The Atlantic

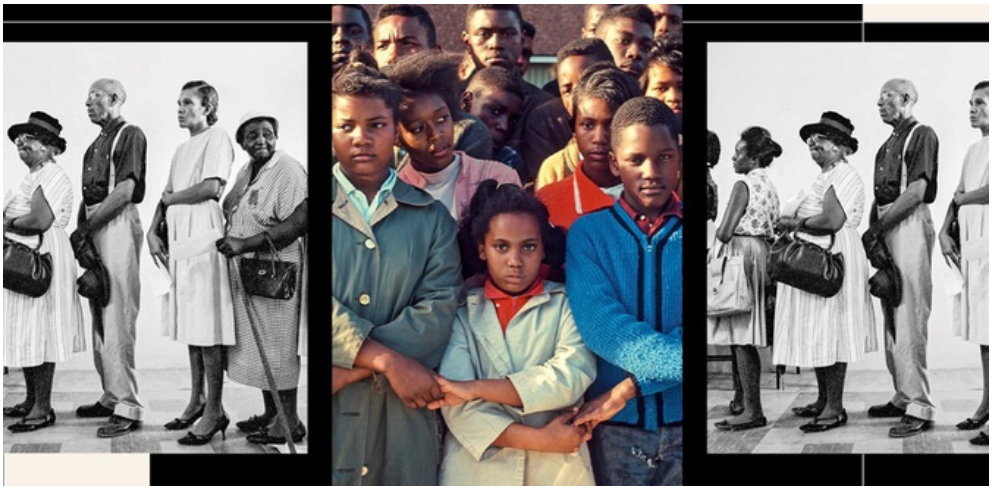
NEWSLETTERS

The Atlantic Daily: The Growing Threat to the Voting Rights Act

Then: Why are vaccines given in the upper arm?

CAROLINE MIMBS NYCE **FEBRUARY 11, 2021**

Every weekday evening, our editors guide you through the biggest stories of the day, help you discover new ideas, and surprise you with moments of delight. Subscribe to get this delivered to your inbox.



Dan Budnik / Contact Press Images; Flip Schulke / Corbis / Getty

"You were born on July 9, 1964, in Greenwood, Mississippi, delivered into the cradle of white supremacy," our senior editor Vann R. Newkirk II writes in the opening section—addressed to his late mother—of his investigation into the growing threat to voting rights.

A year later, the Voting Rights Act was signed into law—"wielding federal muscle to protect Black voters in a way that hadn't been seen since Reconstruction" and ushering in the first era of "what might be considered genuine democracy in America."

Today, the VRA is under siege, Vann warns. Court losses, coupled with the proliferation of restrictive voting laws, leave the legislation—and with it, true American democracy—in danger of disappearing. Read his piece.

Vann also discusses his mom and the future of the VRA on this week's episode of *The Experiment*, our new podcast with WNYC Studios. Listen here.

RECOMMENDED READING

A Playlist for Your Next Walk

SPENCER KORNHABER

The Books Briefing: The Many Sides of Loneliness

KATE CRAY

The Atlantic Daily: A Guide to America's Awkward, Semi-Vaccinated Months

ISABEL FATTAL

Our staff writer Katherine J. Wu, who recently wrote about why the vaccine's second shot can rile up the immune system, has an answer:

> Targeting shots to the deltoid muscle hits a perfect sweet spot for vaccines, distributing their contents quickly, without diluting or destroying the important ingredients. Muscles are rife with blood vessels, which disperse the vaccine's contents throughout the body and provide a conduit for immune cells to move back and forth from the injection site. They are also naturally chock full of "messenger" immune cells, which can quickly grab hold of the bits of the vaccine that resemble the coronavirus and carry them to the rest of the immune system. This baton pass kick-starts the production of antibodies and other disease-fighting molecules and cells.
>
> Injecting a vaccine directly into the blood would water it down too quickly, depriving immune cells of the opportunity to learn from it. Spiking it into a fattier tissue, such as the buttocks, would slow the process down too much because fat isn't laced with as many blood vessels, and is also lacking in many of those crucial messenger cells.
>
> Savor that upper-arm shot: It might ache for a bit, but only because your immune cells are already hard at work.

Tonight's *Atlantic*-approved isolation activity:

Ten years ago, Lady Gaga released "Born This Way," a bombastic anthem that set the table for a decade of culture wars. Revisit the song—and reflect on its place in pop-music history.

Today's break from the news:

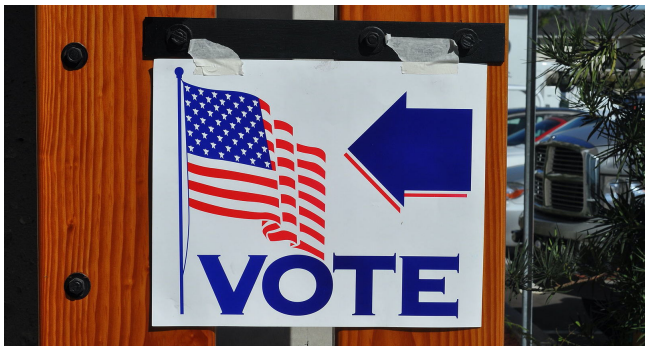
"Falling in love can be exhilarating, but it isn't the secret to happiness per se."

CASE PREVIEW

Justices to consider whether Arizona's voting rules discriminate against minorities

By **Amy Howe** on Feb 16, 2021 at 9:00 am

Share



Oral argument in the latest voting-rights case to come before the Supreme Court is set for March 2. (Tom Arthur via Wikimedia Commons)

The 2020 elections may be over, but the Supreme Court will soon hear oral argument in a pair of voting-rights cases from one of last year's key battleground

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

The cases challenge two Arizona voting provisions: a policy that requires an entire ballot to be thrown out if the ballot was cast at the wrong precinct, and a state law that bans the collection of ballots by third parties, sometimes called "ballot harvesting." The challengers argue that both the policy and the law discriminate against racial minorities in Arizona, and the justices' eventual ruling obviously could affect how the state carries out its elections going forward. More broadly, though, the justices could also weigh in on the proper test for evaluating voting-rights claims like these, which could have a sweeping effect nationwide.

The cases, ***Brnovich v. Democratic National Committee*** and ***Arizona Republican Party v. Democratic National Committee***, have been consolidated for one hour of argument. The court will hear the cases on March 2.

Background

The first provision at the heart of the cases now before the Supreme Court is known as the "out of precinct" policy. Roughly 90% of the state's counties assign voters to a specific precinct based on their home address. (Counties can also opt to use a different model, in which voters can cast a ballot at any voting location within the county; that model is not being challenged here.) A voter who shows up at a polling place where she does not appear on the voting rolls can cast a provisional ballot. If election officials later determine that she voted in the wrong precinct, then her entire ballot is discarded. None of the votes that she cast are counted, even if she was

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

The second provision is the ban on ballot harvesting, which the state's legislature enacted in 2016. The law makes it a felony, punishable by up to two years in prison and a $150,000 fine, to collect and deliver another person's completed ballot (with exceptions for family members, caregivers, mail carriers and election officials).

The Democratic National Committee and voters went to federal court in 2016 to block both the "out of precinct" policy and the ban on ballot harvesting. They argued that both the policy and the ban violate **Section 2 of the Voting Rights Act**, which prohibits policies or laws that result in racial discrimination in voting. They also contended that the ban on ballot harvesting was the product of intentional discrimination by the state legislature, thereby violating both Section 2 and the **15th Amendment to the Constitution**, which prohibits states from denying the right to vote based on race. The district court ruled for the state, concluding that neither provision violated the Constitution or the Voting Rights Act.

9th Circuit decision

The full U.S. Court of Appeals for the 9th Circuit reversed. Stressing that Section 2 no longer requires proof that legislators intended to discriminate, the court of appeals explained that plaintiffs can also establish a violation of Section 2 if they can show that "a challenged election practice has resulted in the denial or abridgement of the right to vote based on color or race." The court of appeals applied a two-part test, dubbed the "results test," to determine that both the out-of-precinct policy and the ballot harvesting ban violate Section 2. In

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

ability of a racial minority group to "participate in the political processes and to elect candidates of their choice." If it does, the question in the second step is whether there is a link between the challenged policy or law and social and historical conditions, creating the inequality in opportunities.

The court of appeals concluded that both the out-of-precinct policy and the ballot-harvesting ban fail this test. For the out-of-precinct policy, the court of appeals noted that "Arizona election officials change voters' assigned polling places with unusual frequency" and that polling places are sometimes "located so counterintuitively that voters easily make mistakes." During the three general elections leading up to the 2020 election, the court observed, Native Americans, Hispanics and African Americans in Arizona were twice as likely as whites to vote outside of the precinct to which they had been assigned and therefore to have their votes not counted as a result of the policy – satisfying the first step of the results test. The court added that 3,709 out-of-precinct ballots were cast in the 2016 general election – which, it suggested, is not an insubstantial number.

Turning to the second step of its inquiry, the court of appeals determined that the disparate impact on minority voters from the out-of-precinct policy is indeed linked to social and historical conditions in Arizona in a way that causes an inequality in the opportunity for minority voters to elect their preferred representatives or otherwise participate in the political process. Arizona, the court found, has a long history of discriminating against its

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

voters for decades. The effects of discrimination, the 9th Circuit continued, have also created disparities in areas like income, employment and education that make it harder for minorities to participate in the political process.

