



# **The Case for Restoring and Updating the Voting Rights Act**

**A Report of the American Civil Liberties Union  
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## Introduction

With approximately eight million members, activists, and supporters, the American Civil Liberties Union (ACLU) is a nationwide organization that advances its mission of defending the principles of liberty and equality embodied in our Constitution and civil rights laws. For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in the courts, legislatures, and communities to defend and preserve the Constitution and laws of the United States. The ACLU's Voting Rights Project, established in 1965, the same year the Voting Rights Act was enacted, has filed more than 300 lawsuits to enforce the provisions of our country's voting laws and Constitution. The goal of the Voting Rights Project is to ensure that all Americans have access to the franchise and can participate in the political process on an equal basis. The Voting Rights Project has historically focused much of its work on combating efforts targeting the political rights of minority voters, who continue to face grave threats to their voting rights. In addition to our work in the courts, the ACLU's Washington Legislative Office has led the ACLU's efforts to develop and strengthen federal laws protecting the right to vote for decades. In 2015, the ACLU launched its National Political Advocacy Department, and, through our work so far, has launched a 50-state campaign to protect and expand access to the ballot nationwide.

More than a century ago, the Supreme Court famously described the right to vote as the one right that is preservative of all others.<sup>1</sup> We are not truly free without self-government, which requires a vibrant participatory democracy where there is fair and equal representation for everyone. The right to vote is an essential act of self-determination—indispensable to the promise of “government of the people, by the people, and for the people.”

Yet since our nation's founding, racial and ethnic minorities have fought pernicious efforts to block them from political representation. After the Civil War and Reconstruction period—when newly emancipated Black men were, for a brief period, able to exercise political rights and hold elected office—more than a hundred years of state-sanctioned voting discrimination followed, which prohibited Blacks and other minority groups from political participation.<sup>2</sup> By the turn of the twentieth

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<sup>1</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>2</sup> African Americans did not possess the right to vote prior to the Civil War. With the ratification of the Fourteenth and Fifteenth Amendments in 1868 and 1870, African Americans and others were granted the right to vote free from racial discrimination, U.S. CONST. amend XV, § 1; *see* U.S. CONST. amend. XIV, § 1, and both amendments gave Congress express power to enforce the amendments with appropriate legislation. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend XV, § 2. But after a brief period of federal enforcement action following the Civil War, Congress and the executive branch abandoned those efforts. For the next hundred years, Southern states undertook sweeping efforts to disenfranchise African Americans and other minority voters by continuing to enact procedural barriers and discriminatory prerequisites to voting, such as literary tests, and through state-sanctioned violence. *See* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 69-93 (Basic Books 2000); *see also* Section I *infra* for more on the

century, official and systematic attempts to block people from voting based on their race or ethnicity had greatly intensified. Many whites feared the exercise of political power by minority voters, and ideologies of racial hierarchy were popular concepts undergirding the structure of numerous state constitutions and for entrenching white supremacy.<sup>3</sup>

Congress enacted the Voting Rights Act in 1965 after trying and failing for almost a century to remedy the affliction of racial discrimination in the voting process and the failure to dismantle state-sanctioned disenfranchisement of African Americans in particular.<sup>4</sup> The most powerful enforcement tool in the Voting Rights Act is the federal preclearance process, established by Section 5. It requires states and political subdivisions with the worst records of voting discrimination to federally “preclear” voting changes, either administratively with the Attorney General or through a declaratory judgment action in federal court. Section 4(b) of the Act established the criteria identifying jurisdictions that would be subject to preclearance, i.e. the “coverage formula.” Section 5 requires covered jurisdictions to demonstrate that a proposed voting change does not have a discriminatory purpose or effect before the change can be enforced.

Since its enactment in 1965, Section 5 has had the greatest impact in dismantling voting discrimination of any congressional action, successfully blocking more than 1,000 instances of discriminatory election rules advanced by state and local officials that would have weakened minority voting power or blocked minority voters from casting a ballot altogether.<sup>5</sup> Section 5 also served as a strong deterrent against countless discriminatory voting changes from going forward.<sup>6</sup> Because of its effectiveness, Congress reauthorized Section 5 four times, most recently in 2006.<sup>7</sup> At

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historical background leading up to the ratification of the Fourteenth and Fifteenth Amendments and adoption of the Voting Rights Act of 1965.

<sup>3</sup> Many of these state constitutional provisions remain today and continue to lock in unequal representation and political conditions. *See, e.g., Evidence of Current and Ongoing Voting Discrimination: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. (2019) (testimony of Derrick Johnson, President, NAACP, discussing historical context of provision in the Mississippi Constitution requiring majority vote requirement for both the state’s popular vote and state House districts for any statewide office and resulting exclusion of successful Black candidates for statewide office); JEFF MANZA AND CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 59-66 (Oxford Univ. Press 2008) (discussing racial origins of felon disenfranchisement rules and finding clear correlation between racial threats—the theory that dominant groups perceive subordinate groups as a threat when subordinate groups gain power to the detriment of the dominant group—and the adoption of state felon disenfranchisement rules).

<sup>4</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

<sup>5</sup> See H. R. REP. NO. 109-478, at 22 (2006).

<sup>6</sup> *Id.* at 24.

<sup>7</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

the time, Congress concluded that although there was significant progress in reducing barriers to voting, there was continued evidence of a pattern of racial discrimination in the covered jurisdictions that justified reauthorization of Section 5's protections.<sup>8</sup>

Despite the vast legislative record compiled by Congress—which included 21 hearings spanning two years and more than 15,000 pages of record evidence<sup>9</sup>—on June 25, 2013, in the case *Shelby County v. Holder*, the Supreme Court held that the coverage formula in Section 4(b) of the Act was unconstitutional,<sup>10</sup> rendering Section 5 preclearance inoperative. In a 5-4 decision, the Supreme Court determined that while “voting discrimination still exists,” the coverage formula was unconstitutional on the basis that it had not been updated in 40 years and was untethered from current conditions of discrimination.<sup>11</sup> Therefore, the formula could no longer be used as a basis for identifying jurisdictions for preclearance. The majority opinion also expressed federalism concerns with the coverage formula's disparate treatment of states, which Chief Justice John Roberts posited could be justified if sufficiently related to the problem it targets; in this case, he maintained that it was not.<sup>12</sup> So while the preclearance requirement itself remains valid, Section 5 is generally deprived of force or effect without a valid coverage formula to identify the jurisdictions subject to preclearance.

With this decision, voters lost the most powerful mechanism to block racially discriminatory voting changes and the ability to learn of potentially discriminatory changes prior to their enforcement. Sure enough, after the *Shelby County* decision, states unleashed a torrent of voting restrictions. Since the 2013 decision, the ACLU, its affiliates, and scores of other voting rights groups, organizers, and litigators have been battling an onslaught of discriminatory voting changes in the courts, legislatures, and local government bodies. Evidence uncovered during the course of litigation and other advocacy demonstrates that many of the voting changes have been aimed squarely at voters of color, preventing them from casting their ballots or to minimize their collective voting strength. The most conservative federal courts in the country have struck down several of these laws as purposefully discriminatory, but often only after years of these laws being in force, during which hundreds of elections took place.

Importantly, the Supreme Court invited Congress to update the Voting Rights Act and ensure that the statute is responsive to voting discrimination where it occurs in the country, stating: “We issue no holding on section 5 itself, only on the coverage

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<sup>8</sup> See H.R. REP. NO. 109-478, at 2, 21-53 (2006).

<sup>9</sup> See *Shelby Cty. v. Holder*, 811 F. Supp. 2d 424, 435 (D.D.C. 2011).

<sup>10</sup> *Shelby Cty v. Holder*, 570 U.S. 529, 557 (2013).

<sup>11</sup> *Id.* at 551-52.

<sup>12</sup> See *id.* at 553.

formula. Congress may draft another formula based on current conditions.”<sup>13</sup> Thus, Section 5’s continued operation depends on Congress updating the Voting Rights Act in a manner that complies with the Court’s decision—and Congress continues to have strong constitutional grounding to do so. For decades, the Supreme Court has recognized that Congress acts at the apex of its constitutional power when legislating to exercise the enforcement power granted to it by the Fourteenth and Fifteenth Amendments to block racial discrimination in the voting process.<sup>14</sup> Congress also has broad power under the Elections Clause of Article 1, Section 4, of the Constitution to regulate the conduct of elections.<sup>15</sup>

Congress must therefore continue to exercise its constitutional authority responsibly, because strong federal protections for the right to vote remain vital in modern America. As demonstrated in this report, voting practices denying or abridging the right to vote on account of race, ethnicity, and language minority status continue in a manner that is flagrant and widespread. The *Shelby County* decision, in halting the preclearance remedy, was itself highly consequential to creating the current conditions of voting discrimination minority voters are now contending with. As Justice Ginsburg forecasted in the opinion’s dissent, “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”<sup>16</sup>

And while the tactics used by officials to discriminate have shifted in light of legal developments and political conditions, the strategies have remained the same, such as efforts to dilute minority voting strength, limit voting opportunities, and advance laws that, while neutral on their face, are intended to deny or abridge the rights of minority voters. Additionally, racially polarized voting has actually intensified under current political conditions, heightening the reward for racial discrimination at the ballot box.<sup>17</sup>

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<sup>13</sup> *Id.* at 557.

<sup>14</sup> See generally *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>15</sup> See U.S. CONST. art. I, § 4; see also *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013); *Foster v. Love*, 522 U.S. 67, 69 (1997).

<sup>16</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J. dissenting).

<sup>17</sup> See Ed Kilgore, *Racially Polarized Voting Is Getting Extreme in the South*, N.Y. MAG: INTELLIGENCER (Dec. 6, 2016), <http://nymag.com/intelligencer/2016/12/racially-polarized-voting-is-getting-extreme-in-the-south.html>; Harry Enten, *It’s Much Harder To Protect Southern Black Voters’ Influence Than It Was 10 Years Ago*, FIVETHIRTYEIGHT (Dec. 5, 2016), <https://fivethirtyeight.com/features/its-much-harder-to-protect-southern-black-voters-influence-than-it-was-10-years-ago/>; LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT, VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 9-13 (March 2006), [https://www.aclu.org/files/votingrights/2005\\_report.pdf](https://www.aclu.org/files/votingrights/2005_report.pdf).

Without congressional action, official acts of voting discrimination will persist against minority voters. Tools are needed to block discriminatory voting changes before they impact voters, because once the right to vote is lost it is virtually impossible to remedy. Overturning prior elections to rectify the ills of the past is difficult to administer, disfavored by courts, and politically complicated. Racial discrimination also infects public confidence in free and fair elections among our citizenry at a time when our election system is viewed with particular scrutiny by the public. Decisive congressional action is needed to protect voters who continue to be targeted by cynical attempts to thwart their political voices and to ensure our electoral system is fair and constitutional.

This report is divided into four parts. First, we provide a brief overview of the conditions leading to the passage of the Voting Rights Act of 1965 and review the Act's provisions, as well as changes made in subsequent reauthorizations to update its protections. Second, we provide an analysis of current law governing Congress's power to enact remedial legislation to address voting discrimination after *Shelby County*. Next we provide information on current conditions of voting discrimination since the last reauthorization of the Voting Rights Act in 2006 based on the ACLU's litigation experience and other advocacy work and identify weaknesses in current enforcement mechanisms. Finally, we review key provisions of the Voting Rights Advancement Act we believe are minimally necessary to provide protection against voting discrimination.

## I. HISTORICAL OVERVIEW

*Since the franchise was first guaranteed to Negroes, there has been a history in the South of efforts to render the guarantee meaningless. As devices have been struck down, others have been adopted in their place. An understanding of this history is relevant to an understanding of the progress of Negroes in the South under recent Federal laws and the obstacles which they face in achieving full and free participation in the electoral and political process.*<sup>18</sup>

This was the observation of the first report by the U.S. Commission on Civil Rights, issued in 1968, reviewing the impact of the Voting Rights Act of 1965. Though intended to be a reflection of lessons from the past, it foretells challenges that have continued for decades and which persist today. This history remains important to Congress's inquiry into current conditions of discrimination at the ballot box, why official acts of discrimination continue against minority voters, and the malign adaptability of racial voting discrimination.

### a. Reconstruction and post-Reconstruction

After the Civil War, the federal government attempted a series of actions to ameliorate unequal conditions of free Blacks and emancipated slaves during the Reconstruction period. The government began that work by recasting our nation's concept of citizenship and the rights associated with it. The most important acts were the ratification of the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth amendments.<sup>19</sup> The Thirteenth Amendment abolished slavery,<sup>20</sup> the Fourteenth Amendment established the guarantees of citizenship, due process, and equal protection against state encroachment,<sup>21</sup> and the Fifteenth Amendment prohibited the denial or abridgment of the right to vote of citizens on the basis of race, color, or previous condition of servitude.<sup>22</sup> The Fourteenth and Fifteenth Amendments—together and standing alone—endowed all citizens with the right to vote free from racial discrimination, and both expressly gave Congress the power to enforce their guarantees through legislation.<sup>23</sup>

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<sup>18</sup> U.S. COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION: A STUDY OF THE POLITICAL PARTICIPATION BY NEGROES IN THE ELECTORAL AND POLITICAL PROCESS IN 10 SOUTHERN STATES SINCE THE PASSAGE OF THE VOTING RIGHTS ACT OF 1965 1 (May 1968), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12p753.pdf> [hereinafter USCCR 1968 REPORT].

<sup>19</sup> The Civil War Amendments were adopted notwithstanding extreme resistance and controversy surrounding their provisions. See KEYSSAR, *supra* note 2, at 77-83.

<sup>20</sup> U.S. CONST. amend XIII, § 1.

<sup>21</sup> U.S. CONST. amend XIV, § 1.

<sup>22</sup> U.S. CONST. amend XV, § 1.

<sup>23</sup> See Section II *infra*.

At the same time, Black Americans joined organized movements, conventions, and petition drives to demand suffrage and protest their exclusion.<sup>24</sup> In 1867, the federal government began Reconstruction initiatives in earnest to rebuild the South and reorient power structures away from the traditional white Southern governments. Congress and the executive branch undertook a range of enterprising actions to implement the change in legal status of African Americans and combat attacks on their political rights. A centerpiece of federal action was the Reconstruction Act of 1867, which required former Confederate states to ratify the Fourteenth Amendment and amend their state constitutions to require Black male suffrage in order to be readmitted to the Union, effectively requiring Southern governments to guarantee full civil and political rights for Black males.<sup>25</sup> This and other enforcement measures allowed hundreds of thousands of Black men to register to vote in the 10 states of the Old South.<sup>26</sup> The integration of Blacks into political life had a radical effect on the composition of federal, state, and local government bodies.<sup>27</sup> The former Confederate states sent 16 African Americans to serve in Congress, including two U.S. Senators from Mississippi.<sup>28</sup> African Americans held positions in state legislatures and statewide offices across the South, including as secretaries of state and lieutenant governors in Mississippi and South Carolina.<sup>29</sup> At one point, over half of the representatives in South Carolina's house chamber were Black.<sup>30</sup> Also for the first time in American history, African Americans held positions of political power in their communities as school board officials and justices of the peace.<sup>31</sup> This new representation had some of the anticipated impact on civic and political life as the region's first public school systems were established, bills were introduced to improve voting rights and governing institutions, and efforts were made to rebuild and diversify the shattered Southern economy.<sup>32</sup>

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<sup>24</sup> See KEYSSAR, *supra* note 2, at 70.

<sup>25</sup> See Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428.

<sup>26</sup> See Enforcement Act of 1871, An Act to enforce the rights of citizens to vote in the several states of this union, ch. 99, 16 Stat. 433 (imposing criminal penalties for interfering with voting and authorizing federal courts to appoint supervisors of elections to protect the voting process from interference); Enforcement Act of 1870, An Act to enforce the Right of Citizens of the United States to vote in the Several States of the union and for other Purposes, ch. 114, 16 Stat. 140 (implementing the Fifteenth Amendment by prohibiting discrimination in voting or voting qualifications on the basis of race, color, or previous condition of servitude, imposing penalties for violations, and granting district courts power to enforce the law's provisions).

<sup>27</sup> See USCCR 1968 REPORT, *supra* note 18, at 1-3.

<sup>28</sup> *Id.* at 3.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Id.* at 2.

<sup>31</sup> See *id.* at 3.

<sup>32</sup> See *ibid.* (highlighting advances in public education and government reform and in Georgia, Florida, and North Carolina with leadership by Black legislators).

Predictably, severe opposition throughout Reconstruction challenged the dramatic increase in political power of African Americans.<sup>33</sup> Following the end of Reconstruction in 1877, dynamic shifts in political power largely resulting from the political repercussions of Reconstruction and a national economic downturn led the federal government to abandon its efforts to advance the promise of the Fourteenth and Fifteenth Amendments.<sup>34</sup> As a result, states were once again free to use legal and extralegal methods to reestablish a racially segregated system. Once readmitted to the Union, white supremacist leaders in Southern states rewrote their state constitutions and intensified efforts to establish a rigid system of racial separation and hierarchy between whites and Blacks.<sup>35</sup> In the absence of political representation, the infamous Black Codes and similar laws flourished, resegregating Blacks from civic life throughout the former Confederacy.<sup>36</sup> The political backlash wiped out most of the gains achieved during the Reconstruction period, foreshadowing a destructive trend in America's pursuit for an inclusive democracy.

The suffrage of Black people was a focal point of the backlash, because it was a key source of civic and political empowerment. Between 1890 and 1910, every former Confederate state had enacted laws that were race-neutral in language but intended to disenfranchise Black voters en masse.<sup>37</sup> Southern states primarily used literacy tests to block Blacks from voting,<sup>38</sup> and also enacted "grandfather clauses" that allowed illiterate whites to bypass literacy tests by exempting individuals

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<sup>33</sup> Despite the progress during Reconstruction, African Americans' access to voting and political participation continued to be a target of intimidation, interference, and violent reprisals throughout the South. See ALLAN J. LICHTMAN, *THE EMBATTLED VOTE IN AMERICA* 84 (Harvard Univ. Press 2018). One horrific example documented by the House Committee on Elections recounted over 2,000 people that were killed or injured in Louisiana in the weeks prior to 1868 Presidential election in midnight raids, secret murders, and open riots. USCCR 1968 REPORT, *supra* note 18, at 4 (citing JOINT SELECT COMMITTEE ON THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, REPORT OF THE JOINT SELECT COMMITTEE APPOINTED TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, SO FAR AS REGARDS THE EXECUTION OF LAWS, AND THE SAFETY OF THE LIVES AND PROPERTY OF THE CITIZENS OF THE UNITED STATES AND TESTIMONY TAKEN, 42D CONG., 2D SESS., REP. NO. 41, pt. 1, at 21-22 (1872)). Intimidation and interference were also widespread when African Americans went to vote on Election Day when harassment and intimidation occurred near polling sites and election fraud committed by those intending to block African Americans' votes from counting. *Id.* at 4-7.

<sup>34</sup> See LICHTMAN, *supra* note 33, at 88-94.

<sup>35</sup> See *id.* at 94.

<sup>36</sup> See *id.* at 97. In addition to legislative acts targeting Black political rights, widespread acts of terror, such as white mob violence and lynchings, were rampant throughout the South and went unprosecuted. The Ku Klux Klan, a white supremacy terrorist organization formed after the Civil War and similar paramilitary organizations used violence as a tool to strategically intimidate Blacks and deny them an equal place in American society. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* 342 (Harper & Row 1988).

<sup>37</sup> See LICHTMAN, *supra* note 33, at 94.

<sup>38</sup> See USCCR 1968 REPORT, *supra* note 18, at 6, 8, 10; LICHTMAN, *supra* note 33, at 94.

whose grandfathers were eligible to vote, in effect preventing only former slaves and their descendants from voting.<sup>39</sup> Other disfranchising practices were just as widespread, including poll taxes, vouchers of “good character,” disqualification for “crimes of moral turpitude” (i.e. felony disenfranchisement laws), residency requirements, and property qualifications to register to vote.<sup>40</sup> Although some rules were explicit in excluding Blacks from political participation, such as rules instituting white primary elections,<sup>41</sup> most of the laws and practices were “color-blind” facially but fashioned or systemically administered in a way to eliminate the ability of Black citizens to vote or diminish their ability to vote on an equal basis.<sup>42</sup>

These efforts caused the percentage of registered Black voters to drop swiftly. In Louisiana, for example, Black voter registration dropped from 130,334 in 1896 to 5,320 in 1900 and to 1,342 by 1904, representing a 96% decrease in Black registration.<sup>43</sup> In South Carolina, Black registration decreased from 92,081 in 1876 to 2,823 in 1898, and in Mississippi the decrease dropped from 52,705 in 1876 to 3,573 in 1898.<sup>44</sup> Black presidential turnout in the 11 former Confederate states dropped from an average of 61% in 1880 to 2% in 1912.<sup>45</sup> By the 1950s, the voter registration rate of Blacks in the South remained steadily low due to the extreme nature of suppressive legal and extralegal tactics, such as in Alabama and Mississippi where the registration rates were 5.2% and 4.4%, respectively.<sup>46</sup>

#### **b. Congressional efforts to address voting discrimination prior to 1965**

With the beginnings of the civil rights movement in the 1950s, Congress reengaged in efforts to advance protections for African American voting rights for the first time since the end of Reconstruction. Congress’s first attempt was the Civil Rights Act of 1957, which established the U.S. Commission on Civil Rights to examine issues of

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<sup>39</sup> See USCCR 1968 REPORT, *supra* note 18, at 6 n.54; LICHTMAN, *supra* note 33, at 94.

<sup>40</sup> LICHTMAN, *supra* note 33, at 94.

<sup>41</sup> See USCCR 1968 REPORT, *supra* note 18, at 6-8 for brief summary on white primaries and *Smith v. Allwright*, 321 U.S. 649 (1944), which held white primaries unconstitutional.

<sup>42</sup> See generally *Giles v. Harris*, 189 U.S. 475 (1903) (upholding tests and other requirements required by Alabama law to register to vote that were discriminatorily administered against Black citizens in practice on the basis that the practices were neutral on their face and applied to all citizens); U.S. COMMISSION ON CIVIL RIGHTS, VOTING IN MISSISSIPPI 4-19 (May 1965), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12v94.pdf>.

<sup>43</sup> USCCR 1968 REPORT, *supra* note 18, at 8.

<sup>44</sup> John Lewis and Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. REV. 105, 107 (1972) (citing BLACK PROTEST: HISTORY, DOCUMENTS, AND ANALYSES 111 (J. Grant, ed. 1968)).

<sup>45</sup> LICHTMAN, *supra* note 33, at 96 (citing KENT REDDING AND DAVID R. JAMES, ESTIMATING LEVELS OF MODELING DETERMINANTS OF BLACK AND WHITE VOTER TURNOUT IN THE SOUTH, 1880 TO 1912, HISTORICAL METHODS 34 (2001)).

<sup>46</sup> See H.R. REP. NO. 89-439 (1965).

racial discrimination in the voting process and recommend corrective measures.<sup>47</sup> The law also enacted a federal prohibition against voter intimidation, coercion, or interference, gave the Attorney General the power to sue to enjoin such acts, and established the Civil Rights Division at the Department of Justice.<sup>48</sup> Congress made another effort with the Civil Rights Act of 1960, which gave federal courts authority to issue special orders declaring individuals qualified to vote if a pattern or practice of voting discrimination in a particular area was found and required local officials to retain registration and voting records to provide to the Attorney General upon request to help identify patterns of discrimination.<sup>49</sup> Finally, the Civil Rights Act of 1964, among its many new protections, prohibited jurisdictions from imposing different voting qualifications on individuals within the jurisdiction and also prohibited discrimination in the voter registration process.<sup>50</sup>

The impact of these bills on the right to vote was limited, suffering from a shared deficiency: despite strong federal protections, after-the-fact enforcement proved extremely ineffective against the widespread practices and devices utilized across the South to prevent African Americans from registering to vote, voting, or having their votes count. In 1963, the U.S. Commission on Civil Rights reported on six years of enforcement of federal voting rights laws and described them as “ineffective” at solving the problems they were aimed at addressing, citing the inherent delays in the judicial process.<sup>51</sup> U.S. Attorney General Nicholas Katzenbach cited the “tortuous, often-ineffective pace of litigation” in his testimony before Congress in 1965.<sup>52</sup> In evaluating the adequacy of their efforts under the Civil Rights Acts of 1957, 1960, and 1964, Congress concluded that “[e]xperience has shown that the case-by-case litigation approach will not solve the voting discrimination problem...The inadequacy of existing laws is attributable to both the intransigence of local officials and dilatory tactics, two factors which have largely neutralized years of litigating effort by the Department of Justice.”<sup>53</sup>

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<sup>47</sup> Civil Rights Act of 1957, Pub. L. No. 85-315, §§ 101-105, 71 Stat. 637.

<sup>48</sup> *Id.* at §§ 111, 121, 131.

<sup>49</sup> Civil Rights Act of 1960, Pub. L. No. 86-449, §§ 301, 601, 74 Stat. 90.

<sup>50</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241.

<sup>51</sup> U.S. COMMISSION ON CIVIL RIGHTS, 1963 REPORT 25 (Sept. 1963), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11963a.pdf>.

<sup>52</sup> H.R. REP. NO. 89-439 (1965); *Hearing on the Proposed Voting Rights Act of 1965 Before the House Comm. on the Judiciary*, 98th Cong. (1965) (statement of Attorney General Nicholas deB. Katzenbach).

<sup>53</sup> S. REP. NO. 89-162 (1965).

### c. The Voting Rights Act of 1965

It was in this context that Congress came to understand that prophylactic measures were necessary for federal legislation to effectively “banish the blight of racial discrimination in voting.”<sup>54</sup> The Voting Rights Act is broadly viewed as one of the most successful pieces of civil rights legislation enacted by Congress and was the culmination of decades of struggle to claim fundamental rights and liberties derived from the ballot box for all citizens. The tipping point for decisive federal action occurred when Alabama State Troopers viciously attacked a group of civil rights activists, led by current Congressman John Lewis, as they marched from Selma to Montgomery, Alabama, in peaceful protest of continued systematic denial of African Americans’ suffrage rights. “Bloody Sunday,” as it came to be known, happened on March 7, 1965, in Selma, Alabama. Days later President Lyndon Johnson, in a special joint session before Congress, announced the introduction of a bill “designed to eliminate illegal barriers to the right to vote,” “to strike down restrictions to voting rights in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote,” “eliminate tedious, unnecessary lawsuits which delay the right to vote,” and “ensure that properly registered individuals are not prohibited from voting.”<sup>55</sup> Two days later, on March 17, Congress introduced the Voting Rights Act of 1965, and after several months of deliberations on its provisions, President Johnson signed it into law on August 6.<sup>56</sup> Through the years, it has undergone several reauthorizations and amendments to update its protections and respond to current conditions of discrimination.<sup>57</sup>

As initially enacted, the law advanced several strategies to stamp out rampant efforts in the South and elsewhere to disenfranchise African Americans and other minorities. First, it established a nationwide, permanent ban on discriminatory voting practices or procedures. Known as Section 2, this provision prohibits states or local jurisdictions from adopting any voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgement of the right to vote on account of race or color.<sup>58</sup> Section 2 is enforceable by both private plaintiffs and the Attorney General and extends to claims of racially discriminatory results, in addition to discriminatory purpose.<sup>59</sup>

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<sup>54</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

<sup>55</sup> Lyndon Baines Johnson, U.S. President, Special Message to the Congress: The American Promise (Mar. 15, 1965), H.Doc. 117, 89th Cong., 1st sess.

<sup>56</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). Section 2 was later amended to include language minorities as a protected class. Voting Rights Act Amendments of 1975 § 206.

<sup>57</sup> See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315.

<sup>58</sup> Voting Rights Act of 1965 § 2

<sup>59</sup> In 1982, after the Supreme Court decided *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in which a plurality of the Court held that Congress intended for Section 2 to extend only to claims of

The 1965 Act also permitted the Department of Justice to send federal examiners to certain jurisdictions to supervise the registration of voters and to certify election observers to help ensure compliance with federal laws.<sup>60</sup> These provisions proved hugely effective at increasing the number of registered voters and for increasing voter turnout in the South and elsewhere. The 1965 Act also temporarily suspended voting tests and devices, such as literacy tests, in covered jurisdictions<sup>61</sup>—a prohibition that became nationwide in 1970<sup>62</sup> and permanent in 1975.<sup>63</sup> It also banned poll taxes<sup>64</sup> and imposed criminal and civil penalties for individuals seeking to deprive others of the right to vote.<sup>65</sup>

In addition to these comprehensive measures, the Act introduced Section 5, the most potent remedial measure contained in the Act's protections, which required federal preclearance of any proposed voting changes in covered jurisdictions before the changes could be enforced. Section 5 required a rigorous review process where the onus was on the jurisdiction to demonstrate to either the U.S. District Court for the District of Columbia or the Attorney General that the change would not have the purpose or effect of denying or abridging the right to vote on the basis of race or color (or, per the 1975 amendments, on the basis of language minority status).<sup>66</sup> The jurisdictions subject to preclearance were identified through a coverage formula contained in Section 4(b) of the Act, which captured jurisdictions (i) that maintained any test or device for voting as of November 1, 1964, and (ii) where less than 50% of voting age residents were registered to vote or voted in the November 1964 general election.<sup>67</sup> Subsequent amendments to the Act in 1970 and 1975 added jurisdictions using this same criteria as applied to subsequent presidential elections, i.e. jurisdictions that maintained a voting test or device and where less than 50% of

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discriminatory intent, Congress amended Section 2 to expressly provide for discriminatory results claims. *See* Voting Rights Act Amendments of 1982 § 3.

<sup>60</sup> Voting Rights Act of 1965 §§ 6-9.

<sup>61</sup> Voting Rights Act of 1965 § 4. The Act initially defined “tests or device” as any requirement that a person, as a prerequisite for voting or registration for voting, (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or knowledge of any particular subject, (3) possess good moral character, or (4) prove qualifications by the voucher of registered voters or members of any other class. *Id.* The Act was later amended to include as a voting test or device English-only elections where at least 5% of the voting age citizens in a jurisdiction are members of a single language minority. *See* Voting Rights Act Amendments of 1975 § 203.

<sup>62</sup> Voting Rights Act Amendments of 1970 § 6.

<sup>63</sup> Voting Rights Act Amendments of 1975 § 102.

<sup>64</sup> Voting Rights Act of 1965 § 10.

<sup>65</sup> *Id.* at §§ 11-12.

<sup>66</sup> *Id.* at § 5.

<sup>67</sup> *Id.* at § 4.

voting age residents were registered to vote or voted in the November 1968 and November 1972 presidential elections.<sup>68</sup>

In enacting the coverage formula, Congress essentially “reverse engineered” the formula to ensure that certain jurisdictions that Congress had identified as having the worst records of voting discrimination were captured by the coverage formula.<sup>69</sup> It then established the criteria—low voter registration and turnout rates, plus the use of tests or devices—to capture those jurisdictions. In identifying the worst offenders, Congress undertook a comprehensive review, gathering what it deemed reliable evidence of voting discrimination.<sup>70</sup>

Congress gave special consideration to the Justice Department’s unsuccessful efforts to effectively address discriminatory voting practices through litigation on a case-by-case basis, which, as explained, had largely failed to open the voting and registration process to Black voters. Confronted with hostile and opportunistic state and local officials, the Justice Department would prove one discriminatory practice or procedure to be unlawful and enjoin it, only to see a new one substituted in its place. Litigation would then have to commence anew to challenge the new practice or procedure, in an endless loop. Congress cited the impotency of its previous legislation aimed at protecting African American suffrage and the lack of effective litigation tools available to private plaintiffs and the Department of Justice:

What has been the effect of the 1957, 1960, and 1964 voting rights statutes? Although these laws were intended to supply strong and effective remedies, their enforcement has encountered serious obstacles in various regions of the country. Progress has been painfully slow, in part because of the intransigence of State and local officials and repeated delays in the judicial process. Judicial relief has had to be gaged not in terms of months—but in terms of years. With reference to the 71 voting rights cases filed to date by the Department of Justice under the 1957, 1960, and 1964 Civil Rights Acts, the Attorney General testified before a judiciary subcommittee that an incredible amount of time has had to be devoted to analyzing voting records—often as much as 6,000 man-hours—in addition to time spent on trial preparation and the almost inevitable appeal. The judicial process affords those who are determined to resist plentiful opportunity to

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<sup>68</sup> Voting Rights Act Amendments of 1970 § 4; Voting Rights Act Amendments of 1975 § 202.

<sup>69</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966).

<sup>70</sup> *Id.* at 309-315 (reviewing Congressional findings from H.R. REP. NO. 89-439, 8-16 (1965); S. REP. NO. 89-162, pt. 3, 3-16 (1965)). From the start, Congress acknowledged the formula did not perfectly capture some places with terrible records of voting discrimination, such as Texas and Arkansas, and also included some places for which, at the time, Congress lacked evidence of discrimination, such as Alaska (even though Alaska, as Congress came to understand later, did in fact have a terrible record of voting discrimination against Alaska Native voters). To address this, Congress included the “bail in” and “bail out” mechanisms, discussed *infra*.

resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.<sup>71</sup>

To protect against overbreadth of the coverage formula, Congress included a provision for the termination of preclearance coverage, also known as “bail out,” if a jurisdiction successfully files a declaratory judgment action in federal district court establishing the absence of voting discrimination for a period of years according to certain criteria set by the Act.<sup>72</sup> Congress also included a provision to protect against under-inclusiveness by giving federal courts the ability to retain oversight—i.e. “bail in” to preclearance review—of a jurisdiction for a period of time if a Fourteenth or Fifteenth Amendment violation warranted it.<sup>73</sup>

The preclearance process proved an immediate success, and it was dramatically more effective than previous legislation at mitigating, deterring, and blocking racially discriminatory voting practices. The results were measureable by significant increases in Black voter registration and turnout, particularly in the South. The May 1968 report by the U.S. Commission on Civil Rights examining Black voter participation since the Act’s 1965 enactment concluded that “the Voting Rights Act has resulted in a great upsurge in voter registration, voting, and other forms of political participation by Negroes in the South.”<sup>74</sup> In the Deep South, Black voter registration rates increased an average of 67% between 1964 and 1968, and there was a dramatic overall increase in the rates of nonwhite voter registration measured in individual states covered by preclearance.<sup>75</sup> The Commission also reported large increases in Black voter turnout and a doubling in the number of Black elected office holders.<sup>76</sup>

Yet while great progress was made, state and local jurisdictions continued to innovate new ways to diminish the voting strength and political power of African Americans. The same U.S. Civil Rights Commission report concluded:

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<sup>71</sup> H.R. REP. NO. 89-439, at 9–11 (1965); *see also South Carolina v. Katzenbach*, 383 U.S. at 328.

<sup>72</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437 (1965). This criteria was amended from initial enactment through reauthorizations. As initially enacted, “bail out” required a jurisdiction to show that it had not used a test or device denying or abridging the right to vote on account of race or color for in the five years preceding the filing of a declaratory judgment action.

<sup>73</sup> *Id.* at § 3(c).

<sup>74</sup> USCCR 1968 REPORT, *supra* note 18, at iii.

<sup>75</sup> VALELLY, RICHARD. THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 4 (University of Chicago Press 2004). In the 10 states examined, the Commission reported that the nonwhite registration rate had increased: from 19.3% to 51.6% in Alabama; from 40.4% to 62.8% in Arkansas; from 51.2% to 63.6% in Florida; from 27.4% to 52.6% in Georgia; from 31.6% to 58.9% in Louisiana; from 6.7% to 59.8% in Mississippi; from 46.8% to 51.3% in North Carolina; from 37.3% to 51.2% in South Carolina; from 69.5% to 71.7% in Tennessee; up to 61.6% in Texas; and from 38.3% to 55.6% in Virginia. USCCR 1968 REPORT, *supra* note 18, at pp. 12-13, 223.

<sup>76</sup> *See* USCCR 1968 REPORT, *supra* note 18, at 14-15, 211-221.

Nevertheless, many new barriers to full and equal political participation have arisen, including measures or practices diluting the votes of Negroes, preventing Negroes from becoming candidates, discriminating against Negro registrants and poll watchers, and discriminating against Negroes in the appointment of election officials. Intimidation and economic dependence in many areas in the South continue to prevent Negroes from exercising their franchise or running for office fully and freely.<sup>77</sup>

The Commission discussed at length the problem of dilution tactics that swiftly replaced the voting barriers that were successfully weakened by the 1965 Act—instead of thwarting the ability of African Americans to register or physically cast a vote, these measures were aimed at diluting the individual and collective weight of votes cast by Black voters relative to white voters. These methods and devices included reapportionment and redistricting of voting boundaries, changes to methods of elections (e.g. conversion to at-large elections), and annexations of predominantly Black jurisdictions with predominantly white jurisdictions.<sup>78</sup> For example, after the surge in Black voter registration in 1966, Mississippi enacted 12 new laws altering the state’s election laws to diminish the weight of votes cast by Black voters. These new laws included measures advancing at-large elections systems for county boards of education and boards of supervisors and several reapportionment and redistricting statutes that had the effect of diluting African American voting strength in Mississippi.<sup>79</sup> Alabama and local counties throughout the state pursued similar strategies in response to the substantial increase in Black voter participation.<sup>80</sup>

In each subsequent reauthorization of the Act Congress determined that as minority voter participation grew, jurisdictions increasingly turned to practices that diluted minority voting strength, and the nature of Section 5 objections and court decisions reflected this trend.<sup>81</sup> Congress intended for Section 5 to keep up with the evolution of voting discrimination to prevent new schemes and practices that diminish minority voting power, recognizing “that protection of the franchise extends beyond mere prohibition of official actions designed to keep voters away from the polls, it also includes prohibition of state actions which so manipulate the elections process as to render votes meaningless.”<sup>82</sup> In view of this, Congress

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<sup>77</sup> *Id.* at iii.

<sup>78</sup> *Id.* at 21-39.

<sup>79</sup> *Id.* at 21-23, 30-35.

<sup>80</sup> *Id.* at 23-25, 26-30.

<sup>81</sup> See H.R. REP. NO. 109-478, at 2 (2006); S. REP. NO. 97-417, at 6 (1982); H.R. REP. NO. 94-196, at 10 (1975); S. REP. NO. 94-295, at 16 (1975); H.R. REP. NO. 91-397, at 3283 (1969).

<sup>82</sup> H.R. REP. NO. 97-227, at 17 (1982); see also H.R. REP. NO. 109-478, at 5 (2006).

continued to strongly endorse Section 5 as the appropriate remedy to protect against new devices adopted to discriminate and disempower.

#### **d. Voting Rights Act amendments and reauthorizations: 1970-1982**

Through periodic reauthorizations, Congress amended the Voting Rights Act several times to respond to newly identified or emerging voting discrimination practices, updating the Act's protections in 1970, 1975, 1982, 1992, and 2006.<sup>83</sup> In 1970, Congress updated the original 1965 coverage formula—originally capturing Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and 28 counties in North Carolina<sup>84</sup>—to add voter registration and turnout data and the use of tests or devices by jurisdictions in the 1968 presidential elections as an additional coverage metric.<sup>85</sup> The 1970 amendments added Bronx, Kings, and New York counties in New York, counties in Wyoming, California, Arizona, and Idaho, election districts in Alaska, and towns in Connecticut, New Hampshire, Maine, and Massachusetts to the list of covered jurisdictions.<sup>86</sup> The temporary suspension of tests or devices contained in the 1965 Act became nationwide in 1970 and permanent in 1975. The 1975 amendments also amended the coverage formula again to include in the list of covered jurisdictions those which had voter registration or turnout below 50% and used a test or device in the 1972 presidential elections.<sup>87</sup>

The 1975 amendments also addressed discrimination directed at language minority voters for the first time. The Senate Judiciary Committee report explained:

Title III is specifically directed to the problems of 'language minority groups,' that is, racial minorities whose dominant language is frequently other than English. [The Act] defines language minorities as persons who are 'American Indian, Asian American, Alaskan Natives, or of Spanish heritage.'...The Committee singled out the 'language minority' groups for several reasons. First, as discussed above, illiteracy is all too often a product of racially discriminatory educational systems...Second, while the documentation of discrimination and non-responsiveness by the states was substantial with regard to the particular minority groups, the Subcommittee was

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<sup>83</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577; Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315.

<sup>84</sup> H.R. REP. NO. 94-196, at 5 (1975). The 1965 coverage formula also captured four counties in Arizona, Honolulu County, Hawaii, and Elmore County, Idaho. *Ibid.*

<sup>85</sup> Voting Rights Act Amendments of 1970 § 4.

<sup>86</sup> S. REP. NO. 94-295, at 13 (1975).

<sup>87</sup> Voting Rights Act Amendments of 1975 § 202.

presented with no evidence of difficulties for other language groups. Indeed, the voter registration statistics for the 1972 Presidential election showed a high degree of participation by other language groups.<sup>88</sup>

During the House Judiciary Committee's hearings, it was relayed that language-minority groups were subjected to instances of discriminatory plans, annexations, and acts of physical and economic intimidation.<sup>89</sup> One member of Congress noted that "[t]he entire situation of these uncovered jurisdictions is tragically reminiscent of the earlier and, in some respects, current problems experienced by blacks in currently covered areas."<sup>90</sup> Congress pointed to the problem that "states and local jurisdictions have been disturbingly unresponsive to the problems of these minorities" and determined that "[b]ecause so many states and counties have not responded to the situation confronting language minority citizens, the Committee believes strongly that Congress is obligated to intervene."<sup>91</sup>

Congress addressed this discrimination in a few ways. First, it added as a test or device the use of English-only elections where at least 5% of voting age residents in a jurisdiction are from a single language minority group.<sup>92</sup> These amendments resulted in the addition of Alaska (which had previously successfully bailed out of coverage), Arizona, Texas, several counties in California, Colorado, Florida, South Dakota, New York (which had also successfully bailed out), and two Michigan townships.<sup>93</sup> The 1975 amendments also added a requirement, commonly known as Section 203, that certain states and political subdivisions conduct bilingual elections; the requirement applies to covered jurisdictions in which a single language minority is more than 5% of the eligible voters and also extends to noncovered jurisdictions where a language minority is more than 5% of the eligible voters and the illiteracy rate within the language minority is higher than the national average.<sup>94</sup> In 1992, Congress extended the language minority provisions for an additional 15 years, concluding that "the type of discrimination previously encountered by these language minority populations still exists, and the need for [Section] 203 continues," and that "without a federal mandate, much needed

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<sup>88</sup> S. REP. NO. 94-295, at 38.

<sup>89</sup> See LAUGHLIN McDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS 36-37 (Univ. of Ok. Press 2010).

<sup>90</sup> *Id.* at 27.

<sup>91</sup> S. REP. NO. 94-295, at 39.

<sup>92</sup> *Id.* at § 203.

<sup>93</sup> S. REP. NO. 97-417, at 117 (1982); see also U.S. DEP'T OF JUSTICE, JURISDICTIONS PREVIOUSLY COVERED BY SECTION 5, [http://www.justice.gov/crt/about/vot/sec\\_5/covered.php](http://www.justice.gov/crt/about/vot/sec_5/covered.php).

<sup>94</sup> Voting Rights Act Amendments of 1975 § 203.

bilingual assistance in the voting process, meant to ensure the guarantees of the Fourteenth and Fifteenth Amendments, may disappear.”<sup>95</sup>

**e. The 2006 reauthorization**

In 2006 the Section 5 preclearance provision and Section 4 coverage formula were again set to expire, and Congress undertook an exhaustive two-year investigation to examine and document evidence of ongoing discrimination in the covered jurisdictions. In its review, Congress built an extensive record of continuing discrimination in the covered jurisdictions since the 1982 reauthorization, largely consisting of evidence of vote dilution but also practices that denied or burdened the ability of minority voters to cast a ballot. The House Report cited evidence of continued discrimination by covered jurisdictions consisting of:

- (i) over 700 objections interposed by the Justice Department between 1982 and 2006;
- (ii) hundreds of voting changes that were withdrawn after requests for more information by the Justice Department;
- (iii) successful Section 5 enforcement actions undertaken in covered jurisdictions since 1982 against election practices that would have diluted minority voting strength, such as annexations and at-large methods for electing officeholders;
- (iv) the number of requests for declaratory judgments denied by the D.C. district court;
- (v) the continued filing of Section 2 cases that originated in covered jurisdictions, predominantly vote dilution cases;
- (vi) litigation initiated by the Justice Department since 1982 to enforce sections 4(e), 4(f)(4), and 203 to protect language minority access; and
- (vii) the tens of thousands of federal observers sent by the Justice Department to monitor elections between 1982 and 2006.<sup>96</sup>

The House evidence also included a nationwide analysis of Section 2 cases showing that, of all the successful Section 2 litigation undertaken in the previous 25 years, more than half had occurred in the covered jurisdictions, notwithstanding the powerful protection of Section 5 and the fact that the covered jurisdictions contained less than 39% of the country’s total population.<sup>97</sup>

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<sup>95</sup> H.R. REP. NO. 102-665 (1992).

<sup>96</sup> H.R. REP. NO. 109-478, at 2 (2006); *see also* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2, 120 Stat. 577 (2006).

<sup>97</sup> H.R. REP. NO. 109-478, at 53.

Congress concluded that violations continued to be concentrated in these areas and warranted reauthorization of Section 5 preclearance and the 4(b) coverage formula, finding that “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”<sup>98</sup> The House Report concluded that the 2006 reauthorization represented “one of the most extensive legislative records in the Committee on the Judiciary’s history,”<sup>99</sup> which included 21 hearings, testimony from 90 witnesses, and more than 15,000 pages of record evidence.<sup>100</sup> The ACLU submitted a report to Congress reviewing our voting rights litigation docket since the previous 1982 reauthorization.<sup>101</sup> The report—close to 900 pages and reviewing 293 cases in 31 states—concluded that purposeful discrimination was still widespread in places where it had historically existed against minority voters and that Section 5 continued to be a critical tool for blocking discriminatory voting practices.<sup>102</sup> The report also concluded that there was a continuing pattern of racially polarized voting in the covered jurisdictions and that hostility to minority political participation was an ongoing problem. In addition, the Section 203 minority language assistance provision and federal observers provision were due to expire, and the ACLU presented evidence that both of these provisions were necessary to deter and remedy ongoing discrimination. Both provisions were reauthorized by Congress, passing the Senate with a vote of 98-0 and the House with a vote of 390-33.

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<sup>98</sup> Voting Rights Act Reauthorization and Amendments Act of 2006 § 2.

<sup>99</sup> H.R. REP. NO. 109-478, at 5 (2006).

<sup>100</sup> Brief for Respondent-Intervenors at 4, *Shelby Cty v. Holder*, No. 12-96 (2013) (citing H.R. REP. NO. 109-478, at 5 (2006); S. REP. NO. 109-295, at 2 (2006)).

<sup>101</sup> MCDONALD, *supra* note 17.

<sup>102</sup> Examples from ACLU litigation of discrimination against minority voters presented in the report included: restrictive photo ID laws; discriminatory annexations and deannexations; challenges by white voters or elected officials to majority-minority districts; pairing Black incumbents in redistricting plans; refusing to draw majority-minority districts; refusing to appoint Blacks to public office; maintaining a racially exclusive sole commissioner form of county government; refusing to designate satellite voter registration sites in the minority community; refusing to accept “bundled” mailing voter registration forms; refusing to allow registration at county offices; refusing to comply with Section 5 or Section 5 objections; transferring duties to an appointed administrator following the election of Blacks to office; white opposition to restoring elections to a majority Black town; requiring candidates for office to have a high school diploma or its equivalent; prohibiting “for sale” and other yard signs in a predominantly white municipality; disqualifying Black elected officials from holding office or participating in decision making; relocating polling places distant from the Black community; refusing to hold elections following a Section 5 objection; maintaining an all-white self-perpetuating board of education; challenges to the constitutionality of the National Voter Registration Act; failure to provide bilingual ballots and assistance in voting; county governance by state legislative delegation; challenges to the constitutionality of the Voting Rights Act; packing minority voters to dilute their influence; and using discriminatory punch card voting systems. *Id.* at 16-19.

## II. CONGRESSIONAL AUTHORITY TO REMEDY RACIAL DISCRIMINATION IN VOTING AFTER *SHELBY COUNTY*

*Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.*

*McCulloch v. Maryland*, 1819<sup>103</sup>

The framers of the Fifteenth Amendment drew on Chief Justice John Marshall’s precept to formulate the scope of Congress’s enforcement powers under the Civil War Amendments.<sup>104</sup> Rooted in the Constitution’s Supremacy Clause, this maxim defines Congress’s expansive powers to enforce the Fifteenth Amendment’s guarantee that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

Congress continues to have sweeping power under the Fifteenth Amendment to identify and eradicate racial discrimination in voting. Regarding preclearance, an unbroken line of Supreme Court decisions going back a half century confirms that the Voting Rights Act’s prophylactic remedy is a valid exercise of congressional power. As explained below, Supreme Court jurisprudence continues to forcefully uphold Congress’s power to enforce the command of the Fifteenth Amendment to “banish the blight of racial discrimination in voting.”

Additionally, through unaddressed in *Shelby County*, Congress may also act to protect minority voters through its expansive grant of authority under the Elections Clause, which gives Congress supervisory power over federal elections. Though less prominent in previous congressional deliberations on the Voting Rights Act, the Supreme Court has consistently recognized Congress’s broad powers under the Clause and Congress should consider this power as additional, considerable authority to the extent policies address federal elections.

### a. Supreme Court review of the Voting Rights Act prior to *Shelby County*

The Voting Rights Act’s heightened degree of federal oversight over local voting changes has been repeatedly challenged by jurisdictions seeking to free themselves from federal review—even when they could otherwise “bail out” by not discriminating over a period of years. In 1966, one year after the Act’s passage, the Supreme Court applied a rational basis standard of review to uphold Section 5 preclearance and the Section 4 coverage formula as constitutional exercises of

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<sup>103</sup> 17 U.S. 316 (1819).

<sup>104</sup> See *Shelby Cty. v. Holder*, 570 U.S. 529, 567 (2013).

Congress's Fifteenth Amendment enforcement power in *South Carolina v. Katzenbach*.<sup>105</sup> The Court expressed its use of the standard as follows:

The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved power of the States, *Congress may use any rational means to effectuate the constitutional prohibitions of racial discrimination in voting...* Section 1 of the Fifteenth Amendment declares that '(t)he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.' This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice....The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.<sup>106</sup>

The Court continued:

[Section] 2 of the Fifteenth Amendment expressly declares that 'Congress shall have the power to enforce this article by appropriate legislation.' By adding this authorization, the Framers indicated that Congress was chiefly responsible for implementing the rights created in [Section] 1. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation...Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.<sup>107</sup>

The Court's analysis was highly deferential to Congress's evaluation of the problem targeted by the Act and its legislative judgment in enacting remedies to address them.<sup>108</sup>

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<sup>105</sup> 383 U.S. at 301, 324 (1966).

<sup>106</sup> *Id.* at 325. (Emphasis added.)

<sup>107</sup> *Id.* at 326-26. The Court also mirrored the language of *McCulloch* when describing the power of Congress to legislate to enforce the Civil War Amendments: "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Id.* at 236 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-346 (1879)).

<sup>108</sup> Rational basis is a highly deferential standard of review and carries with it a strong presumption of validity of a legislative act. Judicial inquiry is typically limited to whether Congress has a rational

Unsuccessful legal challenges followed each reauthorization in 1970,<sup>109</sup> 1975,<sup>110</sup> 1982,<sup>111</sup> and 2006.<sup>112</sup> With respect to the 1975 amendments, the Supreme Court issued a major ruling on Congress’s Fifteenth Amendment enforcement powers in *City of Rome v. United States*. In that case, the City of Rome, Georgia, appealed the denial of preclearance of several annexations on multiple grounds, including by challenging the constitutionality of Section 5. The Court rejected the City of Rome’s argument that preclearance violated federalism principles. It concluded that “principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments ‘by appropriate legislation.’ Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”<sup>113</sup> The Court reinforced *Katzenbach*’s holding that “the Fifteenth Amendment supersedes contrary exertions of state power” and again applied rational basis review to hold that “Congress has the authority to regulate state and local voting through the provisions of the Voting Rights Act.”<sup>114</sup>

The *City of Rome* plaintiffs also argued that Section 5 could not constitutionally prohibit voting changes that had only a discriminatory effect and reasoned that the Fifteenth Amendment only prohibits laws enacted with a discriminatory purpose. The Court firmly rejected this argument, holding that Congress, in exercising its remedial powers under the Fifteenth Amendment, could prohibit voting changes that are discriminatory in effect to enforce the amendment’s proscriptions.<sup>115</sup>

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basis for determining the problem and whether the means selected to address it are reasonable and appropriate. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964).

<sup>109</sup> *Georgia v. United States*, 411 U.S. 526, 534-35 (1973) (reaffirming *Katzenbach*’s holding that the Act was a permissible exercise of congressional power under the enforcement clause of the Fifteenth Amendment).

<sup>110</sup> *City of Rome v. United States*, 446 U.S. 156, 182 (1980) (rejecting the City of Rome, Georgia’s, contention that the Act exceeded Congress’s Fifteenth Amendment enforcement power and that the Act violated principles of federalism).

<sup>111</sup> *Lopez v. Monterey Cty.*, 525 U.S. 266, 268, 283, 284-85 (1999) (rejecting California’s argument that preclearance unconstitutionally violated state sovereignty and affirming that Congress’s Fifteenth Amendment enforcement powers extend to protect against voting practices that are discriminatory in either purpose or effect).

<sup>112</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013) (finding the coverage formula under the Act unconstitutional); *Northwest Austin Municipal Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009) (raising “serious constitutional questions” relating to the Act’s coverage formula and preclearance remedy).

<sup>113</sup> *City of Rome*, 446 U.S. at 179-180.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Id.* at 173-77. In making this holding—that Congress can prohibit voting practices that have only a discriminatory effect—the Court essentially extended its reasoning in *Katzenbach* upholding the Act’s ban on literacy tests in the covered jurisdictions as an appropriate exercise of congressional

Up until the 2006 reauthorization, the Supreme Court acknowledged the preclearance process's uncommon intrusion into state and local policymaking, but consistently and in strong terms upheld the constitutionality of Section 5 and the coverage formula, because "the Fifteenth Amendment permits the intrusion."<sup>116</sup> Yet, as the Court repeatedly upheld the Act's constitutionality, it increasingly narrowed its reach over a series of decisions,<sup>117</sup> ultimately expressing skepticism regarding the continued viability of the coverage formula.

**b. Current burdens, current needs, and the equal sovereignty principle announced in *Northwest Austin* and *Shelby County***

The Act's 2006 reauthorization was initially challenged in *Northwest Austin Municipal Utility District No. 1 v. Holder*.<sup>118</sup> In *Northwest Austin*, a small Texas utility district filed suit seeking relief under the Act's "bailout" provision, which allows political subdivisions to be released from preclearance if certain conditions are met showing the jurisdiction has been discrimination-free for a period of years. In the alternative, the utility district argued that if it was ineligible for bail out, Section 5 posed an unconstitutional intrusion into local sovereignty. A three-judge district court panel upheld the constitutionality of Section 5.<sup>119</sup>

The Supreme Court granted review, and, in a departure from previous cases reviewing the Act, the Court surveyed favorable changes in voting patterns in covered jurisdictions since 1965 and remarked in dicta that, close to 50 years later, the "preclearance requirements and its coverage formula raise[d] serious constitutional questions."<sup>120</sup> The Court cited federalism concerns to aver that "a departure from the fundamental principle of equal sovereignty [among states] requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets"<sup>121</sup> and warned that "the [Act] imposes current burdens and must be justified by current needs."<sup>122</sup> The Court ultimately avoided

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power, because the covered jurisdictions had imposed the tests to effectuate voting discrimination, even if applied and administered in a nondiscriminatory fashion. *Id.* at 176-77.

<sup>116</sup> *Lopez*, 525 U.S. at 284-85.

<sup>117</sup> See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 479–80 (2003) (determining that, in assessing whether a Section 5 violation has occurred, courts should consider factors beyond the traditional inquiry into minorities' ability to elect candidates of their choice); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (holding that Section 5 does not extend to purposefully discriminatory voting changes that are not enacted with a specific retrogressive purpose); *City of Mobile v. Bolden*, 446 U.S. 55, 58 (finding that Congress intended Section 2 to only proscribe purposeful voting discrimination) (1980). Each of these decisions were legislatively overturned by Congress in subsequent reauthorizations.

<sup>118</sup> 557 U.S. 193 (2009).

<sup>119</sup> *Northwest Austin Municipal Utility District No. 1 v. Mukasey*, 573 F.Supp.2d 221 (D.D.C. 2008).

<sup>120</sup> *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. at 204.

<sup>121</sup> *Id.* at 203.

<sup>122</sup> *Ibid.*

the constitutional question by concluding that the utility district was eligible to bail out from coverage under Section 4(a) of the Act and made no holding regarding preclearance or the coverage formula.

Taking this strong signal from the Court regarding its view of the Act's constitutionality, a year after the *Northwest Austin* decision, Shelby County, Alabama, brought suit in the D.C. District Court against the Attorney General after his objection to proposed voting changes within the county in *Shelby County v. Holder*. Unlike the plaintiff in *Northwest Austin*, however, Shelby County did not qualify for bail out. The county instead sought a declaratory judgment that Section 5 preclearance and the Section 4 coverage formula were facially unconstitutional and a permanent injunction against their enforcement. The district court ruled against the county and upheld the Act after finding that the legislative record from the 2006 reauthorization offered ample justification for Congress to reauthorize Section 5 and continue the Section 4(b) coverage formula.<sup>123</sup>

The D.C. Circuit Court of Appeals affirmed, agreeing with the district court's assessment that the legislative record amply supported reauthorization and that litigation under Section 2 remained, by itself, inadequate to protect the rights of minority voters within the covered jurisdictions, and accorded deference to Congress's judgment that preclearance was still necessary.<sup>124</sup> The D.C. Circuit focused its inquiry on "whether [the coverage formula], together with bail-in and bailout, continues to identify the jurisdictions with the worst problems."<sup>125</sup> After weighing the combined effectiveness of Section 2 lawsuits across the country with the deterrent effect of Section 5, the court concluded that the coverage formula continued "to single out the jurisdictions in which discrimination is concentrated," and therefore passed constitutional muster.<sup>126</sup>

On review by the Supreme Court, Chief Justice Roberts' majority opinion directly took up the question of constitutionality, but did not make a holding regarding Section 5. Instead, the Court ruled on the Section 4(b) coverage formula, finding it unconstitutional in light of current conditions. In doing so, Chief Justice Roberts announced two principles guiding the majority's decision, directly referring to the dicta from *Northwest Austin* noted above: *first*, the Voting Rights Act imposes current burdens that must be justified by current needs, and *second*, a departure from the fundamental principle of "equal sovereignty" of the states requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem it targets.<sup>127</sup>

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<sup>123</sup> *Shelby Cty. v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011).

<sup>124</sup> *Shelby Cty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012)

<sup>125</sup> *Id.* at 879.

<sup>126</sup> *Id.* at 883.

<sup>127</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 542 (2013).

Chief Justice Roberts concluded that the statutory coverage formula did not meet this criteria because it was still based on voter registration and turnout data and practices from the 1960s and 1970s, while voter registration and turnout in the covered states had risen dramatically and the practices upon which the coverage formula were based had since been banned.<sup>128</sup> The majority thus concluded that the coverage formula irrationally distinguished between the states “based on decades-old data and eradicated practices.”<sup>129</sup> With respect to the legislative record, the majority identified the “fundamental problem” that “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day...[W]e are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.”<sup>130</sup>

The Court particularly scrutinized the disparate coverage formula as violating the principle of “equal sovereignty,” repeatedly emphasizing that the disparate treatment of states must be sufficiently justified. The Court directed that, in order to serve the Fifteenth Amendment’s purpose to ensure a better future, that “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>131</sup>

**c. Reconciling *Shelby County* with existing Supreme Court precedent upholding the Voting Rights Act**

Even after *Shelby County*, it continues to be correct that Congress acts at the zenith of its power when it enacts legislation to enforce the guarantees of the Fifteenth Amendment,<sup>132</sup> which “targets precisely and only racial discrimination in voting[.]”<sup>133</sup> In full, the Amendment reads:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.<sup>134</sup>

By affirmatively granting Congress authority to enforce its terms, the Fifteenth Amendment was “specifically designed as an expansion of federal power and an

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<sup>128</sup> *Id.* at 551.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Id.* at 554.

<sup>131</sup> *Id.* at 553.

<sup>132</sup> See *Hayden v. Pataki*, 449 F.3d 305, 359 (2d Cir. 2006).

<sup>133</sup> See *Shelby Cty. v. Holder*, 383 U.S. at 567 (Ginsburg dissenting).

<sup>134</sup> U.S. CONST. amend XV, § 1.

intrusion on state sovereignty.”<sup>135</sup> It made Congress “chiefly responsible for implementing the rights created by the amendment.”<sup>136</sup> The Voting Rights Act—particularly its preclearance system—reflects Congress’s definitive attempt to remedy voting discrimination in the face of “unremitting and ingenious defiance of the Constitution.”<sup>137</sup> Its prophylactic approach reflects Congress’s clarity on the continuing vulnerability of minority voting rights and its understanding that the sacred right to vote, once lost or abridged, is impossible to remedy. The *Shelby County* majority did not overrule, or even call into question, the holdings of *Katzenbach*, *City of Rome*, or other prior decisions by the Court upholding the constitutionality of the Voting Rights Act; indeed, Chief Justice Roberts insisted that the majority opinion did not conflict with those cases.<sup>138</sup> Accordingly, these cases should be read in alignment to the extent possible.

Because *Shelby County* did not make a holding on Section 5, the preclearance process itself remains constitutional.<sup>139</sup> As indicated, an unbroken line of Supreme Court decisions going back more than fifty years confirms that the preclearance component is a valid exercise of congressional authority under the Fifteenth Amendment.<sup>140</sup> Rather, the *Shelby County* majority concluded that the coverage formula that Congress adopted when it reauthorized Section 5 in 2006 irrationally relied on outdated data.<sup>141</sup>

Second, the majority opinion in *Shelby County* did not disturb established precedent that Fifteenth Amendment enforcement legislation must meet a rational basis standard of review.<sup>142</sup> While the majority opinion’s focus on current needs and

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<sup>135</sup> *Lopez v. Monterey Cty.*, 525 U.S. 266, 282 (1999).

<sup>136</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966).

<sup>137</sup> *City of Rome v. United States*, 446 U.S. 156, 173-74 (1980) (quoting *Katzenbach*, 383 U.S. at 309.).

<sup>138</sup> See *Shelby Cty.*, 383 U.S. at 535, 545-46 (invoking *Katzenbach* to reinforce that preclearance is a “stringent” and “potent” remedy and “an uncommon exercise of congressional power,” but could be justified by “exceptional conditions.”); see also *id.* at 539 (referring to the Court’s previous decisions upholding the constitutionality of the Act); *id.* at 544 (averring that *Katzenbach* rejected the notion that the equal sovereignty principle operated as a bar on differential treatment, but did not suggest that the principle was irrelevant to the constitutional inquiry).

<sup>139</sup> Congress should take note, however, that the majority opinion in *dicta* seemed to suggest that Section 5 pushed the limits of constitutional bounds. See *id.* at 544-45.

<sup>140</sup> See *Lopez v. Monterey Cty.*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>141</sup> See *Shelby Cty.*, 570 U.S. at 551 (“Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s.”).

<sup>142</sup> See *id.* at 569 (Ginsburg noting in her dissent: “Today’s Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed “rational means.”). Notably, the majority did not respond to Justice Ginsburg’s statement in dissent that the majority did not claim to alter precedent setting rational basis as the standard of review.

burdens to justify the coverage formula appreciably departed from the Court’s prior highly deferential rationality analysis in cases like *Katzenbach*, it repeatedly invoked “rationality” as the proper metric to gauge the constitutionality of the coverage formula.<sup>143</sup> It also cited *Katzenbach* to reach its conclusion that the 1965 coverage formula was rational in practice and theory,<sup>144</sup> while the reauthorization of the 2006 coverage formula was irrational.<sup>145</sup> Legislation ought to be found rational, and thus constitutional, so long as a new coverage formula differentiates among jurisdictions in a manner that is responsive to current conditions of discrimination and the remedies adopted by Congress are sufficiently related to address the discrimination. As this report details in Section IV *infra*, the updated protections contained in the Voting Rights Advancement Act provide the tools needed to enforce the constitutional guarantee to vote free from official acts of discrimination, to remedy racial discrimination where it is most likely to exist, and to create systems to help ensure discriminatory voting practices are blocked before they can victimize voters.

Finally, it also bears brief discussion that legislative action to reinstate the coverage formula based on current needs should survive the test of “congruence and proportionality” associated with challenges to Congress’s Fourteenth Amendment enforcement power.<sup>146</sup> Prior to the decision in *Shelby County*, scholars and practitioners widely expected *Shelby County* to clarify whether the congruence and proportionality standard superseded the rationality analysis employed in Fifteenth Amendment cases such as *Katzenbach*<sup>147</sup> because the Court often treated its jurisprudence of Congress’s Fourteenth and Fifteenth Amendment enforcement powers as coextensive.<sup>148</sup> The Court did not appear to apply the congruence and proportionality standard in *Shelby County*, and—as some justices have recognized—

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<sup>143</sup> See *Shelby Cty.*, 570 U.S. at 552, 554, 556.

<sup>144</sup> *Id.* at 550 (citing *South Carolina v. Katzenbach*, 383 U.S. at 330).

<sup>145</sup> See, e.g., *id.* at 554, 556 (concluding that reliance on vote dilution evidence highlights the irrationality of a coverage formula based on voting tests and access to the ballot.).

<sup>146</sup> See generally *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

<sup>147</sup> Indeed, the Court highlighted the unresolved standard three years earlier in *Northwest Austin*. See *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193, 204 (“The parties do not agree on the standard to apply . . . . [T]hat question has been extensively briefed in this case, but we need not resolve it.”). The Court then gave additional reason to believe that it would address the standard when it modified the question presented in *Shelby County* to include the question of whether Section 5 also violated the Fourteenth Amendment. See Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1498 (2014).

<sup>148</sup> See, e.g., *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001) (“Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment.”); *Lopez v. Monterey Cty.*, 525 U.S. 266, 294 n.6 (1999) (Thomas, J., dissenting) (“[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendment as coextensive.”); *City of Boerne*, 521 U.S. at 518 (citing “parallel power to enforce the provisions of the Fifteenth Amendment”).

it can be difficult to predict how the Court will apply its enforcement jurisprudence in the future.<sup>149</sup> Still, the Court’s cases suggest that a restored preclearance formula that accounts for current conditions of discrimination and its attendant burdens upon states would be also be found valid under that test.<sup>150</sup>

Yet, the rational basis standard continues to be the presumptive lodestar for the question of whether a coverage formula enacted by Congress identifying

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<sup>149</sup> See *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 44 (2012) (Scalia, J., dissenting) (“[T]he varying outcomes we have arrived at under the ‘congruence and proportionality’ test make no sense.”).

<sup>150</sup> Courts applying the “congruence and proportionality” test first outlined in *City of Boerne v. Flores*, commonly engage in a three-part inquiry to assess the appropriateness of the “fit” between the constitutional right that Congress endeavors to protect and the means it adopts to do so. First, the court must identify with “precision the scope of the constitutional right” that Congress sought to remedy. *Bd. Of Trustees of Univ. of Ala. V. Garrett*, 531 U.S. at 356. In the context of the Voting Rights Act’s preclearance framework, Section 5 protects two decidedly fundamental rights worthy of jealous protection: the right to vote and the right to be free from racial discrimination. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights[.]”); see also *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”).

Second, the *Boerne* test considers “whether Congress identified a history and pattern of constitutional [violations] by the States” concerning the relevant constitutional right. *Bd. Of Trustees of Univ. of Ala. V. Garrett*, 531 U.S. at 368. Updated to reflect “current needs” as a result of recent or continuing examples of racial discrimination in voting, Section 5 preclearance should comfortably clear this second factor. To start, the Supreme Court has recognized that Congress may more easily show a “pattern of constitutional violations,” *Nev. Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 722 (2003), when the legislation at issue targets state conduct “subject to a heightened standard of judicial scrutiny.” *Tennessee v. Lane*, 541 U.S. 509, 528-29 (2004). The right to be free from racial discrimination and the right to vote are quintessentially such rights. Separately, in *City of Boerne*, the Supreme Court expressly cited the legislative record supporting the Voting Rights Act preclearance in cases like *Katzenbach* and *City of Rome* as indicative of congruence and proportionality. See *City of Boerne*, 521 U.S. at 530-32. Only the requirement of more “current conditions” the Court announced in *Shelby County* could possibly have justified a different result in that case. But now, preclearance restoration proposals that are presently before Congress are based on recent voting rights violations, and thus would cure the problem of “currency,” as *Shelby County* articulated them.

