



**TESTIMONY OF THE NEW YORK CITY BAR ASSOCIATION  
TASK FORCE ON THE RULE OF LAW AND  
ELECTION LAW COMMITTEE**

**HEARING OF THE SENATE COMMITTEE ON RULES AND ADMINISTRATION**

**“THE ELECTORAL COUNT ACT: THE NEED FOR REFORM”**

**August 3, 2022**

The Task Force on the Rule of Law and the Election Law Committee of the New York City Bar Association (the City Bar) appreciate the opportunity to provide testimony to the Senate Committee on Rules and Administration on the need for reforms to the Electoral Count Act.<sup>1</sup> The City Bar considers free and fair elections to be the foundation of our republican form of government, and, like so many others in America, is proud of its cornerstone feature – the peaceful transfer of power. As a result of the controversial procedures of the presidential election of 1876, the United States Congress sought to clarify the process of electing the president and vice-president of the United States by enacting the Electoral Count Act (the ECA) as a statutory companion to the Twelfth Amendment to the United States Constitution. Despite the statute’s ambiguities and somewhat inconsistent provisions, our presidential elections have followed the rules it set without any meaningful controversy or challenge to outcomes. The 2020 election, however, brought into question certain provisions of the ECA – and the City Bar is supportive of Congress’s work in attempting to clarify the procedures to be followed in presidential elections.

---

<sup>1</sup> The Task Force on the Rule of Law is comprised of members of diverse professional backgrounds in government, civil and criminal private practice, academia, non-governmental organizations and the judiciary, having a wealth of experience in promoting the rule of law domestically and internationally. The Task Force focuses on the framework for decision-making in a constitutional democracy that encompasses, among other things, due process of law, adherence to separation of powers and a system of checks and balances, the protection of fundamental rights, and the fair and equal administration of justice by an independent judiciary. The Election Law Committee focuses on election law, policy, and procedures including voter education and voting rights. It is composed of practitioners from law firms, good government groups, political parties, and government boards and agencies, many of whom have worked in this area for decades. A principal priority of the City Bar, through the work of these committees, has been the protection of voting rights as the foundation of American democracy. They have devoted attention to increasing threats to the franchise in both federal and state elections, by issuing reports, urging legislative reform and presenting educational programming for the bar and the public.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 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.*

In response to the threats posed during the 2020 presidential election, the City Bar has supported a wide range of actions to secure our elections, enforce citizens' right to vote and protect our democratic processes. Our committees have offered recommendations for how Congress might clarify the ECA<sup>2</sup> and supported critical voting reforms, including the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act.<sup>3</sup> The City Bar remains equally committed to the rights of voters to participate in free and fair elections and continues to urge passage of both of those voting rights bills. However, with passage of those important bills uncertain, we urge Congress not to forgo the opportunity to make necessary reforms to the ECA.

The City Bar therefore supports the recently introduced bipartisan Electoral Count Reform and Presidential Transition Improvement Act (ECRA).<sup>4</sup> Critically, the ECRA clarifies the role of the vice-president, as presiding officer of Congress during the ratification of the Electoral College votes cast by the fifty states and Washington DC. The proposed Electoral Count Reform Act makes clear, correctly, that the vice-president's role during this process is ministerial. While this bill contains extremely important reforms of the ECA, we offer the following recommendations for clarifying key provisions that should be included in any final ECA reform legislation.

## RECOMMENDATIONS

The proposed ECRA addresses Congress' role during this ratification process. Instead of the current provision, allowing for just one member of the House of Representatives and one Senator to object to a state's electoral slate, the legislation would require that one-fifth of each house object before Congress may consider the *bona fides* of that slate. We believe this requirement ought to be one-third of each house,<sup>5</sup> though either change is a marked improvement

---

<sup>2</sup> "Statement on Reforming the Electoral Count Act," New York City Bar Association, Feb. 8, 2022, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/reforming-the-electoral-count-act>. A copy of the report is appended to this testimony.

<sup>3</sup> "The Consent of the Governed: Enforcing Citizens' Right to Vote," New York City Bar Association, Sept. 16, 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/american-right-to-vote-election-reform-laws>. In addition to analyzing pending voting rights legislation, the report summarizes recent actions taken to suppress voting rights. A copy of the report is appended to this testimony.

<sup>4</sup> S.4573 (117th Congress), <https://www.congress.gov/bill/117th-congress/senate-bill/4573>.

<sup>5</sup> In its comprehensive report on needed reforms in the ECA, the House of Representatives' Committee on House Administration has recommended a threshold of one-third of the members of each house to trigger an objection, explaining:

The increased threshold would ensure that objections are credible and enjoy substantial support in both chambers before the houses are forced to consider them. The increased threshold would also ensure a timely completion of the count, prevent individual Members from obstructing the count, and reduce the likelihood that Congress will reject a state's electoral votes.

Comm. on House Admin., *Report on The Electoral Count Act of 1887: Proposals for Reform*, at 19, (117th Cong., Second Sess. Jan. 2022), <https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/Electoral%20Count%20Act%20Staff%20Report.pdf>. (House Admin. Rept.) (citations omitted). The Committee observed that at the 2021 proceeding, a single objection took more than three hours to resolve. *Id.* at n. 132, citing 167 Cong. Rec. H98, H113 (2021) and

over existing law, which provides an incentive for frivolous or bad-faith objections. Sound public policy considerations suggest that objections to a state’s electoral slate not be considered in the absence of substantial support in both houses.<sup>6</sup>

Equally important, the ECRA would clarify the objection process by requiring that both houses of Congress vote to sustain any objection, eliminating that provision of Section 15 of the ECA that permits a governor to choose between competing electoral slates. Because of the importance of such an action, we believe the vote sustaining an objection should be by a supermajority, such as two-thirds, of each house.

