testimony before the subcommittees showed continuing discrimination which was “highly concentrated” in jurisdictions which had previously been subject to preclearance review and which in some cases revealed intentional discrimination of a type which had previously been blocked by the Section 5 process.¹¹⁷ It recommended passage of H.R. 4, with a new coverage formulation enabling a resumption of the preclearance remedy, as a result.

B. Restoring Preclearance in “Covered Jurisdictions”¹¹⁸

Recalling that it had held a dozen hearings, heard from 39 witnesses and gathered more than 12,000 pages of testimony and documentary evidence from attorneys, election officials, the

¹¹³ 2019 House Judiciary Comm. Report at 12, citing Hearings Before the Subcomm. on Elections of the H. Comm. on House Admin. 116th Cong. (2019).

¹¹⁴ 2019 House Judiciary Comm. Report at 30.

¹¹⁵ 2019 House Judiciary Comm. Report at 30.

¹¹⁶ 2019 House Judiciary Comm. Report at 14.

¹¹⁷ 2019 House Judiciary Comm. Report at 52.

¹¹⁸ 2019 House Judiciary Comm. Report at 10.

DOJ and various NGOs, the Committee explained that the provisions of H.R. 4 would build upon that record and restore the enforcement mechanisms of Sections 4(b) and 5 of the VRA.¹¹⁹

After the passage of H.R. 4 in the House, the bill was introduced in the Senate as S. 4263 and entitled the John Lewis Voting Rights Advancement Act (“JLVRA”)¹²⁰ after the civil rights leader and congressional representative’s death in July 2020. Its key provisions, as of June 2021, are as follows:

First, the JLVRA would create a new coverage formula under section 4(b) of the VRA to determine which states and localities have a recent historic pattern of discrimination based upon current evidence of voting discrimination, as required by *Shelby County*.¹²¹ This practice-based preclearance requirement would apply to any jurisdiction meeting any of the following criteria:

- a) any state having had 15 or more voting rights violations within the previous 25 years;
- b) any state which has had 10 or more voting rights violations, at least one of which was committed by the state itself, as opposed to a political subdivision of the state, within the preceding 25 years; or
- c) any subdivision of a state which has had three or more voting rights violations within the last 25 years.¹²²

In general, the coverage formula would subject a jurisdiction having repeated violations to preclearance procedures for a period of ten years.¹²³ The 25-year period would continue to roll forward, ensuring that the covered jurisdiction designation keeps pace with current conditions. The bill also establishes a “bail-out” procedure enabling a covered jurisdiction to demonstrate that preclearance is no longer necessary, either by obtaining a declaratory judgment in the United States District Court for the District of Columbia establishing that the covered practice would not have the purpose or effect of denying or abridging the right to vote on account of race, color or minority language group membership; or by submitting the practice to the Attorney General and receiving either an affirmation that no objection will be made to the practice or a failure to respond after 60 days.¹²⁴

¹¹⁹ 2019 House Judiciary Comm. Report at 10.

¹²⁰ See <https://www.congress.gov/bill/116th-congress/senate-bill/4263>, introduced by Senator Patrick Leahy. All 46 Democrats in the Senate signed on as co-sponsors, as did Senator Lisa Murkowski. The House renamed their bill the John R. Lewis Voting Rights Act of 2020 shortly after Representative Lewis’ death. See <https://www.congress.gov/bill/116th-congress/house-concurrent-resolution/107>. It will here be referenced as the JLVRA.

¹²¹ References will be made to the sections of the VRA as amended by H.R. 4/S. 4263, as sections of the JLVRA. JLVRA §4(b); 2019 House Judiciary Comm. Report at 11.

¹²² JLVRA §4(b)(1)(A),(B).

¹²³ JLVRA §4(b)(2)(A).

¹²⁴ JLVRA §4(b)(2)(B).

We believe these amended Section 4(b) procedures should satisfy the requirements of *Shelby County*, as they tie the preclearance requirement to the recent, extensively documented incidence of discrimination in objective terms, and also expire after ten years. States and subdivisions can bail out of them if they are not warranted. Nor does there appear to be any basis to object to them on the ground of the equal state sovereignty doctrine, even as set forth by the majority in *Shelby County*.¹²⁵ The covered jurisdictions would be included based on their recent conduct, not conduct from the distant past or the views of an allegedly biased federal decision maker.

Second, the bill adds a new Section 4A which would expand the types of covered practices/election law changes requiring federal preclearance under Section 5, pertaining to *all* jurisdictions adopting any such laws, in some instances depending upon the percentage of the population in the jurisdiction considered a racial minority. These new covered election practices would include the following second and third generation discriminatory policies:

- 1) changes in the manner of election of seats, to add seats elected at large, or to convert seats elected from a single member district to one or more at-large seats or seats from a multi-member district (in diverse districts as defined by the statute);¹²⁶
- 2) changes to jurisdiction boundaries, which within a year reduces by 3% or more the proportion of voting age population which is from a particular racial or language minority group (in diverse districts as defined by the statute);¹²⁷
- 3) changes to boundaries of election districts through redistricting (in diverse districts as defined by the statute);¹²⁸
- 4) changes in documentation or qualifications to vote which are more stringent than existing federal or state law;¹²⁹
- 5) changes to multilingual voting materials which are not similarly made in English materials;¹³⁰
- 6) changes which reduce or relocate polling locations (in diverse districts as defined by the statute).¹³¹

¹²⁵ Whether the doctrine has future viability remains an open question. Justice Kagan, dissenting in *Brnovich*, noted that the doctrine had previously been rejected and has not been cited by the Court since *Shelby County*. *Brnovich*, dissenting op., at 8-9, citing *Shelby County* (Ginsburg, J., dissenting), 570 US at 587-88.

¹²⁶ JLVRA §4A(b)(1).

¹²⁷ JLVRA §4A(b)(2).

¹²⁸ JLVRA §4A(b)(3).4A

¹²⁹ JLVRA §4A(b)(4).

¹³⁰ JLVRA §4A(b)(5).

¹³¹ JLVRA §4A(b)(6).

Addressing criticism from the Supreme Court, the bill includes in the new Section 4A a specific definition of “denying or abridging the right to vote” for preclearance and bail-out purposes as meaning “[a]ny covered practice described in subsection (b) which will have the effect of diminishing the ability of any citizens to vote, on account of race, color or membership in a language minority group”¹³² Further, as to the covered practices in Section 4A, the bill provides for enforcement by the Attorney General or any aggrieved citizen to secure compliance with its terms before a three-judge federal court in the District of Columbia, and for the possibility of securing immediate injunctive relief against such violations.¹³³

As the preclearance procedures of Section 4A would apply to all states equally, the equal sovereignty doctrine relied upon by the *Shelby County* majority would not apply to them. Further, the 2019 House Judiciary Committee Report and the Fudge Report document numerous instances of such second and third generation enactments and their discriminatory effect.

Other protections provided by the JLVRA include a broadening of the scope of review and retention of jurisdiction by federal courts and the DOJ to include violations of the statute and other federal voting rights laws, in addition to violations of the Fourteenth and Fifteenth Amendments.¹³⁴ Another is an expansion of the situations in which the DOJ may send federal observers to jurisdictions where necessary in the discretion of the Attorney General to prevent a substantial risk of discrimination at the polls in order to protect voters’ rights under the Fourteenth or Fifteenth Amendments, the JLVRA or any other provision of federal law.¹³⁵ A further notable change expands transparency by the addition of a public notice requirement of any voting law changes not in effect 180 days prior to the next federal election.¹³⁶

On August 6, 2021, on the 56th anniversary of the VRA being signed into law, the Subcommittee on Elections released its report of the contemporaneous evidence it had gathered during its five investigatory hearings held during the 117th Congress probing instances of voter suppression and election administration practices resulting in a discriminatory impact on minority voters’ access to the ballot. In its report, Chair G.K. Butterfield and the Subcommittee identified six types of voting and election administration practices which demonstrated evidence of discriminatory impact: 1) voter list maintenance and discriminatory voter purges; 2) voter identification and documentary proof of citizenship requirements; 3) lack of access to multilingual voting materials and language assistance; 4) polling place closures, consolidations, reductions and long wait times; 5) restrictions on additional opportunities to vote; and 6) changes to methods of election, jurisdictional boundaries and redistricting practices.¹³⁷ In discussing each of these areas,

¹³² JLVRA §4A(c).

¹³³ JLVRA §4A(d).

¹³⁴ JLVRA §3(a,c).

¹³⁵ JLVRA §8(a)(2)(B).

¹³⁶ JLVRA §6.

¹³⁷ Comm. on House Administration, Subcomm. on Elections, *Report on Voting in America: Ensuring Free and Fair Access to the Ballot* (July 2021) (Butterfield Report) available at: https://cha.house.gov/sites/democrats.cha.house.gov/files/2021_Voting%20in%20America_v5_web.pdf.

the Butterfield Report detailed how the specific practices identified currently impose a disproportionate and discriminatory impact on minority voters, providing the evidentiary basis required by *Shelby County* for a revised Section 4(b) preclearance formula in the JLVRA, now entitled the John R. Lewis Voting Rights Advancement Act.¹³⁸ Commenting on the flood of election laws enacted since *Shelby County* restricting voting opportunities on the ground of election integrity, the Butterfield Report observed:

The increase in voter turnout in both the 2018 and 2020 elections has not been met with celebrations in statehouses across the country, but has been met with backlash and false claims of fraud—claims that are being used to justify voter suppression and the passage of laws that will disenfranchise minority voters. Investigations have repeatedly found no evidence of widespread fraud in American elections. Fraud in American elections is vanishingly rare.¹³⁹

The Subcommittee reviewed numerous state election law changes since *Shelby County* and concluded that the barriers faced by minority voters and identified in the Fudge Report did not subside after the 2020 elections, and in some instances were actually exacerbated.¹⁴⁰ Indeed, the Subcommittee found evidence of discriminatory purpose as well as effect in many of the new laws, and noted that many election law changes after *Shelby County* occurred in states which had previously been designated covered jurisdictions due to their long history of racial discrimination in voting, and involved measures which had earlier been rejected through the VRA Section 5 preclearance process.¹⁴¹ The Butterfield Report concluded that congressional action to restore preclearance was imperative.¹⁴²

Protection from racially discriminatory voting laws requires, in our judgment, reinstatement of a preclearance mechanism at least as effective as Sections 4(b) and 5 of the VRA prior to the *Shelby County* decision. The record amassed by the House Judiciary Committee and by the House Committee on Administration Subcommittee on Elections in both 2021 and 2019 make clear that the numerous second and third generation restrictive voting laws being adopted in many jurisdictions, including in a significant number of states previously designated as covered jurisdictions subject to preclearance procedures, will diminish the franchise for many minority voters.¹⁴³ Only by restoring preclearance through an updated Section 4(b), and extending practice-based preclearance as to the new covered practices in all jurisdictions, will Congress be effective in addressing the continuing barriers it has documented since the *Shelby County* decision.