The court of appeals arrived at a similar answer when it applied the results test to the ban on ballot harvesting. The court explained that Arizona voters rely heavily on early voting by mail – with 80% voting by mail in the 2016 presidential election. But Arizona voters, and especially minority voters, often have trouble returning their ballots, the 9th Circuit continued: Only 18% of Native American voters in the state, for example, have access to regular mail services. To compensate for these obstacles, the court of appeals explained, "a large and disproportionate number of minority voters relied on" others to collect and deliver their early ballots, without any evidence of fraud. Therefore, the court reasoned, the ban on ballot harvesting creates a disproportionate burden on minority voters. And the court found that the ban fails the second step of the results test for many of the same reasons that the out-of-precinct policy does.

The court of appeals also ruled that Arizona legislators had intended to discriminate against minority voters, in violation of Section 2 and the 15th Amendment, when they passed the ban on ballot harvesting. The court acknowledged that a majority of the state legislature had not necessarily "harbored racial hatred or animosity toward any minority group"; instead, they sincerely (although wrongly) believed that a ban on ballot harvesting was needed to combat voter fraud.

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

attribute a discriminatory purpose to legislators under a theory known as the **"cat's paw" doctrine**.

Both Mark Brnovich, Arizona's Republican attorney general, and the Arizona Republican Party went to the Supreme Court last April, asking the justices to weigh in, which they **agreed to do in early October 2020**.

Republicans' arguments

In his brief on the merits, Brnovich contends that the Supreme Court has never applied the Section 2 results test to a claim that a policy or law denies the right to vote. Instead, he tells the justices, the results test has been applied in cases alleging vote dilution – that is, claims that a system or district was structured to dilute the strength of minority voting groups.

When reviewing a claim that a law or policy violates Section 2, Brnovich explains, courts should keep in mind what Section 2 requires – an "equal opportunity for all voters to participate in a State's political processes" – and what it bans – "laws that cause substantial disparities in minority voters' opportunities to participate in those processes" *and* "to elect representatives of one's choice." When these two things are taken into account, Brnovich continues, it becomes clear that the 9th Circuit used the wrong formulation of the results test to evaluate the out-of-precinct policy and the ban on ballot harvesting.

First, Brnovich argues, the court of appeals was wrong to rule that the first step of the test was satisfied if the law or policy had

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

proper question is instead whether, in light of the state's entire voting system, the racially disparate impact of the law is substantial. For example, Brnovich observes, courts would need to consider other opportunities to vote – including early voting and vote by mail – when considering a challenge to a law that would close the polls 30 minutes earlier than in past years.

The 9th Circuit's analysis at step two was also wrong, Brnovich adds, because it allowed the challengers to win as long as they could show that the minimal effect of the policy and the law was linked to social and historical conditions. Instead, he argues, the challengers should be required to show that the challenged law or practice "is responsible for the substantial disparate impact on minority voters" – a requirement that holds states responsible for their own discrimination but not for discrimination by others.

Under the proper test, Brnovich asserts, the out-of-precinct policy can survive because it applies to all voters, regardless of race, and its effect is "minimal" – affecting only 0.15% of all voters in 2016. And in any event, the challenge also does not satisfy the second step of the test because the plaintiffs "did not prove that the out-of-precinct policy caused voters of any race to vote in the wrong precinct."

The same is true, Brnovich continues, for the ban on ballot harvesting, which Brnovich describes as "a commonsense means of protecting the secret ballot" recommended by a bipartisan commission on federal election reform co-chaired by former President Jimmy Carter and former Secretary of State James Baker. The ballot-

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

the challengers' evidence was purely anecdotal. The ban also survives step two, Brnovich suggests, because the ban was not responsible for "meaningful inequality" in the opportunities enjoyed by minority voters in comparison with non-minority voters.

Finally, Brnovich asserts, the 9th Circuit's conclusion that the ballot-harvesting ban was enacted based on discriminatory intent was "plainly flawed." Courts cannot attribute illegal discriminatory intent, Brnovich writes, "to each co-equal member of a legislative body."

The Arizona Republican Party condemns the 9th Circuit's ruling, suggesting that it would "subject nearly all ordinary election rules" to a challenge under Section 2, "and mandate court-ordered overhauls of state voting rules to achieve racial proportionality." The party echoes some of the points made by Brnovich – noting, for example, that Section 2 "guarantees only equal *opportunity*, not equal *outcome*" and that the results test is primarily intended to address claims of vote dilution, rather than vote denial.

While Brnovich would subject claims like the challengers' to more stringent review, the Republican Party seems to suggest that claims like the ones at issue in this case do not involve Section 2 at all. Laws and policies that regulate the time, place and manner for voting that treat everyone the same, regardless of race, "and impose only the ordinary burdens of voting," the party posited, do not "implicate" Section 2 because they do not take away the right to vote.

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

policy is "consistently one of the most punishing in the nation" and that the ban on ballot harvesting "has never been anything other than a racially-charged tool to suppress minority votes," the Democratic National Committee defends the 9th Circuit's use of the results test. The test, the DNC contends, is widely used by most courts of appeals and is "firmly rooted" in both the text of Section 2 and the Supreme Court's cases. By contrast, the DNC alleges, the defendants' proposed test, by requiring the challengers to show that the law or practice at issue has directly caused the disproportionate effect on minority voters, is "overly narrow": Even literacy tests would survive, the DNC warns, because the tests are not themselves the cause of the disproportionate effect on minorities.

At the first step of the results test, the DNC reasons, there is no minimum level at which a law or practice constitutes a burden on minority voters, because "any bright-line disparity requirement would be a moving target leaving voters unprotected against racially discriminatory laws if no sufficiently large number of other voters shared the same burden." Instead, the DNC continues, the only question is "simply whether minority voters make up a disproportionate share of voters affected by the law."

The court of appeals also used the correct formulation of the results test at step two, the DNC contends: It looked at all of the surrounding circumstances to determine whether a policy or law "'results' in 'political processes' that 'are not equally open to participation'" by minority voters. Here, the DNC writes, the effects of

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

DNC adds, minorities are also more likely to have problems returning their early ballots because they lack access to regular mail service and are more likely to rely on public transportation, for example.

The 9th Circuit was also correct, the DNC continues, when it ruled that the ballot-harvesting ban was the product of intentional discrimination. When the state's legislature enacted the ban, the DNC stresses, "demonstrably false and racially-motivated allegations peddled by influential actors tainted the whole process."

Arizona Secretary of State Katie Hobbs, a Democrat, argues that the Supreme Court should not even consider the challenge to the out-of-precinct policy because, as the chief elections officer for the state, she concluded that there was no reason to maintain the policy and opted not to appeal the lower court's decision. State law gives her, rather than the attorney general, that responsibility, Hobbs stresses. But in any event, Hobbs continues, the 9th Circuit's decision was correct, and the defendants are suggesting "limits on Section 2 that have no basis in text, purpose, or precedent."

Hobbs concedes that, as the defendants assert, most claims brought under Section 2 have involved allegations of vote dilution, rather than vote denial. But, she counters, that is because, until the court's 2013 ruling in **Shelby County v. Holder**, the pre-approval requirements imposed by Section 5 of the Voting Rights Act would have prevented vote denial in areas covered by that requirement. Since 2013, however, Hobbs notes, plaintiffs bringing voting

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

Amicus briefs

Numerous advocacy groups and political officials from around the country have filed "friend of the court" briefs on both sides. Two briefs are particularly noteworthy.

Under the Trump administration, the federal government filed a **brief** in which it agreed with the defendants that the out-of-precinct policy and the ban on ballot harvesting should be allowed to stand. But the Trump administration argued for a different standard than the defendants — one that would require plaintiffs to show that the practice being challenged "causes voters of one race to have less *ability* to vote" – which, the Trump administration said, is not the case here. The Trump administration's test also would require plaintiffs to demonstrate that the law or policy being challenged is responsible for the gap in ability to vote.

With two weeks remaining before the oral argument, the Biden administration could notify the justices that it has altered the federal government's position in the case, **as it did last week in the challenge to the Affordable Care Act**. As in the ACA case, such a move would be largely symbolic, because the parties to the case have briefed both sides of the issues. And because the federal government has not asked the Supreme Court for permission to participate in the March 2 argument, it would not have to defend any change in its stance then.

[*Update (Tuesday, Feb. 16, 8 p.m.)*: On Tuesday afternoon, the federal government informed the court that

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

government's earlier stance that the out-of-precinct policy and the ban on ballot harvesting are legal, Deputy Solicitor General Edwin Kneedler explained in a **letter**. However, Kneedler continued, the department "does not adhere to the framework for application of Section 2 in vote-denial cases" laid out in the Trump administration's brief. Because oral argument will take place soon, Kneedler added, the federal government will not ask for additional briefing.]

In a **brief** that did not support either side, the libertarian thinktank the Cato Institute tells the justices that the Arizona cases give them "an opportunity to make future elections cleaner and less litigious, with results that inspire greater public confidence" by providing "a clear framework by which lower courts are to evaluate" Section 2 claims. The 2020 presidential election, Cato observes, "has demonstrated the critical need to resolve such ambiguities not just for Arizona or for precinct-voting and ballot-harvesting rules, but for all voting-rights cases going forward." The justices likely disagree among themselves about what a "clear framework" should look like, but memories of the 2020 election and its aftermath are almost certainly still fresh in their minds.