The proposed ECRA also attempts to tackle the issue of when an objection to an election is legitimate. Here we think the proposed ECRA can be improved. The proposed language states only that an objection is proper if an elector was not lawfully certified or his or her vote was not “regularly given.” The first consideration is fairly straightforward; however, the requirement that a vote be “regularly given” offers, in our view, excessive opportunities for interpretation. We therefore suggest that an objection may only be made when (a) the elector in question voted in violation of constitutional or statutory requirements or voted fraudulently or corruptly; (b) the elector in question voted on an untimely basis; (c) the elector is constitutionally ineligible to serve;<sup>7</sup> (d) the elector voted for a constitutionally ineligible candidate; or (e) the state submitted electoral votes exceeding the number to which it is entitled. We urge the Congress to consider these or similarly well-defined and specific situations in drafting a provision that permits objections, rather than the open-ended language of the current proposal.

We further commend the drafters of the ECRA in emphasizing the importance of and respect for the voters of each state. We agree that once ballots have been cast and election day is passed, no new laws or regulations can be enacted to disturb the choice of the voters. This means, of course, that neither the legislature of a state nor a court or executive should be able to supersede in any way the will of the voters who have chosen a slate of electors pledged to a presidential candidate on the basis of laws and regulations in effect at the time of the election. That principle, clearly expressed in the pending legislation, is critical to the rule of law and to a free and fair procedure for electing the president and vice-president.

A related point on this issue deserves attention. Section 102(a) of the ECRA includes the catch-all phrase “extraordinary and catastrophic events” in describing conditions that would allow an extension of the period for voters to cast ballots after election day. This is an improvement over the highly problematic Section 2 of the current law, which permits the legislature to appoint electors if there is a “fail[ure] to make a choice” on election day. However, the parameters of such “extraordinary and catastrophic” circumstance are unspecified and could themselves give rise to

---

commenting that both “houses withdrew from the joint session to begin debating Pennsylvania’s votes at 12:20 a.m. and did not reassemble until 3:22 a.m.”.

<sup>6</sup> *Id.*, at n.134.

<sup>7</sup> The House Admin. Rept. includes this recommendation as to the Constitution’s sole requirement for presidential electors. *Id.* at 26 & n. 163, quoting U.S. Const., art. II, sec. 1, cl. 2, which states:

[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

multiple interpretations that could undermine the integrity of election results either within a state or across multiple states experiencing the same conditions. We think it important, therefore, that the proposed legislation make clear that only highly specific circumstances, as determined by a court based on state law or election regulations in effect on election day, can provide a basis for extended voting and that any such extension be tailored closely to the time and place of the voting precincts affected by those conditions and recognize the importance of having all states certify their electoral college votes by the same date.

We commend the ECRA drafters for the reforms they have included designed to ensure that Congress is able to identify a single, conclusive slate of electors from each state that is submitted by the responsible executive official pursuant to state law or election regulations in effect as of election day, and including the requirement that Congress defer to slates of electors submitted by a state's executive pursuant to the judgment of federal or state courts, also based on such state law provisions. To clarify that the executive's decision shall only be conclusive if it is lawful, in Section 104 of the ECRA, amending ECA section 5, we would, at the end of the new section 5(c)(1)(A) (page 5, line 25 of bill), delete the word "and" immediately preceding the new section 5(c)(1)(B) and substitute the words "except that", as outlined below:

(c) Treatment of certificate as conclusive.—

(1) IN GENERAL.—For purposes of section 15—

(A) the certificate of ascertainment of appointment of electors issued pursuant to this section shall be treated as conclusive with respect to the determination of electors appointed by the State; ~~and~~ except that

(B) any certificate of ascertainment of appointment of electors as required to be revised by any subsequent State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section.

Finally, although we support the reforms of the ECRA, we think it unnecessary to engraft an unprecedented proceeding before a three-judge court onto an ECA reform proposal. State and federal courts have the experience and expertise to handle critical election matters efficiently and expeditiously, and have routinely done so in the normal course of their regular judicial processes. We need look no further for proof of that than the scores of cases which federal and state courts promptly and fairly adjudicated after the 2020 presidential election, and would prefer to continue our tradition of reliance on their doing so.

\*\*\*

We applaud the Senate Committee on Rules and Administration for holding this hearing, and congratulate the drafters for taking these important first steps, in a bipartisan nature, to clarify and strengthen the Electoral Count Act. While we continue to believe that it is critical that the Senate adopt comprehensive voting rights protections such as those proposed in the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act, we urge Congress to take this opportunity to enact essential reforms to the Electoral Count Act. We appreciate the Committee's consideration of our recommendations and would welcome the opportunity to answer any questions or to discuss the issue further.

Rule of Law Task Force  
Marcy L. Kahn, Chair

Election Law Committee  
Rachael A. Harding, Chair



## STATEMENT ON REFORMING THE ELECTORAL COUNT ACT

### I. Introduction

In 1887, in an effort to resolve the uncertainties occasioned by the disputed Hayes-Tilden presidential election of 1876, Congress enacted the statutes collectively termed the Electoral Count Act (3 USC Sec. 1 et seq.) (“ECA”). In doing so, Congress intended to clarify the procedure for the counting of electoral votes and determining the winner of the presidency. Rather than clarifying the procedure, however, the ambiguously worded ECA obfuscates the procedure. The ambiguous language of the ECA has resulted in widespread confusion, as evidenced in 2000 during the Bush-Gore election (relating to the implementation of its “safe harbor” provision) and in 2021 when former President Trump and his supporters attempted to transform the ministerial role of the Vice President into a discretionary act to overturn the election of President Biden. Although that effort failed, it brought to light the ambiguities and inconsistencies in the ECA. Thus the ongoing efforts by the Congress to reform the ECA is a welcome remedy to prevent its future use to undermine Presidential election results.

Article IV, Section 4 of the U.S. Constitution (the “Guarantee Clause”) imposes upon the United States the responsibility to “guarantee to every State in this Union a Republican Form of Government.” Although the Guarantee Clause did not historically require popular election of a state’s presidential electors, all 50 states have for more than a century opted, either by statute or in their constitutions, for their electors to be chosen by popular vote, reflecting a fundamental belief that, in a republican form of government, the people choose their leadership through free and fair elections.

Consistent with this principle, the New York City Bar Association (the “City Bar”) remains committed to the objectives expressed in its recent report, *The Consent of the Governed: Enforcing Citizens Right to Vote*.<sup>1</sup> Specifically, the City Bar strongly urges the prevention of all attempts to undermine the will of the people in any American state or jurisdiction, including the District of Columbia. We therefore urge clarification of the ECA along the lines set forth below.