¹³⁸ Butterfield Report, *passim*.

¹³⁹ Butterfield Report, at 8-9.

¹⁴⁰ Butterfield Report, at 23.

¹⁴¹ Butterfield Report, at 24.

¹⁴² Butterfield Report, at 124.

¹⁴³ See note 8, *supra*; see 2019 House Judiciary Comm. Report, *passim*, and Fudge Report, *passim*; see also Section I of this report, *supra*.

Importantly, the JLVRA takes up the Supreme Court’s invitation to create a contemporary coverage formula for preclearance which satisfies the requirements set in *Shelby County*. Using that roadmap, the JLVRA targets contemporaneous discrimination by states having poor records over the preceding 25 years, and does so on a rolling basis, so that the 25-year period continues to move forward with time. Where a formerly errant state improves its record, it can be relieved (bailed out) of the burden of being included among the Section 4(b) covered jurisdictions. To the extent the equal state sovereignty doctrine retains viability after *Shelby County*, we conclude the JLVRA satisfies its requirements.

C. Equal Openness After *Brnovich*

If Section 2 is to retain any vitality after the Supreme Court’s ruling in *Brnovich*, Congress must amend that section of the statute as well to clarify the meaning of “equal openness” and “less opportunity to participate” in the electoral process. The majority’s conclusion was that the disparate impact of the Arizona policies in question was too “small” to warrant invalidating laws which admittedly discriminated. The dissent urged that *any* impact which discriminated against a minority group’s ability to have equal access to any of the voting methods provided was a disparate impact and fatal to the provision’s survival under the statute and the Court’s precedential jurisprudence.

One approach to addressing the equal openness/less opportunity issue is the Inclusive Elections Act, introduced by representatives Mondaire Jones of New York and Ruben Gallego of Arizona. That bill would restore the protections of VRA Section 2 by requiring that in making the determination of whether members of a protected minority have less opportunity to participate in the political process, a reviewing court must consider whether “the challenged standard, practice or procedure imposes a disparate burden” on members of a protected class, and whether “the disparate burden is in part caused by or related to social and historical conditions that produce or produced discrimination against members of the protected class.”¹⁴⁴ This bill would mark a return to the standards of the Court’s prior totality of the circumstances jurisprudence (*Gingles*, *Regester* and *DeGandy*) and prevent adoption of the *Brnovich* rationale of a too “modest” disparate impact being non-actionable under the JLVRA. Crucially, it would render the five “guideposts” announced in *Brnovich* for evaluating the impact of challenged laws obsolete.

Additionally, Congress may also wish to consider that the *Brnovich* majority’s elevation of the rights of the state to regulate its own election over the rights of its citizens to vote is contrary to existing Supreme Court jurisprudence under the *Anderson-Burdick* doctrine.¹⁴⁵ In the context of First and Fourteenth Amendment challenges to abridgement of voting rights, that doctrine

¹⁴⁴ Inclusive Elections Act of 2021, H.R. 4298, introduced July 1, 2021.

¹⁴⁵ *Anderson v Celebrezze*, 460 US 780 (1983); *Burdick v Takushi*, 504 US 428 (1992). *Anderson* involved a challenge by former Congressman John Anderson to get listed on the presidential ballot in Ohio, where state law required candidates to file in March for the November election. The Supreme Court found the state law unduly burdensome. *Burdick* presented the validity of Hawaii’s preclusion of write-in votes. The Court sustained the law, due to candidates’ ability to compete in Hawaii’s open primary process. See Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and how to Treat and Cure Them*, ELECTION LAW JOURNAL: RULES, POLITICS, AND POLICY, Vol. 19, No. 3 (Sept. 17, 2020), available at: <https://www.liebertpub.com/doi/10.1089/elj.2020.0646>.

weighs the burdens imposed on voters' rights against the asserted state interests, imposing higher levels of judicial scrutiny and requiring a greater showing by the state to justify its voting procedures as the burden on voting rights becomes more severe. The Supreme Court has never offered any clear approach to the application of this standard, however.¹⁴⁶ Congress should address the judicial review standard under the forthcoming JLVRA, taking lessons from the *Anderson-Burdick* jurisprudence, and ensuring that plaintiffs do not bear greater burdens of proof than does the state in Section 2 cases.¹⁴⁷ Certainly, the 2021 version of the JLVRA should require that in order to meet its burden under any version of a balancing test, given the primacy of the right to vote (and most certainly, under the compelling state interest test purportedly applied in *Brnovich*), a state must proffer *actual* evidence—not just surmise or prediction—demonstrating that the challenged provision is narrowly tailored to address an existing, factually-based concern, and is likely to do so effectively. The opening for Justice Alito's observation that even if a cognizable disparate impact had been shown by the plaintiffs, their challenge to the ballot collection measure would nonetheless have failed due to the unsupported claim of potential harm to the integrity of Arizona's election process must be unambiguously rejected by Congress in the new law.

D. Post-Election Override Laws

Among the most insidious of the raft of voting suppressive laws which have been enacted since November 2020 are those which permit state legislatures to override the handling of election results by the public officials designated in their state to do so, seemingly on a totally partisan basis.¹⁴⁸ As President Biden has explained, who gets to count the votes is as important as who gets to vote:

This is election subversion. It's the most dangerous threat to voting and the integrity of free and fair elections in our history. Never before have [polarized state legislatures and partisan actors] decided who gets to count—count—what votes count.¹⁴⁹

¹⁴⁶ See *Crawford v Marion County Election Board*, 553 US 181 (2008) (resulting in a 3-3-3 split). Indeed, the Supreme Court's reliance on the doctrine is itself a departure from its reliance on strict scrutiny in evaluating voting rights cases in the 1960's, requiring the government to justify its position without according it any deference. See, e.g., *Reynolds v Sims*, 377 US at 562.

¹⁴⁷ Although the *Anderson-Burdick* test has thus far only been applied to constitutional claims, there is no reason it could not be adapted for use in evaluating statutory voting rights claims under the JLVRA. See "The Anderson-Burdick Doctrine Balancing the Benefits and Burdens of Voting Restrictions," SCOTUSBLOG, available at: <https://www.scotusblog.com/election-law-explainers/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions/>.

¹⁴⁸ Carrie Levine, "Why there's even more pressure now on Congress to pass a voting rights bill," Center for Public Integrity (July 9, 2021), available at: <https://publicintegrity.org/inside-publici/newsletters/watchdog-newsletter/why-theres-even-more-pressure-now-on-congress-to-pass-a-voting-rights-bill/>; see also section I of this report, *supra*.

¹⁴⁹ Joseph R. Biden, Jr., "President Joe Biden's Speech on Voting Rights," July 13, 2021, available at: <https://abcnews.go.com/Politics/president-joe-bidens-speech-voting-rights-transcript/story?id=78827023>; see also Michael Waldman, "Death By a Thousand Cuts," BRENNAN CENTER FOR JUSTICE (July 20, 2021), available at: <https://brennancenter.org/our-work/analysis-opinion/votings-death-thousand-cuts>.

At this writing, there is no indication that Congress is working to address these post-election administrative provisions in the JLVRA. However, with the congressional select committee’s investigation of the attempted insurrection of January 6, 2021 just beginning, and President Biden’s warning about our democracy ringing in our ears, these election subversion provisions should also be the focus of congressional reform this term.

This is not a matter that can be left for a future Congress to address. The ongoing efforts by some state legislatures to overturn the 2020 presidential election and the fear that state legislatures are already attempting to influence the outcome of the 2024 election by enacting voter suppressive state laws¹⁵⁰ make it important to consider promptly what action Congress could take to prohibit state legislatures from overriding the popular vote for electoral slates in their respective states, either through superseding vote counts or simply by legislative action to disregard a popular vote in selecting presidential electors. As discussed below, the feasibility of addressing this abuse through Congressional legislation is not clear, though one approach to this threat may withstand Constitutional scrutiny.

Under the Constitution, each state has the authority to appoint its presidential electors “in such Manner as the Legislature thereof may direct.”¹⁵¹ It is well settled that the federal Constitution “‘convey[s to state legislatures] the broadest power of determination’ over who becomes an elector.”¹⁵² Thus, broad curtailment of this power in order to avert its exercise beyond the bounds of “tracking [a] State’s popular vote”¹⁵³ could require a constitutional amendment or, at least, further Supreme Court guidance. However, federal law already provides a role for Congress – counting the electoral votes it receives from each of the states and certifying the winner of the majority of those votes as President¹⁵⁴ – in accordance with procedures set forth in the Electoral Count Act of 1887.¹⁵⁵

The 1887 Act provides that state legislatures may name a slate of presidential electors after a popular vote has occurred in a “failed” election. Congress could amend the 1887 Act to define the term “failed election” or simply to clarify that a state legislature’s broad powers do *not* include appointing a slate of electors after the legislature has authorized a popular vote (or when a state’s constitution requires such a vote) and that popular vote has been taken unless the federal courts determine that, for reasons unrelated to actions by the legislature or executive of the state, the

¹⁵⁰ See Charlie Sykes, “The Steal Next Time,” available at: <https://morningshots.thebulwark.com/p/the-steal-next-time>, quoting David Atkins, “What Happens When Republicans Simply Refuse to Certify Democratic Wins?,” May 8, 2021, available at: <https://washingtonmonthly.com/2021/05/08/what-happens-when-republicans-simply-refuse-to-certify-democratic-wins/> (“So what happens in 2024 . . . when state legislatures who have seized control of certification refuse to certify their state tallies”).

¹⁵¹ US Const., Art. II, sec. 1; Amend. XIII.

¹⁵² *Chiafalo v Washington*, ___ US ___, 140 S.Ct. 2316, 2324 (2020), quoting *McPherson v. Blacker*, 146 US 1, 27 (1892).

¹⁵³ *Chiafalo*, 140 S.Ct. at 2324, citing *Ray v Blair*, 343 U.S. 214, 227 (1952).

¹⁵⁴ US Const., Art. II, sec. 1.

¹⁵⁵ 3 U.S.C. sec. 15; see Richard L. Hasan, “We Can’t Let Our Elections Be this Vulnerable Again,” THE ATLANTIC, Jan. 3, 2021, available at: <https://www.theatlantic.com/ideas/archive/2021/01/we-cant-let-our-elections-be-vulnerable-again/617542/>.

election failed to provide a meaningful opportunity for the state’s citizens to cast their ballots and that it is not possible to repeat the popular vote in order to cure that failure.¹⁵⁶

Any such Congressional amendment of the 1887 Act could, if upheld by the Supreme Court, reduce the likelihood of abuse of state legislative power in this area.¹⁵⁷ The rationale for such an approach is simply that, once a state decides to select its electors through a popular vote, it may not ignore the results of that vote unless the federal courts determine that the entire electoral process was a “failed” exercise that deprived voters of a fair opportunity to register their choices and that no feasible remedy exists for that failure through a new election.