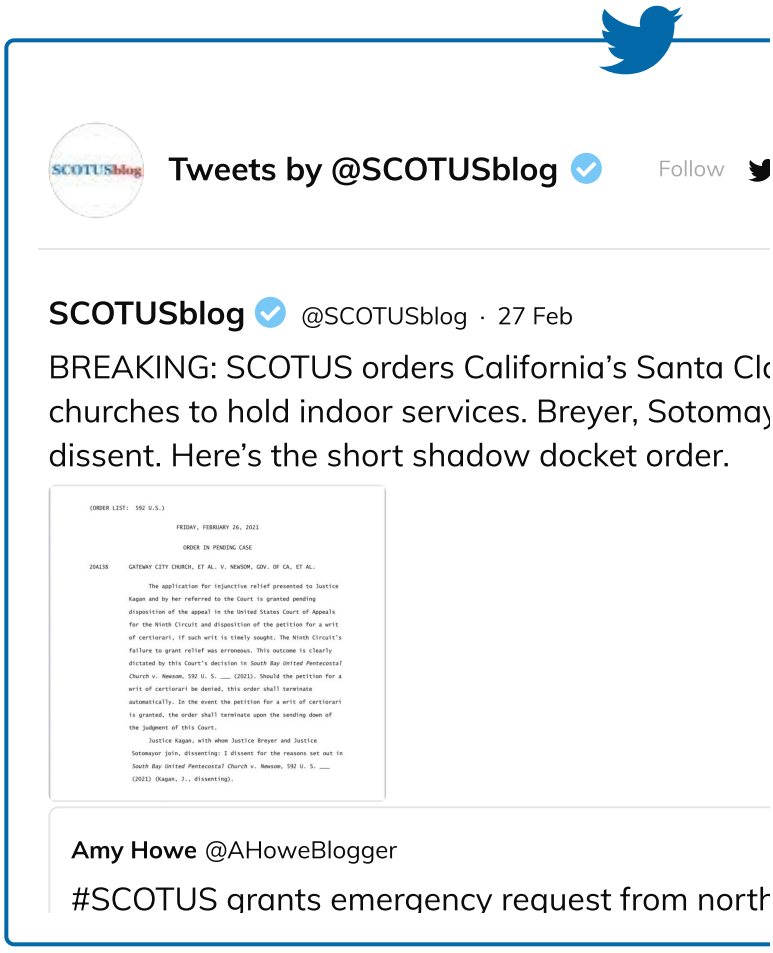
This article was **originally published at Howe on the Court**.

Posted in **Symposium before oral argument**

FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

Recommended Citation: Amy Howe, *Justices to consider whether Arizona's voting rules discriminate against minorities*, SCOTUSblog (Feb. 16, 2021, 9:00 AM), https://www.scotusblog.com/2021/02/justices-to-consider-whether-arizonas-voting-rules-discriminate-against-minorities/



FEATURED POSTS

Justices to consider whether Arizona's voting rules discriminate against minorities

1270 Caroline Street, Suite D120-430 * Atlanta, GA 30307
Voice: 404-307-9631 * E-Fax: 404-393-1243
EIN: 47-1427359

February 22, 2021

Sent via email

Special Committee on Election Integrity
Georgia House of Representatives
131-A State Capitol
Atlanta, Georgia 30334

Re: Opposition to Provisions in House Bill 531

Dear Chair Fleming and Committee Members:

As an organization concerned with fair elections and voter participation in Georgia, Fair Fight Action submits this letter to express its strong opposition to several provisions of House Bill ("H.B.") 531. By rolling back early, absentee, and day-of voting in ways that disproportionately inconvenience voters of color and marginalized groups, this significant piece of legislation violates both the Constitution and federal statutes. The bill also unconstitutionally burdens the fundamental right to vote of all Georgians while failing to address any legitimate concern. As investigations into the 2020 election and the longer course of history have borne out, voter fraud is exceedingly rare. The possibility of a few people illegally casting votes fails to justify measures that will take that ability away from hundreds of thousands.

H.B. 531's across-the-board restrictions demonstrate that its purpose is instead to make it harder for Georgians to exercise their right to vote. It therefore constitutes a brazen attack on our democracy. Georgia voters deserve public servants concerned with protecting the constitutional rights of their constituents—not their own power. Rather than shore up confidence in the state's election system after a barrage of disparaging attacks and conspiracy theories, this hastily crafted bill further fuels these conspiracies and undermines the fundamental democratic principle that every citizen's vote matters and deserves to be counted.

I. The proposed legislation is evidence of history repeating itself.

Since its inception, the state of Georgia has suppressed the right to vote of Black people and other marginalized groups. H.B. 531 is the state's latest effort to disenfranchise Georgia citizens, including those who are Black, poor, rural, young, or uneducated. Even more, the state brings its latest suppressive efforts under the guise of protection from voter fraud, a myth that has been debunked in general with respect to American elections, and specifically with regard to elections in Georgia. Georgia's pretextual attempt to secure elections, rather, is yet another tactic in a long history of suppressive and discriminatory tactics to prevent people of color and marginalized groups from wielding political power, particularly on the heels of an election of record turnout numbers for such groups and a change in state-wide federal political control.

Georgia's first constitution in 1777 limited the franchise to "male white inhabitants, of the age of twenty-one years."[1] The state constitution continued to exclude Black people and women for almost an entire century, choosing to limit explicitly the franchise to only white males in three subsequent versions.[2] In 1865, following the Civil War, the federal government instituted Reconstruction, a period intended to rebuild the South and help ensure the rights of the newly freed slaves.[3] During Reconstruction, mostly due to the occupation of federal soldiers in the southern former-Confederate states, political participation increased as newly freed slaves enjoyed the right to vote and to hold political office for the first time.[4] In Georgia, for instance, Black people totaled about 50 percent of all registered voters.[5]

When Reconstruction ended in 1877, Georgia returned to the systemic, and violent, oppression and suppression of Black people, particularly of their right to vote. Along with the violent intimidation by the domestic terrorist organization Klu Klux Klan, which was founded in Georgia in 1868, Georgia implemented legislative and policy tools to suppress further the Black vote. From the end of Reconstruction to the enactment of the Voting Rights Act of 1965 ("VRA"), the state of Georgia adopted multiple policy tactics to disenfranchise Black voters, including literacy tests, poll taxes, felony disenfranchisement, residency requirements, onerous registration requirements, voter challenges and purges, discriminatory redistricting and apportionment plans, all-white primaries, and the

---

[1] Ga. Const. of 1777, art. IX.
[2] Ga. Const. of 1789, art. IV; Ga. Const. of 1861; Ga. Const. of 1865.
[3] LAUGHLIN MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 11 (Cambridge University Press, 2003).
[4] *Id*. at 12.
[5] *Runoff Bill Revived by Senate Unit: Majority Vote Plan Sent to Sub-Panel*, THE ATLANTA CONSTITUTION (Mar. 1, 1963).

expulsion of Blacks from political office.[6] Georgia also used county administration of elections as a way to dilute the Black vote. By assigning a point system to counties based on whether a county was rural, town, or urban, with the least points going to urban counties, Black electors' votes were effectively diluted and disenfranchised.[7]

Not surprisingly, Georgia lawmakers vehemently opposed the VRA.[8] Georgia's governor at the time, Carl Sanders, wrote a letter to President Lyndon B. Johnson objecting to the prohibition against literacy tests and called the VRA "unnecessary."[9] Fortunately for Georgia's Black citizens, President Johnson signed the VRA into law. Due to Georgia's abysmal history of voter suppression and intimidation, Georgia was one of nine entire states covered by the preclearance provisions of the VRA.

In response to the enactment of the VRA, Georgia attempted to find other, seemingly innocuous, ways to suppress the Black vote. For instance, Georgia implemented at-large election systems for school board seats and local governments, thus effectively diluting the Black vote and guaranteeing all-white control of local politics, despite a growing Black electorate.[10] In addition to implementing at-large election systems, Georgia engaged in discriminatory redistricting schemes. Thanks to the VRA, a 1981discriminatory redistricting plan that was overseen by the chair of the Georgia House appropriations committee who openly referred to Black people as "niggers," failed Department of Justice preclearance and was found to treat whites and Blacks in a disparate manner.[11]

Georgia lawmakers continued to oppose the VRA until the Supreme Court of the United States overhauled the Section 4 preclearance formula in *Shelby v. Holder*, 570 U.S. 529 (2013). Following the Supreme Court's decision in *Shelby*, Georgia and its subdivisions began implementing election changes that likely would not have passed muster under preclearance. For example, prior to Georgia's 2018 election, the Randolph County Board of Elections voted three to zero to close seven majority Black precincts.[12] Importantly, prior to Randolph County's attempt to close polling locations in Black neighborhoods, the office of then-Secretary of State Brian Kemp provided guidance regarding polling location

---

[6] McDonald, *supra* note 3, at 2.
[7] Scott E. Buchanan, *County Unit System*, NEW GEORGIA ENCYCLOPEDIA (Aug. 20, 2020), https://www.georgiaencyclopedia.org/articles/counties-cities-neighborhoods/county-unit-system.
[8] McDonald, *supra* note 3, at 11.
[9] *Id*. at 12.
[10] *Id*. at 130, 155.
[11] *Id*. at 170.
[12] Richard Fausset, *Georgia County Rejects Plan to Close 7 Polling Places in Majority Black Areas*, THE NEW YORK TIMES (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/us/randolph-county-georgia-voting.html.

closures to the county boards of elections where the Secretary of State reminded counties on two separate occasions that counties were no longer required to preclear laws with the Department of Justice in order to close polling locations.[13] Randolph County did not proceed with the poll closings only because of public backlash. Since 2012, more than 200 polling locations have closed in Georgia.[14]

Shortly before and following *Shelby*, Georgia implemented numerous policies and acts in addition to attempts to close polling locations in communities with high numbers of people of color. Since 2012, former Georgia Secretary of State and current governor Brian Kemp purged an estimated 1.5 million people from the state voter rolls, 107,000 of whom were removed for not having voted in the two previous general elections.[15] These purges disproportionately affected Black people, whose voter registrations were removed at a rate that was 1.25 times higher than for white Americans in some counties.[16] Georgia's purge law is often referred to as "use it or lose it." In 2018, 53,000 Georgia voter registrants—70 percent of whom were Black—were placed in "pending" status by the Secretary of State because of minor misspellings or missing hyphens on their registration forms.[17] In Georgia's 2018 gubernatorial election, more than 1,800 voting machines sat unused in a warehouse on Election Day in three of Georgia's largest and most heavily Democratic counties.[18]

---

[13] Mark Niesse et al., *Voting Precincts Closed Across Georgia Since Election Oversight Lifted*, THE ATLANTA JOURNAL CONSTITUTION (Sept. 4, 2018), https://www.ajc.com/news/state--regional-govt--politics/voting-precincts-closed-across-georgia-since-election-oversight-lifted/bBkHxptlim0Gp9pKu7dfrN/.