The City Bar remains equally committed to the rights of voters to participate in free and fair elections. Accordingly, we continue to urge the passage of the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act. However, as the passage of both of these important bills is uncertain, the City Bar urges the drafters of any ECA reform legislation to

<sup>1</sup> New York City Bar Association, *The Consent of the Governed: Enforcing Citizens’ Right to Vote*, Sept. 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/american-right-to-vote-election-reform-laws>. (All websites last visited Feb. 7, 2022.)

include key provisions of those two bills in the ECA reform legislation.

## II. Clarification of ECA Provisions

In furtherance of the objectives stated above, the City Bar urges revision and clarification of the ECA in the following respects:

*Clarify that the Vice President’s role in receiving and counting electoral ballots is ministerial.* Had former Vice President Pence accepted the fallacious argument advanced by some of the former President’s supporters that the ECA confers upon the Vice President discretionary authority to reject a state’s electoral delegation and refuse to count its votes, the results of the 2020 election would have been overturned. Although the former President’s interpretation of the ECA was rejected in 2021 (as it was similarly rejected by the Congress in 1877 during the disputed election between Rutherford Hayes and Samuel Tilden), a more precise drafting of this provision would prevent such future attempts to improperly overturn the will of the voters as reflected in the Electoral College results.

*Clarify that the role of Congress in its January 6th joint session proceedings is ministerial.* The existing provision of the ECA provides that, for the electors from a state to be inoculated from challenge in Congress during the vote counting process, the results of any election dispute within that state must be resolved, under the state law in effect on Election Day, at least six days before the date on which electors from all 50 states are required to meet. Under current law, that “safe harbor” date is during the second week of December. To permit more time for the resolution of such disputes, we suggest that both that “safe harbor” date and the date on which presidential electors from all states meet should be moved to later dates in December.

*Clarify that any role that Congress plays in challenging the legitimacy of a state’s electoral delegation in the course of the January 6th joint session proceedings is strictly limited to specified exceptional circumstances, as set forth below.*

1. Any objections to a state’s electoral delegation should require the support of at least one-third of each house of Congress in order to be cognizable, and a supermajority of both houses to be sustained.

2. Objections on the basis of the vague grounds of “fail[ure] to make a choice” (3 USC Sec. 2) and “failed election” as grounds for objection should be expressly disallowed. Rather, objections should be based upon one or more of a series of clearly defined and specified grounds, including the following:

### *Constitutional Objections*

(a) The elector in question voted in violation of constitutional requirements or voted fraudulently or corruptly.

(b) The elector in question voted on an untimely basis.

- (c) The elector in question is constitutionally ineligible to serve.
- (d) The elector in question voted for a constitutionally ineligible candidate.
- (e) A state submitted electoral votes exceeding the number to which it was entitled.
- (f) A territory submitted electoral votes prior to achieving statehood.
- (g) *True emergencies that prevent* Congress from counting electoral votes, including acts of terrorism and natural disasters.

We recognize that some potential disputes may be nonjusticiable. However, any resulting justiciable dispute between Congress and a state or jurisdiction submitting electoral votes should be resolved in federal court on an expedited basis.

### **III. The So-Called “Independent State Legislature” Theory**

The City Bar continues to reject the validity of the “independent state legislature” theory, as explained in *The Consent of the Governed* report.<sup>2</sup> In order to avert attempts by state legislators or officials to overturn the results of the popular vote in a state’s presidential election, any proposed ECA reform legislation should include a provision making clear that a state legislature may not substitute its judgment for that of the state’s electorate. Rather, any dispute concerning the composition of an electoral delegation should be adjudicated in the state or federal courts, which are fully equipped to resolve such disputes. Further, the ECA should be amended to indicate clearly that the rules for selection of electors, and the selection of electors pursuant to those rules, cannot be changed after the popular vote has been cast. The only exception would be in the event of the post-election death or disability of an elector, in which case the state should be required to appoint a successor elector pledged to support the same presidential and vice presidential candidates as the deceased or disabled elector.

### **IV. Incorporate Key Provisions of the Proposed Freedom to Vote Act and the John Lewis Voting Rights Advancement Act into ECA Reform Legislation**

In the interests of protecting voting rights and ensuring fair elections, the City Bar urges Congress to pass the proposed Freedom to Vote Act and the proposed John Lewis Voting Rights Advancement Act. As the passage of these two important bills may be unachievable at the present time, we urge Congress to incorporate into any proposed ECA legislation at least the following provisions of those bills, which are directly related to the purposes of the ECA amendments discussed above:

- (a) Criminalizing intimidation and harassment of election officials.
- (b) Blocking anti-democratic practices at the state level, such as substituting partisan election administrators for non-partisan administrators, purging voter rolls for partisan or other impermissible purposes (or with partisan or other impermissible effect),

<sup>2</sup> *Id.*, at 29-32.



eliminating polling places and adopting unfair voting practices.

(c) Making Election Day a federal holiday.

(d) Including the preclearance provisions of the John Lewis Voting Rights Advancement Act in any ECA reform legislation.

(e) Easing voter registration and identification requirements, including mandating automatic voter registration programs.

(f) Requiring that state legislatures may only remove non-partisan election administrators for cause (and making clear that any successor administrator must act in a non-partisan manner).

## **V. Conclusion**

The City Bar believes that, once the selection of presidential electors is submitted to a state’s voters, a republican form of government requires that the will of those voters in choosing their national leadership must be respected. We also believe that protecting the rights of eligible voters in each state to vote and to have their votes counted is equally important to a functioning democracy. Accordingly, the City Bar urges Congress to adopt the proposals outlined in this report in order to avoid subversion of future presidential elections and ensure that the composition of each state’s electoral delegation accurately reflects the results of a free and fair election in that state.

Thank you for your consideration.