E. The So-Called “Independent Legislature” Theory

In furtherance of the efforts to overturn the results of the 2020 election, the Supreme Court was repeatedly urged to rely upon a theory articulated in Chief Justice Rehnquist’s concurrence in *Bush v. Gore*.¹⁵⁸ The proponents of this theory maintain that the federal Constitution not only confers upon state legislatures the broad power to regulate presidential elections, as discussed above, but that this power is not subject to any restrictions imposed by state constitutions as interpreted by state courts. According to proponents, this unfettered authority includes the power to select the slate of presidential electors without state constitutional restriction. While this view has been reflected in the opinions of a few of the Supreme Court Justices,¹⁵⁹ it has never been adopted by a majority of the Court. There are a number of reasons why it should not be.

First, although Article II, section 1 of the U.S. Constitution grants broad authority to state legislatures to choose their state’s method of appointment of electors, their powers are not entirely unconstrained. Since the enactment of the Electoral Count Act in 1887, state legislatures have been prevented from seeking to change the method of choosing the electors after the election has

¹⁵⁶ Several commentators and organizations have called for reform of the 1887 Act. *See, e.g.*, “How Are Electoral College Votes Counted, and Why Must This Process Be Updated?”, Campaign Legal Center, July 9, 2021, *available at*: <https://campaignlegal.org/update/how-are-electoral-college-votes-counted-and-why-must-process-be-updated>; Matt Ford, “The Obscure Law That Enabled Trump’s Subversion of the Electoral College,” *The New Republic*, June 25, 2021, *available at* <https://newrepublic.com/article/162853/electoral-college-law-reform-election-integrity>; Ed Kilgore, “It’s Time to Fix the 1887 Law That Led to the Capitol Riot,” *New York Magazine*, Apr. 7, 2021, *available at* <https://nymag.com/intelligencer/amp/article/fix-1887-election-law-capitol-riot.html>.

¹⁵⁷ Such an amendment would not eliminate the possibility of misuse of congressional authority during the counting process. The Act provides that Congress may reject electoral votes presented to it for counting when such votes “have not been so regularly given.” (3 U.S.C. sec. 15) As occurred after the 2020 election, the objection of one Senator and one House member is sufficient to open the floor for debate on whether to reject a state’s slate of electors. *Id.* Attempts by several House members to challenge the results of the 2016 election failed because no Senator could be persuaded to lodge an objection. *See* Kyle Cheney, “House Democrats Fail to Muster Support to Challenge Trump’s Electoral College Win,” *Politico*, Jan. 6, 2017, *available at* <https://www.politico.com/story/2017/01/no-trump-electoral-college-challenge-233294>.

¹⁵⁸ *See Bush v. Gore*, 531 US 98, 120 (2000) (Rehnquist, C.J., concurring).

¹⁵⁹ Four of the current Justices have indicated their support for this view. *See Republican Party of Pennsylvania v Degraffenreid*, 592 US ___, 141 SCt 732 (Feb. 22, 2021)(Thomas, J, dissenting); *Republican Party of Pennsylvania v Boockvar*, 592 US ___, 141 SCt 1 (Oct. 28, 2020)(statement of Alito, J., joined by Thomas and Gorsuch, JJ.); *Democratic National Committee v Wisconsin State Legislature*, 592 US ___, 141 SCt 28 (Oct. 28, 2020) (Gorsuch, J., concurring, joined by Kavanaugh, J.).

occurred.¹⁶⁰ Additionally, for the past 150 years, state legislatures have chosen electors who, either because of an implied or direct pledge, would vote for the candidate who had won the state’s popular election.¹⁶¹

In his concurrence in *Bush v Gore*, the Chief Justice quoted dicta in *McPherson v Blacker*¹⁶² to characterize the state legislative power as both broad and exclusive.¹⁶³ *McPherson*, however, involved the question of whether the state of Michigan could authorize the selection of its electors by district instead of on an at-large basis, and concluded that “[t]hey may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in districts. . . .”¹⁶⁴ The case said nothing precluding state judicial review of the actions of state legislatures in regulating elections, for example, to ensure consistency with the provisions of their state constitutions. As explained by the *McPherson* Court, “The legislative power is the supreme authority except as limited by the constitution of the state”¹⁶⁵

Indeed, in no case prior to *Bush v Gore* did the Supreme Court ever try to overturn a state’s high court decision interpreting state election law.¹⁶⁶ Generally, state constitutions are interpreted by state courts to determine the legitimacy of the actions of state legislatures in regulating elections. In fact, as recently as 2015 the Supreme Court clarified that nothing in the Elections Clause of Article I, section 4 of the Constitution “instructs, nor has this court ever held, that a State legislature . . . [may regulate] federal elections in defiance of the provisions of the state’s constitution,” presumably as interpreted by the state’s highest court.¹⁶⁷ It has been reasonably argued that the same approach should follow with respect to the direction of Article II, section 1, clause 2 as to the power of state legislatures to regulate the manner of selecting presidential electors.¹⁶⁸ Were that not the case, divergent rules could be in force for federal and state elections

¹⁶⁰ Electoral Count Act, 3 USC § 5 (state’s selection of electors is conclusive, provided that the electors are chosen under laws enacted prior to election day).

¹⁶¹ See *Chiafalo v Washington*, 591 US , 140 SCt 2316, 2324, 2325 (2020). Since the 1860’s, all but two states have chosen electors based upon the statewide results of the popular election. In those two states, Maine and Nebraska, two electors are awarded to the winner of the statewide popular vote and one elector is awarded to the winner of each congressional district in the state.

¹⁶² 146 US 1, 27 (1892).

¹⁶³ 531 US at 534. See also *Chiafalo v Washington*, 591 US , 140 SCt 2316, 2324 (2020), where Justice Kagan, writing for the majority in upholding Washington state’s penalty for faithless electors, similarly relied on *McPherson* to acknowledge that the state legislature had the “broadest power of determination” of the state’s electors and the conditions attached to their service.

¹⁶⁴ *McPherson v Blacker*, 146 US at 34.

¹⁶⁵ *McPherson v Blacker*, 146 US at 25; see Jack M. Balkin, “Essay: *Bush v Gore* and the Boundary Between Law and Politics,” 110 Yale L.J. 101, 108-09 & nn. 28, 29 (May 2, 2001) (“nothing in *McPherson* prevents ordinary interpretation of statutes, including harmonizing them with constitutional values, like equality or procedural fairness”).

¹⁶⁶ Amar, Amar and Katyal, “The Supreme Court Should Not Muck Around In State Election Laws,” THE NEW YORK TIMES, (Oct. 28, 2020), available at: <https://www.nytimes.com/2020/10/28/opinion/supreme-court-elections-state-law.html>; see *Bush v Gore*, 531 US at 141 (Ginsburg, J., dissenting).

¹⁶⁷ *Arizona Legislature v. Arizona Independent Redistricting Commission*, 576 US 787, 818 (2015).

¹⁶⁸ Amar, Amar and Katyal, “The Supreme Court Should Not Muck Around In State Election Laws,” THE NEW YORK TIMES, (Oct. 28, 2020), available at: <https://www.nytimes.com/2020/10/28/opinion/supreme-court-elections->

in the same state, even when they are held simultaneously, engendering confusion and possible resulting disenfranchisement.

We also note that Article IV, section 4 of the Constitution places an affirmative obligation on the federal government to guarantee to every state a “Republican Form of Government.”¹⁶⁹ This guaranty presupposes that each state’s government will be determined by its people, under their own state constitutions. If judicial review of state election rules were to be eliminated, “elections” could proceed on an undemocratic basis, vitiating the federal constitutional promise of a republican form of government. State court judicial review of state legislation, including its election laws, is an integral part of the actions of a state government. Any attempt to divorce such function from the action of the state legislature in enacting the laws upends the state’s scheme for its own governance. As explained by Justice Ginsburg in her dissent in *Bush v. Gore*:

The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature’s enactments. See U.S. Const., Art. III; The Federalist No. 78 (A. Hamilton). In light of the constitutional guarantee to States of a “Republican Form of Government,” U.S. Const., Art. IV, § 4, Article II can hardly be read to invite this Court to disrupt a State’s republican regime. Yet THE CHIEF JUSTICE today would reach out to do just that. By holding that Article II requires our revision of a state court’s construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit.¹⁷⁰

For all of these reasons, we believe that the theory derived from Chief Justice Rehnquist’s concurrence purporting to give state legislatures plenary, unchecked power over electoral selection—notwithstanding other federal constitutional provisions or the constitutional and legal provisions of the legislatures’ own states—misinterprets precedent and endangers our republican form of democracy. It should have no place in our federal election jurisprudence.¹⁷¹ Thus, as

[state-law.html](#).

¹⁶⁹ “The United States shall guarantee to every State in this Union a Republican form of Government ...” US Const. Art. IV, §4.

¹⁷⁰ *Bush v Gore*, 531 US at 141 (Ginsburg, J., dissenting).

¹⁷¹ As Jack Balkin has explained, “[t]he problem with Chief Justice Rehnquist’s interpretation of Article II is that it assumes that one can divorce the Florida legislature from every other element of the Florida lawmaking process, including the Florida courts and the Florida Constitution”:

This is a difficult claim to sustain. The legislature only is the legislature because the Florida Constitution creates it as such. All legislative power in Florida is subject to judicial review under the Florida Constitution and statutes are subject to ordinary judicial interpretation as well as to judicial review under the requirements of the Florida Constitution. To argue otherwise would mean that in picking electors some handful of the Florida legislators could assemble as a rump session and do almost anything they wanted, because under Article II they could not be bound by what the Florida courts or the Florida Constitution said.

Congress revises both the For the People Act and the 2021 JLVRA, it should also consider clarifying the rules implementing Article II, section I in the Electoral Count Act to ensure that this theory will never be used in future elections to defeat the will of the people.

