Chapter 9 Running the Gauntlet: The Perilous Path to the Polls in 2018*

Jeffrey I. Cummings and Jenny Terrell

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As the 2018 midterm elections approach, the polls indicate that numerous races for Senate and House seats and governorships across the country are highly competitive. At the same time, Americans—and non-white citizens in particular—face an increasing number and variety of threats to their right to vote. Restrictive state-enacted laws and policies concerning voter eligibility and access to polling places have multiplied like weeds in an unattended garden. Moreover, some political subdivisions have structured their electoral systems in ways that have resulted in voters being denied the equal opportunity to participate in the political process on account of race or membership in a language minority group.[1]

Voting rights advocates who seek to remove these barriers to equality are confronting a challenging atmosphere in the federal courts. It has been five years since the United States

Supreme Court's decision in *Shelby County v. Holder*[2] substantially weakened the Voting Rights Act of 1965 by effectively eliminating the Act's preclearance regimen. Between 1965 and 2013, § 5 of the Act prohibited covered jurisdictions from making any change in their voting procedures until the proposed change was "pre-cleared" by the Attorney General or a three-judge panel after proof that the proposed change had neither the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.[3] Section 4 of the Act provided the formula that was used to determine which jurisdictions had a sufficient history of discrimination to be subject to § 5's preclearance requirement.[4] The Act's preclearance regimen provided strong protection against discriminatory voting changes in the covered states.[5]

Nonetheless, the Supreme Court held in *Shelby County* that § 4's coverage formula is outdated and unconstitutional.[6] While the Court "issue[d] no holding on § 5 itself,"[7] § 4's "invalidation effectively brought § 5 down with it" and "§ 5 does not prohibit or regulate any voting procedure changes after *Shelby County.*"[8] The impact of *Shelby County* was immediate: shortly after the Supreme Court issued its decision, several states that were formerly subject to § 5's preclearance requirements made changes to their voting procedures that made it more difficult to vote.

For example, the day after *Shelby County* was decided, a Republican state senator announced that North Carolina's Republican-controlled legislature was going to expand a photo ID bill into an "omnibus" election bill.[9] This "omnibus" bill "target[ed] African-Americans with almost surgical precision" by requiring certain forms of photo identification that African-Americans disproportionately lacked, reducing the time period for early voting, and eliminating out-of-precinct voting, same-day registration, and pre-registration (which permitted 16- and 17-year olds who declare an intent to register to be automatically registered when they turn eighteen).[10] The Fourth Circuit held that the defendants intentionally discriminated against African-Americans by enacting the challenged provisions in violation of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments and it permanently enjoined the State from enforcing them.[11] The success obtained by the plaintiffs in *McCrory*

was hard-fought and pretty much complete.[12]

Other voting rights plaintiffs in the post-*Shelby County* era have not fared so well. Unlike with the § 5 preclearance regimen where the jurisdiction had the burden of proving that its proposed change did not discriminate, under § 2 (which allows proof of discriminatory intent *or* effect) and the Fourteenth and Fifteenth Amendments (which require proof of discriminatory intent) plaintiffs have the burden of proving discrimination. Even when plaintiffs have obtained successful judgments in the district court, the courts of appeal and Supreme Court have often reversed and left the challenged practices in place.

Although forms of voter suppression such as poll taxes, literacy tests, and white primaries are remnants of a forgone era, arbitrary registration rules, illegal manipulations of the voting rolls, and unequal access to polling places still exist to this day. For the ostensible purpose of assuring election integrity, some state and local governments have continued to use these restrictive practices to disenfranchise people of color and language minorities knowing that the legal system will provide an arduous path towards justice.[13] By using these tactics, some jurisdictions have manipulated the political process to stabilize systems of power that have prevented communities of color, the economically disadvantaged, and language minorities from obtaining a truly equal opportunity to participate in the American democratic process.[14]

In this chapter, we will discuss voting rights decisions that have been issued by the federal courts from January through October 2018 concerning voter eligibility, effective access to the polls, barriers that interfere with voters' ability to effectively cast their ballots, and challenges to electoral structures that allegedly dilute the voting strength of racial and language minority groups. (We will note when appeals have been filed and we caution readers to check the subsequent history of the cited cases given the twists and turns that voting rights cases often take as they are litigated to finality.) We will also discuss non-litigation alternatives that voting rights advocates have used to promote equal opportunity in the electoral process.

I. CHALLENGES TO PRACTICES THAT IMPACT VOTER ELIGIBILITY

States have enacted statutes and engaged in practices

that impact voter eligibility in a number of ways. In particular, a number of states have engaged in voter purges that remove persons who have previously registered to vote from the voter rolls. At least one state (Kansas) has enacted a law requiring documentary proof of citizenship in order to register to vote. A number of states have also enacted voter ID statutes that require that voters present specified types of identification to vote. Finally, although almost all states disenfranchise persons convicted of felonies for some period of time, only four states (Florida, Iowa, Kentucky, Virginia) permanently disenfranchise felons unless the government approves an individual's restoration of rights. The federal courts have decided cases in 2018 concerning these types of statutes and practices.

A. Voter Purges

States engage in voter purges for the ostensible reason of ensuring that persons who were once registered are removed from the voter rolls. Under federal law, removal of voters for the following reasons is permissible: (1) disenfranchising criminal convictions; (2) mental incapacity; (3) death; (4) change in residence; and (5) request by the voter.[15] Voter purges can serve a legitimate function given that voter registration lists in many areas are inaccurate because they have not been updated to reflect that voters have died or moved from the location where they initially registered and failed to cancel the registration in their prior state of residence.[16] Nonetheless, there is a significant danger of harm to our electoral system if voters are improperly removed from the rolls, particularly where identifiable groups of voters are disproportionately impacted.[17]

A 2018 study from the Brennan Center for Justice examined the voter purge practices of the states, assessed the degree of compliance with the National Voter Registration Act of 1993, and concluded that "[i]n the past five years, four states have engaged in illegal purges, and another four states have implemented unlawful purge rules."[18] The Brennan Center found that the overall purge rate is escalating with almost 4 million more voters purged from the rolls between 2014 and 2016 (during which roughly 16 million names were removed) than were purged between 2006 and 2008.[19] The Brennan Center further found that the rate at which voters

are being purged has increased more in jurisdictions that were subject to the § 5 preclearance requirements prior to the *Shelby County* decision.[20] Georgia, for example, under current Secretary of State and gubernatorial candidate Brian Kemp, has reportedly purged roughly 1.5 million registered voters between the 2012 and 2016 elections, and cancelled the registration of 550,702 Georgians in 2016 and 2017.[21] An analysis of the underlying data indicates that 340,134 of those Georgia voters who were purged in 2016 and 2017 were *wrongfully* purged based on the inaccurate presumption that they had moved out of state or out of their county when they had in fact never moved at all.[22] Although thousands of these voters re-registered once notice of their wrongful removal was publicized, it is probable that hundreds of thousands of these voters will be unjustly disenfranchised for the upcoming 2018 general election.[23]

Voting rights advocates have challenged voting purges with mixed success. In *Husted v. A. Philip Randolph Institute,*[24] plaintiffs asserted that Ohio's policy of identifying voters who have not voted in two years—sending them a mailing asking them to verify that they still reside at the same address, and then removing from the rolls voters who do not return the card and fail to vote for four more years—was not in compliance with the NVRA, which permits only "reasonable efforts" to remove ineligible voters from the rolls based on "a change in [] residence[.]"[25] The Supreme Court, by a five to four vote, held that Ohio's policy was in compliance with the NVRA.[26] The *Husted* majority upheld Ohio's policy despite the uncontested fact that the policy "disproportionately affected minority, low-income, disabled, and veteran voters."[27] The Supreme Court did not reach the issue of whether Ohio's confirmation notice, which it sent to voters as part of the process of removing them from the rolls, was in violation of the NVRA.[28] On remand, the Sixth Circuit found that plaintiffs have shown a likelihood of success on this issue and that "[t]here is a great public interest in not denying voters the opportunity to vote, in violation of the procedures of the NVRA, and a great public interest in not removing names from the state rolls in violation of federal law."[29] In granting in part plaintiffs' motion for emergency injunctive relief pending appeal on October 31, 2018, the Sixth Circuit ordered Ohio's county boards of elections to

enforce an exception that had been created during an earlier phase of the purge-related litigation (the "APRI Exception") by counting provisional ballots of certain voters who were purged from the rolls between 2011 and 2015 if the voter: (1) votes at their county's early voting location or at the correct polling place on Election Day; (2) resides where they were previously registered; and (3) has not become ineligible by reason of felony conviction, mental incapacity, or death since the date they were purged.[30] Given that over 7,500 eligible voters had their votes counted under the APRI Exception in the 2016 General Election,[31] it is likely that thousands of additional eligible voters will have their votes counted in the November 2018 election.

Voting rights advocates were successful in their challenge to Indiana's statute[32] governing voter purges. Indiana participates in the Interstate Voter Registration Crosscheck Program ("Crosscheck") as a method for identifying voters who may have become ineligible to vote in Indiana because of a change in residence. "Crosscheck collects the names on the voting rolls of all participating states, which at this point is 27, mostly under Republican legislative control, and conducts a computer search for matches, or quasi-matches" based on name and birthdate.[33] Because of the presence of common names and birthdates along with incomplete voter data, independent analysts have concluded that Crosscheck is highly inaccurate. In particular, a statistical analysis by researchers at Stanford, Harvard, the University of Pennsylvania, and Microsoft "found that Crosscheck would eliminate about 200 registrations used to cast legitimate votes for every one registration used to cast a double vote."[34] Moreover, a disproportionate number of names that matched under Crosscheck (such as Washington, Rodriguez, Garcia, Lee, and Kim) belong to persons of color which in turn creates the risk that inaccurate purging under Crosscheck will disproportionately affect communities of color.[35]

In two parallel cases, plaintiffs alleged that Indiana's policy violated the NVRA because it used the Crosscheck matches to remove voters from the rolls without providing the procedural safeguards required by the NVRA and it failed to provide uniform standards for the use of the Crosscheck data to county election officials.[36] The district court agreed, concluded that plaintiffs had established a

substantial likelihood of success on the merits, and granted plaintiffs' motions for a preliminary injunction to block the implementation of the Indiana statute.[37]

B. Interference With Voter Registration

Some states have interfered with efforts by citizens to register to vote by adopting questionable procedures that disproportionately impact non-white populations or generally impose an excessive burden on those seeking to register. Georgia's voter registration database "exact match" protocol, which was signed into law in 2017, provides a prime example.