Task Force on the Rule of Law  
Stephen L. Kass, Chair  
[kass@clm.com](mailto:kass@clm.com)

Election Law Committee  
Katharine G. Loving, Chair

February 2022

Contact: Elizabeth Kocienda, Director of Advocacy, [ekocienda@nycbar.org](mailto:ekocienda@nycbar.org)



# **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**

**SEPTEMBER 2021**

## Table of Contents

<b>I. STATE LEGISLATION SUPPRESSING VOTING RIGHTS</b> .....	2
<b>A. Laws Restricting Voting Access</b> .....	2
<b>B. Proposed Legislation Moving Through State Legislatures</b> .....	3
<b>C. Undermining Election Results and the Electoral Process</b> .....	4
<b>D. Legislative Restrictions on State Courts</b> .....	5
<b>II. THE VOTING RIGHTS ACT OF 1965</b> .....	5
<b>III. THE SUPREME COURT DECISIONS EVISCERATING THE VRA</b> .....	9
<b>A. <i>Shelby County, Ala. v. Holder</i> (2013)</b> .....	10
<b>i. Majority Opinion</b> .....	10
<b>ii. Dissenting Opinion</b> .....	11
<b>B. <i>Brnovich v Democratic National Committee</i> (2021)</b> .....	13
<b>i. Majority Opinion</b> .....	13
<b>ii. Dissenting Opinion</b> .....	15
<b>IV. CONGRESSIONAL RESPONSE TO SUPREME COURT VRA DECISIONS</b> .....	18
<b>A. Committee Hearings and Reports</b> .....	19
<b>B. Restoring Preclearance in “Covered Jurisdictions”</b> .....	21
<b>C. Equal Openness After <i>Brnovich</i></b> .....	26
<b>D. Post-Election Override Laws</b> .....	27
<b>E. The So-Called “Independent Legislature” Theory</b> .....	29
<b>F. Constitutional Amendment Guaranteeing the Right to Vote</b> .....	32
<b>G. August 2021 Developments</b> .....	33
<b>i. 2021 JLVRA Section 5: Enhancements to Preclearance Process</b> .....	33
<b>ii. 2021 JLVRA Section 2 Amendments</b> .....	34
<b>H. H.R.1 / S.1: The For the People Act</b> .....	36
<b>i. Voting Rights</b> .....	36
<b>ii. Campaign Finance</b> .....	38
<b>iii. Election Security</b> .....	38
<b>V. MANAGING THE FILIBUSTER</b> .....	41
<b>A. “Talking” Filibuster</b> .....	43
<b>B. “Sliding Scale” Filibuster</b> .....	43
<b>C. Shifting the Burden for Cloture</b> .....	43
<b>D. Cloture Change for Voting Rights</b> .....	43
<b>E. “Majority Representation” Cloture</b> .....	44

<b>F.</b>	<b>Abolish the Filibuster</b> .....	44
<b>VI.</b>	<b>THE ROLE OF THE BAR</b> .....	45
<b>A.</b>	<b>Courts</b> .....	45
<b>B.</b>	<b>Law Firms</b> .....	46
<b>C.</b>	<b>Bar Associations</b> .....	46
<b>D.</b>	<b>Law Schools</b> .....	50
<b>VII.</b>	<b>CONCLUSION</b> .....	50

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 Association<sup>1</sup> – 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

<sup>1</sup> 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).

Representatives as the “John R. Lewis Voting Rights Advancement Act of 2021”) and H.R. 1/S.1,<sup>2</sup> (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.<sup>3</sup>

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

<sup>2</sup> 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.*

<sup>3</sup> *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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> Some states have even banned “line warming,” whereby food and water are provided to voters waiting in long lines to cast their ballots.<sup>7</sup>

## **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

<sup>4</sup> *See id.*

<sup>5</sup> *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>.

<sup>6</sup> *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>.

<sup>7</sup> *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.<sup>8,9</sup>

### 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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

<sup>8</sup> 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/>.

<sup>9</sup> 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>.

<sup>10</sup> *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>.

<sup>11</sup> *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>.

<sup>12</sup> *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>.

<sup>13</sup> *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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

#### **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.<sup>17</sup>

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 Act<sup>18</sup> (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,<sup>19</sup> and states and localities which had historically pursued

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

<sup>14</sup> *See id.*

<sup>15</sup> *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>.

<sup>16</sup> *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/>.

<sup>17</sup> *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>.

<sup>18</sup> 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.

<sup>19</sup> 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.<sup>20</sup> In particular, under Section 4(b) of the VRA, jurisdictions with significant histories of racially discriminative voting laws and practices were designated “covered jurisdictions”<sup>21</sup> 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.<sup>22</sup> In 2013, the United States Supreme Court, in a 5-to-4 ruling in *Shelby County, Alabama v. Holder*,<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

In addition, in a decision at the end of its recent term, *Brnovich v. Democratic National Committee*,<sup>26</sup> 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.

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

<sup>21</sup> VRA §4(b).

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

<sup>23</sup> *Shelby County, Ala. v. Holder*, 570 US 529 (2013).

<sup>24</sup> 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>.

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

<sup>26</sup> *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,”<sup>27</sup> 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.”<sup>28</sup> 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.<sup>29</sup> 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,”<sup>30</sup> 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.<sup>31</sup> 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 result<sup>32</sup> of denying members of a racial or language minority an equal opportunity to participate in the political process in violation of the Fifteenth Amendment.<sup>33</sup> However, the Section 2 process is generally too time-

<sup>27</sup> U.S. Const. Amends. XIV, §5; XV, §2.

<sup>28</sup> *Katzenbach*, 383 US at 308-09.

<sup>29</sup> *Id.* at 314.

<sup>30</sup> *Id.* at 309.

<sup>31</sup> VRA §2.

<sup>32</sup> 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>.

<sup>33</sup> 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 law<sup>34</sup> 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.”<sup>35</sup> 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 court<sup>36</sup> 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.<sup>37</sup> 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.”

<sup>34</sup> 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.”

<sup>35</sup> *Katzenbach*, 383 US at 328.

<sup>36</sup> *See* 28 USC §2284.

<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup>

### **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.

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

<sup>39</sup> *Id.*

<sup>40</sup> 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,”<sup>41</sup> 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.<sup>42</sup> 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*,<sup>43</sup> 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.<sup>44</sup> Citing *Northwest Austin*, the Court reiterated that the VRA “imposes current burdens and must be justified by current needs.”<sup>45</sup> 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.<sup>46</sup>

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,”<sup>47</sup> 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

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

<sup>42</sup> US Const., Art I, §4.