F. Constitutional Amendment Guaranteeing the Right to Vote

Another possible approach to protecting voting rights has been proposed by Professor Richard Hasen, who advocates passage of a constitutional amendment guaranteeing the right to vote.¹⁷² Although existing constitutional amendments prohibit abridgment of the right to vote on account of race, color, sex, and age, these protections do not enshrine voting as an affirmative constitutional right which is guaranteed to every American citizen.¹⁷³ Hasen's proposed 28th Amendment to the Constitution would "guarantee all adult citizens the right to vote in federal elections, establish a nonpartisan administrative body to run federal elections that would automatically register all eligible voters to vote, and impose basic standards of voting access and competency for state and local elections."¹⁷⁴

Voting rights protection in our country, Hasen argues, has not developed as quickly or efficiently as needed. Although the 15th Amendment was enacted more than 150 years ago, it took a century before the VRA halted the Jim Crow era denial of African Americans' voting rights, and even now, national elections have continued to generate litigation over citizens' rights to vote.¹⁷⁵ Hasen notes the impermanence of statutory rights in a system where protection of the vote relies upon commencement of expensive and time-consuming state-by-state litigation, the outcome of which is uncertain, not necessarily uniform, and subject to shifts depending upon the current politically polarized environment.¹⁷⁶ Certainly, *Shelby County* and *Brnovich* support his hypothesis and have exacerbated the situation. A constitutional right to vote, on the other hand, could result in the overruling of cases like *Rucho v. Common Cause*,¹⁷⁷ which determined that partisan gerrymandering was non-justiciable and did not violate the U.S. Constitution, effectively greenlighting voter discrimination on the basis of political party affiliation. Hasen recognizes that passage of a constitutional amendment is likely a generational undertaking; but he observes that the effect of the status quo on voter rights, especially in communities of color and among other historically disenfranchised groups, is no longer tenable if our democracy is to be maintained.¹⁷⁸

Balkin, *supra* note 165, at 1414.

¹⁷² Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and how to Treat and Cure Them*, (publication forthcoming)(Hasen, *Three Pathologies*); Richard L. Hasen, "Bring on the 28th Amendment," N.Y. TIMES (June 29, 2020) (Hasen, *Times* op. ed.) available at: <https://www.nytimes.com/2020/06/29/opinion/sunday/voting-rights.html>.

¹⁷³ U.S. Const. amend. XV; U.S. Const. amend. XIX; U.S. Const. amend. XXVI.

¹⁷⁴ Hasen, *Times* op. ed.; Hasen, *Three Pathologies*. Hasen notes that while awaiting support for a constitutional right-to-vote amendment, Congress using its enforcement powers under the Elections Clause and under the voting amendments could enact many of the required protections statutorily.

¹⁷⁵ Hasen, *Times* op. ed.; Hasen, *Three Pathologies*.

¹⁷⁶ Hasen, *Times* op. ed.; Hasen, *Three Pathologies*.

¹⁷⁷ 139 S.Ct. 2484 (2019).

¹⁷⁸ Hasen, *Three Pathologies*,

G. August 2021 Developments

On August 17, 2021, Representative Terri Sewell, the principal author of the 2019 JLVRA, introduced the John R. Lewis Voting Rights Advancement Act of 2021 (2021 JLVRA) and was joined by 190 original co-sponsors in the House.¹⁷⁹ On August 24, 2021, the House passed the 2021 JLVRA and sent it to the Senate for its consideration.

The 2021 JLVRA is designed to restore key protections of the VRA which were gutted by *Shelby County* and *Brnovich*, and is based upon the findings of the Butterfield Report as to its hearings held between April and July 2021. In sum, the revised bill would prohibit states and localities with a recent history of voter discrimination from restricting voting rights by adding an updated formula for determining which ones are subject to federal oversight via preclearance, and would amend Section 2 to overrule the higher standard created by *Brnovich* for plaintiffs who are challenging voter discrimination.¹⁸⁰ The new bill retains many parts of the JLVRA passed by the House in 2019,¹⁸¹ includes several of the remedies we have advocated in this report, and introduces some new provisions designed to address the rash of third-generation state voter suppressive and subversive laws which have emerged since the 2020 elections, particularly via significant amendments to VRA Section 2. Through the 2021 JLVRA, the sponsors seek to restore the full protections originally afforded by the VRA,¹⁸² legislatively overruling the Supreme Court's restrictions on the statute in *Shelby County* and *Brnovich*, and clarifying previously ambiguous aspects of the law.¹⁸³

i. 2021 JLVRA Section 5: Enhancements to Preclearance Process

Within the expansion of practice-based preclearance found in the 2021 JLVRA's new Section 4A, applicable to any jurisdiction engaged in such practices (in some instances, limited by demographic characteristics), the 2021 JLVRA makes two significant changes. First, it revises the provision on "Changes in Documentation or Qualifications to Vote" to make clear that all changes in voter identification laws which are more stringent than previous state requirements will have to

¹⁷⁹ The current version of the House bill is available at: <https://www.congress.gov/bill/117th-congress/house-bill/4?q=%7B%22search%22%3A%5B%22Vote%22%5D%7D&s=4&r=4> (the John R. Lewis Voting Rights Advancement Act of 2021). As of August 23, 2021, more than 200 members had signed on as co-sponsors of the bill in the House.

¹⁸⁰ See press release, Rep. Terri Sewell (Aug. 17, 2021), available at: <https://sewell.house.gov/media-center/press-releases> (Sewell press release); Nicholas Fandos, "House Democrats Introduce a Bill to Beef Up the Voting Rights Act," THE NEW YORK TIMES (Aug. 17, 2021), available at: <https://www.nytimes.com/2021/08/17/us/politics/house-democrats-voting-rights-john-lewis.html>.

¹⁸¹ Provisions retained in significant form from the earlier bill will not be discussed in this section.

¹⁸² See Sewell press release.

¹⁸³ For a concise discussion of all of the most significant aspects of the 2021 JLVRA, including those retained from the JLVRA as passed in H.R. 4 in 2019, see Rick Hasen, *Election Law Blog*, "Travis Crum: 'Revising Sections 2 and 5 in the John Lewis Voting Rights Advancement Act of 2021,'" (Aug. 17, 2021) (Crum analysis), available at: <https://electionlawblog.org/?p=124147>.

go through preclearance.¹⁸⁴ The new bill also provides that any preexisting voter identification law will be subject to what is effectively retroactive preclearance unless it permits the voter to establish identity by means of a sworn written statement, signed by the voter under penalty of perjury, attesting to identity and eligibility to vote in the election.¹⁸⁵

The second change in the 2021 bill is that it adds a seventh covered practice which will be universally applicable to any jurisdiction employing it. Specifically, it adds a section entitled “New List Maintenance Process,” which addresses the problem raised in the Butterfield Report of purging of voter lists in minority districts:

Any change to the maintenance of voter registration lists that adds a new basis for removal from the list of active registered voters or that incorporates new sources of information in determining a voter’s eligibility to vote, wherein such a change would have a statistically significant disparate impact on the removal from voter rolls of members of racial groups or language minority groups that constitute greater than 5 percent of the voting-age population.... [under defined circumstances].¹⁸⁶

Both of these enhancements would do much to guarantee voter access, and we endorse them.

ii. *2021 JLVRA Section 2 Amendments*

1. Brnovich Standard Overruled

To counter the Supreme Court’s refusal, in the *Brnovich* time, place and manner context, to apply the Senate factors employed by the Court to evaluate the vote dilution claim in *Gingles*, the 2021 JLVRA establishes separate standards in Section 2 for evaluation of vote-denial and vote-dilution claims. For vote denial claims (as in *Brnovich*), the bill overrules the five-factor “guidelines” test Justice Alito announced there and instead adopts the two-part test urged by the dissent, namely that plaintiffs must show first, that a disparate impact resulted, and second, that it was attributable to past discrimination against their minority group.¹⁸⁷ The new provision requires consideration of the totality of the circumstances,¹⁸⁸ as urged by the dissenters in *Brnovich*, and specifically includes among the non-exclusive¹⁸⁹ list of those circumstances, whether the state employs voter identification requirements beyond those required by federal law.¹⁹⁰ The bill further

¹⁸⁴ 2021 JLVRA sec. 4A(b)(4) (citations are to the proposed amended VRA section).

¹⁸⁵ 2021 JLVRA sec. 4A(b)(4)(A), (B). See Derek Muller, *Election Law Blog*, “Nationwide Preclearance of Existing Voter Identification Laws in the John L. [sic] Lewis Voting Rights Advancement Act,” (Aug. 20, 2021), available at: <https://electionlawblog.org/?p=124198>.

¹⁸⁶ 2021 JLVRA sec. 4A(b)(7).

¹⁸⁷ 2021 JLVRA sec. 2(c).

¹⁸⁸ 2021 JLVRA sec. 2(c)(3)(A).

¹⁸⁹ 2021 JLVRA sec. 2(c)(3)(A)(ix).

¹⁹⁰ 2021 JLVRA sec. 2(c)(3)(A)(iii).

implicitly rebukes the *Brnovich* majority by expressly rejecting as a factor the “mere invocation” of “voter fraud” to justify such voting laws, apparently requiring instead actual, fact-based evidence of fraud as a justification for a restrictive law.¹⁹¹

In addition, the 2021 JLVRA expressly precludes states from seeking to justify their restrictive voting laws on grounds of partisanship.¹⁹² The rationale for this provision is found in the Supreme Court’s determination in *Rucho v. Common Cause*¹⁹³ that the question of the legitimacy of partisan gerrymandering is non-justiciable, making a Congressional remedy appropriate for such abuses, which have long-plagued our nation’s electoral practices.

As to vote dilution claims, the 2021 JLVRA adopts the Senate Factors from *Gingles* and makes them part of the statutory text.¹⁹⁴ As with the vote-denial provisions, the totality of the circumstances test and its list of factors endorsed by the 1982 VRA legislative history (but not then incorporated into the statutory text) is now included in the bill¹⁹⁵ and characterized as non-exclusive.¹⁹⁶

2. Other Section 2 Relief

Another new provision in the 2021 JLVRA, entitled “Relief From Violation of Voting Rights Laws,” would require appellate courts reviewing claims for equitable relief under the statute to offer reasoned explanations for their decisions on applications for stays and vacatur, curtailing the growing practice of “shadow dockets” by courts that decline to provide reasoned bases for decisions. Equitable relief could only be granted if the reviewing court made specific findings that the public interest, including in expanding access to the ballot, would be harmed or that compliance with the equitable relief would impose serious burdens on the party seeking the stay or vacatur which would outweigh the benefits to the public interest.¹⁹⁷ The new section further provides that the findings of fact made by the reviewing court in issuing the order under review could not be set aside unless they meet the heightened “clearly erroneous” standard.¹⁹⁸

¹⁹¹ 2021 JLVRA sec. 2c)(4)(F).

¹⁹² 2021 JLVRA sec. 2((d)(3).

¹⁹³ 139 S.Ct. 2484 (2019).

¹⁹⁴ 2021 JLVRA sec. 2(b)(2)(A)-(G).

¹⁹⁵ 2021 JLVRA sec. 2(b)(2). In general, these factors include the state or political subdivision’s history of official voting discrimination, racially polarized voting, use of voting practices or procedures to enhance opportunities for voting discrimination, use of a candidate slating process that denies access to members of a protected class, the continuing effects of discrimination in education, health care and employment which hinder the ability of members of a protected class to participate in the political process, political campaigns characterized by overt or subtle racial appeals, the extent to which members of a protected class have been elected to public office and other related factors that the court considers relevant.

¹⁹⁶ 2021 JLVRA sec. 2(b)(3).

¹⁹⁷ 2021 JLVRA sec. 11.