Third, the court determines whether the scope of the law is “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) (quoting *City of Boerne*, 521 U.S. at 532). To apply this factor the Supreme Court has commonly considered a remedial law’s “tailoring” to determine whether it properly remedies the discerned pattern of unconstitutional conduct without imposing undue cost to states’ sovereign constitutional authority—for example, by proscribing more conduct than is necessary to cure the offending conduct. On that score, Section 5 preclearance should be viewed favorably, as the need for a remedy to unconstitutional racial discrimination in voting cannot be gainsaid, and the mechanism Congress proposes should find support in an updated legislative record. Finally, any reviewing court, including the Supreme Court, would be compelled to acknowledge that *City of Boerne* cited Section 5 preclearance as a properly tailored, “congruent and proportional” remedy to violations of the Fifteenth Amendment.

jurisdictions subject to preclearance— and any additional remedies—is within its Fifteenth Amendment enforcement powers. In prior cases upholding the coverage formula, and preclearance as a whole, the Court weighed whether Congress’s chosen means to “effectuate the constitutional prohibition of racial discrimination in voting” were rationally related to that goal.<sup>151</sup> The Court’s answer over decades consistently showed deference to Congress’s judgment that the preclearance formula was “rational in both practice and theory.”<sup>152</sup> Thus, *Shelby County* should not be read to bar what the Supreme Court invited Congress to do: “draft another formula based on current conditions.”<sup>153</sup> Congress should accept the Supreme Court’s invitation to craft an updated Voting Rights Act based upon its guidance that it should be responsive to current conditions of discrimination as well as carefully pursue a coverage formula that identifies jurisdictions for preclearance based on a record of where and when discrimination is most likely to occur.

#### **d. Congressional power under the Elections Clause**

*Shelby County* did not speak on another source of congressional authority for preclearance found outside of the Fourteenth and Fifteenth Amendments: the Elections Clause of Article I of the U.S. Constitution.<sup>154</sup> That Clause provides that state legislatures “shall prescribe” the “Times, Places and Manner of holding Elections for Senators and Representatives,” and importantly states that “the Congress may *at any time* by Law *make or alter such Regulations*.”<sup>155</sup> This is an expansive grant of authority, which the Supreme Court has held affords Congress “general supervisory power over the whole subject” of federal elections,<sup>156</sup> to exercise “as and when [it] sees fit.”<sup>157</sup> Congress, in turn, has directly relied on those powers to enact critical voting legislation like the National Voter Registration Act, which the Supreme Court has determined permissibly overlays a “superstructure of federal regulation atop state voter-registration systems.”<sup>158</sup>

Congress was mindful of its broad authority under the Elections Clause when it passed the Voting Rights Act. In addition to the Fifteenth Amendment, the 1965 House Report states that the enacted bill was “also designed to enforce ... article 1,

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<sup>151</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (recognizing “Congress’ authority under § 2 of the Fifteenth Amendment [is] no less broad than its authority under the Necessary and Proper Clause.”).

<sup>152</sup> *Katzenbach*, 383 U.S. at 330.

<sup>153</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

<sup>154</sup> See U.S. Const. art. I, § 4.

<sup>155</sup> *Id.* (Emphasis added)

<sup>156</sup> *Ex Parte Siebold*, 100 U.S. 371, 388 (1879).

<sup>157</sup> *Id.* at 384.

<sup>158</sup> *Arizona v. Inter Tribal Council of Ariz. (ITCA)*, 570 U.S. 1, 4 (2013).

section 4” of the Constitution.<sup>159</sup> This matters, because as Justice Scalia wrote in 2013, federalism concerns ebb when Congress acts under the Elections Clause, as “States’ role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it ‘terminates according to federal law.’”<sup>160</sup> Put simply, “the Clause ... ‘invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt [their] choices.’”<sup>161</sup>

The Election Clause’s grant of power to Congress to protect the integrity of federal elections has clearly featured less prominently in litigation and debates over the constitutionality of preclearance than the Civil War Amendments. But the Supreme Court has consistently recognized Congress’s broad “authority to provide a complete code for congressional elections.”<sup>162</sup> And the Court has also been clear that Congress can *combine* its Election Clause and Fifteenth Amendment powers to ensure that the “great organisms of [the federal] executive and legislative branches should be the free choice of the people” made without the “violence and internal corruption” of racial discrimination.<sup>163</sup> Congress may surely rely on its Elections Clause authority to “prevent the implementation of local laws and practices that impede the ability to register for and participate in federal elections,”<sup>164</sup> as it has done through the Voting Rights Act.

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<sup>159</sup> H.R. REP. NO. 89-439 (1965); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (“To enforce the fifteenth amendment to the Constitution of the United States *and for other purposes.*”).

<sup>160</sup> *ITCA*, 570 U.S. at 14 (quoting *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001)). *See also* *Cook v. Gralike*, 531 U.S. 510, 522-23 (2001) (aside from Elections Clause, “No other constitutional provision gives the State authority over congressional elections, and no such authority could be reserved under the Tenth Amendment”).

<sup>161</sup> *ITCA*, 570 U.S. at 8-9 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)).

<sup>162</sup> *Id.*

<sup>163</sup> *Ex parte Yarbrough* (“*The Ku Klux Cases*”), 110 U.S. 651, 666-67 (1884).

<sup>164</sup> Brief of Gabriel Chin et al. as *Amici Curiae* Supporting Respondents at 4, *Shelby Cty. v. Holder*, No. 12-96 (2013).

### III. HOSTILITY TO MINORITY POLITICAL PARTICIPATION PERSISTS AT LEVELS THAT JUSTIFY A RESTORED AND UPDATED VOTING RIGHTS ACT

*Our fathers believed that if this noble view of the rights of man was to flourish, it must be rooted in democracy. The most basic right of all was the right to choose your own leaders. The history of this country, in large measure, is the history of the expansion of that right to all of our people.*

President Lyndon B. Johnson's Special Message to Congress, March 15, 1965

Voting discrimination in the United States has manifested according to historical sentiments, political shifts, and available practices based on legal developments. Chief Justice Roberts was correct in observing that, after initial enactment of the Voting Rights Act in 1965, “[n]early 50 years later, things have changed[.]”<sup>165</sup> He also correctly noted that voter registration and turnout have improved dramatically, largely due to the success of the Voting Rights Act. In enacting the Voting Rights Act of 1965, Congress chose to apply the preclearance remedy to jurisdictions that, in Congress’s judgment, were most likely to pursue voting policies that discriminated on the basis of race. Based on its review at the time, Congress wisely chose to identify these jurisdictions based on metrics closely associated with the racial discrimination: the use of voting tests and devices and voter registration and turnout rates. Congress was proven correct in making these determinations—the Act was immediately successful and dramatically increased voter registration and turnout rates in the covered jurisdictions.<sup>166</sup>

Despite these gains, voting discrimination persisted unremittingly through other means, justifying the continued enforcement of Section 5 and other provisions of the Voting Rights Act through subsequent reauthorizations of the law. Discriminatory tactics separate and apart from the massive barriers erected to thwart registration and turnout—barriers such as poll taxes, literacy tests, and other tests and devices—necessitated reauthorization of preclearance in 1970, 1975, and 1982. The Court upheld all of these acts even in the face of major improvements in Black registration and turnout. Indeed, Congress intended for the Voting Rights Act to

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<sup>165</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 547 (2013).

<sup>166</sup> See USCCR 1968 REPORT, *supra* note 18, at pp. 12-13, 223 (reporting in 1968 that nonwhite registration rate had increased dramatically as a result of the 1965 Act: from 19.3% to 51.6% in Alabama; 40.4% to 62.8% in Arkansas; 51.2% to 63.6% in Florida; 27.4% to 52.6% in Georgia; 31.6% to 58.9% in Louisiana; 6.7% to 59.8% in Mississippi; 46.8% to 51.3% in North Carolina; 37.3% to 51.2% in South Carolina; 69.5% to 71.7% in Tennessee; up to 61.6% in Texas; and from 38.3% to 55.6% in Virginia).

keep up with new strategies devised to suppress minority voters.<sup>167</sup> As famously noted by Justice Souter in *Reno v. Bossier Parish*:

In fine, the full legislative history shows beyond any doubt just what the unqualified text of § 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles.<sup>168</sup>

#### **a. Current indicia of discrimination**

The election of Barrack Obama in 2008 was a transcendent moment in our nation's history. Many believed the election signaled America's transformation into a post-racial society, but it was far from the moment of absolution that many had hoped for or expected.<sup>169</sup> The surge in voter registration and turnout among people of color in 2008 turned out one of the most diverse electorates in American history—and it was met swiftly with legislative retaliation in the states.<sup>170</sup>

When the Supreme Court nullified preclearance in *Shelby County* in 2013, the Court released the worst offenders from federal oversight of their voting changes in the midst of the growing backlash against increased minority voter participation. These states, and other states with less culpable records, took the *Shelby* decision as a signal to enact voting restrictions with impunity, and the flood gates were opened to voting discrimination unlike anything the country had seen in a generation. In effect, the majority opinion in *Shelby County* itself was highly consequential to creating the conditions of voting discrimination that minority voters are currently facing. A squall of voting restrictions were advanced on a national scale, wreaking havoc on voters, including photo ID laws, restraints on voter registration, voter purges, cuts to early voting, restrictions on the casting and counting of absentee and provisional ballots, documentary proof of citizenship requirements, polling place closures and consolidations, and criminalization of acts associated with registration or voting.<sup>171</sup> The surge of minority political participation catalyzed a renewed race to stop voters from exercising the franchise,

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<sup>167</sup> See H.R. REP. NO. 109-478, at 2 (2006); S. REP. NO. 97-417, at 6 (1982); H.R. REP. NO. 94-196, at 10 (1975); S. REP. NO. 94-295, at 16 (1975); H.R. REP. NO. 91-397, at 3283 (1969).

<sup>168</sup> *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part and dissenting in part).

<sup>169</sup> See generally NAACP Legal Defense and Educational Fund, Inc., "POST-RACIAL" AMERICA? NOT YET: WHY THE FIGHT FOR VOTING RIGHTS CONTINUES AFTER THE ELECTION OF PRESIDENT BARACK OBAMA (2009), [https://www.naacpldf.org/wp-content/uploads/Post-Racial-America-Not-Yet\\_Political\\_Participation.pdf](https://www.naacpldf.org/wp-content/uploads/Post-Racial-America-Not-Yet_Political_Participation.pdf).

<sup>170</sup> See generally ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 247-85 (Picador 2015).

<sup>171</sup> The appendix to this report documents these events at length to the extent the ACLU provided direct representation or participated as amicus.

and these changes have purposefully targeted people of color to counteract their increased political power. The right to vote in many ways is now defined by a margins game: slicing off margins of the electorate—or diluting the strength of their votes—to tip the balance of political power. This problem has proven to be particularly acute when there is a surge in minority electoral interest or participation.<sup>172</sup>

At the same time, Congress should heed the fact that current discrimination continues to employ many of the same tactics devised decades ago, which justified the initial passage and subsequent reauthorizations of the Voting Rights Act, and which persist in many parts of the country, particularly on the local level. Redistricting, apportionment, and modification of methods of elections continue to be advanced by state and local officials to dilute minority voting strength. Additionally, practices such as poll closures, challenges to voter or candidate eligibility, and schemes to keep minority voters off the registration rolls continue. We document these practices at length in the appendix attached to this report, summarizing the ACLU’s litigation docket from 2006 to present.

Relatedly, Congress must also understand the continuing significance of racially polarized voting. Racially polarized voting refers to patterns where voting blocs within a jurisdiction fall along racial lines. The presence of racially polarized voting often results in the defeat of the electoral choices of a cohesive set of voters of color by the majority, and indicates that race is an important factor in the electorate’s political choices. For this reason, the Supreme Court and Congress have pointed to the persistence of racially polarized voting as probative of purposeful discrimination that justifies remedial legislation to protect minority voting rights.<sup>173</sup> The Court has repeatedly acknowledged that the presence of racially polarized voting “bear[s] heavily on the issue of purposeful discrimination,” because “[v]oting along racial lines allows those elected to ignore [minority] Black interests without fear of

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<sup>172</sup> See, e.g., *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006) (Justice Kennedy concluding, “In essence [Texas] took away the Latinos’ opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation”); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 216 (4th Cir. 2016) (similarly concluding that North Carolina “took away minority voters’ opportunity because they were about to exercise it.”) (*quoting LULAC*); German Lopez, *North Dakota’s new voting restrictions seem aimed at Native Americans who vote Democrat* (Oct. 31, 2018) (describing how former Sen. Heidi Heitkamp 2012 electoral victory won with Native American support, and the North Dakota legislature responded by instituting a photo ID law intended to discriminate against Native American voters), <https://www.vox.com/policy-and-politics/2018/10/31/18047922/north-dakota-voter-id-suppression-heitkamp>.

<sup>173</sup> See *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (“racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions.”); see H.R. REP. NO. 109-478, at 34 (2006).

political consequences.”<sup>174</sup> In support of the 2006 Voting Rights Act reauthorization, Congress concluded:

The Committee finds it significant that the ability of racial and language minority citizens to elect their candidates of choice is affected by racially polarized voting...[It] is the clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process. Testimony presented indicated that “the degree of racially polarized voting in the South is increasing, not decreasing...[and is] in certain ways re-creating the segregated system of the Old South.”<sup>175</sup>

In 2006, the ACLU also concluded that, “[o]ne of the most sobering facts to emerge from this report, as well as from the decisions in other cases, is the continuing presence of racially polarized voting. While much progress has been made in minority registration and office holding, the persistence of racial bloc voting shows that race remains dynamic in the political process, particularly in the covered jurisdictions.”<sup>176</sup> Based on our review of our litigation docket, we continue to find the strong presence of racially polarized voting, which has actually increased in intensity.<sup>177</sup>

**b. The public lacks effective tools to enforce their rights under the Constitution and federal law**

In dicta, Chief Justice Roberts essentially laid out a path for Congress to follow in enacting an updated Voting Rights Act to respond to current conditions of discrimination. Referring to the 1965 coverage formula as “rational in both practice and theory,” Roberts highlighted that “[i]t looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.” Through our litigation and other advocacy, we have been able to identify the discriminatory policies largely responsible for causing recent violations of voters’ federally protected rights.

The effect of these discriminatory voting laws and practices have resulted in an explosion of litigation to protect voters from state and local officials’ violations of federal law. Since *Shelby County*, the ACLU has opened more than 60 new voting rights matters—including cases filed and investigations—and we currently have

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<sup>174</sup> See *Rogers v. Lodge*, 458 U.S. 613, 623-24.

<sup>175</sup> See H.R. REP. NO. 109-478, at 34 (2006).

<sup>176</sup> MCDONALD, *supra* note 17.

<sup>177</sup> See, e.g., *Mo. State Conference of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F.Supp.3d 1006 (E.D. Mo. 2016); *Wright v. Sumter Cty. Bd. of Elections and Registration*, 301 F.Supp.3d 1297 (M.D. Ga. 2018); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004); see also *Kilgore, Enten*, *supra* note 17.

more than 30 active matters.<sup>178</sup> Between the 2012 and 2016 Presidential elections alone, the ACLU and its affiliates won 15 voting rights victories, protecting more than 5.6 million voters in 12 states that collectively are home to 161 members of the House of Representatives and wield 185 votes in the Electoral College.<sup>179</sup>

The ACLU's recent Section 2 litigation experience reveals two things: first, our record of success in blocking discriminatory voting changes—with an overall success rate in Section 2 litigation of more than 80%—reveals that state and local officials are continuing to engage in a widespread pattern of racial discrimination and are committing pervasive violations of federal law. Second, it shows that we lack the tools needed to stop discriminatory changes to voting laws *before* they taint an election. Discriminatory laws that we ultimately succeeded in blocking have remained in place for months or even years while litigation proceeded—time in which elections have been held and hundreds of government officials have been elected under discriminatory conditions.

And while the ACLU continues to bring a number of successful Voting Rights Act cases after *Shelby County*, the nature and number of cases has changed due to the loss of Section 5 and the resulting blitz of discriminatory voting changes. Prior to *Shelby County*, the ACLU focused a large part of our docket on voting discrimination at the local level—where discrimination has the propensity to be especially entrenched and challenging to identify and address. Indeed, Section 5 was uniquely effective at rooting out discrimination at the county or municipal level. For example, between 1982 and 2006, the Justice Department interposed a total of 112 objections to voting changes in Mississippi, most of which occurred on the county and local level.<sup>180</sup> 68 of 91 objections interposed in Georgia during this period were to changes advanced by county or municipal officials.<sup>181</sup> After *Shelby County*, the ACLU and our affiliates have had to pivot away from addressing local discrimination and instead devote substantial resources to challenging statewide action impacting millions of voters.

Adding to the difficulty, there is no longer a means to effectively monitor voting changes occurring at the local level since preclearance was rendered inoperative, and jurisdictions are no longer required to report voting changes to the federal government. We continue to bring successful challenges against local jurisdictions under Section 2, but those cases have become far fewer without notice of voting changes and the prophylactic protection afforded by preclearance. For comparison, between 1982 and 2006, the ACLU brought 145 lawsuits in the State of Georgia

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<sup>178</sup> These numbers are based on a recent review of the ACLU's internal case management system.

<sup>179</sup> See Dale Ho, *Let People Vote: Our Fight for Your Right to Vote in This Election*, ACLU (Nov. 3, 2016), <https://www.aclu.org/blog/voting-rights/fighting-voter-suppression/let-people-vote-our-fight-your-right-vote-election>.

<sup>180</sup> H.R. REP. NO. 109-478, at 37 (2006).

<sup>181</sup> *Id.*

alone; of these approximately 125 of these were against local jurisdictions.<sup>182</sup> In the six years since *Shelby County* was decided—about one quarter of the comparative time period—we have been able to bring four cases in Georgia, two of which were challenges to local voting practices.

Overall, the ACLU and our affiliates have litigated twelve Section 2 cases to judgment, settlement, or other resolution since *Shelby County*. Ten of the ACLU’s twelve Section 2 cases have produced favorable outcomes<sup>183</sup> for our clients, a success rate of 83.3%.<sup>184</sup> The following table summarizes the ACLU’s Section 2 litigation since *Shelby County*:

| <b><u>ACLU Section 2 Cases Litigated to Judgment/Settlement/Resolution since <i>Shelby County</i></u></b> |                            |   |                   |                      |               |                 |   |   |
|---|----------------------------|---|-------------------|----------------------|---------------|-----------------|---|---|
| <b>Case Name</b>  | <b>Citation</b>            | <b>Practice Challenged</b>                                    | <b>Date Filed</b> | <b>Date Resolved</b> | <b>Months</b> | <b>Success?</b> | <b>Electi<br/>ons<br/>Held<br/>Befor<br/>e<br/>Succe<br/>ss</b> | <b>Offic<br/>es<br/>Elect<br/>ed<br/>Befo<br/>re<br/>Succe<br/>ss</b> |
| Bethea v. Deal  | 2016 WL 6123241 (S.D. Ga.) | Failure to extend voter registration deadline after hurricane | 10/18/2016        | 10/19/2016           | 0             | N               | N/A   | N/A   |

<sup>182</sup> See MCDONALD, *supra* note 17, at 4.

<sup>183</sup> We rely on Professor Ellen Katz’s definition of a “successful” Section 2 case. See Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643, 653-54 n.35 (2006) (“Suits coded as a successful plaintiff outcome include both those lawsuits where a court determined, or the parties stipulated, that Section 2 was violated, and a category of lawsuits where the only published opinion indirectly documented plaintiff success,” including decisions where a court “granted a preliminary injunction, considered a remedy or settlement, or decided whether to grant attorneys’ fees after a prior unpublished determination of a Section 2 violation.”). Professor Katz’s study was cited by Congress during the 2006 Voting Rights Act reauthorization and in Justice Ginsberg’s dissent in *Shelby County*. See *Shelby County*, 133 S.Ct. at 2642 (Ginsberg, J., dissenting) (citing *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong., 1st Sess., pp. 964–1124 (2005)).

<sup>184</sup> By way of comparison, our recent review of Section 2 cases available on Westlaw that were decided since *Shelby County* indicates an overall success rate of less than 40%.

|  |                              |   |            |            |    |                  |     |     |
|--|------------------------------|---|------------|------------|----|------------------|-----|-----|
| Frank v. Walker                          | 768 F.3d 744 (7th Cir. 2014) | Voter ID  | 12/13/2011 | 10/6/2014  | 34 | N <sup>185</sup> | N/A | N/A |
| Florida Democratic Party v. Scott        | 2016 WL 6080225 (N.D. Fla.)  | Failure to extend voter registration deadline after hurricane | 10/10/2016 | 10/12/2016 | 0  | Y                | 0   | 0   |
| Jackson v. Bd. of Trustees of Wolf Point | 2014 WL 1791229 (D. Mont.)   | City malapportioned districts                                 | 8/13/2013  | 4/14/2014  | 8  | Y                | 0   | 0   |
| LULAC v. Cox                             | No. 2:18-cv-02572 (D. Kan.)  | County polling place closure                                  | 10/26/2018 | 1/30/2019  | 3  | Y <sup>186</sup> | 1   | 1   |
| Missouri NAACP v. FFSD                   | 894 F.3d 924 (8th Cir. 2018) | School Board At-Large Elections                               | 10/18/2014 | 7/3/2018   | 44 | Y                | 4   | 9   |
| Montes v. City of Yakima                 | 2015 WL 1112096 (E.D. Wash.) | City At-Large Elections                                       | 8/22/2012  | 6/19/2015  | 34 | Y                | 1   | 3   |

<sup>185</sup> We include *Frank v. Walker* as an “unsuccessful” Section 2 case, because even though litigation on plaintiffs’ as-applied constitutional claims is ongoing, the Seventh Circuit has rejected our Section 2 claims. See *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014).

<sup>186</sup> We include *LULAC v. Cox*—in which the ACLU of Kansas represented plaintiffs challenging the location of Dodge City, Kansas’s single polling location outside of the Dodge City limits—as a “successful” case, because the plaintiffs voluntarily dismissed their suit only after the defendants agreed to open additional polling locations, effectively granting the relief sought by the plaintiffs. While not a settlement, the case achieved plaintiffs’ desired outcome.

|  |   |   |               |               |    |   |   |     |
|--|---|---|---------------|---------------|----|---|---|-----|
| MOVE<br>Texas Civic<br>Fund v.<br>Whitley                            | No.<br>5:19-cv-<br>00171-<br>FB<br>(W.D.<br>Tex.)   | Statewide<br>voter purge  | 2/4/201<br>9  | 4/26/201<br>9 | 3  | Y | 0 | 0   |
| NC<br>NAACP v.<br>McCrorry   | 831 F.3d<br>204 (4th<br>Cir.<br>2016)               | Voter ID;<br>Early Voting;<br>Same-day<br>registration;<br>Out-of-<br>Precinct<br>Ballots; Pre-<br>Registration | 9/30/20<br>13 | 7/29/201<br>6 | 34 | Y | 1 | 192 |
| Navajo<br>Nation<br>Human<br>Rights<br>Comm'n v.<br>San Juan<br>Cty. | 281 F.<br>Supp. 3d<br>1136 (D.<br>Utah<br>2017)     | All-mail<br>voting<br>system,<br>elimination of<br>polling places   | 2/26/20<br>16 | 2/21/201<br>8 | 24 | Y | 1 | 1   |
| OH<br>NAACP v.<br>Husted   | 2014<br>WL<br>1038464<br>7 (6th<br>Cir.)            | Early Voting  | 5/1/201<br>4  | 4/17/201<br>5 | 12 | Y | 1 | 139 |
| Wright v.<br>Sumter<br>Cty.  | 301 F.<br>Supp. 3d<br>1297<br>(M.D.<br>Ga.<br>2018) | County<br>Redistricting   | 3/7/201<br>4  | 3/18/201<br>8 | 48 | Y | 3 | 10  |

A few points stand out from a review of our recent Section 2 litigation.

*First, there is a strong public interest in blocking discriminatory voting changes before they take root and impact elections.* When elections take place during the time that voting rights litigation is pending and government officials are elected under conditions that are later found to be discriminatory, there is no way to adequately compensate the victims of voting discrimination after-the-fact. The absence of adequate remedies after an election has taken place under discriminatory voting systems irreversibly stains the democratic process. Therefore, there is a strong public interest in ensuring the integrity of the voting process by insulating it from discrimination.

Our experience shows that Section 2 cases—and voting discrimination cases generally—take substantial time to litigate, leaving discriminatory voting systems in place for months or years before they are ultimately blocked or rescinded. The average length of time that the ACLU’s Section 2 cases have taken to litigate from filing to resolution is 20.3 months, or more than a year and a half.<sup>187</sup> Even when we seek preliminary relief, or otherwise litigate Section 2 cases on expedited schedules to mitigate the discriminatory impact on voters during elections, it usually takes years to block discriminatory voting laws through Section 2 litigation. This reflects the fact that voting rights litigation, and Section 2 litigation in particular, is highly complex. Section 2 cases are among the most difficult cases tried in federal court. The Federal Judicial Center issued a study showing that voting rights cases impose almost four times the judicial workload of the average case, and that voting cases are the sixth most work-intensive type of the sixty-three types of cases that come before the federal district courts.<sup>188</sup>

In the ten ACLU Section 2 cases that resulted in favorable outcomes for our clients since the *Shelby County* decision, more than a dozen elections were held between the time of filing and the ultimate resolution of that case. In the interim, more than 350 federal, state, and local government officials were elected under regimes that were later found by a court to be racially discriminatory or which were later abandoned by the jurisdiction.<sup>189</sup>

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<sup>187</sup> This number includes two rather unusual Section 2 cases filed in 2016 related to voter registration deadlines affected by Hurricane Matthew, which were completed in a matter of days (*FDP v. Scott* and *Bethea v. Deal*). If those two cases are excluded, the average length of the ACLU’s Section 2 cases is 24.4 months—more than 2 years from filing to resolution.

<sup>188</sup> *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization*, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 141 (2006) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project). This testimony was cited in the D.C. Circuit’s ruling in *Shelby County*. See *Shelby Cty. v. Holder*, 679 F.3d 848, 872 (D.C. Cir. 2012), *rev’d on other grounds*, 570 U.S. 529 (2013). See also *Modern Enforcement of the Voting Rights Act*: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 96 (2006) (statement of Rob McDuff, Att’y, Jackson, Mississippi).

<sup>189</sup> This is a conservative estimate for a number of reasons. In calculating the number of elections held under a discriminatory regime (and the number of offices elected during those elections), we

For example, in 2011, the Justice Department blocked a redistricting plan for the Board of Education of Sumter County, Georgia, that would have reduced the number of African Americans on the board from six out of nine to two out of seven total members.<sup>190</sup> The proposed plan resulted in a 5-2 majority of white-preferred candidates on the Board of Education in a county where African Americans outnumbered white residents in total population (52% compared to 42.1%), voting-age population (49.5% to 46.7%), and the number registered voters (48.5% to 46.7%). Prior to this objection by the Department of Justice, the apportionment and method of election of members of the Sumter County Board of Education had for decades been the subject of multiple objections interposed by the Attorney General and litigation by private plaintiffs under Section 5.<sup>191</sup> After *Shelby County*, the Board immediately implemented its plan to reduce the number of African Americans on the board. The ACLU filed a Section 2 lawsuit in 2013 that was finally resolved in 2018 when a federal court found that the plan violated the Voting Rights Act.<sup>192</sup> The court decision was rendered five years after the plan went into effect, meaning African American students and their parents were unlawfully deprived of equal representation on the school board for that time period.<sup>193</sup>

In 2014, the ACLU represented the Missouri State Conference of the NAACP, filing a lawsuit challenging the Ferguson-Florissant school district's at-large method of electing school board members under Section 2. In 2014, the student body of the district was approximately 80% African American, and African Americans constituted a slight minority of the district's voting-age population. Due to racially polarized voting, there was not a single African-American director on the seven-member school board as recently as 2014. In August 2016, the district court ruled in favor of the plaintiffs in a lengthy opinion finding that the at-large method of electing school board members was racially discriminatory. The school district appealed the decision to the Eighth Circuit, which unanimously affirmed the district court's decision.<sup>194</sup> The school board then appealed to the U.S. Supreme Court, which denied cert in 2019, ending the case after four years of litigation—and

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limited our calculation to federal and state elections, and excluded local elections (except where the elections practice challenged was a local elections practice). For example, for a challenge to a statewide law, we included the number of statewide elections that took place under the discriminatory regime, but excluded local elections from our calculation; we also excluded local government officials elected—either in a statewide election or in a local-only election.

<sup>190</sup> *Field Hearing on Voting Rights and Election Administration in Georgia Before the Subcomm. on Elections of the H. Comm. on H. Administration*, 116th Cong. 1 (2019) (statement of Sean Young, Legal Director, ACLU of Georgia); see also *Wright v. Sumter Cty. Bd. of Elections*, 301 F. Supp. 3d 1297 (M.D. Ga. 2018).

<sup>191</sup> *Edge v. Sumter Cty. Sch. Dist.*, 775 F.2d 1509 (1985); 541 F.Supp. 55 (M.D. Ga. 1981).

<sup>192</sup> Statement of Sean Young, *supra* note 190, at 1.

<sup>193</sup> *Id.* at 1-2.

<sup>194</sup> *Mo. State Conference of NAACP v. Ferguson-Florissant Sch. Dist.*, No. 16-4511 (8th Cir. Jul. 3, 2018).

the 2015, 2016, 2017, and 2018 elections were held during that time in which nine members of the school board were elected.

Finally, as partially discussed above, in August 2013 the ACLU and other organizations challenged a sweeping election law in North Carolina that enacted numerous restrictions on voting opportunities for African American voters. These restrictions included cuts to early voting, eliminating preregistration and same-day registration, and prohibiting out-of-precinct voting, which, collectively, about one million North Carolina voters had used in the 2012 Presidential election. The legislature also enacted a highly restrictive photo ID requirement. In a unanimous opinion, the Fourth Circuit held that the law was enacted by the state legislature with the intent to discriminate against the state's African American voters.<sup>195</sup> This case took 34 months to litigate—almost three years—from filing the complaint to a ruling by the Fourth Circuit. In the interim, the 2014 general election took place, with 192 federal and state officers elected—including nine statewide offices, 13 congressional seats, and 170 seats for state legislature.<sup>196</sup> In other words, almost 200 federal and state officials in North Carolina were elected under a discriminatory regime that the Fourth Circuit found “target[ed] African Americans with almost surgical precision.”<sup>197</sup> While the law has since been struck down, there is no way to now compensate the African American voters of North Carolina—or our democracy itself—for that gross injustice.

The ACLU and others used all available tools to prevent this from happening, initially litigating this very complex matter on an expedited timeline and seeking a preliminary injunction before the 2014 midterms, which the Fourth Circuit granted.<sup>198</sup> Unfortunately, the Supreme Court stayed the Fourth Circuit's ruling<sup>199</sup>—presumably due to concerns that the case was decided too close to the general election<sup>200</sup>—effectively leaving the discriminatory regime in place for the 2014 election. The Supreme Court subsequently permitted that preliminary ruling to go into effect,<sup>201</sup> and the plaintiffs ultimately prevailed on the final merits of the

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<sup>195</sup> *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

<sup>196</sup> See North Carolina State Board of Elections, 11/04/2014 General Election Results – Statewide, available at [https://er.ncsbe.gov/?election\\_dt=11/04/2014&county\\_id=0&office=FED&contest=0](https://er.ncsbe.gov/?election_dt=11/04/2014&county_id=0&office=FED&contest=0).

<sup>197</sup> *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (“*NAACP v. McCrory*”).

<sup>198</sup> *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014).

<sup>199</sup> *North Carolina v. League of Women Voters of N.C.*, 135 S.Ct. 6 (Oct. 08, 2014).

<sup>200</sup> Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427, 449 (2016).

<sup>201</sup> That is, despite temporarily staying that preliminary ruling, the Supreme Court declined to hear the case on appeal, leaving the preliminary injunction in place for subsequent local elections. See *North Carolina v. League of Women Voters of N. Carolina*, 135 S. Ct. 1735 (2015). This suggests that the Supreme Court's stay of the preliminary injunction was issued due primarily to the proximity of the Fourth Circuit's ruling to the 2014 general election. See Hasen, *supra* note 200.

case.<sup>202</sup> Despite using every legal tool available, there were no adequate legal avenues to prevent the discriminatory law from tainting the 2014 election.

*Second, there are few tools available for the public to track and effectively respond to discriminatory voting changes that occur in their communities now that jurisdictions no longer have to notify the Attorney General of voting changes.* As changes to voting practices are often more difficult to detect at the local level—where much voting discrimination continues to occur—the lack of effective methods to monitor voting changes has become a major problem.

Since *Shelby County* was decided, there have been a total of 75 Section 2 cases that have been reported on Westlaw in which courts have rendered a determination on liability, preliminary or otherwise, or in which the parties have settled. Of these 75 Section 2 cases, the plaintiffs have been successful in 26 cases<sup>203</sup> (the ACLU and/or its affiliates were counsel in eight of these 26 successful Section 2 cases).<sup>204</sup> And out of the 26 successful cases, 17 were successful challenges to local practices.

| <b><u>Successful Section 2 Cases Decided Since <i>Shelby County</i> That Are Reported on Westlaw</u></b> |                            |                    |              |                      |             |                          |                  |
|--|----------------------------|--------------------|--------------|----------------------|-------------|--------------------------|------------------|
|  | <b>Case Name</b>           | <b>Citation</b>    | <b>State</b> | <b>Frmrly Cvr'd?</b> | <b>Year</b> | <b>Dilution / Denial</b> | <b>Defendant</b> |
| 1  | Allen v. City of Evergreen | 2014 WL 12607819   | AL           | Y                    | 2014        | Dilution                 | City             |
| 2  | Luna v. County of Kern     | 291 F.Supp.3d 1088 | CA           | N                    | 2018        | Dilution                 | County           |
| 3  | Florida Democratic         | 2016 WL 6080225    | FL           | N                    | 2016        | Denial                   | State            |

<sup>202</sup> When the law was struck down after final judgment before the 2016 presidential election, *see NAACP v. McCrory*, 769 F.3d 224), the Supreme Court declined to hear an appeal of that decision as well. *See North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

<sup>203</sup> While we have attempted to be systematic in this research, we do not purport to present a complete picture of all Section 2 litigation. Because this analysis is limited only to cases reported on Westlaw, it is inevitably under-inclusive in some respects. It does not, for example, include all of the ACLU cases discussed in the previous section—some of which have not been reported on Westlaw.

<sup>204</sup> *See Florida Democratic Party v. Scott*, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016); *Jackson v. Wolf Point*, 2014 WL 1794551 (D. Montana April 24, 2014) (settled); *Missouri NAACP v. FFSD*, 894 F.3d 924 (8th Cir. 2018); *Montes v. City of Yakima*, 2015 WL 11120966 (E.D. Wash. June 19, 2015); *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, 281 F. Supp. 3d 1136 (D. Utah 2016); *NC NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Ohio NAACP v. Husted*, 768 F.3d 524 (2016) (vacated as moot, but ultimately settled); *Wright v. Sumter Cty. Bd. of Elections & Registration*, 301 F.Supp.3d 1297 (M.D. Ga. 2018).

|    |  |                    |      |   |      |          |           |
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|    | Party v. Scott   |                    |      |   |      |          |           |
| 4  | Ga. NAACP v. Fayette County  | 118 F.Supp.3d 1338 | GA   | Y | 2015 | Dilution | County    |
| 5  | Wright v. Sumter Cty. Bd. of Elections & Registration                  | 301 F.Supp.3d 1297 | GA   | Y | 2018 | Dilution | County    |
| 6  | Davis v. Guam  | 932 F.3d 822       | Guam | N | 2019 | Denial   | Territory |
| 7  | Terrebone Parish NAACP v. Jindal                                       | 2017 WL 3574878    | LA   | Y | 2017 | Dilution | Parish    |
| 8  | MI APRI v. Johnson   | 2019 WL 2314861    | MI   | Y | 2016 | Denial   | State     |
| 9  | United States v. City of Eastpointe                                    | 2019 WL 1379974    | MI   | N | 2019 | Dilution | City      |
| 10 | Missouri NAACP v. FFSD   | 894 F.3d 924       | MO   | N | 2018 | Dilution | County    |
| 11 | Jackson v. Bd. of Trustees of Wolf Point, Mont., Sch. Dist. No. 45-45A | 2014 WL 1794551    | MT   | N | 2014 | Dilution | City      |
| 12 | NC NAACP v. McCrory  | 831 F.3d 204       | NC   | Y | 2016 | Denial   | State     |
| 13 | Sanchez v. Cegavske  | 214 F.Supp.3d 961  | NE   | N | 2016 | Denial   | State     |
| 14 | Favors v. Cuomo  | 39 F.Supp.3d 276   | NY   | Y | 2014 | Dilution | State     |

|    |  |                      |    |   |      |          |              |
|----|--|----------------------|----|---|------|----------|--------------|
| 15 | Molina v. County of Orange                         | 2013 WL 3009716      | NY | N | 2013 | Dilution | County       |
| 16 | Pope v. County of Albany                           | 94 F.Supp.3d 302     | NY | N | 2015 | Dilution | County       |
| 17 | OH NAACP v. Husted                                 | 2014 WL 10384647     | OH | N | 2014 | Denial   | State        |
| 18 | Bear v. County of Jackson                          | 2017 WL 52575        | SD | N | 2017 | Denial   | County       |
| 19 | Benavidez v. Irving Indep. Sch. Dist.              | 2014 WL 4055366      | TX | Y | 2014 | Dilution | School Board |
| 20 | Harding v. County of Dallas                        | 2018 WL 1157166      | TX | Y | 2018 | Dilution | County       |
| 21 | Patino v. City of Pasadena                         | 230 F.Supp.3d 667    | TX | Y | 2017 | Dilution | County       |
| 22 | Veasey v. Abbott                                   | 830 F.3d 216         | TX | Y | 2016 | Denial   | State        |
| 23 | Navajo Nation Human Rights Comm'n v. San Juan Cty. | 281 F. Supp. 3d 1136 | UT | N | 2017 | Denial   | County       |
| 24 | Navajo Nation v. San Juan County                   | 266 F.Supp.3d 1341   | UT | N | 2017 | Dilution | County       |
| 25 | Montes v. City of Yakima                           | 2015 WL 11120966     | WA | N | 2015 | Dilution | City         |
| 26 | OWI v. Thomsen                                     | 198 F.Supp.3d 896    | WI | N | 2016 | Denial   | State        |

For the ACLU and others, half the battle is simply learning about new voting changes. This is particularly true at the local level, where there are often fewer resources available to assist community members dealing with changes to voting laws they may not know how to analyze or respond to. For example, in Irwin County, Georgia, the Board of Elections in 2017 attempted to close the single polling location that existed in the only Black neighborhood in the county, contrary to the recommendations of the non-partisan Association of County Commissioners of Georgia. While the Board alleged that it wanted to close this polling place to save costs, it also opted to keep open a polling place located at the Jefferson Davis Memorial Park in a neighborhood that was 99% white. After the ACLU of Georgia threatened litigation, the Board rejected this discriminatory proposal. The ACLU of Georgia only learned about these proposed closures in this rural Georgia county because one of its members happened to live in the area and alerted our state affiliate.<sup>205</sup>

In 2018, in Randolph County, Georgia, which is located in the southwest corner of the state and 60% Black, the Board of Elections tried to close seven of the nine polling locations in the county. The ACLU of Georgia only found out because a resident happened to read a small notice in the legal section of a local weekly paper and reached out for help. Our affiliate had less than two weeks before the 2018 general election to undertake intensive advocacy, including the threat of litigation, to counter the efforts by the Board to close the voting sites. Only after significant resources were invested in legal, media, and organizing work did scrutiny build enough to force the Board to vote to keep the polling locations open. During the course of our advocacy, it was discovered that the Board had hired a consultant, handpicked by Secretary of State Brian Kemp who was running for Governor at the time, who recommended closing polling places in counties that were almost all disproportionately Black.<sup>206</sup>

These are just two recent examples from Georgia, which has 159 counties. The ACLU was only able to respond when alerted by residents who became aware of voting changes by happenstance. Additionally, more advocacy and resources are required to block discriminatory voting changes on the backend of the process than those needed in a process where officials are required to affirmatively notify the public in a reasonable manner. Under preclearance, individuals, community organizations, and other impacted stakeholders could—and often did—weigh in with the Justice Department to share their views on the proposed change and its impact on voters. Without legal requirements for fair notice of voting changes, jurisdictions simply do not provide the public adequate notice of changes in voting procedures until it is too late, leaving the public unable to provide input on decisions affecting the voting process before implementation. Since the voting public

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<sup>205</sup> *Field Hearing on Voting Rights and Election Administration in Georgia Before the Subcomm. on Elections of the H. Comm. on H. Administration*, 116th Cong. 1 (2019) (statement of Sean Young, Legal Director, ACLU of Georgia).

<sup>206</sup> *Ibid.*

no longer has a formal say on the propriety of voting changes through the preclearance process, by and large voting changes are advanced by local officials without consideration for the response from the public. Unfortunately, since *Shelby County* over 200 polling places have closed in Georgia.

Finally, it bears mention that the loss of preclearance has also effectively halted the Justice Department's federal observer program, another resource no longer available to monitor the conduct of local elections for voting discrimination. The coverage formula invalidated by *Shelby County* also served as a basis for the Attorney General to identify jurisdictions for federal observers.<sup>207</sup> This outcome has substantially weakened the federal government's ability to identify potential election issues and protect voters from discrimination.

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<sup>207</sup> See U.S. DEP'T OF JUSTICE, FACT SHEET ON JUSTICE DEPARTMENT'S ENFORCEMENT EFFORTS FOLLOWING SHELBY COUNTY DECISION, <https://www.justice.gov/crt/file/876246/download>.

#### **IV. SOLUTIONS IN THE VOTING RIGHTS ADVANCEMENT ACT: BLOCKING DISCRIMINATORY VOTING CHANGES BEFORE THEY IMPACT VOTERS**

Voting discrimination not only persists—after the *Shelby County* decision, it has become frenzied. Stronger protections for voting rights are needed to prevent voting discrimination. Our experience highlights the need for restored and enhanced voting rights protections reflected in the Voting Rights Advancement Act (VRAA), including new preclearance processes based on current conditions, a more protective standard for obtaining and sustaining preliminary relief in voting discrimination cases, and robust notice and transparency requirements necessary to block official acts of voting discrimination before they are implemented. Each of these measures aim to provide prophylactic protection for voters.

##### **a. Preclearance for risky actors and risky behavior**

The VRAA includes a new preclearance provision with a rolling coverage formula based on recent voting rights violations that would prevent discriminatory changes to voting laws from taking effect before an election. The new coverage formula would make states eligible for preclearance coverage based on a record of recent voting violations, with coverage generally triggered by 15 violations in the state, or 10 violations in the state if at least one was committed by the state itself, over the most recent 25 calendar years.<sup>208</sup> The formula also captures jurisdictions that commit three or more voting violations in the previous 25 calendar years. Jurisdictions would also only be subject to preclearance for a period of 10 years if discrimination-free during that time period.

Following the instruction of *Shelby County*, the formula is based on an objective set of reliable criteria: recent violations of federal voting rights laws or, short of a court finding of a violation, evidence of violations elicited through settlements, objections, and denials of declaratory judgments. The new preclearance provision would apply equally to every state, assessing them on an individualized basis and subjecting states to preclearance based only on recent evidence of voting discrimination.

Additionally, the 25-year “look back” period is a reasonable standard that covers two decennial census cycles, which is important to ensure that voters are not subject to “whack-a-mole” type relief and to deter states from simply adopting other discriminatory practices after the second redistricting cycle in response to remedies imposed following the first cycle. The duration of this period is also sensible, because it is not uncommon for litigation that arises from redistricting to take years to resolve, which mean violations are not cured for that time period and potentially run up on the heels of the next redistricting cycle. Additionally, bad actor jurisdictions typically exhibit discriminatory patterns over the span of more than one redistricting cycle. For example, in the ACLU’s prior report to Congress supporting the 2006 reauthorization, we documented protracted litigation that

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<sup>208</sup> See Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. § 3(b) (2019).

arose in Georgia after the 1980, 1990, and 2000 redistricting cycles, in South Carolina after the 1980, 1990, and 2000 cycles, and in Virginia after the 1990 and 2000 redistricting cycles.<sup>209</sup>

The VRAA also advances a new practice-based preclearance mechanism based on current evidence of discrimination that adheres to Chief Justice Roberts’s pillar of equal sovereignty. The new provision triggers preclearance based on the record of the voting practice itself being discriminatory when used in combination with demographic triggers. The covered practices extend to changes to methods of elections, jurisdiction boundaries, redistricting, documentation or qualifications to vote, multilingual voting materials, and polling place locations and resources.<sup>210</sup> As documented in this report, as well as our 2006 report to Congress for the last reauthorization of the Voting Rights Act,<sup>211</sup> the ACLU’s experience demonstrates that these voting changes are the most common practices adopted to discriminate against racially minority voters.

#### **b. Congress should enact a more protective preliminary injunction standard**

Preclearance is a singular remedy that helps ensure the worst offenders of voting discrimination are subject to the rigors of preclearance review. However, based on recent experience, remedial legislation should also effectively address discriminatory changes arising in places with little history or unknown risks of discrimination. These voters must also have a legal mechanism available to help effectively block harmful voting changes before enforcement without having to wait for years of protracted litigation to be resolved. To this end, the Voting Rights Advancement Act provides another important safeguard against voting discrimination in jurisdictions that would not be covered by preclearance. This provision revises the common law standard for obtaining and sustaining a preliminary injunction in federal voting rights litigation<sup>212</sup>—facilitating the ability of plaintiffs to block potentially discriminatory voting laws before they can taint an election.

##### **i. Statutory “serious question” preliminary injunction standard**

Section 7 of the Voting Rights Advancement Act articulates a revised standard for preliminary injunctive relief when adjudicating alleged violations of federal voting laws. It states that the court shall grant relief if it determines that:

“the complainant has raised a serious question whether the challenged voting qualification or prerequisite to voting or standard, practice, or procedure violates this Act or the Constitution and, on balance, the

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<sup>209</sup> See MCDONALD, *supra* note 17, at 108, 113, 126, 566, 568, 576, 691, 693.

<sup>210</sup> H.R. 4, 116th Cong. § 4A (2019).

<sup>211</sup> See generally MCDONALD, *supra* note 17.

<sup>212</sup> *Id.* at § 7.

hardship imposed upon the defendant by the grant of relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted. In balancing the harms, the court shall give due weight to the fundamental right to cast an effective ballot.”<sup>213</sup>

The “serious question” test is a flexible standard that provides heightened protection for possible violations of federal voting rights laws while permitting courts to exercise equitable discretion given the facts and circumstances of a particular case.

There are two aspects of the revised preliminary injunction standard to highlight. It clarifies that plaintiffs may obtain preliminary relief based on a showing of (1) a “serious question” that the challenged practice violates the Voting Rights Act or the Constitution; and (2) that the balance of hardships falls in favor of the plaintiffs, with due weight given to the fundamental right to vote.<sup>214</sup> Section 7 also provides that, on appeal, a jurisdiction’s inability to enforce its voting laws will not, by itself, constitute irreparable harm that would tilt in favor of a stay of preliminary relief. Had this provision been in place in 2014, the preliminary injunction that the ACLU won in North Carolina may have remained in effect for the 2014 midterm, blocking North Carolina’s discriminatory law during from tainting that election. This provision may also have served to protect Black voters in Ohio, which instituted massive cuts to early voting in 2014 after it was used at highly disproportionate rates by Black voters in the state in 2008 and 2012 Presidential elections. The Supreme Court stayed the district court’s preliminary injunction, which vacated the injunction as a result.<sup>215</sup>

The revised preliminary injunction standard underscores what makes the right to vote different from other civil rights. In theory, victims of discrimination in other areas, such as in employment or housing, can be compensated after the fact with money damages and possibly made whole. But once an election occurs under discriminatory conditions, that election generally will not be re-run, and disenfranchised voters have irrevocably lost their ability to participate in the democratic process, which cannot be—and would not be—compensated with monetary damages. Government officials are elected, the benefits of incumbency vest, and there is no way to undo or mitigate the discrimination that has occurred during an election. For these reasons, perhaps more so than in any other area, discrimination in voting must be prevented before it occurs. Our experience illustrates that stronger statutory protections are necessary for that prophylactic purpose.

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<sup>213</sup> H.R. 4, 116th Cong. § 7(b)(4) (2019).

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

<sup>215</sup> *See Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014).

## ii. Congress has the authority to alter the standards for preliminary injunctive relief

Importantly, Congress has authority to modify the standards for granting injunctive relief through legislation; this authority extends to courts' issuance of preliminary injunctions. Preliminary injunctions are considered by courts an "extraordinary remedy," because their issuance occurs before parties' rights have been fully adjudicated.<sup>216</sup> Yet Congress, in its judgment, can determine that the public interest warrants special protection in certain situations and has the discretion to enact a more lenient standard. The Supreme Court has expressly recognized this authority in a series of decisions dating back 75 years and repeatedly concluded that Congress may revise or alter the standard for issuing injunctive relief. In fact, a review of relevant case law shows that courts have never called into question Congress's power to modify the standards for injunctive relief. Most often, the court's inquiry has focused on whether or not Congress had in fact intended to change the conditions under which a plaintiff may acquire injunctive relief. Here, we evaluate congressional authority to revise the standard for granting preliminary injunctive relief and conclude that Section 7 is wholly in line with its authority.

Under the common law approach—reflected in Rule 65 of the Federal Rules of Civil Procedure—federal courts traditionally consider four factors when evaluating whether to grant preliminary injunctive relief: (i) the strength of the plaintiff's claim on the merits; (ii) whether it is likely the plaintiff would suffer irreparable harm in the absence of preliminary relief; (iii) the balance of equities tips in the plaintiff's favor; and (iv) whether an injunction is in the public interest.<sup>217</sup> There is some fluidity as to the precise manner by which these factors are applied by courts.<sup>218</sup>

Notwithstanding the common law method, Congress may legislate the standard by which a preliminary injunction may be granted or denied by a court. The Supreme Court has explicitly and repeatedly recognized Congress's authority to alter the traditional equitable considerations for granting injunctive relief, including the issuance of preliminary and final injunctions.<sup>219</sup> The Court initially recognized this authority with respect to courts ordering final equitable relief, including permanent injunctions. The Court then extended its reasoning to conclude that Congress has

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<sup>216</sup> See generally Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995).

<sup>217</sup> *Id.*; see also *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

<sup>218</sup> Several circuits apply a "sliding scale" approach, where a plaintiff that demonstrates a strong likelihood of success on the merits may be held to a lower standard with respect to the other factors under consideration, and, conversely, a plaintiff who does not make a strong merits would be required to make a stronger showing of the other factors. Other circuits adhere to a complete evaluation of all four factors.

<sup>219</sup> See, e.g., *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006).

the same general authority with respect to preliminary injunctions, since the analytical frameworks for each forms are relief are nearly identical.<sup>220</sup> The Supreme Court has also held that Congress can require by statute that courts issue injunctions automatically when merits violations are found of particular laws, suggesting Congress’s power to regulate courts’ equity jurisdiction is broad.<sup>221</sup>

The Court has also expressed that congressional intent must be clear in its legislative command when revising courts’ equity jurisdiction. In the case *Weinberger v. Romero-Barcelo*, the Court stated:

“Congress may intervene and guide or control the exercise of the courts’ discretion, but [the Court does] not lightly assume that Congress has intended to depart from established principles... Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.”<sup>222</sup>

Congress has revised preliminary injunction standards as part of their remedial provisions in several areas of federal law. Each of these statutes also have been subject to judicial review acknowledging the legislatively modified standard. These statutes include the Petroleum Marketing Practices Act,<sup>223</sup> Endangered Species Act,<sup>224</sup> National Labor Relations Act,<sup>225</sup> Federal Trade Commission Act,<sup>226</sup> and the Securities Exchange Acts of 1933 and 1934.<sup>227</sup>

The modified preliminary injunction standard in the Voting Rights Advancement Act is particularly important because in the elections context in recent years there has been a general reluctance by courts to issue preliminary injunctions requested

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<sup>220</sup> See *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

<sup>221</sup> See *TVA v. Hill*, 437 U.S. 153 (1978) (holding that Congress required in the Endangered Species Act that a final injunction automatically issues once a merits violation is shown).

<sup>222</sup> 456 U.S. 305, 313 (1982) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); see also *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)

<sup>223</sup> See 15 U.S.C. § 2805(b); *Mac’s Shell Serv., Inc. v. Shell Oil Products Co. LLC*, 559 U.S. 175 (2010).

<sup>224</sup> See 16 U.S.C. § 1536; *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); see also *National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782 (9th Cir. 2005); *Friends of the Earth v. United States Navy*, 841 F.2d 927 (9th Cir. 1988); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987).

<sup>225</sup> See 29 U.S.C. §160 (j); *Chester ex rel. N.L.R.B. v. Grane Healthcare Co.*, 666 F.3d 87 (3d Cir. 2011).

<sup>226</sup> See 15 U.S.C. 53(b); *FTC. v. Inc. 21com Corp.*, 688 F. Supp. 2d 927 (N.D. Cal 2010).

<sup>227</sup> See 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d); *SEC v. Bravata*, 763 F.Supp.2d 891 (E.D. Mich. 2011); *SEC v. Homestead Properties, L.P.*, 2009 WL 5173685 (C.D. Cal. 2009); *SEC v. Schooler*, 912 F.Supp. 2d 1341 (S.D. Cal. 2012).

by impacted voters, particularly when the voting change in question is being challenged in proximity to an election.<sup>228</sup> This judicial reticence extends to the Supreme Court, which in a series of recent decisions has reversed or stayed preliminary injunctions that were granted by lower courts close to the date of an election.<sup>229</sup> This judicial doctrine is sometimes referred to as the “*Purcell* principle” and refers to a judicial policy prominently acknowledged in *Purcell v. Gonzalez*, a 2006 per curiam opinion indicating that courts should not issue orders changing election rules in close proximity to an election.<sup>230</sup>

But the *Purcell* principle is likely inapposite where Congress has legislated a preliminary injunction standard, because it is a judicially created doctrine based on policy considerations regarding the public interest, not a matter of constitutional interpretation. It may therefore be overridden by Congress through legislation. Indeed, Congress is generally the more suitable body to evaluate and make determinations regarding what is in the public interest with respect to the enforcement of federal laws and availability of legal remedies for violations of those laws. To be sure, there is an exceptionally strong public interest in ensuring the conduct of free and fair elections.

### **c. Notice and transparency provisions**

On a basic level, notice of proposed election changes and their impact is critical for community awareness of changes in voting procedure so they can comply and cast an effective ballot, or provide feedback to officials as to how the change will impact voters’ ability to exercise the franchise. Thus, officials should provide reasonable notice of potential changes of voting changes before implementation. Before *Shelby County*, Section 5 not only prevented racially discriminatory changes from going into effect, it functioned as a notice requirement, with the Justice Department serving as a central hub for the Section 5 submissions.<sup>231</sup> The public was able to receive notice of the proposed voting changes, review them, and provide the Justice Department with comments regarding their impact. Now, since Section 5 has been

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<sup>228</sup> See Hasen, *supra* note 200, at 449.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 428. In a 2006 per curiam opinion, the Supreme Court in *Purcell v. Gonzalez* 549 U.S. 1 (2006) vacated a Ninth Circuit injunction which had temporarily blocked use of Arizona’s strict new photo ID law. The Court in *Purcell* criticized the Ninth Circuit both for not explaining its reasoning and for issuing an order just before an election which could cause voter confusion and problems for those administering elections. In the 2014 election cases, the Court consistently voted against changing the electoral status quo just before the election.

<sup>231</sup> See Department of Justice, Notices of Section 5 Activity Under the Voting Rights Act of 1965, as Amended, <https://www.justice.gov/crt/notices-section-5-activity-under-voting-rights-act-1965-amended> (last updated Aug. 6, 2015); Archive of Notices of Section 5 Activity Under the Voting Rights Act of 1965, as Amended, <https://www.justice.gov/crt/archive-notices-section-5-activity-under-voting-rights-act-1965-amended> (last updated Nov. 16, 2017).

immobilized, a huge part of the battle to protect voting rights is finding out where and when discrimination is occurring, particularly local-level changes.

The Voting Rights Advancement Act addresses these concerns by including an important section with notice and transparency requirements, separate from the federal preclearance process, to ensure that voters, especially minorities, are able to defend their right to vote against sudden, arbitrary, or discriminatory elections changes. Moreover, notice requirements pose an exceedingly low burden on jurisdictions and come with a high reward to the public and to voters.

Section 6 of the bill serves these goals. It establishes specific requirements for all election changes related to federal elections, polling place resources during federal elections, and changes relating to federal, state, or local constituencies and political boundaries.<sup>232</sup> Specifically, Section 6(a) requires that states and political subdivisions that make voting changes during the 180 days prior to an election for federal office provide the public notice of the change within 48 hours and that the notice is reasonably convenient to access and available on the internet. This permits public notice of important voting changes that occur in reasonable proximity to an election. Section 6(b) requires each state and political subdivision to provide the public notice reasonable notice of changes to polling place resources prior to the 30th day before an election for federal office, or if a change occurs less than 30 days before an election, within 48 hours. This requirement would make it easier to identify resource inequities between polling locations and discourage elections officials from making arbitrary changes to polling locations, resources, and hours. Section 6(c) establishes requirements for public notice of federal, state, or local voting changes that involve redistricting, reapportionment, and changes to methods of election, and requires that such notice is provided no later than 10 days after making the change. The jurisdiction would also be required to provide information on the geographic area impacted and related demographic and electoral data. This section is important to allowing deliberation and examination of potentially racially dilutive effects of these voting changes. It would permit citizens to more easily ascertain whether the change of an election boundary or type is legitimately related to a proper government objective or criteria, or if other impermissible factors like racial discrimination predominated. Further, those who draw and create political boundaries will be further accountable, based on publicly available data, for what they create.

Overall, the provisions of section 6 serve to provide sunlight and awareness regarding voting changes and would greatly enhance the ability of citizens to see understand election changes that may impact them.

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<sup>232</sup> H.R. 4 § 6.

## **Conclusion**

The price of inaction to protect the voting rights of Americans is high, and history offers a myriad of examples demonstrating its cost to the nation. Congress must act now to cement the legacy of the Voting Rights Act and guard the rights of all Americans. Our history is a continuum of periods where galvanized voters exercise their political rights followed by largescale efforts by those with power to quash that political rise. The lessons of our history and current evidence show that the right to vote remains perilous for many Americans and requires Congress to realize their bounded duty to fulfill the promise of the Fourteenth and Fifteenth amendments and restore the Voting Rights Act for a new generation.

## Appendix

The cases summarized in this appendix are cases where the ACLU provided direct representation on behalf of plaintiffs or participated as amicus. We include cases that were active as of, or filed in, 2006 or later. The year listed next to each case represents the year the initial complaint was filed.

### 1. **Schwier v. Cox – Georgia 2000**

With some exceptions, the Privacy Act of 1974 makes it unlawful for “any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.”<sup>1</sup> The law protects individuals registering to vote from having to disclose their social security numbers unless the state required such disclosure before the Privacy Act was enacted. In 1999, after they moved to Walton County, Georgia, and tried to register to vote, Deborah and Theodore Schwier were told they had to disclose their social security numbers. When they declined to do so, the county rejected their voter registration applications. In October 2000, the ACLU filed suit on behalf of the Schwierys under the Privacy Act and the Civil Rights Act of 1964,<sup>2</sup> which makes it illegal to deny anyone the right to register and vote for any act or omission immaterial to determining voting qualifications.<sup>3</sup> The suit sought to require election officials to permit the Schwierys to register and vote without disclosing their social security numbers.<sup>4</sup>

The court preliminarily enjoined the county, allowing the Schwierys to vote if they tendered their social security numbers under seal. Their social security numbers would not be permanently entered into election records and would be destroyed if they ultimately prevailed in the suit.<sup>5</sup> Much of the subsequent dispute turned on whether Georgia’s voter registration law qualified for the Privacy Act’s exception, i.e. whether Georgia required voters to disclose their social security numbers prior to January 1, 1975. The district court initially ruled for the state, holding that neither the Privacy Act nor the Civil Rights Act of 1964 gave the plaintiffs a private

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<sup>1</sup> P.L. 93-579, § 7(a)(1), 88 Stat. 1896.

<sup>2</sup> See Docket Sheet, *Schwier v. Cox*, No. 1:00-cv-2820 (N.D. Ga. Oct. 26, 2000).

<sup>3</sup> See Pub. L. No. 88-352, § 101, 78 Stat. 241.

<sup>4</sup> LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 181-184 (Mar. 2006), [https://www.aclu.org/files/votingrights/2005\\_report.pdf](https://www.aclu.org/files/votingrights/2005_report.pdf).

<sup>5</sup> See *Schwier v. Cox*, 412 F.Supp.2d 1266, 1268 (N.D. Ga. 2005).

right of action.<sup>6</sup> The plaintiffs appealed, and the United States intervened to defend the Privacy Act's constitutionality. The court of appeals reversed and remanded, holding that both the Privacy Act and the Civil Rights Act afforded a private right of action.<sup>7</sup> The court's opinion was significant because other courts had previously rejected private suits under both statutes.<sup>8</sup>

On remand, the district court ruled for the plaintiffs. The court concluded that Georgia's voter registration system did not qualify for the Privacy Act's exception because the state statute's plain language as of December 31, 1974, asked registrants for their social security number "if known at the time of application" and did not uniformly require disclosure.<sup>9</sup> The court also held that the state violated the Civil Rights Act of 1964 because the disclosure of applicants' social security numbers was not "material" to whether they were qualified to vote under state law.<sup>10</sup> On appeal, the court of appeals affirmed the district court's judgment.<sup>11</sup>

## **2. Thompson v. Glades County – Florida 2000**

In 2000, the ACLU filed suit on behalf of Billie Thompson, the first African American to run for the Glades County school board and only the second African American to run for countywide office, against Glades County, Florida. The suit challenged the at-large method of election for the five-member county commission and board of education as diluting minority voting strength in violation of Section 2 and the Constitution.<sup>12</sup> In 1998, when Thompson ran for the school board, the population of the county was 10,576, 10.5% of which was African American. Thompson received 42% of the vote in the Democratic primary against the incumbent but was defeated. The suit also alleged that the State of Florida had a racially discriminatory intent in enacting the at-large method of election systems, which had a racially discriminatory effect.

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<sup>6</sup> See *Schwier v. Cox*, 340 F.3d 1284, 1286 (11th Cir. 2003).

<sup>7</sup> *Ibid.*

<sup>8</sup> LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 184 (Mar. 2006), [https://www.aclu.org/files/votingrights/2005\\_report.pdf](https://www.aclu.org/files/votingrights/2005_report.pdf).

<sup>9</sup> *Schwier v. Cox*, 412 F.Supp.2d 1266, 1274-75 (N.D. Ga. 2005).

<sup>10</sup> *Id.* at 1276.

<sup>11</sup> *Schwier v. Cox*, 439 F.3d 1285 (11th Cir. 2006).

<sup>12</sup> Plaintiffs' Complaint for Injunctive and Declaratory Relief, No. 2:00-cv-212 (M.D. Fla. May 12, 2000).

Glades County was sparsely populated and extremely economically depressed, with employment dependent mostly on citrus farming. African Americans did not fare well economically compared with whites: Black residents' per capita income was half that of whites, the unemployment rate of Blacks was double that of whites, and the poverty rate of Blacks was three times that of whites. There was also a history of official discrimination against African Americans in Glades County, including discrimination against African Americans attempting to exercise their rights to the franchise.<sup>13</sup> A trial was held in October 2001, in which expert testimony presented the history of racial discrimination in Florida, and in Glades County in particular, and the discriminatory purpose behind the state's switch to at-large methods of elections and the extent of racially polarized and racial bloc voting.<sup>14</sup>

Three years after the trial, the court issued a condensed decision finding that, although white voters in Glades County tended to vote as a bloc to defeat candidates of choice of African Americans and acknowledged the long history of racial discrimination behind the at-large election system, the plaintiffs failed to establish a Section 2 or a constitutional violation.<sup>15</sup> The court appeared to base its decision on an erroneous conclusion that there was no viable remedy, rejecting an illustrative five-member plan drawn by the plaintiffs with one district containing a 50.23% African American and 15.23% Hispanic voting age populations, with the evidence showing that African Americans and Hispanics voted cohesively. The plan had an overall deviation of 8.6%. The court determined that it was not permitted to impose a plan with an 8.6% deviation and that African Americans would be a minority in an equal population plan. It further found that a plan with a 50.23% African American voting age population was not viable because "to translate the statistical majority into reality would require that every voting-age African American be registered to vote, actually vote, and vote for the same person."<sup>16</sup> The court therefore found that the proposed district was "in reality only an influence district," placing an unprecedented burden on the Section 2 plaintiffs because it effectively required them to prove it was impossible for a minority candidate to be outvoted in a remedial plan.

The plaintiffs appealed the decision of the trial court on their Section 2 claim to the Eleventh Circuit. The appeal was argued in May 2005, and in July 2007, nearly 27 months later, the appellate court reversed.<sup>17</sup> It held that the district court clearly erred in several of its Section 2 determinations and that plaintiffs had in fact

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<sup>13</sup> *See id.* at ¶ 15.

<sup>14</sup> *See Thompson v. Glades Cty.*, No. 2:00-cv-212, 2004 WL 5616892,\*15-16 (M.D. Fla. 2004)

<sup>15</sup> *Id.*

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

<sup>17</sup> *Thompson v. Glades Cty.*, 493 F.3d 1253 (11th Cir. 2007).

established a viable remedy. Specifically, it held that the district court’s ruling that a minority supported candidate could not win in the proposed district depended on an assumption, contrary to the record, that all whites would register, turn out to vote, and then vote for the same candidate against the candidate of choice of the African American voters. The record in fact showed that the average white crossover vote was 19%. The court of appeals remanded for reconsideration of the record under the correct view of the law.<sup>18</sup>

The county filed a petition for rehearing en banc, which was granted.<sup>19</sup> The court directed the parties to brief additional issues, particularly about the record on crossover voting and whether the plaintiffs had raised the issue of using crossover votes to make their remedy effective. The ACLU brief laid out in detail that the issue of crossover voting had been raised as part of the remedy pre-trial, at trial, and in a motion for reconsideration. The ACLU also pointed out that this was an alternative argument since in the plaintiffs’ view, the evidence showed that the remedy would be effective no matter how white voters cast their votes. Two weeks after the en banc argument, the court announced that “[t]he judges of the en banc court are equally divided on the proper disposition of this case.” Consequently, the judgment of the district court that ruled against plaintiffs was affirmed by operation of law.<sup>20</sup>

In a similar case, *Bartlett v. Strickland*, the U.S. Supreme Court agreed to hear an issue that it sidestepped in four previous cases—whether the ability to draw a remedial district in which the affected minority group is at least 50% of the voting age population is an absolute, bright line requirement for a vote dilution claim under Section 2 of the Voting Rights Act. Because the U.S. Supreme Court took up a similar case for review, the ACLU filed a petition for writ of certiorari. However, the Court subsequently held that no Section 2 violation could be established where a minority was less than 50% of the voting age population in a district,<sup>21</sup> and the Court denied the petition for writ of certiorari in *Thompson v. Glades County*.<sup>22</sup>

### **3. Bone Shirt v. Hazeltine – South Dakota 2001**

In December 2001, the ACLU filed suit on behalf of four Native American voters after the South Dakota legislature redrew the boundaries of the state’s 35 legislative districts; each district elected one member of the state senate and two

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

<sup>19</sup> *Thompson v. Glades County*, 508 F.3d 975 (11th Cir. 2007).

<sup>20</sup> *Thompson v. Glades County*, 532 F.3d 1179, 1180 (11th Cir. 2008).

<sup>21</sup> *Bartlett v. Strickland*, 556 U.S. 1 (2009).

<sup>22</sup> *Thompson v. Glades*, 532 F. 3d 1179 (11th Cir. 2008), cert. denied, 556 U.S. 1126 (2009).

members of the state house for a total of 105 elected members.<sup>23</sup> Every house member was elected at-large in each district, except for one district that was subdivided into two single-member districts. Though the state was 8.25% Native American, Native Americans constituted a majority in only two of the 35 districts. Moreover, they were unnecessarily “packed” into one of the two majority-minority districts, District 27, constituting 90% of the total population of the district. The plaintiffs argued this supermajority of Native American voters was substantially higher than necessary to give Native American voters an equal opportunity to elect candidates of their choice.<sup>24</sup> The adjoining district, District 26, was 30% Native American and they tended to vote as a bloc with Native American voters in District 27.<sup>25</sup> The plaintiffs sued, arguing that the plan diluted Native American voting strength by packing Native Americans into one district while diluting their voting strength in the neighboring district in violation of Section 2 of the Voting Rights Act. The plaintiffs also argued that the state did not submit the plan for preclearance as required by Section 5 of the Voting Rights Act, since two counties in the state were covered jurisdictions impacted by the new plan.

In 2002, a three-judge court ordered the state to submit its 2001 redistricting plan to federal officials for preclearance.<sup>26</sup> The state submitted its plan to the Department of Justice, which cleared it for implementation despite the packing of Native American voters. After substantial discovery and a trial, the district court considered the plaintiffs’ Section 2 claim. In a lengthy 144-page opinion, the court ruled for the plaintiffs and made extensive findings of racially polarized voting in addition to past and continuing discrimination against South Dakota’s Native American population.<sup>27</sup> The court found “substantial evidence that South Dakota officially excluded Indians from voting and holding office.”<sup>28</sup> For example, Native Americans encountered numerous difficulties in obtaining registration cards from county auditors, whose behavior “ranged from unhelpful to hostile.”<sup>29</sup> The court also determined that local officials regularly accused Native Americans of voter fraud and that such accusations were unfounded, politically motivated, and intended to intimidate.<sup>30</sup> The court acknowledged “Indian[s] in Districts 26 and 27 bear the effects of discrimination in such areas as education, employment and health, which

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<sup>23</sup> Complaint at ¶¶ 23-24, *Bone Shirt v. Hazeltine*, No. 3:01-cv-03032 (D.S.D. Dec. 26, 2001).