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

<sup>44</sup> *Shelby County*, 570 US at 545, citing *Katzenbach*, 383 US at 334.

<sup>45</sup> *Shelby County*, 570 US at 536, citing *Northwest Austin*, 557 US at 203.

<sup>46</sup> *Shelby County*, 570 US at 546, citing *Katzenbach*, 383 US at 330.

<sup>47</sup> *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.<sup>48</sup>

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.<sup>49</sup>

The Court then identified a “more fundamental” problem with the 2006 reauthorization.<sup>50</sup> 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.”<sup>51</sup> 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”<sup>52</sup> but instead “reenacted a formula based on 40-year-old facts having no logical relation to the present day.”<sup>53</sup> 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.<sup>54</sup>

## 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

<sup>48</sup> *Shelby County*, 570 US at 554.

<sup>49</sup> *Shelby County*, 570 US at 554.

<sup>50</sup> *Shelby County*, 570 US at 554.

<sup>51</sup> *Shelby County*, 570 US at 553.

<sup>52</sup> *Shelby County*, 570 US at 553-54.

<sup>53</sup> *Shelby County*, 570 US at 554.

<sup>54</sup> *Shelby County*, 570 US at 557.

demonstrated the continuing vitality of the original 4(b) formulation.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup>

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,’”<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup>

<sup>55</sup> *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.

<sup>56</sup> *Shelby County*, 570 US at 565 (Ginsburg, J., dissenting).

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

<sup>58</sup> *Shelby County*, 570 US at 592 (Ginsburg, J., dissenting).

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

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

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

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

<sup>63</sup> *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.<sup>64</sup> 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 9<sup>th</sup> Circuit Court of Appeals.<sup>65</sup>

**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.<sup>66</sup>

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.”<sup>67</sup> 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.<sup>68</sup> Further, it said that “any circumstance” having a bearing on whether the voting process was

<sup>64</sup> *Brnovich*, slip op. at 4, n. 2.

<sup>65</sup> *Democratic National Committee v Hobbs*, 948 F.3d 989 (9<sup>th</sup> 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.

<sup>66</sup> *Brnovich*, slip op. at 12-13.

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

<sup>68</sup> *Brnovich*, slip op. at 15.

“equally open” and afforded “equal opportunity” may be considered in the judicial analysis.<sup>69</sup> 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.”<sup>70</sup>

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.<sup>71</sup> Harkening back to the Court’s first case construing the amended VRA Section 2, *Thornburg v Gingles*,<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> No mention was made of Congress’ broad power to regulate time, place and manner of elections under the Elections Clause of the Constitution.<sup>77</sup>

<sup>69</sup> *Brnovich*, slip op. at 16.

<sup>70</sup> *Brnovich*, slip op. at 15 (citation omitted).

<sup>71</sup> *Brnovich*, slip op. at 15-19.

<sup>72</sup> *Thornburg v Gingles*, 478 US 30 (1986).

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

<sup>74</sup> *Brnovich*, slip op. at 20-21.

<sup>75</sup> *Brnovich*, slip op. at 29.

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

<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> 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.<sup>81</sup> 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.”<sup>82</sup>

## 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.”<sup>83</sup> 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.<sup>84</sup> She described the crudest and most direct

<sup>78</sup> *Brnovich*, slip op. at 27-28.

<sup>79</sup> *Brnovich*, slip op. at 29.

<sup>80</sup> *Brnovich*, slip op. at 31-32 & n. 19.

<sup>81</sup> *Brnovich*, slip op. at 32-34.

<sup>82</sup> *Brnovich*, slip op. at 34.

<sup>83</sup> *Brnovich*, dissenting op. at 2 (Kagan, J., dissenting).

<sup>84</sup> *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.<sup>85</sup>

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.”<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup> 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.”<sup>89</sup> 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

<sup>85</sup> *Brnovich*, dissenting op. at 7 (Kagan, J., dissenting).

<sup>86</sup> *Brnovich*, dissenting op. at 3 (Kagan, J., dissenting).

<sup>87</sup> *Brnovich*, dissenting op. at 7.

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

<sup>89</sup> *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.”<sup>90</sup> 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.<sup>91</sup> 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.””<sup>92</sup> 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””<sup>93</sup> and the obligation of the reviewing court to weigh the state’s need for the challenged policy.<sup>94</sup>

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.<sup>95</sup> Put otherwise, Section 2 directs courts to strike down voting rules which unnecessarily create inequalities of access to the political process.<sup>96</sup> 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.”<sup>97</sup>

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

<sup>90</sup> *Brnovich*, dissenting op. at 13-15, quoting §2.

<sup>91</sup> *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.

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

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

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

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

<sup>96</sup> *Brnovich*, dissenting op. (Kagan, J., dissenting), at 20.

<sup>97</sup> *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.<sup>98</sup>

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.<sup>99</sup> 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.<sup>100</sup>

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.<sup>101</sup>

#### 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.<sup>102</sup> The U.S. Supreme Court has also stated that Congress has “ultimate supervisory power” over federal elections.<sup>103</sup> Moreover, the Supreme Court has repeatedly upheld Congress’ power to

<sup>98</sup> *Brnovich*, dissenting op. (Kagan, J., dissenting), at 22-25.

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

<sup>100</sup> 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.

<sup>101</sup> *Brnovich*, dissenting op. (Kagan, J., dissenting), at 28.

<sup>102</sup> 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>.

<sup>103</sup> *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 116<sup>th</sup> Congress to investigate the status of minority voting and administration of elections subsequent to the *Shelby County* decision.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup>

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.<sup>107</sup> Numerous witnesses testified as to the especially pernicious effect of the voting restrictive laws in impoverished

<sup>104</sup> 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.

<sup>105</sup> 2019 House Judiciary Comm. Report at 13 & nn. 15 & 16.

<sup>106</sup> 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)).

<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

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.”<sup>110</sup> 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).”<sup>111</sup> Citing the reports issued during 2019 by the three 116<sup>th</sup> 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.<sup>112</sup>

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

<sup>108</sup> Fudge Report, *passim*.

<sup>109</sup> 2019 House Judiciary Comm. Report at 241; Fudge Report at 130.