¹⁹⁸ 2021 JLVRA sec. 11.

Finally, for all Section 2 claims, the 2021 JLVRA has included protections against retrogression of minority voting strength.¹⁹⁹ Taking lessons from the pre-*Shelby County* experience under the VRA Section 5 preclearance process, the new bill would use Section 2 to outlaw laws which roll back provisions which had made it easier to vote, *e.g.*, during the COVID-19 pandemic.²⁰⁰

We believe the 2021 JLVRA does much to protect and enhance the right to vote for all Americans and to preserve our republican form of democracy. We urge Congress to pass it speedily.

H. H.R.1 / S.1: The For the People Act

Independently of JLVRA, Congress is also considering a broad remedial statute entitled “The For the People Act,” with a House component known as H.R.1 and a Senate component known as S.1. The For the People Act aims, among other things, to expand Americans’ access to the ballot box and provide election security in federal elections.²⁰¹ H.R.1 passed the House for the second time in 2021; S.1 is pending in the Senate but is not currently up for a vote prior to the early fall. Unlike the JLVRA, the For the People Act is concerned primarily with protecting the rights of eligible voters in federal, not state, elections, though it is likely that many of its provisions, if enacted, would become templates for state elections because of the practical difficulty of managing two differing sets of eligibility rules and voting procedures. As of July 31, 2021, The For the People Act seeks to address voting rights in federal elections in the following ways (as noted above, a narrower version of the proposed Act, known as the “Freedom to Vote Act,” was introduced in the Senate on September 14, 2021):

i. Voting Rights

The Voting Rights provision of H.R.1 calls for several changes in favor of citizens’ voting rights in federal elections. For example, the bill calls for automatic voter registration for every eligible citizen who interacts with designated government agencies.²⁰² H.R. 1 requires the chief election official in every state to create an automatic voter-registration system that gathers individuals’ information from government databases and registers them unless the individual actively declines registration.²⁰³ According to the bill, it is the government’s responsibility to retrieve voter information from agencies such as state motor vehicle administrations, agencies that receive money from Social Security or the Affordable Care Act, the justice system and federal

¹⁹⁹ Crum analysis, *supra* note 183.

²⁰⁰ Crum analysis, *supra* note 183; 2021 JLVRA sec.2(e).

²⁰¹ See <https://www.congress.gov/bill/117th-congress/house-bill/1/>; <https://www.congress.gov/bill/117th-congress/senate-bill/1/>. H.R.1 also includes provisions relating to a proposed ethics code for Supreme Court Justices and ethics in government generally. We do not address those provisions in this report.

²⁰² H.R. 1, Title I, Subtitle A, Part 2.

²⁰³ *Id.*

agencies, including the Department of Veterans Affairs, the Defense Department, the Social Security Administration and others and also to keep that information up to date.²⁰⁴

Currently, 19 states and the District of Columbia allow for automatic voter registration.²⁰⁵ An increase of nationwide participation would add more than 50 million new eligible voters to future elections.²⁰⁶

The bill further advocates for vote by mail, creating a baseline standard for access to mail voting in federal elections.²⁰⁷ H.R. 1 would allow eligible voters to request a mail ballot via various methods including in person, online, by phone, or by mail.²⁰⁸ Currently, certain states require that a voter requesting a mail ballot provide a valid reason.²⁰⁹ The Bill would eliminate this requirement.²¹⁰ Additionally, the Bill permits states to allow the option that one request for a mail-in ballot stand as that particular voter's default choice for future elections.²¹¹

In an effort to achieve nationwide early voting, the bill would extend early voting to every state and establish implementation standards for federal elections.²¹² Each state would be required to provide two weeks of early voting at minimum, with each day lasting for a period of at least ten hours. The states would also be required to include early day and evening hours.²¹³ The bill would also require states to ensure, as much as possible, that early voting locations be walkable from public transportation, accessible to rural voters, and exist on college campuses.²¹⁴

Lastly, H.R. 1 prevents wait times at the polls by requiring states to evenly distribute voting systems, poll workers, and other election resources to ensure fair waiting times no longer than thirty minutes.²¹⁵ While we recognize that this 30-minute requirement may not always be feasible, the principle that voters in all jurisdictions should have reasonable, and reasonably equal, waiting times when voting is one that we endorse.

²⁰⁴ *Id.*

²⁰⁵ Sixteen states and Washington, DC, enacted AVR legislatively or via ballot initiative; two states (Colorado and Georgia) adopted it administratively; and one state (Connecticut) adopted it as an agreement between the state secretary of state and state DMV officials. See “Automatic Voter Registration,” NCSL, Feb. 8, 2021, *available at*: <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>.

²⁰⁶ “The Case for Automatic Voter Registration,” THE BRENNAN CENTER FOR JUSTICE, July 21, 2016, *available at*: <https://www.brennancenter.org/our-work/research-reports/case-automatic-voter-registration>.

²⁰⁷ H.R. 1, Title I, Subtitle I.

²⁰⁸ *Id.*

²⁰⁹ “Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options,” NCSL (Sept. 24, 2020), *available at*: <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

²¹⁰ *Id.*

²¹¹ H.R. 1, Title I, Subtitle I.

²¹² H.R. 1, Title I, Subtitle H.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ H.R. 1, Title I, Subtitle N, Part 1.

ii. *Campaign Finance*

The H.R.1 bill as currently proposed also aims to reform campaign finance policies via small donor matching.²¹⁶ In order for a candidate to opt into the donor matching system, he/she must first gather small donations.²¹⁷ Under the bill, small donor contributions will be matched.²¹⁸ The funds for matching are derived entirely from money paid to the government by corporations and individual taxpayers found to have failed to pay their required taxes. There are limits on the total amount of matching funds a presidential, Senate or House candidate can receive for an election.²¹⁹

Under the bill, candidates running in the primary and general election and opting to participate in the system will receive a 6-to-1 match on contributions of up to \$200 per donor.²²⁰ This system will allow candidates that do not accept donations from large donors to run a competitive campaign, especially considering trends to collect small online contributions.²²¹

The Bill also aims to amend certain existing federal campaign disclosure rules by strengthening federal disclosure law to expose candidates accepting dark money and continuing transparency requirements to political ads on the internet.²²²

iii. *Election Security*

In an effort to improve voter security, the bill mandates replacing simple electronic voting machines with those requiring a paper ballot of each individual vote.²²³ Paper ballots are essential to voter protection, as they safeguard against hackers and foreign governments attempting to interfere with U.S. elections.²²⁴

Additionally, the bill would require that states maintain paper ballots in the event of hand recounts or audits.²²⁵ During the last election, approximately 16 million citizens voted with paperless ballots,²²⁶ making verification of vote totals more difficult. The vast majority of voters

²¹⁶ H.R. 1, Title V, Subtitle B.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ Title I, Subtitle F.

²²⁴ Rick Pearson, "State Officials Say Russian Hackers Stole 76k Illinois Voters' Info in 2016, not 500K," THE CHICAGO TRIBUNE (Aug. 8, 2018), available at: <https://www.chicagotribune.com/politics/ct-met-illinois-elections-board-russia-2016-election-hacking-20180808-story.html>.

²²⁵ Title III, Subtitle A, Part 2.

²²⁶ Patrick H. O'Neill, "16 Million Americans will Vote on Hackable Paperless Machines," *MIT Technology*

(90%) support conducting election audits to ensure voting machines worked properly and votes were counted accurately.²²⁷ Currently, eight states use paperless voting machines exclusively.²²⁸ The Bill would require states to use paper ballots allowing for recounts and manual audits—ensuring a trustworthy election process.²²⁹

The bill addresses the audit process for election results. H.R. 1 requires robust “risk-limiting audits,” where statistical models are utilized to confirm that a sufficient amount of ballots have been checked to corroborate vote tallies.²³⁰ Risk-limiting audits provide a high probability of accuracy because they require that election officials manually recount an adequate number of paper ballots.²³¹ The Bill also calls for the Election Assistance Commission to provide grants to officials conducting risk-limiting audits.²³² Election security is paramount to protecting our democracy.

H.R. 1 has been subject to a number of inaccurate criticisms that exaggerate or misrepresent aspects of the Bill and that deserve brief response. Senator Ted Cruz, for example, has been quoted as claiming:

Under this bill, there's automatic registration of anybody - if you get a driver's license, if you get a welfare payment, if you get an unemployment payment, if you attend a public university. Now everyone knows there are millions of illegal aliens who have driver's licenses, who are getting welfare benefits, who attend public universities.²³³

Senator Cruz's suggestion that the bill will result in large numbers of non-citizens being registered to vote is not accurate. Federal law banning non-Americans from registering to vote remains intact²³⁴ and would be unaffected by the Bill.²³⁵ While H.R. 1 requires every state to

Review, Aug. 13 2019, available at: <https://www.technologyreview.com/2019/08/13/238715/16-million-americans-will-vote-on-hackable-paperless-voting-machines/>.

²²⁷ “The For the People Act,” VOTING RIGHTS LAB (Mar 1, 2021), available at: <https://votingrightslab.org/the-for-the-people-act/>.

²²⁸ The states that exclusively use paperless voting machines are: Texas, Tennessee, Louisiana, Mississippi, Indiana, Kansas, Kentucky, and New Jersey.

²²⁹ H.R. 1, Title I, Subtitle F.

²³⁰ Mark Lindeman and Philip B. Stark, “A Gentle Introduction to Risk-Limiting Audits,” *IEEE Security and Privacy, Special Issue on Electronic Voting* (2012): 1, available at: <https://www.stat.berkeley.edu/~stark/Preprints/gentle12.pdf>.

²³¹ “Post-Election Audits,” *National Conference of State Legislatures* (Oct. 25, 2019), available at: <https://www.ncsl.org/research/elections-and-campaigns/post-election-audits635926066.aspx>.

²³² H.R. 1, Title III, Subtitle A, Part 1.

²³³ Daniel Dale, Holmes Lybrand, and Tara Subramaniam, “Fact Check: Breaking down 10 claims about the Democrats’ elections bill,” CNN (Mar. 25, 2021), available at: <https://www.cnn.com/2021/03/25/politics/fact-check-hr1-s1-for-the-people-hearing-voting-elections/index.html>.

²³⁴ 18 U.S.C. § 611.

²³⁵ H.R.1 Title I, Subtitle A, Part 2.

implement an automatic voter registration system, it continually makes clear that only citizens are eligible to be registered.²³⁶ Section 1013 of the bill states that each contributing agency that (in the normal course of its operations) requests individuals to affirm United States citizenship (either directly or as part of the overall application for service or assistance) shall inform such individual of the “substantive qualifications” required to vote, and that they will be registered to vote unless they decline to register or are found ineligible.²³⁷

While there have occasionally been errors under state automatic voter registration systems that led to noncitizens being registered to vote,²³⁸ there have also been errors in states that have not implemented automatic voter registration.²³⁹ Any errors resulting in noncitizens being registered to vote should not be used as evidence that automatic voter registration will result in increased noncitizen voting.