Under Georgia's "exact match" protocol, information from a voter registration form is entered into a statewide voter registration system and then matched against records on file with the Georgia Department of Driver Services (DDS) or Social Security Administration (SSA).[38] If the applicant's information entered into the statewide system does not exactly match the applicant's identity data on file with the DDS or SSA, the registration application is placed in "pending" status and the burden is on the applicant to cure the "no match" result within 26 months.[39] The "exact match" required is truly exact: "the transposition of a single letter or number, deletion or addition of a hyphen or apostrophe, the accidental entry of an extra character or space, or the use of a familiar name like 'Tom' instead of 'Thomas' will cause a no match result."[40] "No matches," which (according to the plaintiffs' complaint) have resulted in the cancellation of tens of thousands of voter applications, can be created by mere clerical errors and inaccuracies within the DDS and SSA databases.[41] Naturalized citizens can also receive a "no match" if their citizenship status cannot be verified by the DDS records.[42]

Persons whose registrations are placed in "pending status" can vote in person if they present an approved photo ID and possibly proof of citizenship status.[43] However, persons who are in "pending status" cannot vote by mail on absentee ballots until after they resolve discrepancies with their voter registration.[44] If the applicant does not "cure" the "no match" within the 26 month timeframe, the application is cancelled and the applicant must start the voter registration process all over again.[45]

As of late October 2018, Georgia's "pending" voter list contained the names of almost 47,000 persons, of whom 70% identified as African-American, even though African-Americans make up only approximately 32% of Georgia's population.[46] Another 10% of the persons on the "pending" voter list identified as Latino or Asian-American and less than 10% identified as white.[47] In addition, the applications of 3,667 individuals were placed on the "pending" voter list because their citizenship could not be verified.[48]

The discriminatory impact inflicted by Georgia's exact match protocol is exacerbated by the fact that Republican Secretary of State Brian Kemp is responsible for administering it. Kemp, who is currently running for governor and is locked in a neck and neck race with Democrat Stacey Abrams[49] (who will become the first African-American female governor in the nation's history if she is elected), has raised eyebrows and suspicions with his comments about the upcoming election. In particular, in mid-October 2018 at a ticketed campaign event, Kemp stated that Abrams' well-funded voter turnout operation and focus on absentee ballots "continues to concern us, especially if everybody uses and exercises their right to vote—which they absolutely can—and mail[s] those ballots in."[50] Although Kemp has dismissed his critics as "outside agitators,"[51] prominent Georgians—including former President Jimmy Carter—have called for him to step down as Secretary of State to promote voter confidence in the upcoming election.[52]

On October 11, 2018, several civil rights groups filed a lawsuit against Kemp, in his official capacity as Secretary of State, alleging that the "exact match" protocol violates Section 2 of the Voting Rights Act, the National Voter Registration Act of 1993, and the First and Fourteenth Amendments.[53] In particular, plaintiffs allege that the protocol: (1) has a discriminatory impact on African-American, Latino, and Asian-American applicants; (2) prevents the registration of applicants who submit timely, facially complete, and accurate voter registration forms in derogation of federal law; and (3) imposes severe burdens on voting-eligible applicants' fundamental right to vote that are not justified by any rational or compelling state interest.[54]

On October 19, 2018, plaintiffs, through a motion for a preliminary injunction, requested that the district court or-

der that poll workers be allowed "to review documentary proof of citizenship at the polls," which would allow registered voters who are inaccurately flagged as non-citizens (estimated to number 3,143) to vote a regular ballot. Already voters placed in "pending" status for reasons not related to citizenship can vote with a regular ballot if they present an approved ID to a poll worker.[55] In contrast, under the Secretary of State's current procedures, voters flagged as non-citizens must furnish proof of citizenship to a county or deputy registrar (neither of whom is necessarily at the polls). Otherwise, the voter may only vote a provisional ballot.[56] Plaintiffs also presented uncontested evidence that the citizenship verification procedure has a disparate impact on minority voters.[57]

On November 2, 2018, the district court found that the process for an eligible voter to prove citizenship imposed a "severe" burden on the voter that was not "narrowly tailored to advance a compelling state interest."[58] Accordingly, the court found that plaintiffs had shown a likelihood of success on the merits along with the other required elements for injunctive relief, and it ordered Georgia's Secretary of State to permit individuals placed on the pending list because of citizenship issues to cast a regular ballot upon proof of identity and citizenship to either "a poll manager or deputy registrar."[59]

In another state (Kansas), individuals attempting to register have been subjected to the excessive burden of proving their citizenship. In 2011, Kansas passed a law (the Secure and Fair Elections Act ("SAFE Act")) requiring Kansans to produce documentary proof of citizenship when applying to register to vote.[60] Only three other states have such a proof of citizenship law,[61] and Kansas is the only state that has aggressively enforced the proof of citizenship requirement. Between January 2013 (when the Kansas law went into effect) and March 2016, tens of thousands of persons who attempted to register to vote were denied due to their failure to provide proof of citizenship.[62] Plaintiffs filed suit alleging that enforcement of the SAFE Act should be enjoined because the proof of citizenship requirement violated the NVRA and the Fourteenth Amendment to the United States Constitution. The district court granted plaintiffs' motion for a preliminary injunction in May 2016 and the Tenth Circuit affirmed

later that year.[63] In 2018, the district court held a bench trial and granted plaintiffs' motion for a permanent injunction against the enforcement of the SAFE Act.[64] Among other things, the district court found that: (1) over 31,000 persons were denied the ability to register due to the proof of citizenship requirement; (2) the proof of citizenship requirement disproportionately affected the young (those aged 18 to 29) and politically unaffiliated; (3) in the past 19 years, only 67 noncitizens at most registered or attempted to register to vote in Kansas; (4) between 1999 and 2013 when the SAFE Act took effect, only 39 noncitizens (.002% of the 1,762,330 registered voters in Kansas as of 2013) successfully registered to vote; and (5) the small number of non-citizen registrations were "largely explained by administrative error, confusion, or mistake."[65] Ultimately, the court concluded that "the magnitude of potentially disenfranchised voters impacted by the DPOC [documented proof of citizenship] law and its enforcement scheme cannot be justified by the scant evidence of noncitizen voter fraud before and after the law was passed, by the need to ensure the voter rolls are accurate, or by the State's interest in promoting public confidence in elections."[66] Accordingly, the court found that the enforcement of the SAFE Act violated the NVRA and unlawfully infringed on the right to vote guaranteed by the Fourteenth Amendment.[67]

C. Voter ID Statutes

As of 2018, "[a] total of 34 states have laws requesting or requiring voters to show some form of identification at the polls."[68] In 17 states, voters are requested or required to present photo ID.[69] In seven of these states (Georgia, Indiana, Kansas, Mississippi, Tennessee, Virginia, and Wisconsin), the photo ID requirement is "strict," meaning that voters without acceptable identification must vote on a provisional ballot and also take additional steps—such as returning to the election office with an acceptable ID—to have their provisional ballot counted.[70]

The ostensible purpose of the photo ID statutes is to ensure that the person who appears to vote is actually the person who is registered to vote under that name. However, voter impersonation—which is the only type of fraud that the photo ID laws could stop—is incredibly rare and, indeed,

virtually non-existent. One widely cited study found only 31 credible allegations of voter impersonation out of the more than 1 billion ballots casts in general and primary elections across the country between 2000 and 2014.[71] These findings should not be too surprising. Fraudulently casting a ballot in the name of another person is a criminal offense. Moreover, voter impersonation is a very inefficient way to illegally manipulate an election since votes must be stolen one at a time.

Unfortunately, millions of American citizens do not have a government-issued photo ID. A 2006 study by the Brennan Center for Justice found that more than 21 million United States citizens (or 11 percent of the population) do not have government-issued photo identification.[72] The Brennan Center study further found that white voting age citizens were far less likely than African-American and Latino voting age citizens to lack photo ID and that as many as 7% of United States citizens lack ready access to documentary proof of their citizenship.[73]

The situation in North Dakota on the eve of the 2018 general election provides an illustrative example of how a strict voter ID statute can disproportionately impact non-white voters and lead to potential disenfranchisement of thousands of individuals. North Dakota voters (who provided President Trump with a 36% margin of victory in 2016) typically prefer Republican candidates.[74] Nonetheless, North Dakota did elect Democratic Senator Heidi Heitkamp in 2012 by a razor thin margin of less than 3,000 votes. North Dakota's Native Americans (who number 46,000 and constitute 5.5% of the state's population) overwhelmingly supported Senator Heitkamp and provided her with the margin of victory.[75]

North Dakota is the only state in the country that does not require voter registration.[76] Prior to 2013, North Dakota's voters could vote without any ID at all so long as the poll clerk knew them.[77] If the poll clerk did not know the voter, the voter could produce one of several forms of ID.[78] If the voter lacked the requested ID, he or she could still vote utilizing one of the following "fail safe" mechanisms: either having an election official vouch for the voter or having the voter execute an affidavit stating that they were a qualified voter in the precinct.[79] In the spring of 2013, mere months after Senator Heitkamp was elected, the Republican-dominated North Dakota legislature enacted a "strict" non-photo voter