<sup>24</sup> *Id.* at ¶¶ 34-36.

<sup>25</sup> *Id.* at ¶¶ 37, 40.

<sup>26</sup> *Bone Shirt v. Hazeltine*, 200 F. Supp. 2d 1150 (D.S.D. 2002).

<sup>27</sup> *See generally Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004).

<sup>28</sup> *Id.* at 1019.

<sup>29</sup> *Id.* at 1025.

<sup>30</sup> *Id.* at 1026.

hinders their ability to participate effectively in the political process.”<sup>31</sup> In sum, the court found that there was “a significant lack of responsiveness on the part of elected officials to Indian concerns.”<sup>32</sup> The court also concluded that the plaintiffs had demonstrated that there were several ways to draw an additional majority-Native American district and gave the state an opportunity to fashion a new plan. After the state declined to do so, the court adopted the plaintiffs’ proposed plan that remedied the Native American vote dilution.<sup>33</sup> On appeal, the Eighth Circuit affirmed the district court’s decision.<sup>34</sup>

#### 4. **Black v. McGuffage – Illinois 2001**

In January 2001, the ACLU brought a civil rights class action on behalf of individual African American voters challenging the non-uniform, arbitrary, and unequal voting systems used in Illinois under Section 2 of the Voting Rights Act and the Fourteenth Amendment.<sup>35</sup> In Illinois, the average residual vote rate in the 2000 presidential election was approximately 3.85%. Chicago, which used punch card voting systems, had a residual vote rate of 7.06%, although in one precinct it was as high as 36.73%.<sup>36</sup> Based on statistics demonstrating the racial disparity in residual vote rates based on the voting system used, the plaintiffs argued that because African American and Latino voters were more likely to vote with punch cards than other voters, minority voters were less likely to have their votes counted than non-minority voters.<sup>37</sup>

The parties reached a settlement agreement after extensive litigation and lengthy court-ordered settlement discussions. Approved in December 2003, the agreement called for implementation of new and improved voting technology by March 2006 and at least partial reimbursement of the plaintiffs’ costs.<sup>38</sup> The agreement provided that the plaintiffs could reinstate the litigation if the defendants failed to implement the new technology by the specified deadline. The court retained jurisdiction until January 2007, at which point it released the parties from the

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<sup>31</sup> *Id.* at 1038.

<sup>32</sup> *Id.* at 1046.

<sup>33</sup> *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035 (D.S.D. 2005).

<sup>34</sup> *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006).

<sup>35</sup> Complaint at ¶ 1, *Black v. McGuffage*, No. 1:01-cv-00208 (N.D. Ill. Jan. 11, 2001).

<sup>36</sup> *Black v. McGuffage*, 209 F. Supp. 2d 889, 893 (N.D. Ill. 2002).

<sup>37</sup> See Complaint at ¶¶ 3, 26, *Black v. McGuffage*, No. 1:01-cv-00208 (N.D. Ill. Jan. 11, 2001); see also Fourth Amended Complaint at ¶¶ 46-47, *Black v. McGuffage*, No. 1:01-cv-00208 (N.D. Ill. Oct. 9, 2003).

<sup>38</sup> Order Approving Settlement Agreement, *Black v. McGuffage*, No. 1:01-cv-00208 (N.D. Ill. Dec. 15, 2003).

agreement's terms.

## 5. Cottier v. City of Martin – South Dakota 2002

Martin, located in southwestern South Dakota, is a small city of slightly more than 1,000 people, nearly 45% of whom are Native American. It is the county seat of Bennett County, which was created out of the Pine Ridge Indian Reservation in 1909. At the time of the filing of the lawsuit, the county had a slight Indian population majority (52%). Like many border towns in the American West, Martin has seen more than its share of racial conflict.<sup>39</sup> The city was governed by a city council consisting of a mayor, who was elected at-large, and six council members, who were elected from three two-member wards. In January 2002, following the decennial census, the Martin City Council adopted a new redistricting plan for the city council wards.<sup>40</sup>

In 2002, the ACLU filed suit on behalf of two Native American voters, alleging that the redistricting plan adopted by the city had the purpose and effect of diluting Native American voting strength in violation of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.<sup>41</sup> Despite being a significant part of the population, Native Americans had been unable to elect any candidates of their choice to the city council because the redistricting plan ensured white voters controlled all three city council wards.<sup>42</sup>

After more than two years of discovery, the case went to trial in June 2004. The district court ruled against the plaintiffs, finding that the plaintiffs had not established the third *Gingles* factor that whites voted as a bloc usually to defeat the candidates preferred by Native American voters in city elections.<sup>43</sup>

The plaintiffs appealed, and in May 2006 the Eighth Circuit reversed the district court's ruling, concluding that the plaintiffs did in fact establish that the candidates of choice of Native American voters were usually defeated by whites voting as a bloc, thus meeting the third *Gingles* factor. It vacated the lower court's opinion and remanded for further consideration on the totality of circumstances analysis.<sup>44</sup>

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<sup>39</sup> See *Cottier v. City of Martin*, No. 5:02-cv-05021, at \*1-3, slip op. (D.S.D. Mar. 22, 2005).

<sup>40</sup> Supplemental Complaint at ¶ 14, *Wilcox v. City of Martin*, 02-cv-5021 (D.S.D. Sept. 6, 2002).

<sup>41</sup> See *id.*

<sup>42</sup> See *id.* at ¶ 23, *Wilcox v. City of Martin*, 02-cv-5021 (D.S.D. Sept. 6, 2002); *Cottier v. City of Martin*, No. 5:02-cv-05021, at \*2-3 (D.S.D. Mar. 22, 2005).

<sup>43</sup> *Cottier v. City of Martin*, No. 02-5021, 2005 WL 6949764 (D.S.D. May 5, 2005).

<sup>44</sup> *Cottier v. City of Martin*, 445 F.3d 1113 (8th Cir. 2006).

On remand, the district court held that the challenged system violated Section 2 of the Voting Rights Act. The court found there was a long, elaborate history of discrimination against Native Americans in South Dakota in matters relating to voting. Particularly in Martin, the court found Native Americans continued to suffer the effects of past discrimination, including lower levels of income, education, home ownership, automobile ownership, and standard of living. The court also found that Martin city officials had taken intentional steps to thwart Native American voters from exercising political influence and that the city was apportioned in a manner that unlawfully diluted their voting strength, causing a persistent and unacceptable level of racially polarized voting in Martin.<sup>45</sup>

The decision ordered a “full and complete remedy” for the plaintiffs. After the city refused to propose a new election plan, the district court ordered Martin to implement a system of cumulative voting for the city council.<sup>46</sup> The first election under the cumulative voting plan was held, and three Indian-friendly candidates were elected. The city appealed the district court’s ruling on the merits of the plaintiffs’ claim, as well as its remedial order imposing cumulative voting.

In December 2008, a three-judge panel of the Eighth Circuit affirmed the district court’s judgment in the plaintiffs’ favor.<sup>47</sup> The panel found that the district court’s determination that vote dilution was supported by substantial evidence in the record and that the district court did not abuse its discretion when it imposed cumulative voting as the remedy. The Eighth Circuit subsequently vacated the panel’s ruling, however, when it granted the city’s petition for rehearing en banc. In a divided 7-4 opinion, the en banc court ruled in May 2010, that the original decision of the district court dismissing the complaint for failure to satisfy the third Gingles factor was proper.<sup>48</sup> The plaintiffs filed a petition for a writ of certiorari, but it was denied by the Supreme Court in November 2010.<sup>49</sup>

## **6. Quick Bear Quiver v. Nelson – South Dakota 2002**

Prior to the 2013 decision in *Shelby County v. Holder* immobilizing Section 5 preclearance of the Voting Rights Act, Shannon and Todd counties in South Dakota were covered jurisdictions and required to submit voting changes for federal preclearance. When the counties became covered jurisdictions pursuant to the 1975 amendments to the Voting Rights Act, the South Dakota Attorney General at the

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<sup>45</sup> See *Cottier v. City of Martin*, 466 F. Supp. 2d 1175, 1185 (D.S.D. 2006).

<sup>46</sup> *Cottier v. City of Martin*, 475 F. Supp. 2d 932, 938 (D.S.D. 2007).

<sup>47</sup> *Cottier v. City of Martin*, 551 F.3d 733 (8th Cir. 2008).

<sup>48</sup> *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010).

<sup>49</sup> *Cottier v. City of Martin*, 562 U.S. 1044 (2010).

time voiced his opposition to the counties' coverage under the law and his intention to ignore the preclearance mandate, a practice that continued for the next 25 years.<sup>50</sup> Following over 600 unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd counties sued the state in August 2002 to force it to comply with Section 5.<sup>51</sup> In December 2002, the parties entered an agreed-upon consent order that required the state to preclear its backlog of unsubmitted voting change and gave the court continued jurisdiction over the matter to ensure compliance with Section 5.<sup>52</sup> It also referred the matter to a magistrate to develop with the parties a comprehensive remedial plan "that will promptly bring the State into full compliance with its obligations under Section 5."<sup>53</sup> As a result of the consent order, by April 2005 the state had submitted 714 statutes and 545 administrative rule changes to the Department of Justice for preclearance.<sup>54</sup>

In January 2005, separate plaintiffs filed a lawsuit in Charles Mix County alleging the county commission districts were malapportioned in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.<sup>55</sup> Because of that lawsuit, the South Dakota legislature passed a bill establishing a process for emergency redistricting of county commissioner districts to resolve the malapportionment claim, and Charles Mix County officials submitted a redistricting request pursuant to the new rules.<sup>56</sup> However, the state did not request preclearance of the new emergency redistricting law, so the plaintiffs in *Quick Bear Quiver* filed a motion for a temporary restraining order<sup>57</sup> and preliminary and permanent injunctions<sup>58</sup> requesting the law be enjoined from enforcement absent preclearance, which were all granted.<sup>59</sup> In granting the preliminary injunction, the district court issued a strongly worded decision, saying that state officials, "for over 25 years ha[d] intended to violate and ha[d] violated the preclearance requirements

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<sup>50</sup> See *Quick Bear Quiver v. Nelson*, 387 F.Supp.2d 1027, 1029 (D.S.D. 2005).

<sup>51</sup> Complaint at ¶ 1, *Quick Bear Quiver v. Hazeltine*, 5:02-cv-05069 (D.S.D. Aug. 5, 2002).

<sup>52</sup> Consent Order at ¶¶ 3, 6, *Quick Bear Quiver v. Hazeltine*, No. 5:02-cv-05069 (D.S.D. Dec. 27, 2002).

<sup>53</sup> *Id.* at ¶ 4.

<sup>54</sup> *Quick Bear Quiver*, 387 F.Supp.2d at 1029.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Id.* at 1030.

<sup>57</sup> Plaintiffs' Motion for a Temporary Restraining Order, *Quick Bear Quiver v. Nelson*, No. 5:02-cv-05069 (D.S.D. March 11, 2005).

<sup>58</sup> Plaintiffs' Motion for a Preliminary and Permanent Injunction, *Quick Bear Quiver v. Nelson*, No. 5:02-cv-05069 (D.S.D. March 15, 2005).

<sup>59</sup> *Quick Bear Quiver v. Nelson*, 387 F.Supp.2d 1027 (D.S.D. 2005).

of the VRA,” and that the new bill “g[ave] the appearance of a rushed attempt to circumvent the VRA.”<sup>60</sup> The court enjoined implementation of the new emergency redistricting bill until the state complied with Section 5.<sup>61</sup> The state submitted the redistricting bill for preclearance and petitioned the Supreme Court for review. The Department of Justice granted preclearance, and the Supreme Court dismissed the case as moot at plaintiffs’ request.<sup>62</sup>

## **7. Levy v. Lexington Cty. S.C. Sch. Dist. Three Bd. of Tr. – South Carolina 2003**

This was a vote dilution lawsuit brought by the ACLU in 2003 on behalf of Black residents of Lexington School District 3, one of five school districts lying wholly or partially within Lexington County, South Carolina. Prior to the filing of the lawsuit, no Black person had ever been elected to the school board under the challenged system of at-large nonpartisan elections, despite the fact that Blacks constituted 28.5% of the population of the school district.<sup>63</sup>

Lexington County has a long history of racial discrimination. Schools were racially segregated; town ordinances required segregation in places of public accommodation; there was racial discrimination in hiring; the Ku Klux Klan was active in the county; Blacks were excluded from juries; election campaigns were characterized by racial appeals; whites fled the Democratic Party because of its support of civil rights laws; and housing was constructed on a segregated basis.<sup>64</sup> Horace King, a resident of Lexington County, was head of the South Carolina chapter of the Christian Knights of the Ku Klux Klan in the 1990s. To promote the organization’s white supremacist goals, he encouraged Klan members to burn Black churches. In 1998, a member of the local Ku Klux Klan pled guilty to shooting three black teenagers outside a rural nightclub in Pelion in Lexington County.<sup>65</sup>

A trial occurred in March 2006, and after a lengthy delay of three years, during which elections were held for the school board in 2006 and 2008, the district court issued a detailed order on February 19, 2009, in which it held that the challenged at-large system diluted minority voting strength in violation of Section 2 of the

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<sup>60</sup> *Id.* at 1034.

<sup>61</sup> *Id.* at 1034-35.

<sup>62</sup> *Nelson v. Quick Bear Quiver*, 546 U.S. 1085 (2006).

<sup>63</sup> *Levy v. Lexington Cty.*, No. C/A 3:03-3093-MBS, 2009 WL 440338, at \*1 (D.S.C. Feb. 19, 2009).

<sup>64</sup> See *Levy v. Lexington Cty.*, No. C/A 3:03-3093-MBS, 2009 WL 440338, at \*2 (D.S.C. Feb. 19, 2009); Brief of Appellees at ¶¶ C-F, *Levy v. Lexington Cty.*, No. 09-1550 (4th Cir. June 23, 2009)

<sup>65</sup> Brief of Appellees at ¶ E, *Levy v. Lexington Cty.*, No. 09-1550 (4th Cir. June 23, 2009).

Voting Rights Act.<sup>66</sup> Among its numerous findings were that South Carolina and Lexington County had a voluminous history of racial discrimination which had continuing effects, voting was racially polarized, few minorities had been elected to office, churches, businesses, communities, and clubs remained segregated, Blacks had a depressed socio-economic status, Black registration and turnout were depressed, elected officials were unresponsive to the needs of the Black community, Black students had depressed levels of academic achievement, and after the complaint was filed the school board recruited a retired Black school teacher to run for office in an effort to defeat the lawsuit.<sup>67</sup>

The school district appealed, and one of its main arguments was that the trial court should have considered the two election cycles that took place after trial and before the court issued its opinion. Oral argument was heard by the Fourth Circuit on September 24, 2009, and on December 21, 2009, it vacated and remanded the case for further consideration of the 2006 and 2008 elections.<sup>68</sup>

On remand, the district court conducted more hearings and heard testimony from the parties expert witnesses concerning the 2006 and 2008 elections. The district court also engaged the services of a statistical expert to educate the district court regarding the methodologies used by the parties' experts. In April 2012, the district court concluded that the plaintiffs failed to satisfy their burden of establishing a cognizable violation of Section 2 of the Voting Rights Act and granted summary judgment in favor of the school district.<sup>69</sup>

## **8. Kirkie v. Buffalo County – South Dakota 2003**

In 2003, the ACLU filed suit in federal court alongside the Crow Creek Sioux Tribe to challenge a method of election diluting the voting strength of indigenous voters in Buffalo County, South Dakota. The 2000 Census listed Buffalo County as the poorest county in the nation.<sup>70</sup> The county was overwhelmingly Native American with 83% of voters belonging to the Crow Creek Sioux Tribe. The method for

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<sup>66</sup> *Levy v. Lexington Cty.*, No. C/A 3:03-3093-MBS, 2009 WL 440338 (D.S.C. Feb. 19, 2009).

<sup>67</sup> *Id.* at \*1-19.

<sup>68</sup> *See Levy v. Lexington Cty.*, 589 F.3d 708 (4th Cir. 2009).

<sup>69</sup> *See Levy v. Lexington Cty.*, No. CA 3:03-3093-MBS, 2012 WL 1229511, at \*1 (D.S.C. Apr. 12, 2012), as amended (Apr. 18, 2012).

<sup>70</sup> Press Release, ACLU, ACLU of the Dakotas Challenges Districting Scheme that Prevents Native Americans from Holding Office (Mar. 20, 2003), <https://www.aclu.org/press-releases/aclu-dakotas-challenges-districting-scheme-prevents-native-americans-holding-office>; *see* LAUGHLIN MCDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 769-770 (Mar. 2006), [https://www.aclu.org/files/votingrights/2005\\_report.pdf](https://www.aclu.org/files/votingrights/2005_report.pdf).

electing the county’s three-member commission—in effect for decades—packed nearly all of the county’s Native American population, 1,692 of the 2032 residents, into one district.<sup>71</sup> White residents made up only 17% of the population but controlled the remaining two districts and, thus, the county government. The inter-district deviation was 218%—20 times the legal limit under the one person-one vote equal protection principle (total deviations of greater than 10% are presumptively unconstitutional).<sup>72</sup> The plan’s unlawfulness was raised with the Buffalo County Commission prior to the lawsuit, but the commission did not act to cure its problems despite the ability to do so during a reapportionment process. Instead, the commission determined that the existing districts “were as regular and compact in form as practicable and required no change.”<sup>73</sup>

The ACLU’s lawsuit alleged that the districting plan was malapportioned to discriminate against Native American voters.<sup>74</sup> The plaintiffs sought to dissolve existing district lines, draw a new set of nondiscriminatory lines, and call for a special election to fill the county commission. The parties settled the case through a consent decree whereby the county admitted its plan was discriminatory and agreed to submit to judicial preclearance under Section 3(c) of the Voting Rights Act through January 2013.<sup>75</sup> With the decree in place, the county’s Native American community was able to elect two candidates of choice.

## 9. **Prye v. Blunt – Missouri 2004**

The Missouri state constitution prohibits any person from voting who “by reason of mental incapacity” has a legally appointed guardian.<sup>76</sup> Missouri’s Probate Code establishes the procedures by which an individual might be adjudicated as incapacitated and a guardian appointed. An “incapacitated person” is “one who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements for food, clothing shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur.”<sup>77</sup> The ACLU together with the Bazelon Center for Mental Health Law and the Illinois-based

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<sup>71</sup> Complaint at ¶ 20, *Kirkie v. Buffalo County*, No. 3:03-cv-0311 (D.S.D. Mar. 20, 2003), 2003 WL 24224114.

<sup>72</sup> *Id.* at ¶¶ 24-25.

<sup>73</sup> *See id.* ¶ 27.

<sup>74</sup> *Id.* at ¶ 1.

<sup>75</sup> *See* Consent Decree at ¶ 27, *Kirkie v. Buffalo County*, No. 3:03-cv-0311 (D.S.D. Jan. 27, 2004), 2003 WL 24224114.

<sup>76</sup> MO. CONST. art. 8, § 2.

<sup>77</sup> Mo. Rev. STAT. § 475.010(9).

Guardianship and Advocacy Commission, challenged that statute in 2004 on behalf of a plaintiff who required a guardian for certain transactions but was fully capable of understanding the voting process and voting on his own.<sup>78</sup>

Born in 1952, Prye was one of the first Black students to attend desegregated Central High School in Memphis, Tennessee, in the late 1960s. His commitment to ending discrimination intensified sharply while at Central after he witnessed some white teachers celebrating the April 4, 1968, assassination of Dr. Martin Luther King Jr. The Lorraine Motel, where Dr. King was shot, was just one mile away from the school. After graduating from Yale University, attending Harvard Law School, and receiving a Master of Laws in taxation from New York University (NYU), the plaintiff taught courses at NYU, Vermont Law School, and the University of Illinois School of Law. At age 49, he was diagnosed with a serious mental illness. A guardian was appointed and in 2004 the plaintiff came to live in Missouri.<sup>79</sup>

Prye challenged the state law which prohibited him from voting, relying upon the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, and the U.S. Constitution. The Missouri district court acknowledged the importance of voting as preservative of all other rights, but refused to enjoin the state's restriction on voting before the 2004 election. It rejected the plaintiff's equal protection claims and concluded that the ADA and the Rehabilitation Act did not protect his right to vote. After the election, the plaintiff, joined by the Missouri Office of Protection and Advocacy Services (MOPAS) and other individuals, including Bob Scaletty, and with the ACLU's assistance, filed an amended complaint, challenging Missouri's blanket denial of the right to vote to persons who have been adjudged incapacitated.<sup>80</sup> Lead plaintiff Prye passed away in January 2006, but the case he initiated continued to be pursued by MOPAS and Scaletty.

Scaletty was diagnosed as suffering from schizophrenia and, due to his mental illness, placed under a full guardianship in 1999 in accordance with procedures established by Missouri law. The guardianship order, however, expressly provided that Scaletty retain the right to vote. Despite the guardianship order protecting his right to vote, Scaletty was subsequently denied the right to vote in 2004 by election officials who explained that state law does not allow individuals under a guardianship order to vote.<sup>81</sup> However, in January 2005, having learned of their mistake (after Scaletty became a party in this case), the Kansas City Board of

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<sup>78</sup> Complaint, *Prye v. Blunt*, No. 04-4248-CV-C-ODS (W.D. Mo. Oct. 8, 2004).

<sup>79</sup> See First Amended Complaint for Declarative and Injunctive Relief at ¶¶ 24–28, No. 04-4248 (W.D. Mo. Dec. 6, 2004).

<sup>80</sup> See *id.*

<sup>81</sup> See *id.* ¶¶ 29-34.

Election Commissioners sent Scaletty's guardian a voter identification card on his behalf and advised that Scaletty was eligible to vote in the next election.<sup>82</sup>

On July 7, 2006, the defendants' motion for summary judgment was granted.<sup>83</sup> The plaintiffs argued that Missouri violates federal law by denying the right to vote to all persons under a full guardianship order due to a finding of incapacity because at least some incapacitated individuals are qualified to vote notwithstanding a probate court's finding of incapacity. The court found that the Missouri law did not violate the ADA as the law in question affords individualized determination of a person's abilities and limitations, was designed to differentiate those who are qualified to vote from those who are not, and denied the right to vote to those who lack the mental capacity to exercise the right to vote.

On appeal, the Eighth Circuit affirmed the district court's grant of summary judgment although on somewhat different grounds.<sup>84</sup> Here the court found that MOPAS lacked associational standing because the specific claim asserted required participation by individual persons with specific claims. Additionally, the court found that Scaletty's claim for equitable relief was moot as the guardianship order preserved his right to vote, elections officials advised Scaletty that he would be allowed to vote in the next election, and there was no reasonable expectation that the 2004 error would be repeated. The court also found that the plaintiff's claim that Missouri categorically prohibits those under full guardianship to vote without an individualized inquiry failed for failure to prove the prohibition was categorical.

#### **10. New Jersey State Conference NAACP v. Harvey – New Jersey 2004**

In January 2004, civil rights organizations and private plaintiffs, represented by the ACLU and Rutgers Law School Constitutional Litigation Clinic, filed suit in New Jersey state court challenging New Jersey's law that disfranchised convicted individuals on probation or parole. Plaintiffs contended that the law disproportionately impacted African Americans and Hispanics<sup>85</sup> and was an extension of the racial discrimination endemic in the criminal justice system.<sup>86</sup> African American and Hispanic individuals had substantially higher rates of prosecution, conviction, and incarceration. African Americans made up approximately 13.6% of New Jersey's total population, but 63% of the prison

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<sup>82</sup> See Answer to Kansas City Election Board at ¶¶ 2–3, 2005 WL 3683622 (W.D.Mo. 2005)

<sup>83</sup> *Prye v. Carnahan*, No. 04-4248-CV-C-ODS, 2006 WL 1888639 (W.D. Mo. Jul. 7, 2006).

<sup>84</sup> *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, 499 F.3d. 803 (8th Cir. 2007).

<sup>85</sup> Complaint at ¶ 1, N.J. State Conf. NAACP v. Harvey, No. UNN-C-4-04 (N.J. Sup. Ct. Ch. Div. Jan. 4, 2004).

<sup>86</sup> See generally *id.* at ¶¶ 27, 33-40.

population, over 60% of the parolee population, and 37% of those on probation.<sup>87</sup> Hispanic individuals constituted 13.3% of New Jersey's total population, but 18% of the prison population, 20% of the parolee population, and 15% of those on probation.<sup>88</sup> Collectively, African Americans and Hispanics made up 81% of the total prison population, more than 75% of the parolee population, and more than 52% of those on probation; African Americans and Hispanics also comprised more than 62% of those denied the right to vote under New Jersey's disenfranchisement law.<sup>89</sup>

The lawsuit was the first in the nation that challenged a disenfranchisement law based on a state's constitution. The suit made two claims: first, that the state disenfranchisement law has a discriminatory impact on African Americans and Hispanics and denies them the guarantee of equal protection under the New Jersey Constitution, and second, that the disproportionate impact of the state disenfranchisement law dilutes the voting strength of African American and Hispanic communities and deprives them of the ability to elect candidates of their choice, also in violation of the equal protection guarantee of the New Jersey Constitution.<sup>90</sup> The plaintiffs also contended that there is no public benefit or government interest served by denying suffrage to individuals on probation or parole.<sup>91</sup> The plaintiffs included the New Jersey State Conference of the NAACP, Latino Leadership Alliance of New Jersey, and several impacted minority voters who were otherwise eligible to vote.

The state trial court granted New Jersey's motion for summary judgment, ruling that the plaintiffs failed to state a claim upon which relief could be granted.<sup>92</sup> In November 2005, the state appellate court affirmed the lower court's judgment.<sup>93</sup> The court reasoned that the New Jersey Constitution specifically authorized its disenfranchisement law and that the plaintiffs did not claim that it was enacted with an invidious purpose. The Supreme Court of New Jersey denied certiorari in March 2006.<sup>94</sup>

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<sup>87</sup> *Id.* at ¶ 23.

<sup>88</sup> *Id.* at. ¶ 24.

<sup>89</sup> *Id.* at ¶¶ 25, 28.

<sup>90</sup> *Id.* at ¶¶ 45-53.

<sup>91</sup> *Id.* at ¶ 2.

<sup>92</sup> *N.J. State Conf. NAACP v. Harvey* No. UNN-C-4-04 (N.J. Sup. Ct. Ch. Div.).

<sup>93</sup> *N.J. State Conf. NAACP v. Harvey*, 885 A.2d 445 (N.J. Super. App. Div. 2005).

<sup>94</sup> *N.J. State Conf. NAACP v. Harvey*, 895 A.2d 450 (N.J. 2006).

Following the final decision, the ACLU and Rutgers Law School Constitutional Litigation Clinic filed a petition in September 2006 with the Inter-American Commission on Human Rights, an autonomous body of the Organization of American States. The petition requested it find that the denial of New Jersey citizens' right to vote while they are on probation or parole violates universal human rights principles.<sup>95</sup> The United States responded on April 7, 2010 that the petition should be dismissed for failure to exhaust domestic remedies.<sup>96</sup> The ACLU filed responses on May 20, 2010, and November 15, 2010, arguing that the petitioners had exhausted all available remedies and that further pursuit of such remedies would be futile.<sup>97</sup> Unfortunately, the Commission, without notice, archived the case due to its inaction on the petition, and the case is no longer pending.

## 11. **Blackmoon v. Charles Mix County – South Dakota 2005**

In January 2005, the ACLU sued Charles Mix County, South Dakota, on behalf of four tribal members after years of attempting to persuade the county to correct its apportionment scheme. The complaint alleged that the three county commission districts were malapportioned in violation of Section 2 of the Voting Rights Act and drawn to discriminate against Native American voters in violation of the Fourteenth and Fifteenth Amendments.<sup>98</sup> Initially in November 2001, the ACLU wrote to the county on behalf of the Yankton Sioux Tribe that the county's districts violated the one person-one vote principle of the Fourteenth Amendment and diluted Native American voting strength by splitting them into two districts. State law required the county to redraw districts in February 2002, but the county commission opted to leave its then-current districts in place. Each district had a majority white voting age population, despite the fact that Native Americans made up 30% of the county and that it was possible to draw a compact majority Native American district. The total population deviation among the districts was 19%—

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<sup>95</sup> See Petition Alleging Violations of the Human Rights of the State Conference of the NAACP et. al by the United States of America and State of New Jersey, submitted September 13, 2006, <https://www.aclu.org/legal-document/petition-behalf-men-and-women-state-new-jersey-prohibited-voting-pursuant-state?redirect=cpreirect/26731>.

<sup>96</sup> Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Petition No. P-990-06: Michael Mackason et al. (Apr. 7, 2010) (on file with author).

<sup>97</sup> Letter from Steven M. Watt et al., Senior Staff Attorney, ACLU Human Rights Program, to Dr. Santiago Canton, Exec. Sec., Inter-American Comm'n on Human Rights (Nov. 15, 201) (on file with author); Petitioners' Observations to the Response of the Government of the United States of America (May 20, 2010) (on file with author).

<sup>98</sup> Complaint at ¶¶ 3-4, 36-39, *Blackmoon v. Charles Mix Cty.*, 4:05-cv-04017 (D.S.D. Jan. 27, 2005).

almost certainly unconstitutional.<sup>99</sup>

In an effort to avoid court-supervised redistricting, the county asked the state to pass legislation establishing a process for emergency redistricting, as state law otherwise generally prohibited the county from redistricting until 2012.<sup>100</sup> The legislature complied and passed a bill, which the governor promptly signed, allowing a county to redistrict—with the permission of the governor and secretary of state—any time it became “aware” of facts that called into question whether its districts complied with federal or state law.<sup>101</sup> However, South Dakota failed to preclear the new law with the Department of Justice.

Before the county could take advantage of the new law, four Native Americans in a separate lawsuit obtained a preliminary injunction stopping the state from implementing the new voting law for emergency redistricting, unless and until it was precleared under Section 5 of the Voting Rights Act.<sup>102</sup> The preliminary injunction effectively put the law on hold temporarily.

Afterwards the district court in *Blackmoon* granted the plaintiffs’ motion for partial summary judgment on their malapportionment claim, finding a violation of the one person-one vote standard of the Equal Protection Clause of the Fourteenth Amendment.<sup>103</sup> The county eventually adopted a remedial plan that cured both the malapportionment and vote dilution claims and secured federal supervision of its elections through 2024.<sup>104</sup>

Subsequently, residents of the county approved a referendum in an attempt to increase the size of its county commission from three to five positions. The county commissioners submitted its plan to the Justice Department for preclearance, which was rejected on the basis that the county had not met its burden to prove that the increase was not motivated by a discriminatory purpose.<sup>105</sup> Consequently, the three-member plan with one majority Native American district remained in place. The first elections held under the new districts occurred in 2006 and resulted in the first

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<sup>99</sup> *See id.* at ¶ 39.

<sup>100</sup> S.D. CODIFIED LAWS § 7-8-10.

<sup>101</sup> *See* H.B. 1265, 80th Leg., 2005 Sess. (S.D. 2005).

<sup>102</sup> *See Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027 (D.S.D. 2005).

<sup>103</sup> *Blackmoon v. Charles Mix County*, 4:05-cv-04017, 2005 WL 2738954 (D.S.D. 2005).

<sup>104</sup> Consent Decree, *Blackmoon v. Charles Mix County*, 05-cv-04017 (D.S.D. Dec. 4, 2007).

<sup>105</sup> Letter from Grace Chung Becker, Acting Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Sara Frankenstein Gunderson (Feb. 11, 2008), <https://www.justice.gov/crt/voting-determination-letter-14>.

Native American to serve on the commission.

Monitoring of voting changes in the county remains ongoing.

## **12. Crawford v. Marion County Election Board – Indiana 2005**

In May 2005, the Indiana Democratic Party and Marion County Democratic Central Committee filed a lawsuit challenging Indiana’s photo ID law, alleging violations of the First and Fourteenth Amendments, the Voting Rights Act, the National Voter Registration Act, and the Help America Vote Act.<sup>106</sup> The challenged law required in-person Election Day voters to present federally or state-issued photo ID before being able to vote. The plaintiffs argued that the requirement selectively and arbitrarily burdened and disenfranchised qualified voters, that it was a poll tax on voters who did not possess such identification, and that the burdens fell disproportionately on the poor or others of limited means.<sup>107</sup> The plaintiffs also argued that no evidence of fraudulent in-person voting supported the requirement.<sup>108</sup> The ACLU separately filed suit in state court on behalf of elected officials and civic organizations, which was removed to federal court and consolidated with the lawsuit brought by the Democratic Party.<sup>109</sup>

The district court dismissed the complaint<sup>110</sup> and a divided panel of the court of appeals affirmed.<sup>111</sup> While noting that “[n]o doubt most people who don’t have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates,” the panel’s majority concluded that the state law was not an undue burden on the right to vote. The majority decision relied in part on the unfounded conclusion that because the plaintiffs, who did not have the required photo ID, did not indicate in the court record that they intended to vote, the plaintiffs were “unaffected by the law” and thus there were “no plaintiffs whom the law will deter from voting.”<sup>112</sup> Consequently, the panel’s majority affirmed the complaint’s dismissal on grounds that there were a minimal number of voters adversely affected by the law and that the state articulated a reasonable

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<sup>106</sup> Complaint for Declaratory and Injunctive Relief, *Indiana Democratic Party v. Rokita*, No. 1:05-cv-00634 (S.D. Ind. May 2, 2005).

<sup>107</sup> *See id.* at ¶¶ 17-19.

<sup>108</sup> *See* Amended Complaint for Declaratory and Injunctive Relief at ¶ 22, *Indiana Democratic Party v. Rokita*, No. 1:05-cv-00634 (S.D. Ind. May 27, 2005).

<sup>109</sup> *See* Minute Entry, *Crawford v. Marion Cty. Election Bd.*, No. 1:05-cv-00804 (S.D. Ind. June 23, 2005).

<sup>110</sup> *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006).

<sup>111</sup> *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007).

<sup>112</sup> *Id.* at 951-52.

basis for the law, which was to prevent voter fraud. (Notably, Judge Posner, who authored the panel’s majority, later expressed that the case might have been wrongly decided.<sup>113</sup>) However, the dissenting judge found that “[t]he Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”<sup>114</sup> The dissent also acknowledged that the “law will make it significantly more difficult for some eligible voters . . . to vote,” including the “poor, elderly, minorities, disabled, or some combination thereof.”<sup>115</sup> A divided court of appeals denied *en banc* review.<sup>116</sup>

The plaintiffs then filed a petition for writ of certiorari to the U.S. Supreme Court, which was granted.<sup>117</sup> In an April 2008 opinion, the Court upheld the Indiana law by a 6-3 vote.<sup>118</sup> The Court applied the balancing test it outlined in *Anderson v. Celebrezze*, which directs courts to weigh the asserted injury to the right to vote against interests the state advances to justify its attendant burdens.<sup>119</sup> The Court determined that Indiana demonstrated a legitimate and important interest in preventing voter fraud and protecting public confidence in elections. The Court also ruled that obtaining a free photo ID card did not pose a substantial burden on voting since voters could vote by provisional ballot. The Court’s ruling, however, did leave open the door to additional as-applied challenges to photo ID laws if plaintiffs demonstrate that such requirements impose an excessive burden on their right to vote.

### 13. Common Cause v. Billups – Georgia 2005

In September 2005, the ACLU and the ACLU of Georgia, on behalf of voters and seven non-profit organizations filed suit challenging Georgia’s 2005 photo ID law that required voters to present certain forms of photo ID before being able to vote in-person. Political appointees at the Justice Department precleared the law over the objections of career attorneys that the state failed to meet its burden of proof to demonstrate the law did not have the effect of retrogressing minority voting

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<sup>113</sup> See John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, NY TIMES (Oct. 16, 2013), <https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html>; see also Richard Posner, *I Did Not ‘Recant’ on Voter ID Laws*, THE NEW REPUBLIC (Oct. 27, 2013), <https://newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id>.

<sup>114</sup> *Crawford*, 472 F.3d at 955 (Evans, J. dissenting).

<sup>115</sup> *Ibid.*

<sup>116</sup> See *Crawford v. Marion Cty. Election Bd.*, 484 F.3d 436 (7th Cir. 2007).

<sup>117</sup> *Crawford v. Marion Cty. Election Bd.*, 551 U.S. 1192 (2007).

<sup>118</sup> *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

<sup>119</sup> 460 U. S. 780, 789 (1983).

strength.<sup>120</sup> The plaintiffs argued in both facial and as-applied challenges that the law would impose an unnecessary and undue burden on the fundamental right to vote of hundreds of thousands of registered Georgia voters and was an unconstitutional poll tax under the Twenty-Fourth Amendment and violated Section 2 of the Voting Rights Act, the Civil Rights Act of 1964, the Equal Protection Clause, and the Georgia Constitution.<sup>121</sup> The plaintiffs also argued that the stated purpose of the photo ID law, to prevent voter fraud, was a pretext intended to conceal the true purpose of the law, which was to suppress voting by the poor, the elderly, and the infirm, and by African American, Hispanic, and other minority voters. The plaintiffs presented evidence of this fact, including the lack of voter fraud in the state.<sup>122</sup> In October 2005, a federal court preliminarily enjoined the photo ID law. The court ruled that the plaintiffs established a likelihood of success on the merits of their claims that the law was in the nature of a poll tax and a violation of the Equal Protection Clause and sufficiently demonstrated those impacted by the law would suffer irreparable harm without the injunction.<sup>123</sup>

The legislature amended the statute in 2006 to provide what it deemed a free Georgia photo voter ID card to any registered voter who needed one. The ACLU sued on behalf of a set of plaintiffs on similar grounds<sup>124</sup> and requested a preliminary injunction.<sup>125</sup> A court granted the injunction in the run-up to the July 2006 primary elections.<sup>126</sup> In granting the injunction, the court concluded that the plaintiffs had established a likelihood of success again on the merits of their Equal Protection Clause claim and would suffer irreparable harm without the injunction.

However, despite its prior rulings, the district court eventually ruled that the plaintiffs lacked standing and decided the constitutional issues against the

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<sup>120</sup> See Dan Eggen, *Criticism of Voting Law Was Overruled*, WASHINGTON POST (Nov. 17, 2005), [http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504_pf.html); see also Section 5 Recommendation Memorandum: Aug. 25, 2005, <https://www.brennancenter.org/sites/default/files/analysis/08-25-05%20Georgia%20ID%20Preclearance%20Memo%20-%20DOJ%20Staff.pdf>.

<sup>121</sup> Complaint for Declaratory and Injunctive Relief, *Common Cause v. Billups*, No. 4:05-cv-201 (N.D. Ga. Sept. 19, 2005).

<sup>122</sup> *Id.* at ¶¶ 47-51.

<sup>123</sup> *Common Cause v. Billups*, 406 F. Supp. 2d 1326, 1362, 1367, 1375 (N.D. Ga. 2005).

<sup>124</sup> Second Amended Complaint for Declaratory and Injunctive Relief, *Common Cause v. Billups*, No. 4:05-cv-00201 (N.D. Ga. Apr. 26, 2006).

<sup>125</sup> Motion for a Preliminary Injunction, *Common Cause v. Billups*, No. 4:05-CV-201 (N.D. Ga. July 5, 2006).

<sup>126</sup> *Common Cause v. Billups*, 439 F.Supp.2d 1294 (N.D. Ga. 2006).

plaintiffs as well, denying a permanent injunction and dismissing the case.<sup>127</sup> The court determined the burden on the plaintiffs was slight because they testified that they could get ID cards if necessary to vote, and the court therefore applied rational basis analysis to uphold the law. The court also held the state's interest in preventing voter fraud trumped any burden on voters, even though there was no evidence of voter fraud by impersonation in Georgia for more than a decade—the only type of fraud an ID requirement could address.

The plaintiffs appealed, arguing that the law affected a large number of Georgia voters and had an adverse discriminatory impact on the state's African American residents.<sup>128</sup> The plaintiffs' evidence included a data match completed by the Secretary of State that sought to identify registered voters who did not have an ID issued by the Georgia Department of Driver Services (DDS). The match identified 289,426 registered voters without a DDS-issued ID.<sup>129</sup> And although African Americans made up 27.9% of all registered voters in Georgia, African Americans comprised 49% of registered voters without a DDS-issued ID.<sup>130</sup> The plaintiffs also argued that the district court's decision was inconsistent with the standards the Supreme Court established for assessing the law's burden on voters and that the court should have applied strict scrutiny analysis because the law was discriminatory and created an undue burden on the right to vote.<sup>131</sup> The Eleventh Circuit Court of Appeals found the data match unpersuasive, citing data errors and failure of the match to account for other acceptable forms of identification. While it concluded the plaintiffs had standing, the Eleventh Circuit affirmed the decision of the district court<sup>132</sup> and determined that Georgia's interest in preventing election fraud provided sufficient justification for the 2006 law and outweighed the burden imposed by the Georgia statute. The Supreme Court subsequently denied the plaintiffs' petition for a writ of certiorari.<sup>133</sup>

#### **14. Large v. Fremont County – Wyoming 2005**

In 2005, the ACLU filed a lawsuit against Fremont County, Wyoming, on behalf of Native American voters who were members of the Eastern Shoshone and Northern Arapaho Tribes residing on the Wind River Indian Reservation. The plaintiffs alleged that the at-large elections for the Fremont County Board of Commissioners

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<sup>127</sup> *Common Cause v. Billups*, 504 F.Supp.2d 1333, 1383 (N.D. Ga. 2007).

<sup>128</sup> Brief of Appellants, *Young v. Billups*, No. 07-14664 (11th Cir. May 28, 2008).

<sup>129</sup> *Id.* at 7-8.

<sup>130</sup> *Id.* at 9.

<sup>131</sup> *See id.* at 42-52.

<sup>132</sup> *Common Cause v. Billups*, 554 F.3d 1340 (11th Cir. 2009).

<sup>133</sup> *NAACP v. Billups*, 556 U.S. 1282 (2009).

diluted Native American voting strength in violation of the Constitution and Section 2 of the Voting Rights Act.<sup>134</sup> At the time, Native Americans accounted for approximately 20% of the population, but with all five county Board of Commission seats elected at-large with staggered terms, no Native American candidates of choice were able to be elected despite receiving substantial support from the community.<sup>135</sup> The defendants filed an answer denying the allegations of the complaint and a motion for summary judgment on the ground that Section 2, as applied in Indian Country to a county that was not covered by the special preclearance provisions of Section 5 of the Voting Rights Act, was unconstitutional.<sup>136</sup> The plaintiffs filed a brief opposing the motion.<sup>137</sup> On December 14, 2006, the United States filed a notice of intervention to defend the constitutionality of Section 2 and subsequently filed a brief to that effect.<sup>138</sup> On January 26, 2007, the district court denied the defendants' motion for summary judgment.<sup>139</sup>

Following depositions and discovery, the case was tried over a two-week period in February 2007. The district court issued an opinion finding that the at-large method of elections for the Fremont County Commission diluted the voting strength of Native Americans in violation of Section 2.<sup>140</sup> The court made extensive findings regarding past and pervasive ongoing discrimination against Native Americans, particularly in the area of voting, racially polarized voting, the isolation of the Native American community, and the lack of responsiveness by the county Commission to the special needs of Native Americans.<sup>141</sup>

The parties were directed to propose districting plans to replace the at-large system. The county proposed plans that created a majority Native American single-member district with the other four members of the commission elected from the remainder of the county at-large.<sup>142</sup> The plaintiffs' proposed plan consisted of five single-

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<sup>134</sup> Complaint at ¶ 1, *Large v. Fremont Cty.*, 05-CV-0270 (D. Wyo. Oct. 20, 2005).

<sup>135</sup> *Id.* at ¶ 9-10.

<sup>136</sup> Defendants' Answer to Complaint, *Large v. Fremont Cty.*, No. 05-CV-0270 (D. Wyo. Nov. 30, 2005).

<sup>137</sup> Plaintiffs' Reply in Opposition to Summary Judgment, *Large v. Fremont Cty.*, No. 05-CV-0270 (D. Wyo. Dec. 1, 2005).

<sup>138</sup> United States' Notice of Intervention Pursuant to 28 U.S.C. 2403(a), *Large v. Fremont Cty.*, No. 05-CV-0270 (D. Wyo. Dec. 14, 2006).

<sup>139</sup> *Large v. Fremont Cty.*, No. 05-CV-0270, 2007 WL 9709756, at \*1 (D. Wyo. Jan. 26, 2007).

<sup>140</sup> *Large v. Fremont Cty.*, 709 F. Supp. 2d 1176, 1231 (D. Wyo. 2010).

<sup>141</sup> *See generally id.*

<sup>142</sup> *See Large v. Fremont Cty.*, No. 05-CV-0270, 2010 WL 11508507, at \*2 (D. Wyo. Aug. 10, 2010), *aff'd*, 670 F.3d 1133 (10th Cir. 2012).

member districts.<sup>143</sup> In August 2010, the district court adopted the plaintiffs’ plan and concluded the county’s proposal was not an adequate remedy for the Section 2 violation because it treated Native American and white voters differently and state law did not authorize “hybrid” plans.<sup>144</sup>

While the county did not appeal the finding of a Section 2 violation, it appealed the remedy adopted by the district court. In February 2012, the Tenth Circuit affirmed the lower court’s decision, holding that the county’s proposed plan was not entitled to legislative deference because it did not “adhere as closely as possible to the contours of the governing state law.”<sup>145</sup> The Tenth Circuit also determined that “settled Supreme Court precedent . . . strongly favors single-member districts in court-ordered plans.”<sup>146</sup> After the Tenth Circuit’s decision was issued, the district court also ordered that the county pay the plaintiffs’ costs and attorney’s fees.<sup>147</sup> The county did not appeal, and the case closed—filed in 2005 and resolved in 2013, the case took 8 years to litigate.

## 15. **Farrakhan v. Gregoire – Washington 2006**

*Farrakhan v. Gregoire* was a long-running case in which minority plaintiffs argued that discrimination in the state’s criminal justice system led to high rates of disfranchisement for minorities in violation of Section 2 of the Voting Rights Act.<sup>148</sup> The Washington state constitution provided for the automatic disfranchisement of all persons convicted of “infamous crimes,” defined as those punishable by death or imprisonment. The case was originally filed by the NAACP Legal Defense and Educational Fund, Inc., and the University Legal Assistance law clinic at Gonzaga Law School on behalf of a group of African American, Latino, and Native American incarcerated individuals. The plaintiffs presented evidence showing that African Americans sentenced for serious crimes were more likely to be given aggravated sentences by the state’s superior courts than whites sentenced for serious crimes, including the Spokane Prosecuting Attorney’s office that sought the death penalty against an eligible Black person 100% of the time compared to 21% of the time for a white person. The plaintiffs also highlighted that the population of African Americans, Hispanics, and Native Americans in state and federal correctional facilities were disproportionately large given their number in the general

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<sup>143</sup> *Id.* at \*6.

<sup>144</sup> *Id.* at \*10-13.

<sup>145</sup> *Large v. Fremont Cty.*, 670 F.3d 1133, 1135 (10th Cir. 2012).

<sup>146</sup> *Id.* at 1135.

<sup>147</sup> *Large v. Fremont Cty.*, No. 05-CV-0270, 2013 WL 12342417, at \*1 (D. Wyo. Sept. 20, 2013).

<sup>148</sup> *Farrakhan v. Gregoire*, No. 2:96-cv-00076, 2006 WL 1889273, at \*9 (E.D. Wash. July 7, 2006).

population.<sup>149</sup> The plaintiffs argued that the racial disparities were the result of racial discrimination in the Washington state criminal justice system, causing higher rates of arrest, conviction, longer sentences, and fewer suspended sentences.<sup>150</sup>

In 2000, a federal court granted the defendants' motion for summary judgment.<sup>151</sup> The Ninth Circuit affirmed in part and reversed in part, finding that the lower court had applied an incorrect Section 2 analysis and that the plaintiffs had a cognizable claim that the disproportionate disfranchising of racial minorities based on criminal convictions violated Section 2.<sup>152</sup> On remand, the district court found there was racial bias in the enforcement of Washington's criminal laws and the data and analysis in plaintiffs' expert reports was "compelling evidence of racial discrimination and bias in the Washington criminal justice system."<sup>153</sup> The court also found credible the testimony of expert witnesses that the disparate impact on racial minorities was not explained by causes other than the racial bias. Nonetheless, the district court granted the state's motion for summary judgment, ruling that the lack of evidence of other forms of discrimination within the electoral system weighed in favor of the state and that there had to be more of a causal link between the discrimination within the criminal justice system and vote disfranchisement.<sup>154</sup>

Plaintiffs appealed, and the ACLU of Washington submitted a motion to file an amicus brief supporting a reversal of the lower court's decision. The ACLU argued that the district court erred in its analysis of Section 2, arguing that since disfranchisement was automatic upon conviction, the racial bias in the criminal justice system worked with the state election law, so nothing more was required to establish a violation of Section 2.<sup>155</sup> The court denied the motion to file an amicus

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<sup>149</sup> See Plaintiffs' Fourth Amended Complaint Adding New Causes of Action at ¶¶ 16-20, *Farrakhan v. Locke*, No. 2:96-CV-00076. (E.D. Wash. Oct. 26, 1999).

*Farrakhan v. Locke*, 987 F. Supp. 1304, 1307 (E.D. Wash. 1997) (reciting factual and procedural background).

<sup>150</sup> *Id.* at ¶¶ 20-21.

<sup>151</sup> Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment, *Farrakhan v. Locke*, No. 2:96-cv-00076 (E.D. Wash. Dec. 1, 2000).

<sup>152</sup> *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003).

<sup>153</sup> *Farrakhan v. Gregoire*, No. CV-96-076, 2006 WL 1889273, at \*4 (E.D. Wash. July 7, 2006).

<sup>154</sup> See *id.* at \*9.

<sup>155</sup> Amicus Curiae Brief of the American Civil Liberties Union of Washington in Support of Appellants' Position Seeking Reversal, *Farrakhan v. Locke*, No. 01-35032 (9th Cir. Apr. 20, 2001).

brief without providing any reason, but it listed the brief as one of the documents before the court in its opinion issued in January 2010.<sup>156</sup>

Then, in a 2-1 decision the court granted summary judgment to the plaintiffs on their vote denial claim. It concluded that there was discrimination in Washington's criminal justice system based on race, and that such discrimination clearly hindered the ability of racial minorities to participate effectively in the political process. As a consequence, the state's felon disfranchisement law violated Section 2 of the Voting Rights Act.

However, on October 7, 2010, in an en banc decision, the Ninth Circuit reversed the panel's ruling, concluding that the plaintiffs failed to present evidence of intentional racial discrimination in the operation of Washington's criminal justice system and did not meet their burden of establishing a violation of Section 2 of the Voting Rights Act.<sup>157</sup> The plaintiffs did not file a petition for certiorari to the Supreme Court.

## **16. Libertarian Party of New Mexico v. Herrera – New Mexico 2006**

In an effort to remove barriers for new political parties, the ACLU sued New Mexico in July 2006 to invalidate a two-petition ballot access system imposed on minor parties.<sup>158</sup> The challenged law required new parties to collect signatures to petition for formal party status and then required nominees from those parties to gather signatures on a second petition for their names to appear on the ballot. No such requirement existed for Republican or Democrat nominees. The lawsuit charged that New Mexico's law was unduly burdensome and violated the First and Fourteenth Amendment rights of political association by forcing new parties to seek signatures from non-party members in order to appear on the ballot. They sought declaratory and injunctive relief generally prohibiting the defendants from enforcing the two-petition system and injunctive relief requiring the defendants to place Libertarian Party nominees on the ballot for the 2006 general election.<sup>159</sup>

In September 2006, a New Mexico federal district court rejected the challenge and granted summary judgment for the defendants.<sup>160</sup> The court implicitly noted that the measure was in place to minimize large numbers of third party and independent candidates on New Mexico ballots. The court upheld the law on the basis of the

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<sup>156</sup> *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010).

<sup>157</sup> *Farrakhan v. Gregoire*, 623 F.3d 990, 994 (9th Cir. 2010).

<sup>158</sup> Complaint, *Libertarian Party of N.M. v. Herrera*, 6:06-cv-00615 (D.N.M. July 11, 2006).

<sup>159</sup> *Id.* at ¶ 1.

<sup>160</sup> *Libertarian Party of N.M. v. Vigil-Giron*, 6:06-cv-00615, 2006 WL 8443845 (D.N.M. 2006).

Supreme Court’s decision in *Illinois State Board of Elections v. Socialist Worker Party*, which supported a state’s interest that “a candidate demonstrate some support before being placed on the ballot...[to] safeguard[] the integrity of elections by avoiding overloaded ballots with frivolous candidacies, which in turn diminish victory margins, contribute to the cost of conducting elections, confuse and frustrate voters, increase the need for burdensome runoffs, and may ultimately discourage voter participation in the electoral process.”<sup>161</sup> The court also reasoned the burdens imposed by New Mexico’s ballot access law were less burdensome than other laws previously upheld by the Supreme Court.<sup>162</sup> The ACLU appealed, and the Tenth Circuit affirmed the lower court’s ruling.<sup>163</sup> The plaintiffs did not appeal the Tenth Circuit’s decision.

## 17. **Boustani v. Blackwell – Ohio 2006**

In 2006, the ACLU, the ACLU of Ohio, and other civil rights organizations filed suit in Ohio on behalf of two dozen organizations and a set of naturalized citizens challenging a law requiring naturalized citizens to produce a certificate of naturalization when voting in-person or within 10 days of casting a provisional ballot.<sup>164</sup> The state did not request documentation from native-born citizens. Moreover, the naturalization certificate cost more than \$200 to obtain and took nearly a year to receive once requested. The suit challenged this requirement as a poll tax under the Twenty-Fourth Amendment and an undue burden on the fundamental right to vote for a specific group of voters in violation of the Fourteenth Amendment.<sup>165</sup> Because the law also allowed poll workers to ask voters if they were naturalized and demand proof of citizenship, the suit separately challenged the law as encouraging racial profiling of U.S. citizens belonging to certain ethnic groups.<sup>166</sup>

The federal court enjoined the law and struck it down as unconstitutional under both the Fourteenth and Twenty-Fourth Amendments.<sup>167</sup> The court agreed that the law imposed an undue burden on the right to vote, subjected naturalized citizens to

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<sup>161</sup> *Id.* (citing *Ill. State Bd. of Elections v. Socialist Worker Party*, 440 U.S. 173, 183-84 (1979)).

<sup>162</sup> *Id.* at \*7-9

<sup>163</sup> *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303 (10th Cir. 2007).

<sup>164</sup> Complaint for Declaratory and Injunctive Relief at ¶ 15, *Boustani v. Blackwell*, No. 1:06-cv-02065 (N.D. Ohio Aug. 29, 2006).

<sup>165</sup> *Id.* at ¶¶ 36-38.

<sup>166</sup> *Id.* at ¶¶ 39-42.

<sup>167</sup> *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006).

disparate treatment, and constituted an unconstitutional poll tax.<sup>168</sup> Although the court halted the law's enforcement, the statute remained on the books, leaving the plaintiffs concerned that poll workers would continue to enforce additional requirements for naturalized citizens. The plaintiffs filed a motion for additional relief in 2012 asking the court to compel the state to educate poll workers on the law's abrogation and also to require that signs be placed at polling places to advise naturalized voters of their rights.<sup>169</sup> The court denied the order finding a lack of standing; no further action has been taken in the case.<sup>170</sup>

## **18. Ariz. v. Inter Tribal Council of Ariz.; Gonzalez v. Ariz. – Arizona 2006**

In November 2004, Arizona voters approved Proposition 200, a ballot initiative that amended Arizona law by requiring individuals to provide proof of citizenship to register to vote and photo identification. Three lawsuits were filed and consolidated in federal court challenging the new requirements.<sup>171</sup>

The ACLU and additional co-counsel represented the Inter Tribal Council of Arizona, League of Women Voters of Arizona, League of United Latin American Citizens, and other individual and organizational plaintiffs asserting violations of the Fourteenth and Twenty-Fourth Amendments, the Civil Rights Act of 1964, Section 2 of the Voting Rights Act, and the National Voter Registration Act (NVRA). With respect to the proof of citizenship requirement, the plaintiffs argued that the identification requirements imposed an unnecessary and undue burden on the fundamental right vote for thousands of eligible Arizonans who were otherwise qualified to register to vote, but did not possess or were unable to access the documents specified as “satisfactory evidence” of citizenship.<sup>172</sup> The plaintiffs also argued that the proof of citizenship requirement was preempted by the NVRA, at least with respect to voters who apply to register to vote using the federal voter registration form. The plaintiffs cited evidence that Native Americans living on reservations in Arizona, encompassing approximately 25 million acres, were more likely to be living below the poverty line and less likely to have residential home addresses, utility bills in their names, drivers' licenses, and other documents

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<sup>168</sup> *Id.* at 825-27.

<sup>169</sup> Motion for Additional Relief, *Boustani v. Blackwell*, No. 1:06-cv-02065 (N.D. Ohio Sept. 25, 2012).

<sup>170</sup> *Boustani v. Husted*, No. 1:06-cv-2065, 2012 WL 5414454, at \*2 (N.D. Ohio 2012).

<sup>171</sup> Consolidation Order, *González v. Arizona*, No. 2:06-cv-1268 (D. Ariz. Jun. 1, 2006); Consolidation Order, *González v. Arizona*, No. 2:06-cv-1268 (D. Ariz. Aug. 4, 2006) (consolidating Complaint, *González v. Arizona*, No. 2:06-cv-1268 (D. Ariz. May 9, 2006); Complaint, *Inter Tribal Council of Ariz. v. Brewer*, No. 3:06-cv-1362 (D. Ariz. May 24, 2006); Complaint, *Navajo Nation v. Brewer*, No. 3:06-cv-1575 (D. Ariz. June 20, 2006)).

<sup>172</sup> Complaint at ¶ 27, *Inter Tribal Council of Ariz. v. Brewer*, No. 3:06-cv-1362 (D. Ariz. May 24, 2006).

prescribed for proving citizenship under the new law.<sup>173</sup> Additionally tribes living in such poverty made the provision of documents proving citizenship difficult or impossible.<sup>174</sup> The plaintiffs also argued the rules would especially burden the elderly, disabled, nursing home residents, and other individuals in rural areas or who were without access to transportation.<sup>175</sup> The proof of citizenship requirements also severely hampered the voter registration efforts of the plaintiffs.<sup>176</sup>

The plaintiffs sought a preliminary injunction to prohibit the implementation of the proof of citizenship and voter ID requirements for the 2006 midterm election.<sup>177</sup> The district court denied the motion, but an injunction pending appeal was initially granted by the Ninth Circuit.<sup>178</sup> However, the Supreme Court vacated that order.<sup>179</sup> The Ninth Circuit subsequently affirmed the denial of injunctive relief by the district court.<sup>180</sup>

Discovery in the case proceeded and a trial was held in July 2008. The plaintiffs put forth evidence that between January 2005 and the Fall 2007, 31,550 voter registration applications were rejected for failure to provide proof of citizenship, of which 90% had listed the United States as their place of birth. Subsequently, only 11,000 of the total rejected applications were able to register. Plaintiffs also highlighted that although Arizona's population increased by 650,000 people (11%) between 2004 and 2007 in the first three years of Proposition 200, the number of registered voters declined by more than 11,000 voters. With respect to the photo ID requirement, the plaintiffs showed that while voters without acceptable ID were able to cast a conditional provisional ballot, they needed to produce an ID within 5 days for their vote to count, and between 63% and 77% of such ballots went uncounted, while many simply left without voting in the 2006 election after being asked to present ID.<sup>181</sup> Additionally, the plaintiffs' evidence showed that many Native Americans over the age of 40 did not have birth certificates because they were not born in hospitals and could no longer be issued a delayed birth certificate

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<sup>173</sup> *Id.* at ¶ 29.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Id.* at ¶ 30.

<sup>176</sup> *Id.* ¶ 31.

<sup>177</sup> Plaintiffs' Motion for Preliminary Injunction, *Gonzalez v. Arizona*, No. 06-cv-1268 (D. Ariz. Aug. 9, 2006).

<sup>178</sup> Order on Motion for Preliminary Injunction, *Gonzalez v. Arizona*, No. 06-cv-1268 (D. Ariz. Aug. 9, 2006).

<sup>179</sup> *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

<sup>180</sup> *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

<sup>181</sup> *See Gonzalez v. Ariz.*, No. 06-cv-01362, 2008 WL 11395512 (D. Ariz. Aug. 20, 2008).

because no living birth witnesses remained.<sup>182</sup> On August 20, 2008, the district court entered judgment for defendants.<sup>183</sup>

The plaintiffs appealed to the Ninth Circuit, which issued a 2-1 opinion in October 2010 that held the NVRA preempted Proposition 200's proof of citizenship requirement for registration, making the law invalid. The Court of Appeals rejected the plaintiffs' additional arguments that the voter ID requirement violated the Voting Rights Act and the Fourteenth and Twenty-Fourth Amendments. The Ninth Circuit, sitting en banc, issued a subsequent ruling blocking the proof of citizenship requirement under the NVRA, but upholding the voter ID requirement.

On appeal to the Supreme Court, the Court affirmed that Arizona was prohibited from requiring individuals using the federal voter registration form to submit documentary proof of citizenship to register to vote, unless the procedure was approved by the U.S. Election Assistance Commission.<sup>184</sup> In an opinion authored by Justice Scalia, the Court held that the NVRA preempted Arizona's documentary proof of citizenship requirement, and Arizona's refusal to register voters using the federal form without documentary proof was in conflict with the NVRA and therefore unlawful. The Court held that the NVRA requires all states to "accept and use" the federal voter registration form and noted that "[n]o matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available."<sup>185</sup>

## 19. **Jenkins v. Ray – Georgia 2006**

Following the 2000 census, the Georgia General Assembly redrew the state's Board of Education districts and redistricted the five single-member districts for the Randolph County Board of Education.<sup>186</sup> The state submitted the redistricting plan to the Justice Department, which granted preclearance in 2002.<sup>187</sup> One of the new district lines ran through the middle of property belonging to District 5 Board Member and Chairman of the Board, Henry L. Cook, a Black incumbent, leaving his residence in District 4 and his farmland in District 5. District 5 was a majority Black district. Historically, District 4 was predominantly white. A state judge initially ruled that Cook was a District 5 elector, and Cook was reelected as the

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

<sup>183</sup> *Id.*

<sup>184</sup> *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013).

<sup>185</sup> *Id.* at 12.

<sup>186</sup> Complaint at ¶ 7, *Jenkins v. Ray*, No. 4:06-cv-00043 (M.D. Ga. Apr. 17, 2006).

<sup>187</sup> *Id.* at ¶ 8.

District 5 board member.<sup>188</sup> However, in a subsequent election local election officials decided that Cook resided in District 4, making him ineligible to run for his seat.<sup>189</sup>

Black voters in Randolph County sued, supported by the ACLU, alleging that the decision amounted to a new redistricting plan and should have been precleared under Section 5.<sup>190</sup> A three-judge panel agreed and granted the plaintiffs summary judgment.<sup>191</sup> The court relied on the assessment by the Department of Justice that its initial redistricting approval was contingent on Cook retaining District 5 eligibility<sup>192</sup> and concluded that the change was a “standard, practice, or procedure with respect to voting” that required additional preclearance.<sup>193</sup> Upon review, the Justice Department denied preclearance, concluding that there was sufficient evidence to prevent the county from meeting its burden of proving an absence of a discriminatory purpose.<sup>194</sup> The case closed in 2007.

## 20. Strickland v. Clark – Mississippi 2006

The ACLU filed this case on behalf of plaintiffs in October 2006, challenging Mississippi’s disenfranchisement rules in state court.<sup>195</sup> Article 12, Section 241 of the Mississippi Constitution prohibits individuals convicted of 10 enumerated crimes—murder, rape, forgery, bribery, obtaining money or goods under false pretense, bigamy, embezzlement, perjury, theft and arson—from voting in state and certain federal elections; the provision, however, allows individuals with a conviction of one of the 10 crimes to still vote in U.S. presidential elections.<sup>196</sup> In 2004, the state Attorney General interpreted “theft” as including 11 additional crimes, and the decision was precleared by the Department of Justice in 2005.<sup>197</sup> The Mississippi voter registration application form listed the 21 crimes that purportedly disqualify a person from registering to vote or voting in all state and federal elections—11 of which are not included in Article 12, Section 241. The form

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<sup>188</sup> *See id.* at ¶¶ 16-17.

<sup>189</sup> *See id.* at ¶ 17.

<sup>190</sup> *Id.* at ¶ 22.

<sup>191</sup> *Jenkins v. Ray*, No. 4:06-CV-43, 2006 WL 1582426 (M.D. Ga. 2006) (per curiam).

<sup>192</sup> *Id.* at \*3.

<sup>193</sup> *Ibid.*

<sup>194</sup> *See* Letter from Wan J. Kim, Assistant Attorney Gen., U.S. Dep’t of Justice, to Tommy Coleman, Esq. (Sept. 12, 2006), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-2700.pdf>.

<sup>195</sup> Complaint, *Strickland v. Clark*, Case No. G2006-1753 S/2 (Chanc. Ct. Miss. 2006).

<sup>196</sup> MISS. CONST. art. 12, § 241; *see also* Complaint at ¶ 2, *Strickland v. Clark*, Case No. G2006-1753 S/2 (Chanc. Ct. Miss. 2006).

<sup>197</sup> Complaint at ¶ 22-25, *Strickland v. Clark*, Case No. G2006-1753 S/2 (Chanc. Ct. Miss. 2006).

also did not include a provision that permitted individuals convicted of the enumerated crimes to vote in presidential elections.<sup>198</sup> The plaintiffs filed the lawsuit against the Secretary of State and state Attorney General arguing that the defendants denied individuals convicted of the enumerated crimes the right to vote in presidential elections and violated the right of individuals convicted of one of the state Attorney General's 11 additional theft crimes to vote in state and federal elections. The plaintiffs alleged violations of the Mississippi Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the National Voter Registration Act.<sup>199</sup> The plaintiffs sought declaratory and injunctive relief and moved to extend the voter registration deadline so that individuals convicted of one of the additional eleven crimes could vote in the November 2006 election. The plaintiffs also sought a temporary restraining order and preliminary injunction, which were denied. The state then filed a motion to dismiss the plaintiffs' claim, which was also denied.<sup>200</sup> After discovery requests were propounded, additional plaintiffs filed a motion to join the suit in February 2008, but the state court did not rule on that motion,<sup>201</sup> so they filed a separate suit in federal court.<sup>202</sup>

## 21. NAACP v. Carnahan – Missouri 2006

In September 2006, the NAACP and several other civic organizations and individual plaintiffs sued the Missouri Secretary of State and other state officials in a lawsuit seeking a declaratory judgment that the state's new photo ID requirement to vote was unconstitutional and to enjoin its enforcement.<sup>203</sup> The plaintiffs argued that the photo ID law imposed an unauthorized, unnecessary, and undue burden on the fundamental right to vote in violation of the Fourteenth Amendment, an unconstitutional poll tax in violation of the Twenty-Fourth Amendment, was a violation of the Civil Rights Act of 1964, and a violation of Section 2 of the Voting Rights Act. Among the factual allegations presented were the various costs necessary to obtain an acceptable photo ID to vote, including the underlying documents to obtain an acceptable ID, and how the law would disproportionately burden African American and Latino voters, students, women, the disabled, the

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<sup>198</sup> *Id.* at ¶ 3-4.

<sup>199</sup> *Id.* at ¶ 6.

<sup>200</sup> *See* Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at n.1, *Young v. Hosemann*, No. 3:08-cv-567 (S.D. Miss. Sept. 12, 2008).

<sup>201</sup> *See id.* at 2.

<sup>202</sup> Complaint for Injunctive and Declaratory Relief, *Young v. Hosemann*, No. 3:08-cv-567 (S.D. Miss. Sept. 19, 2008).

<sup>203</sup> Complaint for Declaratory and Injunctive Relief, *NAACP v. Carnahan*, No. 2:06-CV-04200-SOW (W.D. Mo. Sep. 6, 2006).

elderly, and the working poor.<sup>204</sup> State officials themselves estimated that the law could disenfranchise 170,000 to 240,000 eligible voters.<sup>205</sup>

The plaintiffs filed a preliminary injunction motion in September 2006 to enjoin enforcement of the law.<sup>206</sup> The plaintiffs' suit was voluntarily dismissed without prejudice in November 2006<sup>207</sup> after the Missouri Supreme Court, in separate state litigation, struck down the law as violating several provisions of the Missouri Constitution.<sup>208</sup> The Missouri Supreme Court in an en banc decision affirmed the trial court's conclusions that the law placed a substantial burden on the fundamental right to vote and violated the state constitution's equal protection clause and guarantee of the right of qualified, registered citizens to vote.<sup>209</sup> The court also agreed that the photo ID law placed heavy burdens on specific populations and rejected the state's argument that the law was justified to protect against voter fraud because the facts did not support that in-person voter fraud was a problem in Missouri.<sup>210</sup> With respect to the state's argument that it had a compelling interest in combating the perception of voter fraud, the court found that "[w]hile the State does have an interest in combating those perceptions [of voter fraud], where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement."<sup>211</sup>

## 22. Stewart v. Blackwell – Ohio 2006

Voters in Ohio, represented by the ACLU and ACLU of Ohio, brought a class action lawsuit in 2002 challenging the state's use of punch card ballots and optical scan systems.<sup>212</sup> Neither system used by Ohio provided notice to voters if there were possible errors in how they marked their ballots that could prevent their votes from being counted. The plaintiffs sued the Ohio Secretary of State, members of the Ohio

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<sup>204</sup> See *id.* ¶¶ 25-37.