Another criticism of automatic voter registration has been expressed by West Virginia Secretary of State Mac Warner, who²⁴⁰ claimed that the bill “overrules checks and balances in our election security. It mandates [automatic voter registration], including 16-year-olds.”²⁴¹ However, while the *bill would require states to allow individuals as young as 16 to register to vote, 14 states and D.C.* already allow this practice.²⁴² Section 1094 of the Bill explicitly states that such early pre-registration has no effect on state voting age requirements. The Bill states: “Nothing in paragraph (1) may be construed to require a State to permit an individual who is under 18 years of age at the time of an election for Federal office to vote in the election,” the bill reads.²⁴³

The bill also aims to improve the process of maintaining rolls. In the past, election officials have removed ineligible voters from rolls in conjunction with resources provided by a national consortium.²⁴⁴ The consortium shares data on who had moved, passed away, or registered multiple

²³⁶ H.R.1 Title I, Subtitle A, Part 2. Sec. 1012(c): [One-time Registration of Voters Based on Existing Contributing Agency Records] State officials are required to provide applicants with the following: “the substantive qualifications of an elector in the State...” as well as “the consequences of false registration, and a statement that the individual should decline to register if the individual does not meet all those qualifications.”

²³⁷ H.R.1 Title I, Subtitle A, Part 2. Sec. 1013.

²³⁸ John Myers, “Layered on top of previous mistakes, California’s DMV finds an additional 1,500 people wrongly registered to vote under new system,” Los Angeles Times (Oct. 8, 2018), *available at*: <https://www.latimes.com/politics/la-pol-ca-dmv-more-voter-registration-errors-20181008-story.html>.

²³⁹ “Some Noncitizens Do Wind Up Registered To Vote, But Usually Not on Purpose,” NPR (Feb. 26, 2019), *available at*: <https://www.npr.org/2019/02/26/697848417/some-noncitizens-do-wind-up-registered-to-vote-but-usually-not-on-purpose>.

²⁴⁰ Daniel Dale, Holmes Lybrand, and Tara Subramaniam, “Fact Check: Breaking down 10 claims about the Democrats’ elections bill,” CNN (Mar. 25, 2021), *available at*: <https://www.cnn.com/2021/03/25/politics/fact-check-hr1-s1-for-the-people-hearing-voting-elections/index.html>.

²⁴¹ *Id.*

²⁴² “Preregistration for Young Voters,” NCSL (June 28, 2021), *available at*: <https://www.ncsl.org/research/elections-and-campaigns/preregistration-for-young-voters.aspx>.

²⁴³ H.R.1 Title I, Subtitle A, Part 10. Sec. 1094.

²⁴⁴ *Id.*

times.²⁴⁵ Still, some persons who are ineligible to vote have not been removed from the rolls and voters who are eligible to vote have been mistakenly removed.²⁴⁶ H.R. 1 calls for “standards governing the comparison of data for voter registration list maintenance purposes” and that standards must be public and applied in a uniform and nondiscriminatory manner.²⁴⁷ The passing of the bill will allow for more accurate voter rolls and greater public confidence in that accuracy in all jurisdictions.

As noted above, a narrower version of H.R. 1 was introduced in the Senate on September 14, 2021. We have not yet been able to review this revised version, which omits a number of the provisions of H.R. 1 discussed above but does seek to improve access to the ballot through automatic voter registration, facilitating mail-in voting, making election day a federal holiday, restoring voting rights to former prisoners, and protecting the voting rights of people with disabilities and Native Americans. The new bill also would require paper ballots to be used as part of electronic voting, and seek to limit partisan gerrymandering and facilitate judicial review of such actions.²⁴⁸ While it does not have the same broad reach as H.R.1, the new bill represents a significant effort to prevent many of the most serious voting abuses addressed in the prior proposal and for that reason deserves similar support.

V. MANAGING THE FILIBUSTER

To have any realistic prospect of enacting the JLVRA, the For the People Act or any of the other legislative proposals discussed above, some reform of the current Senate “filibuster” rules is necessary. Since 1975, 60 votes in the Senate have been required to end a filibuster. And the historical requirement of a “talking filibuster” (requiring Senators to be present in person) is no longer required—making 60 votes a de facto requirement for most major legislation. We believe this is wrong in principle and contrary to the expectation, reflected in the Constitution and public perception, that the Senate, which is already structured to protect minority views, would normally act by majority vote. It is also wrong in practice because it effectively paralyzes half of the Legislative Branch of our federal government and, by so doing, leads inevitably to greater reliance on the Executive Branch (that is, the President and Presidential appointees) to establish policies and programs that are often properly within the purview of Congress.²⁴⁹

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ H.R.1 Title I, Subtitle A, Part 2. Sec. 1015.

²⁴⁸ See Trish Turner and Briana Stewart, “Senate Democrats introduce new voting rights bill,” ABC News (Sept. 14, 2021), available at: <https://abcnews.go.com/Politics/senate-democrats-introduce-freedom-vote-act/story?id=80009296>; see also Michael Waldman, “Pass the Freedom to Vote Act,” Brennan Center for Justice (Sept. 14, 2021), available at: <https://www.brennancenter.org/our-work/analysis-opinion/pass-freedom-vote-act>. The text of the bill is available at: <https://www.klobuchar.senate.gov/public/cache/files/e/4/e448657f-914b-43a3-9153-05cabfb31c76/68440D88BF5EF1F90133FCB5AD2865D9.freedom-to-vote-act-text.pdf>.

²⁴⁹ See *The Senate Filibuster - Abolish, Restrict or Live With?*, NEW YORK CITY BAR ASSOCIATION, (Jun. 8, 2021), available at: <https://www.youtube.com/watch?v=mM3TwZZCZiY> (discussion of reform proposals begins at 47:33). Some of the proposed filibuster reforms proposed below were debated during a recent panel discussion sponsored by the New York City Bar Association’s Rule of Law Task Force and included former U.S. Senator Russell D. Feingold, Brookings Institution Senior Fellow Sarah A. Binder, and Norman J. Ornstein, Emeritus Scholar at the American Enterprise Institute), and much of the information included in this section is based on that discussion.

To understand how the contemporary filibuster came to be, two points of historical context are useful. First, the filibuster does not have its origins in the text or understanding of the Constitution. Nor was the filibuster part of the Framers' original plan to foster extended deliberation in the Senate. The filibuster emerged largely by happenstance as a result of an early nineteenth-century change to Senate rules and evolved as a tactic to stall proposed legislation after the Civil War.²⁵⁰ The modern rule of "cloture" (requiring the vote of a two-thirds majority of the Senate) was formulated in 1917 as a compromise between opposing factions to break a filibuster of a proposal to arm merchant ships in the midst of World War I.²⁵¹

Second, commentators have noted the extensive historical use of the filibuster to block civil rights legislation. As far back as 1891, Southern Democrats used the filibuster to block a voting rights bill.²⁵² In the 1920s, members of the Senate filibustered an anti-lynching bill.²⁵³ And in 1964, opponents of the Civil Rights Act famously used the filibuster to prolong debate for two months before 67 votes were mustered to move to a vote.²⁵⁴ Similar tactics were employed in an attempt to block the Voting Rights Act of 1965, and again in 1982 to block revisions aimed at strengthening the Voting Rights Act.²⁵⁵ As Professor Sarah Binder explained during the New York City Bar Association panel discussion, battles over civil rights historically have been so intertwined with the filibuster that "battles over reforming the cloture rule" were effectively "proxy wars over civil rights." However, as former Senator Feingold pointed out during the same panel discussion, the filibuster has also been used as a negotiating technique by Senators from Northern states to protect their constituents' interests when that was the most effective tool available to them.

Given the current 50-50 split in the Senate, much attention has focused on what kinds of filibuster reforms are appropriate and feasible. We list below several options that we believe may satisfy those criteria, not only for voting rights but more generally.

²⁵⁰ *Id.*

²⁵¹ *Id.* See also Sarah A. Binder, *The History of the Filibuster*, BROOKINGS (Apr. 12, 2010), available at: <https://www.brookings.edu/testimonies/the-history-of-the-filibuster/>; Caroline Fredrickson, *The Case Against the Filibuster*, BRENNAN CENTER FOR JUSTICE (Oct. 30, 2020), available at: <https://www.brennancenter.org/our-work/research-reports/case-against-filibuster>.

²⁵² Magdalene Zier & John Fabian Witt, *For 100 years, the filibuster has been used to deny Black rights*, THE WASHINGTON POST (Mar. 18, 2021), available at: <https://www.washingtonpost.com/outlook/2021/03/18/100-years-filibuster-has-been-used-deny-black-rights/>.

²⁵³ *Id.*

²⁵⁴ Craig Becker, *The Filibuster Threatens Both Civil Rights and Workers' Rights*, ACS Expert Forum (Apr. 5, 2021), available at: <https://www.acslaw.org/expertforum/the-filibuster-threatens-both-civil-rights-and-workers-rights/>.

²⁵⁵ See Steven V. Roberts, *Filibuster Ends on Voting Rights; Senate Rejects Weakening Clauses*, N.Y. TIMES (June 18, 1982), available at: <https://www.nytimes.com/1982/06/18/us/filibuster-ends-on-voting-rights-senate-rejects-weakening-clauses.html>.

A. “Talking” Filibuster

This reform, proposed in 2013 by Senators Tom Udall, Jeff Merkley, and Tom Harkin, would require Senators filibustering legislation to be physically present to speak on the floor of the Senate. Returning to prior practice, this measure is designed to make it more difficult to mount a successful filibuster that blocks a vote on legislation. Proponents of this approach argue that, by requiring a greater expenditure of time and energy by the minority, it will encourage more sparing use of the filibuster.²⁵⁶ However, this proposal would not prevent the ability of a determined minority to hold up legislation for extended, though not indefinite, periods of time.

B. “Sliding Scale” Filibuster

This reform, first proposed several decades ago by former Senator Tom Harkin, would gradually require fewer votes for cloture (i.e., ending a filibuster) over the course of a debate. Initially, there would be a 60-vote threshold to invoke cloture; after a week of debate, the threshold would change to 57 votes; after two weeks, 54 votes; and after three weeks, cloture would require only a simple majority. This would give the minority time to make its case and extract compromises, but without putting legislation with majority support on hold indefinitely.²⁵⁷

C. Shifting the Burden for Cloture

This reform, proposed by former Senator Al Franken, would shift the burden for a cloture vote (i.e., ending a filibuster) from requiring 60 votes for cloture, to requiring 41 votes to block cloture.²⁵⁸ This would shift the burden to the minority to be physically present to block cloture. The status quo only requires one or two members of the minority to be present to object and places the onus on the majority to make a quorum and collect 60 votes to end debate.²⁵⁹ Like the “talking” filibuster proposal, however, burden-shifting would not eliminate the ability of a determined minority to hold up popular legislation for an extended period.