ID law.[80] In its current form, North Dakota's voter ID statute provides a more restrictive list of acceptable ID and eliminates the "fail safe" mechanisms but permits individuals who do not present a valid ID to mark a ballot that is set aside until the individual's status as a qualified voter can be verified with a valid form of ID.[81]

Plaintiff Native American voters brought a lawsuit under the Voting Rights Act and the United States and North Dakota Constitutions to invalidate North Dakota's voter ID statute. Plaintiffs alleged that North Dakota has the nation's most restrictive voter ID law given the absence of any "fail safe" mechanisms and that the law imposes a disproportionate burden on Native Americans.[82] The district court found: (1) Native American eligible voters were less likely to possess a qualifying voter ID than non-Native Americans; (2) Native Americans face burdens in obtaining a state-issued ID due to their lack of required underlying documents; (3) Native Americans were more likely to report using a "fail safe" mechanism to vote in the past than non-Native Americans; (4) almost 5,000 otherwise eligible Native Americans did not possess a qualifying ID and 2,305 (48.7%) of these individuals would not be able to vote in 2018 since they lacked the supplemental documentation needed to obtain a qualifying ID; and (5) the record "revealed no evidence of voter fraud in the past, and no evidence of voter fraud in 2016."[83] In April, 2018, the district court entered a preliminary injunction against key portions of the statute the district entered a preliminary injunction against key portions of the statute after finding that "the public interest in protecting the most cherished right to vote for thousands of Native Americans who currently lack a qualifying ID and cannot obtain one, outweighs the purported interest and arguments of the State."[84]

North Dakota immediately appealed. Although the Eighth Circuit initially denied the State's motion to stay the district court's injunction by its Order dated June 8, 2018, a panel of the Court (by a two to one vote) granted the State's renewed motion to stay the portion of the injunction that required the State to accept ID listing a current mailing address in lieu of a current residential address (which the statute requires).[85] The majority and dissent disagreed about whether the stay would lead to the disenfranchisement of any Native Ameri-

can voters in the upcoming November 2018 election. The dissenting judge noted that, although some portion of the 2,305 Native Americans that the district court found would be disenfranchised under the voter ID law "may be able to obtain proper identification under the aspects of the district court's order not covered by the stay, it is likely that many eligible voters will still be disenfranchised."[86]

The Native American voters promptly presented to the United States Supreme Court an application to vacate the stay entered by the Eighth Circuit. On October 9, 2018, the Supreme Court denied the application over a dissent by Justice Ginsburg (with whom Justice Kagan joined).[87] Justice Ginsberg reiterated the district court's findings that "70,000 North Dakota residents—almost 20% of the turnout in a regular quadrennial election—lack[ed] a qualifying ID; and [that] approximately 18,000 North Dakota residents also lack[ed] supplemental documentation sufficient to permit them to vote without a qualifying ID."[88] Justice Ginsburg further found that "the risk of dis[en]franchisement is large" because the stay created an "all too real risk of grand-scale voter confusion" given that certain forms of identification that were sufficient to permit voting during the primary election—when the injunction against requiring residential address identification was in force—would no longer suffice to permit voting in the general election.[89]

In the aftermath of the Supreme Court's ruling, four of North Dakota's tribes (the Standing Rock Sioux Tribe, the Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe, and the Three Affiliated Tribes of Fort Berthold) along with their non-profit partners have engaged in an energetic effort to mobilize voters and distribute free Tribal ID Cards with residential street addresses so that Native Americans without the required ID can vote in November 2018.[90] These efforts have had some success in providing the requisite IDs to more than 2,000 of the roughly 5,000 Native Americans who did not have them by the end of October 2018.[91] Nonetheless, the Spirit Lake Tribe and several individual plaintiffs—who believe that the residential address requirement leaves several categories of Native Americans at imminent risk of disenfranchisement—filed a lawsuit on October 30, 2018 seeking a declaration that the residential address requirement as applied to Native Americans violates

the First and Fourteenth Amendments.[92] The Spirit Lake Tribe plaintiffs filed an emergency motion for a temporary restraining order based on their supporting evidence and the Eighth Circuit's prior declaration that "the courthouse doors remain open" if "any resident of North Dakota lacks a current residential street address and is denied an opportunity to vote on that basis."[93] Although the district court found that the Spirit Lake Tribe plaintiffs' affidavits provided "great cause for concern," it denied their motion for a TRO on November 1, 2018 because the November 8 election is "imminent" and "a further injunction on the eve of the election will create as much confusion as it will alleviate."[94]

D. Felon Disenfranchisement

The right to vote is one of the most cherished rights in American society and five amendments (the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Ninth Amendments) directly address voting rights. Even the Constitution does not provide American citizens with an unqualified right to vote. In 1974, the Supreme Court held that states may implement laws that disenfranchise persons convicted of felony crimes who have completed their sentences and paroles without violating the Equal Protection Clause of the Fourteenth Amendment.[95] The Court further made clear that each state has the choice as to whether to implement a felon disenfranchisement law and that the Court was not going to choose between the values favoring such laws and the values opposing them.[96] As a consequence, states take a variety of approaches regarding the voting rights of persons convicted of felonies.[97]

The NAACP Legal Defense Fund and The Sentencing Project estimated in 2016 that 6.1 million citizens were denied the right to vote because of a felony conviction.[98] African-Americans are significantly more affected by felon disenfranchisement laws than other citizens: in 2016, 7.4% of African-Americans were denied the right to vote because of a felony conviction, as opposed to 1.8% of the non-Black population.[99] These racial disparities translate to significant losses in political power for communities of color.[100] In Florida, one of the only states that continues to indefinitely ban people with a felony conviction from voting, 21% of the voting-age Black population is disenfranchised as a result.[101] Floridians with a

felony conviction may petition Florida's Executive Clemency Board to restore their right to vote, but the Board has "unfettered discretion" in making the decision and the Governor (who is a member of the Board) holds veto power.[102] The number of Floridians who have had their voting rights restored has varied dramatically depending upon the predilections of whoever is holding the governorship.[103]

In 2017 a class of Florida residents with felony convictions challenged Florida's disenfranchisement and re-enfranchisement laws, alleging (among other claims) that the laws together allowed government officials to arbitrarily limit speech in violation of the First Amendment and to arbitrarily allocate the right to vote in violation of the Equal Protection Clause. The district court agreed with the class, concluding that Florida's vote restoration process violates the First Amendment's guarantees of freedom of association and freedom of expression and violates the Fourteenth Amendment's Equal Protection Clause.[104] The district court subsequently permanently enjoined Florida from enforcing its re-enfranchisement laws and ordered the defendants to promulgate new criteria to guide vote restoration criteria.[105] The Board appealed, however, and a panel from the Eleventh Circuit granted a stay of enforcement of the judgment pending appeal.[106]

Citizens continue to fight against Florida's discriminatory re-enfranchisement laws through legislative advocacy, even as it appears unlikely that the Eleventh Circuit will find the laws unconstitutional. Starting as early as 2014, Floridians for a Fair Democracy began collecting signatures in support of an amendment to the Florida constitution that will restore voting rights to most Floridians with a felony conviction after they complete any outstanding periods of probation or parole.[107] This year, the amendment will appear on Florida's ballot as an initiative.[108] Although the amendment has been criticized by some progressive voices for excluding those convicted of murder or a sex offense,[109] a September 24, 2018 poll by the University of North Florida Public Opinion Research Lab found that the amendment was supported by 71 percent of likely Florida voters..[110] The amendment, if passed, "would restore voting rights to up to 1.4 million people in Florida . . . [and] be the largest enfranchisement of new voters since the passage of the Voting Rights Act of

1965."[111]

II. BARRIERS TO EFFECTIVE ACCESS TO THE POLLS

Election officials in at least two areas have jeopardized the ability of some non-white voters to cast in person ballots by threatening to close—or in fact closing—convenient polling places that had been used in past elections and assigning the voters to inconvenient alternative locations. For example, on August 9, 2018, Georgia's Randolph County Board of Elections and Registration published a notice stating that it planned to close seven of the nine polling places in the county.[112] Randolph County is rural, impoverished, sparsely populated (7,719 persons in 2010), and predominately African-American (61.8%).[113] The proposed polling place closings—if implemented—would have heavily and disproportionately impacted the county's African-American voters, forcing thousands of them to travel up to 30 miles roundtrip to vote.[114] Prior to 2013, the decision to close polling places would have been subjected to the Voting Rights Act's now disabled preclearance regimen. Now, however, such a change in this consequential election year[115] was subject to the determination of the Randolph County Board of Elections and Registration. After the proposed closings were announced, the members of the community and elected officials of both parties made their opposition known and voting rights advocates threatened to sue if the Board carried out its plan.[116] On August 24, 2018, in a meeting that lasted less than a minute, the Randolph County Board bowed to community pressure and voted down its proposed plan.[117]

Voters in one of the few majority-minority jurisdictions in Kansas were not so fortunate. Ford County Kansas (which is 51% Latino) used a civic center in Dodge City (which is more than 57% Latino) as the county's sole polling place from 1998 through the August 2018 primary election.[118] Although the civic center served over ten times more voters than the average Kansas polling place (over 13,000 voters compared with the average of 1,200), it is centrally located with ample parking and is accessible by public transportation.[119]

In mid-September 2018, however, the Ford County Clerk moved the county's sole polling place to an expo center located outside Dodge City, and more than a mile from the nearest bus stop, after she learned of impending construc-

tion around the civic center.[120] The civic center's operator did not tell the Clerk that the center—which is hosting several high capacity events in the days before and after Election Day—would be unavailable.[121] And the Clerk knew that the expo center was "not a convenient location"—there are no bus routes or sidewalks to the expo center, anyone who tries to walk there will have to cross a state highway, and those who are able to drive will likely encounter significant traffic.[122] The inaccessibility of the expo center is a particular issue for Ford County's Latino residents who are disproportionately poor and reliant on public transportation in comparison to their white neighbors.[123] Nonetheless, the Clerk decided to move the polling place to the expo center based on her erroneous assumption that nearby construction would render the civic center unavailable.[124] To compound the problem, the Clerk admits that she has sent almost 300 newly-registered voters conflicting notices about which polling location they should use on the upcoming election day.[125]