[14] Daniel Garisto, *Smartphone Data Show Voters in Black Neighborhoods Wait Longer*, SCIENTIFIC AMERICAN (October 1, 2019), https://www.scientificamerican.com/article/smartphone-data-show-voters-in-black-neighborhoods-wait-longer1/.

[15] Angela Caputo et al., *They Didn't Vote ... Now They Can't Georgia purged an estimated 107,000 people largely for not voting, an APM Reports investigation shows*, APM REPORTS (Oct. 19, 2018), https://www.apmreports.org/story/2018/10/19/georgia-voter-purge.

[16] *Id*.

[17] Ted Enamorado, *Georgia's 'exact match' law could potentially harm many eligible voters*, THE WASHINGTON POST (Oct. 20, 2018 7:00 AM EDT), https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/20/georgias-exact-match-law-could-disenfranchise-3031802-eligible-voters-my-research-finds/.

[18] Amy Gardner et al., *Brian Kemp's lead over Stacey Abrams narrows amid voting complaints in Georgia governor's race*, THE WASHINGTON POST (Nov. 7, 2018, 8:38 PM EST), https://www.washingtonpost.com/politics/brian-kemps-lead-over-stacey-abrams-narrows-amid-voting-complaints-in-georgia-governors-race/2018/11/07/39cf25f2-e2b7-11e8-b759-3d88a5ce9e19_story.html.

H.B. 531 is yet another law that follows in Georgia's legacy of racism and voter suppression. Georgia can only begin to atone for its racist and discriminatory past by fighting to ensure equality for all Georgians in the present and the future; HB 531 takes Georgia backward, it does not move the state forward.

II. The proposed legislation violates fundamental Constitutional and statutory rights.

The right to vote is "precious" and "fundamental."[19] As the committee members are surely aware, ongoing litigation challenges the state's unconstitutional legislation, policies, and gross mismanagement that resulted in an election that deprived Georgia citizens—particularly those of color—of their fundamental right to vote.[20] Instead of addressing the substantial and unnecessary barriers Georgia voters face, the changes proposed in H.B. 531 only exacerbate the problem in violation of the First, Fourteenth, and Fifteenth Amendments of the U.S. Constitution, as well as Section 2 of the VRA.

Many provisions of H.B. 531 will disproportionately impact Black and poor voters. This flies in the face of fundamental principles of fairness embedded in our Constitution's Equal Protection Clause because, as the Supreme Court has explained, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[21] Moreover, Congress specifically passed the VRA to remedy decades of systemic discrimination against Black voters,[22] providing that no "standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[23]

Every citizen therefore has a right to participate in elections on an equal basis with their fellow citizens.[24] The Constitution extends this principle of equal treatment to early and absentee voting. Indeed, the Supreme Court has stated that "it is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause."[25] For example, if early voters have disproportionately lower incomes and less

---

[19] *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 670 (1966).
[20] *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1265 (N.D. Ga. 2019).
[21] *Bush v. Gore*, 531 U.S. 98, 104-105 (2000).
[22] *South Carolina v. Katzenbach,* 383 U.S. 301, 310 (1966).
[23] 52 U.S.C. § 10301(a).
[24] *Dunn v. Blumstein*, 405 U.S. 330, 3360 (1972).
[25] *Am. Party of Texas v. White*, 415 U.S. 767, 795 (1974) (citing *O'Brien v. Skinner*, 414 U.S. 524 (1974)).

education than Election Day voters, a law that eliminates evening and weekend early voting hours burdens that group's right to vote.[26]

In evaluating the constitutionality of burdens on the right to vote such as those in H.B. 531, courts typically weigh "the character and magnitude of the asserted injury" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights."[27] As explained in further detail below, many provisions in H.B. 531 unnecessarily burden the right to vote without any legitimate, non-discriminatory justification. They therefore constitute arbitrary discrimination and cannot withstand constitutional scrutiny.

III. There is scant evidence of fraud in the conduct of Georgia elections to justify such a significant retrenchment in voting rights.

To the extent the proposed changes are meant to combat voter fraud, they do not address that problem, because no real problem exists. Despite H.B. 531 proponents' allegations to the contrary, voter fraud is not a significant problem in the state of Georgia. Indeed, the state's senior election official has repeatedly confirmed as much in recent months. After the 2020 election, Georgia Secretary of State Brad Raffensperger said "Georgia' voting system has never been more secure or trustworthy" and "the truth is that the people of Georgia – and across the country – should not have any remaining doubts" about who won the election.[28] He continued to refute claims of voter fraud in a letter to Congressional representatives in January, noting that after "diligently investigating all claims of fraud or irregularities" his office found "nowhere close to sufficient evidence to put in doubt the result" of the election.[29]

Numerous other high-ranking Georgia election officials, all Republicans, have also recently defended the integrity of *Georgia's* elections against spurious claims of fraud. Lieutenant Governor Geoff Duncan chastised "misinformation" about voter fraud that is

---

[26] *Obama for America v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012).
[27] *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).
[28] Brad Raffensperger, Georgia's Election Results are Sound, Washington Post (Nov. 21, 2020), https://www.washingtonpost.com/opinions/2020/11/21/brad-raffensperger-georgia-results-2020-election-trustworthy/.
[29] Letter from Ga. Secretary of State Brad Raffensperger to Congressman Jody Hice, Congressman Barry Loudermilk and Senator Kelly Loeffler (Jan. 6, 2021), https://sos.ga.gov/admin/uploads/Letter%20to%20Congress%20from%20Secretary%20Raffensperger%20(1-6-21).pdf.

spread with the "sole intent of flipping an election."[30] In response to allegations of fraud, Ryan Germany, general counsel in the Secretary of State's office, told President Trump in January, "[t]he numbers that we are showing are accurate."[31] Gabriel Sterling, another top state election official, said claims of fraud in Georgia in 2020 were "fantastical, unreasonable. Lacking in any factual reality."[32]

Put simply, this outcry over voter fraud is a smokescreen. Despite laborious investigations to uncover fraudulent activity, the reality is that fraud is exceedingly rare in Georgia. Just last week, an independent monitor reported to the State Elections Board that in 250 hours of onsite observation in Fulton County, he did not witness a single action that "involved dishonesty, fraud or intentional malfeasance."[33] After observing these operations related to both the November 2020 and January 2021 statewide elections, the monitor witnessed nothing "that would undermine the validity, fairness and accuracy of the results published and certified by Fulton County."[34] In another investigation this past December, investigators from the Secretary of State's office and the Georgia Bureau of Investigation reviewed a random sample of more than 15,000 absentee ballots in Cobb County to audit the county's signature verification procedures.[35] Investigators only identified two cases where a signature was improperly matched—and in both cases, subsequent investigation confirmed the proper voters had submitted the ballots.[36] In all, they found Cobb County

---

[30] Greg Bluestein, *Duncan Pushes Back on False Voter Fraud Claims: "We're Better Than This,"* Atlanta Journal-Constitution (Dec. 1, 2020), https://www.ajc.com/politics/politics-blog/duncan-pushes-back-on-false-voter-fraud-claims-were-better-than-this/GSNRMYELPBBADHZ5RQ7LDTVHCE/.

[31] Amy Gardner & Paulina Firozi, *Here's the Full Transcript and Audio of the Call Between Trump and Raffensperger*, Washington Post (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html

[32] Scott Pelley, *Georgia Secretary of State Describes Call Where Trump Pressured Him to Find Evidence of Voter Fraud,* CBS News 60 Minutes (Jan. 10, 2021), https://www.cbsnews.com/news/georgia-election-brad-raffensperger-60-minutes-2021-01-10/.

[33] *Raffensperger Sends More Voting Cases to Prosecutors*, Georgia Secretary of State (Feb. 18, 2021), https://sos.ga.gov/index.php/elections/raffensperger_sends_more_voting_cases_to_prosecutors.

[34] *Id.*

[35] Georgia Secretary of State Investigations Division, Georgia Secretary of State/ Georgia Bureau of Investigation ABM Signature Audit Report (Dec. 29, 2020), https://sos.ga.gov/admin/uploads/Cobb%20County%20ABM%20Audit%20Report%20201229.pdf.