<sup>205</sup> See *id.* ¶ 24; see also *Weinschenk v. State*, 203 S.W.3d 201, 206 (Mo. 2006).

<sup>206</sup> Plaintiff's Motion for a Preliminary Injunction, *NAACP v. Carnahan*, No. 2:06-cv-04200 (W.D. Mo. Sep. 22, 2006).

<sup>207</sup> Order Lifting Stay, Dismissing Motion for Preliminary Injunction, and Dismissing Case without Prejudice, *NAACP v. Carnahan*, No. 2:06-CV-04200-SOW (W.D. Mo. Nov. 21, 2006).

<sup>208</sup> *Weinschenk*, 203 S.W.3d at 206. The ACLU and several other organizations filed an amicus brief in support of the plaintiffs in the state case. Brief for NAACP, Inc., et al. as *Amici Curiae*, *Weinschenk v. State*, 203 No. SC 88039 (Mo. 2006).

<sup>209</sup> *Weinschenk*, 203 S.W.3d at 204.

<sup>210</sup> See *id.* at 209-210.

<sup>211</sup> *Id.* at 218.

<sup>212</sup> Complaint for Declaratory and Injunctive Relief with Class Allegations, *Stewart v. Blackwell*, No. 5:02-CV-2028 (N.D. Ohio Oct. 11, 2002).

Board of Examiners for the Approval of Electoral Marking Devices, members of various county boards of elections, and members of various county councils. At the time, Ohio relied predominantly on punch card voting systems; 69 of the state's 88 counties used punch cards. Those 69 counties included 72.5% of all registered voters in Ohio and 74% of the state's 11,756 voting precincts. Among the 19 counties that did not use punch cards, two used lever voting machines, six had electronic voting devices, and 11 used optical scanning equipment.<sup>213</sup>

The plaintiffs were two subclasses of voters. The first argued that non-notice punch card and optical scan systems violated the Fourteenth Amendment.<sup>214</sup> The second consisted of African American voters from Hamilton, Summit, and Franklin counties who alleged their votes were disproportionately at risk of being rejected in violation of Section 2 of the Voting Rights Act.<sup>215</sup> Using lay and expert testimony, the plaintiffs demonstrated racial disparities in counted votes due to flaws in non-notice technology. Election officials in Hamilton County also repeatedly expressed concern that punch card systems disfranchised African American voters in Cincinnati.

During the 2000 presidential election, punch card voting equipment resulted in greater intra-county racial differences in overvoting and undervoting than did notice technology. The analysis by the plaintiffs' expert, Dr. Richard Engstrom, showed that in the 2000 presidential election in Hamilton County, the county seat of Cincinnati, African American voters' ballots were rejected for overvoting at nearly seven times the rate of non-African American voters.<sup>216</sup> His Hamilton County analysis showed that African Americans undervoted at nearly twice the non-African American rate, and adjusted for estimated and intentional undervotes, African Americans in Hamilton County suffered unintentional undervotes seven and a half times more than non-African American voters. African American voters in Montgomery County, the county seat of Dayton, experienced residual voting around two and a half times as often as non-African American voters. Similarly, African American voters in Summit County, the county seat of Akron, experienced overvoting more than nine times the rate of non-African Americans. Summit County's African American voters also experienced total undervoting almost two

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<sup>213</sup> *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 810 (N.D. Ohio 2004).

<sup>214</sup> Complaint for Declaratory and Injunctive Relief with Class Allegations at 32, *Stewart v. Blackwell*, No.5:02-CV-2028 (N.D. Ohio Oct. 11, 2002).

<sup>215</sup> *Ibid.*

<sup>216</sup> LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 805 (Mar. 2006), [https://www.aclu.org/files/votingrights/2005\\_report.pdf](https://www.aclu.org/files/votingrights/2005_report.pdf).

and a half times more frequently than non-African Americans and unintentional undervoting at over three times non-African American voters' rate.<sup>217</sup>

The plaintiffs compared these results with Franklin County, which used direct record electronic (DRE) voting machines in order to determine if election machinery was the cause of the disparities and found there was no racial disparity in the number of overvotes in the county. DRE machines also appeared to reduce the rate of accidental undervoting. For non-African Americans, the rate became negligible, and for African Americans it dropped below 1%, nearly eliminating the racial gap in accidental undervotes.

The plaintiffs' experts testified that racial disparities in the residual vote rates could not be separated from the evident and consistent socioeconomic disparities between African Americans and whites in each of the three counties. However, while error-prone punch card machines used in Hamilton, Summit, and Montgomery counties amplified racial disparities in the counties and caused a gap in residual ballot rates between white and Black voters, the voting technology used in Franklin County prevented a similar gap. In other words, unlike the three defendant counties, Franklin County's use of DRE machines overcame ambient racial disparities to ensure that Blacks and whites had an equal opportunity to participate in the political process.<sup>218</sup>

On December 14, 2004, the district court ruled against the plaintiffs.<sup>219</sup> The court did not find a Section 2 violation, primarily because majority white counties in the state also had high residual vote rates. The plaintiffs appealed and argued that the court erred by applying a "rational basis" level of scrutiny. Sitting *en banc*, the court of appeals vacated the judgment for mootness, since the challenged machines were no longer in use.<sup>220</sup>

### **23. Citizen Equal Rights Alliance v. Johnson – Montana 2007**

Citizens Equal Rights Alliance, Inc. and associated entities filed suit in federal court in May 2007, alleging that various forms of fraud were committed during the November 2006 general election on the Crow Indian Reservation in Big Horn County, Montana.<sup>221</sup> The plaintiffs claimed that the tribal government's

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<sup>217</sup> *See id.*

<sup>218</sup> *See Stewart*, 356 F. Supp. at 795-796.

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

<sup>220</sup> *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007).

<sup>221</sup> Complaint for Declaratory and Injunctive Relief at ¶¶ 1, 14, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. May 24, 2007).

endorsement of certain tribal members running for Big Horn County offices in the 2006 election constituted “election fraud and/or voting rights abuses,”<sup>222</sup> even though the right of an organization or group to endorse candidates for public office is protected by the First and Fourteenth Amendments of the Constitution.<sup>223</sup> The plaintiffs’ other claims of fraud, including double voting and insecure ballot boxes, were similarly without merit. Despite failure to establish evidence of fraud, the plaintiffs argued that the alleged fraud diluted white voting strength in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act and sought removal of all precincts from the Crow Indian Reservation.

The ACLU filed a motion to intervene on behalf of Crow tribal members in July 2007.<sup>224</sup> In November 2007, the district court granted motions to dismiss in favor of the county and state defendants.<sup>225</sup> Among its findings, the court determined that the plaintiffs failed to state a federal claim and failed to prove that the defendants had acted with discriminatory intent or racial animus against the plaintiffs or white voters of the county. The complaint’s dismissal mooted the ACLU’s motion to intervene. However, the plaintiffs were allowed to file an amended complaint joining federal officials as additional defendants.<sup>226</sup> Once again, the ACLU filed a motion to intervene on behalf of tribal members.<sup>227</sup> But, in March 2008 the

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<sup>222</sup> *See id.* at ¶ 14.

<sup>223</sup> This was not the first time whites had accused Indians of voter fraud in Big Horn County. Carroll Graham, a non-Indian and a state senator from Big Horn County, charged that election fraud had been committed during the 1982 primary and requested an investigation by the State Commissioner of Political Practices. He complained, among other things, that Indian voters had been bribed with sandwiches and potato chips by the successful primary candidates or their supporters. Jack Lowe, an attorney with the commissioner’s office, conducted a four-day investigation of the allegations and concluded that no fraud had occurred. According to Lowe, the practices complained of “would raise no eyebrows in some other parts of the state.” Lowe concluded that “the most striking feature of Big Horn County politics is this: there is a very unfortunate racial polarization taking place. This election is seen by some as a sort of latter-day Indian uprising.” A federal court, in a successful Indian vote dilution case, described the allegations of voter fraud on the Crow Reservation as “unfounded.” *See Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986).

<sup>224</sup> Motion for Leave to Intervene, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. July 16, 2007).

<sup>225</sup> Order Granting Defendants’ Motion to Dismiss, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. Nov. 5, 2007).

<sup>226</sup> Amended Complaint for Declaratory and Injunctive Relief, Motion for Leave to Intervene, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. Nov. 19, 2007).

<sup>227</sup> Motion for Leave to Intervene, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. Feb. 19, 2008).

plaintiffs filed a voluntary notice of dismissal of their case.<sup>228</sup>

#### **24. Madison v. Washington – Washington 2007**

In March 2006, King County Superior Court Judge Michael Spearman struck down a Washington state law that denied voting rights to thousands of formerly incarcerated persons solely because they owed court-imposed fines. The ACLU and ACLU of Washington represented three individuals who were unable to vote because they could not pay the court-imposed financial obligations. The challenged state law prohibited individuals from voting after they finished their prison terms until they completely satisfied a number of fines and fees. These legal financial obligations included docket and filing fees, court costs, restitution, and costs related to incarceration. Interest on these court-imposed assessments accrued at 12% a year.<sup>229</sup> According to Washington's own statistics, more than 90% of felony defendants were indigent at the time of charging, so it was extremely difficult for many formerly incarcerated persons to pay the financial assessments upon release. Additionally, at the time of litigation, disenfranchisement affected about 3.7% of eligible voters in Washington—almost double the national average, and more than 250,000 people in Washington could not vote because of a prior felony conviction. The impact of the disenfranchisement law was widespread and disproportionately impacted people of color in Washington, where marked racial disparities in the state's incarceration rate meant the state disenfranchised almost 25% of all voting-age African American males.<sup>230</sup>

After a favorable lower court ruling granting summary judgment for the plaintiffs, the state appealed.<sup>231</sup> In a 6-3 decision issued in July 2007, the Supreme Court of Washington reversed. The majority held that persons convicted of felonies no longer had a fundamental right to vote and, as a result, applied a rational basis standard to review the law—the lowest level of judicial scrutiny. The court concluded that Washington had a rational basis for “limiting political participation of those unwilling to abide by laws and in requiring the completion of all sentence elements before the right to vote is restored.”<sup>232</sup> The court did not address the plaintiffs' argument that a person's financial inability—not their unwillingness—to pay

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<sup>228</sup> Notice of Dismiss, Motion for Leave to Intervene, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. Mar. 25, 2008).

<sup>229</sup> Complaint, *Daniel Madison v. State of Washington*, No. 04-2-33414-4 SEA (Sup. Ct. Wash. Oct. 21, 2004).

<sup>230</sup> Press Release, ACLU, *Washington Court Strikes Down Modern Form of Poll Tax* (Mar. 28, 2006) <https://www.aclu.org/press-releases/washington-court-strikes-down-modern-form-poll-tax>.

<sup>231</sup> *Madison v. State*, No. 04-2-33414-4SEA, 2006 WL 3713716 (Wash. Super. 2006).

<sup>232</sup> *Madison v. State*, 163 P.3d 757, 771 (Wash. 2007).

financial obligations does not indicate whether or not they are a law-abiding citizen. Three dissenting judges countered that the financial conditions violated the Equal Protection Clause, reasoning that drawing a financial line between some formerly incarcerated persons—thus allowing some to vote but not others—was impermissible.<sup>233</sup> The case generated support for the legislature to repeal the conditioning of voting rights restoration on the ability to pay off all court-imposed fines and fees.<sup>234</sup>

## **25. Nick v. Bethel – Alaska 2007**

In June 2007, the ACLU, ACLU of Alaska, and Native American Rights Fund represented Alaskan Natives in the Bethel Census Area of Alaska, where more than 10,000 Yup'ik speakers reside. They contended the state and the City of Bethel failed to provide language assistance in the Yup'ik language as required by the special minority language provisions of the Voting Rights Act, Section 4(f)(4) and Section 203.<sup>235</sup> These complaint alleged the failure to provide written language assistance to voters by way of translations of election materials and the failure to provide oral language assistance by way of translators, interpreters, and adequately trained election officials. The plaintiffs also claimed that the defendants failed to comply with the preclearance provision of Section 5 of the Voting Rights Act and sought to allow Alaska Native limited-English proficient voters to receive assistance from the person of their choice as required by Section 208 of the Voting Rights Act.

The litigation presented a number of distinct challenges. Not only were the plaintiffs geographically isolated and remote, making travel difficult and time consuming, but it was difficult to communicate without the assistance of Yup'ik translators. For example, attorneys for the plaintiffs engaged in election monitoring during the general election on November 4, 2008, but to do so they had to fly on small planes to several Native Villages, which were isolated even from each other, and utilize translators to interview voters about their experiences at the polls, then

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<sup>233</sup> *Id.* at 778-82 (Alexander, J., Chambers, J., Johnson, J., dissenting)

<sup>234</sup> *See* WASH. REV. CODE § 29A.08.520(1); *see also* Felons and Voting Rights, WASHINGTON SECRETARY OF STATE, <https://www.sos.wa.gov/elections/voters/felons-and-voting-rights.aspx> (regarding fines, restitution, or other legal financial obligations, “You are not required to completely pay off your fines, restitution, or other legal financial obligations (LFOs) before you register to vote. However, your voting rights can be revoked if the sentencing court determines that you have failed to comply with the terms of your legal financial obligations”).

<sup>235</sup> *See* Complaint, *Nick v. Bethel*, No. 3:07-cv-0098 (D. Alaska Jun. 11, 2007); First Amended Complaint, *Nick v. Bethel*, No. 3:07-cv-00098 (D. Alaska May 22, 2008).

use those translators to follow up with the interviewees and obtain translated declarations.<sup>236</sup>

In July 2008, the plaintiffs obtained a preliminary injunction against the state defendants. The district court held that the plaintiffs had demonstrated a substantial likelihood of success on the merits of their claims and enjoined the state from further failure to provide adequate and effective language assistance. Specifically, the court ordered the state to, undertake efforts to provide mandatory poll worker training in the requirements of the law, hire a language assistance coordinator fluent in Yup'ik, recruit bilingual poll workers or translators, provide written sample ballots in Yup'ik, provide preelection publicity in Yup'ik, ensure the accuracy of translations, provide a Yup'ik glossary of election terms, and submit pre and post-election reports to the court.<sup>237</sup>

On July 31, 2009, the court accepted a consent decree and settlement agreement entered into by the plaintiffs and the City of Bethel.<sup>238</sup> It provided for translators at the polls, mandatory training for all translators working in city elections, the provision of a Yup'ik-English election glossary, broadcasting of Yup'ik-language election announcements, advance publication of translator services prior to elections, and translation of initiatives and referenda into written Yup'ik.<sup>239</sup> The city also agreed to seek Section 5 preclearance of the settlement agreement.

Following more litigation, the plaintiffs and the state defendants entered into a settlement agreement providing for minority language assistance to Yup'ik speakers including poll workers to serve as bilingual translators, Yup'ik sample ballots, a comprehensive Yup'ik-English glossary of election terms, radio election ads in Yup'ik, election video broadcasts in Yup'ik, outreach to Yup'ik speakers, the formation of a Yup'ik Translation Panel, translation of ballot measures, and compliance with Section 5 preclearance. The agreement also called for payment of costs and fees to the plaintiffs' lawyers and retention of enforcement jurisdiction by the district court until December 31, 2012. The agreement was formally approved

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<sup>236</sup> ACLU Voting Rights Project, ANNUAL REPORT: JANUARY 1, 2010-DECEMBER 31, 2010 8, [https://www.aclu.org/sites/default/files/field\\_document/VRP\\_Annual\\_Report\\_2010.pdf](https://www.aclu.org/sites/default/files/field_document/VRP_Annual_Report_2010.pdf).

<sup>237</sup> *Nick v. Bethel*, No. 3:07-cv-00098, 2008 WL 11456134, at \*6-7 (D. Alaska July 30, 2008).

<sup>238</sup> Order from Chambers, *Nick v. Bethel*, No. 3:07-cv-00098 (D. Alaska July 31, 2009).

<sup>239</sup> See Consent Decree and Settlement Agreement, *Nick v. Bethel*, No. 3:07-cv-00098 (D. Alaska July 9, 2009).

by the district court on February 16, 2010.<sup>240</sup> Monitoring of elections and the implementation of the settlement agreements is ongoing.

## **26. Johnson v. Bredeesen – Tennessee 2008**

For several years, Tennessee had one of the most cumbersome and confusing felon re-enfranchisement schemes in the nation. In 2006, the legislature amended the law to allow people convicted of “infamous crimes” to apply for a Certificate of Restoration. The law, however, requires that applicants pay all victim restitution and be current on any child support obligations.<sup>241</sup> Prior to the 2006 amendment the state did not require individuals with criminal convictions who had otherwise completed all the terms of their sentence to pay legal financial obligations before being eligible to seek restoration of their voting rights.<sup>242</sup>

On February 25, 2008, the ACLU and ACLU of Tennessee filed a lawsuit challenging the requirement to pay legal financial obligations as a condition of rights restoration as unconstitutional under the Fourteenth and Twenty-Fourth Amendments and state laws.<sup>243</sup> The lawsuit also highlighted the fact that individuals who do not have a criminal conviction, but who owe outstanding child support do not risk losing their voting rights for failure to pay. Two of the three plaintiffs in the case, Terrence Johnson and Jim Harris, owed outstanding child support payments but had custody of their children.

The complaint also included a due process claim on behalf of a plaintiff who, prior to the lawsuit being filed, attempted to complete and submit a Certificate of Restoration application. The law requires a supervising authority, such as a probation officer or criminal court clerk, to complete a portion of the Certificate of Restoration. However, the state had not implemented a set of procedures that all counties have to follow when determining whether a person convicted of an “infamous crime” owes a legal financial obligation, and if so, whether that person has satisfied the requirement. Supervising authorities refused to sign the form for this plaintiff on the grounds that he owed victim restitution. Yet, neither the county

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<sup>240</sup> Order Granting Parties’ Joint Request for Approval of Settlement Agreement on §§ 203, 4(f)4 & 208 Claims, Rescission of Preliminary Injunction, and Dismissal of Case With Prejudice at 2, *Nick v. Bethel*, No. 3:07-cv-00098 (D. Alaska Feb. 16, 2010).

<sup>241</sup> See *Johnson v. Bredeesen*, 624 F.3d 742, 744–45 (6th Cir. 2010).

<sup>242</sup> *Id.* at 745.

<sup>243</sup> Complaint for Declaratory Relief, Injunctive Relief, and Nominal Monetary Damages, *Johnson v. Bredeesen*, No. 3:08-cv-00187 (M.D. Tenn. Feb. 25, 2008).

nor the state provided him with documentation confirming whether or not he owed any money.<sup>244</sup>

Three of the defendants filed a motion to be dismissed for failure to state a claim which the court denied. The defendants then filed a motion for a judgment on the pleadings arguing that, even assuming all of the allegations in the complaint were true, the plaintiffs' claims still failed as a matter of law. After a hearing, the court granted the defendants' motion as to all of the claims except for the due process claim. The parties eventually settled one of the plaintiff's claims, and he was able to vote in the November 4, 2008, general election.

The plaintiffs appealed the dismissal of the remainder of their claims to the Sixth Circuit. In a 2-1 decision, a panel affirmed the dismissal of the plaintiffs' claims.<sup>245</sup> The majority ruled that Tennessee's re-enfranchisement scheme does not violate the Equal Protection Clause because the State has a rational basis for requiring payment of restitution and child support, even if the child support payment has nothing to do with the underlying crime of conviction, and that conditioning the right to vote on payment of restitution and child support is not equivalent to imposing a poll tax and, therefore, the Twenty-Fourth Amendment is not implicated.<sup>246</sup> The majority also rejected the plaintiffs' claim under the Privileges and Immunities Clauses of the U.S. Constitution and Tennessee Constitution, reasoning that the provisions do apply to voting rights.<sup>247</sup> In her dissent, Judge Moore concluded that the Supreme Court's decisions in *Harman v. Forssenius*,<sup>248</sup> as well as *Griffin v. Illinois*,<sup>249</sup> and its progeny, required the court to conclude that the law violated both the Equal Protection Clause and the Twenty-Fourth Amendment.<sup>250</sup>

The plaintiffs filed a petition for rehearing en banc which the Sixth Circuit denied on December 17, 2010.<sup>251</sup>

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<sup>244</sup> See *id.* at ¶¶ 1-9.

<sup>245</sup> *Johnson*, 624 F.3d 742.

<sup>246</sup> *Id.* at 750-754.

<sup>247</sup> *Id.* at 751-752.

<sup>248</sup> *Harman v. Forssenius*, 380 U.S. 528 (1965).

<sup>249</sup> *Griffin v. Illinois*, 351 U.S. 12 (1956).

<sup>250</sup> *Id.* at 754-780.

<sup>251</sup> *Johnson v. Haslam*, 624 F.3d 742 (6th Cir. 2010), cert. denied, 563 U.S. 1008 (2011).

## 27. Morales v. Handel; Morales v. Kemp – Georgia 2008

This action was filed by the ACLU, the Lawyers' Committee for Civil Rights Under Law, and MALDEF to challenge a new system of voter verification involving citizenship checks being implemented by the state of Georgia weeks prior to the 2008 presidential election.<sup>252</sup> Georgia's system attempted to match information of voter registration applicants with information contained in the state's Department of Driver Services database and the Social Security Administration database to verify eligibility, flagging individuals whose information did not match to local registrars for special scrutiny. Without providing procedures for evaluating citizenship, the Secretary of State directed county election officials to not permit individuals with flagged registration records to vote a regular ballot unless and until the county verified the individual's citizenship. Individuals designated as potential noncitizens would instead would have to vote a "challenged" ballot.<sup>253</sup>

The complaint argued that the process was inaccurate and error-prone, resulting in the plaintiff being wrongly flagged as a noncitizen and deemed ineligible to vote, even though he had duly registered and had taken steps to prove his citizenship in response to the county's scrutiny of his citizenship status by providing a passport to the county clerk.<sup>254</sup> The plaintiff sought declaratory relief and temporary and permanent injunctive relief on behalf of himself and the class of residents of Georgia who had submitted timely voter registration forms and were wrongly being flagged as noncitizens. The plaintiff argued that the flawed matching procedures were illegally implemented because the state failed to seek preclearance as required by Section 5 of the Voting Rights Act and was in violation of the National Voter Registration Act (NVRA), which prohibits systematic challenges to voter registration 90 days prior to an election subject to certain exceptions provided in the statute which did not apply in this case.<sup>255</sup>

Georgia argued that it was complying with the NVRA and that because it was attempting to comply with a federal law, the change did not reflect a policy choice made by state or local officials and thus did not have to be precleared.<sup>256</sup> Specifically, Georgia argued that the verification procedures were adopted in a

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<sup>252</sup> Complaint for Declaratory and Injunctive Relief – Class Action, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. Oct. 9, 2008).

<sup>253</sup> *Id.* at ¶¶ 34-35.

<sup>254</sup> *Id.* at ¶¶ 58-59.

<sup>255</sup> *See id.* at ¶¶ 64-69; Motion for Preliminary Injunction and Temporary Restraining Order and to Convene Three-Judge Court, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. Oct. 9, 2008).

<sup>256</sup> Response to Motion for Temporary Restraining Order and Preliminary Injunction at ¶ 3, *Morales v. Handel*, Case No. 1:08-cv-03172 (N.D. Ga. Oct. 10, 2008).

purported effort to comply with the Help America Vote Act (HAVA) and its directive to states to accurately maintain their statewide voter registration lists and verify certain voter information.<sup>257</sup> HAVA provides a process for states to remove duplicate registrations and help ensure the accuracy of information submitted by the registrants by matching registrants' information against information contained in a state's drivers' license database and the Social Security Administration database.<sup>258</sup> Such information, however, does not include information on citizenship status, since voters already verify their citizenship during the registration process. Further, HAVA does not require states to use the matching process to verify *eligibility* to vote, which is what Georgia attempted to do and in a manner that wrongly flagged eligible voters as noncitizens.<sup>259</sup>

A three-judge court was empaneled and granted the plaintiff's motion for a preliminary injunction, finding that at least two aspects of the state's voter verification procedure constituted changes in the state's voting process and required Section 5 preclearance prior to implementation.<sup>260</sup> During the course of litigation, the state submitted the voting change to the Department of Justice for preclearance. The organizations representing Morales then filed a comment letter with Department of Justice in November 2008, asking it to either object to the submission or request additional information to evaluate its impact upon language and racial minorities. The Justice Department interposed an objection to the state's submission, finding that the verification procedures were inaccurate and discriminatory and determining that the procedure created disparate voting burdens for Latino, Asian American, and African American citizens than for white citizens.<sup>261</sup>

In September 2009, the state moved to dismiss arguing that the verification program was authorized under both state and federal law and that the plaintiff's complaint was moot given state's newly enacted proof of citizenship law.<sup>262</sup> The plaintiff moved for summary judgment seeking a final judgment permanently enjoining the Secretary from using the voter verification procedures unless the

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<sup>257</sup> *See id.*

<sup>258</sup> Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 18-20, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. March. 10, 2009).

<sup>259</sup> *Id.* at ¶ 21.

<sup>260</sup> *Morales v. Handel*, No. 1:08-cv-03172, 2008 WL 9401054, at\*8 (N.D. Ga. Oct. 27, 2008).

<sup>261</sup> Letter from Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to The Honorable Thurbert E. Baker, Attorney Gen. (May 29, 2009), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l\\_090529.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090529.pdf).

<sup>262</sup> *See* Defendant's Brief in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. Sept. 4, 2009).

procedures were precleared.<sup>263</sup> In June 2010, the three-judge panel issued an order finding that the appropriate remedy was to extend the existing preliminary injunction to the upcoming elections in Georgia.<sup>264</sup> Subsequently, Georgia filed suit in the U.S. District Court for the District of Columbia seeking a declaratory judgment that the voter verification program did not violate Section 5, discussed *infra*.

## 28. State ex rel. Colvin v Brunner – Ohio 2008

In 2006, Ohio began permitting voters to receive no-fault absentee ballots in person at the county boards of elections as a form of early voting. Many election officials promoted absentee voting as a way for voters to avoid the long lines and technical glitches that plagued elections in Ohio. In 2008, Ohio's registration deadline was October 6, but early and absentee voting began on September 30. This allowed a prospective voter to register to vote and receive an absentee ballot in person on the same day during a five-day window, in essence a variation of same day registration known as "Golden Week." When news broke that Democrats' Get Out the Vote efforts would take advantage of this directive, Republicans threatened to sue. They argued that a voter must be registered to vote for at least 30 days before receiving an absentee ballot.

Two registered voters filed for a writ of mandamus to require the Ohio Secretary of State to prohibit the "Golden Week" practice of allowing voters to register and vote on the same day.<sup>265</sup> The ACLU, together with various national and local voting rights groups, filed an amicus brief urging the court to dismiss the voters' claims. The brief argued that the plaintiffs' interpretation of state law was erroneous and violated Section 202 of the Voting Rights Act, Section 1971 of the Civil Rights Act, the National Voter Registration Act, and the First and Fourteenth Amendments.<sup>266</sup>

On September 29, 2008, the Ohio Supreme Court ruled against the plaintiffs and held that any voter who would be registered for 30 days as of Election Day on November 4 would be able to request and receive an absentee ballot.<sup>267</sup>

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<sup>263</sup> Plaintiffs' Motion for Summary Judgment and Permanent Injunctive Relief, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. Sept. 4, 2009).

<sup>264</sup> Order, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. Jun. 15, 2010).

<sup>265</sup> See Verified Petition for Writ of Mandamus, *State ex rel. Colvin v Brunner*, No. 08-1813 (Ohio Sept 12, 2008).

<sup>266</sup> Brief of *Amici Curiae* 1Matters et al. in Opposition to Relators' Petition, *Ohio ex Rel. Skaggs v. Brunner*, No. 2:08-cv-1077 (Ohio Nov. 13, 2008).

<sup>267</sup> *State ex rel. Colvin v Brunner*, 120 Ohio St.3d 110 (Ohio 2008).

## 29. State ex rel. Skaggs v. Brunner; NEOCH v. Brunner – Ohio 2008

### *ACLU as amicus for defendants*

This litigation was originally filed in the Ohio Supreme Court on November 13, 2008, challenging then Ohio Secretary of State Jennifer Brunner’s determination that approximately one thousand provisional ballots cast by registered and qualified voters, which lacked a printed name or signature on the ballot envelope, nonetheless complied with state law and should be counted. The plaintiffs were two voters from Franklin County who filed suit to challenge this determination and requested a writ of mandamus and temporary restraining order against Brunner and the Franklin County Board of Elections to prohibit them from counting the ballots.<sup>268</sup> The issue originated as the result of the Franklin County Board of Elections’ decision to create its own provisional ballot envelope form for use in the 2008 general election, even though a provisional ballot envelope format was prescribed by the Secretary of State. Franklin County’s provisional envelope included a written instruction that a voter was required to print their own name on the form—had the board used the Secretary of State’s prescribed form, a poll worker would have filled out the form for the provisional voter and simply asked the voter to sign.<sup>269</sup> Ohio law also required poll workers to verify that a provisional voter had executed and signed the written affirmation. Approximately 1,000 provisional ballots cast in Franklin County in the November 4, 2008, election were alleged to have been incomplete because they lacked a printed name or signature.<sup>270</sup> Also at issue were the results of three extremely close congressional races in the Fifteenth Congressional District, Twentieth House District, and Nineteenth House District, which might have been determined by the 1,000 provisional ballots.<sup>271</sup> All of the disputed ballots were cast by voters who were properly registered and eligible to vote in their precincts and included a name, either in print or signature form, and other information that allowed the voters who cast the ballots to be identified.<sup>272</sup>

The case was removed to federal court and considered with two other consolidated cases challenging Ohio’s provisional ballot process for the 2008 election.<sup>273</sup> On

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<sup>268</sup> Complaint, Ohio ex Rel. Skaggs v. Brunner, No. 2:08-cv-1077 (Oh. Supreme Ct. Nov. 13, 2008).

<sup>269</sup> See Brief for ACLU Voting Rights Project and ACLU of Ohio as *Amici Curiae* in Opposition to Relators’ request for a writ, at 3, Ohio ex rel. Skaggs v. Brunner, No. 08–4585 (6th Cir. 2008).

<sup>270</sup> *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 509 (2008).

<sup>271</sup> See Complaint at ¶8, Ohio ex Rel. Skaggs v. Brunner, No. 2:08-cv-1077 (Oh. Supreme Ct. Nov. 13, 2008); *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d at 511-512.

<sup>272</sup> See *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d at 509.

<sup>273</sup> See *Ohio Republican Party v. Brunner*, No. 2:08–cv–913 (S.D. Oh. 2008); *Northeast Ohio Coalition for Homeless v. Brunner*, No. C2-06-896 (S.D. Oh. 2008).

November 14, the plaintiffs moved to remand the case back to state court, arguing that no federal question was raised that gave the federal district court jurisdiction.<sup>274</sup> The district court denied the motion on November 16, finding, in part, that the complaint contained Equal Protection Clause questions.<sup>275</sup> On November 20, the district court granted summary judgment for the Secretary of State and permitted the provisional ballots to be counted. The district court determined that the deficiencies on the provisional ballot forms associated with the disputed ballots were the result of poll worker error in failing to verify completion of the form, as required under state law.<sup>276</sup> The plaintiffs appealed, arguing that removal and consolidation was improper, as they had not pled any federal claims, and that the district court's erred in granting summary judgment to the Secretary of State.<sup>277</sup> The ACLU filed an amicus brief arguing that the plaintiffs' interpretation of the law violated Section 1971 of the Civil Rights Act of 1964, which prohibits officials from denying the right of any individual to vote because of an error or omission on any document relating to any application, registration, or other act requisite to voting if immaterial to determining the voter's qualifications.<sup>278</sup> On November 25, the Sixth Circuit agreed with the plaintiffs' argument that federal jurisdiction was improper and remanded the case back to the Ohio Supreme Court.<sup>279</sup> The ACLU again filed an amicus brief in support of Secretary Brunner's determination that the ballots should be counted on the same theory under Section 1971 of the Civil Rights Act of 1964. However, the Ohio Supreme Court ruled that state law required the provisional ballot envelope be completely executed in order for the ballots to count.<sup>280</sup> As a result, nearly 1,000 Ohio registered voters' ballots were discarded, potentially swinging the outcome of the three races.

### **30. Ohio Republican Party v. Brunner – Ohio 2008**

In September 2008, the Ohio Republican Party filed suit against the Ohio Secretary of State in federal court seeking a temporary restraining order and preliminary and permanent injunctions to block a directive issued by the Secretary allowing voters to register to vote and receive an absentee ballot on the same day during the five-

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<sup>274</sup> Motion for Remand of Case to the Ohio Supreme Court, Ohio ex rel. Skaggs v. Brunner, No. 2:08-cv-1077 (S.D. Oh. Nov. 14, 2008)

<sup>275</sup> *Ohio ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 819, 826 (S.D. Ohio 2008).

<sup>276</sup> *State ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 828, 836-37 (S.D. Ohio 2008).

<sup>277</sup> See Emergency Motion of Relators/Appellants, Ohio ex rel. Skaggs v. Brunner, No. 08-4585 (6th Cir. Nov. 20, 2008).

<sup>278</sup> Brief for ACLU Voting Rights Project and ACLU of Ohio as *Amici Curiae* in Opposition to Relators' request for a writ, at 4, Ohio ex Rel. Skaggs v. Brunner, No. 08-4585 (6th Cir. 2008).

<sup>279</sup> *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468 (6th Cir. 2008).

<sup>280</sup> *Ohio ex rel. Skaggs v. Brunner*, 900 N.E.2d 982 (Ohio 2008).

day overlap between state's voter registration and absentee voting periods. Effectively, the overlap between the registration and absentee voting periods permitted voters to register and vote on the same day for those five days.<sup>281</sup> The plaintiff wanted to prohibited this and alleged that the Secretary of State's directive violated various state and federal laws. The ACLU, ACLU of Ohio, and other civil rights organizations filed an amicus brief arguing that there was no federal question giving the district court jurisdiction over the case and that the court should abstain from second-guessing an interpretation of state election law by the chief state election official<sup>282</sup> since there was a similar petition pending in the Ohio Supreme Court.<sup>283</sup> The brief further argued that if the relief sought by the plaintiff was granted, it would violate federal voting laws rather than uphold protected voting rights.<sup>284</sup> The district court abstained from ruling in light of the Ohio Supreme Court's decision on September 29, 2008, upholding the actions taken by the Ohio Secretary of State.<sup>285</sup>

On October 5, the plaintiffs filed a renewed motion for a temporary restraining order requesting the court to rule on its claim under the Help America Vote Act (HAVA), which the court had not done previously. The renewed motion alleged that the Secretary violated HAVA by failing to verify new registrations against the Ohio Bureau of Motor Vehicles and Social Security Administration databases.<sup>286</sup> The Secretary argued that her office was in full compliance with the requirements of HAVA and, further, that HAVA does not mandate the use of database matching to verify voter eligibility or to be used to challenge or purge voters.<sup>287</sup> The ACLU and others again filed an amicus brief in support of the Secretary, which explained that the point of HAVA database matching was to prevent duplicate registrations, not to

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<sup>281</sup> Verified Complaint for Temporary Restraining Order and Preliminary and Permanent Injunction, Ohio Republican Party v. Brunner, 2:08-cv-00913 (S.D. Ohio Sept. 26, 2008).

<sup>282</sup> Brief as *Amicus Curiae* of ACLU of Ohio et al. in Opposition to Plaintiffs' Application for Temporary Restraining Order, Ohio Republican Party v. Brunner, No. 2:08-cv-00913 (S.D. Ohio Sept. 29, 2008).

<sup>283</sup> See Verified Petition for Writ of Mandamus, State ex rel. Colvin v. Brunner, No. 08-1813 (Ohio Sept. 12, 2008).

<sup>284</sup> *Id.* at 8-18.

<sup>285</sup> *Ohio Republican Party v. Brunner*, No. 2:08-CV-00913, 2008 WL 4445193 at \*3 (S.D. Ohio 2008) (citing *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110 (S. Ct. Ohio 2008)).

<sup>286</sup> See Renewed Motion for Temporary Restraining Order Following Interlocutory Appeal, Republican Party of Ohio v. Brunner, No. 2:08-cv-00913 (N.D. Ohio Oct. 5, 2008).

<sup>287</sup> See Memorandum in Opposition to Plaintiffs' Renewed Motion for Temporary Restraining Order and Preliminary Injunction at ¶¶ 8-18, Republican Party of Ohio v. Brunner, No. 2:08-cv-00913 (N.D. Ohio Oct. 8, 2008).

purge voters or subject them to unwarranted challenges at the polls.<sup>288</sup> However, the district court granted the temporary restraining order and directed the Secretary to perform verification of new registrants' identity and match their information to Ohio's motor vehicles database and the Social Security Administration database.<sup>289</sup>

The Secretary of State appealed the order to the Sixth Circuit, and on October 14 the full Sixth Circuit, sitting en banc and in a divided decision, denied the motion to stay the temporary restraining order.<sup>290</sup> The Secretary then appealed to the U.S. Supreme Court to overturn the en banc decision. The ACLU and others filed another amicus brief in the Supreme Court in support of the Secretary's request, advancing several arguments for why the temporary restraining order was wrongly issued.<sup>291</sup> On October 17, the Supreme Court granted the stay and vacated the temporary restraining order. Without deciding the merits, the Court determined that the plaintiff was not likely to prevail on the question of whether a private party could raise a HAVA claim to justify the issuance of a temporary restraining order.<sup>292</sup>

On November 4, 2008, the plaintiffs amended their complaint to allege violations of provisional ballot rules and challenge directives issued by the Secretary of State to guarantee consistent treatment of provisional ballots throughout the state.<sup>293</sup> This portion of the case was consolidated with *Northeast Ohio Coalition for the Homeless v. Brunner*.<sup>294</sup> However, the plaintiffs subsequently dismissed their claims in late November.<sup>295</sup>

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<sup>288</sup> See Brief of *Amicus Curiae* ACLU of Ohio et al. in Opposition to Plaintiffs' Renewed Motion for Temporary Restraining Order, *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913 (S.D. Ohio Oct. 7, 2008).

<sup>289</sup> *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957, 966 (S.D. Ohio 2008).

<sup>290</sup> *Ohio Republican Party v. Brunner*, 544 F.3d 711 (6th Cir. 2008).

<sup>291</sup> Brief of *Amicus Curiae* ACLU of Ohio et al. in Support of Appellant's Application for Stay of Temporary Restraining Order, *Brunner v. Ohio Republican Party et al.*, No. 08A332 (2008).

<sup>292</sup> *Brunner v. Ohio Republican Party*, 55 U.S. 5, 6 (2008).

<sup>293</sup> Amended and Supplemental Complaint for Preliminary and Permanent Injunction, *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913 (S.D. Ohio Nov. 4, 2008).

<sup>294</sup> Order Granting Motions to Consolidate, *Northeast Ohio Coalition for the Homeless v. Brunner*, No. C2-06-896 (S.D. Ohio Nov. 6, 2008).

<sup>295</sup> Order Granting Motion to Voluntarily Dismiss, *Ohio Republican Party v. Brunner*, No. No. 08-4242/08-4243/08-4251 (6th Cir. Nov. 5, 2008).

### **31. Project Vote v. Madison Cty. Bd. of Elections – Ohio 2008**

In September 2008, the ACLU and the ACLU of Ohio sued an Ohio county in federal court for denying absentee ballots to newly registered voters in violation of a directive issued by the Ohio Secretary of State.<sup>296</sup> Specifically, Directive 2008-63, required county boards of election to permit same-day registration and absentee voting during the five-day window where the voter registration and absentee voting periods overlapped (the same directive at issue in *State ex rel. Colvin v. Brunner* and *Ohio Republican Party v. Brunner*).<sup>297</sup> Project Vote sought a temporary restraining order against the Madison County Board of Elections because the county indicated that it would not follow the directive. The complaint asserted violations of state law, the First and Fourteenth Amendments, the National Voter Registration Act, the Civil Rights Act of 1964, and the Voting Rights Act. The plaintiffs asked the court to enjoin Madison County to comply with state law and the Secretary of State’s directive.<sup>298</sup>

On September 29, 2008, the U.S. District Court in the Northern District of Ohio granted Project Vote’s request for a temporary restraining order and directed the Madison County Board of Elections to permit prospective voters to register and request an absentee ballot simultaneously.<sup>299</sup> That same day, the Ohio Supreme Court affirmed a lower court ruling upholding Directive 2008-63.<sup>300</sup> Ultimately, Project Vote filed a motion to dismiss without prejudice after of the Ohio Supreme Court’s decision and official election results showed that ballots cast by voters during the September 30 to October 6 window had been honored.<sup>301</sup>

### **32. State ex rel. Myles v. Brunner – Ohio 2008**

The McCain presidential campaign sent absentee ballot request forms to roughly one million Ohio voters. The McCain request forms included a checkbox with a

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<sup>296</sup> Complaint for Declaratory and Injunctive Relief, *Project Vote v. Madison Cty. Bd. of Elections*, 08-cv-2266 (N.D. Ohio Sept. 24, 2008).

<sup>297</sup> See Memorandum to Directive 2008-63 from Jennifer Brunner, Ohio Sec’y of State, to All Counties; BOE Contacts (Aug. 13, 2008); see also OHIO REV. CODE § 3509.02(A).

<sup>298</sup> See Complaint for Declaratory and Injunctive Relief at ¶ 45, *Project Vote v. Madison Cty. Bd. of Elections*, 1:08-cv-2266 (N.D. Ohio Sept. 24, 2008).

<sup>299</sup> *Project Vote v. Madison County*, No. 1:08-cv-2266, 2008 WL 4445176, at \*12 (N.D. Ohio Sep. 29, 2008).

<sup>300</sup> *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110 (Ohio 2008).

<sup>301</sup> See Plaintiffs’ Motion to Dismiss Without Prejudice, *Project Vote v. Madison Cty. Bd. of Elections*, 1:08-cv-2266 (N.D. Ohio Dec. 22, 2008).

statement that read, “I am a qualified elector and would like to receive an Absentee Ballot for the November 4, 2008 General Election.” The Ohio Secretary of State instructed boards of elections to reject any forms where the voter failed to check a box next to a statement that they are an eligible elector, even if voters signed the bottom of the form affirming that they were eligible. Voters who received the McCain mailers, did not check the box, and had their absentee ballot requests rejected filed suit in the Ohio Supreme Court to compel boards of elections to not reject absentee ballot applications on that basis.<sup>302</sup> The ACLU of Ohio along with other organizations filed an amicus brief<sup>303</sup> opposing the Secretary’s position. The ACLU argued that Ohio law required the absentee ballot request to simply contain certain information, not in a specific form, and that rejecting an application for inconsequential errors or omissions violated Section 1971 of the Voting Rights Act prohibiting officials from denying any individual the right to vote because of immaterial errors or omissions.

The Ohio Supreme Court upheld the voters’ complaint on state law grounds. It ordered the Secretary of State to direct boards of elections to refrain from rejecting absentee ballot applications if the voter left an unmarked box next to a qualified-electror statement and to issue absentee ballots to those applicants.<sup>304</sup>

### **33. ACLU of Ohio v. Brunner – Ohio 2008**

In January 2008, the ACLU of Ohio and two voters filed a complaint against state and local election officials in Cuyahoga County in the Northern District of Ohio. The complaint challenged the county’s use of non-uniform, unequal, and inaccurate voting technologies as violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment and Section 2 of the Voting Rights Act.<sup>305</sup> The plaintiffs argued that the voting technology advanced by the county had a disproportionate and negative impact on the franchise of African American voters.<sup>306</sup>

The defendants in the lawsuit were in the process of changing the voting technology used in Cuyahoga County from less error-prone voting technology, which provided voters notice of ballot errors, to a voting system that was more error-prone and did not provide such notice of potential ballot errors, which would result in those votes

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<sup>302</sup> *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328 (Ohio 2008).

<sup>303</sup> Reply Brief of Amici The Brennan Center for Justice at NYU School of Law et al. as Amici Curiae Supporting Relator’s Petition for Writ of Mandamus, *State el el. Myles v. Brunner*, No. 2008-1842 (Ohio 2008) .

<sup>304</sup> *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328 (Ohio 2008).

<sup>305</sup> Complaint, *ACLU of Ohio v. Brunner*, No. 1:08-cv-00145 (N.D. Ohio. Jan. 17, 2018).

<sup>306</sup> *Id.* at ¶ 3.

being thrown out.<sup>307</sup> Before the 2008 primary election, Cuyahoga County used touchscreen voting machines with auditable paper trails. Because of various issues with the Cuyahoga County Board of Elections and the Secretary of State, the Secretary of State ordered the county to use central count optical scans for future elections.<sup>308</sup> Central count did not provide voters notice of overvotes, unintentional undervotes, or an opportunity to cast a corrected ballot.

Subsequently, the legislature abolished the use of central count optical scans after May 1, 2008.<sup>309</sup> Accordingly, in March 2008 the court issued an order stating that the “[d]efendants will prepare stipulations indicating that they have no intention of using non-notice voting technology based on their interpretation of Senate Bill 286 and funding concerns related to HAVA.”<sup>310</sup> The state and county defendants stipulated that the November 2008 election would be conducted using notice technology, and plaintiffs moved to dismiss without prejudice.<sup>311</sup> The court granted the motion in April 2008.<sup>312</sup>

#### **34. Gillette v. Weimer – Virginia 2008**

In 2008, the ACLU represented an individual plaintiff in a lawsuit against elections officials in Prince William County, Virginia, for refusing to allow him to vote because he did not have a photo ID.<sup>313</sup> At the time, Virginia law permitted voters without ID to cast a ballot by signing an affidavit.<sup>314</sup> The plaintiff was denied this process,<sup>315</sup> and the complaint charged violations of state law, the Fourteenth Amendment, and Section 5 of the Voting Rights Act for failing to preclear a voting change before implementation since Virginia was a covered jurisdiction.<sup>316</sup> The parties negotiated a consent decree in which defendants agreed to follow state law to permit voters who do not present an ID to cast a ballot if they sign an affidavit

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<sup>307</sup> *See id.* at ¶¶ 21-54.

<sup>308</sup> *Id.* at ¶ 40.

<sup>309</sup> *See* S.B. 286, 127th Gen. Assem., 2007-2008 Sess.(Ohio 2008).

<sup>310</sup> Minutes of Proceedings/Order, *ACLU of Ohio v. Brunner*, No. 1:08-cv-00145 (N.D. Ohio Mar. 13, 2008).

<sup>311</sup> *See* Plaintiffs’ Motion to Dismiss Without Prejudice, *ACLU of Ohio v. Brunner*, 1:08-cv-00145 (N.D. Ohio Apr. 2, 2008)

<sup>312</sup> Order Granting Plaintiffs’ Motion to Dismiss Without Prejudice, *ACLU of Ohio v. Brunner*, 1:08-cv-00145 (N.D. Ohio Apr. 4, 2008).

<sup>313</sup> *See* Complaint, *Gillette v. Weimer*, No. 1:08-cv-00188 (E.D. Va. Feb. 28, 2008).

<sup>314</sup> *See id.* at ¶¶ 10-11.

<sup>315</sup> *See id.* at ¶¶ 14-18.

<sup>316</sup> *See id.* at ¶ 1.

attesting to their identity and voter registration status and to post signage indicating the voters' rights.<sup>317</sup>

### **35. Green Party of Michigan v. Land – Michigan 2008**

The ACLU and ACLU of Michigan, on behalf of the Green Party of Michigan, Libertarian Party of Michigan, and others challenged the constitutionality of a state law that required the Michigan Secretary of State to provide voter lists containing party preference data information only to the chairpersons of the two major political parties.<sup>318</sup> The plaintiffs, three minor parties, a journalist, and a political consultant, argued that the statute violated their First Amendment right to access and report on information of public interest and the Fourteenth Amendment's Equal Protection Clause.<sup>319</sup> The district court agreed, concluding in March 2008 that the statute was unconstitutional because it severely burdened the First Amendment rights of association of minor parties and denied them an equal opportunity to win votes by putting them at a distinct disadvantage. The court concluded that the law was not justified by any compelling state interest.<sup>320</sup> The state chose not to appeal the decision.

### **36. Van Hollen v. Government Accountability Board – Wisconsin 2008**

#### *ACLU participating as amicus*

The Attorney General of Wisconsin filed for a writ of mandamus to require the Wisconsin Government Accountability Board (GAB) to retroactively run a matching check on voter registrations received prior to when the state's computerized voter registration database went live on August 6, 2008. For registrations after this date, the GAB performed a process to verify information on registration records with information from the state driver's license database and the federal Social Security Administration database. The Wisconsin Attorney General claimed that the Help America Vote Act (HAVA) required voter registration data to positively match information in the Social Security Administration or state driver's license databases to determine eligibility before voters could receive a ballot on Election Day.<sup>321</sup> The Attorney General argued that this process was necessary to prevent the dilution of

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<sup>317</sup> See Consent Decree, *Gillette v. Weimer*, No. 1:08-cv-00188 (E.D. Va. June 19, 2008).

<sup>318</sup> See Complaint for Declaratory and Injunctive Relief at ¶¶ 13-24, *Green Party of Mich. v. Land*, 2:08-cv-10149 (Mich. Jan. 11, 2008).

<sup>319</sup> See *id.* at ¶¶ 39-51.

<sup>320</sup> See *Green Party of Mich. v. Land*, F. Supp. 2d 912, 917-18, 924 (E.D. Mich. 2008).

<sup>321</sup> Petition for Writ of Mandamus, *Van Hollen v. Gov't Accountability Bd.*, No 2008-CV-004085 (Wis. Ct. App. Oct. 23, 2008).

the rights of qualified voters with those of ineligible voters by risking fraud in the voting process.<sup>322</sup>

The ACLU and several other civil rights and civic organizations filed an amicus brief in support of the defendants' motion to dismiss, arguing that the state Attorney General's interpretation of HAVA was flawed. First, while HAVA includes a limited database matching process to support list maintenance activities—which the GAB was following for registrations after August 2008—it does not require the retroactive process the Wisconsin Attorney General was attempting to force or that the matching process be used to determine voter eligibility.<sup>323</sup> In fact, the GAB specifically declined to link its voter registration database matching process with voter eligibility because of flaws inherent in the matching process and allowed registrants whose information was unsuccessfully matched to still be placed on the registration rolls and to vote in the same manner as other voters. Second, HAVA actually imposes specific restrictions on the authority of states to remove individuals from voter registration rolls to prevent the removal of qualified, registered individuals.<sup>324</sup>

As in other cases where officials attempted to confirm voting eligibility through database matching, problems stemming from clerical errors, mismatching of different people with similar names, or inconsistent use of initials or nicknames resulted in false positives. A 2008 test comparison of Wisconsin's statewide voter registration system data with Wisconsin Department of Transportation data showed that more than 20% of new voters were a mismatch, an implausible number;<sup>325</sup> in fact, four of the six members of the Government Accountability Board themselves failed the initial data crosscheck.<sup>326</sup> Division Administrator Nat Robinson noted that “[i]t's clear the data quality issue must be addressed before this cross-checking function can be used to ensure reliable voter data.” In October 2008, the state court dismissed the Attorney General's complaint, holding that neither HAVA nor state law required voter information to match Social Security data as a condition for voting.<sup>327</sup>

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<sup>322</sup> *See id.* at ¶¶ 2-3.

<sup>323</sup> *See* Brief as *Amici Curiae* of The Lawyers' Committee for Civil Rights Under Law et al. in Support of Defendant's Motion to Dismiss at 2, *Van Hollen v. Gov't Accountability Bd.*, No. 08-CV-004085 (Wis. Ct. App. Oct. 6, 2008).

<sup>324</sup> *Ibid.*

<sup>325</sup> Press Release, WISCONSIN ELECTIONS COMMISSION, Accountability Board Members' Voter Data Do Not Match Department of Transportation Records (Mar. 18, 2008), <https://elections.wi.gov/node/696>.

<sup>326</sup> *See id.*

<sup>327</sup> *Van Hollen v. Gov't Accountability Bd.*, No. 08-CV-4085 (Wis. Ct. App. Oct. 23, 2008).

### 37. Kennedy v. Avondale Estates – Georgia 2008

The town of Avondale Estates, Georgia, had long been a predominantly white enclave before it became mostly non-white. One of the mechanisms used to exclude Black homeowners was a 1967 municipal ordinance that prohibited the display of yard signs that limited information on real estate available for purchase.<sup>328</sup> This technique was common in predominantly white neighborhoods that sought to stave off integration, but such ordinances were seldom enforced.<sup>329</sup>

Although unconstitutional,<sup>330</sup> the ordinance remained unchallenged until 1998 when, two days before a primary election, Avondale Estates residents Tanya Greene and Sean Maher placed a campaign sign on their front lawn in support of a candidate for superior court judge. Like Ms. Greene, the candidate was an African American who had devoted much of his professional career to representing indigent persons facing the death penalty. The city clerk removed the sign on her lunch break the next day.<sup>331</sup>

Separately, Avondale Estates resident Laurie Hunt made a yard sign criticizing the city for not firing the city manager for making racist comments on the job. The city manager, who was also the police chief, was accused of saying “[t]he police officer’s uniform patch would look better if it had a nigger on the patch with a noose around his neck.”<sup>332</sup> The city council fined the police chief \$5,000.00 but did not discharge him. When the city manager/police chief saw Ms. Hunt’s sign, he asked one of his officers to “just stop and ask the people to remove the sign.”<sup>333</sup> Three squad cars visited Ms. Hunt and issued her a citation with a potential \$100 fine.

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<sup>328</sup> *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184 (N.D. Ga. 2005).

<sup>329</sup> LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 281 (Mar. 2006), [https://www.aclu.org/files/votingrights/2005\\_report.pdf](https://www.aclu.org/files/votingrights/2005_report.pdf).

<sup>330</sup> See *Linmark Assoc. Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ban on residential “for sale” signs unconstitutional); *Ladue v. Gilleo*, 512 U.S. 43 (1994) (total ban on political signs unconstitutional).

<sup>331</sup> LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 282 (Mar. 2006), [https://www.aclu.org/files/votingrights/2005\\_report.pdf](https://www.aclu.org/files/votingrights/2005_report.pdf).

<sup>332</sup> *Id.* (citing INVESTIGATIVE REPORT OF ALLEGATION OF RACIAL DISCRIMINATION, PREPARED FOR THE MAYOR AND THE BOARD OF COMMISSIONERS, CITY OF AVONDALE ESTATES, GEORGIA 3 (Aug. 15, 1998)).

<sup>333</sup> *Id.* (citing Plaintiffs’ [First] Motion for Summary Judgment at 21, *Maher v. Avondale Estates*, No. 1:00-CV-1847 (N.D. Ga. Oct. 20, 2000)).

In 1998, several city residents represented by the ACLU filed suit against the city alleging that the ordinance was unconstitutional.<sup>334</sup> In discovery, plaintiffs learned that no version of the sign ban was in place before the effective date of Section 5 of the Voting Rights Act and that the 1967 ordinance had never been submitted for preclearance under Section 5. Because regulations implementing Section 5 include “change[s] affecting the right or ability of persons to participate in political campaigns” as an example of covered changes<sup>335</sup> and Georgia was a covered state, the plaintiffs amended the complaint to include a Section 5 violation.

After the lawsuit was filed, the city adopted a moratorium on enforcing the ordinance, and after plaintiffs filed for summary judgment, the ban was repealed insofar as it applied to political and “for sale” yard signs.<sup>336</sup> For the general election in 2000, residents could display political signs—without fear of police interference—for the first time in three decades.

Though the main problem—the total ban on political yard signs—was resolved in the plaintiffs’ favor, the city amended its ordinance five times during the litigation, which created other issues regarding size, setback regulations, and unequal treatment based on content.<sup>337</sup> When the district court issued an order on the remaining issues, it concluded that Section 5 did not cover political signs.<sup>338</sup> The plaintiffs filed a motion for reconsideration, which the court denied in February 2006.<sup>339</sup>

### **38. New York State Board of Elections v. López Torres – New York 2008**

#### *ACLU participating as amicus*

This case involved a constitutional challenge to the elaborate system that governs the election of judges to the New York State Supreme Court, which is the state’s principal trial court. The state law system requires major parties to nominate judicial candidates at conventions for each of the 12 judicial districts in the state, who then appear on the general election ballot. These judicial candidates are nominated by delegates who attend the conventions who must themselves stand for election from each judicial district. To successfully become a delegate, individuals

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<sup>334</sup> *Maher v. Avondale Estates*, No. 1:98-CV-2584 (N.D. Ga. Sep. 4, 1998); refiled and assigned No. 1:00-CV-1847 (N.D. Ga. Jul. 20, 2000).

<sup>335</sup> 28 C.F.R. § 51.13(k).

<sup>336</sup> *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184, 1188 (N.D. Ga. 2005).

<sup>337</sup> *Ibid.*

<sup>338</sup> *Id.* at 1217-18.

<sup>339</sup> Order, *Maher v. Avondale Estates*, 1:00-cv-1847 (N.D. Ga. Feb. 9, 2006).

need to petition their way onto a ballot and run in a primary election held several weeks before the conventions. Elected delegates from each party then meet at the judicial conventions to nominate the parties' candidates for judicial office.<sup>340</sup> The system, broadly prescribed by state law, effectively worked in a manner whereby control of the delegate petition and election process led to the control of judicial nominees.<sup>341</sup> And local leaders of the major parties dominated the delegate election process. In effect, the system functioned in a way that created very low burdens for judicial candidates supported by local party leaders—who could take advantage of party infrastructure and resources to elect favored delegates—and large burdens for judicial candidates that did not enjoy party support because of the extremely cumbersome process for recruiting delegates to vote for them.

Because of the virtual impossibility of becoming a judicial candidate without party support under this complex process, a set of judicial candidates and their supporters brought a constitutional challenge on First Amendment and Equal Protection Clause grounds. They argued that the system deprived voters of the right to choose their parties' judicial candidates and imposed insurmountable burdens on challenger candidates who seek a major party nomination without the support of local party leaders. After a lengthy analysis of the process, the district court agreed with the challengers and issued a preliminary injunction,<sup>342</sup> which the Second Circuit affirmed,<sup>343</sup> concluding that the plaintiffs were likely to succeed on the merits of their First Amendment claim because the system was set up so that party leaders, and not voters, effectively selected the justices of New York's Supreme Court.

The New York State Board of Elections, the New York County Democratic Committee, New York Republican State Committee, and other defendants petitioned the Supreme Court for certiorari review, which was granted.<sup>344</sup> The petitioners argued that the constitutional challenge to the state system impermissibly intruded into the associational rights of the parties' leadership to choose standard-bearer candidates. The ACLU and New York Civil Liberties Union filed an amicus brief in support of the lower court's decision, arguing that the challenged system not only deprived voters and candidates of the realistic opportunity to participate in the nominating process, but also imposed severe

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<sup>340</sup> See *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 200 (2008).

<sup>341</sup> See *López Torres v. N.Y. State Bd. Of Elections*, 411 F. Supp. 2d 212, 217-223 (E.D.N.Y. 2006).

<sup>342</sup> *Id.* at 255-256.

<sup>343</sup> *López Torres v. N.Y. State Bd. Of Elections*, 462 F.3d 161 (2d Cir. 2008).

<sup>344</sup> *N.Y. State Bd. of Elections v. López Torres*, 549 U.S. 1204 (2007).

burdens on voters and candidates unnecessary to further a compelling interest.<sup>345</sup>

The Supreme Court disagreed. In a unanimous opinion, it reversed the lower court.<sup>346</sup> The Court determined First Amendment associational rights of political parties does not confer associational rights on individuals to be able to join or wield a certain degree of influence in the party. The court also determined parties might control their membership during a candidate-selection process in a manner that helps the party produce a nominee who, in their view, best represents its political platform.<sup>347</sup>

### **39. Riley v. Kennedy – Alabama 2008**

In 1985, the U.S. Attorney General precleared a local law in Alabama providing for a special election to fill midterm vacancies on the Mobile County Commission.<sup>348</sup> This was an exception to the state law practice that provided for gubernatorial appointment for vacant county commission seats. After the Governor called a special election pursuant to the new local law to fill an opening on the commission, a lawsuit was filed seeking to enjoin the election on the basis that it conflicted with state law. Ultimately, the Alabama Supreme Court ruled that the local law violated the Alabama Constitution.

The Alabama Legislature subsequently passed a law in 2004 that the Justice Department precleared, which provided that the Governor would appoint individuals to vacancies in county commissions unless a local law authorized a special election. A lawsuit followed to compel a special election for a vacancy on the Mobile County Commission on the basis that the new Alabama state law revived the previous local special election law from 1985. The Alabama Supreme Court again intervened, holding that the new state law could only apply prospectively and could not revive the previous local law.<sup>349</sup> One of the plaintiffs from this case then sued in federal court alleging that Section 5 of the Voting Rights Act required Alabama to preclear the two decisions of the Alabama Supreme Court on the matter. The U.S. District Court for the Middle District of Alabama agreed and concluded that the 1985 local law was the most recent precleared practice put into

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<sup>345</sup> Brief as *Amicus Curiae* of the American Civil Liberties Union and New York Civil Liberties Union in Support of Respondents, *N.Y. State Bd. of Elections v. López Torres*, No. 06–766 (July 13, 2007).

<sup>346</sup> *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 209 (2008).

<sup>347</sup> *Id.* at 202-03.

<sup>348</sup> *See Riley v. Kennedy*, 553 U.S. 406 (2008).

<sup>349</sup> *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005); *see Riley*, 553 U.S. at 406.

place and the baseline from which to determine a “change” under Section 5.<sup>350</sup>

The state appealed and the Supreme Court granted review. On appeal, the state argued that a decision by a covered jurisdiction’s highest court invalidating a law should not count as a voting change subject to Section 5. The state also argued that a state law found to be unconstitutional by a state’s highest court cannot serve as the baseline for changes in voting or retrogression and that the decision by the three-judge court raised constitutional and workability concerns.<sup>351</sup>

The ACLU filed an amicus brief in support of the respondents in February 2008, arguing that the language and legislative history of Section 5, as well as its implementation, showed that changes in voting implemented in covered jurisdictions pursuant to state court orders should be subject to preclearance.<sup>352</sup> Notably, the Attorney General interposed numerous objections to voting changes implemented as a result of court orders. Those objection letters were submitted as part of the legislative record supporting the 2006 Voting Rights Act reauthorization.<sup>353</sup> Congress similarly approved the application of Section 5 to electoral changes implemented by state courts when it extended Section 5 in 1975 and recognized that litigation could lead to changes requiring preclearance when it extended Section 5 in 1982.<sup>354</sup> Section 5 preclearance was meant to prevent retrogression in minority voting strength without regard for the legality of a practice under state law.

In a 7-2 decision, the Supreme Court held that the local 1985 voting change was never “in force or effect” within the meaning of Section 5. As such, the law did not mark a “change” from the baseline, and Alabama’s reinstatement of prior practice did not require preclearance.<sup>355</sup> The Court did not decide any of the questions that could have weakened or limited Section 5’s scope.

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<sup>350</sup> *Kennedy v. Riley*, 445 F. Supp. 2d 1333, 1336 (M.D. Ala. 2006).

<sup>351</sup> *See generally* Brief for Appellant, *Riley v. Kennedy*, No. 07–77 (Jan. 14, 2008).

<sup>352</sup> Brief *Amicus Curiae* of the American Civil Liberties Union and ACLU of Alabama in Support of Appellees, *Riley v. Kennedy*, No. 07–77 (Feb. 21, 2008).

<sup>353</sup> *Id.* at 5.

<sup>354</sup> *Ibid.*

<sup>355</sup> *Riley v. Kennedy*, 553 U.S. 406, 422-23 (2008).

#### 40. *Avitia v. Superior Court of Tulare County*<sup>356</sup> – California 2008

In 2008, the ACLU joined a lawsuit brought on behalf of Rosalinda Avitia and several other Latino registered voters residing in and around the city of Visalia in Tulare County, California. The plaintiffs challenged the at-large elections for the five-member Board of Directors of the Tulare Local Healthcare District.

*Avitia* was the ACLU's first case involving claims under the California Voting Rights Act of 2001 (CVRA). CVRA provides a cause of action for vote dilution similar to Section 2 of the Voting Rights Act, but is broader and operates without some of the limitations imposed by judicial decisions over the last two decades. Specifically, plaintiffs bringing claims under CVRA need not demonstrate the feasibility of a district in which a minority group constitutes a majority of the electorate (the so-called *Gingles* district). Moreover, the totality of the circumstances, or Senate Report Factors, usually required in addition to evidence of racially polarized voting and the *Gingles* district were probative but not necessary to a claim of vote dilution under CVRA.

The plaintiffs in *Avitia* brought suit in 2007 to address the fact that there had only been one Latino on the Tulare Local Healthcare District's Board of Directors since the body's inception in 1946 and despite the fact that as of 2000, Latinos comprised 47.3% of the population in the district. The plaintiffs' expert witness, Dr. J. Morgan Kousser, did an analysis of voting patterns and concluded that voting was racially polarized in a number of Healthcare District elections and propositions since 1994.

In August of 2008, the plaintiffs moved unsuccessfully for a preliminary injunction to enjoin the district from conducting and certifying the results of the November 2008 election for two members of the Board of Directors. Despite the defendant's failure to submit any contradicting expert testimony or evidence regarding polarized voting in the district, the state superior court held that the plaintiffs did not establish a strong likelihood of success on the merits. The court essentially adopted some of the concerns with plaintiffs' statistical evidence proffered by the defendant, even though federal case law supported the plaintiffs' evidence and their interpretation of CVRA's requirements. The superior court also denied the defendant's motion for a judgment on the pleadings, two motions for summary judgment, various motions to compel discovery, and a motion to dismiss for failure to join indispensable parties.

Following lengthy negotiations, the parties agreed to a settlement providing that a proposal calling for the adoption of district or "zone" elections for the Board of

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<sup>356</sup> See ACLU Voting Rights Project, ANNUAL REPORT: JANUARY 1, 2010-DECEMBER 31, 2010 13-14, [https://www.aclu.org/sites/default/files/field\\_document/VRP\\_Annual\\_Report\\_2010.pdf](https://www.aclu.org/sites/default/files/field_document/VRP_Annual_Report_2010.pdf); *Avitia v. The Superior Ct. of Tulare Cty.*, No. 07-cv-224773 (Cal. Sup. Ct. Tulare Cty. 2008).

Directors be put on the ballot no later than June 2012. If the proposal was approved, the new plan would be implemented in the November 2012 elections. Because the plaintiffs were confident the proposal would be adopted, they agreed that if it were defeated they would not refile their complaint. The state court approved the settlement agreement on February 16, 2010.

#### 41. **Baker v. Chapman – Alabama 2008**

The ACLU and ACLU of Alabama filed this suit in July 2008, in Alabama state court challenging the state’s felon disfranchisement scheme.<sup>357</sup> Alabama’s constitution provides for the disfranchisement of persons convicted of felonies involving “moral turpitude” and authorizes the legislature to enact the state’s voting laws.<sup>358</sup> Pursuant to this provision, the legislature had adopted a list of felonies it defined as involving moral turpitude: murder, impeachment, treason, rape, and various sex related offenses.<sup>359</sup> The state Attorney General, however, compiled another list of disfranchising offenses that includes many not contained on the legislature’s list, such as the sale of marijuana, forgery, bigamy, and income tax evasion.<sup>360</sup> The three plaintiffs were all convicted of offenses—forgery, escape, and receiving stolen property—that were not on the legislature’s list of disfranchising crimes but were disfranchised anyway. One of the plaintiffs attempted to register and vote but was told that she was ineligible due to her offense even though her crime—receiving stolen property—was on neither the legislature’s nor the attorney general’s list of crimes involving moral turpitude.

The plaintiffs asserted that Alabama’s disfranchisement scheme violated the state’s separation of powers doctrine, which leaves the designation of disfranchising offenses to the legislature and not the state Attorney General, as well as state and federal equal protection, due process, and privileges and immunities doctrines. The plaintiffs also argued the state’s requirement that a disfranchised person pay all restitution, fines, and legal costs before being restored the right to vote violated equal protection laws and was an impermissible wealth-based qualification for exercise of the franchise.<sup>361</sup>

The trial court dismissed the plaintiffs’ suit in October 2008 for lack of standing on the grounds that two of the plaintiffs had not suffered any injury because they

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<sup>357</sup> Complaint, *Baker v. Chapman*, No. 03-CV-2008-900749.00 (Cir. Ct. Ala. 2008).

<sup>358</sup> ALA. CONST. art. VIII, § 177.

<sup>359</sup> Complaint at ¶ 2, *Baker v. Chapman*, No. 03-CV-2008-900749.00 (Cir. Ct. Ala. July 21, 2008) (citing Ala. Code § 15-22-36.1(g)).

<sup>360</sup> *Id.* at ¶ 54.