Voting rights plaintiffs filed a lawsuit against the Ford County Clerk alleging that her decision to move the county's polling place out of Dodge City to the expo center unjustifiably burdened their fundamental right to vote in violation of the First and Fourteenth Amendments and discriminated against Ford County's Latino voters in violation of Section 2 of the Voting Rights Act.[126] Plaintiffs filed an emergency motion for a temporary restraining order to force the Clerk to open a second polling location in Dodge City.[127] In her response to the motion, the Clerk offered no evidence to support her initial claim that construction prevented the civic center from serving as a polling place; instead, she claimed that voter inconvenience and confusion on Election Day will be minimized because Dodge City has offered to provide free rides to the expo center and she has widely publicized the polling place change.[128] On November 1, 2018, the federal district court denied plaintiffs' motion for a temporary restraining order.[129] The court held that it would not be in the public interest to force Ford County to makes changes to the polling location this close to the election because doing so "likely would create more voter confusion than it might cure."[130] The court further held that it could not conclude from the limited record presented that plaintiffs have a likelihood of success on their constitutional claims under the

First and Fourteenth Amendments.[131]

The denial of equal access to early voting sites is another issue that has led to litigation in 2018. In Florida, university students and voting rights advocates brought suit against the Florida's Republican Secretary of State alleging that the Secretary's opinion that none of the State's public university buildings could be used as in-person early voting sites violated their rights under the First, Fourteenth, and Twenty-Sixth Amendments.[132] The district court found that: (1) nearly 830,000 students were enrolled in Florida's public universities; (2) Florida college students utilized early voting at a rate higher than Florida's electorate as a whole (in 2016, 43% of college students versus 40.5% of the electorate as a whole voted early) and college students elsewhere; (3) the State's policy "lopsidedly impact[ed] Florida's youngest voters"; and (4) the State failed to articulate precise interests sufficiently weighty to justify the burden on the plaintiffs' right to vote.[133] For these reasons, the court granted a preliminary injunction after concluding that plaintiffs had established a likelihood of success on their constitutional claims (including their claim that the policy intentionally discriminated against them based on their age in violation of the Twenty-Sixth Amendment), that they would face irreparable injury if they were not granted injunctive relief, and that the threatened harm from maintaining the ban on having early voting sites on college campuses far outweighed any damage that enjoining the State's opinion would cause.[134]

Voting rights advocates challenged the location of early voting sites in Indiana in another 2018 case. Under Indiana law, voters may cast their ballots prior to election day by "absentee" voting either by mail (under certain specified conditions) or in person (known as early in-person voting).[135] Each county clerk's office must be open for early in-person voting and county election boards have the authority to establish additional satellite offices for early in-person voting.[136] Marion County is Indiana's most populous county, with the State's highest nonwhite population in absolute and relative terms.[137] In 2008, Marion County opened two satellite in-person early voting sites and more than 73,000 Marion County residents cast early in-person votes.[138] Indiana—for the first time since 1964—also cast its electoral votes for the Democratic Presidential candidate (Barack Obama), who

secured a 26% margin of victory in Marion County.[139] Thereafter, the Marion County election board failed to re-establish satellite in-person voting sites in every federal general election from 2010 through 2016, each time for lack of the Republican Board member's or her proxy's vote.[140]

Voting rights advocates filed suit against the Marion County Election Board alleging that the Board's failure to re-establish satellite offices for early in-person voting after 2009 violated the rights of African-American voters under the First and Fourteenth Amendments and § 2 of the Voting Rights Act.[141] Plaintiffs moved for a preliminary injunction to require the Board to re-establish the satellite offices. The district court considered the evidence and made the following findings: (1) African-Americans who used absentee voting in Marion County were more likely to use early in-person absentee voting than non-Hispanic whites who voted absentee in 2008, 2012, and 2016; (2) the Board's failure to approve any satellite voting locations in 2012 and 2016: (a) decreased the proportion of all voters who used early in-person absentee voting in Marion County; and (b) disproportionately decreased the proportion of African-American early in-person voters relative to non-African-Americans in comparison to 2008;[142] (3) the Board's failure to establish satellite offices had a disproportionate impact on African-American voters and caused a substantial loss of early votes; (4) "partisanship motivated, and indeed is the but-for cause of, the Board's action" given that any restriction on early voting tended to depress Democratic voter turnout and vote share and there was no other credible neutral explanation for the Board's failure to provide the satellite offices.[143] In view of its findings, the district court ordered the Board to provide satellite offices for the November 2018 general election after it concluded that plaintiffs had shown a fair likelihood of success on the merits, that they would suffer irreparable harm without injunctive relief, and that the balance of equities weighed in plaintiffs' favor.[144]

Even properly registered voters who do not physically come to their polling places, but instead vote by absentee ballot, have experienced barriers that can result in their votes not being counted. In Georgia, as of October 20, 2018, election officials had rejected 1,785 (2%) of the absentee ballots that were returned to them.[145] The vast majority of these ballots

(82%) were rejected by officials in the populous and racially diverse Gwinnett County.[146] Gwinnett County had a disproportionately high absentee ballot rejection rate (7.4%) and also rejected a disproportionate number of absentee ballots from non-white voters: in particular, 73.2% of the voters whose absentee ballots were rejected were African-American, Latino, or Asian and only 15.9% were white.[147] Civil rights advocates filed related lawsuits in mid-October 2018 after evidence emerged that Georgia elections officials had rejected hundreds of absentee ballot applications and absentee ballots due to mismatches between the voters' signatures on the applications and ballots and the signatures on file with election officials.[148] Plaintiffs filed motions for injunctive relief and presented evidence that a total of 136 absentee ballots were rejected statewide due to a "signature match" issue.[149] The district court held that plaintiffs established their entitlement to injunctive relief and showed a substantial likelihood of success on their claim that Georgia's procedure—which granted election officials who are not trained in handwriting analysis unchecked discretion to determine whether two signatures matched—violated their rights to procedural due process.[150] Accordingly, the court ordered injunctive relief specifying that Georgia county election officials shall: (1) not reject any absentee ballots due to an alleged signature mismatch; (2) treat any such ballots as provisional ballots; and (3) provide, to the absentee voter, prerejection notice and an opportunity to resolve the alleged signature discrepancy prior to the certification of the consolidated returns of the election.[151] Defendant Secretary of State has appealed the district court's temporary restraining order and sought a stay pending appeal. On November 2, 2018, an Eleventh Circuit panel (by a two-to-one vote) denied the Secretary of State's motion to stay the injunctive relief ordered by the district court.[152]

III. BARRIERS THAT INTERFERE WITH THE ABILITY OF VOTERS TO CAST A VOTE THAT EFFECTUATES THEIR INTENT

"While lost on some, Puerto Rico is part of the United States . . . The American flag has flown over the island since 1898, and its people have been American citizens since 1917."[153] When Congress passed the Voting Rights Act in

1965, it included provisions expressly designed to protect the voting rights of citizens educated in Puerto Rico and to make sure that Puerto Ricans living outside of Puerto Rico could effectively exercise their right to vote.[154] In particular, Section 4(e) of the Act "ensures that Puerto Ricans—American citizens, all of them—are not prevented from voting in a language they may not fully understand" by requiring the provision of voting instructions and ballots in Spanish as well as English.[155] Voting rights advocates successfully sued to enforce Section 4(e) in Chicago, Philadelphia, and New York during the 1970s.[156]

Section 4(e) has come to the forefront once more in Florida. In 2017, Hurricane Maria inflicted catastrophic damage on Puerto Rico and caused many of its residents to relocate to other parts of the United States. As of March 2018, an estimated 50,000 to 75,000 Puerto Ricans have permanently resettled in Florida and many of them have moved to counties that currently conduct English-only elections.[157] In 2018, voting rights advocates brought suit against the Florida Secretary of State seeking to enforce Section 4(e) in 32 Florida counties that contain Puerto Rican populations but do not provide Spanish-language election materials.[158] Plaintiffs sought a preliminary injunction for the Florida counties that contain Puerto Rican populations who were either born in Puerto Rico or speak English less than "very well."[159] The district court entered a preliminary injunction to require Spanish language electoral material in the 32 counties after finding that plaintiffs established a substantial likelihood of success on the merits and irreparable injury, that the balance of equities favored the requested relief, and that the administrative expense of compliance with Section 4(e) is far outweighed by the fundamental right at issue.[160] The court concluded by observing that "[i]t is remarkable that it takes a coalition of voting rights organizations and individuals to sue in federal court to seek minimal compliance with the plain language of a venerable 53-year-old law."[161]

Straight-ticket voting, which allows a voter to select all of a party's candidates with one ballot mark, is another electoral procedure that touches on a voter's ability to cast an effective ballot. Proponents of straight-ticket voting assert that the practice aides voters in understanding long and complicated ballots.[162] Opponents contend that straight-ticket

voting allows people to vote without thinking critically, disadvantages third-party or non-partisan candidates, and encourages partisanship.[163] Advocates on both sides accuse the other of holding to their position only for underlying political motives.[164] In recent years, many states have abolished this option.[165]

The issue of straight-ticket voting recently came to a head in Michigan. In 2018, a district judge concluded that a Michigan bill to end straight-ticket voting "unduly burden[ed] the right to vote, reflect[ed] racial discriminatory intent harbored by the Michigan Legislature, and disparately impact[ed] African-Americans' opportunity to vote in concert with social and historical conditions of discrimination."[166] Straight-ticket voting has existed in Michigan since 1891.[167] In 1964 and in 2001 the Michigan legislature attempted to ban the practice, but voters defeated both bills through a referendum.[168] In 2015, the Michigan Legislature again proposed a bill to end straight-ticket voting and attached a $5 million appropriation, which precluded a voter referendum on the issue.[169] The district court granted a preliminary injunction, finding that the bill likely violated the Equal Protection Clause and Section 2 of the Voting Rights Act.[170] In coming to its decision, the district court explained that Michigan has a "restrictive voting scheme" because it does not allow early voting, allows absentee voting only in rare circumstances, and has longer ballots than many states.[171] Getting rid of straight-ticket voting would "introduce significantly greater wait times and dramatically longer lines," deterring voting.[172] Furthermore, the court concluded that these increased wait times would be experienced disproportionately by African-American voters.[173]