[36] *Id.*

had a "99.99% accuracy rate in performing correct signature verification" and there were "[n]o fraudulent absentee ballots . . . identified."[37]

The same pattern bears out in investigations of voter fraud across the United States. A much-ballyhooed commission to investigate voter fraud established by President Trump after the 2016 election abruptly disbanded in 2018 after failing to find any significant fraud.[38] In a sweeping survey of voter fraud, the Brennan Center for Justice, a leading policy think tank for democracy and justice initiatives, found that it was more likely an individual would be struck by lightning than impersonate another at the polls.[39] The same is true, the Brennan Center later noted, for vote-by-mail fraud. In Oregon, for instance, among 100 million mail-in ballots received since 2000, there have only been roughly a dozen instances of fraud.[40] A national survey by the Walter J. Cronkite School of Journalism and Mass Communications at Arizona State University found the rate of voter fraud from 2000-2012 was "infinitesimal."[41] During that time period, there were only 27 allegations in Georgia of individuals casting an ineligible vote.[42] In a sweeping review of national voter fraud allegations since 2000, Professor Lorraine Minnite found that "[v]oter fraud is a politically constructed myth" and noted that misinformation about voter fraud is often meant "to persuade the public about the need for more administrative burdens on the vote."[43] Precisely this tactic is at work in H.B. 531.

IV. An analysis of the various provisions in the proposed legislation reveals serious problems with substance and with drafting.

Our comments are based on our review of the substitute H.B. 531, bearing the number LC 28 02278. As we said at the outset of this submission, we have concerns about

---

[37] *Id.*
[38] Michael Tackket & Michael Wines, Trump Disbands Commission on Voter Fraud, NY Times (Jan. 3, 2018), https://www.nytimes.com/2018/01/03/us/politics/trump-voter-fraud-commission.html
[39] Justin Levitt, *The Truth About Voter Fraud*, Brennan Center for Justice (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf.
[40] Wendy Weiser & Harold Ekeh, The False Narrative of Vote-by-Mail Fraud, Brennan Center for Justice (April 10, 2020), https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud.
[41] Natasha Khan & Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence that Photo ID is Needed*, News21 (Aug. 12, 2012), https://votingrights.news21.com/article/election-fraud/
[42] *See, Election Fraud in America*, News21 (Aud. 12, 2012), https://votingrights.news21.com/interactive/election-fraud-database/.
[43] Lorraine Minnite, *The Myth of Voter Fraud* 6, 10 (2007).

the constitutionality and legality of a number of provisions in the proposed legislation. While we have not been afforded sufficient opportunity to review, analyze, and understand this complex legislation, several provisions stand out as particularly problematic. Thus, the fact that we comment on any one provision should not be viewed as acquiescence in any other about which we do not comment.

We note at the outset that the proposed changes in H.B. 531 and other pending election legislation will result in unfunded mandates that could well force counties to adopt increases in local taxes.

Section 1: Disallowing any non-governmental funding

Section 1 of the proposed legislation would amend O.C.G.A. § 21-2-71 by adding a subsection (b) that prohibits superintendents from accepting private funding to relieve budgetary concerns about the cost of conducting elections. As you know, during the 2020 election cycle, certain private groups made funding available to counties across the state—indeed, across the country—to assist them in addressing the extraordinary costs associated with administering elections during a pandemic with unprecedented turnout.

If the proponents' goal is to assist the counties administer elections more fairly and more accurately, it is surprising to prohibit those counties from accepting funding that is available to make their jobs easier and less costly to the taxpayers. Yet, without any evidence or attempted showing that the private funding somehow interfered with the operation of the election, the proponents of this legislation now ban that potential revenue source. That makes no sense and runs squarely counter to the professed interest in assisting local election officials.

Of potential significance is the fact that the prohibition on the use of private funds for election assistance could threaten home rule and the ability of localities to deploy private funds for programming, which, as you know, is commonplace for other governmental services.

Section 3: Allowing poll workers to work in adjoining counties

We support the provision in the proposed legislation to amend O.C.G.A. § 21-2-92 to allow poll workers to work in adjoining counties. We recommend the SEB adopt rules and regulations to implement the new provision so as to standardize the procedure for meeting the requirements set out in new subsection (2).

Section 5: Disallowing any non-governmental funding

Aside from our substantive objection to the inclusion of a provision that prohibits counties from accepting any outside funding as detailed in Section 1, above, this is an

example of bad drafting. The original language of O.C.G.A. § 21-2-212 addresses the requirement that registrars prepare budget estimates. Whether the registrar is permitted to accept non-governmental funding has nothing to do with preparing a budget. The inclusion of the two entirely unrelated provision in the same subsection is potentially confusing.

Section 6: Precinct splitting

While we certainly applaud any efforts to reduce long lines at voting locations, the proposed change to O.C.G.A. § 21-2-263 (by adding a subsection (2)) is flawed. It does not provide any notice to voters of the changes in their precinct assignment. And, when that is coupled with the proposed changes in O.C.G.A. § 21-2-419 to prevent out-of-precinct voting, it imposes an unacceptable burden on the fundamental right to vote.

Section 7: Prohibition on routine use of mobile voting

Limiting the use of a mobile voting option, as proponents' amendment to O.C.G.A. §21-2-266 proposes, is a vindictive slap at Fulton County. Without any basis in law or fact—read, no state interest, let alone a compelling state interest—the proposed amendment limits access to the polls. The mobile unit was one of the measures that Fulton County adopted in an effort to address the now-familiar problems that the county experienced during the 2020 General Election Primary. The voting van traveled around the county to help alleviate long lines and problems with hardware during the 2020 General Election and 2021 Runoff. By all accounts, it operated smoothly and was well-received by voters. Moreover, it is unclear what problem the prohibition is intended to address. Fulton County used the mobile unit to "supplement the capacity of existing polling places."[44] The proposal is vague, standardless, and unenforceable. Who will decide whether "emergency circumstances" exist and what criteria will they apply?

Section 9: The requirement of one machine per 250 voters only applies in a general election

The proposed amendment to O.C.G.A. § 21-2-367 to allow an election superintendent to decide how many machines to use in all but general elections runs counter to the expressed desire of Rep. Williams to ensure that all counties are the same. *See* February 19, 2021 video of committee hearing. And, it runs counter to the duties of the State Election Board to obtain uniformity.[45] Furthermore, there is no showing that any

[44] H.B. 531, LC 28 0227S, line 181.
[45] *See* O.C.G.A. § 21-2-31(1). *See also Ne. Ohio Coal. For the Homeless v. Husted*, 837 F.3d 612, 635 (6th Cir. 2016) (A plaintiff may state an equal protection claim by alleging that lack of

change is necessary; the standard of one machine per 250 is an acceptable standard that should apply in all elections.[46]

Section 11: Changes to absentee ballot procedures

As drafted, the amendment would require a voter to provide his or her name, date of birth, address, and either a Georgia driver's license number or identification card. The registrar or absentee ballot clerk is directed, in subsection (b)(1), to compare the voter's name, date of birth, and driver's license or identification card number to information on file with the registrar's office. If all three do not match, the voter will only receive a provisional absentee ballot. If, as proponents of this legislation have claimed, one intent is to reduce the burden on over-worked election staffs, this provision will accomplish the opposite. Even if such scrutiny were appropriate when determining whether to accept a voted ballot—and we certainly do not concede that it is—there is no justification for imposing these hurdles to merely apply for a ballot. In fact, when, for the 2020 Presidential Preference Primary, the Secretary of State sent absentee ballot applications to all registered voters in Georgia, there was no evidence the process was abused or resulted in fraudulent applications. Simply put, the threshold for obtaining a ballot should be simple and easy to administer. This legislation will lead to a contrary result.

We oppose the proposed changes to O.C.G.A. § 21-2-381 on other grounds as well. Specifically, we object to voter's having to include their private information—information that could subject them to a very real threat of identity theft if revealed—on an envelope that could easily be compromised. Further, while proponents of this legislation claim that ninety-seven percent of the electorate has either a Georgia driver's license or Georgia identification card, implying it is hardly a burden to ask them to provide a number, the proponents ignore the three percent. And, in Georgia, with more than 7,692,567 registered

---

statewide standards results in a system that deprives citizens of the right to vote based on where they live).

[46] *See* https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-follow-comment-georgia-state-board-elections ("But the proposed rule amendments are not a good solution to this problem, as our analysis below shows that they would risk long lines by permitting polling places to have far fewer than one voting machine per 250 registered voters on election day. Below, we show that long lines are likely to occur if counties reduce the minimums and adjust machine allocations based on actual early voting data, which would lead to fewer resources for those precincts showing high voter enthusiasm during the early voting period. We further demonstrate that long lines are likely to occur even if counties use county-wide averages of early voting rates to determine minimums, due to high variation in early and election day turnout.")

voters, that means that 230,777 electors do not have the requisite identification and will therefore incur a burden in complying with the law. When that burden is weighed against the state's ill-defined, unsupported, and unsupportable interest, the state cannot and should not prevail.

Section 12: The use of drop boxes

We commend the proponents' recognition of the importance of drop boxes but suggest that the limitations the proposed legislation imposes are onerous and, indeed, unacceptable to the very officials who will be charged with administering the proposal. We have three primary objections to the proposed amendments to O.C.G.A. § 21-2-382. First, there is no plausible justification for banning the use of drop boxes on the actual day of an election.[47] It is well-established that drop boxes are a convenient and reliable way for voters to deliver their ballots, including on election day. Second, requiring drop boxes to be located inside the location where advance voting in conducted defeats the purpose and makes the job of poll workers—already burdened—more complex as they are required to accommodate a drop box in what, for many, are likely tight spaces. And, they will be required to check the box and confirm its contents (or lack thereof) on yet another form. There is no evidence of problems arising with the placement of drop boxes at outside locations and therefore no justification for imposing these conditions. Third, the requirement of "constant surveillance,"[48] suggests the proponents' intention that a person be stationed at the box while the advance voting location is open. There are several problems with that provision, not the least of which is the potential for voter intimidation if armed law enforcement or security personnel are stationed at the box. In addition, the surveillance requirement imposes yet another cost on the counties, as will the requirement that teams of at least two persons collect the ballots.