<sup>361</sup> *See id.* at ¶¶ 78-102.

never attempted to vote and that the third plaintiff who was denied the right to register had not exhausted other state remedies.<sup>362</sup> The plaintiffs appealed the dismissal to the Alabama Supreme Court,<sup>363</sup> and the court affirmed the trial court's order in a per curiam opinion in June 2010, without offering any factual or legal basis for its decision.<sup>364</sup>

#### **42. S.C. Green Party v. S.C. State Election Commission – South Carolina 2008**

In August 2008, the ACLU filed a lawsuit in federal court on behalf of the South Carolina Green Party and Eugene Platt challenging the state's "sore loser" statute.<sup>365</sup> South Carolina's electoral scheme permits "fusion voting," an electoral practice that allows a candidate to seek the nomination of more than one party, and in turn, allows more than one party to nominate the same candidate. Separately, South Carolina's "sore loser" statute prohibits a candidate from having their name placed on the general election ballot as a candidate of a certified political party if the candidate lost the party's primary.<sup>366</sup> Platt was chosen by both the Green Party and Working Family Party as their candidate for a state legislative house seat but lost the nomination for the same office in the Democratic primary. As a result, the election commission prohibited Platt from appearing on the general election ballot. The plaintiffs argued that the application of the state's rules violated the First and Fourteenth Amendments and sought declaratory and injunctive relief prohibiting the election commission from applying the sore loser statute to disqualify candidates from appearing on the general election ballot for one party because of a loss in another party's primary or convention. The plaintiffs also sought preliminary and permanent injunctions requiring the defendants to place Platt on the ballot for the November 2008 General Election.<sup>367</sup>

The district court held oral arguments in September 2008, and denied the plaintiffs' motion for preliminary injunction prohibiting defendants from disqualifying Platt from the general election ballot as the Green Party's nominee for the state house

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<sup>362</sup> See Order, *Baker v. Chapman*, No. 03-CV-2008-900749.00 (Cir. Cit. Ala. Oct. 8, 2008).

<sup>363</sup> See Appellant Brief, *Baker v. Chapman*, 3-CV-2008-900749.00 (Ala. Jan. 30, 2009).

<sup>364</sup> See *Baker v. Chapman*, 83 So.3d 588 (Ala. 2010).

<sup>365</sup> Complaint at ¶ 1, *S.C. Green Party v. S.C. State Election Comm'n*, No. 08-cv-2790 (D.S.C. Aug. 7, 2008).

<sup>366</sup> S.C. CODE ANN. § 7-11-10.

<sup>367</sup> Complaint, *S.C. Green Party v. S.C. State Election Comm'n*, No. 08-cv-2790 (D.S.C. Aug. 7, 2008); Plaintiffs' Motion for a Preliminary Injunction, *S.C. Green Party v. S.C. Election Comm'n*, No. 08-cv-2790 (D.S.C. Aug. 7, 2008).

seat.<sup>368</sup> The plaintiffs and defendants then both filed summary judgment motions. The defendants argued that Platt was disqualified from appearing on the ballot as the Green Party candidate for the seat in question based on the state's sore loser statute, the party loyalty pledge statute, and the filing deadline statute.<sup>369</sup> The plaintiffs challenged the constitutionality of each statute as applied to Platt.<sup>370</sup> The court granted the defendants' summary judgment motion, finding that the application of the sore loser statute in connection with fusion voting did not elevate the plaintiffs' burdens to a level requiring strict scrutiny. The court maintained that Platt and the Green Party had notice of the sore loser statute when he decided to seek multiple nominations and similarly assumed the associated risks.<sup>371</sup> The court also found that significant state interests were served by South Carolina's sore loser statute as applied to fusion candidates, including maintaining party stability and avoiding voter confusion. The court did not address the party-loyalty pledge statute or the filing deadline statute.

The plaintiffs appealed to the Fourth Circuit, raising three questions, including whether the state, consistent with the First and Fourteenth Amendments, could exclude a candidate who won two party nominations but subsequently lost a third, thereby leaving the two nominating parties without a candidate on the general-election ballot.<sup>372</sup> The Fourth Circuit rejected the plaintiffs' arguments, concluding that the burden the sore loser statute placed on the Green Party's association rights was not severe, stating, "[t]he Green Party retained the right to select Platt, or any other candidate, at its state convention. It was Platt's own decision to seek the Democratic Party's nomination, not interference by members of the Democratic Party in the Green Party's nomination process, that affected the Green Party's ability to retain Platt on the general election ballot as its preferred nominee."<sup>373</sup> As a result, the court applied a low standard of scrutiny to determine that South Carolina's sore loser statute advanced state regulatory interests, including the state's interest in minimizing excessive factionalism and party splintering, reducing

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<sup>368</sup> Minute Entry, *S. C. Green Party v. S.C. State Election Comm'n*, No. 08-cv-2790 (D.S.C. Sept. 18, 2008).

<sup>369</sup> Memorandum in Support of Motion for Summary Judgment, *S. C. Green Party v. S.C. State Election Comm'n*, No. 08-cv-2790 (D.S.C. May 22, 2009); *see also* S.C. CODE ANN. §§ 7-11-10, 7-11-210, 7-11-15.

<sup>370</sup> Plaintiffs' Motion for Summary Judgment, *S. C. Green Party v. S.C. State Election Comm'n*, No. 08-cv-2790 (D.S.C. May 22, 2009).

<sup>371</sup> *S.C. Green Party v. S.C. State Election Comm.*, 647 F.Supp.2d 602 (D.S.C. 2008).

<sup>372</sup> Appellants' Brief at 2-3, *S.C. Green Party v. S.C. State Election Comm'n*, No. 09-1915 (4th Cir. Sept. 28, 2009).

<sup>373</sup> *S.C. Green Party v. S.C. State Election Comm.*, 612 F. 3d 752, 757 (4th Cir. 2010).

the possibility of voter confusion, and ensuring orderly, fair, and efficient procedures for the election of public officials.<sup>374</sup>

#### 43. **United States Students Association v. Land – Michigan 2008**

In September 2008, the ACLU, on behalf of the United States Student Association Foundation, Michigan State Conference of NAACP Branches, and ACLU of Michigan, brought suit seeking injunctive relief against the Michigan Secretary of State and other Michigan election officials in a challenge to the election officials' unlawful processes used to reject, cancel, or remove the names of voters from the voter registration rolls. Michigan used a process whereby it would use voter identification cards returned as undeliverable as a basis for rejecting a person's registration and would also cancel a registrant's application if the registrant obtained an out-of-state driver's license.<sup>375</sup> The plaintiffs argued these processes violated provisions of the National Voter Registration Act that govern the voter notification and removal process relating to states' voter registration rolls, as well as the Civil Rights Act of 1964 and the First and Fourteenth Amendments. The plaintiffs sought a preliminary injunction to protect the ability of eligible voters wrongfully affected by these policies to cast ballots in the November 2008 election. The district court granted the preliminary injunction with regard to the removal of voters whose voter registration cards were returned but denied the motion with regard to the driver's license issue.<sup>376</sup>

With regard to the driver's license issue, the district court emphasized that the plaintiffs' likelihood of proving their allegations of standing to challenge this practice was "questionable." The district court also noted that, unlike the undeliverable ID cards issue, the driver's license practice provided some out-of-state driver's license applicants with the opportunity to reaffirm their Michigan residence and remain on the voting rolls.<sup>377</sup> Thus, the preliminary injunction was denied for this issue. By contrast, the court found that the plaintiffs made a strong showing of a likelihood of success on the merits of the undeliverable registration cards issue and thus enjoined the state from canceling or rejecting a voter's registration based upon the return of the original identification card as undeliverable. Michigan state officials appealed the injunction and sought an emergency motion to stay the injunction, but the Sixth Circuit denied the motion for a stay concluding that "the preliminary injunction is necessary to protect the

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<sup>374</sup> *Id.* at 759.

<sup>375</sup> Complaint, U.S. Student Ass'n Found. v. Land, 2:08-cv-14019 (E.D. Mich. Sept. 18, 2008); First Amended Complaint, U.S. Student Ass'n Found. v. Land, 2:08-cv-14019 (E.D. Mich. Oct. 7, 2008).

<sup>376</sup> *U.S. Student Ass'n Found. v. Land*, 585 F. Supp. 2d 925 (E.D. Mich. 2008).

<sup>377</sup> *Id.* at 946.

individual voters of Michigan affected by the undeliverable-voter-ID-card practice.”<sup>378</sup> Shortly after the Sixth Circuit decision, the case settled in exchange for the defendants’ agreement not to reject or cancel individual voter registrations solely because the original identification card was returned as undeliverable or because the individual surrendered their Michigan driver’s license and obtained a driver’s license in another state without specific written confirmation that the individual changed their residence for voting purposes.<sup>379</sup>

#### 44. **Young v Hosemann – Mississippi 2008**

Represented by the ACLU, two individuals with felony convictions filed a civil rights action in September 2008 under federal and state laws in federal district court in Mississippi.<sup>380</sup> The plaintiffs alleged that Article 12, §241 of the Mississippi Constitution explicitly allows individuals to vote for U.S. President and Vice President, notwithstanding a criminal conviction, if they are citizens of the United States, at least 18 years old, meet residency requirements, and have not been adjudicated “non compos mentis.”<sup>381</sup> Both plaintiffs alleged that they met all of the qualifications for an elector in the State of Mississippi and that the defendants’ disfranchisement of them violated § 241 of the Mississippi Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the National Voter Registration Act. The plaintiffs asked the court for declaratory and injunctive relief and simultaneously filed a motion for a preliminary injunction.

On September 25, 2008, the district court denied the motion for a preliminary injunction from the bench and issued an order stating that “the Defendants’ interpretation of Section 241 of the Mississippi Constitution is correct, thus Plaintiffs are not likely to succeed on the merits of their claims.”<sup>382</sup> On appeal, the Fifth Circuit denied the plaintiffs’ motion for emergency injunctive relief pending appeal.

On March 9, 2009, the district court granted the defendants’ motion to dismiss the complaint for failure to state a claim, reaffirming its prior conclusion that the “plaintiffs were entitled to no relief because the court does not find the plaintiff’s

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<sup>378</sup> *U.S. Student Ass’n Found. v. Land*, 546 F.3d 373 (6th Cir. 2008).

<sup>379</sup> Settlement Agreement and Stipulation of Dismissal with Prejudice, *U.S. Student Ass’n Found. v. Land*, Case No. 2:08-CV-14019 (E.D. Mich. Jun. 24, 2010).

<sup>380</sup> Complaint for Injunctive and Declaratory Relief, *Young v. Hosemann*, No. 3:08-cv-00567 (S.D. Miss. Sept. 12, 2008).

<sup>381</sup> MISS. CODE ANN. § 23-15-11; MISS. CONST. art. 12, § 241; Complaint for Injunctive and Declaratory Relief at ¶¶ 11-21, *Young v. Hosemann*, No. 3:08-cv-00567 (S.D. Miss. Sept. 12, 2008).

<sup>382</sup> Order Denying Motion for Preliminary Injunction, *Young v. Hosemann*, No. 3:08-cv-00567 (S.D. Miss. Sep. 25, 2008).

interpretation [of Section 241] to be a fair or reasonable construction, and because the court concludes that defendants have correctly construed this provision.”<sup>383</sup>

The plaintiffs appealed to the Fifth Circuit. On February 25, 2010, in a published opinion, the court of appeals affirmed the district court’s decision, finding that “the text of § 241 is perfectly clear and perfectly contrary to the construction urged by the appellants.”<sup>384</sup>

#### **45. Kelly v. McCulloch; Kelly v. Johnson – Montana 2008**

On April 8, 2008, the ACLU and the ACLU of Montana, filed a lawsuit in federal court challenging Montana’s ballot access system for independent and previously unqualified parties.<sup>385</sup> The complaint charged that the state’s ballot access law violates the rights guaranteed by the First and Fourteenth Amendments. It was filed on behalf of would-be U.S. Senate candidate Steve Kelly and voter Clarice Dreyer, both of Bozeman, Montana. Kelly ran as an independent candidate for U.S. Representative in 1994 and was the last independent candidate for statewide office to appear on the ballot. The defendant was Montana Secretary of State Linda McCulloch.

Under Montana law, independent and minor party candidates can appear on the general election ballot only if they submit the signatures of 5% of the total votes cast for the successful candidate for the same office in the last general election. A 2007 state law also added a filing fee and moved the petition deadline from June to March—more than 200 days before the election. Major party candidates, by contrast, do not have to submit any signatures in order to appear on the primary ballot and they appear on the general election ballot automatically when they win a primary election.<sup>386</sup>

The district court denied the plaintiffs’ motion for a preliminary injunction seeking to have Kelly put on the 2008 general election ballot. The parties filed cross motions for summary judgment in the summer of 2009. On February 3, 2010, the district dismissed the complaint on the grounds that neither of the plaintiffs had standing.<sup>387</sup> The plaintiffs appealed.

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<sup>383</sup> Order Granting Motion to Dismiss, *Young v. Hosemann*, No. 3:08-cv-00567 (S.D. Miss. Mar. 9, 2009).

<sup>384</sup> *Young v. Hoseman*, 598 F.3d 184, 191 (5th Cir. 2010).

<sup>385</sup> Verified Complaint, *Kelly v. Johnson*, 2:08-cv-00025 (D. Mont. Apr. 8, 2008).

<sup>386</sup> *Kelly v. McCulloch*, No. CV-08-25, 2010 WL 11583553, at \*1 (D. Mont. Feb. 3, 2010).

<sup>387</sup> *Id.* at \*3.

The Ninth Circuit heard oral argument on November 5, 2010, and on December 10, 2010, reversed and remanded concluding that both plaintiffs had standing as a matter of law as registered voters.<sup>388</sup> Upon remand, the district court ruled that the deadline for independent and minority party candidates to file for office and submit signatures was unconstitutionally early.<sup>389</sup> The district court cited in its opinion the U.S. Supreme Court ruling in *Anderson v. Celebrezze* that “... protecting the Republican and Democratic parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena... Competition in ideas and governmental policies is at the core of our electoral process and First Amendment freedoms.”<sup>390</sup> The district court also found that the 5% signature requirement and the 1% filing fee did not impose a severe burden and that Montana had an important state interest that justified the burden imposed by the signature and fee requirements.<sup>391</sup>

#### **46. Northwest Austin Municipal Utility District Number One v. Gonzales – Texas 2008**

This case was a challenge to the constitutionality of the 2006 reauthorization of Section 5 of the Voting Rights Act. Northwest Austin Municipal Utility District Number One (NAMUDNO), a subjurisdiction of Texas, a state covered by Section 5, sought a declaratory judgment to bailout of coverage from Section 5 pursuant to Section 4(a) of the Act, which permits jurisdictions to exempt themselves from coverage upon a showing of being discrimination-free for a period of years.<sup>392</sup> Additionally, NAMUDNO sought a declaratory judgment that Section 5 was unconstitutional.<sup>393</sup> Texas became a covered jurisdiction as a result of the 1975 amendments to the Voting Rights Act, which added as a test or device for purposes of the Section 4(b) coverage formula the use of English-only elections in jurisdictions where at least 5% of voting age citizens constitute a single language minority.<sup>394</sup>

The ACLU, ACLU of Texas, and ACLU of the District of Columbia represented a minority resident of NAMUDNO, and was granted leave to intervene. The plaintiff argued that NAMUDNO lacked standing to bail out and also that the extension of

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<sup>388</sup> See *Kelly v. McCulloch*, 405 F. Appx. 218, 219 (9th Cir. 2010).

<sup>389</sup> *Kelly v. McCulloch*, No. CV-08-25, 2012 WL 1945423, at \*8 (D. Mont. May 25, 2012).

<sup>390</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

<sup>391</sup> *Kelly v. McCulloch*, No. CV-08-25, 2012 WL 1945423, at \*3,4 (D. Mont. May 25, 2012).

<sup>392</sup> See 52 U.S.C § 10303(a).

<sup>393</sup> Complaint, Northwest Austin Mun. Utility Dis. No. One v. Gonzales, No. 1:06-cv-01384 (D.D.C. Aug. 4, 2006).

<sup>394</sup> See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400 (1975).

Section 5 was constitutional.<sup>395</sup> Several other civil rights organizations also intervened to defend the constitutionality of Section 5.

Following discovery, all parties filed motions for summary judgment. In a lengthy decision entered on September 4, 2008, the three-judge court granted the motions of the Attorney General and the various defendant-intervenors, ruling that NAMUDNO did not qualify as political subdivision under the Act and therefore could not bailout from coverage under Section 4(a) of the Act.<sup>396</sup> The court also held, after an extensive analysis of the legislative record, that the extension of Section 5 was constitutional under the Fourteenth and Fifteenth Amendments.<sup>397</sup> The court based its opinion on the extensive congressional record of Section 5 objections, continued racial bloc voting, patterns of discrimination by the covered jurisdictions, and litigation under Section 2 of the Voting Rights Act. The court also noted that the extension passed unanimously in the Senate and by an overwhelming majority in the House of Representatives, indicating that the considered judgment of Congress of the continued need for Section 5 was due deference by the courts.<sup>398</sup>

NAMUDNO filed a jurisdictional statement in the Supreme Court, which noted probable jurisdiction on January 9, 2009.<sup>399</sup> The Court heard oral arguments in April 2009 and issued its much-anticipated ruling in June 2009. In an 8-1 opinion written by Chief Justice John Roberts, the Court declined to decide the issue of the constitutionality of Section 5. Instead, the Court ruled that the utility district was in fact eligible to bailout from Section 5 coverage and as a consequence the Court would “avoid the unnecessary resolution of constitutional questions” involving Section 5.<sup>400</sup>

Foreshadowing the 2013 *Shelby* decision, the majority opinion stated in dicta that “the Act imposes current burdens and must be justified by current needs,” “the Act’s preclearance requirements and its coverage formula raise serious constitutional questions,” questioned whether the “statute’s disparate geographic coverage is sufficiently related to the problem that it targets,” and that “[t]he Act also differentiates between States, despite our historic tradition that all States enjoy

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<sup>395</sup> See Motion for Leave to Intervene as Defendants, *Northwest Austin Mun. Utility Dist. No. One v. Gonzales*, No. 1:06-cv-01384 (D.D.C. Nov. 3, 2006).

<sup>396</sup> See *Northwest Austin Mun. Utility Dist. No. One v. Gonzales*, 573 F.Supp.2d 221, 231-235 (D. D.C. 2008).

<sup>397</sup> See *id.* at 266.

<sup>398</sup> See *ibid.*

<sup>399</sup> Probable Jurisdiction Noted, *Northwest Austin Mun. Utility Dist. No. One v. Gonzales*, 557 U.S. 193 (Jan. 9, 2009).

<sup>400</sup> *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

‘equal sovereignty.’”<sup>401</sup> Yet the opinion also underscored the vital role the Act played in American politics, stating that “[t]he historic accomplishments of the Voting Rights Act are undeniable,” and the improvements in minority political participation “are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success.”<sup>402</sup>

Following remand, the utility district, the United States, and the intervenors filed a proposed consent decree allowing the utility district to bailout from Section 5 coverage. The consent decree was approved by the three-judge court in November 2009, and the claim challenging the constitutionality of Section 5 was dismissed without prejudice.<sup>403</sup>

#### **47. Green Party of Arkansas v. Daniels – Arkansas 2009**

On August 27, 2009, the ACLU and ACLU of Arkansas filed suit in federal court on behalf of the Green Party of Arkansas and two of its members in an action to preserve the Green Party’s place on the state ballot in the 2010 election. Candidates of state-certified political parties are granted automatic access to the ballot in Arkansas. Under Arkansas state law, once a political party achieves certification it must earn at least 3% of the total votes cast for the office of governor or nominees for presidential electors at the first general election after the party becomes certified in order to retain its status as a state-certified political party.<sup>404</sup> The Green Party successfully petitioned to become a certified political party in 2006 and 2008 by filing petitions comprised of 10,000 Arkansas voters. However, following certification in 2006 the Green Party received only 1.65% of the vote for governor and in 2008 the Green Party’s candidate for president (Cynthia McKinney) earned only 0.3% of the votes cast (although the Green Party’s candidates for U.S. Senate and U.S. House of Representative each received more than 15% of the votes cast in their respective races). In each case, following the 2006 and 2008 elections, the Secretary of State subsequently decertified the Green Party.<sup>405</sup>

The plaintiffs argued that based upon the 2008 U.S. House and Senate elections it was apparent that the Green Party had substantial support among Arkansas voters and that decertification of the party merely because of a poor showing by the

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<sup>401</sup> *Id.* at 203-04.

<sup>402</sup> *Id.* at 202.

<sup>403</sup> Consent Judgement and Decree, Northwest Austin Mun. Utility Dist. No. One v. Holder, No. 1:06-cv-1384 (D.D.C. Nov. 3, 2009).

<sup>404</sup> Ark. Code Ann. § 7-1-101(21)(C)

<sup>405</sup> *Green Party of Arkansas v. Daniels*, 733 F. Supp. 2d 1055 (E.D. Ark. 2010).

presidential candidate, who did not campaign in Arkansas, violated the political and associational rights of the Green Party and its members.

The district court granted the defendant's motion for summary judgment.<sup>406</sup> It acknowledged that the ballot access statute undoubtedly burdens constitutionally protected rights, but held that Arkansas had a vital interest in organizing and regulating elections and the burden imposed upon plaintiffs' rights was not severe. Because of the importance of the constitutional rights at issue, and the burdens placed upon them by state law, the plaintiffs appealed the district court's decision.

On appeal, the court of appeals affirmed the district court's grant of summary judgment and found that the ballot access statute did not impose a severe burden on the Green Party's associational rights, and as such, was not subject to strict scrutiny.<sup>407</sup> The court also found that the burden the statute imposed on the Green Party's associational rights were significantly outweighed by Arkansas's important regulatory interests in preventing ballot overcrowding, frivolous candidacies, and voter confusion.

#### **48. Moore v. Franklin County Board of Elections and Registration – Georgia 2009**

After finding that a ballot was cast by a voter who did not reside in the city of Franklin Springs, the Superior Court of Franklin County, Georgia, set aside the results of a mayoral election decided by a single-vote margin.<sup>408</sup> The court ordered a special election for December 29, 2009—just 19 days after its ruling, which was not submitted for Section 5 preclearance. Franklin Springs is home to Emmanuel College, and many student-voters were away for the year-end holidays, making them unable or unlikely to participate in the special mayoral election.

The winner of the disputed election, an employee of Emmanuel College, appealed the Superior Court's decision to hold a special election and requested a stay from the Georgia Supreme Court. The ACLU and Lawyers Committee for Civil Rights Under Law filed an amicus brief supporting the request, which argued that the lower court failed to comply with Section 5 and that setting the election during the holiday season would unfairly and unnecessarily burden student voters. Amici relied upon the Twenty-Sixth Amendment and numerous court decisions invalidating disparate treatment of students seeking to register and vote. The

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<sup>406</sup> *Id.*

<sup>407</sup> *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011).

<sup>408</sup> See ACLU Voting Rights Project, ANNUAL REPORT: JANUARY 1, 2009-DECEMBER 31, 2009 20-21, [https://www.aclu.org/sites/default/files/field\\_document/vrp\\_annualreport\\_2009.pdf](https://www.aclu.org/sites/default/files/field_document/vrp_annualreport_2009.pdf) (reviewing *Moore v. Franklin County Board of Elections and Registration*, No. 09-FV-1038-J (Ga. Sup. Ct. 2009)).

Georgia Supreme Court, however, denied the request for a stay. The election went ahead on December 29, and the challenger was elected by five votes.<sup>409</sup>

#### **49. Bartlett v. Strickland – North Carolina 2009**

In this suit, several county commissioners in North Carolina alleged that state officials' redistricting plan, which attempted to preserve minority voting power in a 39% African American North Carolina House of Representatives district, violated the North Carolina Constitution because the district did not encompass whole counties and instead included portions of four different counties. In that district, African American voters had recently joined with white "crossover" voters to elect candidates of choice in contrast to North Carolina's long history of denying Black Americans equal opportunity in state elections.<sup>410</sup> In response to the complaint, the state officials argued that Section 2 of the Voting Rights Act of 1965 prohibiting minority vote dilution required the redistricting plan because the African American population in the district was sufficiently large and geographically compact to constitute a majority under the terms of the Voting Rights Act. The North Carolina Superior Court entered summary judgment for the state officials.<sup>411</sup>

On appeal, the North Carolina Supreme Court held that because the minority group did not comprise a numerical majority of citizens of voting age (at least 50% of the population in the applicable district), the redistricting plan did not meet the conditions of the Voting Rights Act. Instead, the plan had to comply with North Carolina's Constitution, which prohibits counties from being divided for purposes of state legislative districts. Thus, the court reversed the lower court's decision and declared the plan unlawful.<sup>412</sup>

The U.S. Supreme Court granted certiorari and agreed to hear the question of whether the ability to draw a remedial district in which the affected minority group is at least 50% of the voting age population is a strict requirement for a vote dilution claim under Section 2 of the Voting Rights Act. The ACLU submitted an amicus brief along with other civil rights groups, arguing that the state court's position was inconsistent with the history, purpose, and prior interpretation of the Voting Rights Act.<sup>413</sup> The Supreme Court ultimately held that no Section 2 violation

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<sup>409</sup> *Id.*

<sup>410</sup> Brief of NAACP, Cindy Moore, Milford Farrior, Mary Jordan, and the ACLU as *Amici Curie* in Support of Petitioners at 5-7, *Bartlett v. Strickland*, No. 07-689 (2009).

<sup>411</sup> *See Pender County v. Bartlett*, No. 04 CVS 06966, slip op. at 2 (N.C. Super. Ct. Jan. 9, 2006).

<sup>412</sup> *Pender Cty. v. Bartlett*, 649 S.E.2d 364 (N.C. 2007).

<sup>413</sup> Brief of NAACP, Cindy Moore, Milford Farrior, Mary Jordan, and the ACLU as *Amici Curie* in Support of Petitioners at 5-7, *Bartlett v. Strickland*, No. 07-689 (2009).

could be established where a minority was less than 50% of the voting age population in a district.<sup>414</sup> Crossover districts like the one at issue in this case, the Court ruled, did not meet the *Gingles* requirement that a minority is sufficiently large and geographically compact enough to constitute majority in a single-member district for purposes of a Section 2 claim under Voting Rights Act's vote dilution provision.

## 50. Coronado v. Napolitano — Arizona 2009

The ACLU and ACLU of Arizona filed a lawsuit challenging two aspects of Arizona's felon disenfranchisement rules: (a) the denial of voting rights to formerly incarcerated individuals with felony convictions based on their inability to pay the court fines, fees, and restitution associated with their sentences, and (b) the disenfranchisement of people convicted of non-common law felonies.<sup>415</sup> Under Arizona law, everyone who commits a felony is stripped of their civil rights, including the right to vote, serve on a jury, and run for public office.<sup>416</sup> Those who have only one criminal conviction are eligible for automatic restoration of their voting rights once they receive a Certificate of Absolute Discharge from the state and pay all of their legal financial obligations.<sup>417</sup> Those convicted of two or more felonies must seek discretionary approval from a judge before the state can restore their civil rights, a process that is arbitrary and intimidating.<sup>418</sup>

Three of the plaintiffs had only one criminal conviction, but remained ineligible for automatic rights restoration because they owed outstanding legal debts to the state. The plaintiffs argued that conditioning the right to vote on the payment of fines or fees is in the nature of a poll tax and violates the Fourteenth and Twenty-Fourth Amendments of the U.S. Constitution, the Voting Rights Act, and state laws.<sup>419</sup> The lawsuit also argued that the scope of crimes covered by Arizona's felon disenfranchisement rules were inconsistent with the intent of the framers of the Fourteenth Amendment and that Congress only intended to permit states to disenfranchise individuals convicted of serious common law felonies such as murder and treason. Thus, there is no constitutional provision or exception that would

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<sup>414</sup> *Bartlett v. Strickland*, 556 U.S. 1, 14-15 (2009).

<sup>415</sup> Complaint, *Coronado v. Napolitano*, No. 2:07-cv-01089 (D. Ariz. June 1, 2007).

<sup>416</sup> See ARIZ.CONST., art. VII, §2; Ariz. Rev. Stat. Ann. § 13-904; see also *Coronado v. Napolitano*, No. CV-07-1089, 2008 WL 191987, at \*1 (D. Ariz. Jan. 22, 2008).

<sup>417</sup> Ariz. Rev. Stat. Ann. § 13-907.

<sup>418</sup> Ariz. Rev. Code § 13-908; *Coronado v. Napolitano*, No. CV-07-1089, 2008 WL 191987, at \*1 (D. Ariz. Jun. 1, 2007).

<sup>419</sup> See Complaint at ¶¶ 58-83, *Coronado v. Napolitano*, No. 2:07-cv-01089 (D. Ariz. June 1, 2007).

permit states to automatically deny basic voting rights for drug-related crimes or other acts that were never felonies at common law.

In January 2008, the district court dismissed the complaint for failure to state a claim, determining that because fines and fees are terms of an individual's sentence, Arizona was permitted to disenfranchise individuals on that basis and that Section 2 of the Fourteenth Amendment provided an affirmative sanction for states to disfranchise persons convicted of rebellion or other crimes.<sup>420</sup>

Plaintiffs filed an amended complaint in April 2008 to include specific allegations regarding the racial disparities resulting from the disfranchisement law and the negative, disproportionate impact of the state's fines and fees requirement on indigent people.<sup>421</sup> The defendants moved to dismiss the amended complaint, and the court granted that motion in November 2008.<sup>422</sup> The court essentially reiterated its reasoning in dismissing the original complaint, ruling that the plaintiffs did not have a fundamental right to vote because of their criminal convictions, the legislative history behind passage of the Fourteenth Amendment did not support the plaintiffs' interpretation of Section 2, and the fines and fees requirement did not result in discrimination on the basis of wealth even though it might have a disparate impact on indigent people.<sup>423</sup> The court also determined that the plaintiffs were not entitled to any discovery regarding the factual allegations in the complaint, and so dismissal at such an early stage in the litigation was warranted.<sup>424</sup> The plaintiffs appealed the court's decision to the Ninth Circuit, and the case was consolidated with *Harvey v. Brewer*, which focused solely on the disfranchisement of people convicted of non-common law felonies.<sup>425</sup> The Ninth Circuit heard oral argument in October 2009, and issued its opinion affirming the lower court's decision in May 2010. As to the plaintiffs' non-common law felony claim, the court ruled that a plain reading of the phrase "other crime" in Section 2 of the Fourteenth Amendment, as well as the phrase's past and contemporary usage, supported the court's conclusion that the term applies to all crimes, not just common law felonies.<sup>426</sup> The court also rejected the plaintiffs' challenge to Arizona's fines and fees requirement, reasoning that "[j]ust as States might reasonably

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<sup>420</sup> *Coronado v. Napolitano*, No. CV 07-1089, 2008 WL 191987 (D. Ariz. Jan. 22, 2008).

<sup>421</sup> See Amended Complaint for Declaratory Relief, Injunctive Relief, and Nominal Monetary Damages at ¶¶ 45-46, 63, CV 07-1089 (D. Ariz. Apr. 30, 2008).

<sup>422</sup> *Coronado v. Napolitano*, No. CV 07-1089, 2008 WL 4838707, at \*6 (D. Ariz. Nov. 6, 2008), *aff'd* sub nom. *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010).

<sup>423</sup> See generally *id.*

<sup>424</sup> *Id.* at \*3.

<sup>425</sup> 605 F.3d 1067 (9th Cir. 2010).

<sup>426</sup> See *id.* at 1073-1079.

conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights.”<sup>427</sup> The *Harvey* plaintiffs filed a motion for rehearing en banc which the court denied on July 16, 2010. The plaintiffs decided not to file a petition for certiorari to the Supreme Court.

## **51. Gray v. South Carolina State Election Commission – South Carolina 2009**

In August 2009, the ACLU filed this action on behalf of individual South Carolina citizens and the United Citizens Party against the South Carolina State Election Commission under Section 5 of the Voting Rights Act. The suit argued that a voting change related to the state’s reinterpretation of the its filing deadline statute required preclearance and claimed violations of the First and Fourteenth Amendments.<sup>428</sup> The plaintiffs requested declaratory and injunctive relief prohibiting the defendants from enforcing the reinterpreted filing deadline against them.<sup>429</sup> Between 1998 and April 16, 2008, the Election Commission interpreted the law to allow candidates to run as candidates for one or more political parties in the general election so long as they filed a “Statement of Intent of Candidacy” for one political party during the filing period. On April 16, 2008, the Election Commission voted to require candidates seeking party nominations to file a Statement of Intent during the filing period for each political party in which the candidate planned to run in the general election.<sup>430</sup>

The plaintiffs filed a motion for preliminary injunction to enjoin the South Carolina State Election Commission from implementing the change absent compliance with Section 5.<sup>431</sup> The parties agreed to dispense with a hearing on the preliminary injunction and proceed directly to a hearing on the merits based on stipulated facts and oral arguments in November 2009.<sup>432</sup> This proceeding failed to resolve the issue and the district court requested additional targeted discovery, which was completed in February 2010. In March 2010, the district court found in favor of the plaintiffs and granted a permanent injunction. The court held that the subsequent

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<sup>427</sup> *Id.* at 1079.

<sup>428</sup> Complaint at ¶ 1, *Gray v. S.C. State Election Comm’n*, No. 3:09-cv-02126 (D.S.C. Aug. 12, 2009).

<sup>429</sup> *Ibid.*

<sup>430</sup> *Id.* at ¶ 17.

<sup>431</sup> Plaintiffs’ Motion for a Preliminary Injunction, *Gray v. S.C. State Election Comm’n*, No. 3:09-cv-02126 (D.S.C. Aug. 14, 2009).

<sup>432</sup> *Gray v. S.C. State Election Comm’n*, No. 3:09-cv-02126, 2010 WL 753767, at \*1 (D.S.C. Mar. 1, 2010).

policy constituted a change that required preclearance because it required multiple Statements of Intent where a single filing sufficed before; and the implementation of the subsequent policy resulted in an election practice that differed from the baseline practice established by the most recent preclearance that was in force and effect.<sup>433</sup>

## 52. Janis v. Nelson – South Dakota 2009

In February 2009 the ACLU, the ACLU of South Dakota, and local counsel filed suit on behalf of Native Americans who resided on the Pine Ridge Reservation in Shannon County, which was one of two counties in South Dakota covered by Section 5 of the Voting Rights Act.<sup>434</sup> The plaintiffs were denied the right to vote because of their felony convictions, despite the fact that their sentences did not include incarceration and state law expressly provides that persons convicted of felonies would be denied the right to vote only while they were imprisoned in the state penitentiary. The plaintiffs argued that the removal of their names from the voter registration rolls constituted a change in voting that was not precleared as required by Section 5 and was unlawful under state law and provisions of federal law, including the Fourteenth Amendment, the Help America Vote Act (HAVA), the National Voter Registration Act (NVRA), and Section 2 of the Voting Rights Act.<sup>435</sup>

After the state placed the names of the voters back on the voter registration rolls, the state attempted to dismiss the action as moot, which the court denied.<sup>436</sup> Thereafter the state filed a motion to dismiss all counts of the plaintiffs' amended complaint, or alternatively, for a judgment on the pleadings.<sup>437</sup> The state made several arguments, including that the plaintiffs never claimed they actually tried to vote, even though the plaintiffs proffered that they feared prosecution for attempting, and that any alleged wrongdoing laid with local election officials and not state officials.<sup>438</sup> The state also argued that Section 5 was unconstitutional and outdated as applied to Shannon County, as the county was experiencing high voter registration rates and turnout rates above the national average.<sup>439</sup> The court

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<sup>433</sup> *Id.* at \*3.

<sup>434</sup> Complaint for Declaratory and Injunctive Relief and Compensatory and Nominal Damages, *Janis v. Nelson*, No. 5:09-cv-05019 (D.S.D. Feb. 18, 2009)

<sup>435</sup> First Amended Complaint for Declaratory Relief, Injunctive Relief, and Monetary Damages, *Janis v. Nelson*, No. 5:09-cv-05019 (D.S.D. Oct. 7, 2009).

<sup>436</sup> *Janis v. Nelson*, No. 5:09-cv-05019, 2009 WL 4505935 (D.S.D. Nov. 24, 2009).

<sup>437</sup> State Defendants' Amended Motion to Dismiss, or in the Alternative, Motion for Judgment on the Pleadings, *Janis v. Nelson*, No. 5:09-cv-05019 (D.S.D. Nov. 4, 2009).

<sup>438</sup> *See generally id.*

<sup>439</sup> *See Janis v. Nelson*, No. 09-cv-5019, 2009 WL 5216902, at \*7 (D.S.D. Dec. 30, 2009).

rejected these arguments, and in a second decision entered the same day, the court denied requests by state and county officials that they not be required to comply with discovery requests made by the plaintiffs.<sup>440</sup>

Ultimately the parties reached a settlement, whereby the plaintiffs and the state agreed upon the impact of felony convictions on individuals' right to vote, including retention of the right to vote for individuals convicted of felonies who are sentenced only to probation, fines, fees, or restitution. The defendants also agreed to advance various amendments to state laws and conduct affirmative outreach and public education regarding the right to vote for individuals with felony convictions.<sup>441</sup> Based on the settlement, the parties stipulated to dismissal of the litigation with prejudice, which was granted by the court.<sup>442</sup>

### **53. League of Women Voters of Indiana v. Rokita – Indiana 2009**

Three months after the decision of the Supreme Court in *Crawford v. Marion County Election Board*,<sup>443</sup> which rejected a federal challenge brought by the ACLU and others to Indiana's photo ID law, in July 2008 the League of Women Voters of Indiana filed suit in state court seeking a declaration that the photo ID law violated the Indiana State Constitution. The plaintiff argued that the law imposed a substantive new qualification on the right to vote that was unauthorized by the Indiana Constitution. The state filed a motion to dismiss in September 2008, and, after oral arguments in the trial court, the motion was granted based on the court's determination that the photo ID law was a procedural regulation that did not constitute a voter qualification and that the law was not arbitrary or unreasonable.<sup>444</sup>

The Indiana Court of Appeals reversed and struck down the law under the Equal Privileges and Immunities Clause of the state constitution, reasoning that the law effectively added a qualification beyond those constitutionally permitted and was not merely a procedural regulation.<sup>445</sup> The court further held that exempting absentee voters and voters living in a state-licensed care facility from the ID

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<sup>440</sup> *Janis v. Nelson*, No. 09-cv-5019, 2009 WL 5216898 (D.S.D. Dec. 30, 2009).

<sup>441</sup> Settlement Agreement and Release in Full of All Claims, *Janis v. Nelson*, No. 09-cv-5019 (D.S.D. May 25, 2015).

<sup>442</sup> Judgment of Dismissal, *Janis v. Nelson*, No. 09-cv-5019 (D.S.D. May 26, 2010).

<sup>443</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

<sup>444</sup> See *League of Women Voters of Ind. v. Rokita*, 915 N.E.2d 151 (Ind. Ct. App., 2009).

<sup>445</sup> *Id.* at 165.

requirement was unconstitutional disparate treatment of voters and also violated the requirement of uniform application of state election laws.<sup>446</sup>

In November 2009, the ACLU, together with the Southern Coalition for Social Justice, filed an amicus brief, which argued that the decision of the court of appeals was correctly decided in conformity with decisions from other states interpreting their state constitutions' Equal Privileges and Immunities Clauses.<sup>447</sup> The ACLU argued that the Indiana Supreme Court should follow other state courts reviewing analogous or similar state constitutional provisions, where they invalidated similar voting restrictions by using a more expansive approach to finding constitutional violations (i.e. more frequent heightened scrutiny when reviewing certain classifications) than was available under federal equal protection law.<sup>448</sup>

In June 2010, the Indiana Supreme Court reversed the court of appeals and upheld the photo ID law. The plaintiff argued, as it did in the lower court, that the distinctions made by the photo ID law—first, between in-person and absentee voters, and second, between senior citizen voters living in state care facilities that were also voting locations and senior citizens living outside of such facilities—were each impermissible. The court rejected these arguments and found that the first distinction was justified pursuant to the legislature's general power to set identification requirements and that applying the same ID requirement to absentee voters was an impractical method for identification purposes when compared to in-person identification at a voting location. The court determined the second distinction was also permissible due to the relatively extremely small number of similarly situated voters exempted from the photo ID requirement, and thus was an “insubstantial disparity.”<sup>449</sup> Within this framework, the court determined that the law met the requirement of uniform application as a “specific legislative regulation associated with additional accommodations extended by the legislature” and did not have different requirements for in-person, as opposed to absentee, voters. The court analogized this to the “accommodations” that allow for early and absentee voting.<sup>450</sup> The court left open the possibility of a successful “as-applied” claim of constitutional

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<sup>446</sup> *Id.* at 168-69.

<sup>447</sup> See Brief of ACLU and Southern Coalition for Social Justice as *Amici Curiae* Supporting Appellants at 3-7, *League of Women Voters of Ind. v. Rokita*, No. 49S02-1001-CV-50 (Ind. June 30, 2010).

<sup>448</sup> See *id.* at 7-10.

<sup>449</sup> *League of Women Voters of Ind. v. Rokita*, 929 N.E.2d 758, 770-772 (Ind. 2010).

<sup>450</sup> *Id.* at 768.

invalidity, mentioning potential individual claims, such as hardship of obtaining an ID in the first instance due to fees or other requirements for obtaining the ID.<sup>451</sup>

#### **54. Swann v. Handel; Swann v Kemp – Georgia 2009**

The ACLU filed this lawsuit on behalf of disenfranchised Georgia voters in September 2009, challenging the constitutionality of Section 21-2-381(a)(1)(D) of the Georgia Code, which prohibits election officials from mailing absentee ballots to places other than the permanent mailing address, temporary out-of-county, or out-of-municipality address of a voter. Election officials in the state interpreted this provision as prohibiting the mailing of absentee ballots to inmates in county jails who remain eligible to vote but are incarcerated in their county of residence.<sup>452</sup> However, eligible individuals who were incarcerated outside of their county of residence would be able to receive their absentee ballots at their place of confinement. The plaintiffs who were incarcerated within their county of residence asserted that the law violated their right to equal protection under the Fourteenth Amendment and the right to due due process based on the defendants' failure to inform them that they would not be able to receive an absentee ballot in jail.<sup>453</sup>

Both the plaintiffs and defendants filed motions for summary judgment. In October 2010, the district court denied the plaintiffs' motion and granted the defendants'.<sup>454</sup> The court decided that the plaintiffs' equal protection claim failed because they were not treated differently than similarly situated inmates. The court also reasoned that because the plaintiffs' absentee ballot application listed his registered address on his county ballot application, the defendants did not commit any acts that deprived him of his right to vote.<sup>455</sup> Likewise, the court found that the plaintiff's due process claim failed because the board did not deny his application and therefore did not fail to inform him that his application was denied.<sup>456</sup>

The plaintiffs appealed to the Eleventh Circuit in October 2010 seeking the court's determination on whether the plaintiff was required to list the jail's address on his absentee ballot application in order to challenge the constitutionality of the law in question as it applied to him.<sup>457</sup> In response, the defendants argued that plaintiff lacked standing to raise his equal protection claim on the grounds that because he

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<sup>451</sup> *Id.* at 773.

<sup>452</sup> *Id.* at ¶¶ 30-31.

<sup>453</sup> *Id.* at ¶¶ 39-47.

<sup>454</sup> *Swann et al. v. Handel*, Case No. 1:09-CV-2674, 2010 WL 4117448 at \*1 (N.D. Ga. Oct. 18, 2010).

<sup>455</sup> *Id.* at \*3.

<sup>456</sup> *Id.* at \*4.

<sup>457</sup> Brief of Appellant, *Swann v. Kemp*, No. 10-14901 (11th Cir. Dec. 6, 2010).

never listed the jail as his mailing address on the absentee ballot application, his injury was not traceable to the defendants. The Eleventh Circuit agreed with the defendants and determined that the plaintiff would not have received a ballot at the jail regardless of the application of the statute because he did not provide the jail address on his application.<sup>458</sup> The Court vacated the district court's decision and instructed the district court to dismiss the action for lack of subject matter jurisdiction, which it did in April 2012.<sup>459</sup>

## **55. Tempel v. Platt – South Carolina 2009**

George E. Tempel, Chairman of the Charleston County Democratic Party, brought an action in South Carolina state court in August 2008 to enjoin Eugene Platt from being a candidate for the South Carolina state house in the November 2008 general election.<sup>460</sup> A South Carolina candidate oath law—also known as a “sore loser” law—requires every candidate for office to sign an oath to abide by the results of a party's primary. If the candidate loses the party's primary, the law bars the candidate from petitioning or campaigning as a write-in candidate on the general election ballot for any office for which the party has a nominee. South Carolina was also one of four states that permitted fusion voting, allowing a candidate to run in more than one party's primary. Thus, the state's candidate oath law operates with the fusion voting system to bar a candidate who loses a party's primary from having their name placed on the general election ballot by another political party that nominates them. While Platt won the nominations of the Green Party and Working Family Party for the state legislative house seat, he subsequently lost the nomination for the same office in the Democratic primary. At the urging of the Democratic Party, the South Carolina State Election Commission disqualified Platt from appearing on the general election ballot as the Green Party's nominee. Platt and the Green Party separately challenged this ruling in federal court.<sup>461</sup> Platt argued that the case was not ripe for decision in view of this separately pending federal action.

The circuit court granted the injunction pursuant to S.C. Code Ann. § 7-11-210 (2000), which authorizes a party chairman to obtain injunctive relief if a defeated party primary candidate pursues appearing on a general election ballot in a race where the party has a nominee.<sup>462</sup> Represented by the ACLU, Platt appealed to the

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<sup>458</sup> *Swann v. Kemp*, 668 F.3d 1285 (11th Cir. 2012).

<sup>459</sup> Order, *Swann v. Kemp*, No. 1:09-CV-2674 (N.D. Ga. Apr. 24, 2012).

<sup>460</sup> *Tempel v. Platt*, No. 08-CP-10-4978 (S.C. Ct. of Common Pleas 2009).

<sup>461</sup> See Complaint, *S.C. Green Party et al. v. S.C. State Election Comm.*, No. 3:08-cv-2790 (D.S.C. Aug. 7, 2008).

<sup>462</sup> See *Tempel v. Platt*, Case No. No. 2010-MO-002, 2010 WL 10097777, at \*1 (S.C. Jan. 19, 2010).

South Carolina Supreme Court, which affirmed the circuit court's injunction in January 2010.<sup>463</sup>

## **56. English v. Chester County – Pennsylvania 2010**

In January 2010, the ACLU, ACLU of Pennsylvania, and Public Interest Law Center of Philadelphia filed a lawsuit in federal court in Pennsylvania on behalf of African American residents and Lincoln University students against Chester County. The plaintiffs argued that the county's Board of Elections and Department of Voter Services had deprived African Americans in Lower Oxford East Township of their right to vote by assigning them to inconvenient and inadequate polling facilities.<sup>464</sup> Residents of the township, most of whom were African Americans and comprised almost 70% of the township's precinct, had historically voted at a polling place located on the campus of Lincoln University, a Historically Black College and University, where most of the precinct's voters reside. In 1992, after a Lincoln University professor won a seat on the local school board in a hotly contested election, the county moved the polling place to a building several miles away that was significantly smaller and had fewer voting machines.<sup>465</sup> The polling place remained at that location despite continued requests to return it to Lincoln University.<sup>466</sup>

In recognition of the high numbers of newly registered voters in the 2008 primary, precinct residents anticipated a large turnout of Black voters and petitioned the board of elections to return the polling place to the Lincoln University campus prior to the 2008 general election.<sup>467</sup> The board of elections refused.<sup>468</sup> Predictably, the polling location's numerous problems plagued the precinct's voters on Election Day. Lines began before polls opened, and delays began as soon as the polls open. The voter registration rolls at the precinct did not contain an up-to-date list of registered voters because the board had failed to provide it. The delays, combined with the inadequacy of the facility to accommodate the number of voters who had turned out, most of them African American, waited up to seven hours in the pouring rain to cast their votes—far longer than voters elsewhere in Chester County. A poll watcher caused further delays by challenging the identities of young African American

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<sup>463</sup> *Id.* at \*1-\*2.

<sup>464</sup> See ACLU OF PENNSYLVANIA, ENGLISH, ET AL. V. CHESTER COUNTY, <https://www.aclupa.org/our-work/legal/legaldocket/englishetalvchestercounty>.

<sup>465</sup> Complaint at ¶ 2, English v. Chester Cty., No. 2:10-cv-00244 (E.D. Pa. Jan. 10, 2010).

<sup>466</sup> *Id.*

<sup>467</sup> *Id.* at ¶ 29.

<sup>468</sup> *Id.* at ¶ 34.

voters throughout the day.<sup>469</sup> Despite multiple attempts to resolve the issues with the board of elections, the board refused to take any action. The result was low voter turnout and a racially disparate impact in the precinct with the highest percentage of African American voters in the county.<sup>470</sup>

The suit alleged that the polling location was in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.<sup>471</sup> It asked the court to order Chester County to return the Lower Oxford East polling place to the Lincoln University campus, authorize federal elections monitors, and award damages to residents who faced extreme difficulties or were prevented from voting in the 2008 general election.<sup>472</sup> In April 2010, the parties settled the case based upon an agreement with the board of elections that it would return the polling place to the Lincoln University campus.<sup>473</sup>

## 57. Georgia v. Holder – Georgia 2010

In June 2010, the state of Georgia sued the U.S. Attorney General when its voter registration verification process did not obtain preclearance under the Voting Rights Act.<sup>474</sup> Georgia adopted a system attempting to match the information of voter registration applicants with information contained in the state’s Department of Driver Services and Social Security Administration database for verification and flag individuals whose information did not match to local registrars for further inquiry. The state did not initially obtain preclearance under Section 5, even though the new system was clearly a voting change that required preclearance. The state used the Help America Vote Act’s (HAVA) voter registration list maintenance process to justify its new system, even though HAVA does not require a matching process to verify voter eligibility, and in fact contains specific prohibitions against the process Georgia was trying to implement. During the preclearance process, the Attorney General twice rejected Georgia’s verification process, finding the matching program was “seriously flawed,” that “thousands of citizens who are in fact eligible to vote under Georgia law have been flagged,” that the “impact of these errors falls disproportionately on minority voters,” and that “applicants who are Hispanic,

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<sup>469</sup> *See id.* at ¶¶ 35-45.

<sup>470</sup> *See id.* at ¶ 46.

<sup>471</sup> *See id.* at ¶¶ 102-119.

<sup>472</sup> *See id.* at 20.

<sup>473</sup> Settlement Agreement and Mutual Release at ¶ 1, *English v. Chester Cnty.*, No. 2:10-cv-00244 (E.D. Pa. Aug. 9, 2010).

<sup>474</sup> Expedited Complaint for Declaratory Judgment, *Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C. June 22, 2010).

Asian or African American are more likely than white applicants, to statistically significant degrees, to be flagged for additional scrutiny.”<sup>475</sup>

Nonetheless, Georgia sought a declaratory judgement that its verification process did not violate Section 5 of the Voting Rights Act or, alternatively, a ruling that the preclearance requirement was unconstitutional.<sup>476</sup> The ACLU and the Lawyers’ Committee for Civil Rights intervened on behalf of the Georgia State Conference of the NAACP, the Georgia Association of Black Elected Officials, and the Georgia Coalition for the Peoples’ Agenda.<sup>477</sup> A month after intervention, Georgia filed an amended complaint, and within hours the Attorney General abruptly informed the court that it would preclear the system, even though it was substantially similar to the one the Justice Department had objected to a year earlier. The parties filed a joint motion to dismiss on August 20, 2010. The intervenors argued that the unusual process and decision to immediately preclear a system that was previously determined as “seriously flawed” resulted in the denial to the intervenors of access to materials submitted during the preclearance process, and that Georgia nonetheless did not meet its Section 5 burden.<sup>478</sup> The intervenors requested that the Court require Georgia and the Department of Justice to explain the events that led to the administrative preclearance.<sup>479</sup> The court declined to do so and dismissed the action.<sup>480</sup>

## **58. Spirit Lake Tribe v. Benson Cty. – North Dakota 2010**

Shortly before the November 2010 election, Benson County, North Dakota, announced that it was closing all but one of the county polling places, including the two that were located on the Spirit Lake Indian Reservation. The Spirit Lake Tribe filed suit in federal district court that closing the precincts on the Reservation would make it difficult or impossible for many Indians to vote in violation of the

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<sup>475</sup> Letter from Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to The Honorable Thurbert E. Baker, Attorney Gen. (May 29, 2009), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l\\_090529.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090529.pdf).

<sup>476</sup> Expedited Complaint for Declaratory Judgment, *Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C. June 22, 2010).

<sup>477</sup> Motion for Leave to Intervene as Defendants, *Georgia v. Holder*, 1:10-cv-01062 (D.D.C. June 6, 2010).

<sup>478</sup> *See* Notice by Defendant-Intervenors, *Georgia v. Holder*, 1:10-cv-01062 (D.D.C. Aug. 21, 2010); Response to Plaintiff’s and Defendant’s Joint Motion to Dismiss by Defendant-Intervenors Brooks, et al., *Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C. Sept. 7, 2010).

<sup>479</sup> Response to Plaintiff’s and Defendant’s Joint Motion to Dismiss by Defendant-Intervenors Brooks, et al. at 12-13, *Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C. Sept. 7, 2010).

<sup>480</sup> *Georgia v. Holder*, 748 F. Supp. 2d 16, 19 (2010).

federal and state constitutions and Section 2 of the Voting Rights Act.<sup>481</sup> The ACLU filed an amicus brief in support of the Tribe's Section 2 claim and its motion for a preliminary injunction.

Following an expedited hearing, the district issued a preliminary injunction on October 21, 2010, requiring the county to maintain the two polling places on the reservation. It concluded that closing the precincts would have a disparate impact on Indian voters who lacked access to transportation or to voting by mail.<sup>482</sup> After the preliminary injunction was granted the parties entered into a consent decree and settlement in October 2011 requiring the county to maintain the two polling places on the reservation for future general elections, subject to certain conditions.<sup>483</sup>

### **59. Brown v. Secretary of State of Florida – Florida 2010**

This suit was filed by two members of Congress, Mario Diaz-Balart and Corrine Brown, challenging Article III, Section 20 of the Florida Constitution, which was adopted by more than 60% of the state's voters at the November 2010 election. The challenged provision provides standards for congressional redistricting, including that a plan may not favor or disfavor an incumbent or political party or deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. The plaintiffs contended that the state law violates Article I, Section 4, Clause 1 of the U.S. Constitution and the Elections Clause, which gives state legislatures power to prescribe the times, places, and manner of holding elections for members of Congress.<sup>484</sup>

The ACLU and ACLU of Florida represented defendant-intervenors who sought to defend the constitutionality of the state law. The ACLU of Florida played a major role in promoting the adoption of the challenged redistricting standards, and the defendant-intervenors contended that the federal constitution does not prohibit the adoption of redistricting standards by a state's electorate. The motion seeking leave to intervene was filed on December 16, 2010. On January 24, 2011, the Florida House of Representatives filed to join the lawsuit to challenge the adopted provisions.<sup>485</sup>

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<sup>481</sup> Complaint, *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095 (D.N.D. Oct. 8, 2010).

<sup>482</sup> *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614, at \*1 (D.N.D. Oct. 21, 2010)

<sup>483</sup> Consent Judgment and Decree and Stipulation of the Parties, *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095 (D.N.D. Oct. 6, 2011).

<sup>484</sup> *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1272-1273 (11th Cir. 2012).

<sup>485</sup> *Id.* at 1274.

On September 9, 2011, the district court rejected the lawsuit and granted summary judgment to the defendants.<sup>486</sup> The plaintiffs appealed to the Eleventh Circuit, which upheld the district court's decision on January 31, 2012.<sup>487</sup> The appellate court noted in its decision that the Supreme Court had provided clear and unambiguous guidance, explaining that the term "Legislature" in the Elections Clause refers not just to a state's legislative body but more broadly to the entire lawmaking process of the state.<sup>488</sup>

## **60. Nix v. Holder; Laroque v. Holder – North Carolina 2010**

In 2010, residents of Kinston, North Carolina, filed suit seeking a declaratory judgment that Section 5 of the Voting Rights Act was unconstitutional because it exceeded Congress's enumerated powers and violated equal protection principles.<sup>489</sup> Kinston was a covered jurisdiction under Section 5 and required to obtain preclearance of voting changes before enforcement. The suit was filed after the Department of Justice denied preclearance to a proposed voting change in Kinston that would have replaced the city's partisan electoral system with a non-partisan system with a plurality vote requirement. The Department found the change would have a likely retrogressive effect on the ability of Kinston's Black voters to elect candidates of choice.<sup>490</sup> The Justice Department conducted a statistical analysis of the impact of the change, which demonstrated that the removal of partisan cues in city elections would eliminate the single factor that permitted Black candidates to be elected because Kinston voters based their choice more on the race of a candidate rather than partisan affiliation.<sup>491</sup> The analysis showed that without the party appeal or the ability to vote straight ticket, the limited support from white crossover voters for a Black candidate would diminish in a manner that prevented Black candidates from being elected.<sup>492</sup> The City of Kinston did not join the lawsuit, nor did it seek judicial preclearance of the Section 5 objection.

The ACLU and Southern Coalition for Social Justice intervened on behalf of the North Carolina State Conference of the NAACP and residents of Kinston arguing that Section 5 was a constitutional exercise of congressional authority, the plaintiffs

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<sup>486</sup> *Diaz-Balart v. Browning*, No. 10-23968-CIV, 2011 WL 13175016 (S.D. Fla. Sept. 9, 2011).

<sup>487</sup> *Brown*, 668 F.3d 1271.

<sup>488</sup> *Id.* at 1277.

<sup>489</sup> Complaint, *Laroque v. Holder*, No. 1:10-cv-0561 (D.D.C. April 7, 2010).

<sup>490</sup> See Letter from Acting Assistant Attorney General Loretta King, Civil Rights Division, Department of Justice to James P. Cauley III, Esq. (Aug. 17, 2009), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l\\_090817.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090817.pdf).

<sup>491</sup> *Id.*

<sup>492</sup> *Id.*

lacked standing, and the district court did not have jurisdiction over the plaintiffs' claims.<sup>493</sup> In December 2010, the district court issued an opinion granting motions to dismiss filed by the Justice Department and the defendant-intervenors.<sup>494</sup> The court concluded the plaintiffs lacked standing, and there was no cause of action for private persons to challenge the constitutionality of Section 5 as applied to the Attorney General's objection to a proposed electoral change.<sup>495</sup> The plaintiffs appealed to the D.C. Circuit Court of Appeals, and the court of appeals reversed and remanded in July 2011.<sup>496</sup> It held that the plaintiff, a candidate for public office in Kinston, had standing and a cause of action to seek declaratory and injunctive relief against the Attorney General on the ground that Section 5 was unconstitutional. On remand, the district court reached the merits of the plaintiffs' claims in December 2011,<sup>497</sup> rejecting that Section 5 exceeds Congress's enforcement powers and holding that Section 5 was "justified by the evidence of persistent, intentional discrimination that Congress amassed."<sup>498</sup> It also rejected their claim that Section 5 violates equal protection principles.

The plaintiffs again appealed to the D.C. Circuit Court of Appeals. While the appeal was pending, the Justice Department reversed its position regarding Kinston's proposed voting change in light of new evidence it received in a separate preclearance proceeding.<sup>499</sup> After reviewing that additional evidence, the Attorney General withdrew his objection to the proposed change. Accordingly, in May 2012 the D.C. Circuit determined that the plaintiffs' claims were moot and dismissed the case for lack of jurisdiction.<sup>500</sup> The plaintiffs filed a petition for certiorari, which was denied on November 13, 2012.<sup>501</sup>

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<sup>493</sup> Motion to Intervene as Defendants, *Laroque v. Holder*, No. 1:10-cv-0561 (D.D.C. July 7, 2010).

<sup>494</sup> Order on Motion to Dismiss, *Laroque v. Holder*, No. 1:10-cv-0561 (D.D.C. Dec. 20, 2010).

<sup>495</sup> *Id.*

<sup>496</sup> *Laroque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011).

<sup>497</sup> *Laroque v. Holder*, 831 F.Supp.2d 183 (D.C. Cir. 2011).

<sup>498</sup> *Id.* at 228.

<sup>499</sup> See Letter from Assistant Attorney General Thomas E. Perez, Civil Rights Div., to Robert T. Sonnenberg, Esq. (Apr. 30, 2012), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l\\_120430.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120430.pdf).

<sup>500</sup> *Laroque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012).

<sup>501</sup> *Laroque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), cert. denied sub nom. *Nix v. Holder*, 133 S. Ct. 610 (2012).

## 61. **Shelby County v. Holder – Alabama 2010**

Prior to the Supreme Court’s 2013 decision in *Shelby County v. Holder* nullifying the preclearance coverage formula, the Supreme Court most recently weighed in on Section 5’s constitutionality in 2009 in *Northwest Austin Municipal Utility District No. 1 v. Holder*. In that case, Chief Justice John Roberts expressed skepticism regarding the continuing constitutionality of portions of the Voting Rights Act, opining in dicta that the law “imposes current burdens and must be justified by current needs” and that “[t]he Act also differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.”<sup>502</sup> Animated by the decision, Shelby County, Alabama, filed suit the following year in district court in a facial challenge seeking a declaratory judgment that both Section 5 preclearance and the Section 4(b) coverage formula were unconstitutional and a permanent injunction against their enforcement.<sup>503</sup> The D.C. district court upheld the constitutionality of Section 5 and the coverage formula, granting summary judgment for the Attorney General.<sup>504</sup> The U.S. Court of Appeals for the District of Columbia affirmed, holding that Congress did not exceed its powers by reauthorizing Section 5 and that the coverage formula was still relevant to the issue of voting discrimination.<sup>505</sup> On June 25, 2013, the Supreme Court held that the coverage formula was unconstitutional. In a 5-4 decision, the Supreme Court found that while “voting discrimination still exists,” Section 4(b) of the Voting Rights Act was unconstitutional on the basis that the coverage formula had not been updated recently and no longer reflected current conditions of discrimination.<sup>506</sup> Therefore, the formula could no longer be used as a basis for subjecting jurisdictions to preclearance.

## 62. **Frank v Walker – Wisconsin 2011**

In December 2011, the ACLU, ACLU of Wisconsin, and National Law Center for Homelessness and Poverty brought suit on behalf of individual plaintiffs challenging Wisconsin’s strict photo ID law in federal court, seeking declaratory and injunctive relief.<sup>507</sup> The Wisconsin law requires voters to present identification that is one of a limited list of acceptable photo identification in order to vote. Similar to the impact of photo ID laws in other states, Black and Latino voters in Wisconsin disproportionately lack the required photo ID and the documents necessary to

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<sup>502</sup> *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193, 203 (2009).

<sup>503</sup> Complaint, *Shelby Cty. v. Holder*, No. 1:10-cv-00651 (D.D.C. Apr. 27, 2010).

<sup>504</sup> *Shelby Cty. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011).

<sup>505</sup> *Shelby Cty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012).

<sup>506</sup> *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

<sup>507</sup> First Amended Complaint, *Frank v. Walker*, No. 2:11-cv-01128 (E.D. Wis. Dec. 13, 2011).

obtain a free state ID card to vote, and are therefore more likely to be disproportionately disenfranchised as a result.<sup>508</sup> Prior to enactment of the photo ID law, voters were generally not required to provide proof of identity to vote but were required to provide proof of residency with a range of acceptable documents, such as utility bills, bank statements, or pay stubs.<sup>509</sup> Over two dozen individual plaintiffs brought class claims under the Fourteenth and Twenty-Fourth Amendments and Section 2 of the Voting Rights Act.

After a two-week trial—in which the parties presented 43 fact witnesses, six expert witnesses, and thousands of pages of documentary evidence—in April 2014, the trial court struck down the photo ID law and permanently enjoined its enforcement, concluding that the law violated Section 2 of the Voting Rights Act.<sup>510</sup> The court also held that the law violated the Fourteenth Amendment by imposing a substantial burden on the right to vote that was not outweighed by the state’s asserted justification.<sup>511</sup> In making these determinations, the court found that there was no evidence of voter impersonation fraud and the state had failed to put forward evidence to suggest that its photo ID law effectively prevented other types of fraud. The court also found the photo ID law did not enhance public confidence in voting.<sup>512</sup> With respect to the burden on voters and its discriminatory impact, the court concluded that “approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID,” and noted that, “to put this number in context, in 2010 the race for governor in Wisconsin was decided by 124,638 votes, and the race for United States Senator was decided by 105,041 votes. Thus the number of registered voters who lack a qualifying ID is large enough to change the outcome of Wisconsin elections.”<sup>513</sup> The court also found that while many registered voters would be able to obtain qualifying IDs, many others could not.<sup>514</sup> Finally, the court found it “inescapable” that the photo ID law would disproportionately burden and disenfranchise Black and Latino voters in the state and that the photo ID law’s “disproportionate impact results from the interaction of the photo ID requirement with the effects of past and present discrimination and is not merely a product of chance, [and that it] therefore produces a discriminatory result.”<sup>515</sup>

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<sup>508</sup> *Id.* at ¶¶ 95-96.

<sup>509</sup> *Id.* at ¶ 38.

<sup>510</sup> *Frank v. Walker*, 17 F.Supp.3d 837, 879 (E.D. Wis. 2014).

<sup>511</sup> *Id.* at 863-64.

<sup>512</sup> *Id.* at 847-53.

<sup>513</sup> *Id.* at 854.

<sup>514</sup> *Id.* at 862.

<sup>515</sup> *Id.* at 876-78.

Wisconsin appealed the decision to the Seventh Circuit, which in a panel decision reversed the district court’s holdings that the law violated Section 2 of the Voting Rights Act and imposes a substantial burden on the right to vote. With respect to the constitutional claim, the court relied on the Supreme Court’s 2008 decision in *Crawford v. Marion County Election Board*, which upheld Indiana’s photo ID law against a facial challenge, reasoning that the facts of the Wisconsin photo ID case did not justify a different outcome than *Crawford*.<sup>516</sup> With respect to the Section 2 claim, the Seventh Circuit reversed the district court’s holding. The panel concluded, after recognizing the lower court’s finding of a disparate impact on Black and Latino voters, that the district court failed to find that “substantial numbers of persons eligible to vote have tried to get a photo ID but [had] been unable to do so” or that minority voters have less opportunity to obtain a qualifying photo ID.<sup>517</sup> Judge Richard Posner called a vote for rehearing en banc *sua sponte*, but an equally divided court denied the request. The dissenting judges found this case to be “importantly dissimilar” from *Crawford*—a case which Judge Posner himself authored on behalf of the Seventh Circuit in 2008—and that the evidentiary record before the court was vastly different than in *Crawford*.<sup>518</sup>

The ACLU requested review of the Seventh Circuit’s decision by the U.S. Supreme Court, arguing that the Seventh Circuit misinterpreted and misapplied the *Crawford* decision. The ACLU argued that the case was distinguishable from *Crawford* due to the vast evidentiary record demonstrating that Wisconsin voters faced substantial or even insurmountable burdens to obtain a qualifying ID. The request also differentiated the two cases in that Wisconsin’s professed interest to prevent voter impersonation fraud was illusory and pretextual in light of the fact that Wisconsin was unable to show a single case of voter impersonation fraud in the state.<sup>519</sup> The petition also argued that the Seventh Circuit’s panel decision gravely misinterpreted Section 2 and wrongly rejected the factual findings of racially discriminatory denial and abridgement of the right to vote resulting from Wisconsin’s photo ID law.<sup>520</sup> The Supreme Court declined to reconsider the Seventh Circuit’s ruling upholding the law, and the law became effective in 2015.<sup>521</sup>

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<sup>516</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

<sup>517</sup> *Frank v. Walker*, 768 F.3d 744, 745-47 (7th Cir. 2014).

<sup>518</sup> *Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting).

<sup>519</sup> Petition for Writ of Certiorari, *Frank v. Walker*, No. 14-803 (Jan. 7, 2015).

<sup>520</sup> *Id.* at 28-30.

<sup>521</sup> Note that the Supreme Court had previously vacated the Seventh Circuit’s stay of the district court’s permanent injunction. *Frank v. Walker*, 135 S. Ct. 7 (2014).

The plaintiffs then undertook a second stage of litigation, advancing remaining constitutional claims that the district court did not resolve in its initial decision, namely, that the Wisconsin law was unconstitutional as applied to those voters who were unable to acquire a qualifying ID. After initially rejecting the plaintiffs' claim<sup>522</sup> and being reversed on appeal,<sup>523</sup> the district court granted a preliminary injunction in July 2016, instructing that voters who lack photo ID must be able to cast a regular ballot in the November 2016 elections after completing an affidavit. The district court's decision was based on its finding that the plaintiffs had shown some likelihood of success on the merits of their Fourteenth Amendment claim that the photo ID law substantially burdened the right to vote among eligible voters who, even after putting forth a reasonable effort, would be unable to obtain a qualifying ID, and that Wisconsin lacked a viable interest in enforcement of the law with respect to these voters.<sup>524</sup> Wisconsin filed an emergency appeal of this decision with the Seventh Circuit, and on August 10, 2016, the Seventh Circuit stayed the district court's order.<sup>525</sup> On August 26, 2016, the full Seventh Circuit declined to reconsider this decision, holding that the urgency needed to justify an en banc review of the panel decision was not shown because of the state's representation that voters would automatically be able to receive a credential for voting if they requested one in person at a driver's license facility.<sup>526</sup> Because of the Seventh Circuit's order, Wisconsin's photo ID law was in effect without the affidavit alternative for those without ID during the 2016 elections. After the Seventh Circuit issued the emergency stay on the district court's order, the case proceeded to the Seventh Circuit on appeal. Oral argument was held in February 2017. A decision is still pending at this time.