This case is now pending on appeal, but a split panel from the Sixth Circuit has stayed the district court's judgment.[174] In coming to this conclusion, the majority noted that most states do not allow straight-ticket voting and that many states have outlawed the practice in recent years.[175] The majority explained that it found that the plaintiffs' experts' opinions were flawed and that there was no compelling evidence that eliminating straight-ticket voting would significantly increase wait times to vote.[176] The majority concluded that "there are very serious problems with both the factual underpinnings and the legal analysis of the district court's

opinion," and that the appellee therefore showed a likelihood of success on appeal, warranting a grant of the stay motion.[177]

IV. STRUCTURAL IMPEDIMENTS TO EQUAL ELECTORAL OPPORTUNITIES

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, is intended to eliminate discrimination in the electoral process by guaranteeing minority voters an equal *opportunity* to elect the candidates of their choice. Plaintiffs can prove a violation of § 2 by showing that an electoral structure, practice, procedure, or standard has a discriminatory *effect* on minority voters and proof of discriminatory intent is unnecessary.[178] Consequently, a state or political subdivision violates § 2 if its districting plan provides less opportunity for racial or language minorities to elect representatives of their choice.[179]

> To make out a § 2 'effects' claim, a plaintiff must establish the three so-called '*Gingles* factors.' These are (1) a geographically compact minority population sufficient to constitute a majority in a single-member district,[180] (2) political cohesion among the members of the minority group, and (3) block voting by the majority to defeat the minority's preferred candidate . . . If a plaintiff makes that showing, it must then go on to prove that, under the totality of the circumstances, the district lines [or at-large system] dilute(s) the votes of the members of the minority group.[181]

In conducting this "totality of the circumstances" inquiry, courts consider evidence of the following factors (known as the "Senate factors"): (1) the history of voting-related discrimination in the State or political subdivision; (2) the extent to which voting in the elections of the State or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which minority groups bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which members of the minority group have been elected to political office in the jurisdic-

tion; (8) evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group; and; (9) evidence showing that the policy underlying the State's or political subdivision's use of the contested practice or structure is tenuous.[182]

Voting rights advocates have had mixed success in bringing § 2 challenges to districting plans in 2018. In *Abbott v. Perez,* the Supreme Court reversed a three-judge panel's finding that Texas' congressional districting plan diluted the voting strength of Latinos in violation of § 2. The court concluded that the plaintiffs failed to show that they could create additional electoral "opportunity" districts for Latinos in one area of the state, or that they could create such an addition in another area, without breaking a county line in violation of the Texas Constitution.[183] In another Texas case, plaintiffs alleged that the statewide, at-large election of all justices to the Supreme Court of Texas and judges to the Texas Court of Criminal Appeals violated § 2 of the Act by diluting the voting strength of Latino voters.[184] Although the district court found that plaintiffs proved the three *Gingles* preconditions, it ultimately held that this was the "unusual case" where plaintiffs proved the preconditions but nonetheless failed to establish a § 2 violation because the "racial minority is closely aligned with the losing political party and the evidence on the totality of the circumstances renders political partisanship the better explanation for the defeat of minority-preferred candidates at the polls."[185]

On the other hand, voting rights advocates have successfully challenged at-large and single-member districting plans under § 2 in Missouri, California, and Georgia. The Eighth Circuit affirmed the district court's finding that the at-large system of electing school board members in the Ferguson-Florissant School District unlawfully diluted the voting strength of African-Americans in violation of § 2.[186] In *Luna v. County of Kern,* the district court held that Kern County California's single-member redistricting plan unlawfully diluted the voting strength of Latinos in violation of § 2.[187] Finally, in *Wright v. Sumter County Board of Elections and Registration,* the district court held that Sumter County's method of electing members of its board of education (a hybrid system whereby two members are elected at large and five members are elected from single member districts)

unlawfully diluted the voting strength of African-Americans in violation of § 2.[188]

CONCLUSION

The voting rights decisions offer three important lessons. First, voting rights still matter. Notwithstanding the Supreme Court's decision in *Shelby County*, voting rights advocates have continued to litigate and win cases under the Voting Rights Act and constitutional theories. Many of these victories took place in critical background states for the upcoming 2018 mid-term elections. The vindication of voting rights of non-white voters in Georgia, of Puerto Ricans and college students in Florida, and of African-Americans in Indiana could potentially make a difference in what are expected to be very close Senate races in those states. To be sure, victory is not easily (or always) won and it can be fleeting as cases progress to the Courts of Appeal and the Supreme Court. Nonetheless, litigation remains an important tool for the protection of voting rights.

Second, community vigilance and mobilization are of critical and heightened importance. In the post-*Shelby County* world, discriminatory changes that would have been blocked by pre-clearance can be enacted without court scrutiny. Community pressure can thwart potentially devastating changes in the electoral process, such as the proposed closure of polling places in Randolph County, Georgia, before those change are formally enacted. Community mobilization can cause the placement of constitutional amendments (such as the proposed changes to Florida's felony disenfranchisement and re-enfranchisement process) on the ballot so that the people can vote on important issues where the courts are reluctant to provide relief. Community mobilization can also counteract unfair laws and voting procedures. In North Dakota, the activism of the Native American tribes has mitigated the harm that the state's "strict" voter ID statute has disproportionally inflicted on the Native American community.

Finally, personal vigilance must be maintained. Voting purges are increasing and it is the responsibility of each voter to make sure that he or she remains registered in good standing. It is also an unfortunate reality that these strict voter ID statutes have been enacted in the first place—given the almost complete absence of any actual evidence of voter

impersonation fraud—and typically been upheld by the courts. Given this, it is incumbent upon each voter to make sure that he or she has the required ID or takes the steps to learn how to obtain one in those states that have strict voter ID statutes.

NOTES:

[1]*See generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES (2018).

[2]570 U.S. 529 (2013).

[3]*Id.* at 537.

[4]As of 2013, nine states (Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, Alaska, Arizona, Texas), large portions of North Carolina, and certain counties in Florida, California, South Dakota, Michigan, and New York were covered by Section 4's formula. *Id.* at 536–39.

[5]Between 1982 and 2006, for example, the Department of Justice's objections and court-enforcement actions blocked over 800 proposed discriminatory voting changes in the states covered by § 5. *Id.* at 570–71 (Ginsburg, J., dissenting).

[6]*Id.* at 556–57.

[7]*Id.* at 557.

[8]*Voketz v. Decatur*, 904 F.3d 902, 908 (11th Cir. 2018).

[9]*N.C. State Conference of NAACP v. McCrory,* 831 F.3d 204, 215–16 (4th Cir. 2016), *cert. denied,* 137 S.Ct. 1399 (2017).

[10]*Id.* at 214, 216–18.

[11]*Id.* at 214, 238–39.

[12]The Fourth Circuit did decline plaintiffs' request to impose relief under § 3 of the Voting Rights Act, 52 U.S.C. § 10302(a), (c), which would include imposing poll observers during elections and subjecting North Carolina to ongoing preclearance requirements. *Id.* at 241.

[13]Jesus Joslin, *Navigating the Post-Shelby Landscape: Using Universalism to Augment the Remaining Power of the Voting Rights Act,* 19 Scholar 217, 243 (2017).

[14]One commentator has noted that "[a]s [the Voting Rights Act] currently stands, the American legal system considers the traditional prerogative of the state to be more important, more essential, more fundamentally worthy of preservation, than the citizenry's right to participate in the democratic process." Joseph McCarthy, *The Quintessential Political Problem: Current Conditions Justifying Current Burdens and the Modern Shift in Election Law Scrutiny,* 20 Suffolk J. Trial & App. Adv. 55, 87–88 (2015).

[15]*See* National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. §§ 20501 to 20511, at § 20507.

[16]*See* PEW CENTER ON THE STATES, INACCURATE, COSTLY, AND INEFFICIENT: EVIDENCE THAT AMERICA'S VOTER REGISTRATION SYSTEM NEEDS AN UPGRADE 1–5 (2012), *available at* https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf.

[17]*See* 52 U.S.C. § 20501(a)(3) ("discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities").

[18]*See* JONATHAN BRATER ET AL., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (Brennan Center for Justice at New York University School of Law 2018).

[19]*Id.* at 2, 3.

[20]*Id.* at 3–5.

[21]P.R. Lockhart, *Georgia, 2018's Most Prominent Voting Rights Battleground, Explained: How the Governor's Race between Stacey Abrams and Brian Kemp has Fueled Ongoing Problems with Voter Access in Georgia*, VOX (Oct. 26, 2018), https://www.vox.com/policy-and-politics/2018/10/26/18024468/georgia-voter-suppression-stacey-abrams-brian-kemp-voting-rights; Matthew Rozsa, *Election Expert Greg Palast: Thanks to GOP Voter Suppression, "Democrats may have effectively lost*," SALON (Oct. 28, 2018), *https://www.salon.com/2018/10/28/election-expert-greg-palast-brian-kemps-postcard-trick-wrongly-purged-340000-georgia-voters/*.

[22]Rozsa, *supra* note 21.

[23]Rozsa, *supra* note 21.

[24]138 S.Ct. 1833 (2018).

[25]*See* 52 U.S.C. § 20507(a)(4); 52 U.S.C. § 20507(b)(2).

[26]*Husted,* 138 S.Ct. at 1848.