<sup>110</sup> 2019 House Judiciary Comm. Report at 52 (emphasis in original).

<sup>111</sup> 2019 House Judiciary Comm. Report at 52.

<sup>112</sup> 2019 House Judiciary Comm. Report at 29 & n. 118.



discriminatory gerrymandering of legislative districts at the state, local, and federal level.<sup>113</sup>

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.<sup>114</sup> 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.<sup>115</sup>

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 brought<sup>116</sup>—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.<sup>117</sup> 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”<sup>118</sup>**

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

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

<sup>114</sup> 2019 House Judiciary Comm. Report at 30.

<sup>115</sup> 2019 House Judiciary Comm. Report at 30.

<sup>116</sup> 2019 House Judiciary Comm. Report at 14.

<sup>117</sup> 2019 House Judiciary Comm. Report at 52.

<sup>118</sup> 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.<sup>119</sup>

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”)<sup>120</sup> 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*.<sup>121</sup> 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.<sup>122</sup>

In general, the coverage formula would subject a jurisdiction having repeated violations to preclearance procedures for a period of ten years.<sup>123</sup> 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.<sup>124</sup>

<sup>119</sup> 2019 House Judiciary Comm. Report at 10.

<sup>120</sup> 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.

<sup>121</sup> 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.

<sup>122</sup> JLVRA §4(b)(1)(A),(B).

<sup>123</sup> JLVRA §4(b)(2)(A).

<sup>124</sup> 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*.<sup>125</sup> 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);<sup>126</sup>
- 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);<sup>127</sup>
- 3) changes to boundaries of election districts through redistricting (in diverse districts as defined by the statute);<sup>128</sup>
- 4) changes in documentation or qualifications to vote which are more stringent than existing federal or state law;<sup>129</sup>
- 5) changes to multilingual voting materials which are not similarly made in English materials;<sup>130</sup>
- 6) changes which reduce or relocate polling locations (in diverse districts as defined by the statute).<sup>131</sup>

<sup>125</sup> 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.

<sup>126</sup> JLVRA §4A(b)(1).

<sup>127</sup> JLVRA §4A(b)(2).

<sup>128</sup> JLVRA §4A(b)(3).4A

<sup>129</sup> JLVRA §4A(b)(4).

<sup>130</sup> JLVRA §4A(b)(5).

<sup>131</sup> 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 . . . .”<sup>132</sup> 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.<sup>133</sup>

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.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup>

On August 6, 2021, on the 56<sup>th</sup> 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 117<sup>th</sup> 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.<sup>137</sup> In discussing each of these areas,

<sup>132</sup> JLVRA §4A(c).

<sup>133</sup> JLVRA §4A(d).

<sup>134</sup> JLVRA §3(a,c).

<sup>135</sup> JLVRA §8(a)(2)(B).

<sup>136</sup> JLVRA §6.

<sup>137</sup> 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](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.<sup>138</sup> 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.<sup>139</sup>

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.<sup>140</sup> 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.<sup>141</sup> The Butterfield Report concluded that congressional action to restore preclearance was imperative.<sup>142</sup>

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.<sup>143</sup> 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.

<sup>138</sup> Butterfield Report, *passim*.

<sup>139</sup> Butterfield Report, at 8-9.

<sup>140</sup> Butterfield Report, at 23.

<sup>141</sup> Butterfield Report, at 24.

<sup>142</sup> Butterfield Report, at 124.

<sup>143</sup> 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.”<sup>144</sup> 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.<sup>145</sup> In the context of First and Fourteenth Amendment challenges to abridgement of voting rights, that doctrine

<sup>144</sup> Inclusive Elections Act of 2021, H.R. 4298, introduced July 1, 2021.

<sup>145</sup> *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.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup>

<sup>146</sup> 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.

<sup>147</sup> 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/>.

<sup>148</sup> 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*.

<sup>149</sup> 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 laws<sup>150</sup> 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.”<sup>151</sup> It is well settled that the federal Constitution “‘convey[s to state legislatures] the broadest power of determination’ over who becomes an elector.”<sup>152</sup> Thus, broad curtailment of this power in order to avert its exercise beyond the bounds of “tracking [a] State’s popular vote”<sup>153</sup> 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 President<sup>154</sup> – in accordance with procedures set forth in the Electoral Count Act of 1887.<sup>155</sup>

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

<sup>150</sup> 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”).

<sup>151</sup> US Const., Art. II, sec. 1; Amend. XIII.

<sup>152</sup> *Chiafalo v Washington*, \_\_ US \_\_\_, 140 S.Ct. 2316, 2324 (2020), quoting *McPherson v. Blacker*, 146 US 1, 27 (1892).

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

<sup>154</sup> US Const., Art. II, sec. 1.

<sup>155</sup> 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.<sup>156</sup>

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.<sup>157</sup> 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*.<sup>158</sup> 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,<sup>159</sup> 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

<sup>156</sup> 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>.

<sup>157</sup> 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>.

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

<sup>159</sup> 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.<sup>160</sup> 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.<sup>161</sup>

In his concurrence in *Bush v Gore*, the Chief Justice quoted dicta in *McPherson v Blacker*<sup>162</sup> to characterize the state legislative power as both broad and exclusive.<sup>163</sup> *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. . . .”<sup>164</sup> 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 . . . .”<sup>165</sup>

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.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> Were that not the case, divergent rules could be in force for federal and state elections

<sup>160</sup> 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).

<sup>161</sup> 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.

<sup>162</sup> 146 US 1, 27 (1892).

<sup>163</sup> 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.

<sup>164</sup> *McPherson v Blacker*, 146 US at 34.

<sup>165</sup> *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”).

<sup>166</sup> 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).

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

<sup>168</sup> 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.”<sup>169</sup> 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.<sup>170</sup>

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.<sup>171</sup> Thus, as

[state-law.html](#).

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

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

<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup> Hasen’s proposed 28<sup>th</sup> 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.”<sup>174</sup>

Voting rights protection in our country, Hasen argues, has not developed as quickly or efficiently as needed. Although the 15<sup>th</sup> 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.<sup>175</sup> 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.<sup>176</sup> 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*,<sup>177</sup> 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.<sup>178</sup>

Balkin, *supra* note 165, at 1414.