### **63. Citizens In Charge v. Gale – Nebraska 2011**

The plaintiffs challenged three provisions of Nebraska law as violating political speech and associational rights protected by the First and Fourteenth Amendments.<sup>527</sup> The first law set out a signature distribution requirement for would be independent candidates, requiring them to obtain at least 50 signatures from at least one-third of Nebraska's counties on a candidacy petition before they may appear on the ballot. The second requires petition circulators to be "electors"<sup>528</sup>

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<sup>522</sup> *Frank v. Walker*, 141 F. Supp. 3d 932 (E.D. Wis. 2016).

<sup>523</sup> *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016).

<sup>524</sup> *Frank v. Walker*, 196 F. Supp. 3d 893, 904, 914-15 (E.D. Wis. 2016).

<sup>525</sup> *Frank v. Walker*, Nos. 16-3003, 16-3052, 2016 WL 4224616 (7th Cir. Aug. 10, 2016).

<sup>526</sup> *Frank v. Walker*, 835 F.3d 649 (7th Cir. 2016) (per curiam).

<sup>527</sup> Complaint, *Citizens In Charge v. Gale*, No. 4:09CV3255 (D. Neb. Dec. 16, 2009).

<sup>528</sup> According to NEB. REV. STAT. § 32-110, "Elector" shall mean a citizen of the United States whose residence is within the state and who is at least eighteen years of age or is seventeen years of age

of the State of Nebraska, a requirement that has been invalidated by federal courts in other circuits. The third requires all petitions to contain language in large, red type stating whether the circulator is paid or is a volunteer. Subsequent to the initial complaint, intervenors filed a complaint in intervention challenging the provision of the law requiring petition circulators be “electors” and also the requirement that all petitions contain language in large, red type stating whether the circulator is paid or is a volunteer.<sup>529</sup>

Plaintiff Citizens in Charge was an educational non-profit organization dedicated to protecting and expanding the ballot initiative and referendum process in Nebraska and other states. Plaintiff Michael Groene was a Nebraska resident who had participated in securing petition signatures for ballot initiatives in Nebraska in the past and intended to do so in the future. Plaintiff Donald Sluti was a Nebraska resident and wanted to run as an independent candidate for the office of Secretary of State of Nebraska, but he believed the statutes at issue in this case would render futile any attempt by him to gather signatures in order to appear on the ballot. Intervenor Libertarian National Committee, Inc., was a grassroots organization with nationwide membership, and the members would have liked to hire out-of-state paid petition circulators. Intervenor Libertarian Party of Nebraska was a group of voters from Nebraska. The plaintiffs and intervenors were represented by lawyers of the ACLU and ACLU of Nebraska.<sup>530</sup>

After intervenors joined the case they filed a motion for preliminary injunction requesting the court find the residency requirement for petitioners violates the First Amendment. The district court found that the defendants were likely to win on the merits and agreed with the defendants that the Eighth Circuit’s decision in *Initiative & Referendum Institute v. Jaeger*<sup>531</sup> was controlling in denying the motion for a preliminary injunction.<sup>532</sup> The court was unpersuaded by other circuits having disagreed with the analysis in *Jaeger*. The court found witness testimony that the cost of using in-state circulators to be five to ten times greater than the cost of using an outside circulator “less than credible.”<sup>533</sup>

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and will attain the age of eighteen years on or before the first Tuesday after the first Monday in November of the then current calendar year.

<sup>529</sup> See Motion to Intervene as Plaintiffs, *Citizens In Charge v. Gale*, No. 4:09-cv-03255 (D. Neb. May 27, 2010).

<sup>530</sup> *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916, 918-923 (D. Neb. 2011).

<sup>531</sup> *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001).

<sup>532</sup> *Citizens in Charge v. Gale*, No. 4:09-cv-03255, 2010 WL 2682772 (D. Neb. July 1, 2010).

<sup>533</sup> *Id.*

On August 30, 2011 the district court issued its ruling and held that banning circulation of election petitions by non-residents violated the First Amendment but upheld the portion of the law requiring that petitions contain language in large, red type stating whether the circulator is paid or is a volunteer.<sup>534</sup> The court agreed that the circulation of petitions is core political speech and found that there are increased costs associated with using untrained solicitors.<sup>535</sup> The court found that the ban on nonresident petition circulators was subject to strict scrutiny and that the out-of-state ban imposed a heavy burden on the plaintiff-intervenors efforts to promote their political views in Nebraska.<sup>536</sup> The court noted that the majority of circuit courts that have reviewed similar restrictions applied strict scrutiny and have made similar determinations. The court then found that *Jaeger* did not control and distinguished it on the grounds that the court in *Jaeger* specifically stated there was no evidence in the record of the alleged burden associated with the ban while the plaintiffs and intervenors here offered evidence of, among other things, increased cost, a reduction of the available pool of circulators if only in-state-petitioners were used, a lack of petition circulation firms in Nebraska and few instances of fraud.<sup>537</sup> The court also found that there were less restrictive means to meet the ability to subpoena out-of-state residents, such as a consent to jurisdiction or by including an affidavit including the petitioners name and address.<sup>538</sup>

In contrast the court found that requiring the disclosure in large red type did not impose a severe burden on First Amendment rights.<sup>539</sup> The court found that the disclosure was neither a pejorative label nor compelled speech but simply a way to inform the electorate of the status of the petitioner as paid or volunteer. The court also found no violation of the Equal Protection Clause as the plaintiff offered no evidence that they were a protected class.

#### **64. Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections – New Jersey 2011**

The ACLU of New Jersey, Rutgers School of Law-Newark Constitutional Litigation Clinic, and New Jersey Appleseed Public Interest Law Center filed a lawsuit on April 19, 2011, against the Middlesex County Board of Elections on behalf of Rutgers students, Middlesex County residents, the Latino Leadership Alliance of New Jersey, and New Jersey Citizen Action challenging the failure of New Jersey to

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<sup>534</sup> *Citizens in Charge v. Gale*, 810 F. Supp 2d 916 (D. Neb. 2011).

<sup>535</sup> *Id.* at 923.

<sup>536</sup> *Id.* at 925.

<sup>537</sup> *Id.* at 926.

<sup>538</sup> *Id.*

<sup>539</sup> *Id.* at 928

offer Election Day registration of voters as an unnecessary obstacle to exercise of the right to vote in violation of the state constitution.<sup>540</sup> New Jersey law requires 30 days of residence to qualify as an eligible voter. In order to verify voters' identities, the state also required voters to submit their registration applications at least 21 days before an election. However, new electronic databases that New Jersey implemented in accordance with the Help America Vote Act allowed rapid verification of eligibility, obviating the rationale for the three-week cutoff.<sup>541</sup>

The plaintiffs asserted that the defendant's failure to allow them to register on Election Day and have their votes counted "imposes severe burdens on the fundamental right to vote as guaranteed by the New Jersey Constitution art. 2, Sec. 1, Para. 3, and as implemented by N.J.S.A. 10:6-2(c) of the New Jersey Civil Rights Act."<sup>542</sup> The plaintiffs' motion for summary judgment was denied and the defendant's cross motion for summary judgment was granted by the trial court on December 11, 2013, in an order with limited findings of facts and conclusions of law. The court determined that the advance registration requirement imposed only a minimal burden on the right to vote, and, as a result, there was no need for the state to establish a compelling interest.

The lower court's order was reversed and remanded for further proceedings due to the failure to make sufficient findings of fact and conclusions of law particularly with regard to whether the state had demonstrated that the registration requirement advanced the stated purpose.<sup>543</sup> The appellate court noted that the defendants were asserting a legitimate interest in preventing voter registration fraud as a basis for requiring advance registration, but, per the decision, "...plaintiffs submitted reams of evidence, including certifications, reports and deposition transcripts, in support of their contention that New Jersey's SVRS has eliminated voter fraud as valid concern, and explaining why it was no longer necessary to have an advance registration requirement to ensure the integrity of the electoral process."<sup>544</sup>

On remand for additional findings, the lower court concluded that the registration requirement did not warrant strict scrutiny review, and the state's important interests outweighed the minimal burden on voting rights and again granted the defendant's motion for summary judgment on April 14, 2015. The decision was

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<sup>540</sup> Complaint for Declaratory and Injunctive Relief, Rutgers Univ. Student Assembly. v. Middlesex Cty. Bd. Of Elections, 102 A.3d 408 (N.J. Sup. Ct. Ch. Div. Apr. 19, 2011).

<sup>541</sup> *Id.* at ¶¶ 72-75.

<sup>542</sup> *Id.* at ¶ 72.

<sup>543</sup> *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 102 A.3d 408 (Supr. Ct N.J. App. Div. 2014).

<sup>544</sup> *Id.* at 415.

affirmed on appeal.<sup>545</sup> The Supreme Court of New Jersey denied the plaintiff's petition for certification and ordered that the notice of appeal be dismissed on January 17, 2017.<sup>546</sup>

## **65. Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n – Arizona 2012**

In 2000, Arizona voters adopted an initiative, Proposition 106, which amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest it in an independent commission, the Arizona Independent Redistricting Commission (AIRC). The Arizona Legislature challenged the map for congressional districts adopted by the AIRC in January 2012 seeking a declaration that Proposition 106 violated the Elections Clause of the U.S. Constitution and that the adopted congressional maps were unconstitutional and void, and an injunction prohibiting the AIRC from adopting or enforcing any maps.<sup>547</sup> The legislature argued that the Elections Clause—which provides, in part, that “the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof”<sup>548</sup>—required that only state legislative bodies conduct congressional redistricting and precluded delegating the task to an independent commission.<sup>549</sup> AIRC responded that “Legislature” should not be read solely to mean elected representatives but rather all legislative authority conferred by the state's constitution, including ballot measures adopted by the people themselves. A three-judge district court rejected the legislature's complaint on the merits,<sup>550</sup> and the Arizona Legislature appealed the decision to the Supreme Court.

The ACLU submitted an amicus brief with other organizations in support of the AIRC, urging the Court to uphold the district court finding that the Elections Clause does not preclude redistricting by an independent commission created by the people of Arizona.<sup>551</sup> The brief argued that partisan gerrymandering subverts the federal electoral system envisioned by the Constitution by undermining the concept

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<sup>545</sup> *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 141 A.3d 335 (Supr. Ct N.J. App. Div. 2016).

<sup>546</sup> *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 158 A.3d 567 (N.J. 2017).

<sup>547</sup> *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1049 (D. Ariz. 2014).

<sup>548</sup> U.S. Const., Art. I, § 4, cl. 1.

<sup>549</sup> *See Ariz. State Legislature*, 997 F. Supp at 1051.

<sup>550</sup> *Ibid.*

<sup>551</sup> Brief of Campaign Legal Center et al. as *Amici Curiae* Supporting Appellees, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, No. 13–1314 (2015).

of majority rule, reducing the competitiveness of elections, and contributing to the political polarization that risks gridlock.<sup>552</sup> The brief also argued that citizen-driven structural reforms are a constitutionally permissible form of direct democracy, especially in light of courts' inability to date to address extreme partisan gerrymandering.<sup>553</sup>

The Supreme Court affirmed the district court's judgement, holding in a 5-4 decision that the Elections Clause permits Arizona to use a commission to adopt congressional districts and that "lawmaking power in Arizona includes the initiative process."<sup>554</sup> The Court noted that dictionaries printed at the time of the drafting of the Constitution defined the word "legislature" as "the power that makes laws," and in Arizona, the power to make laws rests not only with the official body of elected representatives, but with the voters themselves, who have power under the Arizona State Constitution to pass laws and constitutional amendments through initiatives.<sup>555</sup> The Court noted that such an interpretation of the Elections Clause is "in line with the fundamental premise that all political power flows from the people."<sup>556</sup>

## **66. ACLU of Iowa v. Schultz – Iowa 2012**

In July 2012, the Iowa Secretary of State adopted and immediately made effective through emergency rulemaking two administrative rules impacting voters' ability to stay on the voter registration rolls. The first rule created a procedure where any person, including individuals unconnected with the state, would be allowed to file an unsworn, unverified complaint challenging a voter's eligibility to vote.<sup>557</sup> The second rule allowed the Secretary to initiate challenge and removal proceedings against registered Iowa voters on the grounds of alleged non-U.S. citizenship based on the Secretary's comparison information from the state's voter registration rolls with unspecified state and federal "lists of foreign nationals" and using unspecified criteria.<sup>558</sup> The scheme was similar to voter purges in other states like Florida and

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<sup>552</sup> *Id.* at 5.

<sup>553</sup> *Ibid.*

<sup>554</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659 (2015).

<sup>555</sup> *Id.* at 2671.

<sup>556</sup> *Id.* at 2677.

<sup>557</sup> First Amended Complaint for Judicial Review of Agency Action under Iowa Code §17A at ¶ 13, *ACLU of Iowa v. Schultz*, No. CV 9311 (Dist. Ct. Polk Cty. Aug. 8, 2012).

<sup>558</sup> *Id.* at ¶ 14.

Colorado, where thousands of eligible voters had been wrongfully disenfranchised.<sup>559</sup>

The ACLU and League of United Latin American Citizens (LULAC) filed a motion in state court to enjoin the emergency rules on the grounds that the use of emergency rulemaking power was improper under the Iowa Code and that the Secretary exceeded his statutory authority. The plaintiffs argued the rules were vague and posed a substantial risk of depriving qualified voters of their fundamental right to vote.<sup>560</sup> Because the administrative rules were adopted in close proximity to the November 2012 Presidential election, the ACLU sought expedited review by the court. The state filed a motion to dismiss for lack of standing. The trial court denied the defendants' motion to dismiss,<sup>561</sup> and granted the ACLU's motion for temporary injunctive relief.<sup>562</sup> Despite the temporary injunction against the emergency rules, the Secretary proceeded with developing permanent rules through Iowa's standard rulemaking process, which took effect in March 2013.<sup>563</sup>

The ACLU and LULAC then sought to permanently enjoin both the emergency and permanent rules.<sup>564</sup> The district court in Polk County granted the ACLU's motion, ruling that the Secretary exceeded his statutory authority under the Iowa Code; the court did not address the ACLU's constitutional claim that the rules violated qualified Iowa voters of the fundamental right to vote.<sup>565</sup> The Secretary appealed to the Iowa Supreme Court<sup>566</sup> but ultimately dropped the appeal prior to a ruling in

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<sup>559</sup> Press Release, ACLU, Victory for Voting Rights: State Drops Voter Purge Appeal (Mar. 13, 2005), <https://www.aclu.org/press-releases/victory-voting-rights-state-drops-voter-purge-appeal>.

<sup>560</sup> First Amended Complaint for Judicial Review of Agency Action under Iowa Code §17A at ¶¶ 21-23, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Aug. 8, 2012).

<sup>561</sup> Ruling and Order on Respondent's Motion to Dismiss, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Sep. 11, 2012).

<sup>562</sup> Order on Petitioners' Motion for Temporary Injunction, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Sep. 13, 2012).

<sup>563</sup> Second Amended Petition for Judicial Review of Agency Action under Iowa Code §17A at ¶ 28, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Mar. 29, 2013).

<sup>564</sup> *Id.*

<sup>565</sup> Order re Reconsideration of Review on the Merits, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Mar. 5, 2014).

<sup>566</sup> Motion to Dismiss and Motion for Reconsideration, ACLU of Iowa v. Schultz, No. 14-0585 (Iowa Oct. 20, 2014).

March 2015, effectively keeping in place the lower court’s permanent injunction against the rules.<sup>567</sup>

## **67. Guare v. New Hampshire – New Hampshire 2012**

In 2012, individual plaintiffs represented by the ACLU of New Hampshire filed suit in state court challenging a newly enacted law that added an affidavit requirement to the state’s voter registration form for registrants to sign, attesting that they are subject to the state’s residency laws. By agreeing to become permanent residents of the state, voter registrants would have to meet the state’s residency requirements, and thereby would be required to obtain a New Hampshire driver’s license and to register their vehicles in New Hampshire—both at significant cost—in order to vote.<sup>568</sup> The new voter registration requirement was not only unnecessary and onerous, it directly conflicted with New Hampshire law governing eligibility to vote. Specifically, New Hampshire law permits all inhabitants with a voting *domicile* to vote; a voting domicile under state law is defined as “that one place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence.”<sup>569</sup> By contrast, state law defines a resident as someone who is domiciled and, additionally, demonstrates intent to designate their place of abode as their principal place of physical presence for the indefinite future to the exclusion of all others.<sup>570</sup> The new law targeted students and other mobile domiciliaries who were qualified to vote in the state, but did not wish to accept the legal financial obligations associated with becoming permanent residents of the state.<sup>571</sup> Notably, state law explicitly permitted students attending school in New Hampshire to choose New Hampshire as their voting domicile.<sup>572</sup> The amended voter registration form thus contained language that directly conflicted with applicable state law and conveyed inaccurate information.

The ACLU of New Hampshire challenged the new voter registration requirement on the ground that it violated various provisions of New Hampshire’s state law and constitution and the Fourteenth and Twenty-Fourth Amendments of the U.S.

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<sup>567</sup> Appellant’s Voluntary Dismissal of Appeal, *ACLU of Iowa v. Schultz*, No. 14-0585 (Iowa Mar. 13, 2015).

<sup>568</sup> Second Amended Petition for Preliminary Injunction, Declaratory Judgement, and Final Injunctive Relief at ¶ 9, *Guare v. New Hampshire*, No. 2014-558 (N.H. Sup. Ct. May 15, 2015).

<sup>569</sup> N.H. REV. STAT. § 654:1.

<sup>570</sup> N.H. REV. STAT. § 21:6.

<sup>571</sup> Second Amended Petition for Preliminary Injunction, Declaratory Judgement, and Final Injunctive Relief at ¶ 1, *Guare v. New Hampshire*, No. 2014-558 (N.H. Sup. Ct. May 15, 2015).

<sup>572</sup> N.H. REV. STAT. § 654:1.

Constitution.<sup>573</sup> In September 2012, the Strafford County Superior Court preliminarily enjoined the new voter registration language from being included in the registration form, holding that the language “does not pass constitutional muster, and hinders educational efforts related to the election pertaining to qualifications for registering to vote.”<sup>574</sup> The court added that the language advanced a “confusing expression of the law to be considered by ... those prospective voters in the position of the four student petitioners, that is, non-resident persons who otherwise qualify to vote and would not like to register and/or proceed to exercise their voting rights without feeling they are subjecting themselves ... to residency law obligations.”<sup>575</sup>

In March 2014, the ACLU of New Hampshire filed a motion for summary judgment asking the Superior Court to issue a final, permanent declaratory judgment that the law violated the New Hampshire Constitution.<sup>576</sup> In July 2014, the Strafford County Superior Court issued a decision striking down the law, finding that it did indeed violate the New Hampshire Constitution.<sup>577</sup> In its decision, the court called the added language “a confusing and unreasonable description of the law” that imposed a chilling effect on the right to vote of those domiciled in New Hampshire. The state appealed this decision to the New Hampshire Supreme Court, which affirmed the trial court ruling in May 2015.<sup>578</sup> The Court concluded: “Because the challenged language is confusing and inaccurate, and because, as the trial court found, it could cause an otherwise qualified voter not to register to vote in New Hampshire, we hold that, as a matter of law, the burden it imposes upon the fundamental right to vote is unreasonable.”<sup>579</sup>

## **68. Montes v. City of Yakima – Washington 2012**

In 2012, the ACLU and ACLU of Washington filed suit against the City of Yakima on behalf of Latino voters, arguing that the city’s at-large voting system deprived Latino voters of the right to elect a representative of their choice to the city

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<sup>573</sup> Second Amended Petition for Preliminary Injunction, Declaratory Judgement, and Final Injunctive Relief at ¶¶ 97-135, *Guare v. New Hampshire*, No. 2014-558 (N.H. Sup. Ct. May 15, 2015).

<sup>574</sup> *Rivers v. New Hampshire*, No. 219-2012-CV-00458, slip op. at 7 (N.H. Sup. Ct. Sep. 24, 2012).

<sup>575</sup> *Id.* at 5.

<sup>576</sup> Motion for Summary Judgment, *Guare v. New Hampshire*, No. 219-2012-CV-00458 (N.H. Sup. Ct. Mar. 14, 2014).

<sup>577</sup> *Guare v. New Hampshire*, No. 219-2012-CV-00458 (N.H. Sup. Ct. Jul. 24, 2014).

<sup>578</sup> *Guare v. New Hampshire*, No. 14-0585 (N.H. Sup. Ct. May 15, 2015).

<sup>579</sup> *Id.* at 7.

council.<sup>580</sup> The Yakima City Council was comprised of seven members, who were all elected using an at-large process for both residency district and citywide council member seats. No Latino had ever been elected to the city council since the at-large system had been put in place 37 years prior, even though Latino voters accounted for 33.4% of the city's voting-age population.<sup>581</sup> The complaint argued that racially polarized bloc voting prevented Latino-preferred candidates from being elected and cited a history of private and official discrimination against the city's Latino population in employment, education, health services, housing, and in voting and political participation.<sup>582</sup>

After the close of discovery, both parties filed cross-motions for summary judgment.<sup>583</sup> The Department of Justice filed a Statement of Interest in the case, opposing the city's summary judgment motion.<sup>584</sup> The district court determined that the plaintiffs met the *Gingles* preconditions for Section 2 claims and granted their summary judgment motion. The court found that (1) the Latino population was sufficiently large and geographically compact to allow it to form a majority of voters in a single-member district; (2) the Latino population constituted a politically cohesive minority group and voted as a bloc; (3) the non-Latino majority voted sufficiently as a bloc to enable it to usually defeat the Latino minority's preferred candidate; and (4) the totality of circumstances demonstrated that Yakima City Council elections were not equally open to participation by Latino voters.<sup>585</sup> The court found that there was no genuine issue of material fact that the city's voting system was not equally open to participation by members of the Latino community, in violation of Section 2 of the Voting Rights Act, as well as no issue of fact that the plaintiffs' proposed districting plans were acceptable under existing law.<sup>586</sup> In its Section 2 analysis, the court also discussed a history of voting-related discrimination in Yakima County, including several prior violations of the Voting Rights Act such as literacy tests and failure to provide Spanish-language voting materials as recently as ten years prior.<sup>587</sup> Considering all of the circumstances, the

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<sup>580</sup> Complaint, *Montes v. City of Yakima*, No. 12-CV-3108 (E.D. Wa. Aug. 22, 2012).

<sup>581</sup> *Id.* at ¶¶ 8, 10, 14, 17-27.

<sup>582</sup> *Id.* at ¶¶ 10, 14, 19.

<sup>583</sup> Plaintiffs' Motion for Summary Judgment, *Montes v. City of Yakima*, No. 12-CV-3108 (E.D. Wa. July 1, 2014); Defendants' Motion for Summary Judgment, *Montes v. City of Yakima*, No. 12-CV-3108 (E.D. Wa. July 1, 2014).

<sup>584</sup> Statement of Interest of the United States of America, *Montes v. City of Yakima*, No. 12-CV-3108 (E.D. Wa. Aug. 18, 2014).

<sup>585</sup> *See Montes v. City of Yakima*, 40 F.Supp.3d 1377, 1390-1400 (E.D. Wa. 2014).

<sup>586</sup> *Id.* at 1386.

<sup>587</sup> *Id.* at 1409-1410.

court determined that the non-Latino majority “routinely suffocate[d] the voting preferences of the Latino majority”<sup>588</sup> in violation of Section 2 and required the parties to meet and confer on a proposed injunction and proposed remedial districting plan.<sup>589</sup>

The parties were unable to agree on a joint remedial districting plan, so each side submitted its own plan. A third plan was also submitted by FairVote, a voting-related nonprofit.<sup>590</sup> The defendants’ plan and FairVote’s plan were each hybrid plans with some single-member districts and some at-large seats, while the plaintiffs’ plan included seven single-member districts.<sup>591</sup> The district court rejected the hybrid plans, finding that they would not remedy the Section 2 violations and were potentially unlawful under state law.<sup>592</sup> Instead, the court adopted the plaintiffs’ proposed plan and issued a final injunction requiring its implementation.<sup>593</sup> The court also ordered the defendants to pay the plaintiffs’ costs and attorney’s fees.<sup>594</sup>

Both the defendants and FairVote appealed, arguing that the single-member districts violated the Equal Protection Clause.<sup>595</sup> However, the appeal was stayed pending the Supreme Court’s decision in *Evenwel v. Abbott*, which eventually held that the Equal Protection Clause does not forbid the use of total population, as opposed to voting-age population or registered-voter population, as the basis for equalizing the size of voting districts. After the *Evenwel* decision, the parties agreed to a joint dismissal of the appeal, leaving the lower court’s judgment as final.<sup>596</sup>

### **69. Veasey v. Abbott; Veasey v. Perry – Texas 2013**

Senate Bill 14 (SB 14) was introduced in the Texas legislature in May 2011 and submitted to the Justice Department for preclearance review in July 2011. Considered the strictest photo ID law in the nation, it required Texas voters to present one of seven limited forms of photo ID to cast a ballot. Prior to the law’s introduction, Texas voters were permitted to present a variety of documents for

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<sup>588</sup> *Id.* at 1407.

<sup>589</sup> *Id.* at 1415.

<sup>590</sup> *Montes v. City of Yakima*, No. 12-CV-3108, 2015 WL 11120964, at \*3-4 (E.D. Wa. Feb. 17, 2015).

<sup>591</sup> *Id.* at \*2-\*5.

<sup>592</sup> *Id.* at \*7, 9.

<sup>593</sup> *Id.* at \*11-\*12.

<sup>594</sup> *Montes v. City of Yakima*, No. 12-CV-3108, 2015 WL 11120966, at \*1 (E.D. Wa. June 19, 2015).

<sup>595</sup> Notice of Appeal, *Montes v. Yakima*, No. 12-CV-3108 (E.D. Wa. July 17, 2015).

<sup>596</sup> Order, *Montes v. City of Yakima*, Nos. 15-35309, 15-35593 (9th Cir. Apr. 12, 2016).

proof of identification to vote. SB 14 narrowed the kinds of identification documents Texas voters could use to vote, despite no evidence of in-person voter fraud in Texas.<sup>597</sup> During the legislature's consideration of SB 14, there was significant evidence presented regarding the discriminatory impact of the photo ID law on the state's Black and Hispanic voters, particularly those who lived in poverty. At the time SB 14 was being considered, Texas had the highest rate of poverty in the nation with more than four million people living below the poverty line; three-quarters of which were minorities. State legislators and representatives from civil rights organizations who opposed the bill cited the particular burdens faced by these voters as being the least likely to possess photo ID and the most burdened by the bill's strict photo ID requirement.

Several amendments to SB 14 were proposed to mitigate the discriminatory effect of the bill on minority voters; all were rejected during the legislative process. These mitigating amendments included measures such as allowing state university IDs, providing travel reimbursements for impoverished individuals to obtain a photo ID, and requiring the Secretary of State to conduct a racial impact analysis on whether the photo ID law created disproportionate burdens on minority voters.

Proponents of the bill repeatedly identified voter fraud as the justification for a strict photo ID requirement but provided no evidence showing in-person voter fraud was a problem in Texas. In fact, the legislative record of the bill did not contain a single officially documented case of in-person voter fraud in the state.<sup>598</sup> The lack of evidence of fraud led opposing legislators and stakeholders to voice concern that the bill was not intended to curb voter fraud but to block disfavored voters from voting.<sup>599</sup>

When Texas initially sought preclearance review from the Justice Department in July 2011, civil rights groups opposed preclearance and submitted comments to the

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<sup>597</sup> This narrow class of approved identification included: A Texas driver's license; a personal identification card issued by the Texas Department of Public Safety and featuring the voter's photograph; an election identification certificate (a new form of state photo identification document created by SB 14); a U.S. military identification card featuring the voter's photograph; a U.S. citizenship certificate featuring the voter's photograph; a U.S. passport; or a concealed handgun permit issued by the Texas Department of Public Safety. Notably, the law did not permit federal or state government employee photo ID cards, state-issued student photo ID cards, or tribal photo ID cards.

<sup>598</sup> Letter from Tex. State Conf. of the NAACP et al. to T. Christian Herren, Chief, Voting Section, Civil Rights Div., Dep't of Justice, (Sep. 14, 2011).

<sup>599</sup> *See id.* (citing R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS: FINAL REPORT 40-42 (2009), <http://www.pewcenteronthestates.org/uploadedFiles/Final%20report20090218.pdf>).

department objecting to the law.<sup>600</sup> In response to the Attorney General’s request for more information, Texas submitted a computer generated list of nearly 800,000 registered voters it had been unable to match with corresponding entries in its Department of Public Safety (DPS) driver’s license and state ID database. This “no-match” list consisted of approximately 300,000 voters, almost 40% of whom were Hispanic.<sup>601</sup> Experts also estimated that more than 600,000 registered Texas voters—and many more unregistered but eligible voters—did not have an ID approved under the law.<sup>602</sup> The Attorney General concluded that Texas’ own data showed that “Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack” a DPS-issued driver’s license or ID card.<sup>603</sup> Further, none of methods that Texas stipulated would help voters attain SB 14 compliant ID alleviated the impact of SB 14 on Hispanic voters. To obtain the supposedly free ID some voters were required to pay \$22 for a copy of a birth certificate and all had to travel to driver’s license offices, which 81 counties in Texas lacked.<sup>604</sup> Accordingly, in March 2012 the Department of Justice denied preclearance for SB 14.

Texas then filed for a declaratory judgment in the U.S. District Court for the District of Columbia, seeking to preclear the law and including a claim that Section 5 of the Voting Rights Act was unconstitutional.<sup>605</sup> The ACLU intervened, representing individuals and organizations opposed to the voter ID requirement. The court ruled against Texas and blocked implementation of the voter ID law, finding not only that Texas failed to demonstrate that SB 14 would not “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise... [but] in fact, record evidence demonstrates that, if implemented, SB 14 will likely have a retrogressive effect.” Since both the Justice Department and D.C. district court found the photo ID law would have a retrogressive effect, both entities withheld judgment on whether SB 14 was enacted with a discriminatory purpose.

After the Supreme Court’s decision in *Shelby County v Holder* immobilized federal preclearance, however, Texas swiftly implemented the voter ID law. Civil rights groups challenged SB 14 claiming violations of Section 2 of the Voting Rights Act

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<sup>600</sup> *Id.*

<sup>601</sup> *Texas v. Holder*, 888 F.Supp.2d 117, 140 (D.D.C. 2012).

<sup>602</sup> This figure represented approximately 4.5% of all registered voters in Texas at the time. *Veasey v. Perry*, 71 F. Supp. 3d 627, 659 (S.D. Tex. 2014).

<sup>603</sup> Letter from Assistant Attorney Gen. Thomas E. Perez, Civil Rights Div., Dep’t of Justice to Keith Ingram, Esq. (Mar. 12, 2012), <https://www.justice.gov/crt/voting-determination-letter-34>.

<sup>604</sup> *See Texas v. Holder*, 888 F.Supp.2d at 140.

<sup>605</sup> *Id.*

and the Fourteenth and Fifteenth Amendments. After extensive discovery and a nine-day bench trial, a district court sided again with the challengers of SB 14 on every claim in *Veasey v. Abbott*.<sup>606</sup> On the question of discriminatory effect on minority voters, the court considered it an “understatement” to “call SB 14’s disproportionate impact on minorities statistically significant.”<sup>607</sup> The court found that African Americans and Hispanics made up a disproportionate portion of the poor in Texas as compared to whites, which was directly linked to “socioeconomic effects caused by decades of racial discrimination” and that the poor were over eight times less likely to own an ID that satisfied SB 14’s definition of a qualifying ID.<sup>608</sup> As a result, the court concluded that “SB 14 specifically burdens” minorities, who were less able than whites to bear the costs associated with obtaining the ID that SB 14 required.<sup>609</sup>

Significantly, the court found that Texas enacted the photo ID law to intentionally discriminate against minority voters.<sup>610</sup> Both “by its interaction with the vestiges of past and current racial discrimination,” the court found SB 14 was discriminatorily crafted to harm the ability of minority groups to exercise the right to vote.<sup>611</sup> However because the district court entered a final order striking down Texas’s voter identification laws just nine days before early voting began in the 2014 election, the Fifth Circuit stayed the court’s order. Elections were held with SB 14 in place while litigation continued.

Texas then appealed the district court decision to the Fifth Circuit. The ACLU filed an amicus brief in support of the appellees, which principally focused on a Seventh Circuit decision that upheld Wisconsin’s photo ID law, a case upon which Texas relied heavily to defend its photo ID law and where the ACLU represented a set of plaintiffs. The ACLU brief argued that the Seventh Circuit decision applied a flawed legal analysis in the Wisconsin case and was wrongly decided, and urged the Fifth Circuit to reject its analysis.<sup>612</sup> The Fifth Circuit panel affirmed the district court’s holding that the law had a discriminatory effect in violation of the Voting Rights Act, vacated the holding that the law constituted a poll tax, and remanded

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<sup>606</sup> *Veasey*, 71 F. Supp. 3d 627.

<sup>607</sup> *Id.* at 695 (finding that, among registered voters, African Americans were 305% more likely and Hispanics were 195% more likely to lack eligible ID than were whites).

<sup>608</sup> *Id.* at 664.

<sup>609</sup> *Id.* at 672.

<sup>610</sup> *Id.* at 695

<sup>611</sup> *Id.* at 698.

<sup>612</sup> Brief of *Amici Curiae* the American Civil Liberties Union and the American Civil Liberties Union of Texas in Support of Appellees, *Veasey v. Abbott*, No. 14–41127 (5th Cir. Mar. 10, 2015).

for further findings on the discriminatory purpose claim.<sup>613</sup> Texas then sought *en banc* review, which was granted. In the *en banc* proceeding, the ACLU filed another amicus brief supporting affirmance, focusing again on the flawed factual and legal analysis of the Seventh Circuit decision.<sup>614</sup> When the full Fifth Circuit reached the merits of SB 14 two years after the stay was granted, they affirmed the lower court holding that Texas’ photo ID law discriminated against African American and Hispanic voters. The Fifth Circuit supported the district court’s finding of “a stark, racial disparity between those who possess or have access to [acceptable photo ID], and those who do not.”<sup>615</sup> The court also recognized that SB 14’s legislative proponents made little attempt to lessen the discriminatory burden on minority voters, finding “[t]he record shows that drafters and proponents of SB 14 were aware of the likely disproportionate effect of the law on minorities, and that they nonetheless passed the bill without adopting a number of proposed ameliorative measures that might have lessened this impact.”<sup>616</sup> Further, the *en banc* panel agreed that the stated reason for the necessity of photo ID could be a lie, stating “[t]here is evidence that could support a finding that the Legislature’s race-neutral reason of ballot integrity offered by the State is pretextual.”<sup>617</sup> The Fifth Circuit remanded the case back to the district court to reevaluate its finding of discriminatory purpose. A cert petition to the Supreme Court was denied, effectively letting the Fifth Circuit decision, largely upholding the district court decision.<sup>618</sup>

On remand and pursuant to the Fifth Circuit’s instructions, the district court entered an interim remedy to help cure the discriminatory effect of SB 14. The court’s remedy allowed voters without one of the limited forms of SB 14 ID to vote a regular ballot after signing a declaration indicating their obstacle to obtaining the ID.<sup>619</sup> This was intended as a “stop-gap” measure to lessen the discriminatory effects of the law on the impending Presidential election while the district court proceeded on remand to examine the discriminatory intent claim. After additional briefing and oral argument, the district court reweighed the evidence according to Fifth Circuit guidance and once again found that SB14 had a discriminatory purpose.<sup>620</sup> During the period that the case was on remand, however, the Texas

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<sup>613</sup> *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

<sup>614</sup> Brief of *Amici Curiae* the American Civil Liberties Union and the American Civil Liberties Union of Texas in Support of Appellees, *Veasey v. Abbott*, No. 14–41127 (5th Cir. May 16, 2016).

<sup>615</sup> *Veasey v. Abbott*, 830 F.3d 216, 264 (5th Cir. 2016) (*en banc*).

<sup>616</sup> *Id.* at 236.

<sup>617</sup> *Id.* at 237.

<sup>618</sup> *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 612 (2017).

<sup>619</sup> *See Veasey v. Abbott*, 265 F.Supp. 3d 684, 687 (S.D. Tex. 2017).

<sup>620</sup> *Veasey v. Abbott*, 249 F.Supp.3d 868, 871 (S.D. Tex. 2017).

legislature passed a new law that codified the court’s remedy with respect to the plaintiffs’ discriminatory effect claim. The district court then permanently enjoined the new law pursuant to the plaintiffs’ discriminatory intent claim;<sup>621</sup> a divided panel of the Fifth Circuit overturned the injunction on appeal as premature and an abuse of the district court’s discretion.<sup>622</sup> In September 2018, nearly seven years after Texas passed its initial photo ID law, the Texas district court dismissed the case for the reasons cited in the Fifth Circuit’s opinion.<sup>623</sup> As a result, the Texas photo ID law is partially in place, but only insofar as it was modified to address the Fifth Circuit’s finding that the original version of the law violated Section 2’s prohibition on voting practices with discriminatory results.

#### **70. League of Women Voters of N.C. v. North Carolina – North Carolina 2013**

After *Shelby County v. Holder* was decided and freed North Carolina from federal preclearance, North Carolina’s legislature announced its aim of passing an omnibus election reform bill aimed at curbing voter registration and voting opportunities.<sup>624</sup> In crafting the bill, the legislature asked for data from state agencies regarding the use of various voting practices specifically broken down into categories based on race. After obtaining the racial data, the General Assembly passed legislation curtailing voting and registration in five different ways—all of which disproportionately burdened African Americans.<sup>625</sup>

The ACLU, ACLU of North Carolina Legal Foundation, and Southern Coalition for Social Justice filed a lawsuit challenging the law in August 2013. The suit targeted numerous provisions of the North Carolina law that decreased opportunities for North Carolina’s African American residents to vote, including reducing the early voting period, eliminating same-day registration, and prohibiting “out-of-precinct” voting—all of which were disproportionately used by African Americans in the 2008 and 2012 general elections.<sup>626</sup> The bill also imposed a strict new photo ID requirement that disproportionately burdened African American voters.<sup>627</sup> The plaintiffs charged that these changes would reduce or eliminate voting opportunities relied on by hundreds of thousands of North Carolinians in recent

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<sup>621</sup> *Veasey*, 265 F.Supp.3d at 700.

<sup>622</sup> *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

<sup>623</sup> Final Judgment, *Veasey v. Abbott*, No. 2:13-cv-00193, (S.D. Tex. Sep. 17, 2018).

<sup>624</sup> 2013 N.C. SESS. LAWS 381.

<sup>625</sup> See *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

<sup>626</sup> Complaint at ¶¶ 1, 33, 41, 48, 50, 56, 79, *League of Women Voters of N.C. v. N.C.*, No. 1:13-cv-00660 (M.D. N.C. Aug. 12, 2013).

<sup>627</sup> *Id.* at ¶ 66.

elections and would result in longer lines throughout the remaining early voting period and on Election Day, further burdening the right to vote.<sup>628</sup> For example, North Carolina voters utilized early voting opportunities to an overwhelming extent: in the November 2012 elections, more than 2.5 million ballots were cast during early voting—more than half of all of the ballots cast in the election—and in the November 2008 elections, approximately 2.4 million ballots were cast during early voting.<sup>629</sup> At least 70.49% of African American voters cast their ballots during early voting in the 2012 general election, as compared with 51.87% of white voters who cast their ballot during that period.<sup>630</sup> In 2008, at least 70.92% of African American voters cast their ballots during early voting, compared to 50.95% of white voters.<sup>631</sup> Data also showed that African American voters used Sunday voting and same-day registration to vote at highly disparate rates compared to white voters.<sup>632</sup> The plaintiffs claimed violations of the Equal Protection Clause of the Constitution and Section 2 of the Voting Rights due to the undeniable burden and outsized impact the changes would have on North Carolina’s African American voters and requested declaratory, preliminary, and permanent injunctive relief to block the law from going into effect.

The district court consolidated the challenges to the law and conducted a bench trial in July 2015, with additional days of trial in 2016 on North Carolina’s photo ID provisions. The extensive trial record included numerous expert and fact witnesses demonstrating the racial impact and racial animus driving the voting changes. However, in a lengthy opinion in April 2016, the district court rejected the plaintiffs’ allegations that the challenged provisions were enacted with discriminatory intent and rejected the plaintiffs’ claims under both the Voting Rights Act and the U.S. Constitution.<sup>633</sup>

The Fourth Circuit reversed and ruled decidedly in favor of the challengers to strike down the various provisions of the law. In July 2016, the court held that the challenged provisions of the 2013 law were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act.<sup>634</sup> With respect to the racial animus driving the law, the Fourth Circuit observed:

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<sup>628</sup> *Id.* ¶ 76.

<sup>629</sup> *Id.* at ¶ 27.

<sup>630</sup> *Id.* at ¶ 34.

<sup>631</sup> *Id.* at ¶ 36.

<sup>632</sup> *Id.* at ¶¶ 39, 48.

<sup>633</sup> *N.C. State Conf. of NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016).

<sup>634</sup> *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

“[A]lthough the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. Thus the asserted justifications cannot and do not conceal the State’s true motivation.”<sup>635</sup> ‘

This motivation, the court concluded, was that “the State took away [minority voters’] opportunity because [they] were about to exercise it.”<sup>636</sup> With respect to the actions of the General Assembly:

“[I]n sum, relying on this racial data...[the legislature] enacted legislation restricting all—and only—practices disproportionately used by African Americans. When juxtaposed against the unpersuasive non-racial explanations the State proffered for the specific choices it made . . . we cannot ignore the choices the General Assembly made with this data in hand.”<sup>637</sup>

Citing the legislature’s use of racial data in crafting the voting changes, the court found the legislature made these choices intentionally with respect to cutting same-day registration, early voting, preregistration, and out-of-precinct voting.<sup>638</sup> With respect to the photo ID requirement, the court said that the use of the racial data the legislature used to craft the law “showed that African Americans disproportionately lacked the most common kind of photo ID, those issued by the Department of Motor Vehicles (DMV).” The court stated:

“[The] pre-*Shelby County* version of SL 2013–381 provided that all government-issued IDs, even many that had been expired, would satisfy the requirement as an alternative to DMV-issued photo IDs. After *Shelby County*, with race data in hand, the legislature amended the bill to exclude many of the alternative photo IDs used by African Americans. As amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess.”<sup>639</sup>

Faced with the factual record, the Fourth Circuit concluded that “the North Carolina General Assembly enacted the challenged provisions of the law with

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<sup>635</sup> *Id.* at 214.

<sup>636</sup> *Id.* at 215.

<sup>637</sup> *Id.* at 230.

<sup>638</sup> *Id.* at 216-218.

<sup>639</sup> *Id.* at 216.

discriminatory intent.”<sup>640</sup> The re-erection of racial barriers constituted “purposeful racial discrimination” and “the record evidence is clear that this is exactly what was done” in North Carolina.<sup>641</sup> That purposeful discrimination was coupled with significant—and predictable—impact, also detailed at length in the Fourth Circuit’s opinion.<sup>642</sup> For example, with respect to photo ID, the court found that African Americans “disproportionately lacked the photo ID required by [the law]...[which] establishes sufficient disproportionate impact [to meet legal standards]. The record evidence provides abundant support for that holding.”<sup>643</sup> Tactics such as removing public assistance IDs, among others, from a list of accepted IDs while continuing to allow all forms of ID that whites were most likely to have created disproportionate voting barriers. These barriers, coupled with widespread socioeconomic disparities between African Americans and whites in North Carolina, resulted in a regime that injured African Americans voters in a systematic fashion.

The Fourth Circuit enjoined the challenged provisions and granted the plaintiffs declaratory relief, holding the law unconstitutional and in violation of the Voting Rights Act. In December 2016, North Carolina sought Supreme Court review, which the Court denied in May 2017, effectively letting the decision and findings of the Fourth Circuit stand.<sup>644</sup> Sadly, the unjust impact of law had already impacted numerous elections in North Carolina.

## **71. Belenky v. Kobach – Kansas 2013**

In November 2013, the ACLU and ACLU of Kansas filed a lawsuit in state court challenging Kansas’ two-tiered voter registration system. Under the scheme, adopted without legal authority by Kansas Secretary of State Kris Kobach, voters who registered using the federal voter registration form (Federal Form) were only permitted to vote for federal offices and not for state or local elections unless they provided a birth certificate or passport as documentation of citizenship.<sup>645</sup> In effect, the Kansas Secretary of State subjected voters to an unprecedented and unlawful voter registration system that divided them into separate and unequal categories of voters with different rights and privileges based on nothing more than the method of registration.<sup>646</sup> The dual registration system permitted some voters to cast ballots

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<sup>640</sup> *Id.* at 215.

<sup>641</sup> *Id.* at 226.

<sup>642</sup> *Id.* at 230-32.

<sup>643</sup> *Id.* at 231.

<sup>644</sup> *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

<sup>645</sup> Petition for Declaratory and Injunctive Relief, *Belenky v. Kobach*, No. 2013-CV-1331 (Shawnee Cty. Dist. Ct., Nov. 21, 2013).

<sup>646</sup> *Id.* at 1-2.

for President and other federal offices, but prohibited them from voting for governor, state legislators, secretary of state, and other state and local offices.<sup>647</sup> The plaintiffs argued that the adoption and enforcement of the dual registration system deprived qualified voters of the right to vote in state and local elections in violation of the Kansas Constitution's guarantee of equal protection. The petition also alleged that the program violated the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, which held that the National Voter Registration Act preempted state documentary proof of citizenship requirements for individuals using the Federal Form to register.<sup>648</sup>

In June 2014, the plaintiffs filed a motion for a preliminary injunction and expedited hearing on the matter.<sup>649</sup> In July 2014, the court declined to grant injunctive relief, finding that uncertainty about the status of the law would further discombobulate the election.<sup>650</sup> Throughout 2015 and 2016, the court rejected a string of attempts by the defendants to dispose of the case, strongly criticizing the dual registration system as being "wholly without a basis of legislative authority" and in violation of state and federal law.<sup>651</sup> The court issued a final order in January 2016 granting summary judgment for the plaintiffs and holding that the Secretary of State overstepped his legal authority by creating a system that prevents Federal Form registrants from voting in state and local elections.<sup>652</sup> The court permanently barred any further implementation of the dual-voter scheme, restoring the voting rights of over 17,000 Kansans.<sup>653</sup> The case is now on appeal.

## **72. Wright v. Sumter County Board of Elections – Georgia 2014**

An individual plaintiff, represented by the ACLU, filed suit in 2014 challenging changes to the method of electing members and apportionment of the Board of Education of Sumter County, Georgia.<sup>654</sup> The Sumter County Board of Education packed Black voters into two of the existing five districts and added two more at-

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<sup>647</sup> *Id.* at 2.

<sup>648</sup> *Ibid.*

<sup>649</sup> Plaintiffs' Motion for a Preliminary Injunction and for an Expedited Hearing, *Belenky v. Kobach*, No. 2013-CV-1331 (Shawnee Cty. Dist. Ct., June 27, 2014).

<sup>650</sup> *See* Memorandum Opinion and Order at 6, *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct., Aug. 21, 2015).

<sup>651</sup> *Id.* at 27.

<sup>652</sup> Memorandum Opinion and Order at 26, *Belenky v. Kobach*, No. 2013C1331 (Shawnee Cty. Dist. Ct., Jan. 15, 2016).

<sup>653</sup> *Id.*

<sup>654</sup> Injunction to Stop March 18, 2014 and May 20, 2014 Sumter County School Elections, *Wright v. Sumter Cty. Bd. of Elections and Registration*, No. 1:14-cv-00042-WLS (M.D. Ga. Mar. 7, 2014).

large seats. This resulted in a 5-2 majority of white-preferred candidates on the Board of Education in a county where African Americans outnumbered white residents in total population (52% compared to 42.1%), voting-age population (49.5% to 46.7%), and in the number of registered voters (48.5% to 46.7%).<sup>655</sup> Prior to this lawsuit, the apportionment and method of election of members of the Sumter County Board of Education had for decades been the subject of multiple objections interposed by the Attorney General under Section 5 of the Voting Rights Act<sup>656</sup> and litigation by private plaintiffs.<sup>657</sup> Sumter County also has a bitter history of racial discrimination, including in the voting context.<sup>658</sup>

In *Wright*, the plaintiff alleged that the Board's addition of two at-large seats and apportionment of districts diluted African American voting strength in violation of Section 2 of the Voting Rights Act. The district court initially granted summary judgment to the county, but the Eleventh Circuit reversed the decision of the district court and remanded the case for further consideration.<sup>659</sup> The district court held a four-day bench trial in December 2017. At trial, the plaintiff relied on a racial bloc voting analysis of county elections performed by his expert.

The district court, after going through a detailed Section 2 analysis, ruled in favor of the plaintiff in March 2018.<sup>660</sup> The court found, based on the totality of the circumstances, "that African Americans in Sumter County have less opportunity to elect candidates of their choice than do white citizens," resulting in unlawful dilution of African American voting strength in violation of Section 2.<sup>661</sup> It further found that the plaintiff had presented an illustrative plan that was "likely to give African Americans a more proportional representation on the Board of Education

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<sup>655</sup> *Wright v. Sumter Cty. Bd. of Elections and Registration*, 301 F.Supp.3d 1297, 1302 (M.D. Ga. 2018).

<sup>656</sup> See Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., to Henry L. Crisp, Esq. (Sept. 6, 1983), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1990.pdf>; Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., to Henry L. Crisp, Esq. (Dec. 17, 1982), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1960.pdf>; Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., to Henry L. Crisp, Esq. (July 13, 1973), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1250.pdf>.

<sup>657</sup> See, e.g., *Edge v. Sumter Cty. Sch. Dist.*, 775 F.2d 1509 (11th Cir. 1985); *Edge v. Sumter Cty. Sch. Dist.*, 541 F. Supp. 55 (M.D. Ga. 1981).

<sup>658</sup> For a discussion of this history see Plaintiffs' Brief in Support of his Motion for Summary Judgment, 1:14-cv-00042 (M.D. Ga. Apr. 7, 2017).

<sup>659</sup> *Wright v. Sumter Cty. Bd. of Elections and Registration*, 657 Fed.Appx. 871, 873 (11th Cir. 2016) (per curiam).

<sup>660</sup> *Wright*, 301 F. Supp. 3d at 1297.

<sup>661</sup> *Id.* at 1323.

than does the current plan.”<sup>662</sup> As recommended by the parties, the court directed the Sumter County Board of Elections to confer with the county’s legislative delegation to give elected officials the first opportunity to remedy the unlawful election plan. After the Georgia General Assembly declined the court’s invitation to devise a remedy, the district court enjoined Sumter County from holding school board elections in 2018 using the unlawful plan.<sup>663</sup> After further efforts to devise a remedy did not bear fruit, the November 2018 general election went forward without any school board races on the ballot in Sumter County.

Meanwhile, the county appealed the injunctions to the Eleventh Circuit. In April 2019, after briefing was complete, the plaintiff filed a motion for a limited remand to allow the district court to devise a remedy in time for the 2020 school board elections.<sup>664</sup> The Eleventh Circuit granted the motion in May 2019 and returned the case to the district court.<sup>665</sup>

The district court proceedings are ongoing.

### **73. NAACP V. Husted – Ohio 2014**

In May 2014, the ACLU and ACLU of Ohio, on behalf of the Ohio State Conference of the NAACP, League of Women Voters of Ohio, A. Philip Randolph Institute, Bethel African Methodist Episcopal Church, and other African-American churches, filed suit against the Ohio Secretary of State, filed suit challenging a state law that eliminated the first week of early voting in Ohio and a directive from the Secretary of State even more egregiously slashed the slashed the early voting period by eliminating all Sundays, the Monday before Election Day and all evening voting hours for the upcoming 2014 General Election. The complaint alleged violation of the Equal Protection Clause of the Fourteenth Amendment by burdening the fundamental right to vote and Section 2 of the Voting Rights Act of 1965 by disproportionately burdening African American voters' ability to participate effectively in the political process.<sup>666</sup> Just 16 months earlier, a federal court granted a preliminary injunction, affirmed by the Sixth Circuit, halting the elimination of

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<sup>662</sup> *Id.* at 1326.

<sup>663</sup> *Wright v. Sumter Cty. Bd. of Elections and Registration*, 361 F.Supp.3d 1296, 1305-06 (M.D. Ga. 2018).

<sup>664</sup> Plaintiff-Appellee’s Motion for a Limited Remand, No. 18-11510; 18-13510 (11th Cir. Apr. 26, 2019).

<sup>665</sup> Order, *Wright v. Sumter Cty. Bd. of Elections and Registration*, No. 18-11510; 18-13510 (11th Cir. May 16, 2019).

<sup>666</sup> Complaint, *Ohio State Conference of the NAACP v. Husted*, No. 2:14-cv-00404 (S.D. Ohio May 1, 2014).

the last three days of early voting in 2012.<sup>667</sup>

During the 2012 Presidential election, more than 157,000 people voted during the time periods cut by SB 283 and Directive 2014-06. A disproportionately high percentage of those were low-income voters, many of whom were African American. African Americans also disproportionately voted on Sundays through “Souls to the Polls” programs common among the Black church community.<sup>668</sup> The lawsuit challenged these two restrictions on at least three theories: the restrictions: (1) placed an unconstitutional burden upon the right to vote of certain classes of voters (especially lower-income voters), (2) abridged the voting rights of citizens based on their race in violation of Section 2 of the Voting Rights Act, and (3) violated the equal protection clause by reflecting an intent to suppress voting specifically by African Americans.<sup>669</sup>

In September 2014, the Sixth Circuit affirmed the district court’s ruling that cuts to early voting in Ohio must be restored in time for the 2014 federal midterm elections,<sup>670</sup> but the Supreme Court stayed the lower court rulings without explanation, restoring the early voting restrictions in a 5-4 decision.<sup>671</sup> In April 2015, parties came to a settlement agreement restoring early voting opportunities, including an additional Sunday of voting for the upcoming presidential general election; a week of expanded weekday evening hours from 8 a.m. to 7 p.m. for the presidential primary election and general elections. The agreement took effect after the May 2015 primary and continued through 2018.<sup>672</sup>

#### **74. Howard v. Augusta-Richmond County – Georgia 2014**

The ACLU filed suit against Augusta-Richmond County on behalf of individual African American residents seeking to enjoin a state law that required the county to move its local election date from the November 2014 general election date to the May 2014 primary election date, which historically had a statistically low turnout

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<sup>667</sup> *Id.* at ¶ 1 (citing *Obama for Am. V. Husted*, 888 F. Supp. 2d 897 (S.D. Ohio 2012); *aff’d*, 697 F.3d 423 (6<sup>th</sup> Cir. 2012)).

<sup>668</sup> *Id.*; Press Release, ACLU, ACLU Files Federal Lawsuit Challenging Ohio’s Latest Attempts To Slash Early Voting Opportunities (May 1, 2014), <https://www.aclu.org/press-releases/aclu-files-federal-lawsuit-challenging-ohios-latest-attempts-slash-early-voting>.

<sup>669</sup> *Id.*; ACLU OF OHIO, Case Summary for NAACP, ET AL. V. HUSTED, ET AL. <https://www.acluohio.org/archives/cases/naacp-et-al-v-husted-et-al>.

<sup>670</sup> *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6<sup>th</sup> Cir. 2014).

<sup>671</sup> *Husted v. Ohio State Conference of the NAACP*, 135 S. Ct. 42 (2014) (mem.).

<sup>672</sup> Settlement Agreement, NAACP v. Husted, No. 2:14-cv-00404 (S.D. Ohio Apr. 17, 2015).

by voters of color.<sup>673</sup> The county had initially requested preclearance from the Attorney General to move the date of the local election, as it was required to do under Section 5 of the Voting Rights Act. The Justice Department objected, citing statistics that minorities were less likely to vote earlier in the year.<sup>674</sup> In its objection letter, the Justice Department noted that although the law—which provided that all nonpartisan elections for members of consolidated governments be held in conjunction with the primary in even-numbered years—was proposed as statewide legislation and did not name any specific jurisdictions, it only impacted the Augusta-Richmond mayoral and commissioner elections. The six other consolidated governments in Georgia either did not have any nonpartisan elected offices or already elected their nonpartisan officers on that date.<sup>675</sup> The objection letter also found that although statistically voter turnout was substantially lower in July than November for both Black and white voters, the drop in the participation rate for Black voters was significantly greater than that for white voters and that the differential had been particularly dramatic in recent elections.<sup>676</sup> The letter also indicated that the Justice Department’s analysis of the evidence could not preclude a determination that the change was adopted for a discriminatory purpose, noting:

“Voting is racially polarized in Augusta-Richmond. Census figures show that the black population has gradually increased over the years, such that black persons now comprise a majority of both the total and voting age populations in the consolidated jurisdiction. As a result of these changing demographics, electoral outcomes are particularly dependent on voter turnout.”<sup>677</sup>

After the Supreme Court struck down the Voting Rights Act’s Section 4(b) coverage formula as unconstitutional in *Shelby County v. Holder* and rendered Section 5 unenforceable, the Georgia legislature passed a law moving election dates earlier and permitted local governments to move the dates of their elections earlier as well. Augusta-Richmond County took advantage of this new law, prompting the ACLU’s suit. The ACLU suit argued that the *Shelby County* decision did not apply retroactively and that the Section 5 objection lodged by Department of Justice was

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<sup>673</sup> Complaint, *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097 (S.D. Ga. May 13, 2014).

<sup>674</sup> *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097, 2014 WL 12810317, at \*1; *see also* Objection Letter from Assistant Attorney General Thomas E. Perez, Civil Rights Division, Department of Justice to Deputy Attorney General Dennis R. Dunn, (Dec. 21, 2012).

<sup>675</sup> *See* Objection Letter from Assistant Attorney General Thomas E. Perez, Civil Rights Div., Dep’t of Justice to Deputy Attorney Gen. Dennis R. Dunn (Dec. 21, 2012).

<sup>676</sup> *Id.*

<sup>677</sup> *Id.*

still legally valid; therefore, the state action attempting to move the local elections remained unenforceable.<sup>678</sup>

The district court rejected the plaintiffs' motion for a preliminary injunction and granted the defendants' motion to dismiss.<sup>679</sup> The court also granted the defendants' motion for attorneys' fees, holding that the ACLU's lawsuit was "frivolous, unreasonable, or without foundation," because the result was foreclosed in light of the Supreme Court's prior ruling in *Shelby County*.<sup>680</sup> The plaintiffs appealed, arguing that they had presented evidence that *Shelby County* was not controlling and that the Justice Department's prior objection on Georgia's election dates still held precedential value. The Eleventh Circuit reversed the district court on the issue of attorneys' fees, finding that the lower court abused its discretion because there was no binding precedent at the time the complaint was filed establishing that *Shelby County* applied retroactively.<sup>681</sup> The Eleventh Circuit noted that Georgia's own attorneys had given contradictory statements on the effect of *Shelby County* on the Section 5 objection when questioned by state legislators, establishing that the plaintiffs' argument was far from "settled law" when it was filed.<sup>682</sup> The court held that no award of attorneys' fees was appropriate under the circumstances, bringing the case to an end.

#### **75. Griffin v. Schultz; Griffin v. Pate – Iowa 2014**

In November 2014, on behalf of Kelli Jo Griffin, an Iowa woman seeking to regain her right to vote, the ACLU and ACLU of Iowa Foundation filed suit in state court against state officials seeking declaratory, injunctive, and mandamus relief to effectuate that right.<sup>683</sup> The Iowa Constitution permanently disenfranchises individuals convicted of "infamous crimes," unless the governor restores the rights of citizenship to Iowa electors made ineligible.<sup>684</sup> From 2005 to 2011, by executive order, Iowa automatically restored voting rights to individuals convicted of felonies upon completion of their sentence, a process that reduced the number of

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<sup>678</sup> Complaint, *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097 (S.D. Ga. Apr. 18, 2014).

<sup>679</sup> *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097, 2014 WL 12810317, at \*1 (S.D. Ga. May 13, 2014).

<sup>680</sup> *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097, 2014 WL 5827144, at \*3 (S.D. Ga. Nov. 10, 2014).

<sup>681</sup> *Howard v. Augusta-Richmond Cty.*, 615 Fed. App'x 651 (11th Cir. 2015) (per curiam).

<sup>682</sup> *Id.* at 652.

<sup>683</sup> Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief, *Griffin v. Schultz*, No. EQCE077368 (Iowa Dist. Ct. Nov. 7, 2014).

<sup>684</sup> *Id.* at ¶ 2 (citing IOWA CONST. art. IV, § 16; *State ex rel. Dean v. Haubrich*, 83 N.W.2d 451 (Iowa 1957)).

disenfranchised Iowans by 81% and restored the right to vote to an estimated 100,000 individuals.<sup>685</sup> In 2011, the newly-installed governor issued an executive order that rescinded the previous executive order and required citizens with felony convictions to complete an application process of individualized review in order to petition the state for restoration of their voting rights. This move changed longstanding policy in Iowa regarding rights restoration and resulted in only 40 individuals whose rights were restored out of an estimated 14,350 individuals who had discharged a felony offense.<sup>686</sup>

The plaintiff had been previously convicted of non-violent drug crimes, successfully discharged her sentence of probation, and believed she was eligible to vote.<sup>687</sup> Her defense attorney representing her for her drug conviction advised her that her citizenship rights would be automatically restored by the governor's office, and she was not informed she was ineligible to vote. In November 2013, she registered to vote and cast a provisional ballot in a city election in Montrose, Iowa, which was not counted.<sup>688</sup>

After being acquitted of the perjury charge in March 2014, Griffin sued to invalidate the state's rules disenfranchising individuals with certain felony convictions. The suit claimed that the forfeiture of voting rights by those with criminal convictions violated the Iowa Constitution as applied to her case because her non-violent drug conviction did not qualify as an "infamous crime" under the state constitution. She argued that Iowa's process for disenfranchising voters convicted of felonies violated the Iowa Constitution's guarantee of the right of suffrage and Due Process Clause because it prohibited all Iowans with felony convictions from voting and not just those who had been convicted of "infamous crimes."<sup>689</sup>

The trial court granted summary judgment against Griffin on both claims,<sup>690</sup> and she appealed the decision to the Iowa Supreme Court.<sup>691</sup> The sole issue before the court was whether the felony crime of delivery of a controlled substance is an "infamous crime" for purposes of the Iowa Constitution. After a lengthy analysis of the concept of "infamy" at common law and as defined by other states, the Iowa Supreme Court concluded in a divided 4-3 opinion that "an infamous crime has

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<sup>685</sup> *Ibid.*

<sup>686</sup> *Id.* ¶¶ 2, 28-29.

<sup>687</sup> *Id.* ¶ 1.

<sup>688</sup> *Ibid.*

<sup>689</sup> *Id.* at ¶¶ 30-53.

<sup>690</sup> *Griffin v. Pate*, No. EQCE077368 (Polk Cty. Dist. Ct. Sept. 25, 2015).

<sup>691</sup> *Griffin v. Pate*, 884 N.W.2d 182, 184 (Iowa 2016).

evolved to be defined as a felony.”<sup>692</sup> Accordingly, the court affirmed the trial court’s ruling and dismissed Griffin’s claims in their entirety.

## 76. Evenwel v. Abbott – Texas 2014

The Equal Protection Clause generally requires states to equalize the population of their electoral districts; this constitutional precept is known as the “one person, one vote” principle, and was originally articulated in the seminal case *Reynolds v. Sims*.<sup>693</sup> Since the framing of the U.S. Constitution, states have broadly used total population as the metric for apportioning state legislative districts with equal numbers of persons, and the U.S. Constitution requires use of total population for apportioning congressional seats for the House of Representatives to ensure universal and equal representation in the federal government. Despite the long-established precedent of using total population as a basis for apportionment, individual plaintiffs Sue Evenwel and Edward Pfenninger filed a complaint in Texas district court in 2013 alleging that the state senate districts adopted by the Texas Legislature violated the Equal Protection Clause.<sup>694</sup> The plaintiffs argued that the challenged districts were drawn based on the total overall population rather than the total population of eligible voters.<sup>695</sup> The plaintiffs argued that drawing districts of equal population based on the state’s total population rather than based on the number of eligible voters diluted the weight of their votes when compared to districts with a lower proportion of eligible voters, in violation of the one person, one vote command under the Equal Protection Clause.<sup>696</sup> The plaintiffs sought declaratory relief that the Texas senatorial districts were unconstitutional and an injunction to prevent the use of the maps in subsequent elections.<sup>697</sup>

The district court granted Texas’ motion to dismiss, finding that the plaintiffs “failed to plead facts that state an Equal Protection Clause violation under the recognized means for showing unconstitutionality under that clause.”<sup>698</sup> The district court held that the plaintiffs failed to establish that the apportionment base used by

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<sup>692</sup> *Id.* at 205.

<sup>693</sup> 377 U.S. 533 (1964).

<sup>694</sup> Complaint for Declaratory and Injunctive Relief, *Evenwel v. Perry*, No. 1:14-cv-00355 (W.D. Tex. Apr. 21, 2014).

<sup>695</sup> *Id.*

<sup>696</sup> See Brief of *Amicus Curiae* Lawyers’ Committee for Civil Rights Under Law at pp. 5-11, *Evenwel v. Abbott*, No. 14–940 (2016).

<sup>697</sup> Complaint for Declaratory and Injunctive Relief, *Evenwel v. Perry*, No. 1:14-cv-00355 (W.D. Tex. Apr. 21, 2014).

<sup>698</sup> Order on Motion to Dismiss, *Evenwel v. Perry*, No. 1:14-cv-00355, 2014 WL 5780507, at \*4 (W.D. Tex. Nov. 5, 2014).

Texas, *i.e.*, total population, was forbidden by the Constitution and also failed to show that Texas' senate map did not achieve substantial population equality using total population as the base.<sup>699</sup> In so ruling, the district court rejected the plaintiffs' theory that to satisfy the Fourteenth Amendment, Texas was required to use total eligible voters as its apportionment base.<sup>700</sup>

The plaintiffs' appealed this ruling to the Supreme Court.<sup>701</sup> The ACLU and ACLU of Texas argued in an amicus brief that the use of total population as the metric for state redistricting is consistent with the Framers' understanding of a republican form of government, and that the Framers intended that universal and equal representation through total apportionment would ensure equality of representation for all individuals, not just voters.<sup>702</sup> In April 2016, the Supreme Court affirmed the dismissal of the plaintiffs' claims, holding that "based on constitutional history, this Court's decisions, and longstanding practice, that a State may draw its legislative districts based on total population."<sup>703</sup> In reaching its decision, the Court relied on the fact that all states used census total population numbers to draw districts and that only seven states adjusted these census-derived figures in any meaningful way. Of note, in affirming the district court, the Supreme Court expressly declined to resolve whether, as Texas argued, states *might* "draw districts to equalize voter-eligible population rather than total population."<sup>704</sup> Additionally, Justice Thomas in his concurrence noted:

The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government. The majority should recognize the futility of choosing only one of these options. The Constitution leaves the choice to the people alone—not to this Court.<sup>705</sup>

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<sup>699</sup> *Id.* at \*3.

<sup>700</sup> *Ibid.*.

<sup>701</sup> *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016).

<sup>702</sup> Brief of the American Civil Liberties Union and the ACLU of Texas as *Amici Curiae* in Support of Appellees at 9-13, *Evenwel v. Abbott*, No. 14-940. (2016).

<sup>703</sup> *Id.* at 1133 (Thomas, J., concurring).

<sup>704</sup> *Id.*

<sup>705</sup> *Id.*

This makes it possible that the question of whether states can apportion state electoral districts based on a metric other than total population will again be litigated in federal court and may appear before the Supreme Court.

### **77. Davidson v. City of Cranston – Rhode Island 2014**

Individual plaintiffs and the ACLU of Rhode Island filed suit in federal court in 2014 challenging the redistricting plan adopted by the City of Cranston, Rhode Island, for election of members of the Cranston City Council and the school committee.<sup>706</sup> The plaintiffs alleged that the redistricting plan violates the one person-one vote principle of the Fourteenth Amendment’s Equal Protection Clause by counting the population of Rhode Island’s only state prison as residents of the ward, even though most of the inmates remain residents of their pre-incarceration communities for virtually all other legal purposes, including voting.<sup>707</sup> 3,433 incarcerated individuals were districted into the electoral ward, accounting for approximately 25% of the district’s population despite not having a choice as to where they served their prison sentences and not being able to visit, patronize, or participate in public or private establishments in the city or ward.<sup>708</sup> The plaintiffs alleged that this prison-based gerrymandering results in an unequal system of representation where the prisoner population is used to artificially inflate the population of the ward containing the prison, increasing the district’s political power and diluting the voting strength of persons residing in other districts.<sup>709</sup> The plaintiffs sought declaratory relief and an injunction barring the city from conducting elections under the redistricting plan.

The district court granted the plaintiffs’ motion for summary judgment in May 2016, finding that the redistricting plan violated the one person-one vote principle.<sup>710</sup> The court reasoned that the inmates “share none of the characteristics” of other constituents in the ward and have no rights or stake in the local civic life or political process. In particular, they do not share in the representation of the ward in the city council, but are nonetheless counted for representation purposes.<sup>711</sup> In

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<sup>706</sup> Complaint for Declaratory and Injunctive Relief, *Davidson v. City of Cranston*, No. 1:14-cv-00091 (D.R.I. Feb. 19, 2014).