[27]*Id.* at 1864 (Sotomayor, J., dissenting); *see also Id.* at 1848 (acknowledging but dismissing this fact because Ohio did not intentionally discriminate and plaintiffs did not assert a claim under the provision of the NVRA that prohibits discrimination). Justice Sotomayor also observed that "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." *Husted,* 138 S.Ct. at 1863 (Sotomayor, dissenting).

[28]*A. Philip Randolph Institute et al. v. Husted*, No. 18-3984, Slip Op., at 2 & n.1 (6th Cir. Oct. 31, 2018).

[29]*A. Philip Randolph Institute*, Slip Op., at 7-10, 12.

[30]*A. Philip Randolph Institute*, Slip Op., at 4, 13.

[31]*A. Philip Randolph Institute*, Slip Op., at 4.

[32]Ind. Code § 3-7-38.2-5(d).

[33]Robert Koehler, *The Fallacy of Voter Fraud: Keeping Racism Alive at the Polls*, BUZZFLASH AT TRUTHOUT (Sept. 13, 2018), http://buzzflash.com/

commentary/keeping-racism-alive-at-the-polls.

[34]Christopher Ingraham, *This anti-voter-fraud program gets it wrong over 99 percent of the time. The GOP wants to take it nationwide*, THE WASHINGTON POST, July 20, 2017 (internal quotation marks omitted).

[35]*See* Koehler, *supra* note 27, at 2–3.

[36]*See Ind. State Conference of NAACP v. Lawson,* — F.Supp.3d —, 2018 WL 2752564 at *1 (S.D.Ind. June 8, 2018), *appeal docketed,* No. 18-2492 (7th Cir., July 10, 2018); *Common Cause Ind. v. Lawson,* __ F.Supp.3d __, 2018 WL 2762552 at *1 (S.D.Ind. June 8, 2018), *appeal docketed,* No. 18-2491 (7th Cir., July 10, 2018). The plaintiffs in the *Indiana State NAACP* and *Common Cause* cases brought an identical challenge to the Indiana statute in question and United States District Court Judge Tanya Walton Pratt issued a materially identical ruling in both cases.

[37]*Ind. State NAACP,* 2018 WL 2752564 at *11–14; *Common Cause,* 2018 WL 2762552 at *10–14.

[38]*Georgia Coalition for the Peoples' Agenda et al. v. Brian Kemp, Secretary of State*, No. 1:18-cv-04727-ELR, Complaint, at 2 (N.D.Ga. Oct. 11, 2018) [hereinafter "Georgia Coalition Complaint"].

[39]Georgia Coalition Complaint, at 2.

[40]Georgia Coalition Complaint, at 2-3.

[41]Georgia Coalition Complaint, at 20-21, 28.

[42]Mark Niesse, *Georgia Stalls Voter Registrations, From Jesus to New U.S. Citizens*, ATLANTA JOURNAL-CONSTITUTION, Oct. 24, 2018, *available at* https://www.myajc.com/news/state-regional-govt-politics/georgia-stalls-voter-registrations-from-jesus-new-citizens/03JjPCe0apeRUdhFZPrn3I/.

[43]Jamil Smith, *Watch the Georgia Minority Vote Disappear Before Your Eyes*, ROLLING STONE, Oct. 11, 2018, *available at* https://www.rollingstone.com/politics/politics-news/georgia-voter-suppression-736362/ [hereinafter "J. Smith I"].

[44]J. Smith I, *supra* note 43.

[45]Georgia Coalition Complaint, at 2.

[46]Niesse, *supra* note 42.

[47]Georgia Coalition Complaint, at 30.

[48]Niesse, *supra* note 42.

[49]*New FOX 5 Poll: Abrams Edging Kemp in Dead Heat*, FOX 5-ATLANTA (Oct. 30, 2018), *http://www.fox5atlanta.com/news/new-fox-5-poll-abrams-edging-kemp-in-dead-heat*.

[50]Jamil Smith, *In Leaked Audio, Brian Kemp Expresses Concern Over Georgians Exercising Their Right to Vote*, ROLLING STONE, Oct. 23, 2018, *available at* https://www.rollingstone.com/politics/politics-news/brian-kemp-leaked-audio-georgia-voting-745711/ [hereinafter J. Smith II].

[51]J. Smith I, *supra* note 50.

[52]Letter from Jimmy Carter to Honorable Brian Kemp (Oct. 22, 2018),

available at https://apnews.com/02bf11f29ada46d0833be6e3091b0c31.

[53]Georgia Coalition Complaint, at 41-48.

[54]Georgia Coalition Complaint, at 2, 41-48.

[55]*Georgia Coalition for the Peoples' Agenda et al. v. Brian Kemp, Secretary of State*, No. 1:18-cv-04727-ELR, Order, at 7-8 (N.D.Ga. Nov. 2, 2018).

[56]*Georgia Coalition for the Peoples' Agenda et al. v. Brian Kemp, Secretary of State*, No. 1:18-cv-04727-ELR, Order, at 1-2, 16-17 (N.D.Ga. Nov. 2, 2018).

[57]In particular, "Asian applicants constitute 27.0 percent of those flagged as non-citizens even though they comprise only 2.1 percent of Georgia's registered voter pool; Latino applicants constitute 17.0 percent of those flagged as non-citizens even though they comprise 2.8 percent of Georgia's registered voter pool; and white applicants constitute only 13.7 percent of those flagged as non-citizens even though they comprise 54.0 percent of Georgia's registered voter pool." *Georgia Coalition for the Peoples' Agenda et al. v. Brian Kemp, Secretary of State*, No. 1:18-cv-04727-ELR, Order, at 21 (N.D.Ga. Nov. 2, 2018).

[58]*Georgia Coalition for the Peoples' Agenda et al. v. Brian Kemp, Secretary of State*, No. 1:18-cv-04727-ELR, Order, at 25, 29-30 (N.D.Ga. Nov. 2, 2018).

[59]*Georgia Coalition for the Peoples' Agenda et al. v. Brian Kemp, Secretary of State*, No. 1:18-cv-04727-ELR, Order, at 30-34, 35, 36 (N.D.Ga. Nov. 2, 2018).

[60]*See Fish v. Kobach,* 309 F.Supp.3d 1048, 1053 (D.Kan. 2018), *appeal docketed,* No. 18-3186 (10th Cir. July 3, 2018).

[61]Arizona has "a similar law in effect, but that law is far more lenient and allows people to satisfy it by writing their driver's license on the voter registration form." Roxana Hegeman, *Judge: Kansas cannot require proof of citizenship to vote*, AP NEWS (June 19, 2018), *available at* https://www.apnews.com/4bc02a1dd9c74487aaa9dbdba5e686ac. Alabama and Georgia also have proof-of-citizenship laws that are not currently being enforced. *Id.*

[62]*Fish,* 309 F.Supp.3d at 1067.

[63]*Fish v. Kobach,* 189 F.Supp.3d 1107 (D.Kan. 2016), *aff'd,* 840 F.3d 710 (10th Cir. 2016).

[64]*Fish,* 309 F.Supp.3d at 1113–14.

[65]*Id.* at 1067, 1069, 1102.

[66]*Id.* at 1112.

[67]*Id.* at 1113.

[68]*Voter Identification Requirements | Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 16, 2018), *http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.*

[69]*Id.*

[70]*Id.*

[71]*See* Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASHINGTON POST (August 6, 2014), *available at* https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.d827ac59737a.

[72]BRENNAN CENTER FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (November 2006), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

[73]*Id.* at 2, 3 (finding that 8% of whites, 25% of African-Americans, and 16% of Latinos lacked photo ID); *see also* Issie Lapowski, *A Dead-Simple Algorithm Reveals the True Toll of Voter ID Laws*, WIRED (January 4, 2018), https://www.wired.com/story/voter-id-law-algorithm/ ("According to the study, 3.6 percent of registered white voters had no match in any state or federal ID database. By contrast, 7.5 percent of black registered voters were missing from those databases"); Dan Hopkins, *What We Know About Voter ID Laws*, FIVETHIRTYEIGHT (August 21, 2018), https://fivethirtyeight.com/features/what-we-know-about-voter-id-laws/ (citing a recently released study which "estimated that nonwhite voters were between 2.5 and 6 times more likely as white voters to lack voter ID" in Michigan during the 2016 general election).

[74]Maggie Astor, *A Look at Where North Dakota's Voter ID Controversy Stands*, N.Y. TIMES, Oct. 19, 2018, *available at* https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration.html.

[75]Julian Brave NoiseCat, *Republicans Wanted to Suppress the Native American Vote. It's Working*, THE GUARDIAN, Oct. 26, 2018, *available at* https://www.theguardian.com/us-news/2018/oct/26/the-real-reason-for-voter-id-laws-to-prevent-native-americans-from-voting; Pema Levy, *After Heidi Heitkamp Won a Senate Seat, North Dakota Republicans Made it Harder for Native Americans to Vote*, MOTHER JONES, Oct. 19, 2018, *available at* https://www.motherjones.com/politics/2018/10/heidi-heitkamp-native-americans-vote-north-dakota/.

[76]*Brakebill v. Jaeger*, 2018 WL 1612190 at *6 (D.N.D. Apr. 3, 2018), *appeal docketed*, No. 18-1725 (8th Cir. Apr. 6, 2018).

[77]*Brakebill v. Jaeger*, 2016 WL 7118548 at *1 (D.N.D. Aug. 1, 2016).

[78]*Id.*

[79]*Id.*

[80]*Id.* at *2.

[81]*Brakebill*, 2018 WL 1612190 at *1. In its 2016 ruling, the district court entered a preliminary injunction against the enforcement of the 2013 version of North Dakota's voter ID statute. *Brakebill*, 2016 WL 7118548 at *13. In response to this ruling, North Dakota's legislature enacted an amended version of the voter ID statute in 2017. The district court enjoined the enforcement of certain provisions of the amended stat-

ute in its 2018 ruling. *Brakebill*, 2018 WL 1612190 at *7-8.