Sections 13 and 14: Information on Absentee Ballot Envelopes

We have previously addressed the propriety of including personal identifying information on the outside envelope as the proposed amendments to O.C.G.A. § 21-2-384 and § 21-2-385 require. The necessity for including such information, alone, is a voter intimidation tactic given many electors are protective of their personal data.

Moreover, it is well-known that requiring a date of birth leads to high rejection rates and, in fact, was one of the reasons (others including court rulings) the birth date requirement was excluded from H.B. 316 in 2019. Two federal courts in this state, citing the Voting Rights Act, 52 U.S.C. § 10101 (a)(2)(B), previously enjoined Georgia election

[47] *See* O.C.G.A. § 21-2-382(b)(1).
[48] *See id.*

officials from rejecting absentee ballots on the basis of omitted or erroneous birth date information.[49] Resurrecting this provision simply invites further litigation.

Section 15 and 24: Reductions in early voting and runoff times

The proposed amendments to O.C.G.A. § 21-2-385 on advance voting are a thinly veiled discriminatory effort to reduce the access of people of color to polling locations. It is well-known that Saturday and Sunday early voting is vitally important to communities of color.[50]

The data from the 2020 election are telling about the importance of the early vote period. During the 2020 General Election, more than 2.6 million Georgians voted early in-person.[51] Also during the 2020 General Election, fully ten percent of Georgia voters cast their ballots on weekends.[52] In 100 of the 159 Georgia counties, Hispanic voters were more likely than white Georgians to vote on weekends.[53] In fact, white voters were least likely to vote on weekends.[54]

---

[49] *See Democratic Party of Georgia, Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1339-41 (N.D. Ga. 2018) (adopting the rationale of the court in *Martin v. Crittenden*, 541 F. Supp. 3d, 1302 (N.D. Ga. 2018) and concluding "absentee mail-in ballots rejected solely because of an omitted or erroneous birth date must be counted."); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1304, 1308-09 (N.D. Ga. 2018) (concluding that an elector's birthdate is not material to determining eligility of an absentee voter and that rejecting ballots for omitted or incorrect birthdate information therefore violates the Voting Rights Act, 52 U.S.C. § 10101(a)(2)(B)).

[50] *See generally* The Center for New Data, *Access to the Polls in Georgia: Assessment of Early Vote Wait Times in the General Election and Potential Effects on Voting Restrictions in the Runoff*, Observing Democracy Program Memo, December 6, 2020 (A.6. Racial Disparities in Early Vote Weekend Voting) (available at https://www.newdata.org/ga-analysis). *See also* William H. Woodwell, Jr., *Voting Rights Under Fire: Philanthropy's Role in Protecting and Strengthening American Democracy*, A Report by Carnegie Corporation of New York, November 2019 (available at https://production-carnegie.s3.amazonaws.com/filer_public/bc/46/bc469634-87fd-4233-bc93-d9a89bfc9c00/voting-rights-fin.pdf).

[51] *See* Georgia Secretary of State Website, *Record Breaking Early In-Person Voting Continutes October 31, 5 p.m. Update,* https://sos.ga.gov/index.php/elections/record_breaking_early_in-person_voting_continues_october_31_5_pm_update.

[52] *See* The Center for New Data, *supra.*

[53] *Id.*

[54] *Id.*

And, courts have rejected these kinds of changes to the law.[55] The intent behind the proposed amendment is clear: restrict access to the polls, with knowledge that the provision will disparately impact communities of color. As such, it cannot stand. We are also concerned about the impact of these restrictions on Jewish voters who may be unable to vote during the sabbath due to religious observance and services and for whom Sunday voting is an essential option.

Section 16: Verifying a voter's identity

Under the proposed amendment to O.C.G.A. § 21-2-386, the local election officials will be obligated to confirm the identity of a voter using several methods, any one of which can lead to the rejection of a ballot. First, the officials are to compare the driver's license or identification card number to the information on file. And, in a particularly problematic requirement, they are to compare the date of birth. This latter requirement of confirming birth dates violates court orders and rolls back any progress accomplished when the legislature adopted H.B. 316 in 2019. Two federal courts in this state previously enjoined Georgia election officials from rejecting absentee ballots on the basis of omitted or erroneous date of birth information, citing the Voting Rights Act, 52 U.S.C. § 10101 (a)(2)(B).[56] The provision, which certainly violates the Voting Rights Act, simply invites further litigation.

Further, the proposed amendment to O.C.G.A. § 21-2-386 continues the requirement of a signature match. Specifically, the proposed language, in subsection (a)(1)(B), demands that "[t]he registrar or clerk shall also confirm that the elector signed the oath. . . . " Obviously, confirming that the elector signed requires matching the elector's signature on the ballot with the elector's signature on file. So the proponents of this legislation are

---

[55] *See, e.g. Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524 (6th Cir.), *stay granted*, 135 S. Ct. 42 (2014); *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224 (4th Cir. 2014). One week after the decision of the United States Court of Appeals for the Fourth Circuit, the United States Supreme Court stayed the mandate with explanation. *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014). In both the North Carolina case and the Ohio case, because the Court gave no explanation for its stays, it is not possible to understand the Supreme Court's reasoning but the stays are consistent with the Court's general hands-off approach to orders changing election procedures near an election. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. Civ. Rights-Civ. Liberties L. Rev. 439, 455-59 (2015).

[56] *See Democratic Party of Georgia, Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1339-41 (N.D. Ga. 2018) ("absentee mail-in ballots rejected solely because of an omitted or erroneous birth date must be counted."); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018) ("[a] voter's ability to correctly recite his or her year of birth on an absentee ballot envelope is not material to determining said voter's qualifications under Georgia law.").

imposing an additional hurdle on the local election officials, who will now have to confirm (1) a date of birth; (2) an identification number; and (3) a signature match. That is an unjustifiable burden on both the voter and the counties.

Section 18: Restrictions on line warming

It is absolutely the case that no one may offer anything in return for a vote or a commitment to vote and no one may "electioneer" within 150 feet of a polling place or within 25 feet of a voter waiting in line.[57] But there is no restriction on offering food and water to voters in line as long as whatever is being offered to the waiting voters is also available to everyone else in the area. The proponents' proposed amendment O.C.G.A. § 21-2-214 to prohibit providing food and drink is punitive.[58] Perhaps the proponents are not aware that groups ranging from the Girl Scouts to internationally renowned chef Jose Andres have helped voters exercise patience, tolerance, and respect while waiting in long lines to vote. To prohibit the continuation of that practice is wrong. What we would support, however, is standardization of which activities are permitted and which are not. Particularly during the early vote lead-up to the 2020 General Election, we received reports of differing practices across the state. The message should be clear: line warming—providing food and drink equally to waiting voters and others in the area—is permissible, acceptable, and encouraged as long as providers adhere to clear and understandable rules.

[57] *See* O.C.G.A. § 21-2-570 and § 21-2-414.

[58] We received a report that, on October 12, 2020, at the Eisenhower Board of Elections office in Chatham County, voters waited in the hot sun, without access to water, for over five hours. One older gentleman passed out from the heat. An ambulance arrived to assist but he declined help, saying – with blood on his head – that he wanted to wait to vote. A Fayette County voter, at the Fayette County library, wrote us about the resilience of voters who remained in line for hours outside. He, too, reported that an elderly voter fainted and that paramedics were called to the scene. At the High Museum polling location on Peachtree Street, a middle-aged Black woman fainted after being on line for at least two hours. After receiving treatment from EMTs on the scene, she returned to the line and waited to cast her ballot. And, another Chatham County voter described third-world conditions while she waited: no food, no water, no restrooms, and lines that extended for eight hours. Finally, some apparent Whole Foods workers came with apples, bananas, water, and granola. Of course, under the proposed legislation, anyone who assisted a voter who faints, would violate the law.

Section 19: Restrictions on counting in-county provisional ballots

The proponents' proposed amendment to O.C.G.A. § 21-2-419 will unduly burden lower income voters. The proposal would not allow a voter, properly registered in a county, to cast a provisional ballot at any precinct in the county. Under current law, that provisional ballot would be counted for all races in which the voter was eligible to vote. So, for example, a resident of College Park could cast her ballot in the City of Milton but the only votes that would count would be those for which she could have voted had she voted in her home precinct. Allowing provisional ballots to be cast anywhere in the county is simply a recognition that, in urban areas, it can be difficult to get from one place to another in order to vote within the hours the polls are open and that, in rural areas, it can be difficult for people without access to adequate transportation to travel long distances in order to vote.

Proponents have offered no evidence that allowing voters to cast provisional ballots anywhere in the county in which they are registered has led to any problems whatsoever, let alone problems with allegedly fraudulent ballots—the theoretical problems proponents are apparently attempting to address.

* * *

This theme of disingenuous, unsubstantiated concerns permeates the entire bill. H.B. 531 purports to be a solution to the exceedingly rare problem of voter fraud with the true intention of effectively disenfranchising voters less likely to cast a vote for its drafters. To the extent that H.B. 531 is meant to bolster voter trust in Georgia's elections and democratic principles, it is counterproductive. Instead, the state could choose to run a public relations campaign to convince voters of the security of the system and encourage as many eligible voters as possible participate in elections. That would be a meaningful effort to restore faith in our state's democratic institutions. Instead, Georgians are presented with H.B. 531, which makes it more difficult to vote, especially for Black voters who have historically faced substantial barriers. This legislation breeds cynicism, not confidence.