D. Cloture Change for Voting Rights

This reform would move the threshold for cloture to a simple majority vote, but only for voting rights bills. The Constitution delegates to Congress the authority to “at any time by Law

²⁵⁶ See Press Release, Senator Jeff Merkley, Senators Introduce Rules Resolution to Restore Senate Debate and Accountability (Jan. 4, 2013), available at: <https://www.merkley.senate.gov/news/press-releases/senators-introduce-rules-resolution-to-restore-senate-debate-and-accountability>.

²⁵⁷ See Tom Harkin, *Fixing the filibuster* (Sen. Tom Harkin), THE HILL (Feb. 12, 2010), <https://thehill.com/blogs/congress-blog/politics/80903-fixing-the-filibuster-sen-tom-harkin>.

²⁵⁸ See Al Franken & Norman Ornstein, *Al Franken, Norman Ornstein: Make the filibuster great again*, STARTRIBUNE (Feb. 7, 2021), available at: <https://www.startribune.com/make-the-filibuster-great-again/600020321/>. Cloture is defined as “[a] procedure used in the Senate to place a time limit on consideration of a bill or other matter. Used to overcome a filibuster.” Under the cloture rule (Rule XXII), the Senate may limit consideration of a pending matter to 30 additional hours, but only by vote of three-fifths of the full Senate, normally 60 votes. See United States Senate, *Glossary Term: Cloture*, <https://www.senate.gov/about/glossary.htm#C>.

²⁵⁹ A similar proposed reform would require only the support of three-fifths of those Senators *present* for cloture, rather than three-fifths of the entire Senate.

make or alter [state] Regulations” as to “The Times, Places and Manner of holding Elections for Senators and Representatives.”²⁶⁰ Proponents of this approach note that it would allow Congress to address the issue of voting rights without a more expansive rule change.²⁶¹ Critics have variously argued either (i) that it does not go far enough to restrain what they see as abusive use of the filibuster to thwart a wide range of legislative efforts or, conversely, (ii) that this reform would be a “slippery slope” that leads to the piecemeal abolition of the filibuster for all or most legislation over time.

E. “Majority Representation” Cloture

This reform would allow cloture to be invoked by a majority of Senators representing a majority of the United States population as of the most recent Congressional reapportionment. This proposal is intended to implement (according to its proponents) a “popular-majoritarian cloture rule”—rather than the current rule whereby a filibuster can be, and often is, successfully mounted by a group of Senators who collectively represent only a minority of the U.S. population.²⁶² Critics have argued that this proposal would be unconstitutional, including running afoul of the Seventeenth Amendment’s requirement that “each Senator shall have one vote.” Proponents respond that while this objection presents a “significant challenge,” the Constitution expressly provides that each chamber of Congress has the power to alter its own rules.²⁶³

F. Abolish the Filibuster

Finally, some members of the Senate (and many others) have advocated doing away with the filibuster entirely.²⁶⁴ Given the stated opposition of many Senators to this far-reaching reform,²⁶⁵ it does not appear to be practically feasible at this time. Critics argue that this reform would weaken incentives to compromise in order to enact legislation on a bipartisan basis, while proponents counter that the filibuster does not actually promote bipartisanship and it is more often abused for partisan and obstructionist reasons.

²⁶⁰ U.S. Const., art. I, § 4, cl. 1. Congress may not, however, alter the *place* of voting for Senators. *Id.*

²⁶¹ Recently, House Majority Whip Jim Clyburn (D-SC) expressed his support for carving out an exception to the legislative filibuster for legislation that applies to the Constitution, which would effectively clear the way for voting rights legislation to pass by a simple majority vote. *See* Laura Barrón-López, “Top Biden ally pleads with him to scrap filibuster for election reform,” POLITICO (Jul. 10, 2021), *available at*: <https://www.politico.com/news/2021/07/10/clyburn-biden-filibuster-election-reform-499051>.

²⁶² *See* Jonathan S. Gould, Kenneth A. Shepsle & Matthew C. Stephenson, *Democratizing the Filibuster*, AMERICAN CONSTITUTION SOCIETY (May 2021), *available at*: <https://www.acslaw.org/wp-content/uploads/2021/05/Democratizing-the-Filibuster.pdf>.

²⁶³ *Id.* at 6 (citing U.S. Const., art. I, sec. 5, cl. 2 (“Each House may determine the Rules of its Proceedings”).

²⁶⁴ *See, e.g.*, Glenn Thrush, *More Democrats join the effort to kill the filibuster as a way of saving Biden’s agenda*, THE NEW YORK TIMES (March 5, 2021), *available at*: <https://www.nytimes.com/2021/03/05/us/filibuster-senate-democrats.html>.

²⁶⁵ *See supra* at note 264; *see also* Sen. Kyrsten Sinema, *We have more to lose than gain by ending the filibuster*, WASHINGTON POST (Jan. 21, 2021), *available at*: <https://www.washingtonpost.com/opinions/2021/06/21/kyrsten-sinema-filibuster-for-the-people-act/>.

We take no position at this time which of these possible reforms is preferred, though we do note that some would (or could) apply broadly to a range of fundamental rights that Congress is currently failing to address. What we do urge, however, is that the Senate act promptly on at least *one* of these (or comparable) reforms in order to permit that chamber to carry out its Constitutional duties and play the cooperative legislative role that our democratic system contemplates and that our nation's needs require.

VI. THE ROLE OF THE BAR

If action by Congress is necessary to counter the current wave of voter suppression actions by state legislatures, lawyers also have important, even indispensable, roles in defending this most basic right of citizens in a democracy. The roles that lawyers play in making democracy work – or not – are varied and include (a) their role in litigation, whether as judges or as counsel for parties in cases involving claims of either voter fraud or voter suppression; (b) their participation in state and local bar associations; (c) their service as law school professors and deans, where they teach and model the role of lawyers in building and sustaining a just society; and (d) their actions as individual citizens in their own communities, where many lawyers occupy elected or appointed positions of trust and authority. Unfortunately, as discussed below, the defense of democracy has too often been left to the courts and a relatively small number of lawyers and bar associations who have spoken forcefully about the importance of voting rights to democracy and the rule of law. We believe it is now time for our profession as a whole to speak and to act to protect these values.

A. Courts

We applaud the increasing willingness of courts to criticize, and where appropriate, to sanction lawyers who engaged in repeated efforts to undermine the results of the 2020 Presidential election through frivolous litigation and public statements that went far beyond the limits of accepted professional conduct. The decision of the Appellate Division (First Dept.) of the New York State Supreme Court to suspend Rudolph Giuliani from the practice of law during the pendency of two ethics complaints submitted by non-partisan groups of lawyers makes clear that lawyers who consciously mislead the court and the public in order to undermine the results of previously-adjudicated elections face not only sanctions related to an individual case but the potential loss of their law license.²⁶⁶ In reaching its decision, the Appellate Division stated:

[T]here is uncontroverted evidence that respondent communicated demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump and the Trump campaign in connection with Trump's failed effort at reelection in 2020. These false statements were made to improperly bolster respondent's narrative that due to widespread voter fraud, victory in the 2020 United States presidential election was stolen from his client. We conclude that respondent's conduct immediately threatens the

²⁶⁶ *Attorney Grievance Committee for the First Judicial Department v. Rudolph W. Giuliani*, No. 2021-00506 (App. Div. 1st Dep't 2021).

public interest and warrants interim suspension from the practice of law, pending further proceedings before the Attorney Grievance Committee...²⁶⁷

Similarly, in the more familiar context of sanctions imposed for frivolous or bad faith litigation, Magistrate Judge N. Reid Neureiter imposed sanctions, in an amount still to be determined, against plaintiffs' counsel in *O'Rourke v. Dominion Voting Systems Inc. et al.*,²⁶⁸ a Colorado federal district court case in which those counsel sought to invalidate the 2020 presidential election results in Colorado, Georgia, Michigan, Pennsylvania and Wisconsin based on wholly unsubstantiated claims of a "rigged" or stolen election. Like the Appellate Division decision in *Giuliani*, Judge Neureiter emphasized the dangers to the public and the rule of law from irresponsible and unethical actions by lawyers who fabricate facts and consciously seek to mislead the courts and the public in order to undermine the democratic process.

In the most recent decision to address such attorney misconduct challenging the 2020 presidential election results, U.S. District Judge Linda Parker of the Eastern District of Michigan imposed attorney-fee sanctions *and* referred the plaintiffs' Michigan and out of state attorneys to their respective disciplinary bodies because of their "profound abuse of the judicial process" in *King et al. v. Whitmer, et al.*²⁶⁹ "It is one thing," Judge Parker wrote, "to take on the charge of vindicating rights associated with an allegedly fraudulent election. It is another to take on the charge of deceiving a federal court and the American people into believing that rights were infringed, without regard to whether any laws or rights were in fact violated. This is what happened here."²⁷⁰

B. Law Firms

We also commend those law firms who, frequently on a pro bono basis, have volunteered to assist in challenges to voter suppression measures in their home states. We also note the continued efforts of groups such as Lawyers Defending American Democracy (LDAD) to participate directly, whether as complainants or *amicus curiae*, through proceedings seeking to hold lawyers to account for maintaining frivolous "election fraud" claims. A broad coalition of the nation's leading law firms and corporate legal departments has publicly condemned state voter suppression legislation and pledged to fight those efforts where they are enacted.²⁷¹

C. Bar Associations

Beyond these efforts, however, it is the role of the organized Bar through its local, state and national bar associations that can play the most useful role in addressing the threat of voter suppression in states across our nation. Unfortunately, publicly stated concern for voting rights,

²⁶⁷ *Id.* slip op. at 2.

²⁶⁸ *O'Rourke v. Dominion Voting Sys.*, 2021 U.S. Dist. LEXIS 145644 (D. Colo., Aug. 3, 2021).

²⁶⁹ *King et al. v. Whitmer, et al.*, Civil Case No. 20-13134 (E.D. Mich. Aug. 25, 2021).

²⁷⁰ *Id.*

²⁷¹ *We Stand for Democracy*, N.Y. TIMES, p.A15 (Apr. 14, 2021).

and the current legislative efforts to limit citizens' exercise of those rights, has been limited at bar associations across the country. Most bar associations focus on a similar range of services for lawyers: opportunities for networking, developments in the law and Continuing Legal Education (CLE) requirements. Some bar associations do publish reports dealing with areas of interest to their members and some also provide testimony to federal, state, and local governments on current legal issues. However, very few bar associations appear to be addressing threats to voting rights either generally or to specific portions of the electorate.