[82]*Brakebill,* 2016 WL 7118548 at *2.

[83]*Brakebill,* 2018 WL 1612190 at *2–4, 6.

[84]*Id.* at *7.

[85]*Brakebill v. Jaeger,* 2018 WL 459487 (8th Cir. Sept. 24, 2018), *denying application to vacate stay*, ___ S.Ct.___, 2018 WL 4901222 (Oct. 9, 2018).

[86]*Brakebill,* 2018 WL 459487 at *7 (Kelly, J., dissenting).

[87]*Brakebill v. Jaeger*, __ S.Ct. __, 2018 WL 4901222 (Oct. 9, 2018).

[88]*Brakebill*, 2018 WL 4901222 at *1 (Ginsburg, J., dissenting from denial of the application to vacate stay).

[89]*Brakebill*, 2018 WL 4901222 at *1 (Ginsburg, J., dissenting from denial of the application to vacate stay).

[90]Brave NoiseCat, *supra* note 75; Jacqueline Keeler, *GOP Attacks on Native American Voting Rights Have Catalyzed Resistance*, TRUTH OUT, Oct. 29, 2018, *available at https://truthout.org/articles/gop-attacks-on-native-american-voting-rights-have-catalyzed-resistance/; Standing Rock Sioux Tribe and Nonprofit Partners Team Up to Get out the Vote*, RED LAKE NATION NEWS, Oct. 24, 2018, *available at https://www.redlakenationnews.com/story/2018/10/24/politics/standing-rock-sioux-tribe-and-nonprofit-partners-team-up-to-get-out-the-vote/75923.html*.

[91]Jay Michaelson, *North Dakota's Racist Voter ID Law Is Already Backfiring*, DAILY BEAST (Nov. 1, 2018), *https://www.thedailybeast.com/north-dakotas-racist-voter-id-law-is-already-backfiring*; Erik Ortiz, *Native Americans Fighting Back Against North Dakota Voter ID Law*, NBC NEWS, Oct. 30, 2018, *available at https://www.nbcnews.com/politics/politics-news/native-americans-fighting-back-against-north-dakota-voter-id-law-n926326*.

[92]*Spirit Lake Tribe et al. v. Jaeger*, No. 1:18-cv-222-DLH-CSM, Complaint (D.N.D. Oct. 30, 2018).

[93]*Brakebill*, 2018 WL 459487 at *6.

[94]SPIRIT LAKE TRIBE ET AL. V. JAEGER, No. 1:18-cv-222-DLH-CSM, Order, at 2 (D.N.D. Nov. 1, 2018).

[95]*Richardson v. Ramirez,* 418 U.S. 24, 56 (1974).

[96]*Id.* at 55.

[97]All but two states (Maine and Vermont) disenfranchise persons convicted of felonies while they are actually in prison. *See Felony Disenfranchisement Laws (Map),* AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/ issues/voting-rights/ voter-restoration/felony-disenfranchisement-laws-map. Thirteen states and the District of Columbia automatically restore voting rights to felons after they are released from prison. *Id.* Twenty states restore voting rights after felons have completed their entire sentence (including prison, parole, and probation) and four other states restore voting rights after felons are released from

prison and complete parole. *Id.* Finally, eight states permanently disenfranchise persons who are convicted of certain felony crimes and four states (Iowa, Florida, Virginia, and Kentucky) permanently disenfranchise all persons who are convicted of felony crimes unless the government approves an individual's restoration of rights. *Id.*

[98]*Free the Vote*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE SENTENCING PROJECT 1 (2016), available at http://www.naacpldf.org/files/publications/Free%20the%20Vote%202016.pdf ("*Free the Vote*").

[99]*Id.* "Experts cite disparities in sentencing as the underlying cause: A black person is more likely to be convicted of a felony than a white person who committed the same crime." K.K. Rebecca Lai *et al., Why 10% of Florida Adults Can't Vote: How Felony Convictions Affect Access to the Ballot*, N.Y. TIMES, Oct. 6, 2016), *available at* https://www.nytimes.com/interactive/2016/10/06/us/unequal-effect-of-laws-that-block-felons-from-voting.html.

[100]*Free the Vote, supra* note 61, at 2–3.

[101]*Id.* at 3; *see also Felony Disenfranchisement Laws (Map), supra* at 60; Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT, *available at* https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.

[102]*See Hand v. Scott,* 285 F.Supp.3d 1289, 1292–94 (N.D.Fla. 2018).

[103]For example, more than 150,000 Floridians had their voting rights restored during former Governor Charlie Crist's four-year term while only just over 3,000 have had their rights restored during the seven-year administration of current governor Rick Scott. Greg Allen, *Felons in Florida Want Their Voting Rights Back Without a Hassle*, NPR, July 5, 2018, *available at* https://www.npr.org/2018/07/05/625671186/felons-in-florida-want-their-voting-rights-back-without-a-hassle.

[104]*Hand,* 285 F.Supp.3d at 1303–09.

[105]*Hand v. Scott,* 315 F.Supp.2d 1244, 1255–56 (N.D.Fla. 2018).

[106]*Hand v. Scott,* 888 F.3d 1206 (11th Cir. 2018). Plaintiffs' chances on the merits of the appeal appear bleak. All three judges on the Eleventh Circuit panel appeared to reject plaintiffs' Fourteenth Amendment claim and two of the three cast great doubt on plaintiffs' First Amendment claim. *Id.* at 1208–22.

[107]*See Voting Restoration Amendment*, FLORIDA DIVISION OF ELECTIONS, https:// dos.elections.myflorida.com/ initiatives/initdetail.asp?account=64388&seqnum=1.

[108]*Hand,* 315 F.Supp.3d at 1247 n.1.

[109]*See, e.g.,* Paul Wright, *The case against Amendment 4 on felon voting rights*, TALLAHASSEE DEMOCRAT, Sept. 19, 2018, *available at* https://www.tallahassee.com/story/opinion/2018/09/19/case-against-amendment-4-felon-voting-rights-opinion/1351689002/

[110]*New UNF Poll Shows Gillum ahead of DeSantis for Governor with Nelson and Scott Tied for Senate: High Support for Restoring Felon Voting Rights Among Likely Voters*, UNF PUBLIC OPINION RESEARCH LABORATORY

(Sept. 24, 2018), http://www.unf.edu/coas/porl/2018FLFall.aspx.

[111]Terry Gross, *Republican Voter Suppression Efforts Are Targeting Minorities, Journalist Says*, NPR FRESH AIR, Oct. 23, 2018, *available at* https://www.npr.org/2018/10/23/659784277/republican-voter-suppression-efforts-are-targeting-minorities-journalist-says.

[112]Mark Joseph Stern, *The South Will Disenfranchise Again: Five Years Later, the Consequences of the Supreme Court's gutting of the Voting Rights Act are Painfully Clear*, SLATE (Aug. 22, 2018), *available at* https://slate.com/news-and-politics/2018/08/randolph-county-georgia-2018-election-how-the-supreme-courts-gutting-of-the-voting-rights-act-allows-states-to-disenfranchise-black-voters.html.

[113]*American FactFinder*, UNITED STATES CENSUS BUREAU, http:// factfinder. census. gov/ bkmk/ table/ 1.0/ en/ DEC/ 10_DP/ DPDP1/ 0500000US13243.

[114]Stern, *supra* note 74.

[115]In addition to Stacey Abrams' candidacy, another African-American woman (Democrat Joyce Barlow) is running for a state legislative seat in an attempt to defeat a long-time incumbent white conservative. Errin Haines-Whack *et al., Black Voters Energized Amid Outcry Over Polling Places*, ASSOCIATED PRESS, August 23, 2018, *available at* http://broadstripe.net/ front_ controller.php/ news/ read/ category/ AP%20Top%20News%20-%20US%20 Headlines/ article/ the_ associated_ press-georgia_ legislative_ black_ caucus_ slams_ plan_ to_ shu-ap.

[116]*Id.*

[117]Victor Blackwell, *et al., Elections Board Takes Less Than A Minute to Reject Proposal to Close 7 of 9 Polling Places in Majority-Black County*, CNN, Aug. 24, 2018, *available at* https://www.cnn.com/2018/08/24/us/randolph-county-polling-closures-vote/index.html.

[118]2010 United States Census, *available at https://factfinder.census.gov/ faces/ nav/ jsf/ pages/ community_ facts.xhtml?src= bkmk; https:// factfinder.census.gov/ faces/ tableservices/ jsf/ pages/ productview.xhtml?src= CF League of United Latin American Citizens Kansas et al. v. Deborah Cox, Ford County Clerk*, No. 2:18-cv-02572-DDC-TJJ, Memorandum of Law in Support of Emergency Motion for a Temporary Restraining Order, at 3 (D.Kans. Oct. 26, 2018) [hereinafter "LULAC Mem."].

[119]Jonathan Shorman et al., *Dodge City's Out-of-Town Polling Place Adds to Fears of Voter Suppression in Kansas*, WICHITA EAGLE, Oct. 26, 2018, *available at* https://www.kansas.com/news/politics-government/article220557195.html.

[120]LULAC Mem., *supra* note 118, at 3, 5, 6.

[121]LULAC Mem., *supra* note 118, at 6-7, 11.

[122]LULAC Mem., *supra* note 118, at 3-5, 6-7, 11; Shorman, *supra* note 119.

[123]LULAC Mem., *supra* note 118, at 4-5.

[124]LULAC Mem., *supra* note 118, at 6–8.

[125]*League of United Latin American Citizens Kansas et al. v. Deborah Cox, Ford County Clerk*, No. 2:18-cv-02572-DDC-TJJ, Defendant's Response to Motion for a Temporary Restraining Order, at 5-6 (D.Kans. Oct. 30, 2018); LULAC Mem., *supra* note 118, at 6.

[126]*League of United Latin American Citizens Kansas et al. v. Deborah Cox, Ford County Clerk*, No. 2:18-cv-02572-DDC-TJJ, Complaint (D.Kans. Oct. 26, 2018).