Sincerely,

Lauren Groh-Wargo

Statement of Stacey Y. Abrams
Founder of Fair Fight Action

On Strengthening American Democracy Testimony Before the House Committee on House Administration
February 25, 2021

Thank you, Chairperson Lofgren, Ranking Member Davis, and members of the committee.

The morning of January 6, millions of Americans had their eyes on Georgia as the final results of the January 5 runoff election became clear. Georgia voters of every political persuasion had turned out in record numbers; and in the final tally, we had elected the first Jewish and first Black U.S. Senators from our state.

Yet, as the day progressed, our nation's attention turned from Georgia's elections towards a besieged Washington, as a deadly mob stormed the U.S. Capitol, desecrating the seat of our democracy. In an obscene effort to subvert the will of the American people and nullify a free and fair election, American citizens sought to obliterate the citizenship of others. The attempted coup was defeated, but the scar on our democracy remains.

This insurrection culminated from a nearly year-long disinformation campaign warning of a rigged election – and a two-decade assault on voting rights, centered around racist and baseless allegations of voter fraud. The 2020 contest has been audited, evaluated and investigated, and both Republicans and the majority of the U.S. Supreme Court have acknowledged no evidence of widespread fraud.

A lie cloaked in the seductive appeal of integrity has weakened access to democracy for millions. However, the truth is this: Congress must to act boldly and quickly to safeguard, strengthen and preserve our democracy.

Voter suppression relies on a triumvirate of attacks: barriers to voter registration and staying on electoral rolls, obstacles to receiving and casting a ballot and impediments to having lawful votes counted.

Faced with a changing demography, as our nation becomes more diverse in race and ideology, the anti-democratic forces in the Republican party have focused their energy on peddling unwarranted and expensive voter restriction measures. To date, according the Voting Rights Lab tracker, more than 230 bills have been put forward in thirty-eight state legislatures seeking to restrict voting access. Lest anyone argue that these bills are ordinary in their volume or direction, the nonpartisan Brennan Center for Justice issued a report from the first week of February 2021 finding that state legislators across the country had already introduced over four times the number of bills to restrict voting access as generally compared to the first week of February 2020 – an election year.

The legislation often comes with a disclaimer that the restrictions are necessary to restore confidence in voting or to ensure election integrity. Yet the Secretaries of State in these jurisdictions uniformly rejected outcries of voter fraud or issues of voter integrity. As a Republican committee chairman in my home state of Georgia admitted during a recent hearing regarding an anti-voting rights bill, there is no evidence of widespread voter fraud, and that this excuse is "just in people's minds." With this admission, I would challenge this committee to consider what could have changed so dramatically between November 2020 and February 2021.

In Georgia, record turnout among communities of color, particularly Black voters, helped propel Democrats to victory on November 3 and January 5, in the midst of the Covid-19 pandemic. For more than a decade, Georgians have utilized early voting options, including weekend voting, as well as the ability to vote by mail without an excuse. With most of these advances made during Republican leadership of the legislature, these practices enjoyed bipartisan support, and routinely resulted in the election of Republican candidates. The notable difference in this new raft of repressive legislation is the composition of usership for these options: namely communities of color, young people and newly-forming coalitions of shifting political ideologies.

Thus, when Georgia voters participated in the 2020 elections, overall voter turnout in Georgia increased 22.1% from 2016 to 2020 (4,092,373 votes to 4,998,482). The narrow margin of victory for a Democratic candidate was driven primarily by a large increase in Georgians voting early, particularly by mail, and by large increases in turnout among voters of color. The highest total number of African-American voters participated in the 2020 election, and Asian American and Pacific Islander total voters as well as Latino total voters more than doubled from 2016 to 2020.

Georgia Republicans responded to increased turnout by filing legislation to make it harder to register to vote, to cast a ballot and to have that ballot counted. To be specific, Georgia Republicans introduced 50 bills in the state legislature that would curb access to the ballot box, with no meaningful difference in the 2016 to 2020 elections other than increased uniformity in access to information and increased participation in using these options.

Georgia saw record turnout in the 2020 general election and 2021 senate runoffs. Voters took particular advantage of early vote opportunities, with more than 3.9 million Georgians voting early in the 2020 general election in Georgia.

- 1,316,943 Georgia voters voted by mail
- 2,694,879 Georgia voters voted early in person
- 986,660 Georgia voters voted on Election Day/provisionally

The January 5th Georgia runoffs became the first time Democrats beat Republican turnout during in-person early voting. Turnout among Black Georgia voters was particularly strong on weekends, where they outpaced their share of the electorate by nearly 6% in the general election. Republicans have responded to this strong turnout by proposing legislation to eliminate Sunday voting and slashing half of Saturday voting opportunities. While the target may be Black

voters, this change also impacts the tens of thousands Jewish voters who may not be able to participate in weekend voting if Sunday is eliminated.

Other bills filed include repealing GOP-instituted automatic voter registration, severely restricting in-person early vote opportunities, repealing no-excuse vote by mail, and banning previously eligible provisional ballots from being counted. Voters that identified as Asian, Hispanic, and African American, were more likely to cast their early vote ballot on the weekends than those that identified as white (13.1%, 11.8%, 11.4% vs 8.6% respectively).

Georgia stands as a singular example of the legislative whiplash from defending the integrity of elections in November and January to these naked attempts to erect new hurdles for voters of color, young voters, poor voters and other marginalized voters such as the disabled. Unfortunately, Georgia is not alone in this tragic attempt to employ voter suppression in response to diverse voter participation. In Arizona, the state also saw record turnout in 2020, with participation growing by 27.2% from 2016 to 2020 (2,661,497 to 3,385,294), driven primarily by growth in Latino and Native American voters, and because of an electorate that was younger than in 2016.

- 88.2% of Arizona voted by mail in 2020, an increase of 13.0 percentage points (75.2% in 2016)
- 2,986,962 Arizona voters voted by mail
- 398,332 Arizona voters came in person (Election Day + provisionals)

For the first time in modern Arizona history, Democrats closed the early vote gap to less than 1% or just 22,000 votes, in the 2020 general election compared with an early vote gap of 100,000 in 2016. The top election official for Maricopa County acknowledged the importance of voter access: “We opened the doors to access...When you get over 2 million people casting a ballot and less than 200,000 of them are actually walking in on Election Day and casting a fresh ballot, that’s important.” Of particular note, this election official, Adrian Fontes, lost his own race in November to a Republican, but he continued to lead the ballot counting process and pushback against conspiracy theories.

As in Georgia, the response has been a raft of legislation to suppress voter participation. Arizona Republicans responded to increased turnout by filing legislation to severely restrict vote by mail. For example, bills have been filed to repeal no-excuse vote by mail, ban the return of a ballot by mail, ban vote centers, criminalize drop box ballot return by immediate family members and purge tens of thousands of voters from the permanent early vote list. These efforts disproportionately impact voters of color. One bill to purge the permanent early vote list was estimated to remove between 25,000 and 50,000 Latino voters.

Pennsylvania is another state whose success in increased participation has led to attempts at suppression. In 2020, over 6.9 million Pennsylvanians voted in the general election, a record high since 1960. The state also saw more than 71% of the voting population casting a ballot, a 10% increase in participation from 2016 and its highest participation rate in over 60 years. Turnout in Pennsylvania increased 13.1% from 2016 to 2020 (6,115,402 to 6,915,283), driven

primarily by growth in vote by mail, which was permitted without an excuse for the first time. More than 37.8% of Pennsylvania voters cast their ballots by mail, an increase of 33.5 percentage points (4.3% in 2016).

- 2,616,012 Pennsylvania voters voted by mail
- 4,299,208 Pennsylvania voters voted in person (Election Day or provisionally)

Philadelphia saw its highest turnout in 25 years, with 749,000 voters participating in the election, nearly half by mail ballot. Turnout also increased from 59% in 2016 to 64% in 2020. Despite the high number of early votes cast, Philadelphia still saw 1-2 hour lines on election day.

Pennsylvania Republicans responded to record high turnout and participation by significantly increasing barriers to cast mail ballots early. For example, bills have been filed to repeal no-excuse absentee voting, eliminate in-person absentee voting, prohibit voters from curing mistakes on their ballot, repeal the permanent early vote list, add multiple signature requirements for the same ballot, restrict drop boxes and encourage mass voter purges.

In states where Democrats did not succeed but the composition of the electorate changed, bills are also in motion. In Texas, Republicans have filed bills to increase penalties to voters for residency mistakes on voter registration forms from a misdemeanor to a state jail felony, create new state jail felony offenses for election officials who allow provisional voters to vote a regular ballot or accept more than 3 out of precinct voters at their polling location, eliminate in-person return of mail ballots. In South Carolina, Republicans have filed legislation significantly reducing the number of early vote and election day polling locations from 1 for every 500 voters to 1 for every 3000. In Florida, while promoting false claims of election security, Governor Ron DeSantis announced voting proposals to restrict the mailing of mail-in ballots and to significantly limit access to dropboxes. Montana has introduced legislation to require students to have a second form of ID, while in New Hampshire, Republicans filed legislation to remove college ID cards from accepted forms of in-person voting ID altogether.

HR 1 would not negate every harm posed by these legislative assaults due to the delegation of power to the states with regards to election administration. However, the provisions of HR 1 would address the core assaults on voter access and create a uniform foundation for democracy in America that does not rely on geography. Expansion and protection of voting rights has long had a storied bipartisan history in America, despite attempts by leaders in both parties to thwart equality. Indeed, this body has come together after controversial elections to demand reforms that serve neither party – but instead speak to the will and needs of the electorate. Election administration should never be a weapon to be wielded against eligible Americans. To wit, this body has established protections for our military, our disabled, our elderly and those who are loyal to our nation but new to the English language.