The reasons for this reluctance by the organized bar to speak out in defense of voting rights are varied, but the most important is surely the desire to avoid taking a "political" stand on issues that are controversial within an association's membership. This reluctance finds additional support in the 1990 Supreme Court decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990), which held that an integrated (i.e., mandatory) state bar association could not use its members' dues for political or ideological positions not germane to the association's purpose of regulating the legal profession and improving the quality of legal services. Although *Keller* is an important reminder of the limits on integrated bar association activities, we believe that defending the right to vote, and thus the legitimacy of democratically-elected governments, can properly be viewed as part of most bar associations' central commitment to the rule of law. We hope that more of our colleagues in such associations will concur that, when our nation's democracy and the rule of law are threatened, it is proper for their associations to speak and act on behalf of our shared professional commitment to a lawful and Constitutional democracy.

Some bar associations already view voting rights as squarely within their ambit. Chief among these is the American Bar Association, which has long sponsored its Rule of Law Initiative (ABA ROLI), which has worked for more than 25 years with lawyers, law schools and judges from dozens of other countries to help preserve the rule of law, including democratic elections, around the world. Domestically, the ABA has been a consistent advocate for voting rights as part of the rule of law through its Standing Committee on Election Law, which has, among other things, advocated for publicly available centralized lists of registered voters for states and a wider variety of identification measures for voters to use.

In addition to the ABA, there are at least three state and three local bar associations that have attempted to address voter suppression within the past several years. The New Jersey Bar Association, for example, has an Election Law Committee, which is active on election law and voting rights advocacy and education. Among their responsibilities, the New Jersey Bar Association states that they monitor "funding for the Election Law Enforcement Commission; [] campaign disclosure laws regarding various entities and persons[]; and] make[] comments and/or recommendations when appropriate."²⁷² This committee is notable among other state bar association committees because it was one of the very few which stated that their members advise on election law when appropriate.

Our colleagues at the New York State Bar Association recently launched a Task Force to Protect Voting Rights and Democratic Institutions, indicating that its members "will tap into their

²⁷² *Election Law Special Committee*, N.J. BAR ASS'N, <https://community.njsba.com/electionlawsspecialcommittee/home?ssopc=1>.

collective expertise to analyze the issues before [them] and help policymakers, the legal profession, and the public combat the restrictive laws that are being adopted or are under consideration in many states.”²⁷³ Prior to this Task Force, NYSBA had a 2020 Task Force on the Presidential Election,²⁷⁴ another rarity among state bar associations.

The Texas Bar Association was also extremely clear in encouraging voter turnout during the 2020 elections. Specifically, the Texas Young Lawyers Association spearheaded an impressive campaign with educational materials and voting tools and was one of the few bar associations that sought to register voters by creating public outlines on canvassing and organizing volunteers to register eligible voters on the ground.²⁷⁵ The Texas Bar Association Annual Meeting, like several other bar associations last year, included an event focused on voting rights: “A History of Voter Suppression.”²⁷⁶

At the city level, the Austin Bar Association, the Boston Bar Association, and the Philadelphia Bar Association have sponsored several CLE programs and events to educate attorneys on the current voting rights climate. A number of other local bar associations hosted similar events, but these three associations promoted voter protection in particularly innovative ways.

The Austin Bar Association hosted a CLE entitled “Election Protection Issues” on April 23, 2021 featuring the Texas Legal Rights Project.²⁷⁷ This program explicitly described the voter suppression tactics witnessed by the Texas Legal Rights Project during the last presidential election—an effective public educational tool. Also, their Civil Rights and Immigration Section hosted a CLE entitled “Defending Voting Rights in Texas” on November 26, 2018 featuring Nina Perales from The Mexican American Legal Defense Fund.²⁷⁸

The Boston Bar Association hosted webinars entitled: “Election Protection 2020 Training - Protect the Right to Vote and Learn About Election Law,” through their Joan B. DiCola Fund, featuring Sophia Hall from Lawyers for Civil Rights, and Pamela Wilmot, Common Cause

²⁷³ Susan DeSantis, New York State Bar Association Launches Task Force To Protect Voting Rights and Democratic Institutions, N.Y. STATE BAR ASS’N (July 22, 2021), available at: <https://nysba.org/new-york-state-bar-association-launches-task-force-to-protect-voting-rights-and-democratic-institutions/>.

²⁷⁴ *Id.*

²⁷⁵ TEX. YOUNG LAWYERS ASS’N, *Vote America! Roll Out Guide*, TEX. BAR ASS’N, <https://26i1x33zddmb2ub5ei1n3bec-wpengine.netdna-ssl.com/wp-content/uploads/2019/04/Vote-America-Roll-Out-Guide-7-2018.pdf>.

²⁷⁶ DIVERSITY F., Event, *Annual Meeting On Demand 2020*, TEX. BAR ASS’N (June 25, 2020), <https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=51175>.

²⁷⁷ *Election Protection Issues*, AUSTIN BAR ASS’N (Apr. 23, 2021), <https://www.austinbar.org/for-attorneys/online-cles/election-protection-issues/> (last visited Aug. 2, 2021) (sharing the voter suppression tactics which occurred in the last election cycle including not being given a mail-in-ballot or that they was no confirmation of receipt; not offering curbside voting or lack of signage for curbside voting; voter intimidation (e.g., bringing tanks to the poll place parking lot, brandishing of guns in line, stalking people of color, etc.); and ballot races).

²⁷⁸ CIV. RTS. & IMMIGR. SECTION, *Defending the Right to Vote in Texas*, AUSTIN BAR ASS’N (Nov. 26, 2018), <https://www.austinbar.org/event/civil-rights-immigration-section-cle-12/>.

(Massachusetts);²⁷⁹ and “Can Our Election Be Hacked? Election Cybersecurity and Covid-19 Impact” sponsored by the Privacy, Cyber Security, & Digital Law Section, featuring Michelle K. Tassinari, Director and Legal Counsel, Elections Division of the Office of the Massachusetts Secretary of State and Keryn Cadogan, Chief Information Officer of the Office of the Massachusetts Secretary of the Commonwealth.²⁸⁰

The Philadelphia Bar Association had a compelling event through its Chancellor’s Forum entitled “When the Rule of Law Fails: Lessons From the Holocaust”²⁸¹ as well as a CLE hosted by their Civil Rights Committee entitled “Voting Rights: Where We Came From & Where We Are Going,”²⁸² and a subsequent CLE program entitled “Seeking Justice for All” to discuss election litigation.²⁸³

A number of affinity bar associations have also been strong advocates against voter suppression. For example, The Coalition of Bar Associations of Color (which is comprised of the Hispanic National Bar Association, the National Bar Association,²⁸⁴ the National Asian Pacific American Bar Association, and the National Native American Bar Association²⁸⁵) has adopted a strong resolution on restoring the Voting Rights Act.²⁸⁶

²⁷⁹ Sophia Hall and Pamela Wilmot, *Election Protection 2020 Training - Protect the Right to Vote and Learn About Election Law*, (Oct. 2018).

²⁸⁰ Michelle K. Tassinari, and Keryn Cadogan, *Can Our Election Be Hacked? Election Cybersecurity and Covid-19 Impact*, (Oct. 2020).

²⁸¹ See *When the Rule of Law Fails – Lessons of the Holocaust*, PHILADELPHIA BAR ASS’N (June 18, 2020), <https://mailchi.mp/philabar/chancellors-forum-when-the-rule-of-law-fails-lessons-of-the-holocaust-zpyx5cgd83>.

²⁸² See *Voting Rights: Where We Came From & Where We Are Going*, PHILADELPHIA BAR ASS’N (Apr. 22, 2020), <https://www.philadelphiabar.org/page/YLDEZine032216?appNum=5#story7>.

²⁸³ See BD. GOVERNORS, Minutes, *Board of Governors Meeting*, PHILADELPHIA BAR ASS’N (Oct. 1, 2020), 3, available at: <https://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/BOGOct2020Minutes.pdf>.

²⁸⁴ The National Bar Association (NBA) also has an Election Protection Task Force working on voter and election protection initiatives. See https://www.nationalbar.org/NBAR/content/election_protection. Along with the Transformative Justice Coalition, the NBA also created a paid fellowship to help support voting rights and election protection. The Election Protection Fellow’s mandate is to “work[] with NBA local affiliates to insure the maximum pro bono participation of African American lawyers in the national Election Protection Coalition Program which is facilitated by the Lawyers’ Committee for Civil Rights and features over 100 partner organizations. The mission of the Election Protection Coalition is to advance the right of every eligible citizen of the US to exercise the franchise without obstruction due to voter suppression, onerous and restrictive laws, maladministration, disinformation, deceptive practices, intimidation, racial, gender, and age discrimination, discrimination against one’s national origin and language or disability status, or other obstacles.” TJC and NBA Election Protection Fellow job posting (on file at the New York City Bar Association).

²⁸⁵ See *2020-2021 Annual Report*, NAT’L NATIVE AMER. BAR ASS’N (Apr. 7, 2021), 118, available at: <https://www.nativeamericanbar.org/wp-content/uploads/2021/04/2020-2021-Annual-Report-1.pdf>.

²⁸⁶ *Id.* at 119.

D. Law Schools

To the best of our knowledge, no law school dean has yet spoken out about the current threat posed by voter suppression measures in any state. We are hopeful that this too will change as the threat to democracy and the rule of law becomes evident and the leaders of our preeminent law schools reconsider their own reluctance to speak out in defense of the principles they attempt to instill in their students and for which their institutions stand.

VII. CONCLUSION

The threats to our nation's democratic institutions by the legislative actions described above are serious and should not be disregarded or treated as conventional political combat. While our nation's courts have dealt fairly, quickly and decisively with the numerous frivolous challenges to the results of the 2020 Presidential election, the current wave of state legislation aimed at suppressing the voting rights of citizens disfavored by legislative leaders demands prompt and effective Congressional action and a broader response from the legal profession as a whole.

We urge Congress to promptly exercise its authority under the Constitution to enact both the 2021 John Lewis Voting Rights Advancement Act and The For the People Act (or its successor, the Freedom to Vote Act), either in their currently proposed forms or in substantially similar forms that encourage and protect the broadest exercise by American citizens of their right to vote in both state and federal elections. We recognize that, at least under present circumstances, passage of this legislation will require some amendment of the Senate's current "filibuster" rule and have suggested above a range of reforms to that rule that we believe are appropriate both for the current – and urgent – voting rights legislation and more broadly for the Senate to perform its Constitutional duties in a timely manner.

We also urge our colleagues in the legal profession to speak and act with the urgency that the current threats require, whether through their firms and corporate law departments or through their state and local bar associations, to make clear to the public that voting rights are not "political" issues but the bedrock foundation of our democracy and need to be respected regardless of party preferences or allegiance. We call too on the leaders of our preeminent law schools to raise their voices publicly in support of the rule of law and the need for all elected officials to work to strengthen and broaden, rather than dilute, democratic participation in our nation's electoral process. Our nation's elected officials, our courts and the American public deserve no less from our profession.

September 2021

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