[127]*League of United Latin American Citizens Kansas et al. v. Deborah Cox, Ford County Clerk*, No. 2:18-cv-02572-DDC-TJJ, Motion for a Temporary Restraining Order (D.Kans. Oct. 26, 2018).

[128]*League of United Latin American Citizens Kansas et al. v. Deborah Cox, Ford County Clerk*, No. 2:18-cv-02572-DDC-TJJ, Response to Motion for a Temporary Restraining Order, at 5-8 (D.Kans. Oct. 30, 2018).

[129]*League of United Latin American Citizens Kansas et al. v. Deborah Cox, Ford County Clerk*, No. 2:18-cv-02572-DDC-TJJ, Memorandum and Order Denying Motion for Temporary Restraining Order (D.Kans. Nov. 1, 2018) [hereinafter "LULAC Order"].

[130]LULAC Order, *supra* note 129, at 8.

[131]LULAC Order, *supra* note 129, at 8-9.

[132]*League of Women Voters of Fla., Inc. v. Detzner*, 314 F.Supp.3d 1205 (N.D.Fla. 2018). Although plaintiffs did not allege that the Secretary of State's opinion was driven by partisan motivations, it should be noted that Florida's younger voters (aged 18–29) disproportionately identify as Democrats (40%) as opposed to Republicans (27%) or those without a party affiliation (29%). Susan MacManus, Ph.D, *et al., Who and Where Are Florida's Democrats and Republicans: A Statistical Comparison*, SAYFIE REVIEW, 2018, *https://www.sayfiereview.com/page/Who%20and%20Where%20are%20Floridas%20Democrats%20and%20Republicans.*

[133]*League of Women Voters of Fla.,* 314 F.Supp.3d at 1209–10, 1216, 1218–22.

[134]*Id.,* at 1221–25.

[135]*Common Cause Ind. v. Marion Cnty. Election Bd.*, 311 F.Supp.3d 949, 954-55 (S.D.Ind. 2018), *denying motion to alter or amend judgment*, 2018 WL 3770134 (S.D.Ind. Aug. 9, 2018), *appeal docketed* No. 18-2735 (7th Cir. Aug. 10, 2018) (citing to Ind. Code tit. 3, ch. 3-11-10, § § 24(a)(1), 26(f)).

[136]*Id.* at 955.

[137]As of the 2010 Census, Marion County (which encompasses Indianapolis) had a total population of 903,393 of whom 62.7% were white, 26.7% were African-American, and 9.3% were Latino. *American FactFinder*, UNITED STATES CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0500000US18097.

[138]*Common Cause Ind.,* 311 F.Supp.3d at 955.

[139]*Id.* http://www.indy.gov/eGov/County/Clerk/Election/Election_Info/Past_Results/Pages/2008GeneralElectionResultsSummary.aspx.

[140]*Common Cause Ind.,* 311 F.Supp.3d at 956.

[141]*Id.* at 953–54.

[142]This finding stands in contrast to the increasing utilization of in-person early voting nationwide and statewide (including in the adjacent "whiter, richer, and more Republican" Hamilton County). *Id.* at 959–60.

[143]*Id.* at 959–60, 967, 969–70, 974–75.

[144]*Common Cause Ind.,* 311 F.Supp.3d at 974–76.

[145]*Martin et al. v. Kemp*, No. 1:18-cv-4776-LMM, Declaration of Michael McDonald, at 2 (Oct. 21, 2018), *available at https://ecf.gand.uscourts.gov/doc1/055111169836* [hereinafter "McDonald Declaration"].

[146]McDonald Declaration, at 2; According to the 2010 United States Census, Gwinnett County had a total population 805,321 of whom 53.3% were white, 23.6% were African-American, 10.6% were Asian, and 20.1% were Latino. 2010 United States Census, 2010 Demographic Profile Data, *available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk*.

[147]McDonald Declaration, *supra* note 146, at 2.

[148]*Martin et al. v. Kemp*, No. 1:18-cv-4776-LMM, Complaint (N.D.Ga. Oct. 15, 2018); *Georgia Muslim Voter Project et al. v. Kemp*, No. 1:18-cv-4789-LMM, Complaint (N.D.Ga. Oct. 16, 2018); *Martin et al. v. Kemp/Georgia Muslim Voter Project et al. v. Kemp*, Nos. 1-18-cv-4776-LMM & 1-18-cv-4789, Order, at 7 (N.D.Ga. Oct. 24, 2018).

[149]McDonald Declaration, *supra* note 146, at 7-8. The number of absentee ballots rejected by Georgia officials for lack of a signature match had increased to 161 as of October 26, 2018. *Martin et al. v. Kemp*, No. 1:18-cv-4776-LMM, Supplemental Declaration of Michael McDonald, at 10-11 (dated Oct. 30, 2018), *available at https://ecf.gand.uscourts.gov/doc1/055111191780*.

[150]*Martin et al. v. Kemp/Georgia Muslim Voter Project et al. v. Kemp*, Nos. 1-18-cv-4776-LMM & 1-18-cv-4789, Order, at 24, 26, 29 (N.D.Ga. Oct. 24, 2018).

[151]*Martin et al. v. Kemp/Georgia Muslim Voter Project et al. v. Kemp*, Nos. 1-18-cv-4776-LMM & 1-18-cv-4789, Temporary Restraining Order, at 1-2 (N.D.Ga. Oct. 25, 2018), *appeal docketed*, No. 18-14502-GG (11th Cir. Oct. 29, 2018). On November 2, 2018, the district court denied plaintiffs' motion for a preliminary injunction to prohibit defendants from rejecting an absentee ballot solely based on a discrepancy or omission relating to year of birth. *See Martin et al. v. Kemp*, No. 1:18-cv-4776-LMM, Order (Nov. 2, 2018).

[152]*Georgia Muslim Voter Project et al. v. Brian Kemp*, Nos. 18-1402-GG & 18-14503-GG, Order (11th Cir. Nov. 2, 2018).

[153]*Rivera Madera v. Detzner,* 2018 WL 4289625 at *1 (N.D.Fla. Sept. 10, 2018) (citation omitted).

[154]*Id.* at *1, *citing* 52 U.S.C. § 10303(e).

[155]*Id.* at *6.

[156]*Id.* at *6 (citing cases).

[157]Carmen Sesin, *'I'm staying': Months after Maria, Puerto Ricans settle in Florida*, NBC NEWS, Mar. 14, 2018, https://www.nbcnews.com/news/latino/i-m-staying-months-after-maria-puerto-ricans-settle-florida-n851826; *Rivera Madera,* 2018 WL 4289625 at *2 (noting that only 15 of Florida's 67 counties were providing Spanish-language ballots as of 2018).

[158]*Rivera Madera,* 2018 WL 4289625 at *2.

[159]*Id.* at *7.

[160]*Id.* at *5–10.

[161]*Id.* at *10.

[162]Louis Jacobson, *The Rise and Fall of Straight-Ticket Voting*, July 14, 2016, http://www.governing.com/topics/elections/gov-straight-ticket-voting-states.html; Bob Hall, *End of Straight-Ticket Voting in NC Tinged with Racial, Age Bias*, THE NEWS & OBSERVER, Aug. 27, 2014, *available at* https://www.newsobserver.com/opinion/op-ed/article10042076.html.

[163]*Rise and Fall*; *see also* Chris W. Bonneau, et al., *Getting things straight: The effects of ballot design and electoral structure on voter participation*, 34 Electoral Studies 119 (2014).

[164]*See, e.g.,* Jacobson, *supra* note 102; Hall, *supra* note 102.

[165]*See Straight Ticket Voting States*, NATIONAL CONFERENCE OF STATE LEGISLATURES, Sept. 10, 2018, http://www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx.

[166]*Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-cv-11844, 2018 WL 3769326, at *17 (E.D. Mich. Aug. 9, 2018).

[167]*Id.* at *2.

[168]*Id.*

[169]*Id.*

[170]*Id.* at *38.

[171]*Id.* at *8.

[172]*Id.*

[173]*Id.* at *11.

[174]*Mich. State A. Philip Randolph Inst. v. Johnson*, No. 18-1910, 2018 WL 4214710, at *10 (6th Cir. Sep. 5, 2018).

[175]*Id.* at *1.

[176]*Id.* at *2–4.

[177]*Id.* at *9.

[178]*Thornburg v. Gingles,* 478 U.S. 30, 35–36 (1986).

[179]*Abbott v. Perez,* 138 S.Ct. 2305, 2315 (2018).

[180]In a single member districting plan where the minority group al-

ready has an equal electoral opportunity to elect the candidates of its choice in some districts, this factor is satisfied by showing that it is possible to create one or more additional districts where the minority group will have an opportunity to elect. *See, e.g., Abbott,* 138 S.Ct. at 2331; *Barnett v. City of Chicago,* 141 F.3d 699, 705–06 (7th Cir. 1998).

[181]*Abbott,* 138 S.Ct. at 2330–31 (citations omitted).

[182]*Gingles,* 478 U.S. at 36–38. The Supreme Court has also held that Senate Factors 2 and 7 carry the most weight in the totality of the circumstances analysis. *Id.* at 48 n.15.

[183]*Abbott,* 138 S.Ct. at 2330–34.

[184]*Lopez v. Abbott,* 2018 WL 4346891 (S.D.Tex. 2018).

[185]*Id.* at *4, 7–20.

[186]*Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.,* 894 F.3d 924 (8th Cir. 2018).

[187]*Luna v. Cnty. of Kern,* 291 F.Supp.3d 1088 (E.D.Cal. 2018).

[188]*Wright v. Sumter Cnty. Bd. of Elections and Registration,* 301 F.Supp.3d 1297 (M.D.Ga. 2018). The tangled and repeatedly changing structure of the Sumter County Board of Education is described on pages 1303–1305 of the district court's opinion.