<sup>707</sup> *Id.* at ¶ 1.

<sup>708</sup> *Id.* at ¶¶ 17-18.

<sup>709</sup> Complaint for Declaratory and Injunctive Relief at ¶ 1, *Davidson v. City of Cranston*, No. 1:14-cv-00091 (D.R.I. Feb. 19, 2014); see also Sean Young, ‘Home’ Is Not Where You Are Involuntarily Confined, ACLU (Oct. 15, 2015), <https://www.aclu.org/blog/voting-rights/gerrymandering/home-not-where-you-are-involuntarily-confined>.

<sup>710</sup> *Davidson v. City of Cranston*, 188 F.Supp.3d 146 (D.R.I. 2014).

<sup>711</sup> *Id.* at 150.

the court's view, this differentiated the situation from other cases in which non-voting populations are typically included in the population count for purposes of apportionment. The court granted the requested injunction and ordered the city to propose a districting plan that complied with the one person-one vote principle.<sup>712</sup>

The city appealed the decision to the First Circuit, which reversed, finding that the city's inclusion of the prison population in the surrounding ward was constitutionally permissible.<sup>713</sup> The court reasoned that where total population is used for apportionment, a plaintiff must make a showing of invidious discrimination to support an equal protection claim, which was not shown in this case.<sup>714</sup> The court also reasoned that it was required to give deference to the decision of the local election officials on apportionment<sup>715</sup> and that the Supreme Court had generally approved the use of total population data from the Census for apportionment, which the city had done.<sup>716</sup>

#### **78. Missouri NAACP v. Ferguson-Florissant School District – Missouri 2014**

On December 18, 2014, the Missouri State Conference of the NAACP and individual plaintiffs, represented by the ACLU and ACLU of Missouri, sued the Ferguson-Florissant School District challenging the district's at-large method for electing school board members, arguing it denied the district's Black residents an equal opportunity to participate in the political process and elect representatives of their choice in violation of Section 2 of the Voting Rights Act.<sup>717</sup> The Ferguson-Florissant School District extends through numerous municipalities pursuant to a 1975 desegregation order intended to remedy the effects of discrimination against the area's African American students.<sup>718</sup> The area's segregated school system was the result of municipal borders that were initially drawn along racial lines and reinforced through racial housing covenants to avoid increasing African American voting strength in certain areas.<sup>719</sup> The desegregation order that created the school district required that two seats on the then 6-member school board be replaced by

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<sup>712</sup> *Id.* at 152.

<sup>713</sup> *Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016).

<sup>714</sup> *Id.* at 142-43.

<sup>715</sup> *Id.* at 143-44.

<sup>716</sup> *Ibid.*

<sup>717</sup> Complaint, *Mo. NAACP v. Ferguson-Florissant Sch. Dist.*, No. 4:14-cv-02077 (E.D. Mo. Dec. 18, 2014).

<sup>718</sup> *Id.* at ¶ 2.

<sup>719</sup> *Id.* at ¶ 8.

designees of the boards of two annexed African American districts.<sup>720</sup> Yet, since the implementation of the three-district desegregation plan in 1976, the demographics of Ferguson-Florissant changed dramatically and what had become a racially integrated school district once again became segregated.<sup>721</sup>

At the time of filing, the Ferguson-Florissant School District's total voting age population was 51,010; whites constituted a slight majority of the voting age population at 49.69% and Blacks constituted 47.37%, yet Black students made up a majority of the district's student body, accounting for 77.1% of total enrollment in the school district.<sup>722</sup> And while only 13% of the student body in the school district was white, 6 out of the 7 school board members were white.<sup>723</sup> The plaintiffs sued the district arguing that there was inadequate representation of African Americans on the board, and the votes of the district's Black citizens were being diluted by the at-large voting system in violation of Section 2 of the Voting Rights Act. The plaintiffs argued that the school district's African American population was sufficiently numerous and geographically compact enough to allow for the creation of multiple, properly apportioned single-member districts in which African Americans would constitute a majority of the voting age population and that there was a clear pattern of voting cohesion among African American voters who tended to prefer the same candidate, but their preferred candidates were consistently defeated by the at-large system.<sup>724</sup> After a six-day bench trial in January 2016, the district court in August 2016 in a lengthy opinion evaluating the Section 2 claim held that the plaintiffs had established a Section 2 violation, finding that Black voters had less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.<sup>725</sup> The court also adopted the plaintiffs' proposed remedial plan and rejected the defendant school district's proposal.<sup>726</sup>

The school district appealed the decision to the Eighth Circuit, which unanimously affirmed the district court's decision.<sup>727</sup> The appellate court concluded that the district court properly found a Section 2 violation after engaging in the appropriate legal analysis and after thorough review of the facts and applicable legal

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<sup>720</sup> *Id.* ¶ 14 (citing *United States v. Missouri*, 515 F.2d 1365, 1373 (8th Cir. 1975)).

<sup>721</sup> *Id.* at ¶ 10.

<sup>722</sup> *Id.* at ¶ 11.

<sup>723</sup> *Id.* at ¶¶ 15-17.

<sup>724</sup> *Id.* at ¶¶ 22-24.

<sup>725</sup> *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F.Supp.3d 1006 (E.D. Mo. 2016).

<sup>726</sup> *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 219 F.Supp.3d 949 (E.D. Mo. 2016).

<sup>727</sup> *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F. 3d 924 (8th Cir. 2018).

standard.<sup>728</sup> The court found “no clear error in the district court’s exhaustive factual findings” or the conclusion that “[g]iven the extent to which African Americans in [the Ferguson-Florissant School District] continue to experience the effects of discrimination, their ability to participate in the political process is impacted.”<sup>729</sup> The school district petitioned for **certiorari** to the U.S. Supreme Court, which declined review.<sup>730</sup>

## 79. Greater Birmingham Ministries v. John Merrill – Alabama 2015

*ACLU and ACLU of Alabama as amicus in support of plaintiff-appellants*

In December 2015, plaintiffs represented by the NAACP Legal Defense and Educational Fund, Inc., challenged Alabama’s restrictive photo ID law.<sup>731</sup> In 2011, Alabama passed a law that required voters to “provide valid photo identification to an appropriate election official prior to voting.”<sup>732</sup> The law requires in-person and absentee voters to present one of seven limited forms of photo ID in order to vote,<sup>733</sup> which Alabama’s own data shows Black voters in the state are less likely to possess.<sup>734</sup> The only exception to the prescribed forms of photo ID is a provision that permits a voter to cast a ballot without presenting an ID if two election officials at the voter’s polling location “positively identify” the voter.<sup>735</sup>

Despite the purported justification of protecting against voter fraud, proponents of the bill could only point to one documented case of voter impersonation fraud in the 12 years prior to the law’s passage.<sup>736</sup> The dubious proposition that the photo ID law is intended to curb voter fraud was further undermined when it was revealed that supporters and sponsors of the bill in the Alabama statehouse had made racist and racially charged comments in the run up to the law’s passage. The plaintiffs

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<sup>728</sup> *Id.* at 941.

<sup>729</sup> *Id.* at 940.

<sup>730</sup> *Ferguson-Florissant Sch. Dist. v. Mo. State Conf. of NAACP*, 139 S. Ct. 826 (2019).

<sup>731</sup> Complaint, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015); *see also* First Amended Complaint, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. May 3, 2016).

<sup>732</sup> ALA. CODE § 17-9-30(a).

<sup>733</sup> *Id.*

<sup>734</sup> *See* Brief for Plaintiffs-Appellants at 27, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Feb. 21, 2018); *see also* First Amended Complaint at ¶¶ 100-103, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. May 3, 2016).

<sup>735</sup> ALA. CODE § 17-9-30(f).

<sup>736</sup> First Amended Complaint at ¶ 70, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. May 3, 2016).

argued that these statements and the legislative history in Alabama provided evidence of the law’s discriminatory intent.<sup>737</sup> In one instance, the photo ID bill’s chief sponsor, a state senator who had tried for over a decade to pass a photo ID law, told Alabama newspapers that a photo ID law would undermine Alabama’s “black power structure” and that lacking an ID law “benefits black elected leaders.”<sup>738</sup> The trial testimony in another case relating to an Alabama ballot initiative revealed that another sponsor of the bill, the chair of the Alabama Senate Rules Committee, referred to Black voters as “aborigines.”<sup>739</sup> In another instance, the bill’s cosponsors were recorded devising a plan related to a planned ballot measure to depress turnout among Black voters, whom they slurred as “illiterates,” who would ride “H.U.D.-financed buses” to the polls in the 2010 midterm election.<sup>740</sup> The same state legislature that passed the photo ID law also passed an intentionally racially discriminatory voter registration ID requirement and redistricting plan held unconstitutional by a three judge court.<sup>741</sup>

At the time the photo ID law was enacted, Alabama had been subject to the preclearance requirements of Section 5 but never sought preclearance for the law. Instead, the state chose to delay implementation until the outcome of *Shelby County v. Holder*, Alabama’s challenge to the constitutionality of the Voting Rights Act.<sup>742</sup> The day after *Shelby County* was decided, immobilizing Section 5 of the Act, Alabama—in lock step with other formerly covered jurisdictions—announced it would implement its photo ID law.<sup>743</sup>

The plaintiffs challenged the photo ID law as violating Section 2 of the Voting Rights Act of 1965 on the basis that it was “enacted and/or operate...with the purpose or effect of abridging or denying the right to vote on account of race” and

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<sup>737</sup> See Brief for Plaintiffs-Appellants at 38-42, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Feb. 21, 2018).

<sup>738</sup> See Brief for Plaintiffs-Appellants at 38-39, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Feb. 21, 2018); see also Scott Douglas, *The Alabama Senate Race May Have Already Been Decided*, NY TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/opinion/roy-moore-alabama-senate-voter-suppression.html>; *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1259 (N.D. Ala. 2018).

<sup>739</sup> See *United States v. McGregor*, 824 F.Supp.2d 1339, 1345 (M.D. Ala. 2011).

<sup>740</sup> Brendan Kirby, *Jury at bingo trial hears Sen. Scott Beason’s infamous ‘aborigines’ comment, Ronnie Gilley jailhouse call*, AL.COM (Feb. 17, 2012), [https://www.al.com/live/2012/02/jury\\_at\\_bingo\\_trial\\_hears\\_sen.html](https://www.al.com/live/2012/02/jury_at_bingo_trial_hears_sen.html).

<sup>741</sup> Complaint at ¶ 58, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015); see also *Greater Birmingham Ministries*, 284 F. Supp. 3d at 1259.

<sup>742</sup> Complaint at ¶¶ 72-73, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015).

<sup>743</sup> See *id.* at ¶¶ 74-75.

the Fourteen and Fifteenth Amendments to the U.S. Constitution because the defendants “intentionally enacted or operate the law to deny or abridge the right to vote on account of race or color.”<sup>744</sup> Over 118,000 registered voters did not have the necessary documentation to vote under the photo ID law, a number that skewed disproportionately Black and Latino.<sup>745</sup> It was also later shown that thousands of voters had their provisional ballots rejected due to the restrictive photo ID law,<sup>746</sup> and African Americans voters were nearly five times more likely to have their ballots rejected than white voters. Thousands more people likely did not appear at the polls to vote because they lacked the required photo ID.<sup>747</sup>

After cross summary judgment motions were filed, the Alabama district court granted summary judgment for the defendants in January 2018. The court ruled that because it found the photo ID law did not “prevent anyone from voting” or otherwise impose a “substantial burden” on African Americans, it was not unconstitutional.<sup>748</sup> Despite significant evidence that the law was motivated by an intent to discriminate, the district court dismissed the plaintiff’s suit because it considered the law’s requirements as mere inconveniences. Based on its determination that the law’s burden on voters was slight, the district court refused to consider the plaintiffs’ evidence that the law targeted minority communities.

The plaintiffs filed a notice of appeal with the Eleventh Circuit in January 2018. The ACLU, ACLU of Alabama, Lawyers’ Committee for Civil Rights Under Law, and Campaign Legal Center, filed an amicus in support of the appellants.<sup>749</sup> Oral argument was held by the Eleventh Circuit in July 2018, and the case is pending decision.

## **80. Democratic National Committee v. Hobbs – Arizona 2016**

The Democratic National Committee and Arizona Democratic Party filed suit in 2016 challenging under the First, Fourteenth and Fifteenth Amendments, and § 2 of the Voting Rights Act, two Arizona election practices: (1) Arizona’s requirement that in-person voters cast their ballots only in their assigned precinct, which

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<sup>744</sup> Second Amended Complaint, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Dec. 6, 2016).

<sup>745</sup> Complaint, *Greater Birmingham Ministries v. Merrill*, No 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015).

<sup>746</sup> Appellant’s Brief at 27, *Greater Birmingham Ministries v. Merrill*, No. 18-10151 (11th Cir. Feb. 21, 2018).

<sup>747</sup> *Ibid.*

<sup>748</sup> *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1277 (N.D. Ala. 2018).

<sup>749</sup> See Brief of ACLU et al. as *Amicus Curiae* in Support of Appellants, *Greater Birmingham Ministries v. Merrill*, No. 18-10151 (11th Cir. Mar. 1, 2018).

Arizona enforces by not counting ballots cast out of precinct even for races in which the voter is qualified to vote and (2) House Bill 2023, which makes it a felony for third parties to collect early ballots from voters unless the collector falls into one of several exceptions.<sup>750</sup>

After a lengthy bench trial, the district court dismissed the lawsuit on May 10, 2018, finding that the plaintiffs had not carried their burden of showing “that the challenged election practices severely and unjustifiably burden voting and associational rights, disparately impact minority voters such that they have less opportunity than their non-minority counterparts to meaningfully participate in the political process, or that Arizona was motivated by a desire to suppress minority turnout when it placed limits on who may collect early mail ballots.”<sup>751</sup> The plaintiffs’ evidence included analyses by three experts, and testimony from numerous lay witnesses, including voters, election officials, and community advocates who collected ballots. A divided panel of the Ninth Circuit affirmed on September 12, 2018.<sup>752</sup> The panel majority upheld the district judge’s findings that Arizona’s requirements “imposed only a minimal burden on voters and were adequately designed to serve Arizona’s important regulatory interests.”<sup>753</sup> The dissenting judge stated that the in-precinct requirement “has a disproportionate effect on racial and ethnic minority groups,” and the ballot collection provision “serves no purpose aside from making voting more difficult.”<sup>754</sup> Plaintiffs sought a rehearing en banc, which was granted on January 2, 2019. En banc oral argument took place on March 27, 2019.

The ACLU filed an amicus brief in support of rehearing en banc on September 24, 2018, and an amicus brief on rehearing, on January 23, 2019. The ACLU principally addressed the correct legal standard for vote denial claims under Section 2 of the Voting Rights Act. It argued that the district court erred by treating the case as concerning vote dilution instead of their vote denial analysis, which led the court to require an arbitrary numerical threshold for showing a discriminatory burden on voters and considering election outcomes. It further argued that the district court committed “a plain legal error” by failing to conduct a totality-of-the-

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<sup>750</sup> Complaint, *Democratic Nat’l Comm v. Hobbs*, No. CV-16-01065-PHX-DLR (D. Ariz. 2016).

<sup>751</sup> *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 882-83 (D. Ariz. 2018).

<sup>752</sup> *Democratic Nat’l Comm. v. Reagan*, 904 F.3d 686 (9th Cir. 2018).

<sup>753</sup> *Id.* at 697.

<sup>754</sup> *Id.* at 732.

circumstances analysis of how race-based discrimination and disparities relate to the burdensome nature of the voting restriction at issue.<sup>755</sup>

The en banc Ninth Circuit's decision is pending.<sup>756</sup>

### 81. **Husted v. A. Philip Randolph Institute – Ohio 2016**

In *Husted v. A. Philip Randolph Institute*, the Supreme Court, in a 5-4 decision, upheld Ohio's voter purge practice, which the plaintiffs argued violated the National Voter Registration Act (NVRA).<sup>757</sup> The case involved a challenge to Ohio's practice of removing voters from its registration rolls due to a voter's past failure to vote. Under the process, Ohio identified registrants for potential removal from the voter rolls if they did not vote in one election; the state removed those voters if they did not vote in the following four-year period or respond to a notice by the state. This process wrongfully presumed that registrants' failure to vote meant these voters had moved and often removed them from the rolls without their knowledge. In 2015, Ohio conducted a massive voter purge based on this practice and removed of tens of thousands of eligible voters who had not moved or otherwise become ineligible to vote since they last participated in November 2008 and were left unable to vote in the 2015 elections.<sup>758</sup> These voters showed up to vote but could not because they had unwittingly been removed from the rolls.<sup>759</sup> The "failure to vote" process disproportionately impacted voters of color and low income individuals, including the homeless.<sup>760</sup>

The ACLU, ACLU of Ohio, and Demōs, representing A. Phillip Randolph Institute and Northeast Ohio Coalition for the Homeless, challenged Ohio's voter purge practice, arguing that it violated Section 8 of the NVRA, which regulates states' list maintenance practices.<sup>761</sup> During the course of litigation, the ACLU put forward evidence that Ohio removed tens of thousands of voters under this practice, leaving many people to arrive at the polls to vote only to learn that they were no longer registered. The plaintiffs sought an injunction to stop the Ohio Secretary of State from removing more people from Ohio's voter registration rolls and require the

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<sup>755</sup> Brief of ACLU as Amicus Curiae, *Democratic Nat'l Comm. v. Hobbs*, No. 8-15845 (9th Cir. Sept. 25, 2018).

<sup>756</sup> See *Democratic Nat'l Comm. v. Reagan*, 911 F.3d 942 (Mem), 19 Cal. Daily Op. Serv. 226.

<sup>757</sup> *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).

<sup>758</sup> Plaintiffs' First Amended Complaint at ¶ 6, *Ohio A. Philip Randolph Institute v. Husted*, No. 2:16-CV-303 (S.D. Ohio Apr. 6, 2016).

<sup>759</sup> *Ibid.*

<sup>760</sup> *Id.* at ¶ 48.

<sup>761</sup> 52 U.S.C. § 20507.

Secretary either reinstate eligible voters who were improperly removed or count their provisional ballots.

The district court found in favor of Ohio<sup>762</sup> but was reversed on appeal by the Sixth Circuit.<sup>763</sup> On review, in a 5-4 decision, the Supreme Court found that Ohio's procedure was not prohibited by the NVRA, reasoning that while the plain language of the statute forbids the removal of a voter where failure to vote is the sole reason for removal, Ohio's procedure did not do so because it required removal of voters based on a failure to vote for two years, plus a failure to return a notice card and failure to vote for four additional years. Justice Sotomayor dissented separately, arguing:

Congress enacted the NVRA against the backdrop of substantial efforts by States to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. It is unsurprising in light of the history of such purge programs that numerous *amici* report that the Supplemental Process has disproportionately affected minority, low-income, disabled, and veteran voters. As one example, amici point to an investigation that revealed that in Hamilton County, 'African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity' since 2012, as 'compared to only 4% of voters in a suburban, majority-white neighborhood.'...*Amici* also explain at length how low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them particularly vulnerable to unwarranted removal under the Supplemental Process."<sup>764</sup>

She concluded that the Court's decision "entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate."<sup>765</sup>

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<sup>762</sup> *Ohio A. Phillip Randolph Institute v. Husted*, No. 2:16-CV-303, 2016 WL 3542450 (S.D. Ohio June 29, 2016).

<sup>763</sup> *Ohio A. Phillip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016).

<sup>764</sup> *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018) (Sotomayor, J., dissenting).

<sup>765</sup> *Id.*

Despite this narrow loss, the parties entered a settlement regarding the inadequacy of Ohio’s notification to voters flagged for removal.<sup>766</sup> For the term of the settlement, Ohio is required to permit qualified voters who were removed without proper notice to cast a ballot and have it counted, and the Ohio Secretary of State is required to send eligible voters who are not registered a mailing informing them of that fact and of the registration deadline. The settlement further directs boards of elections to use motor vehicle records to prevent people queued for removal in 2019 from being removed if their motor vehicle records indicate they still reside at the address where they are registered.

## **82. Howell v. McAuliffe – Virginia 2016**

On April 22, 2016, Virginia Governor Terry McAuliffe issued an executive order that granted restoration of civil rights to an estimated 206,000 Virginians who had completed terms of incarceration and been released from supervised probation or parole.<sup>767</sup> The governor issued the Executive Order pursuant to a section of Virginia’s state constitution that provides, “No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.”<sup>768</sup> The governor issued similar orders periodically thereafter to restore the rights of Virginians with felony convictions who had since completed their sentences of incarceration and supervised release.<sup>769</sup> On May 23, 2016, six voters in their individual capacities filed a lawsuit against the Governor, challenging his legal authority to issue and implement the Executive Order. They argued that the orders had injured them because they “diluted Petitioners’ votes, created an illegitimate electorate, and threatened the legitimacy of the November elections.”<sup>770</sup> The plaintiffs asked the Supreme Court of Virginia to issue a writ of mandamus ordering the cancelation of all voter registrations accepted pursuant to the executive orders and a writ of prohibition proscribing further action by state officials in restoring voting rights “en masse.”

In June 2016, the ACLU and ACLU of Virginia filed an amicus brief supporting the Governor’s authority under the Virginia Constitution to issue the executive order. The brief also argued that the executive order was consistent with the goals of

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<sup>766</sup> Settlement Agreement, *Ohio A. Philip Randolph Institute v. LaRose*, No. 2:16-cv-303 (S.D. Ohio May 17, 2016).

<sup>767</sup> Va. Exec. Order No. 13 (Apr. 22, 2016); *see also Howell v. McAuliffe*, 292 Va. 320, 327-28 (Va. 2016).

<sup>768</sup> VA. CONST. art. II, § 1.

<sup>769</sup> *Howell*, 292 Va. at 328.

<sup>770</sup> Verified Petition for Writs of Mandamus and Prohibition and Memorandum in Support of Verified Petition at 15, *Howell v. McAuliffe*, No. 160784 (Va. May 23, 2016).

rehabilitation and reintegration of ex-offenders and of remedying racial inequality resulting from the racial impact of Virginia's felony disenfranchisement law.<sup>771</sup> The brief was accompanied by affidavits from three individuals who had their rights restored as a result of the Governor's order and who documented the human impact of both disenfranchisement and rights restoration.<sup>772</sup>

In July 2016, the Supreme Court of Virginia concluded that the governor violated the section of the Virginia Constitution disqualifying individuals convicted of felonies from voting unless their rights are restored, and that he exceeded the authority granted to him by the state constitution by issuing a blanket, group pardon and restoration of voting rights without providing individualized review of each person.<sup>773</sup> The court ordered the Secretary of the Commonwealth, the State Board of Elections, and the Department of Elections to take appropriate measures to reverse the executive orders and cancel the voter registrations of individuals who had regained their voting rights as a result of the Governor's actions.<sup>774</sup> At least 13,000 individuals had their voter registrations cancelled as a result.<sup>775</sup>

The Governor subsequently pledged to quickly restore the voting rights of affected Virginians by conducting individual reviews and restoration orders to eligible persons to comport with the court's decision.<sup>776</sup> In August 2016, the petitioners filed a motion asking the court to order the Governor to prove that he was obeying the court's decision.<sup>777</sup> The motion alleged that Governor McAuliffe was circumventing the court's orders because there was no substantive difference between the previous Executive Orders and subsequent individualized reviews and restoration orders.<sup>778</sup> The Governor and other officials filed a lengthy response outlining the measures taken to comply with the court's decision.<sup>779</sup> The court denied the petitioner's

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<sup>771</sup> See Brief of ACLU and ACLU of Virginia as Amici Curiae in Support of Respondents, *Howell v. McAuliffe*, No. 160784 (Va. 2016).

<sup>772</sup> *Id.*

<sup>773</sup> *Howell*, 292 Va. at 342-53.

<sup>774</sup> *Id.* at 351-53.

<sup>775</sup> *Id.* at 327-28.

<sup>776</sup> Laura Vozzella, *Virginia's McAuliffe to Announce Restoration of Voting Rights to 13,000 Felons*, WASH. POST (Aug. 21, 2016), [https://www.washingtonpost.com/local/virginia-politics/virginias-mcauliffe-to-announce-restoration-of-voting-rights-to-13000-felons/2016/08/20/590b43ee-6652-11e6-96c0-37533479f3f5\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginias-mcauliffe-to-announce-restoration-of-voting-rights-to-13000-felons/2016/08/20/590b43ee-6652-11e6-96c0-37533479f3f5_story.html).

<sup>777</sup> Petitioners' Motion to Show Cause, *Howell v. McAuliffe*, No. 160784 (Va. Aug. 31, 2016).

<sup>778</sup> *Id.*

<sup>779</sup> Response to Petitioners' Motion to Show Case, *Howell v. McAuliffe*, No. 160784 (Va. Sept. 12, 2016).

motion in September 2016.<sup>780</sup> Since then, Governor McAuliffe and his successor, Governor Northam, have restored the voting rights to former offenders upon completion of sentence on an individual, person-by-person basis.

### **83. Florida Democratic Party v. Scott – Florida 2016**

On October 6, 2016, about one week before Florida's voter registration deadline, Florida Governor Rick Scott declared a state of emergency due to Hurricane Mathew, a massive, life-threatening hurricane, which caused the mandatory evacuation of 1.5 million people in the state and already killed several hundred people in the Caribbean in the days prior.<sup>781</sup> The hurricane resulted in the closure of state's election offices in 43 counties during the critical days before the end of the voter registration period.<sup>782</sup> Yet on the same day he declared the state of emergency, Governor Scott also refused to extend the voter registration deadline for the 2016 Presidential election, which in Florida was October 11, 2016,<sup>783</sup> despite the fact that other states impacted by the hurricane had done so.<sup>784</sup> At the time, Florida did not offer online voter registration or same-day registration, instead requiring registrants to complete a paper form and deliver it in person or by mail to a local elections office or voter registration organization for submission.<sup>785</sup> For comparison, during the six days prior to the voter registration deadline in October 2012, roughly 116,000 Floridians had registered to vote.<sup>786</sup>

On October 9, 2016, the Florida Democratic Party filed suit in federal court to compel the state to extend the voter registration deadline.<sup>787</sup> On October 10, 2016, the district court granted the plaintiffs' request for a temporary restraining order that directed state officials to extend the voter registration deadline by one day, finding that the plaintiffs were likely to prevail on the merits of their Fourteenth

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<sup>780</sup> Order Denying Motion to Show Cause, *Howell v. McAuliffe*, No. 160784 (Va. Sept. 15, 2016).

<sup>781</sup> Complaint-in-Intervention at ¶ 2, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 11, 2016).

<sup>782</sup> *Id.*

<sup>783</sup> Complaint for Emergency Injunctive and Declaratory Relief at ¶¶ 21-22, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 9, 2016).

<sup>784</sup> *Fla. Democratic Party v. Scott*, 215 F.Supp.3d 1250, 1257-58 (N.D. Fla. 2016).

<sup>785</sup> Complaint for Emergency Injunctive and Declaratory Relief at ¶ 17, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 9, 2016).

<sup>786</sup> Complaint-in-Intervention at ¶ 8, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 11, 2016).

<sup>787</sup> Complaint for Emergency Injunctive and Declaratory Relief, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 9, 2016).

Amendment claim.<sup>788</sup> On October 11 the ACLU intervened on behalf of two voting rights organizations, New Florida Majority and Mi Familia Vota, which were actively involved in voter registration activities in the state. The motion to intervene argued that minorities and young people would be particularly burdened and impacted by the state's refusal to extend the registration deadline, since these groups registered at higher rates in the final days of the voter registration period.<sup>789</sup> The plaintiffs argued that the state's enforcement of the original deadline placed an undue burden on the right to vote in violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act.<sup>790</sup> On October 12, 2016, the district court agreed with the plaintiffs and entered a preliminary injunction that ordered state officials to extend the deadline for six additional days.<sup>791</sup> The state did not appeal, and more than 110,000 voters registered during the extension period.

#### **84. Bethea v. Deal – Georgia 2016**

In 2016, individual and organizational plaintiffs, the Georgia State Conference of the NAACP and WickForce, filed a complaint for injunctive and declaratory relief and an emergency temporary restraining order against the Georgia Secretary of State. The complaint alleged violations of the Fourteenth Amendment, Section 2 of the Voting Rights Act, and Section 8 of the National Voter Registration Act of 1993 due to the state's failure to extend the voter registration deadline for the 2016 November Presidential election.<sup>792</sup> In October 2016, Hurricane Matthew bore down on the East Coast during the last days of the voter registration period. With six days left in the registration period, the Governor of Georgia issued a mandatory evacuation order impacting five hundred thousand people in parts of six counties across the state and a voluntary evacuation order for residents in low lying areas encompassing 30 Georgia counties.<sup>793</sup> In all, one million Georgians were subject to mandatory or voluntary evacuation.<sup>794</sup>

Yet despite the massive disruption due to Hurricane Matthew during the busiest time of voter registration, state officials inexplicably refused to extend the

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<sup>788</sup> *Fla. Democratic Party*, 215 F. Supp. 3d 1250.

<sup>789</sup> Complaint-in-Intervention at ¶¶ 9-10, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 11, 2016).

<sup>790</sup> *Id.* at ¶¶ 20-27.

<sup>791</sup> Order Granting Preliminary Injunction, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 12, 2016).

<sup>792</sup> Amended Complaint for Injunctive and Declaratory Relief, *Bethea v. Deal*, No. 2:16-cv-00140 (S.D. Ga. Oct. 18, 2016).

<sup>793</sup> *Id.* at ¶ 3.

<sup>794</sup> *Id.* at ¶ 18.

registration deadline<sup>795</sup> even though it was well-known to state and local election officials that voter registration would have been particularly high during this period. During the final days of the registration period for the 2012 Presidential election over 77,000 people registered to vote in the state.<sup>796</sup> Due to closures, power outages, and other factors exacerbated by Hurricane Matthew, many voters were unable to register by the October 11, 2016, deadline.<sup>797</sup> The failure to extend voter registration impacted racial and ethnic minorities disproportionately during the last few days of the registration period.<sup>798</sup> The complaint cited statistics showing that in the run-up to the October 2012 election, approximately 29.5% of registered voters in Georgia were Black, and of the people who registered to vote during the final days of the registration period, approximately 49.7% were Black.<sup>799</sup> Compounding the issue, online voter registration opportunities were not available to many residents in evacuation areas due to power outages.<sup>800</sup>

The district court issued an order denying the plaintiff's request for a temporary restraining order in October 2016. The court found that the plaintiffs failed to show that their injury outweighed the potential damage a restraining order would have to the state's interest in running an efficient election because the "requested extension would require local officials to both conduct early voting [beginning on October 17] and continue to register voters through October 25, 2016."<sup>801</sup>

The matter was voluntarily dismissed without prejudice on motion of the plaintiffs in November 2016.<sup>802</sup>

## **85. Mullins v. Cole – West Virginia 2016**

This class action suit for declaratory and injunctive relief was filed on October 20, 2016, in West Virginia state court against the clerk of Cabell County, West Virginia, for refusal to process registration forms submitted through the state's online registration system. The complaint alleged violations of the Equal Protection Clause and Due Process Clause of the Constitution and provisions of the West Virginia Constitution.<sup>803</sup> West Virginia had established an online voter registration system

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<sup>795</sup> *Ibid.*

<sup>796</sup> *Id.* at ¶ 4.

<sup>797</sup> *Id.* at ¶ 5.

<sup>798</sup> *Id.* at ¶ 15.

<sup>799</sup> *Ibid.*

<sup>800</sup> *Id.* at ¶ 38.

<sup>801</sup> *Bethea v. Deal*, 2:16-cv-00140, 2016 WL 6123241 at \*3 (S.D. Ga. Oct. 19, 2016).

<sup>802</sup> Order, *Bethea v. Deal*, No. 2:16-cv-00140 (S.D. Ga. Nov. 11, 2016).

<sup>803</sup> Class Action Complaint, *Mullins v. Cole*, No. 3:16-cv-9918 (S.D. W. Va. Oct. 20, 2016).

but the clerk of Cabell County refused to process online applications based on her representation in a letter to registrants that the “website does not provide the information that is required, by law, to be provided to this office in order to process a voter applications.”

The court granted the plaintiffs’ motion for a temporary restraining order after a hearing on October 25, 2016, and the plaintiffs’ request for a preliminary injunction on November 21, 2016. The preliminary injunction was converted to a permanent injunction on January 24, 2017. The final order was not appealed by the defendant.

In the order granting the plaintiff’s request for a preliminary injunction the court found the Clerk of Cabell County’s assertion that the West Virginia registration website did not provide the necessary information to process voter registration patently untrue<sup>804</sup>. Further, the court found that the failure of the Clerk to include information in the letter to online registrants as to how to complete a paper or alternate registration led to a “high likelihood that online applicants in Cabell County will be confused about whether they can vote or not if they return a paper application after the October 18 deadline.”<sup>805</sup> The Cabell County Clerk’s actions resulted in “disparate treatment and disenfranchisement of thousands of Cabell County residents.”<sup>806</sup>

## **86. Eason v. N.Y. State Bd. of Elections – New York 2016**

This case was filed on behalf of the National Federation of the Blind, the Center for the Independence of the Disabled, and individual plaintiffs who are blind. States are required by law to meet accessibility and confidentiality standards when providing services such as online voter registration; the compliant alleged that New York is failing to comply with that requirement. Specifically, the plaintiffs alleged that New York’s online voter registration system violated these standards because the DMV web pages and downloadable forms could not be read out loud by the screen-reader software used by blind and low-vision people to hear and navigate computer screen content.<sup>807</sup> The software also could not read the fillable form’s section on party affiliation on the Board of Elections’ website; blind and low-vision voters were forced to disclose this private information when they printed out the

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<sup>804</sup> *Mullins v. Cole*, 218 F.Supp.3d 488, 494 (S.D. W. Va. 2016).

<sup>805</sup> *Id.* at 495.

<sup>806</sup> *Ibid.*

<sup>807</sup> Complaint for Declaratory and Injunctive Relief, *Eason v. N.Y. State Bd. Of Elections*, No. 1:16-cv-04292 (S.D.N.Y. June 9, 2016).

form to get someone else to help them sign it, denying them the same degree of privacy and independence afforded to other voters.<sup>808</sup>

The lawsuit alleged violations of the Americans with Disabilities Act and Rehabilitation Act. It sought immediate adjustments to ensure the websites were legally compliant, creation of Board of Elections policies that ensured accessibility and provided a clear path of accountability, and the development of policies and procedures to ensure the sites remained accessible.<sup>809</sup>

The parties reached a settlement on February 15, 2019. Under the settlement agreement, the State Board of Elections and DMV agreed to make their websites accessible to screen-access software within two years.<sup>810</sup> They also agreed to work with an accessibility consultant and put in place practices and procedures to ensure that the websites stay accessible in the long term.<sup>811</sup>

### **87. Chelsea Collaborative v. Galvin – Massachusetts 2016**

This case was filed on November 1, 2016, in Massachusetts state court to challenge the state's requirement that eligible Massachusetts voters register 20 days before an election. The complaint alleged that under the state's voter registration cutoff law thousands of eligible people are barred from voting in each election and that this arbitrary deadline interferes with the fundamental right to vote and unnecessarily disenfranchises voters.<sup>812</sup> The ACLU and ACLU of Massachusetts represented a set of individual and organizational plaintiffs that engaged in voter registration and get-out-the-vote activities. The lawsuit argued the law violated the Massachusetts Declaration of Rights and Massachusetts Constitution and requested the court to issue an order permitting the three individual plaintiffs to vote in the November 2016 election.<sup>813</sup> The plaintiffs argued that under the Massachusetts Constitution, a state statute impinging on the fundamental right to vote can only be upheld if it promotes a compelling state interest that could not be achieved by a less restrictive means<sup>814</sup> and that the arbitrary 20-day voter registration cutoff period was not the least restrictive way to advance a compelling

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<sup>808</sup> *Id.*

<sup>809</sup> *Id.*

<sup>810</sup> See Settlement Agreement and Stipulated Order of Dismissal at 4-5, *Eason v. N.Y. State Bd. Of Elections*, No. 1:16-cv-04292 (S.D.N.Y. Feb. 15, 2019).

<sup>811</sup> *Id.* at 7.

<sup>812</sup> Class Action Complaint for Declaratory and Injunctive Relief, *Chelsea Collaborative v. Galvin*, No. 16-cv-3354 (Mass. Sup. Ct. Nov. 1, 2016).

<sup>813</sup> *Id.* at ¶ 9.

<sup>814</sup> *Id.* at ¶ 25.

state interest, particularly in light of the significant constitutional injury done unto potential voters of being disenfranchised and the rapidity with which election clerks were able to process voter registration forms.<sup>815</sup> The plaintiffs also moved for a preliminary injunction to permit them to vote in the November 2016 presidential election,<sup>816</sup> which the court granted.<sup>817</sup> After a four-day trial, the court issued a ruling in July 2017, agreeing that the 20-day voter registration cutoff law was unconstitutional and disenfranchises thousands of potential voters throughout the Commonwealth.<sup>818</sup>

Secretary of the Commonwealth William Galvin appealed the decision to the Massachusetts Supreme Judicial Court. The court vacated the lower court decision, holding that the 20-day blackout period for voter registration prior to an election did not violate the Massachusetts Constitution.<sup>819</sup> In reaching its decision, the court determined that strict scrutiny was inapplicable because the voter registration blackout period did not pose a substantial enough interference with the right to vote to justify application of that standard.<sup>820</sup> In its decision, however, the court acknowledged that given current realities the basis for the 20-day voter registration deadline might need to be reconsidered. The court also concluded that “having chosen to impose a deadline for voter registration prior to an election, the Legislature has a continuing duty to ensure that the deadline is no further from election day than what the Legislature reasonably believes is consistent with the Commonwealth’s interest in conducting a fair and orderly election.”<sup>821</sup> The ruling noted that a commission that lawmakers established in 1993 to study the voter registration deadline never met and that a task force formed under a 2014 elections law also did not meet or produce a report by its August 1, 2017, deadline.<sup>822</sup> “Although the Legislature appeared to have a reasoned basis for requiring voters to register twenty days in advance of an election in 1993, the mechanisms put in place for a periodic review of that requirement seem to have failed. Thus, we have a

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<sup>815</sup> *Id.* at ¶¶ 45-53.

<sup>816</sup> Emergency Motion for Preliminary Injunction, *Chelsea Collaborative v. Galvin*, No. 16-cv-3354 (Mass. Sup. Ct. Nov. 1, 2016).

<sup>817</sup> Order on Motion for Preliminary Injunction at 10-11, *Chelsea Collaborative v. Galvin*, No. 16-cv-3354 (Mass. Sup. Ct. Nov. 7, 2016).

<sup>818</sup> See *Chelsea Collaborative v. Galvin*, No. 16-cv-3354, 2017 WL 4125039 (Mass. Super. Ct. July, 25, 2017).

<sup>819</sup> *Chelsea Collaborative, Inc. v. Sec’y of the Commonwealth*, 100 N.E.3d 326 (Mass. 2018).

<sup>820</sup> *Id.* at 333-335.

<sup>821</sup> *Id.* at 328.

<sup>822</sup> *Id.* at 338-340.

concern that, given the passage of time, the reasoned basis for the 20-day blackout period may need to be reconsidered.”<sup>823</sup>

## **88. Navajo Nation Human Rights Comm’n v. San Juan Cty. – Utah 2016**

Representing the Navajo Nation Human Rights Commission and individual Navajo voters, the ACLU, ACLU of Utah, and Lawyers’ Committee for Civil Rights Under Law filed suit in 2016 against San Juan County. The lawsuit alleged that the county’s decision to switch to a mail-only voting system and to designate the only in-person voting location in the predominantly white part of the county adversely impacted Navajo voters—who constituted 49% of the voting age population of the county—in violation of federal law.<sup>824</sup>

The predominantly mail-only system was highly problematic for Navajo voters for several reasons. First, it did not comply with San Juan County’s obligations under Section 203 of the Voting Rights Act to provide adequate language assistance to limited English proficient Navajo voters. Navajo is an unwritten language, and the closure of all but one voting location and the switch to a mail-only ballot system interfered with the county’s ability to provide adequate oral assistance, and thus, the ability of Navajo voters to vote.<sup>825</sup> Second, the postal service was unreliable with limited delivery service to rural parts of the county where many Navajo lived, making it difficult for many Navajo voters to receive and return their ballots under a mail-only system.<sup>826</sup>

The only way to vote in-person was at the county clerk’s office in the county seat of Monticello, which required Navajo residents to travel more than twice as long as white residents in order to vote in person. On average, the trip for a Navajo voter took over two hours round trip, while the trip for white voters took, on average, under an hour.<sup>827</sup> For residents living in the southwest parts of the county, which were majority Navajo, the round trip to the Monticello polling location took even longer, sometimes taking between nine and ten hours.<sup>828</sup> The significantly greater average distance required for Navajo residents to reach the county seat of Monticello, in the context of socioeconomic factors, such as disparate rates of poverty and access to reliable public and private transportation, and the history of

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<sup>823</sup> *Id.* at 340.

<sup>824</sup> Complaint at ¶ 1, *Navajo Nation Human Rights Comm’n v. San Juan Cty.*, No. 2:16-cv-00154 (D. Utah Feb. 25, 2016).

<sup>825</sup> *Id.* at ¶ 4.

<sup>826</sup> *Id.* at ¶ 6.

<sup>827</sup> *Id.* at ¶ 31.

<sup>828</sup> *Id.* at ¶ 32.

racial discrimination and hostility toward Navajo people, placed a severe and disproportionate burden on Navajo residents' ability to vote.<sup>829</sup> The plaintiffs alleged that the predominantly mail-only system discriminated against Navajo voters in violation of Sections 2 and 203 of the Voting Rights Act and imposed a disproportionate and severe burden on Navajo voters' fundamental right to vote in violation of the Fourteenth Amendment.<sup>830</sup>

In September 2017, a federal district court granted the plaintiffs' motion to dismiss the defendants' counterclaims, which alleged violations of federal civil rights statutes and Utah tort law, and allowed the lawsuit to proceed to a trial on the merits.<sup>831</sup> In February 2018, the parties reached a positive settlement agreement regarding both claims.<sup>832</sup> The county agreed to implement various measures aimed at providing meaningful and effective language assistance and to create equal opportunities for Navajo voters for the 2018 elections. These changes included providing in-person voting and language assistance at several locations inside the Navajo reservation during the 28 days before an election; maintaining three polling locations with language assistance on the Navajo reservation for Election Day voting; and ensuring quality interpretation of election information and materials into the Navajo language.<sup>833</sup> A motion to dismiss was signed, stipulating that the court would keep jurisdiction over the case.<sup>834</sup>

#### **89. League of Women Voters of the U.S. v. Newby – Washington, D.C. 2016**

This case followed up the seminal 2013 case *Arizona v. Inter Tribal Council of Arizona (ITCA)*, in which the Supreme Court ruled that Arizona was prohibited from requiring documentary proof of citizenship for individuals using the federal voter registration form (Federal Form), unless the proof of citizenship requirement was approved by the U.S. Election Assistance Commission (EAC).<sup>835</sup> In *ITCA*, the Court held that the National Voter Registration Act (NVRA) preempted Arizona's documentary proof of citizenship requirement and the state's refusal to register voters using the Federal Form without documentary proof conflicted with the

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<sup>829</sup> *Id.* at ¶ 7

<sup>830</sup> *Id.* at ¶¶ 1, 8.

<sup>831</sup> *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, 281 F. Supp. 3d 1136, 1149 (D. Utah 2017).

<sup>832</sup> Order re: Stipulated Settlement and Motion to Dismiss, *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, No. 2:16-cv-00154 (D. Utah Feb. 22, 2018).

<sup>833</sup> *See generally id.*

<sup>834</sup> *Id.*

<sup>835</sup> 570 U.S. 1 (2013).

NVRA. In an opinion authored by Justice Scalia, the Supreme Court held that the NVRA requires all states to “accept and use” the Federal Form and noted that “[n]o matter what procedural hurdles a State’s own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available.”<sup>836</sup>

Congress enacted the NVRA principally to “increase the number of eligible citizens who register to vote in elections for Federal office” and to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements.<sup>837</sup> In enacting the NVRA, Congress debated and voted on the question of whether to permit states to require documentary proof of citizenship in connection with the Federal Form, and expressly rejected such a proposal.<sup>838</sup> The final conference committee report concluded that a documentary proof of citizenship requirement was not consistent with the purpose of the NVRA and risked being interpreted by states as permitting registration requirements that could “seriously interfere with” the mail registration program under the law.<sup>839</sup>

Despite the NVRA’s legislative history, since 2006 Arizona had requested multiple times that the EAC amend the Federal Form to require documentary proof of citizenship; the EAC had repeatedly denied those requests. As contemplated by Congress, the EAC determined that documentary proof of citizenship unjustifiably increased the burden on qualified voters to register to vote because—as has been demonstrated repeatedly in litigation addressing documentary proof of identity requirements—many U.S. citizens either do not possess or cannot reasonably retrieve or afford documentation demonstrating citizenship, such as U.S. passports and birth certifications.<sup>840</sup> Moreover, Arizona was unable to show that there was a widespread problem with noncitizens registering to vote or voting, and the Federal Form already required that voters attest under penalty of perjury that they are U.S. citizens.

After the Supreme Court’s decision in *ITCA*, Arizona, Kansas, and Georgia submitted new requests to the EAC to require documentary proof of citizenship. The EAC rejected these requests in a formal decision finding that documentary proof of citizenship requirements were inconsistent with the purposes of the NVRA and

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<sup>836</sup> *Id.* at 9.

<sup>837</sup> 52 U.S.C. § 20501(b)(1); *see also ITCA*, 570 U.S. at 13.

<sup>838</sup> *See* S. REP. NO. 103-6 (1993); 139 CONG. REC. 5098 (1993); H.R. REP. NO. 103-66, at 23 (1993); 139 CONG. REC. 9231-32 (1993).

<sup>839</sup> H.R. REP. NO. 103-66, at 23-24 (1993).

<sup>840</sup> ALICE P. MILLER, U.S. ELECTION ASSISTANCE COMMISSION, MEMORANDUM OF DECISION CONCERNING STATE REQUESTS TO INCLUDE ADDITIONAL PROOF-OF-CITIZENSHIP INSTRUCTIONS ON THE NATIONAL MAIL VOTER REGISTRATION FORM (Jan. 17, 2014).

were not shown to be necessary by any evidence provided by the states.<sup>841</sup> Arizona and Kansas then filed a lawsuit in the U.S. District Court for the District of Kansas under the Administrative Procedures Act (APA) seeking a writ of mandamus to compel the EAC to modify their state instructions for the Federal Form to require documentary proof of citizenship.<sup>842</sup> After an initial lower court ruling in favor of Arizona and Kansas, the Tenth Circuit reversed the judgment and rejected Kansas and Arizona's APA challenge.<sup>843</sup> The Supreme Court did not grant Kansas' and Arizona's cert petition, effectively letting the Tenth Circuit decision stand.<sup>844</sup>

In 2016, the new EAC Executive Director, Brian Newby—acting unlawfully and contrary to longstanding Commission policy—sent letters to the Secretaries of State of Alabama, Georgia, and Kansas stating, without explanation, that he would allow them to require documentary proof of citizenship.<sup>845</sup> Newby was a former local election official in Kansas and was appointed to his local position by then Kansas Secretary of State Kris Kobach.<sup>846</sup> Newby had also publicly supported Kansas' efforts to achieve a documentary proof of citizenship requirement.<sup>847</sup> The ACLU, along with the Lawyers' Committee for Civil Rights Under Law, the Brennan Center for Justice, and Project Vote, representing private plaintiffs, filed suit against the EAC, arguing that Newby's action was a violation of EAC policy and federal law.<sup>848</sup>

The plaintiffs' motion for a preliminary stay of Newby's action was initially denied by the district court<sup>849</sup> but was granted on appeal by the D.C. Circuit Court of Appeals, effectively blocking the new registration requirements from coming into effect until the suit was resolved.<sup>850</sup> The case returned to the district court, where the judge remanded to the EAC to determine whether Newby had the authority to allow the three states to require documentary proof of citizenship on the Federal

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<sup>841</sup> See Complaint for Declaratory and Injunctive Relief at ¶ 3, *League of Women Voters of the U.S. v. Newby*, No. 1:16-cv-00236 (D.D.C. Feb. 12, 2016).

<sup>842</sup> Complaint, *Kobach v. U.S. Election Assistance Comm'n*, No. 13-cv-4095 (D. Kan. Aug. 21, 2013).

<sup>843</sup> See *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015).

<sup>844</sup> *Kobach v. U.S. Election Assistance Comm'n*, 135 S. Ct. 2891 (2015).

<sup>845</sup> Complaint for Declaratory and Injunctive Relief at ¶ 1, *League of Women Voters of the U.S. v. Newby*, No. 1:16-cv-00236 (D.D.C. Feb. 12, 2016)

<sup>846</sup> See *id.* at ¶ 4.

<sup>847</sup> *Ibid.*

<sup>848</sup> *Id.* at ¶¶ 1-2.

<sup>849</sup> *League of Women Voters of the United States v. Newby*, 195 F. Supp. 3d 80 (D.D.C. 2016).

<sup>850</sup> *League of Women Voters of United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016).

Form.<sup>851</sup> In 2017, the EAC announced a split along partisan lines over whether Newby acted within his authority.<sup>852</sup> As a result, the circuit court’s preliminary injunction against the burdensome registration requirements remains in place pending final judgment in the district court.

## 90. **Brown v. Kobach – Kansas 2016**

In 2016, the ACLU filed a lawsuit in state court again challenging a dual voter registration system adopted by Kansas Secretary of State Kris Kobach, this time through a temporary regulation purportedly to formalize and provide a legal basis for the system. The suit charged that the dual registration system violated the Kansas Constitution and state law by preventing qualified Kansas voters from voting in state and local elections due solely to their method of registration using the federal voter registration form (Federal Form).<sup>853</sup> Among other things, the dual-registration system permitted voters who registered either by using the Federal Form or at the Kansas Division of Vehicles while applying for a driver’s license to vote only for federal offices, not state or local offices, unless they provided a birth certificate, passport or other documentation of citizenship.<sup>854</sup> Kobach enacted the temporary regulation on the eve of the 2016 primary elections, putting this system in place despite a state court having already declared it unauthorized and prohibiting its implementation in *Belenky v. Kobach*.<sup>855</sup>

A Kansas state judge granted a temporary restraining order, reiterating the previous holding that the system was unauthorized and prohibited, and required Kobach to count all the votes—local, state, and federal—of all registered voters in the primary elections.<sup>856</sup> Later that year, the court granted a permanent injunction, officially ending Kansas’ dual-registration scheme.<sup>857</sup> An appeal of this case is currently stayed pending the outcome in two related federal cases, *Fish v. Schwab* and *League of Women Voters v. Newby*.

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<sup>851</sup> *League of Women Voters of United States v. Newby*, 238 F. Supp. 3d 6 (D.D.C. 2017).

<sup>852</sup> U.S. ELECTION ASSISTANCE COMMISSION, INTERPRETATION MEMO OF 2015 POLICY (June 1, 2017).

<sup>853</sup> Petition Pursuant to K.S.A. Chapter 60 for Declaratory and Injunctive Relief at ¶¶ 2-3, *Brown v. Kobach*, No. 2016CV550 (Shawnee Cty. Dist. Ct. July 29, 2016).

<sup>854</sup> *See id.* at ¶¶ 35-36.

<sup>855</sup> *See id.* at ¶¶ 27-30, 32-34.

<sup>856</sup> Order Granting Temporary Injunction at 7, *Brown v. Kobach*, No. 2016CV550 (Shawnee Cty. Dist. Ct. July 29, 2016) (as memorized in order issued Aug. 11, 2016).

<sup>857</sup> Memorandum Decision and Order, *Brown v. Kobach*, No. 2016CV550 (Shawnee Cty. Dist. Ct. Nov. 4, 2016).

## 91. Fish v. Schwab – Kansas 2016

In February 2016, the ACLU and ACLU of Kansas, on behalf of the League of Women Voters of Kansas and individual Kansans, filed yet another lawsuit challenging Kansas' enforcement of a documentary proof of citizenship requirement.<sup>858</sup> Prior to this latest lawsuit, the ACLU had twice secured court decisions in separate actions that blocked Kansas Secretary of State Kris Kobach from requiring documentary proof of citizenship from individuals trying to register to vote and dissolved a scheme to create a two-tiered voter registration process in Kansas.<sup>859</sup> At issue this time was a 2013 Kansas law that required documentary proof of citizenship from voter registration applicants applying to register to vote at the Kansas Division of Motor Vehicles. The National Voter Registration Act (NVRA) requires states to provide people with an opportunity to register to vote when they apply for or renew their driver's licenses at a motor vehicle agency and requires applicants to attest under penalty of perjury that they are U.S. citizens.<sup>860</sup> In enacting the NVRA, Congress specifically rejected allowing states to require documentary proof of citizenship, determining it was "not necessary or consistent with the purposes of this Act" and "could effectively eliminate, or seriously interfere with," the administration or voter registration programs.<sup>861</sup> Despite the clear prohibitions of the NVRA regarding documentary proof of citizenship, which had already been extensively litigated in separate lawsuits, Kansans were required to present additional paperwork demonstrating citizenship in order to register to vote at a motor vehicle agency. In some cases they were not informed of the requirement at all, only finding out later that they had been suspended from registering to vote or purged from the voter rolls.<sup>862</sup> In many cases, because of bureaucratic bungling, individuals who had in fact provided documentary proof of citizenship when registering to vote at a motor vehicle agency were still not duly registered.<sup>863</sup> At the

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<sup>858</sup> See Complaint for Declaratory and Injunctive Relief, *Fish v. Kobach*, No. 2:16-cv-02105 (D. Kan. Feb. 18, 2016).

<sup>859</sup> See *Brown v. Kobach*, No. 2016-CV-550 (Shawnee Cty. Dist. Ct. Nov. 4, 2016) (mem. op.); *Belenky v. Kobach*, No. 2013-CV-1331 (Shawnee Cty. Dist. Ct., Aug. 21, 2015). Both lawsuits successfully prevented Kansas from implementing a dual voter registration system, which was intended to prevent qualified Kansas voters from voting in state and local elections if they did not provide documentary proof of citizenship when they registered to vote using the federal voter registration form.

<sup>860</sup> 52 U.S.C. § 20504.

<sup>861</sup> H.R. CONF. REP. NO. 103-66, at 23 (1993).

<sup>862</sup> Complaint for Declaratory and Injunctive Relief at ¶¶ 1-8, *Fish v. Kobach*, No. 2:16-cv-02105 (D. Kan. Feb. 18, 2016).

<sup>863</sup> *Id.* at ¶¶ 46-47.

time the complaint was filed, Kansas' enforcement of its proof of citizenship law had blocked over 35,000 individuals from registering to vote.<sup>864</sup>

The plaintiffs alleged that the Kansas documentary proof of citizenship law violated the NVRA, which was enacted to make it easier for Americans to register to vote and maintain their registrations. Plaintiffs sought a declaratory judgment that the law was invalid and an order requiring the state to register the thousands of Kansans who had attempted to register to vote at a motor vehicles office but were denied due to their supposed failure to comply with the documentation requirements.<sup>865</sup>

In June 2018, a federal judge ruled decisively in favor of the plaintiffs and struck down the law after finding it violated the NVRA and the Equal Protection Clause of the U.S. Constitution.<sup>866</sup> The court found that “the law has acted as a deterrent to registration and voting for substantially more eligible Kansans than it has prevented ineligible voters from registering to vote” and that the proof of citizenship requirement had “caused confusion” and “eroded confidence in the electoral system.”<sup>867</sup> The judge also held Kansas Secretary of State Kris Kobach in contempt of court for failing to implement her preliminary orders in the case and flouting the court's rules and the rules of civil procedure.<sup>868</sup> The court ordered Kobach to pay the ACLU \$26,200 in attorney's fees and attend CLE classes on civil procedure and evidence.<sup>869</sup>

Kansas accepted the contempt ruling but appealed the court's merits ruling to the Tenth Circuit. In March 2019, the Tenth Circuit heard oral arguments for the case. A decision is currently pending. A number of other cases involving similar laws or other actions by Kansas's election officials are stayed pending the Tenth Circuit's decision in this case.

## **92. (a) Common Cause v Rucho – North Carolina 2016**

Common Cause filed suit challenging North Carolina's remedial 2016 redistricting map, which was adopted by the state legislature after the previous map was struck down by a federal court as an unconstitutional racial gerrymander.<sup>870</sup> The challenge

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<sup>864</sup> *Id.* at ¶ 6.

<sup>865</sup> *See id.* at ¶¶ 67-83.

<sup>866</sup> *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1054 (D. Kan. 2018).

<sup>867</sup> *See id.* at 1119.

<sup>868</sup> *See Fish v. Kobach*, 294 F. Supp. 3d 1154 (D. Kan. 2018).

<sup>869</sup> *Fish*, 309 F. Supp. 3d at 1119.

<sup>870</sup> *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016).

was based on allegations that the map was a partisan gerrymander violating the Equal Protection Clause of the Fourteenth Amendment because it diluted the electoral strength of individuals who voted against Republican candidates; the First Amendment, by burdening and retaliating against individuals who voted against Republican candidates on the basis of their political beliefs and association; Article I, Section 2 of the U.S. Constitution, which provides that members of the House of Representatives will be chosen by the people of the several states, by usurping the right of the voters to select their preferred candidates for Congress; and Article 1, Section 4 of the U.S. Constitution because the legislature exceeded its power granted therein.<sup>871</sup> A three-judge panel consolidated the case with a similar challenge, *League of Women Voters v. Rucho*,<sup>872</sup> and denied a motion to dismiss filed by the defendants.<sup>873</sup>

In January 2018, the court in a lengthy opinion found for the plaintiffs on all of their claims, held that the map was an unconstitutional partisan gerrymander, enjoined use of the map, and directed the legislature to adopt yet another remedial map.<sup>874</sup> The court denied the defendants' motion to stay its ruling pending a Supreme Court decision in *Gill v. Whitford*, a separate partisan gerrymandering challenge to Wisconsin's state assembly maps.<sup>875</sup> Thereafter, the defendants filed an emergency application for a stay with the Supreme Court, which was granted in January 2018.<sup>876</sup> Subsequent to the Supreme Court's decision in *Whitford*, the case was remanded for further consideration.<sup>877</sup> In August of 2018, a three-judge panel issued a decision again finding the map unconstitutional on all counts asserted by the plaintiffs.<sup>878</sup> The panel subsequently granted defendants' motion to stay pending Supreme Court review.<sup>879</sup>

The Supreme Court agreed to hear the appeal. The ACLU, the New York Civil Liberties Union, ACLU of North Carolina, and ACLU of Maryland jointly filed an

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<sup>871</sup> Complaint for Declaratory Judgment and Injunctive Relief at ¶¶ 25-54, *Common Cause v. Rucho*, No. 1:16-CV-1026 (M.D.N.C. Aug. 5, 2016).

<sup>872</sup> Order on Joint Motion to Consolidate for Discovery and Trial, *Common Cause v. Rucho*, No. 1:16-CV-1026; 1:16-CV-1164 (M.D.N.C. Feb. 7, 2017).

<sup>873</sup> Order Denying Defendants' Motions to Dismiss, *Common Cause v. Rucho*, No. 1:16-CV-1026; 1:16-CV-1164 (M.D.N.C. Mar. 3, 2017).

<sup>874</sup> *See Common Cause v. Rucho*, 279 F. Supp. 3d 587, 690-92 (M.D.N.C. 2018).

<sup>875</sup> *Common Cause v. Rucho*, 284 F. Supp. 3d 780 (M.D.N.C. 2018)

<sup>876</sup> *Rucho v. Common Cause*, 138 S. Ct. 923 (2018).

<sup>877</sup> *Rucho v. Common Cause*, 138 S. Ct. 2679 (2018).

<sup>878</sup> *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018).

<sup>879</sup> Order Granting Defendants' Motion to Stay, *Common Cause v. Rucho*, No. 1:16-CV-1026; 1:16-CV-1164 (M.D.N.C. Sept. 12, 2018).

amicus brief arguing that partisan gerrymandering claims are justiciable and that the plaintiffs in the two cases under review had established unconstitutional gerrymanders.<sup>880</sup> The amicus brief argued that partisan gerrymandering violated the First Amendment when districts are drawn with the purpose and effect of entrenching partisan advantage because the First Amendment commands neutrality regarding the regulation of speech and other forms of political expression. The ACLU amici also stressed that courts in various cases had used workable evidentiary tools to determine whether an improper partisan gerrymander had taken place.

Despite the series of holdings of five separate federal district courts finding partisan gerrymandering unconstitutional on First Amendment and other grounds, on June 27, 2019, the Supreme Court held that partisan gerrymandering claims are nonjusticiable, vacated the lower court's decision in *Rucho*, and remanded the case for dismissal.<sup>881</sup>

### **(b) Benisek v. Lamone – Maryland 2013**

In November 2013, a set of plaintiffs filed a complaint in the U.S. District Court for the District of Maryland challenging the congressional redistricting plan enacted by the Maryland General Assembly following the 2010 Census, alleging the plan constituted violations of Article 1, Section 2 of the U.S. Constitution and the First and Fourteenth Amendments.<sup>882</sup> At issue were the remedial maps for Maryland's Fourth, Sixth, Seventh, and Eighth congressional districts, each of which contained non-contiguous and demographically distinct segments that resulted in election outcomes that skewed Democratic.

The case was initially dismissed in 2014 as nonjusticiable and for failure to state a claim by a district court judge without convening a three-judge panel.<sup>883</sup> The dismissal was affirmed by the Fourth Circuit,<sup>884</sup> and the plaintiffs appealed to the Supreme Court which granted review.<sup>885</sup> In December 2015, the Supreme Court unanimously rejected the decisions of the lower courts to dismiss the case without

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<sup>880</sup> Brief of ACLU, NYCLU, ACLU of North Carolina, and ACLU of Maryland as *Amicus Curiae* in Support of Affirming District Court Judgments, *Rucho v. Common Cause*, No. 18-422; 18-72 (Mar. 8, 2019).

<sup>881</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2490 (2019).

<sup>882</sup> *See generally* Complaint, *Benisek v. Lamone*, No. 1:13-cv-03233 (D. Md. Nov. 5, 2013); Amended Complaint, *Benisek v. Lamone*, No. 1:13-cv-03233 (D. Md. Dec. 2, 2013); Second Amended Complaint, *Shapiro v. McManus*, Case No. 13-cv-3233 (D. Md. Mar. 3, 2016).

<sup>883</sup> *Benisek v. Mack*, 11 F. Supp. 3d 516, 526 (D. Md. 2014).

<sup>884</sup> *Benisek v. Mack*, 584 Fed. Appx. 140 (4th Cir. 2014) (per curiam).

<sup>885</sup> *Shapiro v. Mack*, 135 S. Ct. 2805 (2015).

convening a three-judge panel, which the Court determined was required by federal law.<sup>886</sup>

On remand, a three-judge panel denied the defendants' motion to dismiss, holding that the plaintiffs presented a justiciable claim,<sup>887</sup> and in 2017 the plaintiffs filed a motion for a preliminary injunction blocking the use of the maps and, alternatively, summary judgment. The district court denied the plaintiffs' request for a preliminary injunction, held the summary judgment motion in abeyance, and entered an order staying any further proceedings pending a decision by the Supreme Court in *Gill v Whitford*, another highly anticipated partisan gerrymandering case.<sup>888</sup> The plaintiffs filed an appeal to the Supreme Court seeking to overturn the lower court's denial of a preliminary injunction.<sup>889</sup> The ACLU submitted an amicus brief supporting the appellants, principally arguing for a standard of review for partisan gerrymandering cases that requires a showing of legislative intent to secure a partisan advantage and that the resulting map has the effect of entrenching the favored party against changes in voter preferences. The brief also argued that the assessment of partisan gerrymandering should focus on the plan as a whole, rather than on a single district.<sup>890</sup> In June 2018, the Supreme Court affirmed the decision not to preliminarily enjoin the map in a per curiam opinion, finding that it was not abuse of discretion.<sup>891</sup> The Court issued its decision in *Whitford* the same day.<sup>892</sup>

The district court subsequently took up and granted the plaintiffs' motion for summary judgment, granted the plaintiffs' request to permanently block further use of the 2011 plan, and ordered new maps be drawn.<sup>893</sup> The defendants appealed the decision to the U.S. Supreme Court, and the plaintiffs consented to a discretionary stay of the order pending appeal.<sup>894</sup> In January 2019, the Supreme Court announced that *Benisek* would be heard along with *Common Cause v. Rucho*, discussed *supra*. As discussed above, the ACLU, the New York Civil Liberties

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<sup>886</sup> *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015).

<sup>887</sup> *Shapiro v. McManus*, 203 F. Supp. 3d 579, 586 (D. Md. 2016).

<sup>888</sup> *Benisek v. Lamone*, 266 F. Supp. 3d 799, 816 (D. Md. 2017).

<sup>889</sup> Plaintiffs' Notice of Appeal, *Benisek v. Lamone*, No. 13-cv-3233 (D. Md. Aug. 25, 2017).

<sup>890</sup> Brief of the ACLU, ACLU of Maryland, and NYCLU as *Amici Curiae* in Support of Appellants, No. 17-333 (Jan. 29, 2018).

<sup>891</sup> *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam).

<sup>892</sup> *Gill v. Whitford*, 138 S. Ct. 1916 (2018). The Court in *Whitford* principally addressed the issue of standing and remanded the case back to the lower court on that issue.

<sup>893</sup> *Benisek v. Lamone*, 348 F.Supp. 493, 525 (D. Md. 2018).

<sup>894</sup> Order Granting In Part Consent Motion to Stay, *Benisek v. Lamone*, No. 17-333 (Nov. 16, 2018).

Union, ACLU of North Carolina, and ACLU of Maryland filed an amicus brief arguing that partisan gerrymandering claims are justiciable and that the *Benisek* plaintiffs—along with plaintiffs in *Rucho*—had proven unconstitutional gerrymanders.<sup>895</sup> In June 2019, as it did with *Rucho*, the Supreme Court held that partisan gerrymandering claims are nonjusticiable, vacated the lower court’s decision in *Benisek*, and remanded the case with instructions to dismiss for lack of jurisdiction.<sup>896</sup>

### 93. ACLU v. Trump – Washington D.C. 2017

The ACLU filed a lawsuit in federal court against President Donald Trump, Vice President Mike Pence, and the Pence-Kobach Commission, alleging that Trump’s newly created Presidential Advisory Commission on Election Integrity violated federal law by holding its meetings behind closed doors and failing to allow documents to be available for public inspection in violation of the Federal Advisory Committee Act.<sup>897</sup> Kansas Secretary of State Kris Kobach was appointed Vice Chair of the committee. Because of Kobach’s involvement in a number of lawsuits surrounding unlawful voter suppression tactics, many civil rights organizations were apprehensive that the commission would be used to justify nationwide voter suppression measures.<sup>898</sup> The lawsuit sought declaratory, injunctive, and mandamus relief, requiring the commission to hold open meetings and make all records and minutes open for public inspection.<sup>899</sup>

The district court denied the request for a preliminary injunction in July 2017.<sup>900</sup> The ACLU filed an amended complaint in January 2018<sup>901</sup> after commission documents were released in a related case in the same court filed by a member of

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<sup>895</sup> Brief of ACLU, NYCLU, ACLU of North Carolina, and ACLU OF Maryland as *Amicus Curiae* in Support of Affirming District Court Judgments, *Rucho v. Common Cause*, No. 18-422; 18-72 (Mar. 8, 2019).

<sup>896</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

<sup>897</sup> Complaint for Declaratory and Mandamus Relief, *ACLU v. Trump*, No. 1:17-cv-01351 (D.D.C. July 10, 2017).

<sup>898</sup> *See, e.g.*, Press Release, Civil and Human Rights Coalition Blasts Presidential Commission on Election ‘Integrity,’ (May 11, 2017), <https://civilrights.org/2017/05/11/civil-and-human-rights-coalition-blasts-presidential-commission-on-election-integrity/>.

<sup>899</sup> *See generally* Complaint for Declaratory and Mandamus Relief, *American Civil Liberties Union v. Trump*, No. 1:17-cv-01351 (D.D.C. July 10, 2017), <https://www.aclu.org/legal-document/american-civil-liberties-union-v-donald-trump-complaint>.

<sup>900</sup> *American Civil Liberties Union v. Trump*, 266 F.Supp.3d 133 (D.D.C. 2017).

<sup>901</sup> Amended Complaint for Declaratory, Injunctive, and Mandamus Relief, *American Civil Liberties Union v. Trump*, No. 1:17-cv-01351 (D.D.C. Jan. 3, 2018).

the commission itself.<sup>902</sup> On the same day as the ACLU's filing, Trump issued an executive order terminating the commission.<sup>903</sup> The defendants moved to dismiss for mootness, but the parties agreed to a stay while the other case is being decided. The stay is still in place as of September 2019.