The For the People Act is a contemporary example of the courage of the many to oppose the fears of the few. Recent news reports from around the country bemoan what has become a legion of bills designed to renew the ugliest chapters of voter suppression in our nation. Indeed, Joshua A. Douglas, professor of law at University of Kentucky J. David Rosenberg College of

Law remarked, “There was record turnout and zero evidence of massive voter fraud. … So, the logical next step would be to continue what worked well and even expand upon those successes. But instead, Republican legislators in numerous states are advancing new laws to cut back on voter access.”

HR 1 has broad-based and bipartisan support for its provisions to empower voters and expand access to the franchise, outlaw voter purging, restore the Voting Rights Act, improve the redistricting process to serve the needs of voters, and protect our right to free, fair and safe elections. Democracy works best when install guardrails to ensure every American has an equal opportunity to make their voice heard and be fairly represented. This set of pro-democracy reforms will place power back in the hands of everyday Americans – of every political stripe.

We must pass HR 1, the For the People Act, to embolden, revitalize and strengthen our democracy. Because meaningful progress on health care, racial justice and the rebuilding of our economy requires aggressive action on voting rights, partisan gerrymandering and campaign finance. The purveyors of voter suppression seek to preserve power by limiting the voices heard rather than winning voters over.

Congress alone holds the power to implement federal protections against retribution meted out at the ballot box. This body can and must respect the differences in states and allow them to decide how best administer elections to meet the specific needs of its people. However, modern election laws demand a basis of uniformity to ensure election integrity – not election insincerity.

Each American’s ability to access our democracy should not rely on their state of residence. Justice comes from the equal opportunity to access and participate in the arena of our democracy. We all have a right to take our seat at the table and our place at the ballot box.

I thank you for the opportunity to take part in this important discussion, and I urge you to continue to protect and strengthen our democracy.

National Redistricting Foundation

Year in Review

The National Redistricting Foundation seeks to prevent and reverse invidious gerrymandering through legal action across the country. We seek to overturn unconstitutional district maps that entrench racial or partisan bias and to challenge actions that threaten to undermine the redistricting process.

Our mission is to dismantle unfair electoral maps and create a redistricting system based on democratic values in advance of the 2021 redistricting cycle. By helping to create more just and representative electoral districts across the country, we also hope to restore the public's faith in a true representative democracy. This past year, the NRF successfully litigated to get new, more fair maps in North Carolina and Virginia, kept the Trump Administration from adding a citizenship question to the Census, and is seeking to abolish a provision of the Mississippi Constitution that was put in place to dilute the voting power of African-Americans. NRF's victories in 2019 are a testament to the range of our broad litigation strategy and ability to move swiftly.

We are pleased with this year's achievements, but we are just getting started.

Virginia

The NRF successfully funded a racial gerrymandering lawsuit in Virginia, *Bethune-Hill v. Virginia State Board of Elections*, seeing the case through to a final victory in the United States Supreme Court in June. The lawsuit, filed by a group of African-American Virginia voters, resulted in a determination that 11 districts in the Virginia House of Delegates were unconstitutional racial gerrymanders that violated the Equal Protection Clause of the 14th Amendment and had to be redrawn. In drawing the districts, the Virginia legislature had improperly set an arbitrary minimum of 55% black voting age population for each of the districts—claiming that threshold was necessitated by the Voting Rights Act (VRA) without conducting the relevant analysis to determine that such a threshold was actually necessary. The case was appealed to the Supreme Court by state officials after the lower court ordered the state to redraw the gerrymandered districts. In June 2019 the Supreme Court rejected the state's appeal, and the new map was used in Virginia's 2019 elections.

The Supreme Court's Bethune-Hill decision was an important victory for African-American voters in Virginia. The remedial map prepared by Special Master Bernard Grofman, and subsequently imposed by the lower court, created districts free from unconstitutional racial discrimination.

Census

Through 2018 and 2019, the NRF supported a lawsuit challenging the Trump Administration's attempt to add a citizenship question to the 2020 Census questionnaire. The NRF's suit, *Kravitz v. U.S. Department of Commerce*, was one of several such cases across the country, which collectively led to the decision by the Supreme Court this past June that the Administration had impermissibly added the question. On the last day of its 2019 term, the Court issued its decision in *Department of Commerce v. New York*. In a 5-4 decision penned by Chief Justice John Roberts, the

Court agreed with three lower court judges, including Judge Hazel in Kravitz, that the rationale given for adding a citizenship question—facilitating the Department of Justice's enforcement of the Voting Rights Act—was contrived and not credible. The Court's somewhat unexpected holding was surely influenced by mounting evidence exposing the Administration's true motivation to use the Census for Republican political gain. In an otherwise-unrelated case supported by the NRF in North Carolina, *Common Cause v. Lewis*, documents obtained from the files of the late Dr. Thomas Hofeller (the longtime Republican redistricting strategist) revealed two important new facts. First, it became clear that Dr. Hofeller played a significant, previously undisclosed role in orchestrating the Trump Administration's effort to add a citizenship question to the 2020 Census. And second, Republican political operatives viewed the inclusion of the citizenship question as a necessary step to using citizenship data for redistricting, instead of total population data—a strategy that, in Dr. Hofeller's words, would benefit Republicans and non-Hispanic whites."

Though the Administration initially fought the Supreme Court's ruling, President Trump ultimately announced that the Census questionnaire would be printed without the citizenship question.

The Court's decision to bar the Administration from including the citizenship question on the 2020 Census was one of the biggest accomplishments of the year, as its effects would have had decades-long consequences on representation. This is an enormous victory for the American people, and gets us one step closer to a fair and accurate count in 2020. We will be monitoring the administration of the Census in 2020 and are prepared to bring new legal action if it is warranted.

Mississippi

In May, plaintiffs supported by the NRF filed a lawsuit, *McLemore v. Hosemann*, contesting Mississippi's electoral scheme for statewide races, which requires that statewide officers win both a majority of the popular vote and a majority of the House

districts (the “electoral vote”)—otherwise the Mississippi House gets to decide the winner of the election. Most states require only a plurality of voters to decide the winner for statewide contests. This scheme became part of Mississippi’s Constitution during the state’s 1890 constitutional convention, which had the explicit purpose of diluting the political influence of African-American voters.

On November 1, the court indicated that it is likely to find the electoral vote piece of the scheme unconstitutional. Regarding plaintiffs’ claim that the electoral vote provision violates the doctrine of one-person/one-vote, the court said, “[t]hey’re right.”

Following the court’s decision communicating this view, Mississippi Secretary of State-elect Michael Watson has said that he plans to push the legislature to initiate the process of amending the provisions of the constitution at issue in the litigation—amendments that would then need to be approved by voters. The NRF is committed to seeing that these discriminatory provisions are amended and replaced, whether through continued litigation or a legislatively initiated ballot measure.

North Carolina

A pair of NRF lawsuits in North Carolina successfully concluded this year—resulting in new, fairer maps for the state’s House, Senate, and congressional delegation. In each case, the NRF supported plaintiffs argued that extreme partisan gerrymandering violates the North Carolina Constitution. A three-judge panel of North Carolina Superior Court judges presiding over the cases agreed.

On September 3, in *Common Cause v. Lewis*, the panel unanimously held that significant portions of the state’s House and Senate districts violated the North Carolina Constitution. The court found the districting plans to be such extreme partisan gerrymanders that Democrats—in nearly any reasonable electoral environment—would be unable to reach a majority in either chamber of the state legislature. For example, in both the state House and state Senate elections in 2018, Democratic candidates won a

majority of the statewide vote, but Republicans still won a substantial majority of seats in each chamber. Following the court's decision, the General Assembly redrew those unconstitutional districts over the course of a court-mandated two-week window. And though a handful of the districts remain gerrymandered, voters in the state will now have the opportunity, for the first time this decade, to elect legislative chambers that actually represent the will of the people.

Just a few weeks later, the NRF initiated a second, separate lawsuit in North Carolina state court, *Harper v. Lewis*, supporting plaintiffs challenging North Carolina's congressional map. The same three-judge panel swiftly granted plaintiffs' motion for a preliminary injunction on October 28, which led to the General Assembly drawing a new congressional map, which was then passed on November 15. Non-partisan analysts believe that the new congressional map will likely yield 8 seats for Republicans and 5 for Democrats—a marked improvement from the old map, which was designed to limit Democrats to just 3 of the 10 seats no matter how the state voted. That built-in 10-3 advantage withstood even the historic 2018 wave election.

On December 2, the three-judge panel ordered the state to hold the 2020 elections under the General Assembly's new 2019 map, declining to push the election deadlines back in order to address lingering questions about whether the General Assembly had, yet again, instituted a partisan gerrymander. The court noted that though the new map is not perfect, it is a vast improvement over the egregious map that North Carolinians had been voting under previously.

While these new, court ordered maps are an improvement, the people still deserve better. With the redistricting process set to occur in 2021, the fight for fair maps in North Carolina and states around the country continues. The NRF is committed to fighting for voters' rights wherever state action has impeded the voters' will. Fighting for maps that reflect the diversity and desires of voters is absolutely fundamental to our work.

The Road Ahead

The successes of the past year are encouraging, but we remain focused on the road ahead. The NRF has a broad litigation strategy, and we are poised to intervene wherever structural barriers are erected that keep the will of voters from being realized.