<sup>172</sup> 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 28<sup>th</sup> 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>.

<sup>173</sup> U.S. Const. amend. XV; U.S. Const. amend. XIX; U.S. Const. amend. XXVI.

<sup>174</sup> 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.

<sup>175</sup> Hasen, *Times* op. ed.; Hasen, *Three Pathologies*.

<sup>176</sup> Hasen, *Times* op. ed.; Hasen, *Three Pathologies*.

<sup>177</sup> 139 S.Ct. 2484 (2019).

<sup>178</sup> 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.<sup>179</sup> 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.<sup>180</sup> The new bill retains many parts of the JLVRA passed by the House in 2019,<sup>181</sup> 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,<sup>182</sup> legislatively overruling the Supreme Court’s restrictions on the statute in *Shelby County* and *Brnovich*, and clarifying previously ambiguous aspects of the law.<sup>183</sup>

### 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

<sup>179</sup> 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.

<sup>180</sup> 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>.

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

<sup>182</sup> See Sewell press release.

<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup>

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].<sup>186</sup>

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.<sup>187</sup> The new provision requires consideration of the totality of the circumstances,<sup>188</sup> as urged by the dissenters in *Brnovich*, and specifically includes among the non-exclusive<sup>189</sup> list of those circumstances, whether the state employs voter identification requirements beyond those required by federal law.<sup>190</sup> The bill further

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

<sup>185</sup> 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>.

<sup>186</sup> 2021 JLVRA sec. 4A(b)(7).

<sup>187</sup> 2021 JLVRA sec. 2(c).

<sup>188</sup> 2021 JLVRA sec. 2(c)(3)(A).

<sup>189</sup> 2021 JLVRA sec. 2(c)(3)(A)(ix).

<sup>190</sup> 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.<sup>191</sup>

In addition, the 2021 JLVRA expressly precludes states from seeking to justify their restrictive voting laws on grounds of partisanship.<sup>192</sup> The rationale for this provision is found in the Supreme Court’s determination in *Rucho v. Common Cause*<sup>193</sup> 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.<sup>194</sup> 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 bill<sup>195</sup> and characterized as non-exclusive.<sup>196</sup>

## 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.<sup>197</sup> 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.<sup>198</sup>

<sup>191</sup> 2021 JLVRA sec. 2c)(4)(F).

<sup>192</sup> 2021 JLVRA sec. 2((d)(3).

<sup>193</sup> 139 S.Ct. 2484 (2019).

<sup>194</sup> 2021 JLVRA sec. 2(b)(2)(A)-(G).

<sup>195</sup> 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.

<sup>196</sup> 2021 JLVRA sec. 2(b)(3).

<sup>197</sup> 2021 JLVRA sec. 11.

<sup>198</sup> 2021 JLVRA sec. 11.

Finally, for all Section 2 claims, the 2021 JLVRA has included protections against retrogression of minority voting strength.<sup>199</sup> 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.<sup>200</sup>

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.<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup> 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

<sup>199</sup> Crum analysis, *supra* note 183.

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

<sup>201</sup> 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.

<sup>202</sup> H.R. 1, Title I, Subtitle A, Part 2.

<sup>203</sup> *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.<sup>204</sup>

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

The bill further advocates for vote by mail, creating a baseline standard for access to mail voting in federal elections.<sup>207</sup> H.R. 1 would allow eligible voters to request a mail ballot via various methods including in person, online, by phone, or by mail.<sup>208</sup> Currently, certain states require that a voter requesting a mail ballot provide a valid reason.<sup>209</sup> The Bill would eliminate this requirement.<sup>210</sup> 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.<sup>211</sup>

In an effort to achieve nationwide early voting, the bill would extend early voting to every state and establish implementation standards for federal elections.<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup>

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.<sup>215</sup> 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.

<sup>204</sup> *Id.*

<sup>205</sup> 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>.

<sup>206</sup> “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>.

<sup>207</sup> H.R. 1, Title I, Subtitle I.

<sup>208</sup> *Id.*

<sup>209</sup> “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>.

<sup>210</sup> *Id.*

<sup>211</sup> H.R. 1, Title I, Subtitle I.

<sup>212</sup> H.R. 1, Title I, Subtitle H.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> 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.<sup>216</sup> In order for a candidate to opt into the donor matching system, he/she must first gather small donations.<sup>217</sup> Under the bill, small donor contributions will be matched.<sup>218</sup> 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.<sup>219</sup>

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.<sup>220</sup> 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.<sup>221</sup>

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.<sup>222</sup>

**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.<sup>223</sup> Paper ballots are essential to voter protection, as they safeguard against hackers and foreign governments attempting to interfere with U.S. elections.<sup>224</sup>

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

<sup>216</sup> H.R. 1, Title V, Subtitle B.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Title I, Subtitle F.

<sup>224</sup> 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>.

<sup>225</sup> Title III, Subtitle A, Part 2.

<sup>226</sup> 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.<sup>227</sup> Currently, eight states use paperless voting machines exclusively.<sup>228</sup> The Bill would require states to use paper ballots allowing for recounts and manual audits—ensuring a trustworthy election process.<sup>229</sup>

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.<sup>230</sup> Risk-limiting audits provide a high probability of accuracy because they require that election officials manually recount an adequate number of paper ballots.<sup>231</sup> The Bill also calls for the Election Assistance Commission to provide grants to officials conducting risk-limiting audits.<sup>232</sup> 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.<sup>233</sup>

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 intact<sup>234</sup> and would be unaffected by the Bill.<sup>235</sup> 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/>.

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

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

<sup>229</sup> H.R. 1, Title I, Subtitle F.

<sup>230</sup> 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>.

<sup>231</sup> “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>.

<sup>232</sup> H.R. 1, Title III, Subtitle A, Part 1.

<sup>233</sup> 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>.

<sup>234</sup> 18 U.S.C. § 611.

<sup>235</sup> 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.<sup>236</sup> 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.<sup>237</sup>

While there have occasionally been errors under state automatic voter registration systems that led to noncitizens being registered to vote,<sup>238</sup> there have also been errors in states that have not implemented automatic voter registration.<sup>239</sup> 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, who<sup>240</sup> claimed that the bill “overrules checks and balances in our election security. It mandates [automatic voter registration], including 16-year-olds.”<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup>

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.<sup>244</sup> The consortium shares data on who had moved, passed away, or registered multiple

<sup>236</sup> 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.”