#### **94. Missouri NAACP v. State of Missouri – Missouri 2017**

On June 8, 2017, the Missouri NAACP and the League of Women Voters of Missouri, represented by the ACLU and Advancement Project, filed a petition for injunctive and declaratory relief with respect to the requirements of Missouri's new voter ID law, arguing that the law fails to provide mandated funding to properly implement the law.<sup>904</sup> Specifically, the petition alleged that there was insufficient appropriation of state funds to cover all costs associated with implementing the law, including all costs for related public education, free voter IDs and birth certificates, and training of poll workers. The plaintiffs argued that the law could not be enforced because Section 115.427.6(3) provides that, "If there is not a sufficient appropriation of state funds, then the personal identification requirements of subsection 1 of this section shall not be enforced."<sup>905</sup> According to the petition, the Secretary of State and Department of Revenue's combined reasonably necessary implementation costs would total nearly \$6 million, which is more than 350% of the actual appropriation.<sup>906</sup>

The Circuit Court of Cole County, Missouri, granted the state's motions for judgment on the pleadings and dismissed the case without prejudice on January 2, 2018.<sup>907</sup> The Missouri NAACP and the League of Women Voters timely appealed to the Missouri Court of Appeals. The court found on October 30, 2018, that the appellants claims against the state were not precluded by sovereign immunity or on the ground that appellants' suit was not ripe for adjudication.<sup>908</sup> The court determined that the trial court's judgment on the pleadings and dismissal for failure to state a claim was reversible error: "The petition alleged that the insufficiency of the appropriation was demonstrated by the disparity between the cost estimates to implement the statute in Fiscal Year 2018 which were submitted

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<sup>902</sup> See *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 286 F.Supp.3d 96 (D.D.C. 2017).

<sup>903</sup> Exec. Order No. 13820, 83 Fed. Reg. 969 (Jan. 3, 2018).

<sup>904</sup> See Petition for Injunctive and Declaratory Relief at ¶¶ 3-6, 34-39, *Mo. NAACP v. Missouri*, No. WD81484 (Mo. Cole Cty. Cir. Ct. 2017).

<sup>905</sup> *Id.* at ¶ 39.

<sup>906</sup> *Id.* at ¶ 35.

<sup>907</sup> *State Conf. of NAACP v. Missouri*, 563 SW 3d 138, 145-146 (Mo. Ct. of App. 2018).

<sup>908</sup> *Id.* at 147-48.

to the legislature and the legislature's actual appropriation for Fiscal Year 2018, and was demonstrated in part by the allegedly inadequate manner in which the Secretary of State sought to discharge his advance-notice obligations. The allegations in Appellants' petition adequately pleaded a claim alleging insufficient appropriation."<sup>909</sup>

Trial in the case was held in August 2019. A decision is pending.

#### **95. Whitest v. Crisp County Georgia Bd. of Education – Georgia 2017**

The ACLU brought suit against Crisp County, Georgia, challenging the at-large method of electing members of the county's Board of Education under Section 2 of the Voting Rights Act. Crisp County has six members of the Board of Education who each serve six-year staggered terms in non-partisan elections. The suit seeks to prove that this method prevents Black community members, who make up 43% of Crisp County, from electing even one representative of their choice.<sup>910</sup> The plaintiffs have requested that the court enjoin any elections under the existing at-large method and redistrict in a way that complies with Section 2 of the Voting Rights Act, allowing areas of the county that are heavily populated with black citizens to elect their own representative.<sup>911</sup>

The case is currently under a stay while the parties undergo mediation to discuss a proposed settlement involving single-member districts.

#### **96. NAACP v. East Ramapo Central Sch. Dist. – New York 2017**

The NAACP, represented by NYCLU, filed a lawsuit challenging the at-large method of electing members of the East Ramapo Central School District, alleging that the method allowed the white majority in the community to control the entire board and effectively disenfranchise the minority members of the community.<sup>912</sup> The suit further alleged that the at-large voting method filled the school board with white representatives who voted to redirect state funds into predominantly-white private schools, leaving predominantly-minority public schools underfunded (over 99% of private-school students in East Ramapo are white, while 96% of public-school students in East Ramapo are students of color).<sup>913</sup> The only board member

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<sup>909</sup> *Id.* at 151.

<sup>910</sup> Complaint at 4, *Whitest v. Crisp Cty. Bd. of Ed.*, No. 1:17-cv-00109-LJA (M.D. Ga. June 14, 2017).

<sup>911</sup> *Id.* at 7.

<sup>912</sup> Complaint, *NAACP v. East Ramapo Central Sch. Dist.*, No. 7:17-cv-08943-CS-JCM (S.D.N.Y. Nov. 16, 2017).

<sup>913</sup> Complaint at 3.

elected with Black and Latino voter support was initially forbidden from serving, until the legislature stepped in and passed a law restoring her full term.<sup>914</sup>

East Ramapo has been under state oversight since 2015 when a state report found that the district favored the needs of private school students over public school students and that the district had eliminated nearly 450 public school positions between 2009 and 2014, including 200 teachers as well as all social workers. Additionally, the state-appointed monitor found that public school programs for kindergarten, arts, athletics, and music were cut, while private school programs were increased.<sup>915</sup>

The case was filed in the Southern District of New York, with several Black and Latino parents of public school students serving as plaintiffs. The court denied the school board's motion to dismiss in mid-2018, and the case is currently in discovery.<sup>916</sup>

## **97. Saucedo v. Gardner – New Hampshire 2017**

Individual plaintiffs, represented by the ACLU, filed a lawsuit in 2017 challenging New Hampshire's signature match requirement for absentee ballots that required local election officials to compare the signature of every voter's absentee ballot application with the signature on an affidavit sent with the ballot.<sup>917</sup> An election official was required to reject the ballot without notice to the voter if—using no objective criteria—the signature did not appear to them to conform to what they envisioned was a matching signature.<sup>918</sup> In doing so, election officials had rejected the ballots of several hundred absentee voters in recent elections.<sup>919</sup> The plaintiffs argued that this procedure violated voters' rights under the Fourteenth Amendment and Americans with Disabilities Act.

The plaintiffs' summary judgment submission included testimony concerning New Hampshire's processing of absentee ballots and statistics from the 2016 general election regarding the rejection of absentee ballots.<sup>920</sup> It also included the expert

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<sup>914</sup> Complaint at 13.

<sup>915</sup> Complaint at 14.

<sup>916</sup> Cite.

<sup>917</sup> See Complaint for Declaratory and Injunctive Relief at ¶ 15, *Saucedo v. Gardner*, No. 1:17-cv-00183 (D.N.H. May 10, 2017).

<sup>918</sup> *Ibid.*

<sup>919</sup> *Id.* at ¶ 16.

<sup>920</sup> Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment as to All Claims at ¶ 50, No. 1:17-cv-00183 (Mar. 19, 2018).

report of a forensic document examiner who specialized in handwriting and signature identification. The expert opined that a person’s signature may vary for a variety of reasons, that variations were more prevalent in persons who are elderly, disabled, or who speak English as a second language, and that extensive training and several exemplars are required for proper signature analysis.<sup>921</sup> He further predicted that New Hampshire election officials would likely make erroneous determinations due to lack of training and multiple exemplars.<sup>922</sup>

The district court granted the motion for summary judgment on the plaintiff’s facial challenge on Fourteenth Amendment procedural due process grounds.<sup>923</sup> The court reasoned that the signature match requirement “fails to guarantee basic fairness” under the Fourteenth Amendment for several reasons: it vested moderators “with sole, unreviewable discretion to reject ballots due to a signature mismatch”; the “absence of training and functional standards on handwriting analysis”; and “the lack of any review process or compliance measures.”<sup>924</sup> Since the court granted relief based on the plaintiffs’ procedural due process claim, it declined to address their remaining claims. Based on its liability finding, the court permanently enjoined enforcement of the New Hampshire statute.<sup>925</sup> New Hampshire did not appeal.

## **98. Peter La Follette v. Alex Padilla – California 2017**

An individual plaintiff and the ACLU of North California filed suit in state court in 2017 challenging California’s signature-match requirement for mailed ballots. This provision of California law required local election officials to reject vote-by-mail ballots if they believed the signature on a ballot envelope did not match the signature on file for the voter. Officials did so without notice to the voter or any opportunity to cure the perceived mismatch. The plaintiffs argued that this requirement violated voters’ rights to due process and equal protection under the Fourteenth Amendment and the California Constitution.<sup>926</sup>

In the 2016 general election, over half of California’s 14.6 million voters voted by mail. An estimated 45,000 absentee voters’ ballots were rejected due to a signature mismatch, without giving voters adequate notice or an opportunity to cure.<sup>927</sup> In

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<sup>921</sup> *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 205-206 (D.N.H. Aug. 14, 2018).

<sup>922</sup> *Id.* at 212.

<sup>923</sup> *Id.* at 202.

<sup>924</sup> *Id.* at 222.

<sup>925</sup> *Id.*

<sup>926</sup> Verified Petition for Writ of Mandate and Memorandum of Points & Authorities at ¶ 65-75, *La Follette v. Padilla*, No. CPF-17-515931 (Sup. Ct. Cal. Aug. 23, 2017).

<sup>927</sup> *Id.* at ¶ 41.

support of their motion for a writ of mandate prohibiting the California Secretary of State and county registrars from rejecting ballots due to signature mismatches, the plaintiffs submitted several declarations addressing factual issues. They also submitted declarations from a forensic document expert in handwriting and signature identification and a political sociologist who conducted a study of vote-by-mail use by California voters.<sup>928</sup>

The California Superior Court granted the plaintiffs' motion for a writ of mandate in March 2018.<sup>929</sup> The court held that California's requirement facially violated the due process clauses of the federal and state constitutions because it "fails to provide for notice that a voter is being disenfranchised and/or an opportunity for the voter to be heard," which are "fundamental rights."<sup>930</sup> The court relied on experts who "cite several reasons why a person's signature may differ on two occasions"<sup>931</sup> and cited several federal court rulings that invalidated similar signature match laws.<sup>932</sup> The court effectively granted injunctive relief by ordering that "no ballot may be rejected based on a mismatched signature without providing the voter with notice and an opportunity to cure before the election results are certified."<sup>933</sup>

California appealed to the California Court of Appeal in April 2018. In December 2018, the court of appeals dismissed the appeal as moot because California passed new legislation in September 2018 that provides voters with an opportunity to correct or verify a mismatched signature before the certification of election results, which implemented the remedy sought by the plaintiffs in this case.

## **99. Common Cause Indiana v. Lawson – Indiana 2017**

The ACLU, ACLU of Indiana, and Demōs filed a lawsuit in federal court on behalf of Common Cause Indiana challenging a state law that permitted election officials to immediately purge the registrations of Indiana voters based on an interstate matching program known as the "Interstate Voter Registration Crosscheck

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<sup>928</sup> *See generally id.*

<sup>929</sup> Order Granting Plaintiffs' Motion for Writ of Mandate, *La Follette v. Padilla*, No. CPF-17-515931 (Sup. Ct. Cal. Mar. 5, 2018).

<sup>930</sup> *Id.* at 6.

<sup>931</sup> *Id.* at 2.

<sup>932</sup> *Id.* at 4-5.

<sup>933</sup> *Id.* at 6.

Program” (Crosscheck). Indiana would remove voters flagged by the faulty matching system without notifying voters or any grace period to cure.<sup>934</sup>

The ACLU argued that Crosscheck was inaccurate and unreliable, utilizing a matching protocol that—according to a study by a team of researchers at Stanford, Harvard, the University of Pennsylvania, and Microsoft—incorrectly flagged people as potential double voters more than 99% of the time.<sup>935</sup> The same study found that Crosscheck’s standard procedure, as applied by Indiana, would wrongfully eliminate the registrations of more than 300 legitimate voters for every potential double vote prevented.<sup>936</sup> Crosscheck also had racially discriminatory outcomes according to numerous studies evaluating the program and its methodology. The flawed system flagged voter registration records with the same first and last name appearing in more than one state, which disproportionately targeted voters of color, who are much more likely to have similar first and last names according to U.S. census data, for removal.<sup>937</sup> An analysis also showed that Crosscheck flagged one in six Latinos, one in seven Asian Americans, and one in nine African Americans as potential double registrants.<sup>938</sup>

The suit charged that Indiana’s purge procedures violated the National Voter Registration Act (NVRA), which requires states to follow a minimum notice process and waiting period before a state may remove a voter from the rolls and that voter registration list maintenance programs be reasonable, uniform, and nondiscriminatory. Crosscheck was championed and administered by then Kansas Secretary of State Kris Kobach, who has a long history of initiating and implementing numerous voter suppression tactics. A federal court granted the ACLU’s request for a preliminary injunction in 2018, blocking implementation of the new law.<sup>939</sup>

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<sup>934</sup> Complaint for Declaratory and Injunctive Relief, *Common Cause Indiana v. Lawson*, No. 1:17-cv-03936 (S.D. Ind. Oct. 27, 2017).

<sup>935</sup> *Id.* at ¶ 43 (citing SHARAD GOEL ET AL., ONE PERSON, ONE VOTE: ESTIMATING THE PREVALENCE OF DOUBLE VOTING IN U.S. PRESIDENTIAL ELECTIONS, 2-3, 25-26 (Harv. Univ., Working Paper, Jan. 13, 2017), <https://scholar.harvard.edu/files/morse/files/1p1v.pdf>).

<sup>936</sup> See SHARAD GOEL ET AL., ONE PERSON, ONE VOTE: ESTIMATING THE PREVALENCE OF DOUBLE VOTING IN U.S. PRESIDENTIAL ELECTIONS 1 (Harv. Univ., Working Paper, Jan. 13, 2017).

<sup>937</sup> Complaint for Declaratory and Injunctive Relief at ¶ 47, *Common Cause Indiana v. Lawson*, No. 1:17-cv-03936 (S.D. Ind. Oct. 27, 2017).

<sup>938</sup> *Id.*

<sup>939</sup> *Common Cause Indiana v. Lawson*, 327 F.Supp.3d 1139 (S.D. Ind. 2018). A separate lawsuit challenging Crosscheck was filed by the Indiana State Conference of NAACP and League of Women Voters of Indiana in federal court and a preliminary injunction was granted in that case as well.

Indiana appealed the preliminary injunction to the Seventh Circuit. In August 2019, a unanimous panel of the Seventh Circuit affirmed the district court's preliminary injunction. The Seventh Circuit concluded that the organizational plaintiffs had standing to challenge Indiana's list maintenance program.<sup>940</sup> Regarding the plaintiffs' likelihood of success on the merits, the Seventh Circuit concluded that Indiana's policy of "remov[ing] [voters] from the rolls based on Crosscheck without direct notification of any kind" appeared "inconsistent with the NVRA" "on its face."<sup>941</sup> The court explained that removal from voter lists based on "an inference from information provided by Crosscheck" could not likely be construed as a "request for removal . . . from the registrant" as the NVRA demands.<sup>942</sup> Separately, the court concluded that Indiana's argument that a notification from Crosscheck qualified as "confirmation in writing" that a voter moved was also likely to fail, as it "defie[d] the structural logic of the [NVRA] by allowing a state to bypass [its] notice procedure."<sup>943</sup> A trial before the district court was scheduled for March 2020.

#### **100. League of United Latin American Citizens v. Reagan – Arizona 2017**

In November 2017, the League of United Latin American Citizens and the Arizona Students' Association, represented by Campaign Legal Center, filed a lawsuit for declaratory and injunctive relief against the Arizona Secretary of State challenging the state's dual registration system. Arizona administered a voter registration system whereby registrants who completed either the state voter registration form or the federal voter registration form (Federal Form)—prescribed by the National Voter Registration Act (NVRA)—without providing documentary proof of citizenship would not be duly registered for both federal and state elections.<sup>944</sup> If a voter completed the Federal Form without documentary proof of citizenship, the voter was only registered to vote in federal elections but not state elections.<sup>945</sup> If a voter completed the state form without documentary proof of citizenship, the voter was not registered in state or federal elections.<sup>946</sup> Additionally, Arizona was failing to

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*Indiana State Conf. of NAACP v. Lawson*, 326 F.Supp.3d 646 (S.D. Ind. 2018). The cases were consolidated on appeal by the Seventh Circuit.

<sup>940</sup> *Common Cause Indiana v. Lawson*, 937 F.3d 944, 956 (7th Cir. 2019).

<sup>941</sup> *Id.* at 959.

<sup>942</sup> *Id.* at 960.

<sup>943</sup> *Id.* at 962.

<sup>944</sup> Complaint for Declaratory and Injunctive Relief at ¶ 1, *LULAC v. Reagan*, No. 2:17-cv-04102 (D. Ariz. Nov. 7, 2017).

<sup>945</sup> *Id.* at ¶ 3.

<sup>946</sup> *Ibid.*

register voters who already had provided documentary proof of citizenship to the state through its Motor Vehicle Division (MVD), which the state could have used to confirm citizenship of registrants given the fact that Arizona already had a process of verifying registrant information against the MVD database.<sup>947</sup> Arizona adopted the dual registration practices presumably to get around the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona*, which held that the NVRA preempted Arizona's documentary proof of citizenship requirement for individuals using the Federal Form to register.<sup>948</sup>

The plaintiffs argued that Arizona's dual registration policies unduly burdened the right to vote in violation of the First Amendment and Equal Protection Clause of the Fourteenth Amendment. The litigation was ultimately settled through a court-ordered consent decree in June 2018. The consent decree requires that the state provide instructions to county recorders so that voters using the state form would be registered to vote in federal elections, regardless of added documentary proof of citizenship requirements imposed for registration in state elections.<sup>949</sup> The consent decree further requires county recorders to advise registrants of the state's documentary proof of citizenship requirement, provide the necessary information in order to be registered as "full ballot" voters, and provide public education and information on pertinent websites.<sup>950</sup>

Notwithstanding the settlement, the matter continued to create problems for Arizona voters. Prior to the close of voter registration in 2018, Luis Cisneros, a naturalized citizen and Arizona resident, went to update his voter registration after moving only to be told that his registration was rejected because he was incorrectly identified as a noncitizen.<sup>951</sup> Working to correct this error, Mr. Cisneros brought his passport to prove his citizenship but was told by the Pima County Recorder's Office that, contrary to the terms of the consent decree, while he would be registered to vote, his ballot would not count for the 2018 election since it was after the voter registration deadline.<sup>952</sup> The ACLU and the ACLU of Arizona represented Mr. Cisneros and sought to have the Pima County Recorder restore his voter registration and have his ballot counted in the 2018 election. The Pima County Recorder refused twice, so the ACLU filed a motion to compel compliance with the consent decree in the district court, which had continuing jurisdiction over the

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<sup>947</sup> *See id.* at ¶¶ 40-58.

<sup>948</sup> 570 U.S. at 1 (2013).

<sup>949</sup> Consent Decree, *LULAC v. Reagan*, No. 2:17-CV-04102 (D. Ariz. June 4, 2018).

<sup>950</sup> *Id.*

<sup>951</sup> Motion to Compel Compliance with Consent Decree at 4-5, *LULAC v. Reagan*, No. 2:17-CV-04102 (D. Ariz. Nov. 9, 2018).

<sup>952</sup> *Id.* at 5.

matter.<sup>953</sup> The Pima County Recorder finally updated Mr. Cisneros’s voter registration and sent his ballot to be counted after the filing of the motion. The court held an expedited hearing on both motions. Because Mr. Cisneros’s registration was restored and ballot was counted, the district court dismissed his motion as moot, and an order denying the plaintiffs’ motion to compel was entered in November 2018.<sup>954</sup>

### **101. League of Women Voters of N.Y. v. N.Y. State Bd. of Elections – New York 2018**

Plaintiffs Nicholas Dinnerstein and the League of Women Voters, an organization whose mission is to increase voter registration and participation, brought this lawsuit challenging New York’s 25-day voter registration cutoff for arbitrarily disenfranchising tens of thousands of eligible voters in violation of the state constitution. The complaint argued that, “[a]s a direct result of the Voter Registration Cutoff, many thousands of constitutionally eligible voters in every election cycle are denied their fundamental right to vote.”<sup>955</sup> The complaint further charged that the voter registration cut-off, which was established nearly 30 years ago, is no longer necessary given the development of a computerized statewide voter registration database, and needlessly disenfranchises thousands of voters. Thus, “[a]dministrative rationales that may have supported the Voter Registration Cutoff at that time are no longer valid and are fundamentally undermined by the dramatic advancements in technology that have since been made.”<sup>956</sup>

The complaint asserted that the disenfranchisement violates the state constitution’s guarantee of the fundamental right to vote as well as equal protection. The complaint alleged that “[e]very constitutionally eligible voter who is denied the right to vote in even one election cycle suffers a severe and irreparable harm” and that “[t]his severe deprivation cannot be reconciled with the Constitution’s prohibition against disenfranchisement and guarantee of the right to vote to every eligible citizen.”<sup>957</sup> With respect to equal protection, the complaint explains that “[t]he Voter Registration Cutoff makes voting more difficult for some eligible voters than others, as it unnecessarily imposes a more burdensome 25-day registration cutoff that applies only to some voters—including the individual Plaintiff in this case—while

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<sup>953</sup> *Ibid.*

<sup>954</sup> *LULAC v. Reagan*, No. 2:17-CV-04102, 2018 WL 5983009, at \*4 (D. Ariz. 2018).

<sup>955</sup> Complaint for Declaratory and Injunctive Relief at ¶ 5, *League of Women Voters of N.Y. v. N.Y. State Bd. Of Elections*, No. 160342 (N.Y. Sup. Ct. Nov. 6, 2018).

<sup>956</sup> *Id.* at ¶ 6.

<sup>957</sup> *Id.* at ¶ 30.

other classes of voters are permitted to register up to ten days before a general election and still vote.”<sup>958</sup>

The defendants filed a motion to dismiss the case on January 28, 2019, alleging that the plaintiffs lacked standing to bring the action. On October 4, 2019, the trial court denied the motion to dismiss.

## 102. Gill v. Whitford – Wisconsin 2018

Private plaintiffs filed suit in 2015 challenging Wisconsin’s plan for state legislative district boundaries as an unconstitutional partisan gerrymander, claiming the redistricting plan intentionally and systematically diluted Democratic voters’ strength in elections for state legislative seats. The plaintiffs claimed the map violated the Equal Protection Clause under the Fourteenth Amendment and rights of free association and speech under the First Amendment.<sup>959</sup>

The U.S. District Court for the Western District of Wisconsin, in a lengthy opinion, held for the plaintiffs, finding that the plan was intended to burden the representational rights of Democratic voters and ensure the Republican Party maintained durable control of the legislature.<sup>960</sup> Relying on social science metrics, which measure the intensity of partisan gerrymandering based on the number of “wasted” votes, the court held that the plan was intended to have and resulted in a discriminatory impact on Democrats to obtain state legislative seats.<sup>961</sup> Among the extensive evidence relied upon by the court was its finding that, despite Republicans winning a minority of the statewide legislative assembly votes in 2012, Republicans won 60 of the 99 assembly seats.<sup>962</sup> The court also rejected the defendants’ explanation that the disparate representation in election outcomes was attributable to political geography, finding that no inherent geographic advantage could explain the degree of partisanship in Wisconsin’s maps.<sup>963</sup>

In 2017, the defendants requested review by the U.S. Supreme Court. In its amicus brief, the ACLU argued that the Wisconsin legislature committed constitutional violations when it “locked up” the political process for the purpose of disabling competition among partisan viewpoints and that the legislative monopoly attained

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<sup>958</sup> *Id.* at ¶ 51.

<sup>959</sup> *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018).

<sup>960</sup> *Whitford v. Gill*, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018).

<sup>961</sup> *See id.* at 890-96, 898-910.

<sup>962</sup> *See id.* at 899.

<sup>963</sup> *See id.* at 921.

by the Wisconsin legislature violated the First Amendment and the Equal Protection Clause by putting its thumb on the scale of electoral competition.<sup>964</sup> The Court ultimately bypassed the merits of the case, vacated the judgment, and remanded back to the district court on the issue of standing.<sup>965</sup>

On remand, the district court granted in part the Wisconsin State Assembly's motion to stay the case, allowing discovery to proceed, but postponing the trial and decision on the merits until the Supreme Court issued a decision on two other partisan gerrymandering cases from North Carolina and Maryland.<sup>966</sup> Ultimately, the Supreme Court ruled that partisan gerrymandering claims were nonjusticiable in the North Carolina and Maryland cases.<sup>967</sup> As a result, the Wisconsin case was dismissed for lack of jurisdiction in 2019.<sup>968</sup>

### **103. Georgia Muslim Voter Project v. Kemp – Georgia 2018**

On behalf of the Georgia Muslim Voter Project and Asian Americans Advancing Justice-Atlanta, the ACLU and ACLU of Georgia filed a lawsuit against Georgia Secretary of State Brian Kemp and all Georgia county registrars demanding due process for Georgia voters whose absentee ballots or applications were rejected due to an alleged mismatch of signatures. Under Georgia law, county elections officials were required to reject all absentee ballots—as well as absentee ballot applications—of voters whose signature “[did] not appear to be valid” because the signature allegedly did not match the signature on the voter file, without giving prior notice to the voter or an opportunity to review, contest, or appeal that determination.<sup>969</sup> The plaintiffs argued that signatures of the same person could greatly vary for a variety of reasons, including age, physical and mental condition, disability, medication, stress, accidents, and even inherent differences in a person's neuromuscular coordination and stance.<sup>970</sup> Moreover, signature variants were more prevalent in the elderly, disabled, or limited English proficient speakers.<sup>971</sup> Georgia

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<sup>964</sup> Brief of the American Civil Liberties Union, the New York Civil Liberties Union, and the ACLU of Wisconsin Foundation as *Amici Curiae*, in Support of Appellees, *Gill v. Whitford*, No. 1601161 (Sept. 6, 2017).

<sup>965</sup> *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018).

<sup>966</sup> *Whitford v. Gill*, No. 15-cv-421; 18-cv-763, 2019 WL 294800, at \*2 (slip copy) (W.D. Wis. Jan. 23, 2019).

<sup>967</sup> See *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019).

<sup>968</sup> *Whitford v. Vos*, No. 19-2066, 2019 WL 4571109, at \*1 (7th Cir. Jul. 11, 2019).

<sup>969</sup> Complaint at ¶ 1, *Ga. Muslim Voter Project v. Kemp*, No. 1:18-cv-04789 (N.D. Ga. Oct. 16, 2018).

<sup>970</sup> *Id.* at ¶ 4.

<sup>971</sup> *Ibid.*

law effectively put elections officials, which having no such qualifications, in the position of acting as handwriting experts.

The plaintiffs argued that the ballot rejection process violated the procedural due process guarantees of the Fourteenth Amendment and unconstitutionally burdened the fundamental right to vote in violation of the Fourteenth Amendment.<sup>972</sup> The plaintiffs sought a temporary restraining order and preliminary and permanent injunctions requiring election officials to provide absentee voters notice and an opportunity to confirm their identity or otherwise resolve the alleged discrepancy prior to a ballot being rejected, as well as the opportunity to appeal the election officials' decision to reject a ballot due to an alleged signature discrepancy. Notably, Georgia already provided these due process safeguards for other types of balloting issues, including situations where a voter lacks an acceptable photo ID.<sup>973</sup>

In October 2018, the district court granted a temporary restraining order requiring Georgia to offer notice, an opportunity to cure, and an appeals process to voters with perceived signature mismatches.<sup>974</sup> In reviewing the case, the court cited evidence showing that the ballot rejections were applied disproportionately among racial groups. Nearly three times as many Black voters' ballots were rejected than white voters despite the fact that white voters outnumbered black voters two-to-one, and 25% of the rejected ballots came from Asian and Pacific Islander voters despite comprising only 15% of the mail ballot voters.<sup>975</sup> The district court rejected the state's argument that absentee voting, as a privilege rather than a right, did not require the same due process protections as Election Day voting. The court also found that there would be no unreasonable burden involved in extending substantially similar due process safeguards already in place for other balloting issues and that such safeguards would strengthen, rather than weaken (as the state had argued), the integrity of Georgia elections.<sup>976</sup>

The state appealed to the Eleventh Circuit and filed an emergency motion for a stay of the injunction pending appeal, which was denied.<sup>977</sup> The Eleventh Circuit dismissed the state's argument that extending the safeguards to signature rejections would be burdensome and cause irreparable harm. The court noted that the chair of the board of registrars of one of Georgia's most populous counties had testified that compliance with the order was "pretty straightforward," "easily

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<sup>972</sup> *Id.* at ¶¶ 46-65.

<sup>973</sup> *Id.* at ¶ 7.

<sup>974</sup> *See Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018).

<sup>975</sup> *Id.* at 1331.

<sup>976</sup> *Id.* at 1340.

<sup>977</sup> *Martin v. Kemp*, 1:18-cv-04789, 2018 WL 7822108, at \*1 (11th Cir. Nov. 2, 2018).

doable,” and would “not really add any burdens to what we are already doing . . . even with a week left until Election Day.”<sup>978</sup> Shortly after the Eleventh Circuit handed down its decision, the Georgia legislature passed a set changes to its elections laws, which included a revision to the state’s absentee ballot laws that largely mirrored the due process safeguards ordered by the district court for absentee ballots and applications with perceived signature mismatches.<sup>979</sup> These laws were in direct response to this suit and other successful lawsuits addressing voter suppression in Georgia. In light of the passage of these new laws, the parties jointly agreed to a voluntary dismissal of the case in April 2019.<sup>980</sup>

#### **104. New Florida Majority, et al. v. Detzner – Florida 2018**

This case involved an action for injunctive and declaratory relief brought by the ACLU, ACLU of Florida, and Lawyers’ Committee for Civil Rights Under Law, on behalf of New Florida Majority Education Fund, Common Cause, and Mi Familia Vota Education Fund. Plaintiffs sought a statewide week-long extension of the voter registration deadline as the result of Hurricane Michael and problems with the state’s online voter registration system in the final days of the registration period. On October 7, 2018, two days before the voter registration deadline, Florida Governor Rick Scott declared a state of emergency in 35 of Florida’s 67 counties based on the threat posed by Tropical Storm Michael and issued mandatory and voluntary evacuation orders throughout the state.<sup>981</sup> At the time, over 5.6 million people, including nearly 3.7 million registered voters, lived in these 35 counties, accounting for over 28% of registered voters in the state.<sup>982</sup> These announcements caused residents of affected areas to evacuate, causing a major disruption for the last two days of the voter registration period.

Compounding the problem for Florida voters, the state had recently adopted an online voter registration system, but users had been experiencing a number of difficulties with the system in the weeks prior to the voter registration deadline; the ACLU and other organizations warned government officials about these problems

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<sup>978</sup> *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1268 (11th Cir. 2019) (Pryor, J. concurring).

<sup>979</sup> See H.R. 316, Section 27, 155th Gen. Assem., Reg. Sess. (Ga. 2019); see also Press Release, ACLU of Georgia, ACLU of Georgia Lawsuit Results in Changes to State Law (Apr. 4, 2019), <https://www.aclu.org/press-releases/aclu-georgia-lawsuit-results-changes-state-law>.

<sup>980</sup> Joint Stipulation of Dismissal, *Ga. Muslim Voter Project v. Kemp*, No. 1:18-cv-04789 (N.D. Ga. Apr. 15, 2019).

<sup>981</sup> Complaint for Emergency Injunctive and Declaratory Relief at ¶ 17, *New Fla. Majority Educ. Fund v. Detzner*, No. 4:18-cv-00466 (N.D. Fla. Oct. 10, 2018).

<sup>982</sup> *Ibid.*

repeatedly, but the state did not take steps to resolve the issue.<sup>983</sup> The inability of Florida residents to use the online system placed an additional burden on Floridians residing in affected counties that otherwise would have been able to register in person. These disruptions had an outsized impact on the ability of voters to register, especially since the final days of the registration period tend to involve the most activity.<sup>984</sup> The plaintiffs argued that, under the circumstances, the state's refusal to extend the registration deadline amounted to a denial of critical voter registration opportunities, and that, absent relief, tens of thousands of Floridians would likely be prevented from participating in the November 2018 general election.<sup>985</sup> Florida officials did not present any rationale for why it refused to extend the voter registration deadline as other states had done due to the hurricane, including North Carolina and South Carolina. Moreover, in 2016 a federal court ordered Florida to extend its voter registration deadline by a week due to disruptions caused by Hurricane Matthew, which resulted in an additional 80,000 Floridians being able to register;<sup>986</sup> this case sought similar accommodations in 2018 due to Hurricane Michael.

Florida Secretary of State Ken Detzner issued a directive expressly refused to extend the October 9, 2018, registration deadline despite authorizing Supervisors of Elections, whose offices were closed on the voter registration deadline due to Hurricane Michael, to accept paper registration forms on the day that their offices reopened.<sup>987</sup> The plaintiffs sued Detzner asserting that the failure to extend the deadline placed an undue burden on Floridians' right to vote and violated the Equal Protection Clause of the Fourteenth Amendment by failing to uniformly establish an extended voter registration deadline throughout the state. The plaintiffs sought an injunction against enforcement of the October 9 registration deadline and a one-week extension of the deadline throughout the state, including registrations through the online voter registration system.

Shortly after filing, this action was consolidated with *Florida Democratic Party v. Detzner*, a case asserting a similar challenge to Florida's failure to extend the voter registration deadline.<sup>988</sup> Prior to consolidation, the district court in that case denied the Florida Democratic Party's request for a temporary restraining order against enforcement of the voter registration deadline, finding that there was no

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<sup>983</sup> *Id.* at ¶¶ 22-23.

<sup>984</sup> *Id.* at ¶ 24.

<sup>985</sup> *Id.* at ¶ 4.

<sup>986</sup> *See id.* at ¶ 20 (summarizing *Fla. Dem. Party v. Scott*, Case No. 4:16-cv-626, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016)).

<sup>987</sup> *Id.* at ¶ 29.

<sup>988</sup> *Fla Dem. Party v. Scott*, No. 4:18-cv-463 (N.D. Fla. Oct. 10, 2018).

justification for a statewide extension of the deadline since Secretary Detzner's directive operated as a mandatory extension of the deadline in counties affected by Hurricane Michael. Following consolidation, the court applied the same reasoning to deny the plaintiffs' request for a preliminary injunction in *New Florida Majority*.<sup>989</sup> In December 2018, a joint motion to dismiss was filed,<sup>990</sup> and the court granted the voluntary dismissal with prejudice.<sup>991</sup>

### 105. Ohio A. Phillip Randolph Institute v. Ryan Smith<sup>992</sup>— Ohio 2018

This case involved a constitutional challenge to Ohio's congressional redistricting plan as an unconstitutional partisan gerrymander in violation of the Fourteenth Amendment, the First Amendment, and Article I of the U.S. Constitution. In May 2018, Ohio A. Phillip Randolph Institute, the League of Women Voters of Ohio, along with other civil and political organizations and numerous Ohio citizens filed suit against the leaders of the Ohio General Assembly and the Secretary of State.<sup>993</sup> The plaintiffs argued that following the 2010 Census, Ohio Republicans, with the support and assistance of the national Republican Party, used advance computer mapping software to create an unlawful congressional map entrenching a 12-4 Republican to Democratic seat ratio. This ratio was notable because Republicans generally captured between 51% to 59% of the total statewide congressional vote for the decade.<sup>994</sup> For example, in 2012, even though Republicans received 51% of the congressional vote, the challenged map had consistently given Republicans 75% of the congressional seats.<sup>995</sup> The plaintiffs raised four primary challenges to the constitutionality of Ohio's electoral map: (1) it violated the First Amendment by purposefully disfavoring individuals based on their political views and violating association rights; (2) it substantially burdened the right vote in violation of the Fourteenth Amendment; (3) it violated the Equal Protection Clause of the Fourteenth Amendment by diluting the plaintiffs' votes based on their political affiliation and did so intentionally; and (4) it exceeded Ohio's powers under Article I of the Constitution.<sup>996</sup>

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<sup>989</sup> See *New Fla. Majority v. Detzner*, No. 4:18-cv-00466 (N.D. Fla. Oct. 16, 2018).

<sup>990</sup> Joint Motion to Dismiss with Prejudice, *New Fla. Majority v. Detzner*, No. 4:18-cv-00466 (Dec. 11, 2018).

<sup>991</sup> Order of Dismissal, *New Fla. Majority v. Detzner*, No. 4:18-cv-00466 (Dec. 13, 2018).

<sup>992</sup> Larry Householder was subsequently substituted for Ryan Smith as a party.

<sup>993</sup> Complaint, *Ohio A. Philip Randolph Inst. v. Kasich*, No. 1:18-cv-357 (S.D. Ohio Feb. 4, 2019).

<sup>994</sup> Second Amended Complaint at ¶ 2-3, *Ohio A. Phillip Randolph Inst. v. Smith*, 1:18-cv-00357 (S.D. Ohio July 11, 2018).

<sup>995</sup> *Id.* at ¶¶ 2, 86.

<sup>996</sup> *Id.* ¶¶ 136-169.

In August 2018, the three-judge panel assigned to the case denied the defendants' motion to dismiss.<sup>997</sup> The defendants argued that the plaintiffs' claims were nonjusticiable, lacked standing, and was barred by laches.<sup>998</sup> As to justiciability, the court found that all three metrics proposed by the plaintiffs to evaluate the constitutionality of Ohio's map ("efficiency-gap," "mean-median difference," and "partisan bias") were potentially viable at the pleading stage of the litigation, rendering the case justiciable.<sup>999</sup> The court also found that the individual plaintiffs suffered a constitutional injury for purposes of standing under the First Amendment because the challenged maps specifically disfavored the Democratic Party, thereby creating a tangible associational burden, and diluted their votes to such a degree that it made a practical difference in their ability to achieve electoral success.<sup>1000</sup> Similarly, the court found standing for the plaintiffs' Fourteenth Amendment claims because, as residents (or organizational representatives of residents) of particular "cracked" or "packed" districts, the dilution of the plaintiffs' votes constituted an injury-in fact.<sup>1001</sup> The court summarily dismissed the defendants' laches argument because the plaintiffs only sought prospective declaratory and injunctive relief, which laches did not bar.<sup>1002</sup>

Following the court's ruling on the pleadings, the defendants filed a motion for summary judgment in January 2019.<sup>1003</sup> The motion for summary judgment rehashed the justiciability and standing arguments already evaluated by the court.<sup>1004</sup> Relying on the same reasoning as before, the three-judge panel denied the defendants' motion in a lengthy opinion, and the case proceeded to trial.<sup>1005</sup> Following an eight-day bench trial, the court issued another lengthy opinion holding Ohio's "partisan gerrymandering unconstitutional."<sup>1006</sup> The court explained that because the Ohio map created "districts that [were] so skewed toward one party

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<sup>997</sup> *Ohio A. Phillip Randolph Inst. v. Smith*, 335 F. Supp. 3d 988, 993 (S.D. Ohio 2018).

<sup>998</sup> *Id.* at 994.

<sup>999</sup> *Id.* at 996.

<sup>1000</sup> *Id.* at 997-98. In addition to finding that the plaintiffs had established standing under two separate tests, the court found that the organizational plaintiffs had alleged injuries-in-fact on their own behalf and of their members.

<sup>1001</sup> *Id.* at 999.

<sup>1002</sup> *Id.* at 1001-02.

<sup>1003</sup> Defendants' Motion for Summary Judgment, *Ohio A. Philip Randolph Inst. v. Kasich*, No. 1:18-cv-357 (S.D. Ohio Jan. 8, 2019).

<sup>1004</sup> See Memorandum in Law in Support of Defendants' Motion for Summary Judgment, *Ohio A. Philip Randolph Inst. v. Kasich*, No. 1:18-cv-357 (S.D. Ohio Jan. 8, 2019).

<sup>1005</sup> *Ohio A. Phillip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 703 (S.D. Ohio 2019).

<sup>1006</sup> *Ohio A. Phillip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 994 (S.D. Ohio 2019).

that the electoral outcome [was] predetermined,” the map violated the First Amendment, the Fourteenth Amendment, and Ohio’s Article I powers to regulate elections.<sup>1007</sup> The defendants appealed the ruling. The Supreme Court stayed the ruling of the district court<sup>1008</sup> before ruling in *Rucho v. Common Cause*, which found partisan gerrymandering claims nonjusticiable.<sup>1009</sup> The case is currently pending before the Supreme Court, but the plaintiffs filed a motion to have the case dismissed in the light of the Supreme Court’s finding in *Rucho*.

## 106. League of Women Voters of Arizona, et al. v. Reagan – Arizona 2018

In August 2018, the ACLU, the ACLU of Arizona, Demōs, and the Lawyers’ Committee for Civil Rights Under Law, on behalf of the League of Women Voters of Arizona, Mi Familia Vota, and Promise Arizona, filed a lawsuit for declaratory and injunctive relief to remedy Arizona’s violations of Section 5 of the National Voter Registration Act (NVRA).<sup>1010</sup> Section 5 requires that when an individual notifies a state motor vehicles agency of a change of address, the agency must automatically update the individual’s voter registration information, unless the voter affirmatively indicates that their change of address is not for voter registration purposes.<sup>1011</sup> Contrary to this requirement, the Arizona Secretary of State was failing to automatically update the addresses of individuals who changed their addresses through the Arizona Department of Transportation.<sup>1012</sup> Because of this failure to comply with federal law, Arizona had been consistently at the top of the list of states issuing and rejecting provisional ballots.<sup>1013</sup> To put this in perspective, almost 70% of Arizonans changed their residential address between 2000 and 2010, making Arizona the state with the second highest rate of residents with address changes.<sup>1014</sup> The U.S. Census Bureau estimated that in 2016, more than 800,000 people in Arizona moved within the same county and more than 126,000 moved to a different county.<sup>1015</sup> The plaintiffs also presented information showing that one of

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<sup>1007</sup> *Id.*

<sup>1008</sup> *Chabot v. Ohio A. Philip Randolph Institute*, 139 S. Ct. 2635 (2019).

<sup>1009</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2490 (2019).

<sup>1010</sup> Complaint, League of Women Voters of Ariz. v. Reagan, No. 18-cv-02620 (D. Ariz. Aug. 18, 2018).

<sup>1011</sup> 52 U.S.C. § 20504.

<sup>1012</sup> See Complaint at ¶ 32, League of Women Voters of Ariz. v. Reagan, No. CV-18-02620 (D. Ariz. Aug. 18, 2018).

<sup>1013</sup> *Ibid.*

<sup>1014</sup> *Id.* at ¶ 29.

<sup>1015</sup> *Id.* This matters because under Arizona law if a voter moves between counties he or she is unable to vote at either their new or old polling place if their address is not up to date. See A.R.S. §§ 16-122, 16-135, 16-584. If a voter moves within the same county and attempts to vote at their old polling location, the voter would still be disenfranchised because Arizona law does not permit any part of an

the most frequent reasons provisional ballots in Arizona are rejected is because they are cast out-of-precinct. In the 2008 general election, 14,885 out-of-precinct ballots were not counted, constituting 0.6% of total ballots cast.<sup>1016</sup> In the 2012 general election, 10,979 ballots were cast out-of-precinct and not counted, constituting 0.5% of all ballots cast.<sup>1017</sup> Arizona's process also affected its early vote by mail system because if a voter moves within the state and the state does not automatically update their registration address in accordance with the NVRA, then the voter would not receive their early voting ballot.<sup>1018</sup> In 2016, 75% of Arizona voters utilized vote by mail. Accordingly, the plaintiffs sought an injunction to compel compliance with Section 5 of the NVRA and to count out-of-precinct ballots cast in the 2018 elections for races for which voters were eligible.

Following a hearing for a preliminary injunction, the district court rejected the plaintiffs' request.<sup>1019</sup> While the court indicated there may be a substantive NVRA violation, the court found that the plaintiffs had little chance to prevail on the merits due to the defendants' lack of authority to unilaterally alter voter registration procedures and compel Arizona election officials to count out-of-precinct ballots.<sup>1020</sup> The court also concluded that the plaintiffs were unable to show irreparable harm, citing a lack of evidence indicating that individuals who updated their address with the Arizona Department of Transportation had their ballots invalidated.<sup>1021</sup> The case is currently in discovery.

### **107. Rangel-Lopez v. Cox – Kansas 2018**

On October 26, 2018, just days before the 2018 general election, the ACLU and ACLU of Kansas, on behalf of the League of United Latin American Citizens and an individual plaintiff, filed a lawsuit challenging the unilateral decision of the county clerk of Ford County, Kansas, to move the only voting site in its county seat of Dodge City to a location outside of the city.<sup>1022</sup> Ford County is a majority-minority county in Kansas, largely due to the demographics of Dodge City. At the time of the filing, Hispanic residents made up approximately 53% of the county's population,

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out-of-precinct ballot to count, even for races for which the voter is otherwise eligible, such as statewide or federal offices. *Id.*

<sup>1016</sup> *Id.* at ¶ 32.

<sup>1017</sup> *Ibid.*

<sup>1018</sup> *Id.* at ¶ 33.

<sup>1019</sup> *League of Women Voters of Ariz. v. Reagan*, No. CV-18-02620, 2018 WL 4467891, at \*10 (D. Ariz. Sept. 18, 2018).

<sup>1020</sup> *Id.* at \*6.

<sup>1021</sup> *Id.* at \*7.

<sup>1022</sup> Complaint at ¶ 1, *LULAC v. Cox*, No. 2:18-cv-02572 (D. Kan. Oct. 26, 2018).

five times the percentage of Hispanic residents in Kansas.<sup>1023</sup> Prior to the polling location change, Dodge City's Civic Center had been the only polling location in the city since 1998 and used as recently as August 2018 for the primary election.<sup>1024</sup> The county clerk's decision to move the city's only polling site also came after a year of efforts by voters and civic organizations requesting the clerk to add additional polling locations to better serve the area's Hispanic voters. The new location was over a mile from the nearest bus stop and did not have sidewalks for the majority of the route between the bus stop and new polling location.<sup>1025</sup> A significant number of people in Dodge City were dependent on public transit because of income, age, and disability.<sup>1026</sup> In 2016, Dodge City Public Transportation estimated that approximately 36% of the county had a potential need for public transportation, and 40% of households in Ford County did not own a car or shared a single vehicle among multiple family members.<sup>1027</sup> Additionally, the county's poverty rate was higher than the rest of Kansas, and its Hispanic residents were twice as likely than their white neighbors to be poor.<sup>1028</sup> Given the socioeconomic burdens faced by the city's Hispanic voters, the plaintiffs argued that they would be disproportionately burdened by the polling location change.

The plaintiffs alleged that the county clerk's actions violated the First and Fourteenth Amendments and Section 2 of the Voting Rights Act and sought a temporary restraining order to require the clerk to open an additional polling place in Dodge City for the upcoming election and a permanent injunction requiring her to open locations accessible by public transportation.<sup>1029</sup> The judge denied the plaintiffs' request for a temporary restraining order on November 1, 2018, after a hearing on the matter, determining a late voting change to revert the polling site back to its original location was not in the public interest because it "likely would create more voter confusion than it would cure."<sup>1030</sup> The court did not come to a determination on whether the plaintiffs would have succeeded on the merits because of the limited record before it, but expressed concern with the facts that had been presented in support of the temporary restraining order.<sup>1031</sup>

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<sup>1023</sup> *Id.* at ¶ 8.

<sup>1024</sup> *Id.* at ¶ 6.

<sup>1025</sup> *Id.* at ¶ 11.

<sup>1026</sup> *Id.* at ¶ 9.

<sup>1027</sup> *Ibid.*

<sup>1028</sup> *Id.* at ¶ 8.

<sup>1029</sup> *Id.* at ¶ (a) - (d)

<sup>1030</sup> *Rangel-Lopez v. Cox*, 344 F.Supp.3d 1285, 1290 (D. Kan. 2018).

<sup>1031</sup> *Id.* at 1291.

After national attention on the issue and increasing pressure, the county clerk announced that she would open two additional polling locations in the city, and the plaintiffs filed a motion to voluntarily dismiss the action without prejudice, which was granted on January 29, 2019.<sup>1032</sup> The county expended approximately \$90,000 on legal fees as a result of the lawsuit.

### **108. Maricopa County Republican Party v. Reagan – Arizona 2018**

In 2018, some Arizona county recorders publicly disclosed that they stopped notifying voters that their absentee ballot signatures were deemed mismatched as of 7:00 p.m. on Election Day, effectively denying these voters an opportunity to prove their signatures were genuine even though they had turned their ballots in on time.<sup>1033</sup> This policy was especially arbitrary in light of the fact that Arizona had a process in place that permitted voters who cast provisional ballots up to five business days to cure those ballots.<sup>1034</sup>

To address this issue, the ACLU, ACLU of Arizona, Campaign Legal Center, and others sent a letter to the Arizona Secretary of State and county recorders two weeks prior to the 2018 election warning that this practice violated the due process and equal protection clauses of the Constitution.<sup>1035</sup> The letter informed the Secretary of State that, outside of Pima County, election officials were not providing notice to voters with alleged mismatched signatures if the mail-in ballot was received on or near Election Day. As a result, whether an eligible voter's mail-in ballot would be counted was arbitrary and dependent on which county they resided in and when they turned in their ballot within the allowable window.<sup>1036</sup> The letter also highlighted the arbitrary nature of the signature matching requirement, since election officials comparing signatures were not handwriting experts nor did they follow uniform procedures or standards in comparing signatures.<sup>1037</sup> The letter argued that the various practices across the state violated the Fourteenth Amendment in three ways: (1) by depriving voters of procedural due process; (2) by imposing an undue burden on the fundamental right to vote; and (3) by counting

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<sup>1032</sup> Order Granting Voluntary Motion to Dismiss, *LULAC v. Cox*, No. 18-2572 (D. Kan. Jan. 29, 2019).

<sup>1033</sup> See Letter from ACLU et al. to Michele Reagan, Secretary of State, Ariz. (Oct. 22, 2018), <https://campaignlegal.org/document/letter-arizona-secretary-state-michele-reagan-regarding-signature-matching-process>.

<sup>1034</sup> See *id.* at 2.

<sup>1035</sup> See *id.* at 5.

<sup>1036</sup> *Id.* at 7.

<sup>1037</sup> *Ibid.*

votes in an arbitrary manner in violation of the Equal Protection Clause.<sup>1038</sup> Accordingly, the letter urged the Arizona Secretary of State to issue immediate guidance to county recorders requiring that all voters whose ballots were flagged for allegedly mismatched signatures be provided notice and an opportunity to cure before their ballots were rejected. Alternatively, the letter requested all county recorders to independently implement procedures ensuring notice to all voters with “mismatched” signatures to cure their ballots if they were submitted within the allowable timeframe.<sup>1039</sup>

On November 7, 2018, several county Republican parties filed a motion for a temporary restraining order in state court seeking to enjoin the improved practice because several rural counties were not permitting voters the same notice and cure opportunity.<sup>1040</sup> They argued that “certain County Recorders—specifically those of Maricopa and Pima Counties—[would] allow voters to cure non-compliant early ballots for a period of five days after Election Day...[which] threatens to beget an extended period of confusion and uncertainty following the election” and that this practice denied Arizona voters equal protection.<sup>1041</sup>

In response, the ACLU, ACLU of Arizona, and Campaign Legal Center intervened and filed a responsive brief late in the evening on November 8, 2018, two days after the general election, on behalf of the League of United Latin American Citizens, the League of Women Voters, and Arizona Advocacy Network Foundation, seeking an order from the court that *all* Arizona counties offer voters whose signatures were flagged notice and an opportunity to cure through the deadline for resolving provisional ballot issues, which was Wednesday, November 14.<sup>1042</sup> The brief argued that the court should not remedy the failure of some Arizona counties to provide voters with due process by prohibiting *all* Arizona counties from doing so. If the court was inclined to address the uniformity question on an emergency basis, it should order all counties to provide voters with notice and an opportunity to confirm their signatures.<sup>1043</sup> The brief cited data from 2016 showing approximately three-quarters of Arizona’s voters voted by mail and that 2,657 mail-in ballots in Arizona were rejected because officials determined the ballots’ signatures did not match the

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<sup>1038</sup> *Id.* at 5.

<sup>1039</sup> *Id.* at 2.

<sup>1040</sup> Verified Complaint for Injunctive and Declaratory Relief, Maricopa Cty. Republican Party v. Reagan, No. CV 2018-013963 (S. Ct. Ariz., Maricopa Cty. Nov. 7, 2018).

<sup>1041</sup> *See id.* at ¶¶ 28-30.

<sup>1042</sup> Defendant-Intervenors LULAC et al.’s Brief in Response to Plaintiffs’ Motion for a Temporary Restraining Order, Maricopa Cty. Republican Party v. Reagan, No. CV2018-013963 (Maricopa Cty., Ariz. Nov. 8, 2018).

<sup>1043</sup> *Id.* at 2, 8-10.

signatures on record.<sup>1044</sup> The plaintiffs also argued that any administrative burden on the government was insufficient to overcome these voters' interests in due process protection for their fundamental right to vote.<sup>1045</sup>

A hearing was held on November 9, 2018, and the Maricopa County Superior Court, upon agreement of a settlement by the parties, including the state and all fifteen county recorders, ordered all county recorders statewide to permit voters to cure an alleged signature mismatch issue by the provisional ballot cure deadline of Wednesday, November 14, to confirm their vote.<sup>1046</sup>

### **109. Adams Jones v. Boockvar – Pennsylvania 2018**

On November 13, 2018, the ACLU, ACLU of Pennsylvania, and Lawyers' Committee for Civil Rights Under Law filed a lawsuit challenging Pennsylvania's deadline for submitting absentee ballots.<sup>1047</sup> The plaintiffs include nine individuals who applied for an absentee ballot on time but received the ballot either too close to or after Pennsylvania's deadline for returning ballots. For an absentee ballot to count in Pennsylvania, the county board of elections must receive the ballot by 5:00 p.m. on the Friday before the election, four days before Election Day, making it the earliest absentee ballot receipt deadline in the country.<sup>1048</sup> The deadline regularly disenfranchises thousands of Pennsylvania absentee voters due to the unreasonably early deadline.<sup>1049</sup> The Philadelphia Inquirer reported that 86% of Pennsylvania absentee ballots rejected in the 2014 election—2,030 out of 2,374—were rejected solely for missing the Friday 5:00 p.m. return deadline, and 2,162 absentee ballots were rejected for the same reason in 2010.<sup>1050</sup> Voters can comply with every legal deadline for registering to vote and requesting an absentee ballot and still receive their ballot too late to return it on time.<sup>1051</sup>

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<sup>1044</sup> *Id.* at 3.

<sup>1045</sup> *Id.* at 5-8.

<sup>1046</sup> Settlement Order, *Maricopa Cty. Republican Party v. Reagan*, No. CV 2018-013963 (Maricopa County Sup. Ct., Ariz. Nov. 9, 2018).

<sup>1047</sup> Petition for Review, *Adams Jones v. Boockvar*, No. 717 MD 2018 (Pa. Commw. Ct. Nov. 13, 2018).

<sup>1048</sup> See 25 PA. CONS. STAT. § 3146.6(a); see also Petition for Review at ¶ 3, *Adams Jones v. Boockvar*, No. 717 MD 2018 (Pa. Commw. Ct. Nov. 13, 2018).

<sup>1049</sup> Petition for Review at ¶ 4, *Adams Jones v. Boockvar*, No. 717 MD 2018 (Pa. Commw. Ct. Nov. 13, 2018).

<sup>1050</sup> *Id.* at ¶ 46.

<sup>1051</sup> *Id.* at ¶ 4.

The burden on these absentee voters is particularly acute because Pennsylvania does not have early in-person voting and Pennsylvania law only permits absentee voting for voters who cannot vote on Election Day for certain specified reasons, so many of these voters have no other option but to vote absentee.<sup>1052</sup> These voters are effectively deprived of their only available option to cast a ballot.<sup>1053</sup> The problem is only expected to get worse due to cuts to the postal service.<sup>1054</sup> Most of these disenfranchised individuals do not learn that their ballot was rejected.<sup>1055</sup> This problem has persisted for over a decade; post-election data that became public following the filing of the petition confirmed that the problem continued to be an issue in the November 2018 midterm election.<sup>1056</sup>

The plaintiffs seek declaratory relief that Pennsylvania’s absentee ballot deadline violates their right to vote under the state and federal constitutions and injunctive relief barring the use of the current absentee ballot deadline in future elections. The respondents filed preliminary objections in motions to dismiss in January 2019, and the petitioners filed their brief in opposition to the preliminary objections in April 2019.<sup>1057</sup> Oral argument on the motions was held on June 5, 2019, and the case is awaiting decision on the preliminary objections.

#### **110. State of Texas v. Crystal Mason – Texas 2018**

The State of Texas prosecuted Crystal Mason for the crime of illegal voting pursuant to Tex. Elec. Code § 64.012(B), which bars someone who “votes or attempts to vote in an election in which the person knows the person is not eligible to vote.”<sup>1058</sup> She cast a provisional ballot in the 2016 presidential election while on federal supervised release, which the state claims renders her ineligible to vote under Texas law. Her provisional ballot was never counted. She asserted that she cast the provisional ballot upon the suggestion of a poll worker and did not know that the state considered her ineligible to vote at the time, but she was convicted on March 28, 2018, following a bench trial and sentenced to serve five years in state prison.

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<sup>1052</sup> *Id.* at ¶ 6.

<sup>1053</sup> *Ibid.*

<sup>1054</sup> *Id.* at ¶ 48.

<sup>1055</sup> Petitioners’ Brief In Opposition to the Preliminary Objections of All Respondents at 2, *Adams Jones v. Boockvar*, Docket No. 717 MD 2018 (Pa. Commw. Ct. Apr. 8, 2019).

<sup>1056</sup> *Ibid.*

<sup>1057</sup> *Id.*

<sup>1058</sup> Tex. Elec. Code § 64.012(B).

The ACLU of Texas, along with the Texas Civil Rights Project, filed an amicus brief in support of Ms. Mason’s amended motion for a new trial on May 23, 2018. It argued that Texas’ criminalizing of the casting of a provisional ballot when the person mistakenly believes he or she is eligible to vote is inconsistent with federal law. The brief argued that the reading of the Texas Election Code to criminalize Ms. Mason is in violation of her protected rights under the Help America Vote Act (“HAVA”), which permits people who believe they are eligible to vote to cast a provisional ballot even when eligibility to vote is uncertain.<sup>1059</sup> It further argues that evidence that an individual cast a provisional ballot based on an apparent mistake about her eligibility is insufficient as a matter of law to demonstrate the requisite criminal intent under the Texas law.

On June 11, 2018, the trial court denied Ms. Mason’s amended motion for a new trial as untimely and declined to consider the ACLU’s brief.<sup>1060</sup> The trial court also denied Ms. Mason’s original motion for a new trial, rejecting her claims of bias, ineffective assistance of counsel, and legal insufficiency.<sup>1061</sup>

Ms. Mason appealed her conviction. On May 10, 2019, the ACLU, ACLU of Texas, and the Texas Civil Rights Project joined the legal team representing Ms. Mason in her appeal. On September 10, 2019, a three judge panel heard oral arguments on appeal, in which Ms. Mason’s defense argued that the evidence was neither legally nor factually sufficient to sustain her conviction because the prosecution failed to prove that: (1) Ms. Mason voted in the 2016 election because her provisional ballot was never counted and a counted provisional ballot is not a “vote” under the Texas Election Code, (2) Ms. Mason was ineligible to vote because the conditions of her release from federal prison did not amount to “supervision” under Texas law; and (3) Ms. Mason knew she was ineligible to vote. The defense also argued that (1) the illegal voting statute is unconstitutionally vague as applied to Ms. Mason because what constitutes “supervision” for purposes of rendering someone ineligible to vote is undefined and ambiguous; (2) HAVA preempts the state’s interpretation of the Texas Election Code to criminalize Ms. Mason’s actions because HAVA creates a system whereby people who believe they are eligible to vote to cast a provisional ballot may do so, even if they turn out to be incorrect; and (3) Ms. Mason received ineffective assistance of counsel at trial. The panel’s decision is currently pending.

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<sup>1059</sup> Brief of ACLU et al. as Amicus Curiae, *Texas v. Mason*, No. D 432-1485710-00 (432nd Judicial District Court of Tarrant County, Texas, May 23, 2018).

<sup>1060</sup> Findings of Fact, Conclusions of Law and Order, *Texas v. Mason*, No. D 432-1485710-00 (432nd Judicial District Court of Tarrant County, Texas, June 11, 2018).

<sup>1061</sup> *Id.* at 12-15.

### **111. Jarrod Stringer v. Whitley – Texas 2016**

Private plaintiffs filed suit in 2016 alleging that Texas violates the “motor voter” provisions of the National Voter Registration Act of 1993 (“NVRA”) and the Equal Protection Clause of the Fourteenth Amendment by failing to provide for simultaneous voter registration with online driver’s license renewals and by failing to provide for simultaneous voter registration with online change-of-address forms.<sup>1062</sup>

The district court granted summary judgment to the plaintiffs on May 10, 2018.<sup>1063</sup> The district court ruled that Texas was legally obligated under the NVRA to permit a simultaneous voter registration application with every transaction, and that it violated the NVRA by failing to do so.<sup>1064</sup> It also ruled that Texas violated the Equal Protection Clause of the Fourteenth Amendment.<sup>1065</sup> The plaintiffs obtained declaratory and injunctive relief.

Texas appealed to the Fifth Circuit on May 23, 2018, and the ACLU filed an amicus brief in support of the plaintiffs on September 21, 2018. The brief provided background on the requirements of the NVRA, identified how other states meet their NVRA obligations and provide voter registration services during online driver’s license transactions, and explained specific steps Texas could take to enhance its voter registration, change-of-address, and renewal procedures in order to comply with the NVRA.<sup>1066</sup> Oral argument was held on February 5, 2019. The Fifth Circuit’s decision is pending.

### **112. Department of Commerce v. New York – New York 2019**

The ACLU represented a coalition of civil rights groups, including the New York Immigration Coalition (“NYIC”), in a challenge to the U.S. Department of Commerce’s decision to add a citizenship question to the 2020 census, which the department claimed was for the purpose of facilitating enforcement of the Voting Rights Act. The suit alleged that the citizenship question would cause noncitizen households not to respond to the census, leading to an undercounting, and ultimately, underrepresentation, of communities of color. The suit alleged constitutional violations under the Enumeration Clause and the Equal Protection Clause as well as violations of the Census Act and the Administrative Procedures

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<sup>1062</sup> *Stringer v. Whitley*, No. 5:16-cv-00257 (W.D. Tex. Mar. 14, 2016).

<sup>1063</sup> *Stringer v. Pablos*, 320 F. Supp. 3d 862 (W.D. Tex. 2018).

<sup>1064</sup> *Id.* at 888-97.

<sup>1065</sup> *Id.* at 897-900.

<sup>1066</sup> Brief of ACLU et al. as Amicus Curiae, *Stringer v. Pablos*, No. 18-50428 (5th Cir. Sept. 10, 2018).

Act (APA). The APA creates a process by which courts can review a government agency’s justifications for taking an action and strike down the action if the decision is found to be arbitrary or capricious.

The district court found for the NYIC coalition, holding that Commerce Secretary Wilbur Ross violated the APA by acting in a manner that was arbitrary and in spite of overwhelming evidence that the question would cause undercounting of immigrant communities.<sup>1067</sup> The court found that the Secretary “failed to consider several important aspects of the problem; alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices.”<sup>1068</sup> The court also found substantial evidence that the reasons given for the decision to include the census question were pretextual, and suggested that discriminatory intent may have been found if the plaintiffs had been permitted to gather additional evidence. Because of the mismatch between the Secretary’s stated reasons for adding a citizenship question to the census and the actual evidence on the record, the district court found the ruling to be arbitrary and capricious and vacated it under the APA.

The Trump Administration appealed the ruling to the Supreme Court, which reversed in part and affirmed in part the district court’s holding in a June 2019 decision.<sup>1069</sup> The Supreme Court reversed the lower court’s finding that the Secretary violated the Census Act, but upheld the ruling that the Secretary violated the APA by providing pretextual justification for the decision. The Court concluded that the Secretary provided a sole reason for including the citizenship question—facilitating enforcement of the Voting Rights Act—yet the record showed that the Voting Rights Act played almost no part in the discussions surrounding the decision and was merely a “distraction.”<sup>1070</sup> The Court found that the APA required the Secretary to provide a full and honest account of the justifications for its decision, and that his failure to do so justified the district court’s ruling vacating the Secretary’s decision to include a citizenship question on the 2020 census.

The Justice Department and Secretary Ross initially announced that they would abandon the citizenship question and begin to print census forms without it, but President Trump later announced a decision to reverse course and pursue a renewed effort to include the question. In late July, the Trump administration

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<sup>1067</sup> *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom. Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

<sup>1068</sup> *Id.* at 516.

<sup>1069</sup> *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

<sup>1070</sup> *Id.* at 2576.

finally abandoned plans to include the citizenship question on the census, a significant victory for voting rights advocates.

### **113. Texas League of United Latin American Citizens v. Whitley – Texas 2019**

In 2019, the ACLU and ACLU of Texas sued the Texas Secretary of State in federal court on behalf of MOVE Texas Civic Fund and other plaintiffs to prevent an unlawful purge of the voting rolls that would target and threaten the voting rights of eligible naturalized citizens and people of color.<sup>1071</sup> Shortly after commencing, this case was consolidated with two other cases.<sup>1072</sup>

The action stemmed from a January 25, 2019, press release from Secretary of State Whitley, announcing that his office had identified approximately 95,000 individuals whom he claimed were possible noncitizens registered to vote. According to the press release, a purge list was created to facilitate counties purging these individuals from the county's voter rolls.<sup>1073</sup> When the list was created, officials failed to account for naturalized citizen who submitted documentation to DPS before registering, despite the large number of Texans who naturalize every month and the amount of time, sometimes years, between DPS transactions. When the purge list was released, it was revealed that the data was seriously flawed, and the Secretary of State retracted individuals from the purge list because they were citizens who had been included due to a "coding error." Some of those citizens had already been sent notices threatening them with removal from the rolls.<sup>1074</sup>

The lawsuit alleged that the purge list was discriminatory and arbitrary in its design, purpose, and effect, violating the U.S. Constitution and the Voting Rights Act of 1965 by targeting naturalized citizens. There are approximately 1.6 million naturalized citizens in Texas, and over 87 % of them are Black or Latino.<sup>1075</sup> With general elections to be held on May 4, 2019, for which the registration deadline was April 4, 2019, eligible voters who were purged through this program would have limited time to re-register before the elections.<sup>1076</sup> In April 2019, the parties agreed

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<sup>1071</sup> First Amended Complaint, MOVE Tex. Civic Fund, et al., v. Whitley, No. 3:19-cv-00041, Dkt. No. 7 (S.D. Tex. Feb. 6, 2019).

<sup>1072</sup> Order of Consol., Tex. League of United Latin Am. Citizens, et al., v. Whitley, No. 5:19-cv-00171-FB (S.D. Tex. Feb. 22, 2019).

<sup>1073</sup> First Amended Complaint at 2, MOVE Tex. Civic Fund, et al., v. Whitley, No. 3:19-cv-00041, Dkt. No. 7 (S.D. Tex. Feb. 6, 2019).

<sup>1074</sup> *Id.* at 4

<sup>1075</sup> *Id.* at 5

<sup>1076</sup> Pls.' Mot. for Prelim. Injunction, MOVE Tex. Civic Fund, et al., v. Whitley, No. 3:19-cv-00041, Dkt. No. 10 (S.D. Tex. Feb. 10, 2019).

to a settlement providing that with the dismissal of all three consolidated cases, the state would rescind its original advisory announcing the purge effort, as well as provide and maintain information regarding the implementation of the process.<sup>1077</sup>

#### **114. Gruver v. Barton – Florida 2019**

In June 2019, the ACLU, ACLU of Florida, NAACP Legal Defense and Educational Fund, Inc., and Brennan Center for Justice filed a federal lawsuit on of a set of plaintiffs challenging a new state law that conditions the restoration of the right to vote after a felony conviction on a person's ability to pay court-related fees.<sup>1078</sup> The lawsuit alleges violations of the First, Fourteenth, and Fifteen Amendments; the Twenty-Fourth Amendment; and the Ex Post Facto Clause.

Over five million Floridians supported Amendment 4 in the November 2018 elections, passage of which automatically restored the right to vote of 1.6 million people with past felony convictions, or nearly 25% of the 6.1 million Americans who had been permanently disenfranchised. Florida had been one of only four states who permanently disenfranchised their citizens based on a single felony conviction, causing the highest percentage of felon disenfranchisement in the country. More than 10% of the Florida's voting-age population were ineligible to vote, and of that number, over 20% were Black.

In response, the Florida Legislature quickly passed SB 7066 in response, require that returning citizens pay off all court-related fees before their voting rights could be restored. The new law essentially created two classes of returning citizens: those who are wealthy enough to pay off all court-related fees in order to restore their voting rights and another group who are not. This unconstitutional conditioning of the ability of a returning citizen to vote maintains the harsh racial disparities in the criminal justice system, given longstanding racial disparities in wealth and poverty.

In October 2019, a federal court granted a partial preliminary injunction in the plaintiffs' favor. The court ruled that individual plaintiffs in the case would have their rights restored, and in doing so did not make a definitive decision on the poll tax claim. However, the court held that "Florida cannot deny restoration of a felon's right to vote solely because the felon does not have the financial resources to pay the other financial obligations." Another trial date is set for April 2020.

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<sup>1077</sup> Settlement Agreement, *Tex. League of United Latin Am. Citizens, v. Whitley*, No. 5:19-cv-00171 (S.D. Tex. Apr. 26, 2019).

<sup>1078</sup> Complaint for Injunctive and Declaratory Relief, *Gruver v. Barton*, No. 4:19-cv-00302 (N.D. Fla. June 28, 2019).