<sup>237</sup> H.R.1 Title I, Subtitle A, Part 2. Sec. 1013.

<sup>238</sup> 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>.

<sup>239</sup> “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>.

<sup>240</sup> 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>.

<sup>241</sup> *Id.*

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

<sup>243</sup> H.R.1 Title I, Subtitle A, Part 10. Sec. 1094.

<sup>244</sup> *Id.*

times.<sup>245</sup> 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.<sup>246</sup> 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.<sup>247</sup> 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.<sup>248</sup> 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.<sup>249</sup>

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> H.R.1 Title I, Subtitle A, Part 2. Sec. 1015.

<sup>248</sup> 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>.

<sup>249</sup> 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.<sup>250</sup> 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.<sup>251</sup>

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.<sup>252</sup> In the 1920s, members of the Senate filibustered an anti-lynching bill.<sup>253</sup> 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.<sup>254</sup> 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.<sup>255</sup> 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.

<sup>250</sup> *Id.*

<sup>251</sup> *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>.

<sup>252</sup> 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/>.

<sup>253</sup> *Id.*

<sup>254</sup> 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/>.

<sup>255</sup> 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.<sup>256</sup> 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.<sup>257</sup>

### 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.<sup>258</sup> 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.<sup>259</sup> 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

<sup>256</sup> 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>.

<sup>257</sup> 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>.

<sup>258</sup> 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>.

<sup>259</sup> 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.”<sup>260</sup> Proponents of this approach note that it would allow Congress to address the issue of voting rights without a more expansive rule change.<sup>261</sup> 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.<sup>262</sup> 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.<sup>263</sup>

### **F. Abolish the Filibuster**

Finally, some members of the Senate (and many others) have advocated doing away with the filibuster entirely.<sup>264</sup> Given the stated opposition of many Senators to this far-reaching reform,<sup>265</sup> 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.

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

<sup>261</sup> 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>.

<sup>262</sup> *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>.

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

<sup>264</sup> *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>.

<sup>265</sup> *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.<sup>266</sup> 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

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

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

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.*,<sup>268</sup> 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.*<sup>269</sup> “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.”<sup>270</sup>

## **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.<sup>271</sup>

## **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,

<sup>267</sup> *Id.* slip op. at 2.

<sup>268</sup> *O’Rourke v. Dominion Voting Sys.*, 2021 U.S. Dist. LEXIS 145644 (D. Colo., Aug. 3, 2021).

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

<sup>270</sup> *Id.*

<sup>271</sup> *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.”<sup>272</sup> 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

<sup>272</sup> *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.”<sup>273</sup> Prior to this Task Force, NYSBA had a 2020 Task Force on the Presidential Election,<sup>274</sup> 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.<sup>275</sup> 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.”<sup>276</sup>

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.<sup>277</sup> 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.<sup>278</sup>

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

<sup>273</sup> 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/>.

<sup>274</sup> *Id.*

<sup>275</sup> 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>.

<sup>276</sup> 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>.

<sup>277</sup> *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).

<sup>278</sup> 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);<sup>279</sup> 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.<sup>280</sup>

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

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,<sup>284</sup> the National Asian Pacific American Bar Association, and the National Native American Bar Association<sup>285</sup>) has adopted a strong resolution on restoring the Voting Rights Act.<sup>286</sup>

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

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

<sup>281</sup> 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>.

<sup>282</sup> 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>.

<sup>283</sup> 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>.

<sup>284</sup> 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](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).

<sup>285</sup> 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>.

<sup>286</sup> *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

## TASK FORCE ON THE RULE OF LAW

Stephen L. Kass, Chair

Nilima M. Singh, Secretary

Christopher Amore\*\*  
Christopher Benbow  
Steven Cash\*\*  
Robert Cusumano  
Joshua L. Dratel  
Miles Fischer  
Martin S. Flaherty  
Eric Friedman\*  
Elizabeth Gibson  
Rachel Godsil  
Ronald Goldbrenner

R. Scott Greathead  
Scott Horton  
Marcy Kahn  
Anil Kalhan  
Peter Karanjia  
Hon. Katherine Levine  
Hon F. James Loprest Jr.\*\*  
Lauren Melkus  
Karen J. Orlin \*\*  
Christopher Pioch  
Jennifer Rodgers

Alan Rothstein  
Aníbal Sabater\*\*  
Harry Sandick  
Michael Shapiro\*  
James Silkenat  
Hon. Elizabeth Stong\*\*  
Jennifer Trahan\*\*  
Jessenia Vazcones-Yagual  
Erik Wilson  
Gerti Wilson\*  
Willy Wilson

## ELECTION LAW COMMITTEE

Katharine G. Loving, Chair

Rachael A. Harding, Secretary

Kwame Akosah  
Jarret W. Berg  
Henry T. Berger  
Martin E. Connor  
Marc Philip Epstein  
Elizabeth K. Friedrich  
Chad Gholizadeh  
Michael A. Guerra

Theodore Harris  
Douglas A. Kellner  
Rachel Landy  
Matthew D. Levy  
Edward L. Murray  
Paul D. Newell  
Lawrence D. Norden  
Lauren W. Shandler

India L. Sneed  
Nicholas Stabile  
Sarah K. Steiner  
Jorge L. Vasquez, Jr.  
Ekow Yankah  
Jeffrey M. Wice  
Laura J. Wood  
John Wm. Zaccone\*\*

\*associate members

\*\*abstained

*We would like to thank Megan Wheeler, a law student intern from Indiana University Maurer School of Law, for her assistance in the preparation of this report.*

### Contact

Maria Cilenti, Senior Policy Counsel | 212.382.6655 | [mcilenti@nycbar.org](mailto:mcilenti@nycbar.org)

Mary Margulis-Ohnuma, Policy Counsel | 212.382.6767 | [mmargulis-ohnuma@nycbar.org](mailto:mmargulis-ohnuma@nycbar.org)

Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | [ekocienda@nycbar.org](mailto:ekocienda@nycbar.org)